

**THE IMPLEMENTATION OF COURT ORDERS IN
RESPECT OF SOCIO-ECONOMIC RIGHTS IN SOUTH
AFRICA**

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the degree of Master of Law at the University of Stellenbosch**



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DECLARATION

I, the undersigned, hereby declare that the work in this thesis is my own original work and that it has not previously in its entirety or in part been submitted at any university for a degree.

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Date: 09 April 2003

ABSTRACT

In recognition of the socio-economic imbalances inherited from the past and the abject poverty experienced by many, the people of South Africa adopted a Constitution fully committed to protecting socio-economic rights and advancing social justice. Apartheid constituted a violation of every internationally recognised human right. Seen in this light the emphasis on socio-economic rights in the new South African Constitution represents a commitment to guarantee to everyone in society a certain minimum standard of living below which they will not be allowed to fall.

As the Constitution recognises socio-economic rights as justiciable rights, they can be of assistance to those who are unable to support themselves when challenging the state for the non-delivery of basic services. The duty to deliver the services lies first with the state and the court becomes involved only once it is alleged that the state has failed to fulfil its duty.

The primary purpose of the study is aimed at determining the effectiveness of the South African Human Rights Commission in monitoring court orders in respect of the implementation of socio-economic rights. Non-Governmental Organisations, involved in the promotion and protection of human rights including socio-economic rights, cannot be left out of the process.

It is argued that where the Courts issue structural interdicts, which have of late been used by them, albeit not enough in the context of socio-economic rights, they are responsible for the implementation of such orders. It is also argued that the South African Human Rights Commission and NGOs must be enjoined to ensure that court orders are better implemented. Court orders in respect of socio-economic rights in almost all the cases to date were neither implemented nor monitored adequately.

OPSOMMING

Ter erkenning van die sosio-ekonomiese ongelykhede wat post-apartheid Suid-Afrika geërf het en die volslae armoede waaraan talle Suid-Afrikaners onderwerp is, het die mense van Suid-Afrika 'n grondwet aanvaar wat verbonde is tot die beskerming van sosio-ekonomiese regte en die bevordering van maatskaplike geregtigheid. Apartheid het elke internasionaal-erkende mensereg geskend. Teen hierdie agtergrond verteenwoordig die klem op sosio-ekonomiese regte in die nuwe Suid-Afrikaanse grondwet 'n verbondenheid daartoe om vir elkeen in die maatskappy 'n bepaalde minimum lewensstandaard te waarborg, waaronder hulle nie toegelaat sal word om te sak nie.

Aangesien die grondwet sosio-ekonomiese regte as beregbare regte erken, kan hierdie regte van nut wees vir mense wat hulself nie kan onderhou nie, as hulle die staat uitdaag omdat basiese dienste nie gelewer word nie. Die plig om dienste te lewer berus eerstens by die staat, met die gevolg dat die hof eers betrokke raak as die staat nie daarin slaag om sy plig te vervul nie.

Die primêre doel van hierdie studie is om vas te stel hoe effektief die Suid-Afrikaanse Menseregtekommissie is met die monitering van hofbevele wat betrekking het op die verwesenliking van sosio-ekonomiese regte. Nieregeringsinstansies wat betrokke is by die bevordering en beskerming van menseregte, met inbegrip van sosio-ekonomiese regte, kan egter nie uit die proses gelaat word nie.

In hierdie studie word aangevoer dat waar die strukturele interdikte gee, soos wat in die onlangse verlede gebeur het, selfs al is dit nie genoeg in die konteks van sosio-ekonomiese regte nie, hulle ook verantwoordelikheid is daarvoor dat sulke bevele uitgevoer word.

Dit word verder gestel dat die Suid-Afrikaanse Menseregtekommissie en nieregeringsinstansies moet saamwerk om te verseker dat hofbevele beter uitgevoer word. Tot op datum is amper geen hofbevele oor sosio-ekonomiese regte bevredigend uitgevoer of genoegsaam gemoniteer nie.

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND

In Motala's words¹, South Africa's democratic elections in 1994 under the Interim Constitution² and the inauguration of Nelson Mandela as the President of the country marked the beginning of a truly historic chapter of constitutional change in South Africa. The elections signified the end of a tyrannical system of domination, of an order in which widespread oppression and exploitation had occurred. Since then, the democratically elected leadership in South Africa has encouraged forgiveness of the perpetrators of what has been termed a crime against humanity.

As Liebenberg and Pillay note, despite the scars of apartheid which the majority of the black population bears and the manifestation of the vestiges of apartheid in inequalities in wealth, access to property and basic facilities such as housing, health and education, the aftermath of the elections has seen a remarkable period of tranquillity and optimism³. Instead of seeking revenge, the Truth and Reconciliation Commission was established under the Promotion of National Unity and Reconciliation Act 34 of 1995 for the purpose of investigating gross human rights violations and to grant amnesty on condition of a full, truthful disclosure of acts with a political objective.

The 1996 Constitution⁴ completes the fundamental change in the legal order heralded by the 1994 elections. As the 1996 Constitution is the product of a generally elected Constitutional Assembly, it should be no surprise that the drafters recognised the socio-economic imbalances inherited by post-apartheid South Africa and the abject poverty experienced by many South Africans, by adopting a Constitution fully committed to protecting socio-economic rights and advancing social justice. According to Heyns,⁵ constitutions born from

¹ Motala, Z. 'Socio-Economic Rights, Federalism and the Courts: Comparative Lessons for South Africa' (1995) *SALJ* at 61.

² Act 200 of 1993 (hereinafter referred to as the "Interim Constitution").

³ Liebenberg, S. and Pillay, K. *Socio-Economic Rights in South Africa* (2000) at 21.

⁴ Act 108 of 1996 (hereinafter referred to as the Constitution).

⁵ Heyns, C. "Taking Socio-Economic Rights Seriously: The Domestic Reporting Procedure and the Role of the South African Human Rights Commission" (1997) 30 *De Jure* at 195.

successful liberation struggles are inevitably retroactive. They are written by people who are determined to prevent history from repeating itself. Heyns notes that apartheid constituted a violation of virtually every internationally recognised civil and political as well socio-economic right. In light of the past, the entrenchment of socio-economic rights in the new South African Constitution is supposed to guarantee to everyone a certain minimum standard of living, below which they will not be allowed to fall.

Since South Africa was previously governed in terms of a system of parliamentary supremacy, no court of law could declare a statute of Parliament invalid. The new Constitution marks a departure from this tradition by providing for an entrenched Bill of Rights and judicial review, as is the case in other countries such as the United States, Canada and Germany.⁶ Chapter Two of South Africa's 1996 Constitution contains an extended list of universally accepted fundamental rights. These rights are considered so important that no organ of state may transgress them. Even Parliament must respect these provisions and at the centre of the Bill of Rights there is a new commitment to substantive social justice, represented most visibly by the socio-economic rights entrenched in Chapter Two.

1.2 THE AIM OF THE STUDY

The aim of this study is to determine how court orders in respect of the socio-economic rights should be implemented and, in particular, how the implementation of the orders can be monitored in order to ensure that they are successfully implemented in South Africa. The main focus in the study will be on the monitoring of court orders in the field of socio-economic rights. The problem that we are currently faced with is that litigants achieve victories in courts, but those victories are not translated into reality. These successful litigants are not afforded the relief envisaged by the court order. For this purpose, the following objectives are pursued:

- to provide an overview of the literature on the status of socio-economic rights and of monitoring processes;

⁶ See Motala (note 1 above) at 64.

- to examine the successes in the implementation and monitoring of court orders;
- to determine the problems encountered in the process;
- to make recommendations for the improved implementation of court orders in respect of socio-economic rights and more rigorous monitoring.

1.3 STATEMENT OF THE PROBLEM

The recent increase in a resort to litigation in order to ensure the realisation of socio-economic rights shows that checks and balances are necessary, even where the government professes to be committed to the achievement of social justice. For this reason, the drafters of the 1996 Constitution charged the judiciary with the task to review decisions affecting socio-economic rights and people of our country. Much of the debate has focused on the legitimacy of court intervention in the area of socio-economic rights. The problems do not stop there. Even if one assumes, as I will do, that such intervention is legitimate, the problem of government compliance with court orders remains. Some form of monitoring of the implementation of these orders is essential. The question is: which institution or institutions should be tasked with monitoring? Should it be the courts, the SAHRC and NGOs or the government itself?

1.3.1 Problems with the role of the courts

Questions about the enforceability of socio-economic rights tend to be raised whenever attempts are made to litigate about these rights in a court of law. This debate is over. Socio-economic rights are now protected in the South African Constitution and they must be regarded to be enforceable through courts of law. However, there is little jurisprudence or literature on the monitoring of implementation of court orders in respect of these rights, and the implementation of court orders remains beset with problems.

The recognition that socio-economic rights are enforceable is important, but several other problems remain. In this thesis I will investigate the

monitoring of the implementation of court orders. This is of course not the only problem. A lack of awareness of legal processes prevents those most affected from using law and litigation to enforce socio-economic rights. Even those who are aware of their rights, find that the judicial enforcement of socio-economic rights requires skills that lay persons do not have. Even if the rules are simplified, the reality will always be that poor people will not be able to use the courts because they cannot afford the exorbitant legal costs. The only hope for the poor is that they organise themselves and find sponsors willing to support their cause. The South African Constitution provides for a class action and an action to be brought in the public interest in sections 38(c) and (d). These provisions should be used if social and economic constitutional commands are not properly honoured. It is obviously in the public interest to implement socio-economic rights properly. Communities should therefore be afforded a standing before the court in order to exercise pressure on the state to respect their constitutional rights. However, even if the community is afforded standing, there remains the problem of finding willing and able institutions to sponsor such class actions for the affected people. Not many sponsors have presented themselves thus far. Litigation is a slow and expensive manner of enforcing socio-economic rights. Moreover it requires skills and a kind of commitment to pro bono work that very few legal practitioners have.

Another problem is that the courts will not be able to distinguish between the government's inability to implement a specific right, and its unwillingness to do so unless it is provided with the results of intensive research. Such research is time-consuming and costly and it has to be coordinated with the litigation strategy of the applicants.

Another factor that has hampered the development of a strong socio-economic jurisprudence has been the vague content of the rights. Some say socio-economic rights lack the precision of "first-generation" rights. The meaning of the right to "access" to housing is, for example, obscure. However, the lack of clarity is due largely to the fact that socio-economic rights have not received sufficient attention from the courts, academics and other agencies. It is a "catch-22" situation. The vague content of the rights discourages the very

litigation that is necessary to provide greater clarity about the contents of the rights.

Finally, the problems with the enforcement of court orders must be urgently addressed. There is nothing more disheartening than overcoming all the obstacles mentioned above and achieving victory in the courts, only to be denied relief as a result of the failure of the responsible organ of state to implement the court's order. Courts are not in a position to enforce their own orders. They do not even have the staff to monitor whether their orders are implemented. Another institution will have to be identified to fulfil this function and the obvious candidate is the South African Human Rights Commission.

1.3.2 Problems with the role of the South African Human Rights Commission

To add a monitoring function to the tasks of the SAHRC is not without difficulties. The Commission already lacks resources to fulfil its function. No budget is designated by the government for the monitoring of court orders, which will make it very difficult for the Commission to carry out this additional task.

The collaboration between the government departments and the SAHRC is minimal. Some departments, such as Welfare, Health, Local Government and Housing in the Eastern Cape, have for example been subpoenaed to appear before the Commission for their failure to respond to the questionnaire that was issued by the Commission. The lack of healthy co-operation will hamper any effort of the Commission to monitor the implementation of court orders.

Another problem is that the court almost never requires the SAHRC to monitor the implementation of its orders. In the few instances when they have done so, the courts have not laid down proper guidelines as to what it is that has to be monitored by the Commission. Time frames are also not generally laid down for the Commission to report back about the progress made regarding the effective implementation of orders.

The lack of communication has not only affected the ability of the SAHRC to monitor the implementation of court orders. Sometimes those

directly responsible for implementing the order were not properly informed. The *Grootboom* case is a case in point. In this case, the Constitutional Court did not inform the Mayor of the area concerned where it had ordered the government to honour its obligation. This borders on negligence on the part of the court.

1.3.3 Problems with the role of the Non- governmental Organisations

Non-governmental organisations are also not ideal institutions to task with the monitoring of court orders. Not only do they currently lack the skills to monitor the implementation of court orders, but no guidelines exist for the performance of such a monitoring function. As I have stated above, such guidelines will first have to be developed before the monitoring function can be entrusted to the SAHRC and NGOs.

NGOs also complain about geographical and structural constraints that restrict their involvement in the implementation of socio-economic rights.⁷ An NGO is dependent on funding for the project it undertakes. NGOs will therefore need to secure long term funding if they are serious about fulfilling a monitoring function.

Despite the difficulties, it is of absolute importance to involve NGOs. Their lack of participation undoubtedly contributes to the lack of awareness amongst indigent people of their socio-economic rights. Their participation will also make monitoring more credible, as most NGOs operate independently from the government.

1.3.4 Conclusion

In the light of the problems described above, the main question that will be addressed in this study is how the implementation of court orders in respect of socio-economic rights should be monitored.

⁷ Craven, M. *International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) at 80.

1.4 ASSUMPTIONS UNDERLYING THE STUDY

I assume for purposes of this thesis that the government is under an obligation to implement socio-economic rights in the Bill of Rights. In terms of section 7(2) of the constitution, the state is under an obligation to respect, protect, promote and fulfil the rights in the Bill of Rights. The duty to *respect* a human right implies an immediate obligation on the state to refrain from legislative or other actions, which interfere in people's access to or enjoyment of the right in question. The duty to *protect* requires the state to prevent the right from being undermined by the conduct of private actors. The duty to *promote* and *fulfil* requires the state to take legislative and other measures to assist individuals and groups to obtain access to their rights.⁸ Some argue that the internal limitations limit the enforceability of socio-economic rights.⁹ I will address this argument in Chapter Four below.

The study further departs from the viewpoint that the socio-economic rights guaranteed in the Constitution are not implemented adequately. While the whole world admires South Africa for its modern and progressive Constitution, it is time that South Africans should start to focus on the implementation of the rights. If the rights are not implemented, there is little value in the admirable wording of the Constitution.

The government's commitment towards the realisation of these rights is reflected in the enormous number of national programmes it has put in place. Some of these have, however, failed. It is generally agreed that housing has still not been provided adequately, health care is beridden with problems, children's rights have not been implemented fully and education leaves much to be desired.

In order to start addressing the problems, socio-economic rights have to be given priority when allocations are made in the national budget. However, as I shall argue in Chapter Four, even a lack of resources does not absolve the state of its minimum obligations to provide for the basic necessities of its citizens. In the present climate, with huge amounts of money being spent on the acquisition

⁸ Liebenberg S. "Report of a Joint Workshop Organised by the Community Law Centre (University of the Western Cape) and the Human Rights Centre (University of Pretoria) (1997) at 17.

of arms, it is particularly distressing that the government sought to justify its failure to honour the socio-economic obligations imposed upon it by the Constitution in the case of *Soobramoney*,¹⁰ by arguing that it did not have the necessary resources to implement these rights.

Budlender¹¹ ascribes such failures to the enormity of the challenges the state faces in this regard. The reason for the failure to implement “second-generation” rights, he argues, does not seem to be a lack of commitment, but rather a lack of skill, experience and focus in government’s work, coupled with limited resources in an economy that is not growing:

“The problem is that government is trying to do too much at the same time. In the typical department dealing with social and economic issues we have more major new programmes than a stable, well-organised and well-resourced government would attempt in two decades. Our government is not yet stable, or well-organised, or well-resourced – yet we are trying to introduce all of these ambitious new programmes simultaneously.”¹²

Effective realisation is further thwarted by fraud and corruption on the part of state officials who are responsible for the delivery of the socio-economic needs.¹³ Some state officials in the Eastern Cape have, for example, been charged with fraud and misappropriation of the funds, which were meant for the realisation of the socio-economic needs. The case of Mrs Nolundi Yanta¹⁴ is a case in point where she misappropriated funds with her common law husband and she was sentenced to fifteen years imprisonment. In a similar case, Dr Bevan Goqwana, the Minister of Health, was suspended pending an investigation for corruption in which he was later cleared of the allegations against him.

Whatever the exact cause, the reality is that many of the programmes set up by the state for the implementation of socio-economic rights do not appear to meet the minimum standards required for their effective realisation. In the

⁹ Sections 26(2) and 27(2).

¹⁰ *Soobramoney v Minister of Health KwaZulu-Natal* 1998(1) SA 765 (CC) at para 11.

¹¹ Bundlender G. “Facing the Challenges of Implementation” (1999) 1 *ESR Review* at 15.

¹² *Ibid* at 15.

¹³ SAHRC, “Socio-Economic Rights Report: 1999-2000”, 15 September 2000 at 178.

¹⁴ She was the official in the Department of Welfare now called “Social Development”.

Grootboom case,¹⁵ for example, it was held that the programmes for the realisation of these rights fell short of the standard required because they had not catered for emergencies.

Government has been given more than sufficient time to implement socio-economic rights since the coming into force of the 1996 Constitution. The time has arrived when government's failure to implement socio-economic rights can only be addressed by the enforcement of these rights by the courts. In other words, if the government cannot effectively implement the rights in question, the court's function to implement these rights is triggered. I will assume for purposes of this thesis that the time has come for the courts to become more active in the field of socio-economic rights.

At the moment, the courts are not in an ideal position to fulfil this role. However, the courts are themselves responsible for improving the process of enforcement. While the simplification and speeding up of the litigation process alone will be an important step towards more efficient implementation of "second-generation" rights, more detailed measures seem to be needed. One of these is to establish a system for the monitoring of court orders.

1.5 THE VALUE AND LIMITATIONS OF THE STUDY

Since the study seeks to ensure the effective and adequate implementation of court orders in respect of socio-economic rights, the main value is its attempt to describe how the process of the implementation of socio-economic rights through the courts can be streamlined. This study is limited to the examination of how the monitoring institutions can effectively and properly monitor the implementation of court orders in respect of socio-economic rights.

1.6 SEQUENCE OF CHAPTERS

Chapter Two examines the provisions regarding socio-economic rights in the South African Constitution in the light of the International Covenant on Economic, Social and Cultural Rights in order to determine the status of these

¹⁵ 2000 (11) BCLR 1169 (CC).



rights internationally and within the South African context. The chapter also examines the different interpretations of socio-economic rights in South African law.

Chapter Three outlines the monitoring role of the SAHRC as provided for in section 184 of the Constitution with due regard to the First¹⁶ and Second Socio-Economic Report¹⁷. It will also be argued that SAHRC and NGOs have to be more directly involved in the area of the monitoring of the implementation of court orders in respect of socio-economic rights.

Chapter Four provides an analysis of court cases to determine the extent to which the Constitutional Court and other courts have managed to enforce socio-economic rights. I will also determine whether the SAHRC have been able to monitor the implementation of court orders in respect of these rights meaningfully. The analysis of cases makes it possible to estimate the efficiency of the implementation of court orders in respect of these rights, while the results of the interviews with members of the SAHRC and NGOs will provide some indicators of the problems that are preventing an adequate monitoring process from developing.

Chapter Five contains a summary and recommendations towards the effective implementation of court orders in respect of socio-economic rights guaranteed in the Constitution.

¹⁶ SAHRC, "Monitoring Socio-Economic Rights In South Africa Report 1998-1999".

¹⁷ SAHRC, "Monitoring Socio-Economic Rights in South Africa Report 1999-2000".

CHAPTER TWO

STATUS OF SOCIO-ECONOMIC RIGHTS

2.1 INTRODUCTION

The South African Constitution¹ does not draw any distinction between civil and political rights and socio-economic rights. The two types of rights are interrelated and interdependent. Indeed, the international position dating back to the Universal Declaration of Human Rights is that the two sets of rights as enumerated in the two covenants (the International Covenant on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights) are universal, indivisible, interdependent and interrelated.²

The close relationship that exists between the two sets of rights means that both require permanent protection and promotion if they are to be fully realised. The ideal of human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone enjoys economic, social and cultural rights.

This chapter is meant to illustrate that the two sets of rights are dependent on each other. No right can be enjoyed without the proper protection of the other. For the effective realisation of one, the other right must also be recognised. In addition, the Chapter shows that both sets of rights are recognised domestically and internationally as universal human rights.

The apartheid legacy of social and economic deprivation is a major source of inequality in South African society. It undermines human dignity and the freedom to participate fully in the democratic institutions and processes. Among comparable middle-income developing countries, South Africa has one of the worst records in terms of social indicators (housing, health, education, etc.) and income distribution.³ Poverty in the country also has strong racial,

¹ Act 108 of 1996.

² Craven, M. *International Covenant on Economic Social and Cultural Rights: A Perspective on its Development* (1995) at 24.

³ Pienaar, J. "The Impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998 on Homelessness and Unlawful Occupation Within the Present Statutory Framework" (1999) 3 *Stellenbosch Law Review* 370 at 373.

gender, age and rural dimensions. This section deals with the manner in which the policy of apartheid has affected socio-economic development.

The Constitution reflects a heightened concern for the position of groups in vulnerable and disadvantaged circumstances.⁴ The inclusion of socio-economic rights in the Bill of Rights represents a commitment to overcome the country's dismal human rights legacy and accords with the underlying values and purposes of the Constitution. Many provisions are aimed at redressing the legal and structural patterns of inequality and disadvantage that exist in our society. This requires the state not only to refrain from passing laws and adopting policies that undermine the rights in the Bill of Rights, but also to take positive measures in order to protect and fulfil these rights.⁵ Justice Kriegler has, for example, remarked that:

“We do not operate under a constitution in which the purpose was to place limits on the governmental control. Our constitution aims at establishing freedom and equality in a grossly disparate society.”⁶

This attitude could play a critical role in guiding our interpretation of socio-economic rights. By suggesting that the courts should be particularly alert to the impact of state action or legislation on groups living in marginalised, vulnerable and disadvantaged circumstances in South Africa, it indicates how the state could deal with the inequalities of the past in conjunction with the courts. Legislation that creates barriers that impede access by vulnerable groups to the socio-economic benefits provided for in the Bill of Rights should, for example, be avoided.

The lack of access to these rights by particular groups may, however, also be due to the absence of appropriate policies and legislation. Thus a failure on the part of the state to enact regulatory legislation and to implement the law may expose these groups to abuse and exploitation in the private sector.

Socio-economic rights have not had the benefit of a long tradition of interpretation by judicial and quasi-judicial bodies. Their content and scope are consequently undeveloped and in the process of evolution. There are also

⁴ *S v Makwanyane* 1995 (6) BCLR 665 (CC) at para 34.

⁵ Section 7(2).

