JUDICIAL ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS UNDER THE 1996 CONSTITUTION: REALISING THE VISION OF SOCIAL JUSTICE

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ABSTRACT

Few legal developments in South Africa and elsewhere in the world in recent times have excited such controversy as the legal recognition of social and economic rights. South Africa has created a special place for itself in world affairs for being one of the countries that recognise socio-economic rights in a justiciable Bill of Rights. Partly this is in response to the appalling levels of poverty prevalent in the country which could potentially destabilise the new democracy. Improvement of the quality of life of every citizen is a crucial step in consolidating the constitutional democracy. The question that will face any court in giving effect to socio-economic rights is: how are these rights to be judicially enforced in a given context? The crux of this thesis lies in the resolution of this question. Firstly this thesis traces the philosophical foundations to the legal recognition of socio-economic rights. It is stated that the recognition of these rights in a justiciable bill of rights requires a conceptually sound understanding of the nature of obligations that these rights place on the state. It is emphasised that it is imperative that access to justice be facilitated to poor and vulnerable members of society for the realisation of the constitutional goal of addressing inequality. Particular concern and priority should in this context be given to women, children and the disabled. The study explores various judicial remedies and makes suggestions on new and innovative constitutional mechanisms for judicial enforcement of these rights. It is concluded that there is an important role to be played by civil society in giving meaningful effect to socio-economic rights.

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ABBREVIATIONS AND ACCRONYMS

ANC:	African National Congress
AJ:	Acta Juridica
BCLR:	Butterworths Constitutional Law Reports
CGE:	Commission for Gender Equality
CILSA:	Comparative and International Law Journal of Southern Africa
CWILJ:	California Western International Law Journal
ECOSOC:	Economic and Social Rights Council
ESR:	Economic and Social Rights Review
LHR:	Lawyers For Human Rights
LRC:	Legal Resources Centre
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic Social and Cultural Rights
ICJ:	International Commission of Jurists
ILO:	International Labour Organisation
OAU:	Organisation of African Unity
SAHRC:	South African Human Rights Commission
SAJHR:	South African Human Rights Journal
SALC:	South African Law Commission
SALR:	South African Law Reports
SALJ:	South African Law Journal
SAPL:	South African Public Law
TSAR:	Tydskrif vir die Suid Afrikaanse Reg
UCLA:	University of California Los Angeles Law Review
UDHR:	Universal Declaration on Human Rights
UN:	United Nations Organisation
UNGA:	United Nations General Assembly

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DEDICATION

To my late father Gcinabantu Hutchinson Ngcukaitobi.

CHAPTER 1

1. INTRODUCTION

Constitutionalism and the rule of law are essential features of many political democracies that respect human rights. A judiciary that is sufficiently independent from the executive is a guardian of the rule of law ensuring that proper checks and balances are maintained in a system where the separation of powers doctrine is entrenched in a Constitution.[1] Otherwise there is no guarantee that the executive will respect fundamental rights and act according to the rule of law. As Albie Sachs once said

> 'It is no accident that constitutions usually come into being as a result of bad rather than good experiences. Their text or sub-text is almost invariably: ''never again''. In the case of South Africa the new constitution arises out of the need to escape the profound humiliations and oppression created by apartheid. Through the constitution we affirm that we learn something from our dolorous history.
>
> It is worth repeating: all constitutions are based on mistrust. If we could trust our rulers, our parties, ourselves, we would not need constitutions.
>
> Power not only corrupts, it intoxicates, it confuses. Like nature it abhors a vacuum. Like water it follows the path of least resistance. Oppression is oppression, but in some ways oppression in the name of the good is worse than oppression in defence of the bad, since it tarnishes the very ideas it seeks to protect and deprives people even of the image or hope of a better society.'[2]

A Constitution of a nation is therefore a fundamental law of the land. It defines and guides actions by government, it prohibits and sets sanctions for unlawful conduct. It bonds the nation together and represents a collective vision for the

[1] See M Mutua 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23 *Human Rights Quarterly* 96.

[2] A Sachs 'The Constitution is Natural Justice Writ Large' in H Corder and F McLennan (eds) *Controlling Public Power* (Department of Public Law, UCT: Cape Town 1995) 51.

future.[3] The South African Constitution is also founded on the idea of constitutionalism. It is the supreme law of the land.[4] Law or conduct inconsistent with it is invalid to the extent of such inconsistency. The obligations imposed by it must be fulfilled. It aims to create a society where the achievement of equality, human dignity and freedom are the core values.[5] An important feature of the Constitution is the express recognition of socio-economic rights in a justiciable Bill of Rights. These rights include the right to basic education, access to adequate shelter and housing, adequate health care services, the right of access to sufficient food, water and social security.

The incorporation of these rights was a contentious issue at the time of the adoption of the Constitution. The debate about their enforceability is now over, but crucial questions that remain relate to how these rights will be enforced in a given situation. By including these rights, the legislature recognised that the elimination of poverty and the achievement of substantive equality are critical in the establishment of a society based on social justice, a vision that the Constitution expressly articulates. The Constitutional Court has itself noted that the goal of poverty eradication 'lies at the heart of our new constitutional order'.[6]

At the time the interim Constitution came into force many people, in particular, the African rural and urban poor were living under conditions of extreme poverty and hopelessness. They had to survive without access to clean water, sanitation, basic health services and had no chances of employment. These people constituted the majority of the citizens in the country. On the other hand, a relatively few people lived in better off conditions, where access to these basic

[3] See *Hunter et al v Southam Inc* (1985) 11 DLR (4th) 641, 649; *S v Acheson* 1991 (2) SA 805 (Nm HC) 813A-C.

[4] Section 2 of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution).

[5] Section 1(a).

[6] *Soobramoney v Minister of Health, Kwazulu Natal* 1998 (1) SA 765 (CC) para 8.

services was almost taken for granted. Whilst efforts aimed at addressing inequality have started there is lot that still needs to be done to complete the task of transformation. As Bongani Majola says:

> 'South Africa remains a country of devastating dichotomy. Millions languish in abject poverty, thousands starve –while a fortunate few relish the wealth of the nation. Despite the marvelous reforms of the recent past, we remain a country in which most cannot afford the price tag which has been attached to those basic, those core rights through which inherent human dignity is secured.'[7]

This is not an accident. It is a product of history. It is history that has shaped the unbalanced distribution of wealth, the skewed development, repression and exploitation. A history designed and implemented by man. Various means were used to further the cause of oppression. Law was an important tool of social and political repression. Apartheid laws were often designed and implemented with total disregard of human dignity and inviolability of the person. While it is not possible for the purposes of this study to engage in a thorough and microscopic discourse about the history of this country, suffices to state that South Africa's political history is characterised by authoritarianism, race, gender and class discrimination and generally a systematic abuse of human rights. Like many colonial states, a minority arrogated to itself the right to control the resources of the nation. More emphasis was put on power than rights. A defining characteristic of the apartheid laws was that it was one's pigmentation that determined whether one could have access to jobs, houses and other forms of subsistence.[8] As a result resistance was sure to follow leading to conflict between the majority and the minority. In *Azapo and Others v President of the RSA*[9] Mohamed J summarises this history thus

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[7] B Majola *'The Legal Resource Centre, South Africa. Promoting Access to Justice. Welcoming the Challenges of a Constitutionally Entrenched Bill of Rights.'* (unpublished 1998) 1.

[8] See E Roux *Time Longer than Rope: A History of the Black Man's Struggle for Freedom in South Africa* (University of Wisconsin Press 1967) , 'The Truth and Reconciliation Report' (1998) 1, 24. A Cockrell 'The SA Bill of Rights and the Duck Rabbit' (1997) 60 *Modern LR* 5.

[9] *Azanian Peoples Organisation (AZAPO) and Others v President of the RSA* 1996 (4) SA 671 (CC).

> 'For decades South African history has been dominated by a deep conflict between a minority which reserved for itself all control over the political instruments of the State and a majority who sought to resist that domination. Fundamental human rights became a major casualty of this conflict as the resistance of those punished by their denial was met by laws designed to counter the effectiveness of such resistance. [T]he result was a debilitating war of internal political dissension and confrontation, massive expressions of labour militancy, perennial student unrest, punishing international economic isolation, widespread dislocation in crucial areas of national endeavour, accelerated levels of armed conflict and a dangerous combination of anxiety, frustration and anger among expanding proportions of the populace. The legitimacy of law itself was deeply wounded as the country haemorrhaged dangerously in the face of this tragic conflict which had begun to traumatise the entire nation.'[10]

The context therefore of the South African history is one of dispossession and oppression. The Constitution commits the nation to move away from the racial, class and gender divisions of the past. Through the preamble, the Constitution commits the nation to '[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights' and also to '…Improve the quality of life of all citizens and free the potential of each person…'. The Constitution embraces the values of freedom, equality and dignity as central in the establishment of such a society.[11]

Since 1994, when the democratically elected government came into power, various initiatives including laws, policies, and projects have been adopted by the executive in response to the obligations imposed by the Constitution. The judiciary has also on the other hand responded to the task laid down in the Constitution with the necessary commitment. In a few headline hogging judgments, courts have been seen to fill the vacuum left and sometimes created by the executive and the legislature, the elected branches of government.[12] They

[10] *Ibid* para 1.

[11] The centrality of these values is strengthened by the fact that they collectively appear at least four times in the text of the Constitution. See sections 1(a), 7(1), 36(1), and 39(1) (a).

[12] See *Government of the RSA and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2000 (12) BCLR 1322, *Mahambehlala v MEC for Welfare, Eastern Cape Provincial Government and Another*

are starting to develop a significant jurisprudence based on the values of the rule of law, the achievement of equality, freedom and human dignity.[13]

But having a Constitution, which guarantees fundamental rights does not on its own resolve the problems confronting society. In South Africa the levels of poverty are disturbing. An authoritative study on Poverty and Inequality in South Africa, reported in 1998 that 71,6% of the poor live in rural areas; and 70,9 % of the people living in rural areas are poor.[14] A critical task facing the government under the Constitution is to bridge the continuously widening gap between the rich and the poor. Steps in that direction have to be taken swiftly and within the strictures of the rule of law. For constitutionalism to prosper, it must have a fertile ground on which to grow. The levels of poverty in this country effectively deny to many access to their rights and freedoms that the Constitution guarantees. The challenge to all role players therefore is not an easy one. In the words of Gross Espiel:

> 'If the enormous and deplorable gap between poverty and opulence and between development and underdevelopment would be diminished; and the misery and ignorance which characterise a majority of the peoples…sensibly decreased, an acceleration in the

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2001 (9) BCLR 890 (SE), *Mbanga v MEC for Welfare, Eastern Cape Provincial Government* 2001 (8) BCLR 821 (E).

[13] There are a number of decisions handed down in recent times by the Constitutional Court which affirm the centrality of rule of law, human dignity and the notion of progressive achievement of substantive equality in our jurisprudence. As examples one could highlight *Pharmaceutical Manufactures Association of SA; In re Ex Parte Application of the President of RSA and Others* 2000 (3) BCLR 241 (CC) which held that the Constitution is the source of all law including the common law and that the common law does not continue to have its own separate application parallel to the Constitution. The common law principles are to the extent that they continue to have any application subsumed under the Constitution. It was also held that the President could not bring a law into force without the necessary regulatory framework. In *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 (7) BCLR 652 (CC) the Constitutional Court held that the President could act without an empowering legislation if the source of his power could be located in the Constitution itself in order to bring emergency aid to homeless victims of floods. See also A Chaskalson 'Human Dignity as a Foundational Value of our Constitutional Order (2000) 16 *SAJHR* 193.

[14] J May (ed) Poverty and inequality in South Africa (report prepared for the office of the executive deputy President and the Inter-Ministerial Committee on Poverty and inequality) (1998) 27. The full report can accessed from the government website www.polity.org.za .

> process of the effective recognition of human rights...could be looked for.'[15]

1.2 The South African Constitution as a Charter for Socio-Economic Transformation

It is argued in this study that the Constitution should not be seen as a document that makes colourful pronouncements about rights and obligations with no real effect on the lives of the many who live in poverty and destitution. The Constitution should be used as an instrument to facilitate socio-economic transformation. On its own provisions the Constitution places the challenge of socio-economic transformation on the national agenda. This should be used as a rallying point for all those whose concerns are to improve the standard of living of poor communities.

Chaskalson P has emphasised that commitment to 'transform' the South African society is a central goal of the Constitution.[16] It is important that in the process of building constitutionalism in the country courts and all role players concerned take poverty alleviation as a central feature. In one of his most quoted passages Mahomed J said

> 'In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: It retains from the past only what is defensible and represents a decisive break from and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos,

[15] G Espiell 'The Evolving Concept of Human Rights: Western Socialist and Third World Approaches to Human Rights (1978) 64 cited by T Madala in '*The Role of the Courts in Transforming our Legal System*' 4 October 1996 (unpublished paper).

[16] In *Soobramoney* (note 6 above) para 8. See also A Chaskalson (note 13 above) 202. The idea of 'transformative constitutionalism' as a goal of the South African Constitution is usefully discussed by K Klare in 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146, 155. This idea is also endorsed by P de Vos in '*Grootboom*, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *SAJHR* 258, 260-263.

> expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.'[17]

In a sense, these comments remind us about the gross violations of human rights and that the Constitution now seeks to commit the nation to demonstrate care and sensitivity to groups and people that were excluded from participating effectively in the economy. There are many such groups. They include black women and men generally, and in particular people with disabilities, children and the elderly. A 'caring' society respects the rights of these groups and takes their concerns into cognisance. It is the government that is at the forefront of demonstrating this care and concern.

In developing legislation, the legislature should be astute to this challenge of poverty. It must draft legislation that is sensitive to the needs of the poor people, -- legislation that accelerates rather than impedes access to basic services. This is how the law-makers can account to the poor who put them into power. Such legislation will always be tested against the standard of the Constitution to see if it does not conflict with the provisions of the Constitution, the supreme law of the land.

The primary duty of the executive with the administrative machinery is to implement legislation. The impact of the legislation, is felt by the citizens through the actions of the administration. It is administrative decisions, actions and processes that bring law into reality. These administrative procedures are also the tools with which the administration delivers on the promises made by the Constitution or any legislation. The resources of the nation are kept and administered by the administration. In this sense it is the administration that assists the state to 'progressively realise' the socio-economic rights in the Constitution. If the administration therefore does not treat the citizens in a

[17] *S v Makwanyane* 1995 (3) SA 391 (CC) para 262.

manner that accords with the values in the Constitution, it is guilty of failing to give effect to the constitutional obligations of the state. On the one hand, it is important that citizens have access to means of reviewing the decisions or actions of these organs where decisions and/ or actions adversely affect their rights, interests and legitimate expectations. This is the overall context in which a study on remedies against breaches of constitutionally protected rights should be viewed. Access to judicial review is an important component of that mechanism to keep the legislature and the executive in check. It is not by any means the only way in which the same goals can be achieved. There are other mechanisms, which also have to be nurtured. They are different to courts but are nonetheless important mechanisms.

1.3 Are the Courts an Appropriate Forum?

The Constitution contains provisions which are intended to ensure that the state in giving effect to its mandate acts within its lawful mandate and does so fairly. Courts are the guardians of the Constitution and the freedoms it contains.[18] Their role is to interpret the Constitution. It is the role of government to implement the orders of the courts where mandated to do so. A characteristic feature of socio-economic rights is that they impose positive obligations on the state and that their realisation may involve massive expenditure of public resources.[19] But courts are traditionally reluctant to involve themselves in cases which involve decision making about the allocation of public resources. Lon Fuller says that this reluctance is due to the fact that

[18] *Hunter et al v Southam Inc* (note 3 above) at 649.

[19] It is not suggested that the realisation of civil and political rights is cost free. The Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 78 held that sometimes in giving effect to some civil and political rights like the right to legal representation at the state's expense the courts will make decisions with budgetary implications. Holmes and Sunstein in 'The Cost of Rights' (W.W. Norton and Company 1999) suggest that all rights impose positive obligations on the state and that the implementation of all rights requires expenditure of public resources.

> 'A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centred" —each crossing of strands is a distant center for distributing tensions.'[20]

The second reason is that often the resources in question are limited and the demands placed upon them are quite significant.[21] So the question can be asked: will the incorporation of socio-economic rights change this reluctance and if so what type of cases will encourage the courts to be involved in cases which involve allocation and expenditure of public resources. The jurisprudence from *Soobramoney*[22] and *Government of the RSA and Others v Grootboom and Others*,[23] the only 'socio-economic rights' cases to reach the apex court so far is helpful. In *Soobramoney*, the Constitutional Court stated that courts should be slow to interfere with rational decisions taken by organs of government, which are best suited to make such decisions.[24] Yacoob J in *Grootboom* stated that it was unreasonable for the government to expect to progressively realise the right of access to adequate housing without a programme that proritises people in desperate situations.[25] He also stated that the adoption of a rationally conceived programme was not on its own sufficient.[26] Steps had to be taken in a reasonable way to implement the programme.[27] Consistent with the separation of powers doctrine, the court also said that the precise contours of the programme

[20] L Fuller 'The Forms and Limits of Adjudication' (1978-1979) 92 *Harvard LR* 353, 395.

[21] See A Chaskalson (note 13 above) 202.

[22] *Soobramoney* (note 6 above).

[23] *Grootboom* (note 12 above).

[24] Note 6 above para 29.

[25] *Ibid* paras 40-41 and 44.

[26] *Ibid* para 42.

[27] *Ibid*.

should be left to government in the initial instance.[28] It can therefore be argued that courts will not instruct the government on the allocation of scarce public resources. They will however be willing to consider the reasonableness of the measures that the government is taking in giving effect to socio-economic rights.

In this study, it will be argued that courts should adopt an activist approach in socio-economic rights cases. This will include devising new remedies for such cases. To complement the role of the courts, lawyers who bring the cases to courts should themselves be creative about the type of cases and the manner in which they bring cases to court. In some quarters, this has been referred to as 'strategic litigation'.[29] In line with the strategic litigation approach, Geoff Budlender proposes certain cases, which he asserts will encourage courts to be involved in cases involving expenditure of public resources.[30] These cases are those where the state has misconceived its constitutional mandate; where the state delays without justification in progressively realising socio-economic rights; where the state takes retrogressive measures. In cases where retrogressive measures have been taken, there may be a requirement for special justification. There may also be cases where a formal promise has been made to the recipients of the benefits and the budget has been allocated for that purpose but remains unjustifiably unspent. In these cases courts will be the last resort where the constitutionality of the actions of the government will be tested.

In enforcing rights, courts should be mindful of the separation of powers doctrine. Although, the line between what strictly falls under each branch of government is not absolute and often crossed, there is in our Constitution a clear separation of

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[28] *Ibid* para 41.

[29] G Bellow 'Turning Solutions into Problems: The Legal Aid Experience' (1977) at www.garybellow.org/garywords/solutions.html 15.

[30] G Budlender *'Using the South African Constitution as a Mechanism for Addressing Poverty: A Strategy Memorandum for the Legal Resources Centre'* (unpublished 2000)

powers which has to be respected.[31] The courts should leave decisions, which would be best suited for the legislature and the executive to carry to those two institutions. They should not substitute their decisions for what they think is right or is a more preferable policy alternative.[32] On the other hand the other branches of government should help the courts protect their own integrity by co-operating with them.[33] An important aspect of this co-operation is compliance with judicial decisions. A disturbing trend is emerging with government departments simply ignoring court decisions.[34] Whereas such actions should be admonished in the strongest possible terms, that is not enough. The courts need to fashion ways of both preempting and dealing with non compliance with their orders. But a limitation that courts face is that they do not have coercive means like the assistance of soldiers and police to force anyone to comply with their directives.[35] So how do they ensure the compliance with such orders? Mahomed suggested that first and foremost the power of the courts lies in their independence from the executive. He proposed that no executive would run the political risk of disobeying a judiciary that is not only independent but is seen by the populace to be so independent.[36] Mahomed's views are important. They serve, however, only as a starting point.

The Constitution gives the courts wide ranging powers to ensure the compliance with their decisions. They have the power to grant 'appropriate relief' to any

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[31] See *Bernstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC) para 105, *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC) paras 60-61, *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) BCLR 77 (CC) paras 23-26, *S v Dodo* 2001 (5) BCLR 423 (CC) para 22.

[32] *Soobramoney* (note 6 above) para 29, *Pharmaceutical Manufactures* (note 13 above) para 90.

[33] See section 165 (4) of the Constitution.

[34] See C Rickard 'Judges Orders Ignored-Make Officials Pay, Urges Law Professor' an article that appeared on the *Sunday Times* of 1 April 2001. See too the comments by Jafta J in *Mjeni v Minister of Health and Welfare* 2000 (4) SA 446 (Tk) 452B-D.

[35] See I Mahomed 'The Independence of the Judiciary' (1998) 115 *SALJ* 658, 660.

[36] *Ibid* 659.

person who alleges that a right in the Bill of Rights has been violated.[37] They can invalidate legislation which is in conflict with the Constitution.[38] They also have the inherent power to regulate and develop their own processes in line with the values in the Constitution.[39] It is clear that the power of the judiciary is awesome. Like any other power, it is capable of being abused. Judicial power should therefore go with judicial responsibility.[40] The courts should in discharging their mandate take this factor into account. They must in giving effect to rights and socio-economic rights in particular consider the resources available on the part of the state, the competing claims in society and the practical effect of their decisions.[41] If the courts make judgments with emotional appeal but which cannot be implemented, they run the risk of being regarded as irrelevant and therefore hampering the rule of law because they will not be respected by the government any more.[42]

1.4 Promoting Access to Justice: An Important Goal of the Constitution

A constitution that guarantees rights and sets the rule of law as its fundamental pillar presents a promising picture. This is so especially where there is a

[37] Section 38 of the Constitution.

[38] Section 172 of the Constitution.

[39] Section 173 of the Constitution.

[40] I Mahomed (note 35 above) 662.

[41] In *Soobramoney* (note 6 above) para 31 Chaskalson P stated that in dealing with a claim for the provision of dialysis treatment to the applicant the court has to bear in mind that '[T]here are those who need access to housing, food and water, employment opportunities, and social security. These too are the aspects of the right to "…human life: the right to live as a human being,…"'.

[42] In DM Davis et al 'Democracy and Constitutionalism: the Role of Constitutional Interpretation' edited by Van Wyk et al *Rights and Constitutionalism* (Juta 1994) 1, 61, the authors state that the growth of public interest litigation in India led to a flurry of cases which the courts in the early 90s were increasingly unable to handle owing to resource limitations and the fact that the government was simply not carrying out the orders. See also J Cassels 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible's (1989) 37 *American J of Comparative L* 495. The point being made here is not that the courts must not give orders unfavourable to government in the fear that they will be ignored but that they should take the means available to give effect to those orders into account.

guarantee that the people will have access to basic services to meet their basic needs. Where they are denied access to these services without justification they will have access to means of redress like courts. Access to courts as institutions to articulate and enforce rights is an important element of the promotion of access to justice. In South Africa, many people do not have access to courts. Many people are unemployed and the infrastructure in many rural parts of the country is poorly developed. It is difficult to consult with a lawyer for a poor person. The costs of litigation are also fairly prohibitive for people who want to bring lawsuits to courts.[43]

For the realisation of the objective of access to justice it is important that many people have access to lawyers. There is therefore a need to take conscious steps by all role players to promote access to lawyers. Lawyers have during the apartheid era played a significant role in the overall struggle against oppression.[44] For many people who were threatened with evictions from their homes, separation from their spouses and families, forced removals and relocations, arbitrary arrests and detentions, lawyers provided a sense of hope in the wake of despair. It is not proposed that lawyers should deal with the democratic government in the same way as they responded to the hostile regime of apartheid. But the sense of commitment to the cause of the struggle that

[43] See *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 14, cited with approval in *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Governmnet and Another* (note 13 above) 1329F-G.