⁶ *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) at para 147.

relatively few sources of comparative constitutional law to guide interpretation in this area. Because socio-economic rights have consistently been affirmed as part of universal human rights, international law is perhaps the most valuable guide to interpretation. Even under international law, however, individual petition procedures are not used to enforce socio-economic rights although there appears to be some developments in the area.

The above paragraphs reflect the difficulty in dealing with socio-economic rights because there is a relative scarcity of jurisprudence that will serve as a guide to the interpretation of rights in this area. It also shows that socio-economic rights have been neglected in the past and this has affected their development..

The inclusion of these rights in the Constitution was a step forward towards realising them. Having considered a series of objections⁷ against these rights, the political parties included them after agreeing that these rights were universally accepted fundamental rights in international law. South Africa took a bold step by entrenching these rights in its Constitution. Nationally and internationally their inclusion was seen as a progressive move, which brought South Africa in line with the current international practice and established itself as one of the international role models for the promotion of these rights. Despite the equal status of the various so-called generations of rights internationally and locally, reclaiming space for socio-economic rights is still a challenging task both locally and internationally.

In this Chapter the provisions regarding socio-economic rights in the South African Constitution will be examined. This will be done in the light of the meaning of the similar rights in the International Covenant on Economic, Social and Cultural Rights.⁸

The rights in the Constitution include the following:

⁷ See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa* 1996 (10) BCLR 1253 (CC) at paras 78-79.

⁸ South Africa signed (on 3rd October 1994) but has not yet ratified the International Covenant on Economic, Social and Cultural Rights.

- Section 26, guarantees everyone the right of access to adequate housing and prohibit arbitrary evictions.⁹ This right is recognised in a number of international human rights instruments¹⁰ and in several other domestic constitutions although in countries such as Namibia, India, etc, the corresponding provisions are regarded as directive principles of state policy.
- Section 27 provides for the right to have access to health care services, sufficient food and water and social security. This section also prohibits anyone from being refused emergency medical treatment.¹¹ This right was included because of its general acceptance in international human rights instruments and national Constitutions.¹²
- Section 28 guarantees every child basic nutrition, shelter, basic health care services and social services.¹³ In this section the “child” means a person under the age of eighteen years.
- Section 29 guarantees everyone the right to basic education including adult basic education. This right is also contained in international instruments.

⁹ Section 26 states:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

¹⁰ See the Universal Declaration of Human Rights 1948 article 25 which provides as follows:

- (1) Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food...

¹¹ Section 27 states:

- (1) Everyone has the right to have access to:
 - (a) health care services, including reproductive health care;
 - (b) sufficient food, water, and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right.
- (3) No one may be refused emergency medical treatment

¹² Craven (note 2 above) at 361-362.

¹³ Section 28 declares:

- (1) Every child has the right
- (b) to family care...
- (e) to be protected from exploitative labour practices...

Another fundamental right that can be classified as socio-economic right such as the right to property,¹⁴ is also included in the Bill of Rights. Some commentators¹⁵ are of the view that the relationship between the right to property and economic and social rights is somewhat strained. While an effective realisation of social rights calls for redistribution of wealth and resources, the right to property protects acquired rights and can thus run counter to social rights.¹⁶

It is so that the right to property entails that the institution of property is guaranteed¹⁷ and that acquired property rights are protected from arbitrary interference.¹⁸ On the other hand, the right may also contribute to a decent standard of living and to life in dignity for everyone. Eide has demonstrated that the right to property can serve as a basis for entitlements that can ensure an adequate standard of living, while on the other hand it is the basis of independence and therefore of freedom.¹⁹ Therefore, property rights are closely connected with socio-economic rights.

2.2 THE STATUS OF SOCIO-ECONOMIC RIGHTS IN INTERNATIONAL LAW

This part highlights some international instruments that provide for the protection of socio-economic rights. The purpose is clearly to determine the status of these rights within the international legal arena.

The Universal Declaration of Human Rights provides as follows in article 25:

- (1) Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

¹⁴ Section 25.

¹⁵ Krause, C. "The Right to Property" in Eide et al (eds) *Economic, Social and Cultural Rights* (1995) at 143.

¹⁶ Ibid at 143.

¹⁷ Section 25(1).

¹⁸ Section 26(3).

¹⁹ Eide, A. *Economic, Social and Cultural Rights* (1995) at 31.

- (2) Motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock, shall enjoy the same social protection.

The International Covenant on Economic, Social and Cultural Rights provides in article 11:

- (1) The state parties to the present covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The state parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance on international co-operation based on free consent.
- (2) The state parties to the present covenant, recognising the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
 - (a) To improve methods of production, conservation and distribution of food by making full use of scientific and technical knowledge, by disseminating knowledge of the principles of nutrition and by developing of reforming of agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources;
 - (b) Taking into account the problems of both food-importing and exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

The Convention on the Rights of the Child in article 27 recognises the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

In international law two separate International Covenants form the bedrock of the International Human Rights norms. They are the International Covenant on Civil and Political Rights²⁰ and International Covenant on Economic Social and Cultural Rights. Apart from the entrenchment of socio-economic rights in the covenant itself, the recognition of these rights is found in other international human rights instruments such as article 25 of the Universal Declaration of Human Rights,²¹ and article 5 of the Convention on All Forms of Racial Discrimination.²²

²⁰ Adopted on 16 December 1966 and came into force on 23 March 1976.

²¹ Article (22-28).

²² Article 5 states that:

The fact that there are two Covenants illustrates the assumptions about the nature of these rights. The rationale behind having two separate human rights covenants lies in assumptions about the nature of each of the two sets of rights. The fact that it was not possible to include both sets of rights in one document perpetuates the perception that the rights are different in nature, and that the socio-economic rights are secondary. This idea was supported by the distinction between different “generations” of rights with socio-economic rights placed in the “second generation”. The terminology seeks to draw a distinction between the two sets of rights on the basis that civil and political rights impose a negative obligation on the state while social, economic and cultural rights impose a positive obligation.

This assumption about the nature of these rights has affected their development. This distinction had an adverse impact on the implementation of socio-economic rights. It generated a belief that socio-economic rights are not enforceable or justiciable in a court of law. It is therefore the cause of the traditional perception of socio-economic rights as belonging to a “second generation” rights of lesser importance than their counterparts, civil and political rights as “first generation” rights. It is now recognised that the perception distorts the nature of the two sets of rights. All human rights demand a combination of negative and positive conduct from the state and varying levels of resources to implement them.

The mechanisms that have been put in place to ensure the effective realisation of the socio-economic rights are weak. The problem with socio-economic rights is not their validity but rather their implementation. The wording of provisions of the covenant and the relatively weak international monitoring mechanisms has affected the enforceability of international treaties on economic and social rights.

-
- (e) Economic, social and cultural rights, in particular:
- I. The right to work...and favourable remuneration
 - II. The right to form and join trade unions,
 - III. The right to housing,
 - IV. The right to public health, medical care, social security, and social services,
 - V. The right to education and training,
 - VI. The right to equal participation in cultural activities,
 - VII. The right of access to any place intended for use by the general public such as transport, hotels, restaurants, theatres and parks.

The coming into force of the draft optional protocol on socio-economic rights adopted²³ by the Committee on Economic, Social and Cultural Rights would certainly be one method of overcoming the weaknesses in the existing provisions on economic and social rights. This protocol makes provision for individuals or groups and organisations to submit complaints to the Committee on Economic, Social and Cultural Rights.²⁴

The basic obligation imposed by the ICESCR covenant on member states is to take steps to the maximum of available resources, with a view to achieving progressively the full realisation of the right by all appropriate means, including particularly the adoption of legislative measures.²⁵ This is in line with the general rule of international law requiring states to take the necessary action to execute the provisions of the covenant. While the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant is ratified. Such steps should be “deliberate, concrete and targeted” as clearly as possible towards meeting the obligations recognised in the covenant.²⁶

Article 2 of the Covenant places particular emphasis on the adoption of legislation. Appropriate domestic judicial remedies are also vital for the effective realisation of the rights in the Covenant. For example, the Committee considers the element of the right to adequate housing to be enforceable through the courts.²⁷ These include remedies to prevent or compensate for forced

²³ It was adopted in December 1996.

²⁴ Article 2 of the Draft Optional Protocol states that:

1. Any individual or group claiming to be a victim of a violation by the state party concerned of any economic, social and cultural rights recognised in the covenant, or any individual or group acting on behalf of such claimants, may submit a written communication to the Committee for examination.
2. State parties to this protocol undertake not to hinder in any way the effective exercise of the right to submit a communication and to take all steps necessary to prevent any persecution or sanctioning of any person or group submitting or seeking to submit a communication under this Protocol.

²⁵ Article 2(1) of the Covenant states that:

‘Each state to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’.

²⁶ Liebenberg, S. “The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa”(1995) 11 *SAJHR* at 365.

²⁷ *Ibid.*

demolitions and evictions, complaints against public and private landlords in respect of rent levels, dwelling circumstances, racial or other forms of discrimination, and any form of discrimination in the allocation and availability of access to housing. Apart from legislation and judicial remedies, measures of progressive implementation include those of a financial, educational and technical nature as well as adoption and implementation of appropriate policies and detailed plans by the government.

The majority of the articles in the Covenant also specify particular steps, which the states are obliged to take towards progressive realisation of the rights.²⁸ The steps that the states must take to ensure the full realisation of the rights to health inter alia, include “provision for the reduction of stillbirth-rate and of infant mortality...[and] the creation of conditions which would ensure to all medical service and medical attention in the event of sickness”.²⁹

The Committee has emphasised that priority should be given to the worse-off region and to any specific groups, which appear to be particularly vulnerable or disadvantaged.³⁰ Thus the legislation, policies and plans implementing the obligations under the covenant should be designed to have the maximum impact on the poorest and most marginalised groups in our society.³¹

The state obligation to realise the rights progressively is qualified by the phrase “to the maximum of its available resources” in article 2(1). This qualification recognises the reality that the extent of fulfilment of the rights will depend on the financial capacity of the state. Scarcity of resources does not relieve the state of its core minimum obligation. However, the qualification in no way diminishes the state obligation. Lack of resources in itself would not allow states to defer indefinitely taking the necessary action to give effect to the obligations under the Covenant. The state is under a burden to demonstrate that it has done its utmost within the constraints of its available resources to satisfy the rights protected under the Covenant. Thus even where resources are

²⁸ General Comment No 3 ‘The Nature of the State Parties Obligations Under Article 2(1) of the Covenant’ UN Doc E/1991/23.

²⁹ Article 12 of the Covenant quoted by Essop, F. *The Constitutional Enforceability of Socio-Economic Rights with Special Reference to Housing* (1999) LLM Thesis, University of Cape Town at 29.

³⁰ General Comment on People with Disabilities, UN Doc E/C. 12/ 1994/ 13.

³¹ Craven (note 2 above) at 288.

demonstrably inadequate to attain the desired level of fulfilment of the rights, state must still monitor the extent of non-realisation and to devise appropriate remedial strategies and programmes.³²

The “available resources” refers to the resources of the country, and are not to be equated with budgetary appropriateness. They also include the resources available to the country through international assistance and co-operation, which are essential components of state funding under the Covenant. This is particularly important in the light of the dependence of national economies on global economic trends and policies, especially in developing countries.³³

It should be noted that the Convention on the Rights of the Child (CRC), which includes many socio-economic rights, does not contain the qualifying clause “progressive realisation”. Under the CRC, the obligations arise immediately, only qualified by the phrase “within their means”. This shows that what is special about economic, social and cultural right is only the question of the availability of means when such are required. The obligations are otherwise as immediate as are those relating to civil and political rights.

The state furthermore has a “minimum core obligation” to satisfy at least the essential levels of the rights such as basic nutrition, primary health care, shelter and basic education. A failure to satisfy these basic needs and minimum standards for a dignified human existence would prima facie amount to a breach of the covenant’s obligation. An increased justificatory burden would fall on the state to demonstrate that every effort has been made to mobilise all the resources at its disposition to satisfy, as a matter of priority, these minimum obligations.³⁴

The rights in the Covenant are not absolute. The ICESCR contains a general clause³⁵ prescribing the circumstances under which the state is entitled

³² Essop, F. *The Constitutional Enforceability of Socio-Economic Rights with Special Reference to Housing* (1999) LLM Thesis, University of Cape Town at 33.

³³ Liebenberg (note 27 above) at 366.

³⁴ Essop (note 33 above) at 41.

³⁵ Article 4 of the Covenant states that:

“The state parties to the present Covenant recognise that, in the enjoyment of those rights provided by the state in conformity with the present Covenant, the state may subject such rights only to such limitations as are determined by law only in so far as

to limit the rights contained in the Covenant. The sole purpose of the limitation must be the promotion of “the general welfare in a democratic society”. Thus limitations would be permissible to regulate the enjoyment of the various rights, and to provide for situations where giving unlimited effect to particular rights would threaten the democratic welfare of the state. Laws that are clear, accessible and not arbitrary, unreasonable or discriminatory must determine limitations of the rights.³⁶ In addition, the state is under a burden to demonstrate that the particular limitation is necessary and proportionate to its purpose, and extends only in so far as is compatible with the nature of these rights. A limitation may not amount to the complete abrogation of the right or introduce restrictions, which are inconsistent with the overall purpose of the covenant.

Article 5 makes it clear that the conditions under which the rights may be limited do not extend beyond that specifically provided for in the covenant. This article also provides that nothing in the covenant may be interpreted as implying for any state, group or person a right to engage in any activity aimed at the destruction of the rights or freedoms. This provision is designed to safeguard the conditions within a state necessary for the full enjoyment of all human rights.³⁷

The main source of interpretation of the Covenant is the comments adopted by the Committee and their records of the state reports. For example, as far as the right to housing is concerned, it becomes apparent that the right to adequate housing does not simply entail the provision of a house on demand. This is a common misconception which exists with respect to the right to adequate housing, where this right is equated with the immediate duty of the government to substantively provide a house to anyone who request it to do so. However, this is not the case, the right of access to adequate housing does not imply that the state is required to build houses for the entire population, or to provide housing to all those who request it.³⁸

this may be compatible with the nature of those rights and solely for the purpose of promoting the general welfare in a democratic society”.

³⁶ Craven (note 2 above) at 67.

³⁷ Ibid at 360.

³⁸ Pienaar (note 3 above) at 375.

The above negative analysis of what the right does not entail will prove useful when attempting to understand how this particular right can be enforced. Whilst the state is not generally obliged to provide housing on demand, international law dictates that there are circumstances, for instance in times of severe economic constraints, where the states are legally bound to provide certain vulnerable groups with adequate housing. In so far as the full realisation of the rights the only method of supervision for these rights is the system of periodic reporting. The states report to the Committee for Economic, Social and Cultural Rights³⁹ the extent to which they have complied with their obligations.

The Committee will question the representative of the state party presenting its report and is prepared to conclude in appropriate cases that the state is in breach of its obligations under the covenant. The Committee examines the reports at public meetings to which the reporting state sends representatives to answer questions and to debate the content of the report with members of the Committee.

The Committee's recommendations and a summary of the information received from a state party may be submitted to the General Assembly. The Committee may also bring matters arising out of the considerations of the reports to the attention of specialised agencies of the UN such as World Health Organisation, Food and Agricultural Organisation.⁴⁰ The purpose of this referral is to enable the appropriate technical assistance to be furnished and to enable such bodies to advise on international measures likely to contribute to the effective progressive implementation of the covenant's rights.

The objective of the reporting process includes the undertaking of a comprehensive review of national legislation, rules and practices combined with the adoption of strategies and policies to ensure conformity with the obligations imposed by the covenant. Thus the government will be required to demonstrate that such principled policy making has in fact been undertaken.

Another important objective of the reporting process is to facilitate public scrutiny of government policies relating to economic, social and cultural

³⁹ UN body established in 1987 to monitor the compliance of state parties with their obligations under the Covenant.

⁴⁰ Craven (note 2 above) at 51.

rights and to encourage the involvement of civil society in the making and implementation of the relevant policies. These concluding observations are unfortunately the beginning and the end of the Committee's powers of enforcement.

Non-governmental organisations or citizens concerned with the government's failure to enforce socio-economic rights as per the ICESCR cannot rely on the international covenant or Committees to have these rights enforced locally. The reason is that the recommendations do not have binding force on the states but they can serve as a valuable guide in the effective realisation of socio-economic rights.

Human rights groups or NGOs can use the carefully reasoned analysis by the Committee to put pressure on the government to meet their obligations. A further limitation of these international instruments is that they do not deal with the question of who within the government is responsible for making decisions about welfare. More particularly, they do not deal with the question of whether the courts can force the government to meet its welfare obligations.

Despite the fact that the Committee has a limited enforcement function it is able to play a valuable role in giving content or meaning to the various socio-economic rights entrenched in the ICESCR.⁴¹ Since its inception the Committee has been issuing general comments and has dealt with the interpretation of the various provisions in the covenant. These comments are authoritative statements by the Committee on the meaning of the rights in the covenant and the nature of the obligations they impose on the state parties.⁴²

The Committee on Economic, Social and Cultural Rights responsible for the monitoring of the ICESCR has adopted⁴³ a draft optional protocol permitting complaints by individuals or groups alleging violations of their rights recognised in the ICESCR.⁴⁴ There are also arguments for and against this Draft Optional Protocol, but I do not intend to dwell on them.⁴⁵

⁴¹ *Ibid* at 75.

⁴² Craven (note 2 above) at 77.

⁴³ See Essop (note 33 above).

⁴⁴ This protocol will obviously be binding only on those states that in addition to having ratified the ICESCR have also ratified the optional protocol. The protocol has to be adopted by the

The potentially valuable role of international law in the interpretation of the rights in the Bill of Rights is explicitly recognised in our Constitution. In terms of s39 (1)(b) and (c) of the Constitution the courts must consider international law and may consider foreign law when interpreting the Bill of Rights. The Constitutional Court has further confirmed that regard may be had to both binding and non-binding international law.⁴⁶

Therefore the economic, social and cultural rights has been recognised internationally which encouraged countries such as South Africa to incorporate the “second generations” rights in their domestic constitutions subject to certain limitations. The coming into effect of the adopted Optional Protocol to the covenant allowing individuals, groups and non-governmental organisations to submit formal complaints of violations to the Committee would both complement and reinforce the reporting system under the covenant.

South Africa has committed itself at international level to the protection of human rights. At a regional level, South Africa has ratified the African Charter on Human and People’s Rights and the African Charter on the Rights and Welfare of the Child. Both these treaties protect a wide range of human rights including socio-economic rights. South Africa’s obligations under both these treaties are enforced through a reporting procedure and a complaint system.

The state reporting process is the most common enforcement mechanism for human rights treaties. It requires a state to submit periodic reports to a monitoring body on measures it has taken to implement the rights in the specific human rights instrument. Depending on the instrument, the complaint system allows individuals to bring complaints against a state party alleging that there has been a violation of human rights. South Africa has ratified a further five of the six major treaties protecting human rights. These are:

- the International Covenant on Civil and Political Rights;

United Nations Commission on Human Rights and the Economic and Social Council and the General Assembly.

⁴⁵ De Wet E. “Recent Developments Concerning the Draft Optional Protocol to the International Covenant on Economic Social and Cultural Rights” (1997) 13 *SAJHR* 516-517.

⁴⁶ See (note 4 above) at para 35.

- the International Convention on the Elimination of All Forms of Racial Discrimination;
- the Convention on the elimination of All Forms of Discrimination Against Women;
- the Convention Against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment; and
- the Convention on the Rights of the Child.

The only major international human rights instrument that South Africa has not yet ratified is the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR is unique in that it is the first international instrument dedicated exclusively to the protection of socio-economic rights.

Given South Africa's strong constitutional commitment to social justice and the protection of socio-economic rights, the failure to ratify the ICESCR is particularly disconcerting. The approval to ratify the ICESCR by the Cabinet was announced by Minister Kader Asmal on the 23 February 1998. As mentioned above, a draft optional protocol was adopted by the Committee on the effective mechanisms for the effective realisation of socio-economic rights. The fact that South Africa has not yet ratified the covenant gives an impression that it does not want to be legally bound internationally, in the area relating to the enforcement of socio-economic rights.

Most of the socio-economic rights included in the South African Bill of Rights are echoed from those of the covenant. It has ratified other covenants as mentioned but the question still remains as to why South Africa is so reluctant to ratify the covenant given the covenants that it has ratified to date. There is an urgent need for South Africa to ratify the covenant as it has indicated its intention to ratify by signing the covenant. By doing so it will be incurring an international obligation not to act contrary to the object and spirit of covenant.

2.3 STATUS OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA

The question of whether socio-economic rights should be constitutionally protected rights has been the subject of intense debate in both local and international human rights law.⁴⁷

Notwithstanding the various arguments against the entrenchment of socio-economic rights the drafters took a bold step of entrenching these rights alongside civil and political rights in the Bill of Rights. As mentioned earlier, South Africa is one of the few countries in the world, which entrenched socio-economic rights as justiciable rights.

This does not mean that problems such as poverty will be eliminated overnight but it does establish certain priorities and it should ensure that serious problems are at least addressed by the government.

The principle of interdependence and indivisibility are clearly manifest in the Bill of Rights, which does not distinguish between the traditionally perceived “first generation” rights and “second-generation” rights, except in their formulation. The manner in which these rights can be enforced is dealt with in general terms in section 7(2) of the Constitution,⁴⁸ which stipulates that “the state must respect, protect, promote and fulfil the rights in Bill of Rights”.

In South Africa the state has these various levels of obligations towards all the rights in the Bill of Rights. In order to understand how socio-economic rights can be enforced against the state it becomes necessary to understand what these various levels of obligation entail. The state has an obligation to respect the autonomy of the individual by not interfering or allowing others unjustifiable to interfere with the individual’s rights, whether they are the civil and political rights or the socio-economic rights.

This negative dimension, of socio-economic rights requires the state to protect the individual’s right of access to housing, food, health care, social, security and basic education from any kind of unjustified infringement. Hence the state is expected to respect the resources owned by the individual or the

⁴⁷ Davis, D. “The Case Against Inclusion of the Socio-Economic Rights in the Constitution” (1992) 8 *SAJHR* 475 at 478-479.

⁴⁸ South African Constitution Act 108 of 1996.

group and their right to use the resources in the best possible manner to satisfy their needs.⁴⁹

In the context of the right of access to housing for example, as formulated in s 26 (1), this would mean that the Bill of Rights would guarantee every person the right not to have his or her access to housing be subjected to interference.

De Vos⁵⁰ illustrates this by the hypothetical example of a provincial government that, in the preparation for a visit by members of the International Olympic Committee, decides to bulldoze a cluster of informal houses that have been erected on an open piece of land near the airport. By acting in such a manner, the government is failing to respect the informal settler's right to access housing.

However it is also important to note that the drafters of the constitution took great care to frame the rights in such a way as not to place an absolute and unambiguous obligation on the government to fulfil them. The provisions in the Constitution recognises everyone's right to have "access" to the right as opposed to "have" a right. The inclusion of the word "access" could be criticised as it renders the meaning of the provisions vague and ambiguous.

However, the distinction could also be understood as an attempt to avoid an interpretation that the section creates an unqualified obligation on the state. It must not be interpreted to guarantee a right on demand to everyone, which would amount to an unrealistic interpretation of the right. This formulation serves to limit the obligations of the state.

This shows that a clear understanding of the right in question is essential. When attempting to enforce the right of access to adequate housing it becomes essential to understand what the core content of the right entails. The term "access" to housing for example, has been defined⁵¹ to mean access by the individual to the following: privacy, space, security, lighting, ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities all at a reasonable cost.

⁴⁹ Craven (note 2 above) at 37

⁵⁰ De Vos, P. "Pious Wishes or Directly Enforceable Human Rights" (1997) 13 *SAJHR* 13 at 80.

⁵¹ Essop (note 33 above) at 39.

This interpretation is further elaborated by the Committee on Socio-Economic Rights which asserts that the core entitlement of the right to adequate housing comprises the following components: legal security of tenure, availability of services, materials, facilities and infrastructure, location, habitability, affordability, accessibility and cultural adequacy. This provides a useful guideline as to what the content of this right entail, which belie the argument that socio-economic rights are vague and imprecise.

South Africa has adopted a number of legislative and other measures in an attempt to realise the right to adequate housing. The Housing Act⁵² is the legislative framework that complies with the requirement as set out in section 26(2). The Act does not provide any clear definition of the term “housing” but instead refers to the term “housing development” which is defined as:

“The establishment and maintenance of habitable, stable and sustainable public and private residential environment to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to:

- permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements and
- potable water, adequate sanitary facilities and domestic energy supply”.⁵³

Apart from enacting legislation to promote the right to housing, the government has also introduced a National Housing Subsidy Scheme as one of the means to adhere to its obligation to fulfil the right of access to adequate housing. All subsidies are paid out of the National Housing Fund in order to allow a qualifying beneficiary to acquire a residential property with secure tenure at a price that is affordable.

The state’s duty to respect and protect the individual’s right against infringement is provided for in section 26(3) that protects an individual against eviction or demolition of a person’s home without an order of the court.

⁵² The Housing Act 107 of 1997.

⁵³ Pienaar (note 3 above) at 389.

The court has to consider all the relevant circumstances before granting an order of eviction or demolition. According to international law relevant circumstances would include personal circumstances of those being deprived of accommodation. Furthermore, any provision in legislation that allows evictions or demolitions without an order of the court will be unconstitutional. This subsection binds not only the state authorities but also natural and juristic persons. Section 8(2) of the South African Constitution provides as follows:

“A provision of the Bill of Rights binds natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

The nature of section 26(3) is that it imposes a negative obligation not to arbitrarily evict without an order of the court and can therefore be applicable to all landlords who have the power to evict, be it the state, a natural or a juristic person. Specific legislation was introduced to give effect to s 26(3) of the constitution in the form of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998, which aims to regulate evictions from occupation of land.

As for the requirement that the court has to consider all the relevant circumstances before issuing an order of eviction, in *Uitenhage Local Transitional Council v Zenza*,⁵⁴ the court granted an application for the eviction of squatters who had illegally occupied land belonging to the Council. It was held that on consideration of all the relevant circumstances, s 26(3) did not protect the squatters from eviction. The squatters had ignored the Council's right of ownership and they had not co-operated with the council's efforts to resolve the situation by finding an alternative land for them to settle on.

The impact of s 26(3) on the common law relating to eviction was considered in *Ross v South Peninsula Municipality*.⁵⁵ The allegations failed to place all the relevant circumstances justifying the eviction before the court as required by s 26(3). The Act⁵⁶ requires the court to consider the rights and the needs of certain vulnerable groups in society.

⁵⁴ 1997 (8) BCLR 1115 (SE).

⁵⁵ 2000 (1) SA 589 (C).

⁵⁶ Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998.

The state has to ensure that the individual's rights are protected against infringement by the state or private actors. The state is therefore under an obligation to prevent the infringements of the rights through the adoption of legislation and other measures, the legislation then being subject to judicial review. The right therefore does not require the state to deliver a commodity to the individual in the generally understood sense but rather expects the state to create amongst other measures a legislative framework in which the individuals will be able to realise their protected rights without interference from others.

The next layer of obligation requires the state to promote socio-economic rights whereby it has a positive duty to create conditions or an environment in which these rights could be realised by the individual. At this level the individual can expect more positive assistance from the state, but it still falls short of the state actually providing a commodity to the individual. Instead the state is expected to create an environment conducive to these rights being realised.

In the case of the right to food under the ICESCR the state is required to take measures to improve the production, conservation and distribution of food. The state has to make full use of technical and scientific knowledge of the principles of nutrition and by developing systems so as to achieve the most efficient development and utilisation of natural resources.⁵⁷

The last level of obligation, which is the duty of the state to promote and fulfil socio-economic rights, is the most interventionist and costly level of obligation imposed on the state. It could be required to deliver on a commodity and it may for instance have to make provision for people's most basic needs. With regard to the right to have access to housing states are encouraged to take steps to ensure that housing related costs are commensurate of with income levels.

Asbjorn Eide gave some indication in his recommendations of what shape the obligations to promote and fulfil could take in the context of the right to food. He recommended that states have to:

⁵⁷ See Article 11(2) of the ICESCR, 1966.

- establish a nation wide system of identifying local needs and opportunities for achieving food security.
- draw up plans for national food security, focusing on housing and community food security.
- identify as a matter of priority the needs of groups, which have the greatest difficulty in achieving food security and set specific objectives for achieving sustainable access to adequate food.
- determine the areas in which international assistance is required and detail the requirements.
- ensure that an adequate monitoring system for the right to food is developed and put in action.⁵⁸

These recommendations can be used to conceptualise more clearly what the right to adequate food would entail and the specific state obligations, which it generates. Needless to say, at the level of promoting and fulfilling socio-economic rights the state duties are less clearly defined and enforcing these rights against the state becomes more complex as courts are likely to show greater deference to the legislative and executive branches of government where the allocation of resources are required for the realisation of the socio-economic rights.

Despite the difficulties, which may arise with the state obligation, the above model of layers of obligations provides the states with very helpful guidelines on the issue of enforcing socio-economic rights. Apart from using the levels of obligations⁵⁹ to enforce socio-economic rights the courts will further be able to use the traditional civil and political rights in the Constitution to enforce socio-economic rights to give effect to the interdependence principle. Hence the provision on equality⁶⁰ and human dignity⁶¹ could both be used to enforce socio-economic rights, an argument can be easily made out that being deprived of a

⁵⁸ Eide (note 20 above) at 90.

⁵⁹ Section 7(2).

⁶⁰ See section 9 which states that:

(2) Equality includes full and equal enjoyment of all rights and freedoms. To promote... by unfair discrimination.

⁶¹ See section 10 stating that: 'Everyone has inherent dignity and the right to have their dignity respected and promoted'.

socio-economic right amounts to a direct infringement of one's human dignity as well as the right to equality. Those who are denied access to the basic necessities for an adequate standard of living will not enjoy the enjoyment of the civil and political rights.

In the Indian jurisprudence the Supreme Court in, *Olga Tellis and Others v Bombay Municipal Corporation*⁶² tried to enforce the socio-economic right to adequate housing by inextricably linking this right to the fundamental right to life.⁶³ The court emphasized the wide ambit of the right to life and said that an equally important facet of the right to life is the right to livelihood because no person can live without the means of living. While the state may not be compelled to provide adequate means of livelihood except according to just and fair procedures established by law, can challenge the deprivation as offending the right to life.⁶⁴

Another civil and political right that could be used to enforce socio-economic rights indirectly is the right to just administrative action as set out in section 33(1) of the Constitution. Individuals should be able to challenge administrative action that for instance, results in unfair or discriminatory allocation of housing subsidies.

Apart from using these "first generations" rights nothing precludes one from using the existing common law or legislative remedies to obtain redress. On the question of who these rights can be enforced against, section 7(2) of the Constitution states that the state has various levels of obligations towards the rights in the Bill of Rights. The provision in the Constitution dealing with the application of the Bill of Rights provides that "the Bill of Rights applies to all law and binds the legislature, executive judiciary and all organs of state".⁶⁵

It is necessary to clarify exactly who is responsible for meeting these obligations as it is possible that local government authorities may attempt to abdicate their responsibility in this regard on the basis that housing for instance does not fall within their functional competence.

⁶² (1985) 3 SCC 545.

⁶³ For a more detailed discussion and critique of the case see De Vos (note 52) at 82.

⁶⁴ See (note 54 above) at para 369 (B-C).

⁶⁵ Section 8 (1).

This demonstrates that interaction between state and people takes place at the level of the local government. Furthermore, in the light of the fact that the greatest interaction between the government and the people takes place at the level of the local government, especially in relation to people's basic socio-economic needs, it is imperative that those local authorities understand what their obligations are.⁶⁶

Therefore, the objective of the local government under the Constitution is to provide services to the communities in a sustainable manner, promoting social and economic development and promoting a safe and healthy environment.

On the issue of who may enforce these rights, the constitution has a broad and progressive *locus standi* provision allowing for class actions. It allows anyone acting in the public interest to approach the courts for relief or a declaration of rights, where they allege that a right has been threatened or infringed.⁶⁷

Hence NGOs will be able to take socio-economic issues to court on behalf of or in the interest of indigent groups of people especially where the group is experiencing financial constraints and are unable to secure legal assistance or fearing an adverse costs order. The various methods of enforcing socio-economic rights as shown above, enforcement would most likely take place through the courts of which their role will be explained in Chapter Four.

The Constitution does provide for an alternative institution where one could lodge complaints about the state's failure to enforce socio-economic rights, namely the HRC whose role will be discussed in Chapter Three. Therefore, the courts in collaboration with the HRC and NGOs will contribute a lot to improve and enhance the betterment of the lives of all human beings.

2.4 ADVANCING SOCIO-ECONOMIC RIGHTS

The previous sections dealt with status of socio-economic rights both internationally and locally. Despite the entrenchment of these rights in the

⁶⁶ Pillay, K. "The Role of the Local Government in Implementing the Right of Access to Adequate Housing" (1998) 1 *ESR Review* at 12.

⁶⁷ Section 38.

ICESCR and the South African Constitution, measures for more effective mechanisms for the realisation of these rights have been put in place. The purpose in this section is to examine the effectiveness of those measures that have been adopted towards the effective realisation of the socio-economic rights.

In ensuring the effective realisation of socio-economic rights the Committee on Economic, Social and Cultural Rights has adopted a Draft Optional Protocol in December 1996. As highlighted this protocol will be entirely non-compulsory in that it will bind only those states that have ratified it. This is the international practice that the states must adhere to. There are reservations about the effectiveness of this protocol considering the reluctance of countries such as South Africa to ratify the ICESCR.

In line with international practice South Africa has passed two acts, which will serve as the basis for the protection of socio-economic rights.

2.4.1 The Promotion of Access to Information Act No. 2 of 2000

The coming into effect of the Act will provide a mechanism for accessing information and addressing situations like these. This Act has been drafted in terms of section 32(2) of the Constitution that mandates the passage of this legislation to give access to information.⁶⁸

The Act aims to provide a coherent legislative framework for the right of access to information held by public bodies, and by private individuals that is necessary for the protection of the rights. For a country emerging from a history of authoritarian secrecy exercised by both the state and the private sector, the culture of openness and accountability envisaged by this Act is likely to revolutionise the treatment and management of information in South Africa.

While the impact of the Act will permeate many sectors, it has the potential to have a particularly profound effect on socio-economic rights of the disadvantaged groups and individuals. Information held by private bodies is

⁶⁸ Section 32(2) states that:

National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

subject to the procedural requirements set out in the Act and must be necessary for the protection or the exercise of a right. This Act echoes the constitutional provisions on standing in terms of section 38. An individual, the community or a group of people can exercise the right of access to information. It is also possible for interventions to be made on behalf of vulnerable communities.

The inclusion of the state is likely to enhance the protection of the socio-economic rights. It effectively enables the state to intervene on behalf of vulnerable communities by requesting the information from powerful private bodies. This role will be particularly important in protecting socio-economic rights against improper invasion from other private bodies.

For example, the state can request information from a manufacturing company in order to determine the effects of pollution on a local community caused by the company's activities. The intervention may be necessary to protect the right to a clean environment. The information gathered can be used to advance the socio-economic rights of the disadvantaged communities and is therefore a tool for the state by which to fulfil its constitutional obligations.

The courts also have been given an opportunity to widen its scope of enquiry in respect of socio-economic rights through additional information that can now be accessed. In addition, the courts will be able to develop innovative remedies for the enforcement of these rights.

The information can be withheld if it is going to encroach upon:⁶⁹

- mandatory protection of privacy of a third part who is a natural person;
- protection of commercial information of a third party;
- protection of confidential information of a third party; and
- mandatory protection of safety of individuals and protection of property.

This one shows that despite withholding the information as envisaged in the Act, it will not prejudice the disadvantaged people of our country. These provisions are unlikely to jeopardise the Act's role in advancing socio-economic rights because they are subject to the general public interest override. In other words, even information that falls within the ambit of an exemption and is

therefore *prima facie* protected, but must be disclosed if the public interest warrants it.

The Act empowers civil society to participate meaningfully in the measures adopted by the government towards the realisation of socio-economic rights. It can contribute to improve the quality of people's lives through being used to access information from the government and private bodies relating to the protection and advancement of socio-economic rights. For example, it can play a particularly useful role in accessing information relating to budget management and priorities. If this information indicates a disproportionately low spending on socio-economic rights, it may be used to challenge government spending. It therefore, empowers the public and individuals with an important tool to monitor state spending priorities.

The enforcement procedures of the Act are problematic. Firstly, reviews of internal decisions that refuse access to records must be made to the High Court. The High Court is an inaccessible, expensive, slow and adversarial forum. It therefore poses a barrier to ordinary people using the Act to enforce socio-economic rights.

Furthermore, High Court turf is the lawyer's terrain that is a further barrier to the poor and the disadvantaged individuals and groups. The power given to the state to request information on behalf of vulnerable and poor communities is therefore particularly important.

Secondly, the internal procedures are only intended to facilitate access to information. It does not have a bearing on socio-economic rights but it can be used to advance the protection of socio-economic rights. Once accessed, the information must still be interpreted and analysed. The interpretation and analysis of complex information is often beyond the scope of the expertise of ordinary people and requires specialised services.

Despite this shortcoming, the culture of openness and accountable governance envisaged by the Act will promote the realisation of socio-economic rights. The prescriptive measures adopted in the Act will ensure that it is accessible, easy to comprehend and beneficial to the general public. In short, it

⁶⁹ Part 2 and 3 of Chapter 4 of the Act.

will empower the public to participate meaningfully in the affairs of the government and to influence the protection and advancement of socio-economic rights.

Therefore, irrespective of the difficulties, the Act will promote the realisation of socio-economic rights. As the Act is aimed at breaking the culture of secrecy and strives for openness and accountability it is therefore likely to revolutionalise the treatment and management of information in South Africa.

2.4.2 The Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000

The second Act that has been put into place was passed in February 2000. Because of the deep structural inequalities in our society the Act will take effect in that context.

Income inequalities are likely to remain a key feature of the South African society because of the trends towards the more skilled labour, job shedding in the formal economy and the low employment capacity of the economy. Unemployment, the lack of access to productive resources such as land, social services such as water, health care and education have increased the vulnerability of many households. The President of the Constitutional Court has said that:

“...the socio-economic rights in the Bill of Rights represent a commitment addressing conditions of poverty and inequalities in our society”.⁷⁰

The right to equality in our Bill of Rights includes the full and equal enjoyment of all rights and freedoms. This implies that vulnerable and disadvantaged groups should not experience unfair discrimination in accessing and enjoying their constitutionally protected rights, including socio-economic rights. It is clear therefore that the Act is committed to a vision of equality that seeks to redress systemic, socio-economic inequalities. It is far reaching in its application, binding both the state and all private parties.

⁷⁰ *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 at paras 8 and 9.

The two Acts taken together have the potential to be a powerful tool to protect disadvantaged groups from unfair discrimination in accessing and enjoying socio-economic rights.

2.5 LIMITATION OF SOCIO-ECONOMIC RIGHTS

This section examines the extent to which the state can limit the rights guaranteed in the Constitution. Despite the general limitation clause, a discussion on the nature of the internally qualified rights in respect of socio-economic rights will be made. All the rights in the Bill of Rights including the socio-economic rights can be limited or restricted by a law of general application. The section dealing with the limitation⁷¹ of rights sets out the conditions for a valid limitation of a right.

The limitation must be under a law of general application. In other words, the law must not target named or easily identifiable individuals or groups and it must not be arbitrary. The limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁷² A court will look at the number of factors to decide if a limitation of a right is justifiable and reasonable including:

- the reason why the right is being limited;
- the degree to which the right is being limited;
- whether there are other less restrictive ways to achieve the limitation meaning that the right should be limited no more than is necessary to achieve the purpose of the limitation. The government has to prove that a limitation is reasonable and justifiable.

Apart from being subjected to the general limitation clause, most of the socio-economic rights except for children's rights, the right to an environment that is not harmful to health and well being,⁷³ the right against arbitrary evictions or demolitions,⁷⁴ the right against refusal of emergency treatment,⁷⁵ the right to

⁷¹ Section 36.

⁷² Liebenberg, S. and Pillay K. *Socio-Economic Rights in South Africa* (2000) at 35.

⁷³ Section 24(a).

⁷⁴ Section 26(3).

basic education⁷⁶ and the socio-economic rights of people in prison or in detention,⁷⁷ were formulated with their own internal limitations.

The unqualified rights will be easier to enforce in the courts than the qualified rights. The government will not be able to argue that it has not fulfilled these rights because it needs more time or has limited resources. Rather the government will have to argue that it has reasonably and justifiably limited these rights under the general limitation clause in the Bill of Rights.

In terms of these internal limitations everyone has the right to have “access” to adequate housing, health care, food, water and social security and the state is required to take “reasonable legislative and other measures” within its available resources to achieve the progressive realisation of these rights. The constitutional drafters have obviously included these rights in recognition of the difficulties that may arise when challenging the state’s lack of promoting or fulfilling these socio-economic rights in courts.

These limitations provide the state with some form of defence against a potential claimant’s demand for an immediate delivery of a socio-economic entitlement. By including the word “access” one automatically limits the obligation of the state and does not require the state to provide one of the above resources directly at no cost to the individual.

The government’s role in accessing socio-economic rights is to create an “enabling environment”, which makes it possible for people to gain access to these rights and improve their quality of life. In addition, it has to remove barriers in the way of people gaining access to these rights and lastly, to adopt special measures to assist vulnerable and disadvantaged groups to gain access to the rights.

Socio-economic rights therefore, do not mean that people do not have to pay school fees, service charges and other user fees. However, these charges should not be a barrier that prevents poor people from gaining access to education, water services, health care and other rights. Charges for basic services should be affordable to poor people. People who genuinely cannot afford service charges

⁷⁵ Section 27(3).

⁷⁶ Section 29(1)(a).

⁷⁷ Section 35(2)(e).

should be able to talk to the relevant authority for a reduction or other concession. Government must fulfil its duties, but groups and communities are also responsible for participating actively in their own development. As Liebenberg notes, people are “active participants and beneficiaries” of the right to development not “passive recipients”.⁷⁸

As far as the phrase “reasonable legislative and other measures”⁷⁹ is concerned it has been recognised internationally and locally that the adoption of legislative measures alone will not suffice. Other measures, which would also be considered appropriate, would include administrative, financial, educational and social measures.

The state should further be seen to be adopting and implementing comprehensive policies and plans relating to these rights whilst at the same time providing for appropriate judicial remedies to enable the rights to be enforced in courts. The key to the justiciability of socio-economic rights in the Constitution is the standard of reasonableness.

The courts can evaluate the reasonable measures adopted by the state. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. Once it is shown that the measures are reasonable, this requirement is met.⁸⁰ Given that both the legislative and other measures must be taken, reasonableness can be evaluated both at the level of the legislative programme and its implementation.

The state is obliged to act in order to achieve the intended results and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies must be reasonable both in their conception and their implementation. An otherwise reasonable programme that is not implemented reasonably will not

⁷⁸ Liebenberg (note 74 above) at 27.

⁷⁹ Sections 25(5), 26(2) and 27(2).

⁸⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 41.

constitute compliance with the state's obligation.⁸¹ This means that courts can require an explanation from the state of the measures chosen to fulfil its duties to realise socio-economic rights. The state can be required to give an account of its progress in implementing these measures.

While there can be disagreements about the best way to achieve those goals, the state has an obligation to justify its choice of means to the public. The explanation can be evaluated for its reasonableness and its ability to convince a reasonable person of its coherence.

The obligation of justification means the provision of reasons would satisfy most people of the rationality of a policy on its own terms, even if they were not convinced about the wisdom of choosing such a policy. The court will be able to make an order finding that there has been a violation by the state of an individual's socio-economic rights because the state's programme to fulfil the right is not reasonable.

Despite the centrality of the reasonableness standard to the court's treatment of socio-economic rights, the court does not define the standard at all. Instead it emphasises that the enquiry into reasonableness must be conducted in accordance with the merits of each case. A characteristic of a legal standard is that considerable interpretative discretion is given to the adjudicator responsible for its application and that it therefore does not specify an outcome in advance.⁸²

The standard of reasonableness becomes more bound as courts develop guidelines and set of factors with a bearing on future applications. The plight of the *Grootboom* applicants was decided as follows:

“...the root of the cause of their problems is the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing”.⁸³

The state had in place legislation and policy measures designed to provide for alleviation over time of housing shortages by providing access to permanent, durable residential structures with secure tenure rights. What was lacking was a

⁸¹ Ibid at para 42.

⁸² De Waal, J. et al (eds) *The Bill of Rights Handbook* 4ed (2000) at 437.

⁸³ *Grootboom* (note 82 above) at para 44.

provision for temporary relief to people in an emergency.⁸⁴ The legislation has overlooked those in an emergency, an omission that was unreasonable, additionally because it was in conflict with the constitutional obligations to respect human dignity and the right to equality. Reasonableness must be understood in the context of the Bill of Rights as a whole.

The right of access to housing is entrenched because human beings are valued and to ensure that they are afforded their basic needs. Reasonableness requires the design, adoption and implementation of measures to realise socio-economic rights that do not exclude those most in need of the protection of these rights. Reasonable measures were therefore not in place at the initial application for constitutional relief in *Grootboom* and the state was held to be in violation of its obligation under section 26(2).