[44] See RL Abel *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994* (Routledge1995). For a further discussion see the following articles; 'The Legal System in South Africa 1960-1994 Representations to the Truth and Reconciliation Commission' (1998) 115 *SALJ* 21, C Plasket 'The Eastern Cape Bench, Civil Liberties and the 1985/1986 State of Emergency (1986) 2 *SAJHR* 142, D Basson 'Judicial Activism in a State of Emergency: An Examination of Recent Decisions of the South African Courts (1987) 3 *SAJHR* 28, Human Rights Index 17 June 1987-30 October 1987 (1987) *SAJHR* 398, *South Africa: Human Rights and the Rule of Law* International Commission of Jurists Geoffrey Bindman (ed) (1988) 64, A Chaskalson 'Legal Control of the Administrative Process' (1985) 102 *SALJ* 419 and N Haysom and C Plasket 'The War Against Law: Judicial Activism and the Appellate Division' (1988) 4 *SAJHR* 303. See also the following cases: *Oos-Randse Administratiesraad en 'n Ander v Rikhoto* 1983 (3) 595(A), *Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A), *In Re Dube* 1979 (3) SA 820(N), *In Re Duma* 1983 (4) SA 466 (N), *Black Affairs Administration Board Western Cape and Another v Mthiya* 1985 (4) SA 754 (A), *Minister of Law and Order v Hurley and Another* 1986 (3) SA 568 (A).

prevailed during apartheid should still prevail. Lawyers should make their services available to the poor to accelerate the fight for social justice, a fight that started even before the constitutional era. In so doing they should take into account that both the political context and the law have changed. We have now moved from a culture of authoritarianism into a culture where governmental action should be justified.[45] One way of doing that is to promote public interest litigation.[46] Section 38 of the Constitution contains a flexible provision on standing to sue in constitutional matters. These provisions are important. They need to be utilised in a manner that facilitates access to courts for many.[47]

Access to justice does not mean access to courts. No attempt will be made in this study to define what access to justice means. The point will however be made that there are many elements of facilitating access to justice. Access to the courts is one of them, and an important one, too. There is also a need to utilise the system of Advice Offices. They play a very useful role for many people who live in the rural areas. They are also the initial point of interface between the people they serve and the state administration.[48] The Constitution also creates institutions that are intended to complement constitutional democracy. They must also be accessible and be used to realise the goals of the Constitution. The office of the Public Protector and the Human Rights Commission are examples of such institutions.[49]

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[45] E Mureinik 'A Bridge to Where?: Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31, 32.

[46] G Budlender 'On Practising Law' in H Corder (ed) *Essays in Law and Social Practice in South Africa* (Juta and Co 1988) 319.

[47] Mokgoro J in *Chief Lesapo v North West Agricultural Bank And Another* 2000 (1) SA 409 (CC) para 22, said that the right of access to courts is a 'bulwark against vigilantism'.

[48] See G Budlender 'The Accessibility of Administrative Justice' (1993) *Acta Juridica* 128, 131. See too C Plasket 'Accessibility Through Public Interest Litigation' in Corder and Maluwa (eds) *Administrative Justice in Southern Africa* (Dept of Public Law: UCT, Cape Town 1996) 119, 124.

[49] Section 181 of the Constitution provides for the establishment of the following institutions: The Public Protector, The South African Human Rights Commission, The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, The Commission on Gender Equality, The Auditor General and the Electoral Commission. For the purposes of this study only the first two are examined.

A fair and a just society, a vision that our Constitution seeks to accomplish will undoubtedly take time to achieve. In the words of Mohamed DP

> 'Generations of children born and yet to be born will suffer the consequences of poverty, of malnutrition, of homelessness, of illiteracy and disempowerment generated and sustained by institutions of apartheid and its manifest effects on life and living for so many. The country has neither the resources nor the skills to reverse these massive wrongs. It will take many years of strong commitment, sensitivity and labour to "reconstruct our society" so as to fulfil the legitimate dreams of new generations exposed to real opportunities for advancement denied to preceding generations…'[50]

A Constitution, which embodies civil and political rights and socio-economic rights, is based on the rule of law and guarantees the independence of the judiciary is a *necessary* condition for the achievement of such a society. It is not, however, a *sufficient* condition. The achievement of such a society requires many things. Amongst them is a commitment from the government to address the wrongs of the past, a cooperative and yet vigilant civil society, a strong and an independent judiciary to define the ambit of the Constitution and to hold the government accountable for its breaches of the law. Lest one be misunderstood, there is no suggestion that the courts will resolve all the ills of society created by apartheid. They have their specific functions. And further, they have their own limitations.[51] According to the former Chief Justice of India P.N. Bhagwati:

> 'We must always remember that social action litigation is a necessary and valuable ally in the cause of the poor, but it cannot be a substitute for organization of the poor, development of community self-reliance and establishment of effective organizational structures through which the poor can combat exploitation and injustice, protect, and defend their interests and secure their rights and entitlements.'[52]

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[50] *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* (note 10 above) para 43.

[51] See GN Rosenberg *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago 1991), and GN Rosenberg 'Knowledge and Desire: Thinking about Courts and Social Change' in David A. Schultz *Leveraging the Law: Using the Courts to Achieve Social Change* (Peter Lang 1998) .

[52] Quoted in J Cooper 'Public Interest Law Revisited' (1999) 25 *Commonwealth L Bulletin* 135, 140.

Thus another important point is that the people must be empowered to take care of themselves and not to be perpetually dependent on handouts from the State. But before that goal is realised, the government must give effect to its obligations under the Constitution. In this context this study contributes towards the broader debate about how the Constitution can be used as a means of alleviating poverty, and the courts as instruments to articulate and enforce the socio-economic rights contained in the Constitution.

1.5 Scope of Inquiry

This study is divided into seven discursive chapters including this chapter. The second chapter will deal with the recognition of social and economic rights as legal rights. This discussion looks at various international and regional human rights instruments which recognise socio-economic rights and the way in which these rights are reflected in those instruments. A comparison is also made with India as a country which, although it does not have justiciable socio-economic rights, has enforced socio-economic rights through widening the interpretation of civil and political rights. The third chapter will look at the meaning of the concept of 'progressive realisation' as articulated in ss 26(2) and 27(2) of the Constitution. In so doing reliance will be placed on the United Nations General Assembly Comments, the Maastricht Guidelines and the Limburg Principles. In chapter four the relationship between the rules of *locus standi* and socio-economic rights will be examined. It will be argued that our courts should learn from examples of how other countries have expanded the notion of locus standi to accommodate poor and marginalised groups in society. Chapter five examines the various judicial remedies that obtain under the common law and how these remedies have been affected by the Constitution. New remedies are proposed to cater for the socially vulnerable groups in society and to vindicate the rule of law. The sixth chapter examines the availability and effectiveness of other non-judicial remedies. The Human Rights Commission and the office of the Public Protector are used as

examples of the institutions which serve the role of promoting human rights alongside the courts. The weaknesses of these institutions will be discussed and proposals will be made on how these institutions can overcome these weaknesses to ensure that these institutions serve as effective bodies in the promotion of human rights. Chapter seven is the conclusion. It is a summary of the study in which the key aspects will be highlighted.

CHAPTER 2

THE CONSTITUTIONAL RECOGNITION OF SOCIAL AND ECONOMIC RIGHTS

2.1 INTRODUCTION

This chapter traces the legal recognition of socio-economic rights from an international law perspective. The term 'socio-economic rights' is used to refer to the rights under section 24 to section 29 of the Constitution. This chapter follows the debates that led to their incorporation into the South African Constitution. It lays the basis for their interpretation in the context of addressing poverty and addressing inequalities. In this chapter, it is argued that the Constitution is a starting point in the efforts to erode poverty and inequality. The recognition of socio-economic rights as justiciable rights affirms that assertion. The challenge facing those committed to the erosion of poverty and inequality is about how the rights can be converted from paper guarantees to reality. All the arms of government have a role to play in this effort. The legislature can do so through developing just legislation which facilitates access to the rights in question. The executive has to administer and implement the law in a fair manner which is sensitive to the needs of the disadvantaged groups. The judiciary has a duty to interpret the Constitution and to ensure proper checks and balances between the other arms of government. All these arms of government have an overall responsibility to uphold the Constitution. They should do so collectively driven by a common goal of facilitating access to justice to everybody, especially the poor and the downtrodden.

2.2 DEFINING HUMAN RIGHTS

The introduction of the Constitution in South Africa signifies a paradigmatic shift from the previous 'rights' regime. Whereas previously, rights existed in extra-

constitutional forms, this has largely been superseded by the advent of the new Constitution. Because the principle of constitutional supremacy now obtains, all law derives authority from the Constitution. Any practice or law has to conform to the spirit and tenor of the Constitution.[1] Constitutional supremacy applies universally and so applies in the field of social and economic rights. Whereas, the state may have been under a moral duty to provide housing, social security and other socio-economic benefits to its citizens, it is now constitutionally obliged to do so. Failure has to be justified.[2]

It is necessary at the outset to define human rights. Two major theories occupy a central stage in the debate about the meaning of human rights. The first conceives of human rights as independent from the legal instruments. Central to this conception is that rights are independent from the legal system and that human beings have some claims from society simply because they are human. Rights are seen more as natural in the sense that all people deserve to live life in dignity and respect irrespective of their social, economic and other circumstances. Thus it is only when the functionaries of the state help individuals to realise their maximum potential that a just and fair society could be achieved.

The second theory is that human rights are not 'rights' unless they receive some form of legal recognition either by a statute or, as in many countries, the Constitution. In this sense, standards for the achievement of those rights are set and means of ensuring compliance are also designed. This set up also provides remedies against breaches of these legal rights. According to this theory human rights can only derive authority if they are inscribed in legal documents, institutions for implementation created and remedies against breaches provided. In this sense the state may legislate for the protection of the individual as well as

[1] See *Pharmaceutical Manufactures Association of SA*; *In Re Ex Parte Application of the President of RSA and Others* 2000 (3) BCLR 241 (CC) para 44.

[2] See *S v Makwanyane* 1995 (3) SA 391 (CC) para 156. See also E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31.

develop policy measures to ensure that the individual fully realises his or her being.[3]

But as we have seen, the theoretical meaning of rights will not play a significant role in the interpretation of the Constitution. In *S v Makwanyane*[4] the Constitutional Court stressed the importance of looking into the structure of the words that are used in the text and also paying due regard to the values underlying the text. In *S v Mhlungu*[5] Mahomed DP cautioned against the use of 'the austerity of tabulated legal formalism'. In our context the values that permeate the text of the Constitution are human dignity, equality and freedom. The test of the constitutional state is the extent to which these values, which in a way are also 'moral' standards, guide the interpretation of the words used in the statute, which is seen as guaranteeing 'legal' rights. The Constitution of South Africa commits the nation to the goal of attaining social justice and the improvement of the quality of life for everyone.[6] The Constitution recognises everybody's civil and political rights. It enjoins the state to progressively make available to everyone their social and economic rights.[7]

2.3 INTERNATIONAL RECOGNITION OF SOCIO-ECONOMIC RIGHTS

Social and economic rights are drawn from diffuse sources. Steiner and Alston argue that the recognition of the entitlement of man to inherent dignity and hence to subsistence can be traced from Christian sources. In Catholicism, for instance, papal encyclicals promoted the right to subsistence with dignity and have had programmes to care for the poor and the needy in society. Other sources have

[3] See P Sieghart *The International Law of Human Rights* (Clarendon Press: Oxford 1983) 6-23.

[4] *S v Makwanyane* (note 2 above) para 9.

[5] *S v Mhlungu* 1995 (3) SA 867 (CC) para 8.

[6] *Government of the RSA and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 1.

[7] See sections 26(2) and 27(2) of the 1996 Constitution (the Constitution).

little to do with Christianity. Philosophers like Karl Marx recognised the need to fight injustice and deprivation of workers and wanted to guarantee humane conditions for all workers of the world. Bismarck of Germany introduced the first social insurance schemes in Germany during the early 1880s.[8]

One of the earliest legal documents, however, to recognise socio-economic rights of workers as 'rights' at an international level was the Convention of the International Labour Organisation (the ILO). The ILO was established under the Treaty of Versailles and was seen by some as a response to the rise of Bolshevism after the Russian revolution of 1917. The ILO's main objective is 'to abolish the injustice, hardship and privation which workers suffered and to guarantee fair and humane conditions of labour'.

In the United States of America, interesting developments took place towards the end of the Second World War. The President at the time, Franklin D. Roosevelt spelt out his dream of the future world order. He was of the view that 'freedom from want' should constitute the basis of the new world order and in his address to the Union in 1944 he said that 'necessitous men are not free men.' [9] In his speech he also included a list of rights, which he felt should be included in the 'second bill of rights'. These included, the right to have a remunerative job, the right of every family to a decent home, the right to adequate medical care, to enjoy good health, to a good education and to adequate protection from sickness and disability. He further urged the American society to move forward in the 'implementation of these rights to new goals of happiness and well being'.[10]

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[8] H Steiner and P Alston *International Human Rights in Context Law, Politics, Morals* (Clarendon Press-Oxford 1996) 256 (hereafter Steiner and Alston).

[9] Eleventh Annual Message to Congress (11 January 1944) in FL Israel (ed) *The State of the Union Messages of the Presidents, 1790-1966* (New York: Chelsea House 1966) 3 2875, 2881.

[10] R Russell and J Muther *A History of the United Nations Charter: The Role of the United States 1940-1945* (Washington DC: Brookings Institution 1958) 786. See also J Dugard *International Law: A South African Perspective* (Cape Town: Juta 1994) 198-230.

These views were reflected in the International Bill of Rights, which was drafted by the American Law Institute (the ALI). The ALI enjoined states to ensure that man enjoys these freedoms, which are essential to his being. The proposals that came from the institute were reflected in the United Nations first draft of the Universal Declaration of Human Rights, which appeared first in 1947.[11]

The Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention of the ILO were among the first instruments in the world to recognise socio-economic rights. While the Universal Declaration of Human Rights contained social and economic rights alongside civil and political rights, the Covenant on Economic, Social and Cultural Rights was an exclusive and comprehensive document to give expression to social and economic rights. These documents still serve as models for regional declarations and many national constitutions in the protection of social and economic rights.

2.3.1 The United Nations Charter

The United Nations Charter (the Charter) makes it a duty for the United Nations to ' promote … higher standards of living, full employment and conditions of economic and social progress and development'. In addition, all members pledge themselves to take joint and separate action in co operation with the United Nations Organisation for the achievement of the purposes set in the Charter. As a result, members who sign the Charter have a duty to put into effect government programmes aimed at the attainment of a higher standard of living, a goal of the Charter.[12]

[11] Statement of Essential Human Rights, UN Doc A/148 (1947) Articles 11-15.

[12] Charter of the United Nations adopted 26 June 1945 entered into force 24 October 1945.

2.3.2 The Universal Declaration of Human Rights

In 1948 the Universal Declaration of Human Rights (UDHR or the Declaration) was adopted.[13] The adoption of the Declaration followed a period of massive human rights violations, which occurred during the Second World War. Largely, it was viewed as a response to those violations. It was intended to foster good relations amongst the nations of the world and to encourage all nations to work for peace and the attainment of a world order based on the respect of human dignity. In its preamble the declaration states:

> 'Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.'

The Declaration guarantees the rights of everyone to social security and to the realisation of the economic, social and cultural rights indispensable for his or her dignity and the free development of his or her personality.[14] It guarantees the right to work, to free choice of employment, to just and favourable working conditions, to equal pay for work and to form trade unions.[15] The Declaration also protects the right to rest and leisure, to education, to participate in cultural life, and to an adequate standard of living including food, clothing, housing and health and welfare provisions.[16] Article 26 recognises the right to education and it states that education shall be free, at least in the elementary fundamental stages. Article 28 provides for the right of everyone 'to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised'.

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[13] UNGA Res. 217 (111) adopted by 48 countries whilst 8 others abstained.

[13] Article 22 of the UDHR.

[14] Article 22 of the UDHR.

[15] Article 23 of the UDHR.

[16] Articles 24 and 25 of the UDHR.

This Declaration is not a treaty and is therefore not a legally binding document. In many jurisdictions however, its aspirations have been used as benchmarks in the development of human rights law and it is now regarded as customary international law. Provisions of the Declaration have thus infiltrated the domestic law in many countries and have informed the contents of many national constitutions. Its provisions have been cited in countless judgments in the sphere of international law worldwide.

2.3.3 The International Convention on the Elimination of all Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination was adopted by the General Assembly on 21 December 1965 and came into force in 1969. The Convention recognises that all human beings have inherent dignity, which must be protected. It sets its main objective as the elimination of race as a ground for unfair discrimination. It does not only prohibit racial discrimination but other forms of discrimination as well.

In order to achieve its objectives, the Convention enjoins the state parties to guarantee to their citizens social, economic and cultural rights.[17] The rights that the Covenant specifically mentions are the following;

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to equal pay for equal work, to just 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 and

[17] Article 5 of the Convention Against Racial Discrimination.

(vi) The right to equal participation in cultural activities.

The Covenant further requires member states to ensure that they establish within their jurisdictions effective institutions and remedies to deal with racial discrimination and generally other forms of discrimination.[18] State parties are also urged to adopt immediate and effective measures particularly in the fields of teaching, education, culture and information, with a view to combating prejudices, which lead to racial discrimination.[19]

2.3.4 The Declaration on Social Progress and Development

The Declaration on Social Progress was proclaimed by the General Assembly of the United Nations in 1969.[20] It spells out in broad terms the need to combat racism and discrimination and the need for states to take steps to achieve social progress and development as a part of combating discrimination. Article 2 of the Declaration states that social progress and development shall be founded on respect for the dignity and value of the human person and shall ensure the promotion of human rights and social justice.

The objectives of the declaration are to continuously raise material and spiritual standards of all members of society. For this to happen the states should strive to achieve the following goals;

(a) The assurance at all levels of the right to work, to form and join trade unions; to establish equitable and favourable conditions of employment; as well as a sufficiently high minimum wage to ensure a decent standard of living.
(b) The elimination of hunger and malnutrition and the guarantee of the right to proper nutrition.

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[18] Article 6 of the Convention Against Racial Discrimination.

[19] Article 7 of the Convention Against Racial Discrimination.

[20] UNGA Resolution 2542 (XXIV).

(c) The elimination of poverty.
(d) The achievement of the highest standard of health for the entire population free of charge where possible.
(e) The eradication of illiteracy and the assurance of the right to universal access to culture, to free compulsory education at the elementary level and to free education at all levels.
(f) The provision for all, particularly persons in low-income groups and large families, of adequate housing and community services.[21]

The Declaration further requires states to mobilise national resources and effectively utilise them for the attainment of these goals.[22] It calls upon states to adopt appropriate legislative and administrative measures to provide everyone not only their civil and political rights but also their social, economic and cultural rights as well.[23]

The Declaration is not a treaty and therefore not legally binding on states. It serves, however, as an inspirational charter on the standards of social progress that states must aim to achieve. In this sense it plays an important role in setting out how states can improve the social and economic well-being of their citizens.

2.3.5 The International Covenant on Economic Social and Cultural Rights

The International Covenant on Economic Social and Cultural Rights (the ICESCR or the Covenant) is a comprehensive instrument in the area of socio-economic rights internationally. It was initially conceived as an expansion of the Universal

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[21] Article 10 of the Declaration on Social Progress.

[22] Article 16 (a) of the Declaration on Social Progress.

[23] Article 18 of the Declaration on Social Progress.

Declaration on Human Rights and served as a counterpart of the International Covenant on Civil and Political Rights (the ICCPR).[24]

2.3.5(a) The Terms of the Covenant

The Covenant is a treaty and therefore has to be signed by countries wishing to be bound by its provisions. Although it was signed by some member states in 1966, it only came into effect in 1976. The Covenant guarantees a list of social and economic rights. These rights are: the right to work, including the right of everyone to the opportunity to gain his or her living by work which he or she freely chooses or accepts;[25] the right to just and favourable conditions of work, including fair remuneration, safe and healthy working conditions, equal opportunity for promotion, as well as reasonable working hours and paid holidays;[26] the right of trade unions to organise, subject to laws necessary for national security or public order or for the protection of the rights and freedoms of others; the right to strike, provided it is exercised in conformity with the laws of the particular country;[27] the right to social security;[28]the right to the protection of the family, mothers (including the right to maternity leave) and young persons;[29] the right to an adequate standard of living, including adequate food, clothing and housing and the continuous improvement of living conditions;[30] the right to the

[24] See C Scott 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 *Osgoode Hall LJ* 792. (hereafter Craig Scott) The author gives an account on why there are two covenants and not one. He says that at the time of drafting the treaties in 1951 the Soviet bloc argued that economic rights should be reflected in a Resolution of the General Assembly. These rights were to be recognised in the same document as the ICCPR. The western bloc disagreed with this motion and it was subsequently agreed that there should be two documents and the states should have an option of choosing which one to sign.

[25] Article 6 of the ICESCR.

[26] Article 7 of the ICESCR.

[27] Article 8 of the ICESCR.

[28] Article 9 of the ICESCR.

[29] Article 10 of the ICESCR.

[30] Article 11 of the ICESCR.

highest attainable standard of physical and mental health, which includes the improvement of environmental and industrial hygiene and the creation of services ensuring to all medical services and attention in the event of sickness.[31] The right to education, including compulsory and free primary education, generally available secondary education and higher education equally accessible to all, on the basis of capacity;[32] and the right to take part in cultural life.[33]

The implementation of the ICESCR is based on the principle of 'progressive realisation'. The Covenant also states that state parties shall take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of their available resources, to progressively achieve the full realisation of the rights in the Covenant. Relevant legislation must be adopted in order to give effect to socio-economic rights.[34]

The language that is used to give effect to socio-economic rights in terms of the ICESCR differs from the ICCPR (which is its sister covenant) as the latter obliges the state parties to immediately 'respect and ensure' the rights in the ICCPR.[35] However, as will be shown later, this difference does not mean that social and economic rights do not warrant immediate respect. Even the fact that these two sets of rights are contained in separate documents does not mean that they are separable from each other.[36]

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[31] Article 12 of the ICESCR.

[32] Article 13 of the ICESCR.

[33] Article 15 of the ICESCR.

[34] Article 2 of the ICESCR.

[35] Article 2 of the ICCPR.

[36] See Craig Scott (note 24 above) 780-781. He says that 'separation did not mean separability' and that these two sets of rights are 'interdependent and indivisible'.

The ICESCR is intended to enhance national and global social justice. It is designed to promote social progress, freedom from want, and better standards of life as envisaged by the Universal Declaration on Human Rights. As of July 1995 some 131 states, including 38 African states, had acceded to the treaty either by ratifying it or accepting its provisions.[37] At its inception the covenant was conceived of as breaking new ground in international treaty-making for two reasons: first, it linked the advancement of human rights directly to government policies to promote economic, social and cultural development and the adoption and execution of international economic and technical cooperation programmes; secondly, by so doing, the treaty is aimed at ensuring that economic and social development programmes safeguard and enlarge the enjoyment of human rights internationally.

2.3.5.(b) Machinery for Enforcement of the ICESCR

The ICESCR creates specialised agencies to oversee the implementation and enforcement of the Covenant amongst member states. The Covenant entrusted the Economic and Social Council (ECOSOC) with the task of considering reports which states are expected to provide regularly to the United Nations on the steps they have taken to promote and protect economic, social and cultural rights and in the progress made in the realization of these rights.[38] There currently exists a Committee of Experts which was established in 1986 to receive reports from state parties on behalf of the UN Secretary General. Apart from receiving the reports handed in by member states the Committee may make recommendations to ECOSOC on its study of these reports and of those it receives from special agencies of the United Nations.

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[37] See J Oloka-Onyango 'Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa' (1995) 26 *California Western Int LJ* 4 (hereafter Oloka-Onyango).

[38] Article 16 (2) (a)-(b).

This system is not without its problems. The first problem is that often when state parties make their reports, their focus is on the legislative mechanisms they have created in compliance with the Covenant. Often states' reports focus exclusively on legislative measures and do not go beyond these 'paper' protections of social and economic rights. They often do not report on statistics relating to successes or failures of poverty relief programmes, for instance, or other forms of assessing the efficacy of their legislative frameworks.

The second problem is the complexity of the reporting procedure itself. The procedure followed is set out in Articles 16 and 17 of the Covenant as follows. Reports must be submitted to the United Nations Secretary General. The Secretary General transmits the reports to the Committee and to specialised agencies. The Committee refers both state and specialised agency reports to the Commission on Human Rights, (a United Nations special body dealing with rights), for study and general recommendation or for information. The agencies and the states may then comment upon the Commission's recommendations. The Committee reports to the United Nations General Assembly with recommendations of a general nature and a summary of information from states and specialised agencies. Many states find it difficult to follow this procedure properly. A simpler procedure which allows the Committee some room to carefully assess the reports and also gives it access to some concrete data obtaining in the countries themselves is a desirable option.

The third problem relates to the nature of international law itself. Internationally human rights are enforced and implemented by persuasive rather than coercive means. Since there is no international 'government' there is no way in which states can impose their jurisdiction over other states. International law is governed by the principle of equality of states. There are bodies created in order

to ensure that the states meet their minimum obligations but, in essence the functions of these bodies are to 'formalise the persuasive process'.[39]

In an effort to counter some of these weaknesses, the Committee on Economic, Social and Cultural Rights has been preparing a draft protocol to the ICESCR to permit individuals and groups to have access to the complaints procedure against violations of social and economic rights to the UN.[40] The motivation for such a protocol is that governments will be more likely to take the Covenant seriously if their decisions can be reviewed by an international monitoring body.