The provision of “progressive realisation” allows the state a further justification in delaying the full realisation of the right. However it does not mean that the state may defer its obligations to some distant undetermined time in the future, it simply amounts to a recognition that the full realisation of socio-economic rights will generally not be able to be achieved in a short period of time. The state has an obligation to move as expeditiously and effectively as possible towards the realisation of these rights and any undue delay or deliberate retrogressive measures would constitute an infringement of the relevant right in question.

The phrase “within its available resources” could further be used to rationalise the failure of government to meet its obligations with respect to these rights. It is argued that available resources do not depend solely on the gross national product of the society concerned, but also on the amount of resources being made available to the state for the pursuit of its obligations under the constitution as well as international human rights law.

It has also been argued that “available resources” refer to the resources of the country and not to the budgetary appropriateness, which would mean courts may probe beyond government allocations as reflected in the national budget and may take account of the country’s “real” resources. It is assumed

⁸⁴ Ibid at para 52.

that the “real” resources of the country would be the natural resources, including state land or mineral resources as well as existing intellectual capital and levels of skills in the country which could all be used in the realisation of socio-economic rights.

Thus if for example only 5% of the budget is allocated to housing, and the state claims lack of resources (*Soobramoney* case) should the courts not then be allowed to scrutinise for instance what available state land could be used or sold for the building of more houses? A further question in relation to available resources concerns the choices made by the state in its allocation of its budget, for instance what resources have been allocated to the realisation of socio-economic rights compared to other purposes? Where available resources are demonstrably inadequate, the state must still strive to ensure the widest possible enjoyment of the relevant right under the prevailing circumstances.

It is interesting to note that children’s socio-economic rights are not subject to the same limitation of available resources and progressive realisation as other socio-economic rights. Children are considered as vulnerable members of the society and are therefore entitled to special protection of their basic subsistence needs. Hence parents could use the rights (*Grootboom*) of their children to achieve socio-economic rights for themselves, as they would be free of the internal limitations attached to other socio-economic rights. Despite the fact that these rights will not be subject to any internal limitations, children’s right provision like every right in the constitution is subject to the general limitation provision.⁸⁵

2.6 CONCLUSION

Having discussed the status of socio-economic rights internationally as well as within the South African context it becomes apparent that constitutionalising these rights is not without problems. Measures have been adopted internationally and locally for the effective realisation of these rights so that they do not become paper rights. Internationally every democracy is unique and has its own defining qualities.

⁸⁵ Section 36.

In South Africa, despite entrenching the socio-economic rights in the constitution and their justiciability, other legislation⁸⁶ have been passed to ensure commitment to the realisation of the socio-economic needs. In South Africa breaking the culture of secrecy, empowering people with information by providing written reasons for the decisions that affect their lives is crucial to the consolidation of our democracy. Building and transforming broken lives requires the active participation of affected communities. Access to information is likely to foster greater accountability and result in better-informed decisions.

These Acts⁸⁷ will be effective tools to prevent and promote substantive equality if the courts are accessible and user friendly to disadvantaged groups. If sufficient resources are allocated for the effective implementation of these Acts, that alone will be a step forward towards more stringent mechanisms for the effective realisation of these rights.

Internationally, the UN Committee on Economic, Social and Cultural Rights has adopted the Draft Optional Protocol as one of the effective ways of putting more stringent mechanisms for the protection and the preservation of the socio-economic needs. But as mentioned there are reservations about the effectiveness of this Protocol. It is non-compulsory and the states have to ratify it like any other international treaty. It is important to take note of the fact that the Constitutional Drafters took great care to frame the rights in such a way as not to place an absolute and unambiguous obligation on the government to fulfil them.

Despite, South Africa's commitment to the protection of human rights internationally and locally, it still has failed to ratify the ICESCR. South Africa's failure to ratify the ICESCR undermines its commitment to economic and social rights before the international community. Judging from the international instruments South Africa has ratified to date, it seems that more emphasis is placed on civil and political rights than on socio-economic rights. Support for this contention lies in our ratification of the ICCPR, but our ongoing reluctance to ratify the ICESCR.

⁸⁶ Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000 and Promotion of Access to Information Act No 2 of 2000.

⁸⁷ Ibid.

Commitment to the ICESCR is an ideal opportunity to reiterate our commitment to alleviating poverty and ensuring social justice for all. Ratification of the ICESCR will clearly indicate our commitment to the plight of South Africa's poor and development opportunities for all.

Equal status has been accorded to "first and second generations" rights, but it is still clear that to reclaim the space of socio-economic rights is still a challenging task. Therefore, the measures adopted for the effective realisation of these rights must not only be taken but must be seen to be taken.

CHAPTER THREE

THE MONITORING FUNCTION

3.1 INTRODUCTION

The real test for a commitment to human rights norms lies in the mechanisms that are in place for their enforcement. In order to ensure that socio-economic rights do not end up as mere paper rights, the progress made in realising these rights will have to be closely monitored. Monitoring must be designed to give a detailed overview of the existing situation. The principal value of such an overview is to enable people to determine how the government has performed in respect of the implementation of socio-economic rights.

The new South African Constitution¹ places a unique emphasis on socio-economic rights, both through the legally binding² or “hard” protection of these rights by the courts, and the non-legally binding or “soft” protection offered by non-judicial institutions such as the South African Human Rights Commission³ (SAHRC) and Non-governmental Organisations (NGOs).⁴ It is not exclusively or primarily through the courts that the rights are to be realised. In order to support the limited justiciability of socio-economic rights the new Constitution introduced an additional soft mechanism for their protection. The decisions of the Commission are not binding enforcement mechanisms such as the decisions of the courts. Instead, the Constitution obliges relevant organs of the state to report regularly to the Commission on the measures they have taken towards realising these rights and requires the Commission to exercise a monitoring function in this regard.

The role of the Commission is described in section 184(3) of the Constitution:

¹ Act 108 of 1996.

² Section 172 (1) (b) and see, also, De Vos, Pierre “Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa’s 1996 Constitution” (1997) 13 *SAJHR* at 67, on the judicial protection of socio-economic rights under the new Constitution.

³ Section 184 (3) (Hereinafter referred to as the “Commission”).

⁴ Section 38 (Hereinafter referred to as “NGOs”).

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

The Commission clearly has a special constitutional obligation to monitor the realisation of the rights enshrined in the Constitution. In executing this mandate the Commission has no direct precedent to follow in the legal systems of other countries. The closest analogy would be with the reporting procedures on socio-economic rights under international instruments, whereby states are required, at regular intervals, to provide information on the realisation of certain socio-economic rights in their jurisdictions to the relevant treaty monitoring bodies.

The section 184(3) procedure captures the essential spirit of the international reporting procedure. It introduces the procedure on the domestic level, by placing an obligation on the state to justify itself to a domestic body in respect of socio-economic rights. By imposing an obligation to justify, it ensures that organs of state will keep the realisation of socio-economic rights on their agendas. More than that, monitoring should galvanise the organs of the state by exposing shortcomings and highlighting the government’s successes in the implementation of socio-economic rights. Through the introduction of domestic reporting and monitoring procedure the “soft” protection of socio-economic rights in the constitution consequently has the potential to be more significant than one would have thought.

In this Chapter I highlight the mechanisms that have been put in place to ensure the effective monitoring in respect of socio-economic rights both locally and internationally. That will help to determine whether our own system is on par with the international one. I do not mean to imply that the international system should be emulated at the domestic level. It may or may not be suitable. Instead, the objective is to use the system as a point of reference for the development of a uniquely South African domestic system. The manner in which the Commission has dealt with its constitutional mandate will also be examined. I will further argue that NGOs should be more actively involved in the process of monitoring socio-economic rights.

Therefore, considering the scarcity of jurisprudence in relation to socio-economic rights, the reference to the international system of monitoring will be of great value to the effective implementation of these rights domestically.

3.2 THE INTERNATIONAL SYSTEM OF MONITORING

This section examines the international reporting and the petition procedure in respect of socio-economic rights. The reason is that it may serve as a guide to the local domestic system of monitoring. Since the closest analogy to the domestic reporting procedure is the international practice in this regard it is useful to analyse the role of the reporting and the petition procedures under international law. In addition, I discuss how the international reporting system can benefit the domestic reporting procedure.

The institution of the international supervisory mechanisms through the creation of human rights committees has become one form of effecting compliance with the human rights treaty obligations. The main function of such bodies is to ensure compliance with the relevant treaty obligations. The monitoring body has to clarify and develop standards that are to be implemented for the effective realisation of socio-economic rights. It also has to assess the degree to which the states are actively acting in conformity with their obligations. Lastly, it has to recommend either remedial or preventive action to ensure compliance with the relevant treaty.⁵

The monitoring bodies play a constructive role in assessing the situation and to give advice to countries as to possible remedial actions. The procedure requires a certain amount of co-operation from the states that might not be forthcoming if it were thought that the burdens of participation outweighed the benefits. As far as benefits are concerned, the importance of the promotional aspects of implementation should not be underestimated.⁶

⁵ Van Dijk, P. et al (eds) *Restructuring the International Economic Order: The Role of Lawyers* (1996) 135 at 144.

⁶ Cohn C. "The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the International Covenant on Civil and Political Rights" (1991) 13 *Human Rights Quarterly* 95 at 97.

The international body responsible for monitoring compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR) is the Committee on Economic, Social and Cultural Rights. It has been charged with the difficult task of ensuring that states comply with their international obligations under the covenant. This monitoring body is composed of eighteen experts serving in their personal capacities. The Council elects them by secret ballot from a list nominated by state parties to the ICESCR. Furthermore, special consideration is given to equitable geographical distribution and to the representation of different forms of social and legal systems.⁷

Monitoring on the international plane draws on the reporting and the petition systems that I will discuss below. Each of these forms has a theoretical and practical basis.

3.2.1 Reporting Obligation

Reporting obligations is often used as an enforcement mechanism of human rights norms on the international level.⁸ A whole range of United Nations and regional human rights conventions require state parties on a regular basis to give account to international supervisory bodies created for this purpose, of all the steps they have taken to meet the obligations they assumed by becoming parties to the conventions.⁹

According to the Committee¹⁰ the reporting process has a number of objectives, namely, the state concerned should undertake to monitor and evaluate its own performance by conducting a thorough review of the degree to which the rights are enjoyed by all sections of the community. In doing so, it should stimulate public scrutiny of government policy in the areas concerned and pinpoint difficulties and shortcomings in existing arrangements. Promotion of human rights is often the first and the necessary stage leading to the protection of rights. In short, it promotes the protection of human rights.

⁷ Bayat, N. "A Comparative Overview of Reporting on Socio-Economic Rights Under International Human Rights Law Report" (1997) *Socio-Economic Rights Project*, Centre for Human Rights, University of Pretoria at 2.

⁸ Heyns C. "Taking Socio-Economic Rights Seriously: The Domestic Reporting Procedure and the Role of the South African Human Rights Commission" (1997) 30 *De Jure* 195 at 205.

⁹ *Ibid* at 197.

The most important UN instrument that employs this mechanism in respect of socio-economic rights is the International Covenant on Economic, Social and Cultural Rights.¹¹ Several other international human rights instruments enunciate socio-economic rights in respect of certain vulnerable groups and pose corresponding reporting obligations. They include the International Convention on the Elimination on All Forms of Racial Discrimination,¹² the Convention on the Elimination of Discrimination against Women¹³ and the Convention on the Rights of the Child.¹⁴

South Africa has ratified the African Charter and other UN instruments including those listed above except for the ICESCR. The latter is in the process of being ratified. It has been signed. Ratification will mean that the country will be subjected to reporting obligations in respect of socio-economic rights on three distinct levels. Most important will be the ICESCR, which requires an initial report after two and thereafter a report every five years. On the regional level the country is required to report to the African Commission on Human and People's Rights every two years. On the domestic level these international obligations will be supplemented by the internal reporting procedure created by section 184(3) that requires yearly reports.

As I have stated above, reporting requires the state to submit periodic reports on the domestic implementation of the treaty rights. Generally, the reports are considered by the supervisory body, which reviews them and makes recommendations. It is dependent to a large extent on the good faith of the states concerned. The international bodies are reliant upon the provision of accurate and relevant information by the states and the monitoring body is mandated purely with the function of assisting and advising states. Reporting is therefore considered as a mechanism for fact-finding and more specifically the verification or the promotion of human rights in contrast to the protective function of a petition system.

¹⁰ General Comment No 1 (1989) at 12.

¹¹ It was adopted on 16 December 1966, see Eide, A. et al (eds) *Economic, Social and Cultural Rights* (1995) at 15 and Chapman, A "A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights" (1996) 20 *Human Rights Quarterly* 21 at 23.

¹² Adopted 1965 and entered into force in January 1969.

¹³ Adopted 1979 and entered into force in 1981.

¹⁴ Adopted 1989 and entered into force in 1990.

3.2.2 Petition System

The petition system is regarded to be a more effective means for the protection of human rights.¹⁵ It involves the receipt of communications from individuals or state parties alleging violations of the treaty concerned. As regards the individual complaint system, which is generally optional for state parties, the procedure is intended to provide the victim of the violation with an international remedy where a domestic remedy is not available. Although the international body may not necessarily have the power to enforce its decision, this does not always detract from the efficacy of the system.

The petition procedure is not without problems. While the petition procedure allows for an in-depth analysis of particular situations, it cannot compete with the breadth and scale of action that takes place under the various reporting mechanisms. It has been noted that even in those cases where petition systems are operative, the reporting system has formed the mainstay of supervision by providing continuous monitoring. This is partly due to the fact that fewer states have agreed to be bound by the petition system. Equally important, the complicated procedures for the receipt and consideration of complaints mean that they are not always readily accessible to the disadvantaged who might be victims of violations.¹⁶

Both the reporting and petition systems depend upon the force of national and international pressure for their effectiveness. Petition procedures are generally accompanied by greater public interests and therefore could be said to be more effective in mobilising pressure and causing shame.

Finally, it is clear that petition systems are particularly effective mechanisms for the elaboration of standards, for application in specific cases. In comparison the process of reviewing states reports does not give rise to similar opportunities for expounding on the meaning of the norms in the treaty concerned. It is only with the use of the General Comments that the monitoring body may develop a general and understanding of the norms within the treaty concerned.

¹⁵ Schoenberg H, *The Implementation of Human Rights by the United Nations Committee* (1977) 22 at 37.

¹⁶ *Ibid* at 39.

3.2.3 Lessons from the International Community

There is a meaningful connection between the international and the domestic monitoring systems. In my view the domestic system can rely on the international system to enhance the protection of socio-economic rights.

The international monitoring system has advantages that the domestic system cannot offer. It provides a basis for a cross-national assessment of a country's performance in the world as seen from an impartial international perspective. A body of jurisprudence on these rights has already started to develop on the international level, which at least provides a time-tested starting point. The South African Human Rights Commission would be well advised to take cognisance of this jurisprudence. Moreover, through co-ordination of the international and domestic procedures the cost and efforts of obtaining and assessing the required information can be reduced. The time frame for domestic reporting could be co-ordinated with South Africa's obligations under the ICESCR because of the large degree of overlap between the rights in question.

The first step, for the Commission, should be to issue guidelines on what is expected from the various organs of state. It should have access to governments reports submitted to the international supervisory body and to the findings issued by UN Committee. The relationship of the report to the National Assembly and South Africa's report to the UN Committee will also have to be carefully considered. The Commission should have compiled an inventory of the international human rights instruments that relate to the rights in question and that the government has ratified or intends ratifying (ICESCR). According to international practice states are encouraged to make use of cross-referencing between different reports instead of re-submitting the same information where they have overlapping reporting duties.¹⁷

Internationally NGOs have been recognised as prominent players in the process. The ability of NGOs to participate freely and effectively in the review process is critical for putting more pressure on the government for the effective realisation of human rights including socio-economic rights. Therefore, the

¹⁷ General Comment No 1 (1989) at 13.

Commission has to bring on board NGOs. It is not enough to recognise them in theory without giving them a platform to exercise their functions.

The manner of protecting socio-economic rights is to an extent depends on global developments and trends. Increasingly claims must be advanced within the international as well as domestic legal order. In so doing the capacity of both domestic and international human rights institutions are enhanced. Courts are more likely to hold their governments to a purely internal standard of the right to social security or to an adequate standard of living. They are less likely to enforce standards and entitlements linked to internationally recognised social and economic rights.¹⁸

In other words, our domestic claims will be more successful if international human rights bodies have identified certain areas in which the domestic protection fails against international standards. That being the case, it is important to take our claims and issues forward internationally as well as domestically and to ensure that UN treaty monitoring bodies give clear directions to our courts, Commission and the Government.

There is a need to collaborate to ensure that the pressing issues of domestic socio-economic rights struggles are addressed at the international level. The consideration by the UN Committee of the right to social security and to an adequate standard of living may be useful in convincing the SAHRC, courts and Parliamentarians of the importance of effective legal remedies to ensure the realisation of these rights and universal and justiciable standards. The effective monitoring of socio-economic rights requires constant interaction between the international and domestic monitoring bodies.

3.3 DOMESTIC SYSTEM OF MONITORING

In this section I discuss the role and the steps to be taken by the South African Human Rights Commission (“SAHRC”) in fulfilling its constitutional obligation of monitoring human rights including socio-economic rights. The

¹⁸ As the courts have a role to play in holding the government to its obligations and to supervise the implementation of its orders in respect of these rights, their role will be discussed at length in Chapter Four.

Commission's primary aim and objective should be to promote socio-economic rights rather than to criticise the state's performance in respect of these rights.

3.3.1 The Role and the Nature of the Commission's Mandate in Section 184(3)

The SAHRC has a key role to play in monitoring the implementation of court orders in respect of socio-economic rights. The Commission was established in terms of section 181(1)(b) of the South African Constitution. It is one of the institutions described in the Constitution as a "state institution supporting and strengthening constitutional democracy" in the Republic. It is a watchdog whose main task is to monitor the actions of the government and the private sector that may affect human rights.¹⁹

The Commission is therefore equipped with a powerful information-gathering tool on the steps taken by the relevant organs of the state to respect, protect, promote and fulfil socio-economic rights.²⁰ Section 184(3) of the Constitution places an obligation on the Commission to request information each year from relevant organs of the state on the steps that they have taken towards the realisation of the socio-economic rights. With this information and the information obtained from other independent sources, the Commission will be in a strong position to monitor and assess the observance of socio-economic rights in South Africa.

Therefore, the question could be asked whether is it correct to describe the system which section 184(3) create as a domestic reporting procedure? In other words, does the section 184(3) procedure do something similar for socio-economic rights on the domestic level to what the reporting procedure in terms of the treaties like the ICESCR do for these rights on the international level? In my view section 184(3) creates precisely such a system on the domestic level, whereby state organs are placed under a legal duty to report to an independent body on their performance.

¹⁹ Liebenberg, S. and Pillay, K. *Socio-Economic Rights in South Africa* (2000) at 53.

²⁰ Section 7(2).

The essence of the international system of reporting as I have stated above, is that organs of state are required by law to inform an independent monitoring body on a regular basis on the extent to which they have managed or failed to comply with treaty norms. At the heart of the reporting procedure as enforcement mechanism lies a duty of justification on the one side and a system of monitoring on the other, a system of introspection and inspection.

The South African Constitution creates such a duty of justification. There are differences between the two types of reporting. In the one case the monitoring body is international and dedicated only to monitoring the particular set of rights in question. In the other case, the monitoring body is domestic and it has some other functions as well.

However, in both cases the bodies serve as independent monitors. The sources of the legal obligations on the national and international levels are also different. In the case of the international reporting the source is the voluntary decision of the state in question to become a state party to a treaty. In the case of the section 184(3) procedure the obligation is imposed by the Constitution. That does not diminish the fact that legal obligations are created in both instances to provide information on one's performance in respect of the rights in question.

The mandate contained in section 184(3) of the Constitution must be read in conjunction with the other functions and powers of the Commission that are provided for in section 184 of the Constitution. The purpose of section 184(3) cannot merely be for the Commission to gather information concerning socio-economic rights. The information gathered must be analysed and evaluated in terms of the Commission's duty to monitor and assess the observance of human rights in the Republic under section 184(1)(c).

In addition, the Commission has the power to take a number of steps in relation to the information that it obtains. Of particular relevance are its powers to investigate and to report on the observance of human rights and to take steps to secure appropriate redress where human rights have been violated. The Commission identifies a violation of any of the rights in the Bill of Rights it

may further institute litigation or make recommendations to the relevant organs of state.²¹

The Commission must submit an annual report that must be tabled in Parliament. In addition, it is obliged to submit quarterly reports to the President and Parliament on investigations and its findings. It may also submit reports at any time if it deems this necessary.²² Importantly, the end-goal of the section 184(3) process should not be seen as the production of the report. These reports have the potential to be a valuable public record of the monitoring process if they identify instances of the violation of socio-economic rights, engage organs of the state in measures to improve access to these rights and educate them regarding their obligations, make well-considered recommendations, follow up on such recommendations, raise public awareness and identify areas of priority for the next monitoring cycle.

At the end of the day, the value of section 184(3) mandate lies in the Commission's ability to contribute to making socio-economic rights a reality in the daily lives of the disadvantaged groups.²³ The tabling of a formal report in Parliament will not achieve this goal on its own. It is essential that the report receive some form of consideration in the parliamentary system. The report should be considered by the relevant portfolio committees and perhaps debated in the National Assembly. In addition, a user-friendly version of the report should be disseminated to the press and media. These institutions bear the responsibility of taking matters further by informing the public through the radio, Internet and television.

It is consequently concluded that section 184(3) does create a system that can legitimately be referred to as a domestic reporting procedure.

²¹ Section 184(2)(a) and (b).

²² Section 15(2) of Act 54 of 1994.

3.3.2 Determining Relevant Organs

In this section I will analyse the duty of the Commission to fulfil its constitutional mandate of identifying the relevant organs of the state responsible for socio-economic delivery.²⁴

The primary challenge of the Commission is to establish what constitutes an organ of state and which organs are relevant for the purpose of this section. This entails an enquiry into which organs are charged with the task of taking measures towards the realisation of the rights in the Bill of Rights. The task of identifying relevant organs requires an analysis of the constitutional division of power between the different levels of government. The three different levels of government are clearly organs of the state as defined in section 239(a) and (b) of the Constitution. This does not include the Court or Judicial Officers.

Another key challenge in the process is the nature of the information that will be requested from the various organs of the state. It has been argued that the Commission should focus on socio-economic rights, and develop guidelines to ensure that organs of state provide it with the relevant data.²⁵

A difficult balance will have to be struck between ensuring that it is practical and feasible for the relevant organs of state to provide the information, while, at the same time, the Commission is provided with an effective basis for evaluating their performance.

3.4 NGO INVOLVEMENT IN THE MONITORING PROCESS

In this section I will analyse NGO involvement in the monitoring process. The sad reality is that most human rights NGOs are not directly involved in the area of socio-economic rights. This was highlighted by their non-involvement in monitoring the court order, along with the Commission in the *Grootboom* case.

²³ Brand, D. and Liebenberg, S. "The Second Economic, Social and Cultural Rights Reports" (2000) 2 *ESR Review* 12 at 16.

²⁴ Before the Commission can require organs of state in terms of section 184(3) to provide information, it has to identify those organs responsible for socio-economic delivery. This is in line with the obligation imposed by the Constitution.

There has been a concern raised by human rights activists that they have to be more directly involved, especially in this area of socio-economic rights.

There is a considerable room for NGO participation in the monitoring process. Because NGOs are close to the people, they can provide information on the real problems people experience in getting access to socio-economic rights. They can also use the Access to Information Act 2 of 2000 to obtain information in respect of these rights.

The information gathered can be valuable in helping NGOs to compile a shadow report. Liebenberg defines a shadow report as an NGO report that aims to highlight information and problems relating to the realisation of socio-economic rights that are not covered in the official government report.²⁶ Governments usually assess themselves in a more favourable light than NGOs, that are often more critical of the government. NGOs can also monitor the implementation of the National Action Plan for the Promotion and Protection of Human Rights.²⁷ It is a detailed plan for implementing a full range of civil, political, economic, social and cultural rights and also rights to development, self-determination, peace and environmental protection.

A shadow report can also be submitted to international human rights bodies. International reporting systems have shown that civil society is central to an effective monitoring process. For example, the UN Committee on Economic, Social and Cultural rights, which is responsible for supervising states parties obligations under the International Covenant on Economic, Social and Cultural Rights has developed innovative ways of involving NGOs in the reporting system under the covenant. These include inviting the submission of shadow reports or alternative reports as well as opportunities for oral representations.

Indeed, the participation by NGOs in the work of the UN Committee is the most significant and perhaps the most controversial aspect of the supervision

²⁵ Pillay, K. "Identifying Relevant Organs of State" (1998) Report of a Joint Workshop Organised by: Community Law Centre (University of the Western Cape) and Centre for Human Rights (University of Pretoria).

²⁶ Liebenberg, (note 18 above) at 55.

²⁷ It was handed in to the UN on 10 December 1998 in response to the commitment in The Vienna Declaration of Human Rights and Programme of Action adopted by the World Conference on Human Rights in June 1993.

system.²⁸ The reason for this is that the Covenant makes no reference to the NGO participation in the process. Similarly, the South African Constitution makes no reference to the NGO participation in the monitoring process. It does provide for a class action that may be used and for NGOs to act on behalf of the victims if the government fails to honour its obligations.²⁹ By analogy NGOs must be entitled to submit written statements and make oral representations to the monitoring bodies and the government on how they have performed in respect of the delivery of basic services. The objective of allowing presentation is to foster wider participation that will make the monitoring process more transparent. NGO participation should therefore be institutionalised and not merely encouraged informally.

The major obstacle to creative NGO participation seems to be the lack of awareness and willingness and the physical and financial constraints on the organisations working within the spheres of socio-economic rights.³⁰ The existing human rights NGOs have shown a reluctance to become involved with the promotion of socio-economic rights.³¹ However, there have been calls by, organisations such as Congress of South African Trade Unions (COSATU) and Black Sash, for access to the information provided to the SAHRC by the organs of state and for public hearings where comments can be made on the information.³²

The Commission's reporting mechanisms offers an institutionalised opportunity to comment on the extent of socio-economic rights delivery.³³ Public hearings must therefore be arranged to allow comments on the information provided by government departments. For example, the Black Sash has a particular interest in monitoring the realisation of the right of access to

²⁸ Craven, M. *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) at 81.

²⁹ Section 38.

³⁰ Craven (note 27 above) at 82.

³¹ *Ibid.*

³² Liebenberg, S. "The South African Human Rights Commission" (1998) 1 *Economic and Social Rights Review* at 7.

³³ Bevan, G. "The Impact of the Different Conceptions of Socio-Economic Rights in South Africa" (1999) LLM Thesis, University of Witwatersrand, Johannesburg at 62.

social security in South Africa.³⁴ Its efforts are frustrated by their lack of access to government reports and their inability to comment on them.

What role then does the Commission currently envisage for NGOs? The approach adopted by the Commission is that civil society will not be provided with the information received by the Commission from the government departments until the provisional composite report has been prepared.³⁵ This makes it impossible for NGOs to participate meaningfully.

As I have stated, the participation of NGOs is vital to the long-term success of the monitoring mechanism.³⁶ Denying NGOs immediate access to the information is further at odds with the sentiments of the then, Chairperson of the South African Human Rights Commission, Dr Barney Pitso Moseneke. He argues that the implementation of social and economic rights requires democratic participation by society at all levels: an informed civil society, a democratic government and state institutions that monitor and inspire human rights action.³⁷ People must be enabled to tell the Commission and the government what the situation is on the ground.³⁸

If this is the objective, the Commission cannot be the only monitoring body. If the monitoring is to succeed, there has to be more public and NGO participation.³⁹ NGOs and the public should have access to the information provided by the organs of state, as soon as it is released to the Commission. The Commission can only assess the progress made in the realisation of socio-economic rights in South Africa if the information provided by the government is checked against alternative information submitted by NGOs, individuals and trade unions.

This would also be a more inclusive procedure and will give NGOs and others an opportunity to comment before the Commission drafts its report.⁴⁰ More should be done to analyse the information submitted before the report is

³⁴ Interview "Black Sash" held in Cape Town on the 03 June 2001.

³⁵ The First and Second Report on The Monitoring of the Realisation of Socio-Economic Rights.

³⁶ Bevan (note 32 above) at 63.

³⁷ Concluding Address, Workshop on the South African Human Rights Commission (1997) 35 at 37.

³⁸ Ibid.

³⁹ Interview with Doctor Meidlay, "Department of Welfare" Eastern Cape 21 May 2001.

⁴⁰ Interview with Mr Kumalo, "Department of Education" Eastern Cape 21 May 2001.

drafted. A more inclusive and critical approach will not only promote a more balanced assessment, but it will also place a wealth of resources and experience at the disposal of the Commission, free of charge. We need a civil society who knows where change should come from. According to Danie Brand:

“Experience has shown that state representatives often portray the situation in their country in too rosy manner, whereas NGOs and civil society tend to be more critical. It is only by being exposed to both perspectives that a balanced and credible assessment can be made”.⁴¹

Also, Parliamentary processes are only effective when complemented with lobbying and advocacy of the civil society. Civil society is able to create political pressure unlike the interventions by the Commission and the Constitutional Court. Civil society may remove barriers that stood in the way of people gaining access to socio-economic rights,⁴² by highlighting the cases of groups who are particularly vulnerable and disadvantaged and by placing pressure on the state to assist these groups and to ensure that they gain access to the rights in question. They are often the only voice for rural women, people living with disabilities or chronic illness, poor children and elderly persons.

Finally the State, the HRC and the Constitutional Court have to be informed about grassroots experiences of the people if a more holistic conceptualisation of these rights is to be achieved. The Poverty Hearings organised by the Commission for Gender Equality (CGE), South African National NGO Coalition (SANGOCO) and the South African Human Rights Commission (SAHRC), illustrated the hardship and suffering experienced by the people on the ground.⁴³ A closer look at the poverty hearings reveals how NGOs may open space for the marginalised to be heard.

3.5 NETWORKING STRATEGIES FOR NGOs

Effective participation will require NGOs to share information and collaborate in formulating strategies for their involvement in the monitoring process.

⁴¹ Brand, D. “South African Human Rights Commission” *Economic and Social Rights Review* (1998) 2 at 11.

⁴² Bevan (note 32 above) at 81.

⁴³ The hearings were launched on 24 February 1998 and ran from March to June 1998.

At the moment there is limited opportunities for NGOs to participate in the monitoring function entrusted to the Commission by the Constitution. One of the creative ways in which NGOs could play a vital role is through a compilation of the shadow report as mentioned above. This will require a joint effort. Another way in which NGOs may become more directly involved in the process, is by implementing a carefully thought-out socio-economic rights litigation strategy with the aim of incrementally establishing positive precedents. Establishing and funding a group of progressive lawyers who would assist the communities to enforce their socio-economic rights can do this. NGOs should further identify and take up cases, including the preparation of *amicus* briefs as the Legal Resources Centre and the Community Law Centre (University of the Western Cape) have done in the *Grootboom*⁴⁴ case.

Other activities that should be co-ordinated include: social mobilisation, policy research and formulation, lobbying individuals, legislatures, statutory bodies and international agencies and information sharing.⁴⁵ Co-ordinated actions have greater impact and results as recognised by the report on the Poverty Hearings.⁴⁶ This could cover both the process of giving effect to socio-economic rights and the substantive impact of government programmes on the socio-economic rights of communication with NGOs work.

Although the Constitution⁴⁷ and the Promotion of Access to Information Act 2 of 2000 provide for access to information, the knowledge of legal rights and remedies by poor people leaves much to be desired. Legal advice offices could play an important role in providing the necessary information. The restructuring of the Legal Aid system must include the right of poor people to be provided with information and advice on their constitutional rights, particularly their socio-economic rights. NGOs could lobby for a portion of the State's Legal Aid budget to be allocated to local citizen's advice offices for the purpose of providing access to information and advice on all human rights including

⁴⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1253 (CC).

⁴⁵ Ntombela-Ndzimande, P. "The Role of the Independent Commissions and Civil Society" (1999) 1 *Economic and Social Rights Review* at 20.

⁴⁶ Report on Poverty Hearings Organised by CGE, SANGOCO, SAHRC, (U W C) Community Law Centre, July 1998 at 171.

⁴⁷ Section 32.

socio-economic rights and it is encouraging that there are developments in this regard.

Lastly, it is also encouraging that Schools for Practical Legal Training have included socio-economic rights into their curricula. Therefore this could be used by NGOs to contribute to the emergence of a new generation of human rights lawyers and activists.

3.6 ANALYSIS OF THE MONITORING FUNCTION

The purpose here is to examine the manner in which the SAHRC has managed or failed to carry out its constitutional mandate. I do not intend to provide an overview and critique of specific reports of government departments but rather of the Commission's monitoring function and of the Commission's Socio-Economic Report. I will focus on the monitoring of court orders in Chapter Four. This, more general critique will focus on a comparative analysis of the First⁴⁸ and Second⁴⁹ Socio-Economic Report.

Three aspects of the monitoring procedure are discussed separately: the process of preparing the report, the protocols or questionnaire in terms of which the information was gathered and the report itself.

3.6.1 The Process

The second annual cycle of monitoring socio-economic rights was characterised by the efforts of the Commission to assert its control over the monitoring process. The Commission maintained the attitude adopted in the first monitoring cycle that is that it would not make the departmental reports available to civil societies prior to the production of its own report.⁵⁰ This was confirmed by the member of the Commission in a private interview held in Cape Town on 13 March 2001. As a result the involvement of the NGOs in the process was kept at a minimum.

⁴⁸ The 1998-1999 Socio-Economic Report was launched on 25 March 1999.

⁴⁹ The 1999-2000 Socio-Economic Report was launched on 15 September 2000.

⁵⁰ See Thipanyane, T. "The First Economic and Social Report" (1998) 1 *ESR Review* at 11-12.

The Commission justifies withholding the information by arguing that organs of state submit their reports to them in confidence. If it were to make these reports available to organs of civil society, it may harm or embarrass a particular organ of state. This response is difficult to understand.⁵¹ What possible harm could come from making information available to NGOs that is in any event part of a public record? The government departments were perfectly willing to provide the reports they had sent to the Commission.⁵² Why then should the Commission be reluctant to make reports available to NGOs? The absurd attitude of the Commission undermines the monitoring process.

The Commission remains unwilling to involve civil society directly and meaningfully in the process. The fact is that the Commission does not have sufficient resources to carry out its mandate.⁵³ Civil society organisations can provide invaluable information and analysis to the Commission. NGOs, if allowed to study the information provided by the organs of state, can provide the Commission with alternative information against which to verify the government's reports. They can also make available to the Commission their own experience and evaluation of the government programmes and policies. This could assist the Commission greatly.

The lack of NGO participation in the process is further bad for the Commission's image. As an institution established for the purpose of upholding the spirit and the objectives of the Bill of Rights, it should be seen to function in a transparent, open and participatory way. Withholding information from NGO's and not actively seeking input from civil society on the realisation of social and economic rights does not project a good image.

In order to ensure response from the departments, the Commission was at pains to make sure that the departments took the section 184(3) mandate seriously. It wanted to avoid the bad experience it had in the first monitoring cycle. It emphasised the need for the departments to respond in time to its request for the information. Eventually the Commission, after various

⁵¹ See also Brand, D. "The South African Human Rights Commission- First Economic and Social Rights Report" (1999) 2 *Economic and Social Rights Review* 18 at 20 for a discussion of this problem during the course of the first monitoring cycle.

⁵² Interviews held with Eastern Cape Provincial Departments on 21 and 22 May 2001.

⁵³ See (note 34 above) and Mr Southwell (Project Co-Ordinator, Western Cape) confirmed this.

extensions of deadlines, subpoenaed 36 Departments who had not submitted their reports by the final deadline.⁵⁴ The Commission took a strong action against government departments to ensure that they responded to its request for information.

The heads of these departments were subpoenaed to appear before the Commission to explain the reasons for their failure to submit the information requested. Some departments were not happy with the action of the Commission's and referred to it as "unreasonable". They cited the lack of co-ordination within their departments and training by the Commission as the reason for their failure to comply with the request.⁵⁵

The subpoenaing had the desired effect because all the departments managed to submit their reports before the return date⁵⁶, except for the departments of Health in the Eastern Cape and Education in Northern Province. The strong action by the Commission to ensure compliance has to be welcomed. However, it should as a rule be avoided by ensuring that for effective and smooth administration relating to the rights in question, maximum participation from all stakeholders is important.

One of the most important advantages of the monitoring process is the opportunity it creates for a constructive dialogue between the monitoring body and those who are monitored. The Commission has the opportunity through its monitoring process to influence the policies, laws and programmes of the government through education and recommendations. The adversarial atmosphere created by the strong action of the Commission to issue out subpoenas is not conducive to the process of constructive engagement. Subpoenaing is particularly problematic when one takes into account that no substantial effort was made by the Commission to ensure that government officials responsible for preparing the reports received education and training on socio-economic rights and the specifics of the reporting process.

⁵⁴ The Eastern Cape Provincial Departments for example were on top of the list.

⁵⁵ See (note 39 above).

⁵⁶ 08 and 09 December 1999 for the Hearings for non-compliance with the HRC request for submission of the information on the measures taken by the Departments on the progressive realisation of socio-economic rights in South Africa.

The Commission has identified the lack of awareness, understanding and knowledge of the section 184(3) process⁵⁷ as one of the most important reasons for the inadequacy of the reports received from the departments. In the light of this problem it is critical for the Commission to engage in a process of training government officials who have to prepare reports for the Commission. They need to be trained on the technical aspects of the monitoring process: how to prepare the report, what information to include and what format to follow. They should receive training on the meaning of socio-economic rights and the duties they impose on the state. This training can be provided by the Commission or through NGOs, but it will have to be relatively intensive in order to have the desired effect.

3.6.2 The Protocols

The Commission gathers information from the relevant organs of the state through questionnaires (referred to as ‘protocols’). The nature and role of these protocols was one of the most contentious issues during the preparation of the first monitoring cycle.⁵⁸ The protocols that formed the basis of the first monitoring cycle represented a compromise between the views held respectively by the Commission and NGOs in the process at the time. This was intended to form the basis for further development of protocols in the future.

However the Commission developed the protocols for the second monitoring cycle with the assistance of a Canadian consultant specialising in the quantitative analysis of social and economic policy. These differed fundamentally from the protocols used in the first monitoring cycle.⁵⁹ The new protocols have created problems that go to the core of the monitoring process and will influence their practical efficacy as human rights monitoring tools.

The new protocols are problematic for two reasons: they ask too much from the departments and they ask the wrong questions. During the first

⁵⁷ South African Human Rights Commission “Second Economic and Social Rights Report” (2000) at 13.

⁵⁸ Liebenberg, S. “First Economic and Social Rights Report” *Economic and Social Rights Review* (1999) 1 at 7.

⁵⁹ See Brand (note 51 above), and also Brand, D. “The Second Economic and Social Report” (2000) *ESR Review* 13 at 14.

monitoring cycle, the approach was to request a modest amount of information. This enabled the government to respond adequately and the Commission was able to process and analyse the information it received.⁶⁰ This set of protocols focused on:

- the impact of past discriminatory policies and practices on the implementation of socio-economic rights;
- the understanding by government departments of the obligations imposed on them by the socio-economic rights in the Constitution;
- the policies, laws and programmes planned or in place to implement socio-economic rights; and
- the existence of information and monitoring systems within government departments through which to track the implementation of socio-economic rights.⁶¹

The questions were formulated in such a way that the organs were able to determine which information the Commission needed. In essence the protocols focused on very clearly defined and limited batches of information, and it was designed to give the Commission a relatively clear picture of the measures being taken by the relevant organs of the state towards the realisation of socio-economic rights. The more modest approach also avoided overlap with other processes of information gathering, such as those conducted by Statistics South Africa. They also stressed to the organs of state that the realisation of socio-economic rights is a constitutional obligation.

The focus in the first monitoring cycle, on the measures adopted by government departments was appropriate. Sadly, the Commission, in designing its protocol for the second cycle of monitoring consciously departed from the modest approach adopted in the first monitoring cycle.⁶² The new protocols required extensive and detailed statistical information from the government departments. They were asked to provide statistical data for seven listed categories of vulnerable and disadvantaged groups. This expected too much.

⁶⁰ See Thipanyane (note 50 above) at 13.

⁶¹ Ibid at 14.

⁶² See Brand D. (note 51 above) at 14.

The final report bears witness to the fact that in general the departments could not provide this kind of information.

The Commission is not adequately equipped to analyse large volumes of statistical information effectively. To ask the departments this kind of detailed statistical information is a waste of effort and energy. In any event, much of the information the Commission requested is already available from other institutions in a conveniently digested form.⁶³ Some of the information requested is also of the wrong kind.

Also, the role of a particular government department in realising the rights to food, for example, cannot be assessed through examining abstract statistical information relating to the nutritional status of the population. These statistics may reveal that there are people without access to sufficient food, but they do not indicate which organ of state should be held responsible and why the situation exists. Is it due to a lack of a coherent nutritional strategy on the part of the government, or that the relevant policies and laws are not being properly enforced? Only through a close examination of measures adopted by relevant organs of state and their impact, is it possible to assess whether government is fulfilling its constitutional duty in terms of section 7(2) to respect, protect, promote and fulfil socio-economic rights.

3.6.3 The Report

Despite the problems with the completion of questionnaires, the second report reflects a number of key problem areas in the implementation of socio-economic rights in South Africa.⁶⁴ A welcome feature of the report is the fact that it seeks to evaluate. This presents an important departure from the Commission's understanding of its section 184(3) mandate during the first monitoring cycle. It seems that the Commission now accepts that its role in the socio-economic rights monitoring process is indeed to evaluate the performance of the government in realising socio-economic rights, and to report its assessment to Parliament.

⁶³ See Liebenberg (note 58 above) at 110.

⁶⁴ Ibid at 282.

Indeed, one of the main functions of the Commission is to “monitor and assess the observance of human rights in the Republic”. Section 184(3) is not only an important tool for information gathering in the sphere of socio-economic rights. It is intended to enable over-all monitoring and evaluation by the Commission. The evaluation of government protocols is separately treated in sections of the report under the heading “Commentary” and is followed up by a list of “Recommendations” addressed to a particular department involved.

However, unfortunately these sections of the report tend to focus on an evaluation of the manner in which a particular department reported to the Commission, rather than the content of the report itself. This is understandable given the fact that the reports submitted by the departments were largely inadequate, and did not provide the information the Commission required. In future, it would be important for the Commission to focus more on the evaluation of the substantive content of the report.

In so far as it deals with substance, the focus in the evaluation of the report is placed on an analysis of the statistical indicators relating to social services. More emphasis need to be given to assessing whether the measures taken by the relevant organs in fact prioritise the effective realisation of socio-economic rights within the shortest possible time and whether they are effective in their implementation.

In order to hold the government accountable for a failure to realise socio-economic rights, it is imperative that there is a thorough analysis of the legislation, policies and programmes adopted by all spheres of government and the manner in which they are implemented. This kind of analysis will of course only be possible if the Commission solicits divergent views from civil society on the effects of the government policies and practices, something that the Commission has failed to do in its current report.

A further shortcoming of the report is that it makes no reference to the recommendations made in the first report. The protocols did not contain any follow-up questions to government departments on the extent to which these recommendations were accepted and implemented.⁶⁵ It is consequently not clear

⁶⁵ See Liebenberg (note 58 above).

whether the Commission took action to follow-up on the recommendations it made in the first report. The end-goal of the monitoring process should not be seen as the production of the report.

The report has the potential to be a valuable public record. But the value of the process is even more than that. If the report is used creatively it can achieve a number of important further objectives. It should enable the Commission to enter into a process of constructive dialogue, aimed at designing measures of implementing socio-economic rights better and faster.

The report should further be used by the Commission to identify cases of violations of socio-economic rights, in which it can intervene. For example, the Commission has identified “corruption” on the part of government officials in most of the Eastern Cape Departments as a major cause of under-performance. Corruption has affected the socio-economic delivery and made it difficult for the disadvantaged groups to access the rights in question and therefore the Commission has to act on such gross misconduct. In this respect, the tabling of the report in Parliament is not good enough. The Commission will have to ensure the report receives the considered attention of Parliament. This could be done through a debate on the report in the National Assembly and by making the report available and accessible to the public.

3.7 CONCLUSION

The fact that socio-economic rights have been entrenched in the Covenant and our Constitution is commendable, but the acid test lies in the manner in which these rights are realised. It is encouraging to note that the bodies entrusted with the responsibility of ensuring the effective realisation of these rights are using everything at their disposal to realise these rights effectively. As the process is new for the SAHRC it is extremely important that they look for guidance from the international community as to how to do it effectively. The Commission has made mistakes, but useful experience has been acquired. The relations that the Commission has managed to establish with all the parties concerned will continue to improve in order to ensure more effective monitoring in future.

I conclude by quoting the Chairperson of the SAHRC, Dr. Barney Pityana, on the Commission's role in monitoring the implementation of socio-economic rights in South Africa:

“The constitution makers decided in their wisdom to provide a mechanism whereby economic and social rights (considered by some to be of dubious justiciability and enforceability) could go beyond mere aspirations and unenforceable directives. The Constitutional makers intended to make these rights substantial and effective.

In order to take up this challenge we must hold the government accountable through requiring them to justify their laws and policies, the setting of priorities and the way in which the resources of our country are being spent. We will assess whether decisions taken by the government are reasonably targeted at the realisation of the economic and social rights enshrined in the Bill of Rights.