The significance of the draft optional protocol is that it eases the complaints procedure. For the protocol to see the light of day it will need to be ratified and it will bind only those countries that ratify it. With the belief still held in some countries that socio-economic rights are not justiciable it will be difficult to extract this concession. Perhaps the solution will be found in De Wet's suggestion that those promoting the optional protocol must convince the others that 'almost all economic, social and cultural rights have some justiciable layers' the development of which could benefit greatly from a user-friendly complaints procedure.[41]

2.3.6 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (the Banjul Charter) was adopted in 1981 by the Organisation of African Unity (OAU). It came into force in 1986. It is founded upon the recognition that 'freedom, equality, justice and

[39] See M Schein, *Economic and Social Rights as Legal Rights* in A Eide et al (eds) Economic, Social and Cultural Rights: A Textbook (Martinus Nijhoff Publishers 1995) 41.

[40] E De Wet, 'Recent Developments Concerning the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (1997) 13 *SAJHR* 154 (hereafter De Wet).

[41] De Wet (note 40 above) 543. See also G Bekker 'An NGO Shadow Report on Socio-Economic Rights' (1999) *ESR Rev* 16.

dignity are essential objectives for the achievement of the legitimate aspirations of the African Peoples'. The Charter guarantees the right to property and gives the right to the state to only interfere where it is in the public interest to do so.[42]

The Charter also guarantees some social and economic rights. The rights that the charter guarantees include the following; the right to work under favourable conditions and to receive equal pay for equal work;[43] the right of everyone to attain the best attainable state of physical and mental health; the state has a duty to provide health care and medical facilities for the realisation of this right;[44] the right to education for everyone and the right of everyone to take part in cultural life;[45] the obligation on the state to ensure that the aged and the disabled receive special protection in keeping with their moral and physical needs.[46]

2.3.7. The European Social Charter

In Europe, a regional charter exists in the form of the European Social Charter. This Charter predates the ICESCR as it came into operation in 1961. Even though its status is that of a charter and not a treaty, it does however, determine quite an extensive list of social objectives that member states should seek to achieve.

The European Charter guarantees the right to work,[47] the right to just conditions of work,[48] the right to healthy working conditions,[49] the right of air

[42] Article 14 of the Banjul Charter.

[43] Article 15 of the Banjul Charter.

[44] Article 16 of the Banjul Charter.

[45] Article 17 of the Banjul Charter.

[46] Article 18 (4) of the Banjul Charter.

[47] Article 1 of the European Social Charter.

[48] Article 2 of the European Social Charter.

remuneration,[50] the right of workers to organize,[51] the right of workers to bargain collectively,[52] the right of children and young persons to protection,[53] the right of unemployed women to protection,[54] the right to protection of health,[55] and the right to social security.[56] Various committees that are established under the charter undertake the implementation of the charter. States bind themselves to observe the social policies contained in the Charter.

2.4 THE RECOGNITION OF SOCIAL AND ECONOMIC RIGHTS IN PARTICULAR JURISDICTIONS

2.4.1 As Directives of State Policy —The Indian Approach

The Indian Constitution does not contain socio-economic rights in a justiciable form. Instead, Article 37 contains a list of social and economic objectives of the state. These are called the directives of state policy. The Indian Constitution specifically states that these directives of state policy provisions 'shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws'.

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[49] Article 3 of the European Social Charter.

[50] Article 4 of the European Social Charter.

[51] Article 5 of the European Social Charter.

[52] Article 6 of the European Social Charter.

[53] Article 7 of the European Social Charter.

[54] Article 8 of the European Social Charter.

[55] Article 11 of the European Social Charter.

[56] Article 12 of the European Social Charter.

This has a two-fold meaning. The first is that a person cannot approach a court to seek relief on the basis that a socio-economic directive has been violated or ignored. The second is that the legislature is obliged to act in a manner that gives effect to the directives of state policy. This will apply in instances where laws and policies of the country are drafted and implemented. The ambit of 'making laws' is wide enough to include interpreting them and therefore the courts should give consideration to the principles when interpreting the law.[57]

The Constitution provides that the state shall endeavour to promote the welfare of the people by effectively securing and protecting a social order in which social, economic and political justice shall inform all the institutions of national life.[58] Article 39 provides for specific objectives. It requires that the state should direct its policy towards securing the right of citizens to an adequate means of livelihood; that the ownership and control of the material resources of the community be so distributed as best to serve the common good; that the economic system should not result in the concentration of wealth and the means of production to the common detriment; that there shall be equal pay for equal work for both men and women; that the state should endeavour to secure the health and strength of workers, men and women and to ensure that the tender age of children is not abused; and that the citizens are not forced by economic necessity to enter avocations unsuited to their age and strength and that childhood and youth are protected from exploitation and from moral and material abandonment.

The Constitution further provides for the right to work, to education and public assistance in certain cases.[59] In order to carry out this function the state must act within the limits of economic capacity. Public assistance is specifically required in

[57] HM Seervai *Constitutional Law of India* (4 ed) N M Tripathi Pvt Ltd Bombay: 1993, 2008.

[58] Article 38 of the Constitution of India.

[59] Article 41 of the Constitution of India.

cases of unemployment, old age, sickness and disability. Provision is also made for just and humane conditions of work and maternity relief,[60] to a living wage,[61] to free and compulsory education for children,[62] and the state is put under a duty raise the level of nutrition and the standard of living and to improve public health.[63]

2.4.1 (a) The Application of Directive Principles by Courts

The directive principles are not directly enforceable by courts of law.[64] The view that has been taken by the Supreme Court of India is that the directive principles and fundamental rights in the Constitution complement each other.[65] In *Minerva Mills Ltd v Union of India*[66] the court recognised the importance of directive principles stating that 'harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution'.

In *Kesavananda Bharati v State of Kerala*[67] Mathew J explained the relationship between the directive principles of state policy and fundamental rights in the following terms

> '…I think there are rights which inhere in human beings because they are human beings — whether you call them natural rights or by some other appellation is immaterial. As the preamble indicates, it was to secure the basic human rights like liberty and equality that the people gave unto

[60] Article 42 of the Constitution of India.

[61] Article 43 of the Constitution of India.

[62] Article 45 of the Constitution of India.

[63] Article 47 of the Constitution of India.

[64] B De Villiers 'Directive Principles of State Policy and Fundamental Rights: The Indian Experience' (1992) 9 *SAJHR* 29, 34 (hereafter De Villiers).

[65] *CB Boarding & Lodging v State of Mysore* (1969) 3 SCC 84.

[66] (1980) 2 SCC 591.

[67] (1973) 4 SCC 225, 880-881 para 1714.

themselves the Constitution and these basic rights are an essential feature of the Constitution; the Constitution was also enacted by the people to secure justice, political, social and economic. Therefore the moral rights embodied in Part IV of the Constitution are equally an essential feature of it, the only difference being that the moral rights embodied in Part IV are not specifically enforceable as against the State by a citizen in a court of law in case the State fails to implement its duty but, nevertheless, they are fundamental in their governance of the country and all the organs of the State, including the judiciary, are bound to enforce those directives. The fundamental rights themselves have no fixed content; most of them are mere empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgment, curtailment, and even abrogation of these rights in circumstances not visualised by the Constitution-makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in Part IV.'

In some cases the Supreme Court has not only emphasised the importance of harmonisation between fundamental rights and directive principles but has also given more weight to the directive principles over the rights. In one case the court held that the right of every child to education until they reach 14 years should be respected. The right to education is protected under Articles 41 and 45 as a directive of state policy. It has been held that this right is only 'subject to the limits of economic capacity and development of the State'.[68]

The Supreme Court has also used the directive principles to give content to the freedoms guaranteed by the fundamental rights. The right to life under the Indian Constitution has been used to give substance to the socio-economic directives. In *Olga Tellis and Others v Bombay Municipal Corporation and Others*[69] proceedings were brought to prevent the Bombay Municipality from carrying out its threat to evict the street dwellers from the streets of Bombay. The petitioners relied upon Article 21, of the Constitution which provides that no person shall be deprived of their life except according to a procedure established by law. The

[68] *Unni Krishnan v State of A.P* (1993) 1 SCC 645, 765.

[69] (1985) 3 SCC 545.

contention was that the street dwellers had a right to life, and that this right could not be exercised without the means of livelihood. It was further contended that the Bombay Municipality was contemplating taking away the right to life of the street dwellers in an arbitrary manner in that the street dwellers had not been given adequate notice of their eviction from the street and that there were no alternative accommodation arrangements in place. The procedure contemplated by the Constitution on the other hand had to be fair and reasonable.

The court held that the forced removal of the street dwellers was in violation of their right to life under the Indian Constitution. It held that the forcible removal of squatters even if they are resettled in other areas totally disrupts the economic life of the household. In coming to this conclusion the court found that Article 39 (a) of the Constitution which is a directive principle, provides that the state should direct its policy towards securing that all the citizens have the right to adequate means of livelihood. The principles should play a fundamental role in interpreting the Constitution. It held that '[i]f there is there is an obligation upon the state to secure to the citizens an adequate means of livelihood…it would be sheer pedantry to exclude the right to livelihood from the content of the right to life'. [70]

The *Olga Tellis* decision followed the reasoning of the court in *Francis Coralie Mullin v Administrator, Union Territory of Delhi*.[71] A detainee petitioned the Supreme Court on the grounds that she had been denied visits by her family. The court held that although the Constitution allows for deprivation of liberty, the actions of the authorities in this instance had violated the petitioner's right to human dignity, a component of the right to life. The Supreme Court in finding in favour of the petitioner said

> 'We think that the right to life includes the right to live with human dignity and all that goes with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for

[70] *Ibid* para 33.

[71] (1981) 1 SCC 608.

> reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow beings.
>
> Of course the magnitude and content of this right would depend upon the extent of the economic development of the country…[but] every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.'[72]

In *State of Himachal Pradesh v Sharma*[73] the applicant, who was a resident of a remote village complained that the villagers' only access to the rest of India was via a four to five mile descent down a steep mountain on foot and that under these circumstances democracy was meaningless to them. The government had in earlier years promised to construct a road to the village but it never did. The Supreme Court, in holding that the government was under a constitutional duty to construct the road, held:

> 'The applicant has also the right under art 21 to his life and that right under art 21 embraces not only physical existence of life but the quality of life and for residents of hilly areas, *access to a road is access to life itself* … To the residents of the hilly areas as far as feasible and possible society has [a] constitutional obligation to provide roads for communication.'[74]

Singh states that the difference between directives and fundamental rights is that fundamental rights are primarily aimed at assuring political freedom to the citizens by protecting them against excessive state action while the directive principles are aimed at securing the social and economic freedoms by appropriate action.[75]

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[72] *Ibid* 618-619. See also *Uppendra Baxi v State of Uttar Pradesh* (1986) 4 SCC 106.

[73] (1986) 2 SCC 68.

[74] *Ibid* 75 (italics mine). See also *Peoples' Union for the Democratic Rights v Union of India* AIR 1982 SC 1473 and *Pandey v State of West Bengal* [1988] LRC (Const) 241 (SC) where the same principle was used in the context of labour law.

[75] M P Singh *V N Shulka's Constitution of India* 9 ed (Lucknow Eastern Book Co: 1994) 299.

The Supreme Court stresses that there should be a balance between the two. It does not concentrate on what makes a directive principle unenforceable but rather on what social justice requires. The importance of this discussion on the Indian Constitution is that the Constitution does not expressly protect socio-economic rights as justiciable rights but this has not prevented the courts from making orders with clear socio-economic impact. The Supreme Court has stated that where the court is called upon to give effect to a directive policy or fundamental duty, it cannot shrug its shoulders and say that it is a matter of policy and therefore a matter for policy-making authority.[76]

2.5 THE INCLUSION OF SOCIO-ECONOMIC RIGHTS IN THE SOUTH AFRICAN BILL OF RIGHTS

2.5.1 The debates that preceded the recognition

The former president, Nelson Mandela, in 1991 said:

> 'A simple vote without shelter is to use first generation rights as a smokescreen to obscure the deep underlying forces that dehumanise people. We do not want freedom without bread nor do we want bread without freedom.'[77]

The recognition of socio-economic directives as legal rights which are justiciable has been subjected to attack on three fronts. The first is that these rights do not enjoy universal recognition internationally as rights.[78] They appear mainly as social goals of the state and not as rights.[79] This argument goes further to add

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[76] *Pandey v State of West Bengal* (note 74 above).