As we seek to do this work, we recognise that we have enormous resources in our country. The NGOs and other organisations have been working on these issues in other ways. We need to consult with them”.⁶⁶

⁶⁶ See (note 37 above) at 18.

CHAPTER FOUR

SUCCESSSES AND FAILURES

4.1 INTRODUCTION

As I have been emphasizing throughout this thesis, although socio-economic rights have been entrenched in the Constitution, the acid test is whether these rights are implemented by the state and whether the judiciary is able to hold the state to its obligations as set out in the Bill of Rights. The purpose of litigation in respect of socio-economic rights is to use the courts to force the government to fulfil its constitutional commitments. Van Bueren¹ suggests a number of other reasons for litigating, including grass roots mobilisation and empowerment; the promotion of knowledge of cultural identities, parliamentary procedures and objectives; and even the fight against the eradication of poverty.

South Africa has committed itself to the protection of socio-economic rights as justiciable rights. In *In re: Certification of the Constitution of the Republic of South Africa*,² the first decision in which this commitment was dealt with, the Constitutional Court boldly stated the following about the enforcement of socio-economic rights and the traditional objections to their entrenchment:

“The second objection was that the inclusion of these rights is inconsistent with the doctrine of separation of powers because the judiciary would have to encroach upon the proper terrain of the legislature and executive. In particular the objectors argued that it would result in the courts dictating to the government how the budget should be allocated. It is true that the inclusion of socio-economic rights may result in courts making orders that have direct implications for budgetary matters. However, even when a Court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A Court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily

¹ Van Bueren G. “Alleviating Poverty Through the Constitutional Court” (1999) 15 *SAJHR* 52 at 52.

² 1996 (10) BCLR 1253 (CC).

conferred upon them by a bill of rights that it results in a breach of the separation of powers.”³

The Constitutional Court therefore appeared to have no principled concern with the courts dictating to the government how it should spend money. In fact, the court appears to have accepted the inevitability that some of its decisions might have budgetary implications. Subsequently, in the case of *August v Electoral Commission*,⁴ the court ordered the government to marshal its resources to protect a vital interest (prisoner's right to vote) and the effective implementation of its order. This boded well for the enforcement of human rights, as it seemed that the courts would approach the question of budgetary allocation with a degree of flexibility and creativeness characteristic of a social activist judiciary. It must be noted, however, that the *August* case dealt with civil rights. At this stage it was still unclear whether the court would approach socio-economic rights as boldly.

The disadvantage of being one of the few countries in the world to have entrenched socio-economic rights is that there is little precedent in foreign case law to assist our courts in interpreting and enforcing socio-economic rights. Any guidance from abroad would be valuable, but it will have to be kept in mind that each legal system crafts rules to accommodate the interests peculiar to that particular system.⁵ Foreign case law should therefore be treated with caution.⁶

Another hurdle to the implementation of socio-economic rights is the principle of *stare decisis*, which has engendered a judiciary with a strong attachment to legal precedent. In terms of the principle of *stare decisis*, judges have traditionally justified their judgements by relying on previous decisions, arguing by way of analogy rather than relying on policy reasons for developing the law. The result has been that, in the absence of clear precedent to support a decision, judges often shy away from formulating new or innovative legal rules

³ Ibid at para 77.

⁴ 1999 (3) BCLR 1 (CC).

⁵ See *Park-Ross v The Director for Serious Economic Offences* 1995 (2) BCLR 198 (CC).

⁶ See Addo M. “Justiciability Re-Examined” in Beddard and Hill et al (eds) *Economic, Social and Cultural Rights: Progress and Achievement* (1986) 93 at 95 where he argues that there is normally a degree of subjectivity involved in the identification by courts of the entitlements and duties created by the Bill of Rights.

or principles.⁷ This is the result of the deep-seated conservative positivism prevalent in the legal fraternity in South Africa, which dictates that judges are not the makers of the law but merely adjudicators of law.⁸ Southwell expresses this sentiment as follows:

“judges were able to kill themselves into believing that they had no choice in interpreting racist and repressive statutes. It was the body of statutory law that contained the law of apartheid and no more. Anything else would not have sat comfortably with the judiciary if judicial choice were to be accepted as part of the interpretative process”.⁹

While judicial enforcement of socio-economic rights is one of the weapons in the arsenal against poverty,¹⁰ it must also be acknowledged that litigation is by no means the only means (or even the most important means) of bringing about the desired changes in our society. Other institutions have been created by the Constitution to monitor the implementation of these rights. Ideally, therefore, the interpretation and enforcement of socio-economic rights must occur through a collaborative and interactive process involving the legislature, the executive, the courts, the South African Human Rights Commission and non-governmental organisations.

As mentioned in Chapter One, it was the understanding of the constitutional drafters that sometimes the courts would have to move beyond the narrow and rigid confines imposed by the doctrine of separation of powers, and pronounce on questions that are traditionally regarded as within the realm of other branches of the government.¹¹ Our courts are empowered, whenever they decide any issue involving the interpretation, protection and enforcement of the Constitution, to make any order that is just and equitable.¹² But the courts cannot enforce their own orders. The proper implementation of court orders is

⁷ De Vos P. “Pious Wishes or Directly Enforceable Rights (1997) 13 *SAJHR* 67 at 74.

⁸ See Southwell V. “Working for the Progressive Change in the South African Courts” (1995) 28 *Cilsa* 261 at 266.

⁹ *Ibid.*

¹⁰ *Ibid* at 267.

¹¹ See (note 2 above) at para 78.

¹² See section 172 (1) (b) which states that:

When deciding a constitutional matter within its power, a court may make any order that is just and equitable, including, an order limiting the retrospective effect of the declaration of invalidity and an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

therefore crucial to any attempt to use litigation in order to advance socio-economic rights.

This brings me to the purpose of this Chapter. Firstly, I will describe some remedies that are available for the enforcement of socio-economic rights. Secondly, I will refer to foreign jurisprudence to determine the extent to which South African courts can rely on such precedents for the development of our law. India, in particular, may have some answers for South Africa. It has one of the few judiciaries that have been vociferous, even aggressive in protecting and promoting the rights of the poor, and its case law may be of particular assistance to South African courts.

Lastly, in order to determine whether the courts have succeeded in their supervisory function, I will analyse the impact of the remedies given by the South African courts in the few cases dealing with socio-economic rights that have come before them. Particular attention will be paid to the use of the structural interdict, which is aimed at ensuring that the violator of the fundamental right rectifies the breach by setting up a supervisory mechanism¹³ The manner in which the Human Rights Commission has been used to monitor court orders will be examined in this part of the chapter. Therefore, the main issue examined in this Chapter, is the enforcement of socio-economic rights through the proper implementation of court orders, in which structural interdicts given by the courts provide for effective monitoring of the implementation of court orders in respect of these rights.

4.2 REMEDIES FOR VIOLATIONS OF SOCIO-ECONOMIC RIGHTS

While there is agreement that it is necessary to alleviate poverty and suffering by the realising of socio-economic rights, there is still no agreement on the most effective ways of realising these rights.¹⁴ Although there are other remedies for the effective implementation of socio-economic rights, the most important and

See also section 167 (7) which states that: A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

¹³ De Waal J. *"The Bill of Rights Handbook"* 4ed (2001) at 193.

effective remedy that has emerged is the ‘structural interdict’. There appears to be some resistance to the granting of this remedy. It is considered to be radical in nature and to burden the courts with the functions of the executive, i.e. the execution of court orders. In my view there is no reason why courts should be hesitant to grant this remedy.

Section 38 provides that whenever a fundamental right has been infringed or threatened, a court may grant appropriate relief. It follows that a court’s choice of remedy in any case where a fundamental right has been violated or threatened is determined only by what is just, equitable and appropriate. A striking feature of the Constitution is that the courts are given the widest possible power to develop and forge new remedies for the protection of constitutional rights and the enforcement of constitutional duties. The Constitutional Court has also been emphasizing the need for constitutional remedies to ‘look to the future’ and the need for ‘effective remedies’. I shall argue below that the structural interdict, more than any of the other available remedies fulfil these two criteria. Apart from the structural interdict, there are a number of other constitutional remedies, which may be used with some effect. These include:

- orders of invalidity¹⁵ as the Court has done in *Despatch Municipality v Sunridge Estate and Development Corporation*¹⁶ when it declared invalid the provisions of the Illegal Squatting Act 52 of 1951;
- the development of the common law to give effect to the constitutional rights; by for example awarding damages¹⁷
- procedural remedies, such as the applications for access to information, for reasons for decisions made and for access to justice¹⁸

Trengove is of the view that litigation about socio-economic rights often presents features that call for the development and the creation of new and more effective remedies. The reasons are:

¹⁴ Majola B. “A Response to Craig Scott: A South African Perspective” (1999) 1 *ESR Review* at 6.

¹⁵ Section 172 (1) (a).

¹⁶ 1997 (8) BCLR 1115 (SE).

¹⁷ Section 173 and section 8 (3).

¹⁸ See sections 32 (1), 33 (2) and 34.

- litigation is undertaken in the interests of communities or classes of people and not only in the interest of specified individuals.
- such classes of people are usually poor, politically and socially weak and dependent on the state for the provision of basic socio-economic services, as a result of which they lack the political and social power to get basic services without judicial intervention.
- they accordingly have a particular interest in the enforcement of the positive duties of the state to take action towards the provision of socio-economic services.¹⁹

The difficulty is that legal remedies have historically, at least in the area of constitutional law, been negative rather than positive. A court would typically strike legislation down or grant a prohibitory interdict for the violation or a threatened violation of a fundamental right. This negative and defensive type of remedy is of course of little assistance to a poor community wishing to realise a socio-economic right. In contrast, the rich and powerful, who are able to look after themselves, usually invoke the Constitution only to prevent or strike down state action that interferes with their lives.²⁰

Rather than negative remedies, the realisation of socio-economic rights requires a court to give positive relief. In my view, there are only three appropriate remedies for a failure to realise a socio-economic right. They are an award of damages (preventive damages and reparation in kind) orders to enact legislation and structural interdicts. Of the three, the structural interdict has proved to be the most effective.

¹⁹ Trengove W. "Judicial Remedies for Violations of Socio-Economic Rights" (1999) 1 *ESR Review* at 8.

²⁰ *Minister of Public Works and others v Kyalami Ridge Environmental Association and others* 2001 (7) BCLR 652 (CC) is an example of a case where the relatively affluent people unsuccessfully tried to challenge the power of the government to establish an emergency camp

4.2.1 Preventive Damages

In *Fose's*²¹ case the Constitutional Court upheld an exception to a claim for constitutional damages that included an element of punitive damages. Among the reasons given by the Court was that:

- damages of this nature exacted punishment without the due process safeguards applicable to a criminal trial;²²
- there was no reason to believe that such damages would be an effective deterrent against individuals or systematic repetition of police brutality;²³
- the plaintiff is given an unjustified windfall denied to other victims of the same conduct;²⁴ and
- scarce public resources could be better employed in structural and systematic ways to eliminate or substantially reduce the causes of the infringement.²⁵

These objections seem to be valid, but as Varney points out, an award of 'preventive' rather than 'punitive' damages may not raise the same concerns.²⁶ Damages directed only at one specific and discrete violation in the past does not address the threat of existing and ongoing violations posed by a delinquent state institution.²⁷ Rather they require the court to look back to the past in order to determine how to compensate the victim or even to punish the violator. Preventive damages on the other hand recognise and address an existing threat and seek to remove it from society in order to prevent future violations rather than merely giving solace to a victim.

Preventive damages are not awarded in favour of the one specific victim of a human rights violation. It could have been awarded against the state in favour of

on the state land to those who had no access to the land, no roof over their heads and were in dire need for adequate housing.

²¹ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

²² *Ibid* at para 65.

²³ At para 72.

²⁴ At para 84.

²⁵ At para 103.

²⁶ Varney H. "Forging New Tools: A Note on *Fose v Minister of Safety and Security*" (1998) 14 *SAJHR* at 336.

²⁷ Trengove (note 18 above) at 9.

an independent body or private agency that is skilled in and dedicated to the prevention of the type of violation. An award designed to prevent police brutality may for instance be made to the Independent Complaints Directorate, the SAHRC or an NGO active in the combat of police brutality, especially where such a body has effectively litigated the case on behalf of the victim or in the public interest. Because such an award is designed to prevent future violations rather than to punish violations of the past, the amount of the award should be based on the cost of prevention rather than on the injury inflicted in the past.

Before the award is made, the proposed recipient of the award may be called upon to present a plan of action and may be ordered to report to the court on its implementation and the effectiveness of the preventive measures taken. Such an award would also be forward-looking, community-orientated and structural.

Although damages could therefore be developed as a remedy for the violations of fundamental rights, including socio-economic rights, the jurisprudence of the courts, more especially of the Constitutional Court, is not particularly encouraging at present. In short, it will take a mammoth effort to persuade the Court to grant the type of 'preventative' damages in the manner described above. However, there are situations where a declaration of invalidity or an interdict would make so little sense that an award of this nature would be the only form of relief that will vindicate the fundamental right and deter future infringements. The substantial award of damages may also encourage victims to litigate, which may in itself serve as a vindication of the Constitution and a deterrent against breaching rights.²⁸ For these reasons, I do not believe that damages should be completely discarded as a remedy.

4.2.2 Reparation in Kind

A conventional award of damages in delict seeks to compensate the victim in money for the injury inflicted on his person or property. Such an award may often be inappropriate to compensate the victims of past violations of socio-economic rights because the harm done may be too widespread. How much

²⁸ De Waal J. (note 13 above) at 178.

does one pay, for example, to victims of unfair race discrimination in the provision of education, pervasive throughout a town, region or province over a long period of time? Imagine that the victimised group did receive some education, but of an inferior quality compared to that given to the privileged group. How are the victims of the violations of this kind to be compensated for the harm they have suffered because of the past violations of their constitutional rights? Individualised awards of compensatory damages would be manifestly inappropriate. It would be impossible to identify all the individual victims and to determine the harm they have suffered because of the inferior education provided to them. Any attempt at such identification and assessment would be a logistical nightmare that would devour valuable resources in a hopeless and inadequate attempt to determine who should get what. In any event, there will be several 'technical obstacles' to such a claim, such as the fact that the Constitution does not operate retrospectively, the operation of prescription periods and the like.

Another way of addressing the problem would be to order the state to provide appropriate remedial services for the benefit of the victimised group as a whole, rather than to resort to individualised awards of damages in cash. An action for an order requiring the state to provide remedial education to the victims of past race discrimination in the schools system could conceivably be instituted. The purpose of the award is the same as that of a conventional award of compensatory damages in delict. It is merely the form of the award that is tailored to suit the nature of the violation and its impact.

However, our courts are unlikely to be enthusiastic about this type of relief. Apart from the fact that there is no precedent for this in South Africa (and as far as I could establish elsewhere), the implementation of this type of order will have to be closely supervised by the court. An order of this kind can obviously not simply be made and left to the defendant to determine the manner and form of its implementation. It would require the court to involve itself in the specifics of the remedial action to be taken and often also in the on-going supervision of the implementation of the order. As I will explain more fully below, our courts are hesitant to involve themselves with the execution of their orders on an on-going basis.

4.2.3 Orders to Enact Legislation

The formulation of human rights, including socio-economic rights, entrenched in the Constitution is peppered with duties imposed on the state to enact legislation within a reasonable time.²⁹ Indeed, the Constitution explicitly provides that all obligations imposed by the Constitution must be fulfilled³⁰ diligently and without delay.³¹ These provisions bind all persons to whom and organs of state to which it applies.³² The Constitutional Court is explicitly afforded the power to decide that Parliament or the President has failed to fulfil a constitutional obligation.³³

However, one can anticipate that the court will be slow to order parliament to pass particular legislation to give effect to socio-economic rights. Judicial restraint in this area arises from valid concerns regarding the institutional roles and competencies of the judiciary and the parliament. The question is: should a court ever compel an elected legislature to enact legislation against its will? In my view, in defined circumstances, a court may do so.

The appropriate first step when parliament or provincial legislature has failed to enact legislation essential to the protection or fulfilment of socio-economic rights should however be a declaration that should specify that the failure to enact the necessary legislation is unconstitutional. In the absence of any mandatory relief the declaration would leave it to the legislature, to design an appropriate scheme to remedy its failure to comply with its positive duties. In appropriate circumstances the declaration may be accompanied by broad normative guidelines on the positive action required to remedy the breach and the periods within which the legislation should be adopted.³⁴

²⁹ See Schedule 6, Item 21(1) which states that: Where the new Constitution requires the enactment of national or provincial legislation, that legislation must be enacted by the relevant authority within a reasonable period of the date of the new Constitution took effect.

³⁰ See section 2 of the Supremacy Clause.

³¹ See section 237 of the Constitution.

³² See section 165(5).

³³ Section 167(4)(e). See also Klaaren J. "Judicial Remedies" et al (eds) in Chaskalson M. *Constitutional Law of South Africa* (1996) at 9.4 (e).

³⁴ It is submitted that such general guidelines and recommendations are within the court's power to make any order that is just and equitable. See section 172(1)(b).

As the state has a wide range of legislative options to give effect to its positive duties in relation to these rights,³⁵ the guidelines for the declaration should be broad. The desired effect is to stimulate the appropriate legislative response. The guidelines should highlight the constitutional issues at stake and may galvanise public pressure on government to fulfil its constitutional obligations. Ultimately, such a declaration forms part of the constitutional dialogue, not only between the branches of government, but also with society as a whole. If government persists, in the face of such an order, to remedy the omission, a follow-up application seeking mandatory relief could be brought. As I stated at the outset, if they are serious about the protection of socio-economic rights, the courts may on occasion have to act in a more pro-active and inquisitorial fashion and intrude further into the legislative and executive domain than they have done in the past.

4.2.4 Supervisory Jurisdiction

Our conventional remedies postulate that the court makes an order once and for all, which is enforced by execution if it sounds in money, or by punishment for contempt of court if it does not. Because the order is made once and for all, it has to be sufficiently specific so that the defendant is able to determine precisely what to do or refrain from doing, to comply with the order. It must also be amenable to enforcement by execution or punishment for contempt of court.³⁶

When a court is asked to put a stop to the violation of socio-economic rights and prevent its recurrence, it is often not possible or appropriate to make such a specific order once and for all. The reasons are as follows: The pattern of violation may be too widespread, systemic and diffuse to put a stop to it by a single court order. For example, unfair race discrimination, which still prevails with regard to the provision of social services, cannot be rectified overnight.

The same applies in many other situations where for example, the overcrowding of our prisons probably constitutes a violation of the prisoner's rights under sections 12(1)(e) and 35(2)(e) of the Constitution. The prisoners are

³⁵ Chaskalson P in *S v Lawrence* 1997 (10) BCLR 1348 (CC) observed that the court has a broad range of remedial options, but what it cannot do is legislate, at para 80.

entitled to conditions of detention that are consistent with human dignity. Where their rights are violated, the only ‘once-and-for-all’ remedy that will put a stop to the violation will be to release as many prisoners as possible. However, such action would be manifestly inappropriate.³⁷

Violations of this kind must be remedied in other ways. To have any effect at all, a court order should be directed at the reform of the institution itself rather than only at the specific violation. In addition, the choice of means should, in the first place, be the prerogative of the legislative and executive branches of the government. Only if they make the wrong choices, would it be appropriate for the judicial branch to interfere with this prerogative.³⁸

In my view, the way to stop widespread violations of socio-economic rights is for the court to order the government to bring about far-reaching institutional and structural reform over a period of time in a manner to be determined by the legislative and executive branches of the government. It requires a “hands on” approach.

This sounds like a lot of work for our courts and they are unlikely to warm to this task easily. However, it should be recalled that the courts remain responsible for the ultimate protection of the violations and enforcement of constitutional rights. They cannot abdicate their responsibility simply because conventional remedies are not suitable to cure the violation of a right.

The main steps in the type of structural relief advocated in this part are the following:

- the court issues an order that identifies the violation and broadly defines the reform that has to be brought, having regard to the provisions and objectives of applicable legislation.
- the court calls upon the responsible state official to present a more detailed plan of reform that would put an end to the violation by achieving the identified statutory objectives. In other words, the government agency is given the opportunity to choose the means of

³⁶ Budlender, G. “Facing the Challenges of Implementation” (1999) 1 *ESR Review* at 16.

³⁷ Trengove (note 18 above).

³⁸ *Ibid.*

compliance. The plan will usually have to set a series of deadlines by which clearly identified milestones have to be reached.

- the government's plan is presented to the court for scrutiny. The complainant and all other interested parties are given the opportunity to comment on the plan and to advance alternative suggestions.
- the court settles the plan of reform in the light of all the submissions made to it. In doing so, it generally defers to the state's choice of means unless it is irrational, not *bona fide* or in some other way clearly inadequate.
- the court issues an order directing the defendant to implement the finalised plan. Its order directs the defendant to report back to the court on the implementation of the plan after the period allowed for implementation or, where appropriate, after each of the deadlines set for the achievement of the pre-determined milestones.
- the court appoints an independent person to monitor the implementation of the plan and report back to it on the return day. The monitoring institution such as the SAHRC has a constitutional obligation of ensuring the effective implementation of the rights. Therefore, being appointed by the court to ensure compliance is a step forward towards realising the rights. The NGOs cannot be left out of the process as they have to co-ordinate efforts with the court and the SAHRC to bring about the meaningful implementation of all the rights in the Constitution including socio-economic rights.
- when the matter returns to court, the government is called to account for its implementation of the plan. The applicants, the court appointed monitor and all other interested parties are also heard. If the hearings reveal unforeseen difficulties or inadequacies in the plan, suitable adjustments are made, new orders are issued and the process repeated until the reform is achieved.³⁹ This of course envisages that the court provides, at the outset, that its order will be amended to cater for the unforeseen circumstances.

A structural interdict of this kind works well if the state agency is co-operative and the court is willing to supervise. When the responsible state agency does not want to co-operate by preparing a plan, a court may have no option but to write its own plan, if needs be, with the aid of other interested parties and court appointed experts. This will involve the judiciary in the making of policy choices that are ordinarily in the legislative and executive domain. But that is sometimes the only way to ensure the protection and enforcement of constitutional rights. If the state agency is dragging its feet or simply refuses to comply with the court order, as it has done in *Grootboom*, the court may call upon the national government to intervene. This is of course only possible if the state agency is in the provincial sphere⁴⁰ or in the local sphere of government.⁴¹ A government official may also be held responsible for contempt of court and a fine that is sufficient to exact compliance may be imposed. As a last resort, the responsible state official may be imprisoned to compel co-operation.

4.2.5 Comment

While the first three remedies mentioned above are still imaginable in a country such as India that has an activist judiciary, it must be acknowledged that South African courts are highly unlikely to ever impose them. Our courts have

³⁹ Ibid.