[77] N Mandela 'Address on the Occasion of the ANC's Bill of Rights Conference' (1991) CDS *A Bill of Rights for A Democratic South Africa* 12.

[78] E Mureinik 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *SAJHR* 464. A Sachs 'Towards a Bill of Rights in a Democratic South Africa' (1990) 6 *SAJHR* 1.

[79] DM Davis 'A Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *SAJHR* 475. H Corder et al *A Charter For Social Justice: A Contribution to the South African Bill of Rights Debate* Cape Town, University of Cape Town: 1992.

that in the South African context it would be better if social and economic rights were only recognised as directive principles because of the excessive demands that their implementation would place on the budget. It is pointed out that South Africa is a developing country with a high level of poverty and a skewed distribution of income.

Secondly, it has been argued that the recognition of social and economic rights is in violation of a constitutionally entrenched principle of separation of powers. The judiciary would, once these rights have been recognised, have to direct the government on how the budget should be spent. This effectively means that the judiciary would be interfering in a terrain that is primarily reserved for the legislature and the executive. The court is not a proper forum to make decisions on how the budget should be allocated.[80]

The third point is closely related to the second in that it has been argued that the nature of socio-economic rights requires expenditure of public resources. They cannot be achieved immediately but over a period of time. Civil and political rights are seen to be absolute and 'immediate' whereas social and economic rights are 'programmatic' and have to be realised over a period of time. The fact that they are not immediately achievable renders them non-justiciable. Internationally, it has been argued further, that justiciability is closely related to immediate availability. If the state cannot be ordered to immediately make the rights available to the people who claim them, then they can hardly be said to be justiciable.[81]

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[80] See A Eide 'Economic, Social and Cultural Rights as Human Rights' in *Economic Social and Cultural Rights* (note 39 above) 22. See also P De Vos 'Pious Wishes or Directly Enforceable Rights: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67.

[81] See G Van Bueren 'Alleviating Poverty Through The Constitutional Court' (1999) 15 *SAJHR* 52. Craig Scott (note 24 above) illustrates the problem of distinction between these rights by means of the following table and he concludes that such simplicity of division is untenable.

Economic, Social and Cultural Rights	vs Civil and Political Rights
1. Positive	vs Negative
2. Resource Intensive	vs Cost Free
3. Progressive	vs Immediate

2.5.2 The Constitutional Court Certification Judgment

In *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* (the Certification Judgment)[82] the Constitutional Court rejected all of these arguments against the inclusion of socio-economic rights as fundamental rights in a bill of rights. On the separation of powers point, the court reasoned that this could not be raised as an objection because even in the enforcement of civil and political rights, the court often makes decisions with budgetary implications without compromising the justiciability of such rights. It gave an example of a court directing the state to ensure a fair trial to an accused in a criminal case by providing that accused person with legal representation at the state's expense. The court concluded that it cannot be said that a task conferred on the courts to monitor the implementation of social and economic rights is different from the role it plays to monitor civil and political rights.[83]

The court held further that the fact that socio-economic rights almost inevitably give rise to courts making decisions with budgetary implications is not a bar to their justiciability. The court was of the view that socio-economic rights can at least be 'negatively protected from improper invasion'.[84] This judgment effectively put an end to the argument that socio-economic rights are not justiciable on the

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4. Vague	vs Precise
5. Unmanageably Complex	vs Manageable
6. Ideologically Divisive / Political	vs Non Ideological/ Non Political
7. Non Justiciable	vs Justiciable
8. Aspirations or Goals	vs 'Real' or 'Legal' Rights.

[82] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (hereafter Certification Judgment).

[83] *Ibid* para 77.

[84] *Ibid* para 78.

basis that they involve policy decisions and that they involve the courts in decisions which have budgetary implications.

The certification judgment was in line with the development of international jurisprudence on socio-economic rights. The Committee on Economic Social and Cultural Rights has recognised that for the realisation of both categories of rights, there is a need for states to acknowledge that they are inseparable and must coexist. To this extent the Committee has commented

> 'Full realisation of human rights can never be achieved as a mere by product or fortuitous consequence, of some other development no matter how positive. For that reason, suggestions that the full realisation of economic, social and cultural rights will be a direct consequence of, or will flow automatically from, the enjoyment of civil and political rights are misplaced.
>
> Such optimism is neither compatible with the basic principles of human rights nor is it supported by empirical evidence. The reality is that every society must work in a deliberate and carefully structured way to ensure the enjoyment by all of its members of their economic, social and cultural rights…
>
> Just as carefully targeted policies and unremitting vigilance are necessary to ensure that respect for civil and political rights will follow from, for example the holding of a free and fair elections or from the introduction or restoration of an essentially democratic system of government, so too is it essential that specific policies and programmes be devised and implemented by any government which aims to ensure the respect of the economic, social and cultural rights of its citizens and of others for whom it is responsible…
>
> Some governments in the industrialised countries tend to assume that that the existence of a genuinely democratic system and the generation of relatively high levels of per capita income are sufficient evidence of comprehensive respect for human rights. Yet, the committee's experience shows that that such conditions are perfectly capable of coexisting with significant areas of neglect of the basic economic, social and cultural rights of large numbers of their citizens. High infant mortality rate, a significant evidence of hunger and malnutrition, mass unemployment, large scale homeless people at least prima facie are examples of

> violations of economic social and cultural rights and hence human rights.'[85]

And as the former Tanzanian President, Julius Nyerere observed:

> 'What freedom has our subsistence farmer?... Certainly he has freedom to vote and to speak as he wishes. But these freedoms are less real to him than his freedom to be exploited. Only as his poverty is reduced will his existing political freedom become properly meaningful and his right to human dignity become a fact of human dignity.'[86]

Human rights, both civil and political as well as socio-economic rights, are in this sense no luxury. They are essential to a person's existence. They supplement and give meaning to the concept of human dignity.[87]

2.6 SOCIAL AND ECONOMIC RIGHTS IN THE BILL OF RIGHTS

The South African Constitution contains within it a number of social and economic rights. Most of these rights are derived from international instruments like the ICESCR and ICCPR. These rights are; the rights of workers to fair labour practices, to form and join trade unions, and to strike;[88] the right to a healthy environment;[89] the right of everyone to own property and the related property rights;[90] the right to have access to adequate housing which includes the right

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[85] Statement to the World Conference on Human Rights on behalf of the Committee on Economic, Social and Cultural Rights, UN Doc, E/1993/22, Annex III quoted by Steiner and Allston (note 8 above) 1127.

[86] Quoted by R Howard, 'The Full-Belly Thesis: Should Economic Rights take Priority over Civil and Political Rights? Evidence from Sub Saharan Africa' (1983) *Human Rights Quarterly* 476.

[87] See E Bondzie-Simpson 'A Critique of the African Charter on Human and Peoples' Rights' (1988) 3 *Howard LJ* 659. See also Craig Scott (note 24 above) 834.

[88] Section 23.

[89] Section 24.

[90] Section 25. This right also includes the right not to be deprived of ownership of property without lawful process and without fair compensation. The state ought to take 'reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis'.

not to be arbitrarily evicted from one's home;[91] the right of everyone to have access to health care, food, water and social security;[92] the rights of children to basic nutrition, shelter, basic health care services, and social services;[93] the right of everyone to basic education including basic adult education.[94]

The realisation of the rights under ss26 and 27 is based on the principle of progressive realisation. The realisation of these rights is also subject to the available resources. This is an internal limitation.[95] Some rights do not carry internal limitations. They are subject to the limitation imposed by section 36 which applies to all the rights in the Bill of Rights. They may be limited by law of general application that is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. [96]

2.6.1 Interpreting Socio-Economic Rights under the South African Constitution

The interpretation of the Bill of Rights is guided by section 39, which provides

'(1) When interpreting the Bill of Rights, a court, tribunal or forum-
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

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[91] Section 26. This section enjoins the state to take 'reasonable legislative and other measures within its available resources, to achieve the progressive realisation' of the right to access to adequate housing.

[92] Section 27 The state is also placed under an obligation to take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of each of the rights. This right includes the right not to be refused emergency medical treatment.

[93] Section 28.

[94] Section 29. This right is also extended to further education, which the state through reasonable measures must make progressively available, and accessible.

[95] It is not only ss 26 and 27 which carry internal limitations. Section 29(1) (b) does also carry such a limitation. See S Liebernberg *'Socio-Economic Rights'* in M Chaskalson (et al)Constitutional Law of South Africa Revision Service 3, 1998, (Juta and Co 1996) 41-6. In *Grootboom* (note 6 above) para 74 the Constitutional Court stated that although section 28(1)(c) does not refer to available resources, a proper construction of the section would entail taking into account the resources available.

[96] See s36.

(b) must consider international law; and
(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, the court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights and freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

Courts have a pivotal role in ensuring that the Constitution is made a living instrument. The courts must fashion their interpretation in a manner that ensures that the law as articulated by the Constitution finds expression in a social context.[97] The task that faces the courts was explained by one eminent author in these terms

> 'The central concern of legal interpretation is not the meaning of the words but the purpose and structure of the rules in terms of which the pattern of the words can be understood…[Judges] should be guided by a set of principles in forming a judgment…principles do not operate on an all-or-nothing basis. The strength of a principle is dependent upon its innate appeal and influence, which will determine the extent to which it guides or shapes a decision. […] In its struggle towards democracy South Africa needs a critical jurisprudence, one which allows us to examine the dominant values of the legal system; its quest for coherence and the structure and justification of it. In this manner law might assist in the transformation to a pluralist democracy rather than being a tool for social engineering towards a non-racial autocracy.'[98]

The interpretation of socio-economic rights occurs in the context of the overall interpretation of the Constitution. The rights in the Constitution reinforce one another. They are also not mutually exclusive but are interconnected to one another. In interpreting them, courts should take this factor into account. At the centre of the new constitutional framework are values which must be upheld each time the courts give meaning to the words in the Constitution. The

[97] In *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2000 (12) BCLR 1322 (E) 1325F-G, Froneman J recognised the importance of applying law in a given social context. See also Didcott J's comments in *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 14.

[98] DM Davis 'Integration and Ideology: Towards a Critical Theory of the Judicial Function' (1996) 113 *SALJ* 104, 130.

Constitution commits the nation to the goal of attaining social justice. It seeks to lay a foundation for the recognition and respect of 'human dignity, equality and freedom'. It has been noted that the value of human dignity is central to the interpretation of social and economic rights.[99] In interpreting the Constitution courts must consider applicable international law and may consider relevant foreign law.[100]

While international law and foreign precedents offer great value and assistance in the interpretation of the Constitution, the Constitutional Court has warned that 'the use of foreign precedent requires introspection and acknowledgment that transplants require careful management'.[101] The courts have developed a theoretical framework for the interpretation of the Constitution. They require that the Constitution be read textually and contextually.[102] The true meaning of the Constitution can only be arrived at when the overall structure of the Constitution is looked at.[103] This means that the court must look both at the text as well as historical, social and political context of the rights.[104]

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[99] See *Grootboom* (note 6 above) para 1.

[100] See Section 39(1)(b)-(c). See also *S v Makwanyane* (note 2 above) paras 36-37.

[101] *Sanderson v Attorney General (Eastern Cape)* 1998 (2) SA 38 (CC) para 26.

[102] See *S v Zuma and Others* 1995 (2) SA 642 (CC) paras 17-18 where the Constitutional Court stressed the importance of the text of the Constitution in the following terms: 'While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Wilberforce's reminder that even a constitution is a legal instrument, the language of which, must be respected. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination.'

[103] See *S v Makwanyane* (note 2 above) para 10.

[104] *Grootboom* (note 6 above) para 22, *President of RSA v Hugo* 1997 (4) SA 1 (CC) para 41, *S v Mhlungu* (note 5 above) para 10, *Sanderson v Attorney General, Eastern Cape* 1998 (2) SA 38, 50 para 22, *S v Williams and Others* 1995 (7) BCLR 861 (CC) 877 para 47, *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC) para 165, *Beukes v Krugerdorp Transitional Local Council and Another* 1996 (3) SA 467(T) 474G-H, *Shabalala v Attorney General of the Transvaal* 1996 (1) SA 725 (CC) *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 26.

The values that the Constitution embodies play a significant role in informing its interpretation. The Constitutional Court has noted the centrality of these values in the context of socio-economic rights. In *Government of the RSA and Others v Grootboom and Others* Yacoob J stated

> 'Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.'[105]

2.6.2 The Obligations of the State in Respect of Social and Economic Rights

The Constitution enjoins the state to take positive action to realise the rights contained in the Constitution. Henry Shue, an American scholar, developed a three-tiered definition of social and economic obligations that has been adopted by many commentators and followed by the United Nations in much of its work in this field. The structure of government duties was originally used to examine the protection of subsistence rights but has been applied by commentators to both civil and political as well as socio-economic rights. Section 7(2) of the Constitution follows this three tired definition of the obligations of the state to realise the fundamental rights. It provides that the state 'must respect, protect, promote, and fulfil the rights in the Bill of Rights.' The three types of obligations that this formulation creates are, first, the obligation to respect, secondly to protect and thirdly to promote and fulfil the rights in the Bill of Rights.

[105] *Grooboom* (note 6 above) para 23. See too A Chaskalson 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 193.

2.6.2 (a) The Obligation to Respect

The obligation to respect socio-economic rights is to the effect that the state may not infringe the rights in question. The thrust of many socio-economic rights is that they place positive duties on the state. They also invariably place a negative obligation on the state to refrain from their infringement. For instance, the state would be infringing socio-economic rights if it carried out arbitrary evictions or denied people access to means of subsistence like pensions or other forms of state grants without lawful justification. The Constitution provides in s26(3) that 'no one may be evicted from their home or have their home demolished, without an order of court made after considering all the relevant circumstances'. Section 27(3) states that 'no one may be refused emergency medical treatment'.

Most civil and political rights are couched in this language. Both civil and political rights and socio-economic rights may therefore be infringed in this way. The administrative justice provision is an important means to ensure that the obligation to respect human rights is adhered to. In the South African context, it has been utilised extensively in the area of the protection of the right of access to social security.[106]

2.6.2 (b) The Obligation to Protect

The obligation to protect socio-economic rights is a positive obligation that is placed on the state. The state has an obligation to ensure that a framework exists to enable citizens to enjoy their rights without interference from others.

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[106] The following cases demonstrate how the courts used the right to administrative justice to defend already existing social benefits *Rangani v Superintendent-General, Department of Health and Welfare* 1999 (4) SA 385 (T*), Bushula v Permanent Secretary Department of Welfare Eastern Cape Provincial Government* 2000 (7) BCLR 728 (E), *Bacela v MEC for Health and Welfare (*EC) 1998 All SA 525 (E), *Ngxuza and Others v MEC for Welfare and Another* (note 97 above). *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) dealt with the prevention of unlawful eviction from housing in the context of section 26 of the Constitution.

This includes ensuring that private bodies do not act in a manner that violates peoples' social and economic rights. De Vos states 'the obligation is not to act positively in the sense of providing money or resources directly to individuals, but to protect individuals by creating a framework in which they will be able to realise their protected rights without interference by others'.[107]

The obligation to protect therefore, whilst it does not only create a negative duty for the state is not resource based but requires the state only to create 'an enabling environment' for the enjoyment of socio-economic rights. This can be done by making policies and legislation which facilitate the enjoyment of these rights.[108]

2.6.2 (c) The Obligation to Promote and Fulfil Human Rights

The obligation to promote and fulfil comprises of the duty to create an enabling environment for the enjoyment of socio-economic rights. It also enjoins the state to take positive action to assist those who cannot do so on their own to enjoy their rights fully. The state ought to make provisions for basic commodities to individuals, especially vulnerable and disadvantaged communities. Because such people generally do not have means to access these basic services the state ought to make them available.[109] The South African Constitution is, however, a far cry from the commonly held perception of s ocio-economic rights as commodities to be dispensed by the state on demand and free of charge.[110]

[107] De Vos (note 80 above) 83.

[108] *Grootboom* (note 6 above) para 35.

[109] See for instance the report of the South African Human Rights Commission on Economic and Social Rights 1999/2000 which reported that approximately 20 million people in South Africa live below the poverty line and that the poverty alleviation programmes of the government reach only 2,8 million of those people. The full report can be accessed from the Human Rights Commission website at www.sahrc.org.za .

[110] *Ibid* para 95.

The Constitution provides for access to the rights under ss 26 and 27.[111] This is in recognition of the fact that individuals and groups in society have divergent socio-economic needs because of their different socio-economic standing. The state has a duty to provide individuals in different social circumstances with appropriate measures to help them realise these rights. These may include subsidy allocations and other measures. In other words, this means that a state department must have a programme. This programme must take into account the different circumstances that exist for the different people that are served by the department. The Constitutional Court has held that such a plan will not have sufficiently complied with the constitutional requirements if it makes no provision for people in desperate and crisis conditions.[112]

In carrying out these obligations the state must act rationally and in good faith and is required to justify its failure to carry out its obligations.[113] In *Soobramoney*[114] this duty was emphasised and the court concluded that it could see no reason to interfere with rational policies of government made in good faith. Sections 33 and 36 reinforce this duty. Section 33 guarantees the right of everyone to just administrative action. Section 36, which deals with limitations of the rights in the Bill of Rights requires any limitation of a fundamental right to be effected in terms of a law of general application and the limitation should be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom…'.

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[111] Both sections use the qualification of 'progressive realisation'.

[112] In *Grootboom* (note 6 above) para 44.

[113] See K O'Regan 'Introducing Socio-Economic Rights' (1999) 1 *ESR Rev* 2. See too *Pharmaceutical Manufactures* (note 1 above) para 90. See also Mureinik (note 2 above) 32.

[114] *Soobramoney* (note 7 above) para 30. See also Yacoob J's comments in *Grootboom* (note 6 above) para 42 where he asserts that that the standard that must be used to assess whether or not the state has complied with its constitutional duties under section 26 (2) is whether or not the measures that have been adopted are reasonable under the given circumstances…. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable.[…] A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question is whether the measures that have been adopted are reasonable.'

2.7 CONCLUSION

Since the First World War and probably even earlier than that, attempts have been made to search for space for socio-economic rights in the global human rights agenda. That space has to a large extent been found. Many international instruments now recognise socio-economic directives as rights. There is, however, a recognition that the implementation of these rights may not be possible immediately, which is why many instruments grant some form of discretion for states to take steps progressively towards the implementation of those rights. The South African Constitution approaches the implementation of socio-economic rights in much the same way. The major challenge facing South Africa is to ensure that the gains represented by the inclusion of social and economic rights in the Constitution are irreversible. The state must ensure that steps are taken to deliver on these constitutional obligations. This will not happen overnight. But steps must be taken immediately to ensure that the dream of social and economic justice as set out in the preamble of the Constitution becomes a reality. The Indian Constitution and the manner in which the Indian Supreme Court has interpreted it shows that even in countries where there is no express provision of directly enforceable socio-economic rights in the Constitution, the court can 'read in' the socio-economic provisions to other directly enforceable rights. Although the South African Constitution is differently structured to the Indian Constitution, the South African courts can learn a great deal from the Indian jurisprudence in dealing with the enforcement of socio-economic directives. What has informed the interpretation of the Indian Constitution is the need to address socio-economic imbalances in post-colonial India. The courts have had to reject old fashioned rules and methods of interpretation to accommodate the Indian poor and to facilitate access to justice for the majority. This is a valuable lesson for the South African judiciary, especially in respect of socio-economic rights. Such an approach will vindicate

the Constitution as an operational and effective landmark in the quest for respect, protection, promotion and fulfillment of human rights.

CHAPTER 3

DEFINING 'PROGRESSIVE REALISATION' UNDER THE CONSTITUTION

3.1 INTRODUCTION

The following discussion deals with the concept of progressive realisation and its significance in the enforcement of socio-economic rights. The Maastricht Guidelines together with the Limburg Principles are referred to extensively. Guidance is also sought from the United Nations General Assembly Comments to define the scope and content of the state's obligations under sections 26(2) and 27(2). The cases of *Grootboom*[1] and *Soobramoney*[2] are used as the first 'socio-economic rights' cases to reach the apex court so far. In both cases it is noted that the Constitutional Court has stayed clear of interfering in the role of the executive and the legislature. In the *Soobramoney* case, the Court used rationality as a benchmark to determine whether or not the decisions taken by the government were in accordance with section 27. In the *Grootboom* case, the court said that in any challenge based on section 26(2), the enquiry would be whether or not the measures that the government has adopted were reasonable to realise the rights in the section. It is noted that the principal difference between these two cases is that in *Grootboom* the applicant was able to show what the applicant had failed to show in *Soobramoney*: namely that the state had failed in its duty to progressively realise the socio-economic rights in the Constitution. It is concluded that progressive realisation is about careful and detailed planning. It is proposed in this chapter that the Municipal Systems Act 32 of 2000, which has as one of its objectives to 'assist national and provincial government in progressive realisation of the fundamental rights in the Constitution' will serve as an instrument through which compliance with sections 26(2) and 27(2) in particular

[1] *Government of RSA and Others v Grootboom and others* 2000 (11) BCLR 1169 (CC).

[2] *Soobramoney v Minister of Health, Kwazulu Natal* 1998 (1) SA 765(CC).

could be tested. The Act requires each municipality to develop an Integrated Development Planning (the IDP) as a planning strategy to deliver basic social services to the people. Where the local municipality has not adopted an IDP then it could be argued that it is not complying with its constitutional obligations in so far as socio-economic rights are concerned.

The achievement of the rights under sections 26 and 27 in the Constitution is based on the principle of 'progressive realisation'.[3] These rights have been described as rights of access to subsistence, for without access to them it is difficult to comprehend how human beings can survive. In this way they are at the core of the existence of mankind.[4]

The International Covenant on Economic Social and Cultural Rights (the ICESCR or the Covenant) provides that 'each party 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 realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.[5]

Sections 26(2) and 27(2) of the Constitution provide that 'the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights'. There are thus three distinct elements contained by the language of these sections. They are 'progressive realisation', 'legislative and other mechanisms' and 'within the available resources'. These elements will be discussed in the following section.

[3] Sections 26 and 27 of the Constitution make provision for the right of access to housing, water, food, health care, adequate and social security.

[4] A Chaskalson 'Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 193, 203.

[5] Article 2 (1) of the ICESCR.

3.2 PROGRESSIVE REALISATION

3.2.1 The Limburg Principles

From the 2nd to the 6th June 1986, a group of distinguished legal experts in international law met in Netherlands, under the auspices of the International Commission of Jurists (the ICJ). The purpose of the meeting was to consider the nature and scope of the obligations of the states in terms of the ICESCR, the reporting procedure by the Economic and Social Rights Council (the ECOSOC) and the international co-operation to realise social and economic rights. The outcome of the meeting was that it was necessary to develop some guidelines to guide state action in the performance of their duties under Article 2(1) of the ICESCR. These were documented and published worldwide and are referred to as the 'Limburg Principles'. They are used as an unofficial guide to the interpretation of the state action under the ICESCR. They are relevant in the interpretation of social, economic internationally and social rights and especially in South Africa where most of the social and economic rights are provided for in similar language to the ICESCR.

The Limburg Principles recognise that the full realisation of some economic and social rights is to be achieved progressively. Some rights can be made justiciable immediately while others are justiciable over time.[6] It is stated in the Limburg Principles that the achievement of economic and social rights may be realised in a variety of political settings and there is no single road to their full realisation.[7] The report called for full participation by state and non-state actors as being indispensable for the full realisation of socio-economic rights. The state must

[6] Limburg Principles (1986) para 8. The Principles are reproduced in *Human Rights Quarterly* (1987) 9 No 2.

[7] Limburg Principles para 6.

always act in good faith to fulfil the obligations it has accepted under the ICESCR.

The ICESCR obliges the state parties 'to achieve progressively the full realisation of rights'. This according to the principles means that the state is required to move as expeditiously as possible towards the realisation of the rights. Under no circumstances shall this be interpreted as implying for states the right to defer indefinitely efforts to ensure full realisation. On the contrary all states parties have the obligation to begin immediately to take steps to fulfill their obligations under the Covenant.[8] Some obligations under the Covenant require immediate implementation in full by all state parties.

The obligation of progressive realisation exists independently of the increase in resources available to the state. This is so because apart from requiring the state to avail resources for progressive achievement of the rights it requires effective use of available resources.[9] Progressive implementation can be effected not only by increasing resources, but also by the development of societal resources necessary for the realisation by everyone of the rights recognized in the Covenant.[10]

3.2.2 The Maastricht Guidelines

After ten years of the existence of the Limburg Principles, a group of more than thirty experts met in Maastricht under the auspices of the International Commission of Jurists (the ICJ) with the purpose of elaborating on the Limburg Principles with regard to the nature and scope of violations of economic, social and cultural rights and the appropriate responses and remedies. The resolutions

[8] Limburg Principles para 21.