⁴⁰ See section 100 of the Constitution.

⁴¹ Previously, section 100 merely empowered the national government to intervene in a province that fails to fulfil an obligation imposed on it in terms of the constitution, the government does not have the same power to intervene in a municipality. The national executive's obligation to direct the taking of steps to meet its obligations or to assume responsibility for the relevant obligation in order to maintain national standards or to prevent an unreasonable action is therefore restricted to provinces. As a result, there is at present very little the national can do if a municipality defaults on its obligations with regard to some functional areas such as water and electricity supply systems, apart from facilitating national institutions to assume responsibility.

This is out of line with other provisions of the Constitution that depict the three spheres of government as distinctive, interdependent and interrelated. To the extent that the constitutional relationship between the three spheres are generally direct and not hierarchical, the section must be seen as a constitutional anomaly that should be corrected by extending the power to intervene in municipalities to the national government as well.

Because the greatest interaction between the government and the people takes place through the local government, the section was amended to give national executive the same power to intervene in a non-complying municipality as section 139 confers on provinces. The amendment will enable the government to meet its obligation with regard to the implementation of socio-economic rights more effectively and probably limit the number of Constitutional Court cases needed to implement socio-economic rights.

however shown some interest in the structural interdict. If this remedy is applied meticulously in the ways suggested above, it could go a long way towards addressing the discrepancy that exists between the promotion of civil rights on the one hand and socio-economic rights on the other.

4.3 APPROACH OF THE SOUTH AFRICAN COURTS

The development of case law dealing with socio-economic rights has started to gain momentum in South Africa. This section critically analyses the existing jurisprudence in this regard.

4.3.1 Refusal to Adjudicate

The Constitutional Court (and other courts) could for a number of reasons refuse to entertain an application and so avoid having to deal with the difficult question of enforcement raised by these challenges. While adherence to the doctrine of the separation of powers is commendable, the injudicious refusal to adjudicate in socio-economic matters could jeopardise the realisation of these rights.

4.3.1.1 *Mkangeli and Others v Joubert and Others*⁴²

This case dealt with an application for leave to appeal directly to the Constitutional Court against a decision of the Witwatersrand High Court. While it did not directly deal with the protection of socio-economic rights, the High Court's judgment clearly had implications for the enforcement of socio-economic rights.

The applicants had initially occupied a piece of land unlawfully and had been accused of causing a nuisance. An order was then granted by the High Court for them to vacate the land and abate the nuisance. In terms of the order, the structures in which they were living were to be broken down and, if they failed to leave the property, they were to be ejected by the sheriff. In the course of reaching his decision, Flemming DJP commented on the constitutionality of

⁴² 2001 (4) BCLR 316 CC.

the provisions of the Tenure Act. Although the provisions of section 172(1) require that a Court when deciding a constitutional matter within its jurisdiction “must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency”, and Flemming DJP reached the view that the provisions of the Tenure Act were inconsistent with the Constitution, he did not declare them to be unconstitutional.

On appeal, Chaskalson P remarked that appeals are brought against orders made by a court and not against comments made in the course of a judgement. The Constitutional Court therefore refused to grant leave to appeal directly to it, missing an opportunity to break away from a purely legalistic approach to socio-economic issues.

4.3.1.2 Discussion

The High Court failed to acknowledge that it was dealing with two opposing fundamental interests. On the one hand, there was the traditional right inherent in ownership reserving exclusive use and protection of the property to the landowner. On the other hand, there was the genuine despair of South African citizens who were in dire need of adequate accommodation. The court’s duty was to balance these opposing interests and bring out a decision that was “just and equitable”. The Constitutional Court’s “judicious avoidance”⁴³ to address the issue indicates a reluctance to adjudicate on these matters.

As in South Africa, the framing of the Indian Constitution occurred in the context of massive socio-economic deprivation of the majority of Indian citizens. Its genesis lies in the directive principles requiring the state to secure a social order that promotes welfare and raises the standard of living. In contrast with South Africa, however, the Indian jurisprudence is abound with orders to the government to fulfil its obligations. Judges are spearheading what is called social action or public interest litigation, which is aimed at making justice accessible to those who are denied their constitutional rights and enabling them to use the courts to force the government to fulfil its commitments. This is happening despite the fact that socio-economic rights are contained in non-

⁴³ Ian Currie “Judicious Avoidance” (1999) 15 *SAJHR* at 139.

justiciable directive principles of state policy and therefore do not have the same status as socio-economic rights in the South African Constitution, where they are entrenched in the Constitution. Despite criticisms that the courts are taking over the functions of the administration and involving themselves in policy determination, which is the executive's domain, the judiciary remains committed to principles of social justice.⁴⁴

The Indian Court has been willing to protect and promote socio-economic rights on different levels. They have extended protection for existing rights, enforced measures adopted by the state and required active fulfilment of rights in certain cases. Although the first duty in fulfilling socio-economic rights vests with the government rather than with the court, this does not preclude the courts from articulating constitutional values and corresponding obligations at this level.

For example, in *State of Himachal Pradesh and Another v Umed Ram Sharman and Others*,⁴⁵ the applicants applied for an order to force the state to complete the construction of a road to their village. The authorities had already sanctioned the building of the road, some money had been allocated for the task and the building was in progress when the work suddenly stopped. After hearing expert evidence the order was granted against the Department of Public-Works to proceed with the construction of the 5km stretch of the road to the applicant's village.

The court went further to direct the superintendent engineer to make an application to the state government for an additional sum of 50000 rupees to be allocated for the project and directed the government to consider the demand seriously.⁴⁶ The engineer was also ordered to report back to the High Court on the progress made on the bridge. The appeal to the Supreme Court was dismissed and the court held that the applicants were personally affected by the absence of the road because they were poor *harijans* and their access to

⁴⁴ De Vos (note 7 above) at 69.

⁴⁵ AIR (1986) SC 847 cited and discussed by De Vos (note 7 above) at 89-90.

⁴⁶ Ibid at 850 at para 8.

communication, as well as to life outside the village, was obstructed and prevented by the absence of the road.⁴⁷

The court therefore held that there was a constitutional duty on the state as far as is feasible and possible, to provide roads for communication to residents in hilly areas.⁴⁸ In deciding whether the court had not exceeded its powers, the Supreme Court stressed that the applicants had in effect asked the courts to review the administrative inaction of the state and to determine the urgency of such access to the right in question. Although the court concluded that it had always been relatively easy to review an administrative action in terms of an existing state policy, it acknowledged that to review administrative inaction or the lack of state policy was far more difficult in practice and most courts would be loath to go this far. Judicial review of administrative inaction therefore had to be approached with caution and not in haste.⁴⁹ Eventually, however, the court not only reviewed the administrative inaction, but ordered the state to act positively and made provision for itself to monitor the progress of the state's action in fulfilling its obligation.

In *Olga Tellis v Bombay Municipal Corporation*,⁵⁰ an appeal, which was brought by pavement dwellers against the state who had been granted an order to remove them, the court found that, although an infringement of the right to livelihood had occurred, it had been justifiable in the circumstances. However, the court insisted that the pavement dwellers could be removed only on certain stringent conditions. They had to be provided with alternative sites for resettlement and those who had lived on the pavement for more than twenty years could not be removed unless the land was needed for a public purpose.⁵¹ The Supreme Court therefore ensured that justice was not miscarried at the expense of the desperate.

In the light of these decisions, the Indian experience warrants closer scrutiny by South African courts. As the Indian courts have shown, the courts can and should exact some pressure on the government for the promotion of

⁴⁷ At para 10.

⁴⁸ At para 11.

⁴⁹ Ibid 854 at para 27.

⁵⁰ AIR (1987) LRC 351.

⁵¹ Ibid at 369 B- C.

socio-economic rights. By dismissing the application of *Mkangeli* out of hand, the court has failed to rise to this task.

4.3.2 Resource Constraints

While the High Court adopted a seemingly progressive approach in *Van Biljon v Minister of Correctional Services and Others*,⁵² the Constitutional Court adopted a much more conservative approach in *Soobramoney v Minister of Health, KwaZulu-Natal*.⁵³ In both cases the issue of budgetary constraints figured prominently. However the outcome of the two cases differed radically. *Van Biljon* won his case and *Soobramoney* lost. The reasons provided for the different results are instructive.

4.3.2.1 Van Biljon v Minister of Correctional Services and Others

In this case the applicants were four prisoners diagnosed as HIV positive. Medication had been prescribed to them but had not been provided. Relying on the provisions of section 35(2)(e) of the Constitution, they sought an order directing the state to provide the prescribed treatment at state expense. The state raised the issue of budgetary constraints. It was argued on behalf of the Department of Correctional Services (“the Department”) that the question of what is “adequate medical treatment” for prisoners had to be determined according to what is provided for patients outside prison at state expense. For this reason, it was contended that HIV positive prisoners are not entitled to better treatment than HIV positive patients outside prison. It was further argued that if the prisoner were to receive anti-viral combination therapy, this would result in a prioritisation of resources in their favour. In light of budgetary limitations on hospital services, such prioritisation would be at the expense of other patients dependent upon the provision of health care by the state.⁵⁴

⁵² 1997 (4) SA 441 (C).

⁵³ 1998 (1) SA 765 (CC).

⁵⁴ The relevant part of section 35(2)(e) provides as follows: Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

Responding to this argument, the Brand J held that a lack of funds in principle could not be the answer to a prisoner's constitutional claim to adequate medical treatment. The crucial point was that adequate medical treatment must be determined according to what the state could *afford in a particular case*, and not in a vacuum.⁵⁵ If the state had based its case on budgetary constraints, that is, if they had argued that they could not afford a particular form of medical treatment to particular individuals or that a particular form of medical treatment to a person would place an unwarranted burden on the state, the Court might have decided that treatment which is affordable to the state be accepted as adequate medical treatment.⁵⁶ However, as it turned out the Correctional Services Department could not show that it could not afford the anti-viral treatment to the two HIV positive prisoners. There was therefore no reason not to order the Department to provide the treatment prescribed to them by the medical doctors.

Section 36(1), the limitation clause, was also irrelevant. This section provides that a right may be limited only in terms of the law of general application that is reasonable and justifiable in a democratic society, taking into account all relevant factors. The implication is that the only basis on which a qualifier such as "within available resources" may limit section 35(2)(e) would be if it was incorporated into a law of general application. No such case was made by the Department.⁵⁷

Responding to the argument that the rights of prisoners are stronger than the rights of people outside prison, Brand J held that with regard to basic needs, such as accommodation and medical care, the Constitution itself draws a distinction between prisoners and people outside prison. Standards applying outside prison cannot necessarily be used to determine what is adequate for prisoners as required by section 35(2)(e). It is an unfortunate fact of life that there are so many people in this country whose accommodation cannot be described as adequate by any standard. What is provided for people outside prison can therefore not be an absolute standard for prisoners.⁵⁸ Unlike the

⁵⁵ *Van Biljon* at paras 43-46.

⁵⁶ *Ibid* at para 49.

⁵⁷ At para 60.

⁵⁸ At para 52.

people outside prison, prisoners have no recourse to other resources to assist them in gaining access to medical treatment. And because of the over-crowded conditions in which prisoners are accommodated, they are more susceptible to opportunistic diseases than people outside prison.

In respect of accommodation, nutrition, and medical treatment, therefore, section 35(2)(e) guarantees to every prisoner a direct right at state expense to the provision of medical treatment. This right is not contingent upon or affected by the provisions of sections 26 and 27 of the Bill of Rights, which entitle everyone progressively within the available resources of the state, to access housing, food, health care services and the like. In other words, if there is a distinction between persons inside and those outside prison, the Constitution itself draws that distinction.

The *Van Biljon* decision did not mean that prisoners always had to be treated better than persons outside prison. Brand J explicitly said that he was prepared to accept limitations of the level of medical treatment provided to prisoners and that the degree of such a limitation would depend on the availability of resources. Had the state proved that it had inadequate means, the term 'adequate' in section 35(2)(e) provides a vehicle for limiting the type of treatment available to prisoners. The failure to demonstrate inadequacy of resources caused the Department to be the author of its own misfortune. However, the court established that, while budgetary constraints could be seen as part of the definition of adequacy, the onus to prove the unavailability of funds is on the state. This decision allays fears that the burden rests on the applicant, and is therefore a progressive judgement in terms of socio-economic rights.

The aftermath of the *Van Biljon* case illustrates the central concern addressed in this study. Progressive orders without an effective system to ensure compliance may not be enough. Nobody had been appointed to supervise the order. Because of the respondent's arguments of the scarcity of resources, the treatment was provided only in the first few months after the order was granted. After this time, the applicants were given only vitamins.⁵⁹ No supervision occurred. The

⁵⁹ Telephonic Interview with Judge Fagan on 18 October 2001.

Human Rights Commission was not involved in this case. Ultimately, therefore, the lawyers involved and the court again failed the people of this country by failing to ensure the monitoring of the court order after giving an interdict. As the Commission was not involved in this case the court should have involved it to ensure the proper implementation of this order.

The Legal Resources Centre is also partly to blame for failing to monitor the order. It had represented the applicants in the matter. At the moment, the Centre is unaware whether the prisoners are still given the treatment or even whether they are still alive. Apparently, one of them was released.⁶⁰ As an NGO committed to the protection and promotion of human rights, they should ensure that their victories are honoured by the state. As it has been mentioned that there has been a huge cry for NGOs to be involved in promoting socio-economic rights, but when the very same NGO who challenged the inaction of the government in realising these rights fail to follow-up a court's decision to ensure meaningful implementation of the order, it raises concerns. The fact that the victims have not complained about the meaningful implementation of the order also encourages the non-committal of the government in honouring its obligations.

4.3.2.2 Soobramoney v Minister of Health

The constitutional provision, section 27, which was dealt with in the case of *Soobramoney*⁶¹ relates to health care services and stipulates that:

- (1) Everyone has the right to have access to:
 - (a) health care services, including reproductive health care;
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.
- (3) No one may be refused emergency medical treatment.

In *Soobramoney* the applicant relied specifically on section 27(3) as well as the section 11 provision on the right to life. He was a 41-year-old diabetic man

⁶⁰ Telephonic Interview with Mr William Crawford, "Legal Resources Centre" Cape Town on 20 November 2001.

⁶¹ *Soobramoney* (note 43 above).

suffering from ischemic heart disease and cerebro-vascular disease. At the time of his appeal he was judged to be in the final stages of chronic renal failure. However, his life could be prolonged by regular renal dialysis, which he was seeking from Addington Hospital in Durban. In terms of its policy on the provision of the dialysis treatment, the hospital denied him access to the machines. As it had only 20 machines, there were not enough for all the patients suffering from chronic renal failure. Hence those whose condition was irreversible and who were not eligible for a kidney transplant were denied access to them in order that the patients who could use them be kept alive while waiting for a kidney transplant.

The Constitutional Court dismissed the right to life challenge on the basis that the right to life does not justify a claim to the provision of life-sustaining medical care.⁶² The court acknowledged that Indian jurisprudence contains valuable insights on the interpretation of the right to life especially on the subject of positive obligations on the state to respect the basic needs of its inhabitants. However, it went on to distinguish the Indian Constitution from the South African one and held that:

“Unlike the Indian Constitution ours deals specifically in the Bill of Rights with certain positive obligations imposed on the state and, where it does so, it is our duty to apply the obligations as formulated in the Constitution and not to draw inferences that would be inconsistent therewith.”⁶³

Therefore, since the right to medical treatment is dealt with pertinently in the Constitution, it does not have to be inferred from the right to life. The result of the Court’s reasoning is that the inclusion of socio-economic rights in the South African Constitution detracts from the positive duties on the state that may be derived from the right to life. In short, the right to life may mean less in South Africa than in India because we have chosen to entrench socio-economic rights in our Constitution. This cannot be accepted. The proper manner of dealing with the right to life challenge was to ask whether an order in Soobramoney’s favour would endanger the lives of others, as one does when justifying the killing of a

⁶² Moellendorf D “Reasoning About Resources: Soobramoney and the Future of Socio-Economic Rights Claims” (1998) 14 *SAJHR* at 327.

⁶³ *Soobramoney* at 772 E-F.

person in self-defence or while making an arrest. If a place for Soobramoney on the machines meant danger to the life of another the challenge was correctly dismissed. However, as I shall argue below, the state failed to demonstrate this.

As far as the challenge based on section 27(3) is concerned, which contains the emergency medical treatment provision, Chaskalson P argued that:

“The words “emergency medical treatment” may possibly be open to a broad construction which would include ongoing treatment of chronic illness for the purpose of prolonging life. But this is not the ordinary meaning, and if this had been the purpose which section 27(3) was intended to serve, one would have expected that to have been expressed in positive and specific terms.”⁶⁴

He added that:

“The purpose of the rights seems to ensure that the treatment be given in an emergency and is not frustrated by reason of bureaucratic requirements or other formalities”.⁶⁵

As the appellant needed ongoing dialysis treatment, the Court held that it did not qualify as an emergency and that section 27(3) was therefore not applicable. In contrast to Brand J’s approach who argued that this was not a decision for the courts but constituted a medical question best answered by medical professionals, Chaskalson P, as well as Sachs J⁶⁶ in his concurring judgement, engaged with the question of what the term “emergency medical treatment” might mean.

The Court then proceeded to determine the issue in accordance with the provisions of section 27(1) and (2).⁶⁷ These provisions entitle everyone to access to health care services provided by the state within its available resources. Both Chaskalson P and Madala J proceeded to highlight the budgetary constraints experienced by the Department of Health in KwaZulu-

⁶⁴ Ibid at para 13.

⁶⁵ *Soobramoney* at para 20.

⁶⁶ Sachs J explained the limited sense of emergency medical treatment in the following manner: “The special attention given by section 27(3) to non-refusal of emergency medical treatment relates to the particular sense of shock to our notions of human solidarity occasioned by the turning away from the hospital of people battered and bleeding and those who fall victim to sudden unexpected collapse. It provides reassurance to all members of society that accident and emergency departments will be available to deal with unforeseeable catastrophes which could befall any person, anywhere and at any time.” At para 51.

⁶⁷ Ibid at para 22.

Natal, and held that it hardly had enough funds to cover the cost of the basic services, which it was providing to the public.⁶⁸

Chaskalson P continued to give a breakdown of how the Department had consistently overspent its budget for the two preceding years and how that was most likely to continue unless serious cutbacks were made in the service that the Department provided.⁶⁹ On the question of courts making decisions that have budgetary implications, he added that:

“The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about funding to be available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A Court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility is to deal with such matters.”⁷⁰

I have two problems with this type of reasoning. The first is that when someone’s life is at stake it is inappropriate for a court to defer to choices of majoritarian branches. Instead, a court should employ strict scrutiny. Let me illustrate by way of an example. The health authorities in KwaZulu-Natal claimed that they were treating 85 patients with the 20 machines at their disposal, which was 25 more than the ideal of 60 patients. However, on my rough calculations the authorities should have been able to treat many more than 85 patients with the 20 machines. Most patients require to be treated twice a week. Now, if each machine was capable of treating four patients a day (four hours for treating and two hours for cleaning), as appears from the judgment, the authorities could accommodate a maximum of 280 patients (20 times 4 times 7 divided by 2) and not 85. At the very least, this type of question should have been asked. The Court should have demanded an explanation as to why the authorities were incapable of accommodating *one more person*.

My second problem is that the tone of *Soobramoney* is a far cry from the sentiments expressed in the *Certification* judgement where the court readily accepted that it might be required to make judgements that would require a

⁶⁸ See pages 774-776 at paras 24-28 and 779 at para 43.

⁶⁹ 774 at para 24.

⁷⁰ 776 at para 29.

change in fiscal priorities when enforcing civil and political rights as well as socio-economic rights. In that judgement, it would seem that the court's role in upholding socio-economic rights was not limited to the framework of existing national and provincial budgetary allocations. At the time, the fact that the court rejected the objections against inclusion of these rights in the Constitution sent a message that the court would give judgements that would move beyond the rigid confines imposed by the scarcity of resources. Unfortunately the Court failed to stick to this promise.

Moellendorf has persuasively argued that the court has adopted a narrow interpretation of available resources, where "narrow" can be equated with the budgetary allocations made by a particular state department⁷¹ for the protection of a right. A broad interpretation of the word "resources" has to be equated with the real resources of a state.

In Canada, unreasonable delays in the case of an accused person awaiting trial have resulted in the court's ordering the state to increase capacity of the judicial system by building new Courtrooms and hiring extra judges and staff. In *R v Askov*⁷² a delay of up to two years between the date of committal for trial and the trial itself was held to be in violation of the accused's right to be tried within a reasonable time as guaranteed by the Canadian Charter of Rights and Freedoms. Recognising the systematic problem in the judicial system, the Supreme Court of Canada was aware that its decisions could have fiscal implications, but nonetheless suggested several ways in which the costs could be minimised, such as adapting government buildings or portable structures to serve as court houses. It further stated that if such temporary measures proved unworkable, some other solutions would be required.⁷³

A precedent therefore exists in which a court has ordered the state to marshal any resources at its disposal to protect the right to a fair trial even if it meant cutting down on salary increases for highly paid judges or decreasing

⁷¹ Moellendorf (note 52 above) at 330.

⁷² 1990 2 SCR 1199, 1203-07, 1247 (Canada) cited in Essop F. "Enforceability of Socio-Economic Rights with Special Reference to Housing" LLM Thesis, University of Cape Town (1999) at 37.

⁷³ Ibid at 1243.

capital expenditure used for building new court rooms.⁷⁴ Had the court in *Soobramoney* therefore adopted a broad interpretation of available resources, it might have ordered the state to marshal its resources in any reasonable way, for example, by cutting down on money paid to consultants or by reducing outrageous car allowances. However, Madala J alarmingly expresses its narrow interpretation in his concurring judgement:

“Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise, in some cases, and an indication of what a democratic society aiming to salvage lost dignity, freedom and equality should embark upon. They are values which the Constitution seeks to provide, nurture and protect for a future South Africa.”⁷⁵

In the light of the fact that a hard battle was fought to entrench socio-economic rights in the Constitution and to grant them the same status as civil and political rights, the view of socio-economic rights as “ideals and something to be strived for” is disturbing. Not only is the view reminiscent of the arguments that were used against the entrenchment of these rights, but it also fails to distinguish between rights and policy goals or priorities. As the protection of these rights is a necessary condition for meaningful political participation, the view also diminishes the value of civil and political rights. As they become the prerogative of the privileged, and socio-economic rights are relegated to a second-class position, the promise of democracy fades.

4.3.2.3 Discussion

A closer analysis show the following similarities and differences between *Soobramoney* and *Van Biljon*:

- in both cases an order was sought for the provision of expensive medical treatment and, in both cases, it was sought at state expense.
- the applicants in both cases relied on the provisions of the Bill of Rights.
- in both cases the state raised the defence of the lack of funds.

⁷⁴ Ibid.

⁷⁵ *Soobramoney* at para 42.

- while the medical treatment sought in both cases would have extended the patient's life expectancy and enhanced the quality of life, it would not have brought about a cure.

In the light of these similarities, it is odd that the courts came to opposing conclusions, which brings us to the differences between the two cases. The first is that the applicants in *Van Biljon* were prisoners, while the applicant in *Soobramoney* was an ordinary citizen. This leads to the next dissimilarity. The status of the prisoners allowed them to rely on the unqualified right to medical care, which is different from the right relied upon by *Soobramoney*. Section 35(2)(e), which entitles prisoners to adequate medical treatment, is neither qualified by phrases such as "within the available resources" nor by the progressive realisation of these rights as in the case of section 27. This explains why the state could use the argument of a lack of resources in *Soobramoney*, but it could not do so in *Van Biljon*. A limitation of the right to health care was also built into the section providing for the right to medical care in *Soobramoney*. Once the court was persuaded that the state did not have unlimited resources and that its budget allocations and applications were rational, that was the end of the matter.

In *Van Biljon*, however, the state would have had to convince the court under section 36 of the Constitution that it was authorised by the law of general application to limit the right to adequate medical treatment. Nothing in the judgement suggests that the Department had even considered the burden that faced it, let alone justifying the limitation of the right.⁷⁶ By reading sections 27(1) and 2 together the Court in *Soobramoney* did not require the government to justify the violation of the right by clearly demonstrating a lack of resources.

⁷⁶ In fact, the court came to its partial rescue by intimating that it was prepared to consider budgetary constraints to which the department was subjected. In the words of Brand J:

"I do not agree with the proposition that budgetary constraints are irrelevant in the present context. What is adequate medical treatment cannot be determined in vacuo. In determining what is adequate regard must be held to, *inter alia*, what the state can afford. The point is that the state would have had to show that it was entitled in terms of the general law of application to use budgetary constraints as an argument for the limitation of the applicant's right. Such law of general application could either be the right of other, or some form of statutory measure." See *Van Biljon* at para 49.

Instead, the availability of resources became an inherent limitation of the socio-economic right. As explained by Sachs J in *Soobramoney*:

“The traditional right analyses have to be adapted so as to take into account of the special problems created by the need to provide a broad framework of constitutional principles governing the right of access to scarce resources and to adjudicate between competing rights bearers. When the rights by their very nature are shared and interdependent, striking appropriate balances between the equally valid entitlements of a multitude of claimants should not be seen as imposing limits on those rights (which would then have to be justified in terms of section 36), but defining the circumstances in which the rights may most fairly and effectively be enjoyed.”⁷⁷

Resource constraints should not a *fortiori* exclude the need for justifying a failure to realise a socio-economic right. The approach of the Constitutional Court in *Soobramoney* detracts from the function of socio-economic rights as imposing a duty to justify a failure to realise socio-economic rights. If the reason for failure is a lack of resources, this should be clearly demonstrated by government.

4.3.3 Absence of Monitoring

After the disappointment of the *Soobramoney* case, the decision in the *Government of the Republic of South Africa and Others v Grootboom and Others*⁷⁸ became a critical judgement with regard to future litigation in the area of socio-economic rights. It provided another, and much better opportunity for the court and the South African Human Rights Commission to exercise their functions properly to ensure the proper realisation of these rights.

4.3.3.1 Government of the Republic of South Africa and Others v Grootboom and Others

The government challenged the correctness of the High Court decision that ordered the government to provide the respondents, who were children, and their parents with adequate basic shelter or housing until they could obtain

⁷⁷ *Soobramoney* at para 54.

⁷⁸ See (note 6 above).

permanent accommodation. The High Court held that the applicants failed to make a case on the basis of right of access to adequate housing under section 26, but found that there was a violation of section 28(1)(c). The decision therefore clearly recognised that the state has a positive duty to provide shelter to children whose parents are unable to do so and that it is in the best interests of children to be accommodated with their parents.

The High Court also confirmed unequivocally that the question of budgetary constraints was not a determinative when analysing an alleged breach of section 28(1)(c). In an argument reminiscent of the reasoning employed in *Van Biljon*, the High Court held that section 26 complements the unqualified rights of children to shelter entrenched in section 28(1)(c). However, in the process the High Court failed to deal with the argument that section 26 imposes certain minimum duties, as argued by the Legal Resources Centre and the Community Law Centre at the University of the Western Cape.

The Constitutional Court allowed the appeal in part and substituted for the order of the High Court an order declaring that section 26(2) of the Constitution required the state to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the right of access to adequate housing. It also declared that the housing programme in the area had fallen short of the standard required in that it failed to make provision emergency measures to accommodate those who had no access to land, no roof over their heads and who were living in intolerable conditions. A programme aimed at providing relief to such people had to include measures such as, but not necessarily limited to, those contemplated in the Cape Metro Housing Programme or Accelerated Managed Land Settlement Programme.

In addition, it ruled that the High Court had erred in deciding the case on the basis of section 28(1)(c).⁷⁹ Instead it held that section 26 included a duty on the state to provide emergency housing relief for those in desperate need. The Constitutional Court confirmed that the Bill of Rights is a transformative

⁷⁹ *Grootboom* at para 74.

document aimed at achieving a society where people will be able to live their lives in dignity, freedom from poverty, diseases and hunger.⁸⁰

Finally, the Constitutional Court reminded the South African Human Rights Commission that it had to monitor and assess the observance of human rights in the Republic in terms of section 184(1)(c), of which subsections 2(a) and (b) afford it the power to investigate and to report on the observance of human rights and to take steps to secure appropriate redress where human rights have been violated. The court also specifically mentioned the Commission's task to monitor and report on the compliance by the state of its section 26 obligations.

4.3.3.2 Discussion

Despite being a landmark decision, the judgement in this case is flawed in some respects. The court indicated unambiguously that it would not prescribe any particular policy option for giving effect to socio-economic rights. Instead it recognised that there is a wide range of measures that could be adopted by the state to meet its obligations. These measures may also be reviewed by the court against the standard of reasonableness imposed by the sections protecting socio-economic rights.⁸¹

This judgement failed to give guidelines on which state organ is responsible for socio-economic delivery. Among those who were not informed of the judgement was the mayor of the area concerned,⁸² who got to know about the judgement only when notified by the SAHRC. The court also did not give the Commission guidelines on what to monitor and did not provide time frames for a report back on progress even though the SAHRC was an *amicus curiae* party to the litigation. Also, the court did not consider that the Commission does not have sufficient resources (human and financial) to monitor without financial assistance. The lack of sufficient pressure to ensure that the order be monitored effectively, allowed inefficient administrators, who were supposed to

⁸⁰ De Vos P “*Grootboom*, The Right of Access to Housing and Substantive Equality as Contextual Fairness”(2001) 17 *SAJHR* 258 at 256.

⁸¹ *Grootboom* at para 41.

⁸² Interview with Mr Victor Southwell (SAHRC) March 2001 Cape Town.

communicate the order to all those involved in the delivery of services, to delay the implementation of the order.

In the final analysis nothing much has improved for the homeless and destituted in the Cape Metropole, although the judgement was handed down in October 2000. People are still living in appalling conditions.⁸³ The *Grootboom* community themselves were supposed to benefit from a settlement in terms of which land and temporary facilities were to be provided for them. Even though this settlement was made an order of court, it was not properly implemented.

For these reasons, I believe that the outcome of the *Grootboom* case is in many ways unsatisfactory, especially when one contrasts the outcome with what has been achieved by the Court in other areas of fundamental rights litigation. The case of *August*⁸⁴, which dealt with the right to vote rather than socio-economic rights, provides a good example in which the Constitutional Court, following a breach of fundamental rights, gave clear directions for the implementation of its order to the Electoral Commission to make arrangements for the prisoners to register and once registered to vote in the elections. In this case, the Electoral Commission was required to furnish an affidavit setting out the manner in which the order would be complied with and to serve a copy of the affidavit to the attorneys for the applicants and on the Registrar of the Constitutional Court. In the light of the urgency of the matter, a period of two weeks was given for the Commission to prepare the affidavit.⁸⁵ The court therefore exercised its supervisory jurisdiction in this instance to ensure the proper implementation of the order.

It is also interesting to note the emphasis on the effective remedies in the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*⁸⁶ and *Hoffman v South African Airways*⁸⁷ cases. In the latter an order was granted for the reinstatement of a person who was denied employment because of his HIV-positive status. The court held that the reinstatement was a basic element of the appropriate relief in the case of a prospective employee who is denied

⁸³ Special Assignment (SABC 3) 03 June 2001.

⁸⁴ *August v Electoral Commission* 1999 (3) SA 1 (CC).

⁸⁵ *Ibid* at para 42.

⁸⁶ 2000 (1) BCLR 39 (CC) at para 65.

⁸⁷ 2000 (11) BCLR 1211 (CC).

employment for unconstitutional reasons.⁸⁸ The court did not only give the remedy but ensured that it monitored compliance that resulted in the instatement of the applicant.

Therefore, if the *Grootboom* order had determined precisely what the state had to do to comply with the order, the destitute would have been accommodated by now. It is not clear why the Court has been able to give detailed guidelines and supervised the implementation of the court orders in respect of civil and political rights, but has failed to do the same with regard to socio-economic rights.

A much better order was given, albeit by the High Court, in *Strydom v Minister of Correctional Services*.⁸⁹ Again concrete guidelines were laid down regarding the effective implementation of the court order. The High Court held that the failure of the Department of Correctional Services to supply electricity to some parts of the Johannesburg Maximum Security Prison was inconsistent with the right to conditions of detention that are also consistent with human dignity. The prison authorities were ordered to report by affidavit to the court within one month of the order, setting out the timetable for the upgrading of the electrical system. The court held that this form of interdict was appropriate where a respondent refuses to commit him / herself to a date by which he / she will perform an enforceable undertaking.⁹⁰

Although the *Strydom* judgement has not been implemented fully yet, at least there are moves by the government to take the prisoners to an upgraded prison in Kokstad.⁹¹ The court has also been persistent and made sure that the order is fully implemented. The commitment of the government cannot be questioned and the court's willingness to monitor the order must be commended, but the delay in implementing the order raises some concerns.

None of the judgments involved NGOs (Legal Resources Centre and the Community Law Centre, University of the Western Cape), even though many of these NGOs were before the courts, participating in the litigation as *amici curiae*. The SAHRC also refrained from involving them. It appears that if NGOs

⁸⁸ Ibid at para 51.

⁸⁹ 1999 (3) BCLR 342 (W).

⁹⁰ Ibid at para 356 A-B.

are to be used effectively, the court must involve them in the process in a practical way by guiding the SAHRC.

It must also be said that the NGOs have not offered their services either. Considering the hard battle that was fought for the inclusion of socio-economic rights in the Constitution, and the hard battle again for courts to interpret them in ways that encourage promotion of socio-economic rights, the attitude of the NGOs is disappointing. They fought a hard battle challenging the inaction of the government in realising the rights in question but after getting a progressive judgement in their favour they failed to finish their task.

4.3.4 The Treatment Action Campaign Case

In *Minister of Health v Treatment Action Campaign*⁹² the Constitutional Court held that the failure by the government to make nevirapine available in state hospitals to be used where practicable in order to prevent mother-to-child transmission of HIV was unreasonable and unconstitutional. The Court held that the government was obliged to administer nevirapine for the prevention of mother-to-child transmission of HIV at those hospitals and clinics where testing and counselling facilities are already in place, at least when in the opinion of the attending medical practitioner this was medically indicated. The woman concerned had to be appropriately tested and counselled. It was unreasonable to confine the availability of the drug to the research and training sites (two per province) in the public health sector.

The result must be applauded. It is an important victory for those wishing to use courts to enforce socio-economic rights. The question however remains whether the *Grootboom* lessons have been learnt? What mechanisms were put in place to ensure that the Court's order is going to be implemented?

Unfortunately this does not appear to have happened. As I have argued above, when giving a progressive judgement such as this one, the Court has to be pro-active by ensuring that the proper structures are in place to ensure

⁹¹ Interview (note 59 above).

⁹² Not yet reported but the judgement was delivered by the Constitutional Court on 5th July 2002 (referred to as the 'TAC' case).

compliance. The Court therefore did not learn from the *Grootboom* saga. Again, no provision was made for monitoring of the implementation of the court order. The Court simply ordered the government to provide nevirapine. It made no provision for feedback on the manner in which the government has complied with the order. This shortcoming may result in the failure to implement the order by hiding behind excuses such a lack of capacity within the respective Departments.

The applicant in this case, the Treatment Action Campaign, might not have the capacity to monitor effective implementation of the court order. Moreover, even if they detect an unwillingness, a ‘dragging of the feet’, or a lack of capacity, no mechanism was provided in terms of which they will be able to approach the court in order to ensure the effective implementation of the order. The Community Law Centre, based at the University of the Western Cape, is apparently monitoring the implementation of the order without being appointed by the Court.⁹³ Sadly, the SAHRC and these NGOs were not officially mandated to monitor the implementation of the order.

4.4 CONCLUSION

In *Soobramoney* the Constitutional Court (wrongly in my view) sanctioned the policy decision of the Kwazulu-Natal authorities not to provide life-prolonging treatment to a critically ill patient. The very arguments rejected by the Court in the *Certification case* and by the High Court in the *Van Biljon* case were unfortunately accepted. This relegated socio-economic rights to a second-class position. The court’s refusal to grant a certificate for leave to appeal directly to it in *Mkangeli vs Joubert*, reinforced this perception. Despite this, the later decisions (in *Grootboom* and the *Treatment Action Campaign*) show that the Court will intervene in some instances in order to enforce socio-economic rights. There is certainly a move away from *Soobramoney* and *Mkangeli*.

However, where the Court decided to promote socio-economic rights, it failed to ensure meaningful implementation of its orders. While the court has

⁹³ Telephonic Interview with Prof. Sandra Liebenberg, University of the Western Cape Community Law Centre, 11 October 2002.

been able to give detailed guidelines and has supervised the implementation of its orders in respect of civil and political rights, it has failed to do the same with regard to socio-economic rights. This failure reduces the status of socio-economic rights to “an ideal and something to be strived for”, as it was stated in *Soobramoney* by Madala J.

In addition, the South African Human Rights Commission refrained from involving NGOs in monitoring the implementation of Court orders. This is an attitude that is at odds with the sentiments expressed by the former Chairperson of the Commission. In turn the NGOs have, by and large, refrained from involving themselves in the monitoring of the implementation of the order. It has become imperative for all those involved in socio-economic rights to review their roles in relation to their obligations towards ensuring the effective implementation of court orders.

It has become apparent that the inclusion of socio-economic rights in the Bill of Rights does not automatically make government accountable. Legal strategies seldom produce immediate and concrete socio-economic transformation. Courts are hesitant to formulate concrete policies on the redistribution of material resources. However, when a court does so, it is necessary for the court to carefully provide for the implementation of its orders.

The judges in the Constitutional Court do not seem to have escaped a stereotypical view of the division of functions between court, legislature and executive.⁹⁴ This has resulted in a failure to seek and create mechanisms aggressively to ensure implementation of the Court’s orders. Once such mechanisms are put in place, they will allow the Court to operate more confidently in the socio-economic rights arena.

⁹⁴ See for example *S v Zuma* 1995 (4) BCLR 401 SA (CC) where Kentridge AJ said: “while admitting that general language does not have a single objective meaning, nevertheless warns that the main task of the judiciary should remain the interpretation of a written instrument and that a less vigorous approach may entail the danger that the constitution may be taken to mean whatever one wishes it to mean” at 412 paras (F-G), see also *S v Makwanyane* 1995 (4) SA 665 (CC) where Kriegler J said: “In answering that question the method to be used are essentially legal, not moral, or philosophical. The incumbents are judges not sages, their discipline is the law, not ethics or philosophy and certainly not politics” at 747 F-748 A. For an extensive discussion on the jurisprudence of the Constitutional Court see Cockrell A. “Rainbow Jurisprudence (1996) 12 *SAJHR* at 23 where he argues that the judges of the Constitutional Court had by and large failed to go beyond the formulation of formal reasons for their decisions

The Court has also not always made use of the more creative foreign case law, emanating from countries such as India.⁹⁵ The body of international standards developed, amongst others that of the UN Committee on Economic, Social and Cultural rights, can also provide valuable guidance to our courts.⁹⁶ If the courts are to contribute to the alleviation of existing inequalities, a judiciary with a vision and lawyers with compassion are essential to ensure the proper execution of the judgements handed down by the court.⁹⁷

and had not engaged in the moral and political reasoning required when making the difficult decisions about matters of political morality.

⁹⁵ According to section 39(1)(b) of the final Constitution, the courts or other tribunals “must consider international law” when interpreting the Bill of Rights. See also Dugard J. “The Role of International Law in Interpreting the Bill of Rights” (1994) 10 *SAJHR* 208 at 212.

⁹⁶ Eide A. *Economic, Social and Cultural Rights* (1995) at 56.

⁹⁷ Unfortunately the training of such lawyers has never been a priority at South African law schools. See Gabriel A. “Socio-Economic Rights in the Bill of Rights: Comparative Lessons from India” (1997) 1 *Human Rights Constitutional Law Journal of Southern Africa* at 8.

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

This chapter aims at drawing together lines from the study and recommends a model for improvement. The research question posed was whether court orders in respect of socio-economic rights are implemented adequately in South Africa. The answer appears to be unequivocally negative. The responsible institutions have executed none of the few court orders that have been decided since 1996 effectively. This bodes ill for the implementation of court orders enforcing socio-economic rights.

5.2 SUMMARY

Although the study is concerned with the realisation of socio-economic rights through the effective implementation of court orders, it must be noted that the first duty regarding the implementation of such rights lies with the state. The court becomes involved only once the state is alleged to have neglected its duty.

In Chapter Two, the processes that have been instituted for the protection of socio-economic rights were examined in international law and within the South African context. The purpose was to establish whether there is a meaningful recognition of these rights in South Africa. Since the country has emerged from a protracted and violent struggle for the recognition of civil political and socio-economic rights, it was reasonable to expect that South Africa would apply special measures for the implementation of all the rights protected in our Constitution.

It was found that while measures have been adopted in South Africa for the effective realisation of human rights so that they do not become paper rights, several problems still exist in the implementation of socio-economic rights. Firstly, the internal qualifications contained in the provisions dealing with socio-economic rights mean that there is no absolute entitlement to a minimum level of social goods free of charge or on demand in South Africa. Except for

the provision of emergency medical treatment and the prevention of the demolition of housing or eviction, the Bill of Rights recognises that socio-rights cannot be realised with immediate effect. In fact, it states explicitly that steps taken by the state with regard to health care, food, water and social security must be reasonable, that the state should operate within available resources and that the rights must be realised progressively.

Secondly, despite South Africa's commitment to protection of human rights in the international plane, it has failed to ratify the ICESCR to date. Judging from the international instruments South Africa has ratified, it seems that more emphasis is placed on civil and political rights than on socio-economic rights. As mentioned before, this discrepancy undermines South Africa's commitment to these rights before the international community.

In Chapter Three the monitoring function of the SAHRC and NGOs was analysed. The purpose was to determine the efficiency of the Commission in the monitoring process and to establish how NGOs could be involved in process. Because a democratic state can by its very nature not monitor itself, it is dependent on such organisations for maintaining its democratic integrity. It was found that the process of monitoring human rights in this country is still problematical. Two possibilities exist. The first is monitoring by a state commission, such as the HRC. The second is monitoring by NGOs.

Neither the Constitution nor the ICESCR involve NGOs with monitoring of socio-economic rights. The South African Constitution merely contains a reference to class actions in section 38. In practice NGOs have consistently been sidelined. As far as the HRC is concerned, the main problems are that its findings are recommendatory and do not bind the government; It is unable to order effective remedies and to follow up findings; and its activities lack publicity and visibility due to the fact that their communications are considered during private sessions.

The HRC has also made some clear mistakes in the monitoring process. Denying NGOs' access to reports by government departments is a matter of grave concern. In addition, the Commission was hampered by a lack of training of government officials, an overly statistical approach to data collection,

ineffective distribution of information and a lack of coordination.

The main problem identified in Chapter Three is, however, the lack of sufficient human and financial resources to carry out the task of the Commission, which requires an enormous amount of detailed and exacting work. The Constitution does not provide the Commission with direct access to resources.

At present it appears that it is only in interaction between the State, the NGOs, the Courts and the South African Human Rights Commission, that the specific meaning of socio-economic rights in South Africa will become consolidated in the course of time. If one of the key institutions, such as the HRC, is seriously underfunded, it would undermine the system of protection of human rights and socio-economic rights in particular.

Chapter Four examined the implementation of actual court orders in South Africa. It was found that these order were unsatisfactorily implemented in general. The analysis of cases illustrated quite clearly the passive role the Court seems to have adopted in respect of the implementation of their own orders.

Although the Court has been able to give concrete guidelines and has monitored the implementation of the orders in respect of civil and political rights, it has failed to do so in respect of socio-economic rights. In the *Grootboom and TAC* cases, the Court reprimanded the state by ordering the government to honour its constitutional obligation but, as mentioned, it failed to put proper mechanisms in place for the monitoring of its progressive orders.

3. RECOMMENDATIONS

It is not possible within the scope of this study to make detailed recommendations. However, a number of general recommendations can be made.

First, the structural interdict is by far the most effective form of relief for a court to award in case of a failure to respect the positive dimension of socio-economic rights. Our courts should make more use of this remedy.

Secondly, where the structural interdict is awarded, the Court must keep

the case 'alive' after the judgement is handed down by incorporating timetables pertaining to the implementation of the order into the judgment.

Thirdly, the appointment of monitors in the order is essential to ensure that the judgment is properly implemented. Moreover, the Court has to guide the Commission in a practical way on how to monitor orders, when to report back and which NGOs to involve.

Fourthly, it follows that the SAHRC should not take the task of the implementation and monitoring of courts orders on alone. It should rather be co-ordinating its own efforts and those of NGOs in the field.

Fifthly, the Investigation Unit of the Commission needs to be strengthened in order to enable it to undertake the necessary fact finding for performing the envisaged function.

Finally, the SAHRC must keep a databank of the government's reactions to decisions of the Court.

5.4 CONCLUSION

The democratisation of South Africa has opened a window to allow a fresh breeze into a dusty room. However, it seems increasingly likely that the wind has not blown the dust from all the corners. South Africa has undergone a rhetorical conversion. Having democracy in name and rights on paper means very little if it does not change the lives of the people. But if socio-economic rights cannot be implemented meaningfully through court orders, there is a danger that South Africa may use human rights talk to keep up appearances. This leads back to the central theme of this study, socio-economic rights cannot be realised without the proper implementation of court orders.

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