[9] Limburg Principles para 23.

[10] Limburg Principles para 24.

and observations that were made at the meeting were documented as the Maastricht Guidelines and have been used worldwide to identify the violations of social, economic and social rights and to provide for appropriate remedies thereto. They have been quoted in many judgments locally and internationally. They are of great use to the interpretation of the provisions of the Covenant and are also important in determining the instances where these rights are violated.

The Maastricht Guidelines recognise that since the end of the Cold War there has been a trend in all regions of the world to reduce the role of the state and to rely on the market to resolve problems of human welfare. The guidelines also recognise that it is no longer taken for granted that the realisation of economic and social rights is primarily the responsibility of the state and state action is the starting point to their full realisation.[11]

The guidelines state further that as in the case of civil and political rights, states may enjoy a margin of discretion in selecting the means for implementing their respective obligations. State practice and the application of legal norms to concrete cases and situations by international treaty monitoring bodies as well as by domestic courts have contributed to the development of universal minimum standards and the common understanding of the scope nature and limitation of economic social and cultural rights. The fact that full realisation of economic, social and cultural rights can only be achieved progressively, does not alter the nature of the legal obligation of states which requires that certain steps be taken immediately and others as soon as possible. Therefore, it is upon the state to demonstrate that it is making measurable progress towards the realisation of the rights in question.

A state party cannot use the progressive realisation provisions of article 2 of the Covenant as a pretext for non-compliance. Nor can the state justify derogations

[11] Maastricht Guidelines on Violations of Economic, Social & Cultural Rights (1997) para 2 (hereafter Maastricht Guidelines). These guidelines can be accessed at www.umn.edu/humanrts/.

or limitations of rights recognised in the Covenant because of different social, religious and cultural backgrounds.[12] In this sense the concept of progressive realisation means that states must take steps over a period of time to ensure the full realisation of some social and economic rights. Strategies for their realisation differ depending on the circumstance of each and every country.

Eide suggests that governments should establish nation-wide systems of identifying local needs and opportunities for the enjoyment of economic and social rights. They should identify different groups in society, which have difficulties in accessing socio-economic rights. Socio-economic rights are needs based and therefore the information gathering exercise should have as its main focus the identification of local needs. When the government has identified the area of most pressing need it can develop strategies and policies that can produce tangible and concrete results. The blueprint or general model may not fit each country in a similar way. Again whilst there is an appreciation of different circumstances which obtain in each country that should never be used as a pretext not to provide access to socio-economic rights.[13]

The Constitutional Court has said that the use of the term ' progressive realisation' in section 27(3) of the Constitution is in recognition of the fact that 'the Constitution … cannot solve all society's woes overnight, but must go on trying to resolve these problems.'[14]

3.2.3 UN General Assembly Comments

ECOSOC (the Committee), a subcommittee of the United Nations, analyses reports submitted by states about their compliance with the Covenant. The

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[12] Maastricht Guidelines para 8.

[13] A Eide *'Economic, Social and Cultural Rights as Human Rights'* in Economic Social and Cultural Rights: A Textbook Eide et al eds (Marticuns Nijhoff 1995) 21, 40.

Committee then makes observations about the nature of the reports of the states. Their observations are called comments and are often used as guidelines to measure compliance of the states with their obligations under the Covenant. They are an official reference point. States are often placed under a duty to observe standards set by the Committee in its comments.

The UN General Assembly commentary[15] has urged states to include in their reports information which shows progressively, steps taken towards the realisation of socio-economic rights. The commentary states further that both qualitative and quantitative data are required for an adequate assessment of the situation to be made.

In 1990, the UN General Assembly[16] sought to provide content to the concept of progressive realisation in the following manner

> 'The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be achieved in a short period of time… Nevertheless, the fact that the realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the other hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être,* of the Covenant which is to establish a clear obligations for states parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.'

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[14] *Soobramoney* (note 2 above) para 43. See also *Grootboom* (note 1 above) para 45.

[15] UN General Assembly Comment No1 (1989) *'Reporting by State Parties'*.

[16] UNGA Comment No 3 (1990).

Progressive realisation also inhibits the state from taking retrogressive measures to deny its citizens access to socio-economic rights.[17] However, a distinction should be drawn between measures which are taken in order to extend the level of benefit to other social classes which previously did not enjoy such benefit and measures which deny citizens the right of subsistence and do not benefit anyone altogether. The suspension of a person's social grant, for instance, without lawful justification, which has an effect of denying him or her access to the means of subsistence will not be compatible with the spirit and tenor of progressive realisation and hence of the Bill of Rights. By the same token where the state reduces the level of benefit from one sector of the population, say white orphaned children, in order to extend such child support system to black orphaned children who were previously not catered for by the system, such measures may not be incompatible with the requirements of progressive realisation. The onus, however, rests on the state to prove that the decision was made bona fide and that it guarantees access to those benefits to another section of the population, which previously did not enjoy such benefits.

3. 2 WITHIN THE AVAILABLE RESOURCES

Whereas some years ago, all the essentials of life could be found outside the organised society, today most people depend on the organised society for their needs. The state in most developed and developing countries has become the major provider of employment and social security. In this sense organised society in the form of the state has also received a responsibility to cater for the needs of the unemployed and those without access to basic services like water, shelter and food. The need to improve the social conditions of the lower classes in society gave rise to the development of the welfare state in the nineteenth

[17] See A Chapman 'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 *Human Rights Quarterly* 23.

century.[18] This has largely been replaced by what is referred to as the 'benefactor state'.[19] The characteristics of the benefactor state have not changed significantly from the welfare state. The only distinction is that the creation of the welfare state was inspired by the need to advance backward social classes through the provision of social services. The model benefactor state is also inspired by the desire to improve the social conditions but it also wants to improve the economy of the state.[20]

The recognition that the state has become the major role-player in the day to day activities of mankind has made many people to be dependent on the state also for their physical survival. But there is a potential conflict between the provision of basic services and the development of the state economy. This becomes so especially where the disparities between the poor and the rich are as high as is the case in South Africa. It is therefore necessary to ensure that a balance is maintained between these two apparently competing needs. It is necessary to develop an approach that extends the basic services to the poor whilst it ensures that there is minimal interference with the body politic. This, according to Wiechers, is a 'pragmatic, middle-of-the-road approach'.[21]

Because of the need to avoid tension and potential conflict[22] the ICESCR requires the states to devote the 'maximum of its available resources' to realising economic, social and cultural rights. The resource constraint is used in the recognition that the state has other responsibilities that it must fulfill but in so doing it must also make provision for social and economic rights. The South African Constitution uses the words 'within its available resources' while the

[18] C Reich 'The New Property' (1964) 73 *Yale LJ* 733.

[19] M Wiechers 'Administrative Law and the Benefactor State' (1993) *Acta Juridica* 248, 251

[20] *Ibid* 251.

[21] *Ibid.*

[22] See *Soobramoney* (note 2 above) para 11.

Covenant uses 'to the maximum of its available resources'. It is submitted that the difference in how these two provisions are structured does not change the nature of the obligations on the part of the state.

The Limburg Principles have interpreted the phrase to mean that states are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.[23] Its available resources refers to both the resources within a state and those available from the international community through technical co-operation and assistance.[24]

In determining whether adequate measures have been taken for the realisation of the rights in the Covenant attention shall be paid to equitable and effective use of and access to the available resources.[25] In the use of the available resources due priority shall be given to the realisation of the rights recognised in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services.[26]

The Maastricht Guidelines state that whilst some rights in the ICESCR can be realised with very little effect on the financial resources some may depend for their realisation on adequate financial resources. Resource scarcity should not relieve the states of their minimum core functions in terms of the Covenant.[27]

Even where the available resources are demonstrably inadequate, the obligation remains for a state party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.[28] The Committee has held

[23] The Limburg Principles para 25.

[24] The Limburg Principles para 26.

[25] The Limburg Principles para 27.

[26] The Limburg Principles para 28.

[27] The Maastricht Guidelines para 10.

that even in times of serious constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low cost targeted programmes.[29]

The words used in the article are 'maximum' and 'available'. Robertson argues that the two are potentially in conflict in the sense that maximum represents the ideal whereas available represents realism. 'Maximum' is the usual rights rhetoric whilst 'available' is the political wiggle room.[30]

The duty to allocate the resources at the disposal of the state is outside the ambit of the courts. It rests with the executive. Courts will, however, examine whether there is a rationally conceived programme in place and there are reasonable steps that are taken towards its implementation.[31]

The term 'resource' is not limited only to the resources currently available to the government but also extends to other resources that can be available through technical co-operation with other countries. It is also not limited to financial resources but also includes cultural, human, technological, and informational resources.[32] The use of these resources must be directed at promoting the goal of economic, social and cultural well being of all the citizens of the state. If this is done that would signify a substantial if not total compliance with the requirements of the ICESCR.

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[28] UNGA No3 (1990) para 11.

[29] *Ibid*.

[30] E Robertson 'Measuring State Compliance with the Obligation to Devote 's'Maximum Available Resources'' to Realising Economic, Social and Cultural Rights' (1994) 16 *Human Rights Quarterly* 694.

[31] Note 1 above.

[32] Maastricht Guidelines para 26.

3.3 LEGISLATIVE AND OTHER MEASURES

Another requirement in terms of sections 27(2) and 26(2) is that the state must 'take reasonable legislative and other measures'…[to ensure the] realisation of social and economic rights. The state should not only legislate but should also engage in other measures, which will ensure that the social and economic rights in the Constitution are realised. The ICESCR provides that the state parties are obligated to 'take steps … by all appropriate means, including particularly the adoption of legislation'.[33]

The Limburg Principles provide that all state parties have an obligation to begin immediately to take steps towards the full realisation of the rights in the Covenant.[34] At a national level the state shall use all appropriate means including legislative, administrative, judicial, economic, social, and educational measures, consistent with the nature of the rights in order to fulfill their obligations under the Covenant.[35]

The Limburg Principles recognize that legislative measures alone are not sufficient to fulfill the obligations of the Covenant. It is however important that the states take legislative action especially in cases where the current legislation conflicts with the spirit of the Covenant.[36] The state parties should in their legislative mechanisms provide for effective remedies including, where appropriate, judicial remedies. The United Nations Economic and Social Council will determine whether or not the legislative measures that have been adopted are sufficient or insufficient

[33] Article 2(1) of the ICESCR.

[34] The Limburg Principles para 16.

[35] The Limburg Principles para 17.

[36] The Limburg Principles para 18.

The Maastricht Guidelines state that violations of the Covenant occur when a state pursues either by act or omission, a policy or practice which deliberately contravenes or ignores obligations of the Covenant, or fails to achieve the required conduct or result. The guidelines include as one of the areas of discrimination social origin and property. It therefore encourages state parties to adopt legislation and policies that discourage discrimination. By effecting discriminatory policies the state parties would be acting contrary to the provisions of the Covenant. A state party fails to comply with the terms of the Covenant when it fails to effect legislation or put in place policies that are designed to achieve the objectives of the Covenant.[37]

The state should not adopt legislation or policies that are manifestly incompatible with existing international obligations giving effect to these rights, unless it is done with the purpose and effect of increasing equality and improving the realisation of economic, social and cultural rights for the most vulnerable groups.

The Committee has in its commentary said that the requirement that the state should take steps should be interpreted to mean that the state is placed under a duty to start acting towards the realisation of the goals of the Covenant. The Committee has recognised that legislation is necessary and in other instances even indispensable. For example it may be difficult to effectively fight discrimination in the absence of a sound legislative measure prohibiting discrimination. The most vulnerable groups like children and the elderly have to be protected through the adoption of legislation first and state action should then follow.[38]

Whereas the Committee has recognised that the adoption of legislative measures is central to the realisation of the economic, social and cultural rights,

[37] Maastricht Guidelines paras 14-16

[38] UNGA Comment No 3 (1990) para 3 (hereafter UNGA No3).

the adoption of the laws alone is by no means exhaustive of the obligations of the state parties.[39] The state parties should rather take appropriate measures to realise the social rights. The states are given a discretion to determine what is 'appropriate' taking into account their specific circumstances. This discretion, however does not override the power of the Committee to determine whether the measures used were indeed appropriate. Thus the appropriate measures must be taken in the context of the limitations imposed by the Committee.

The Committee has also emphasized that there is a need to develop judicial remedies in respect of rights, which in the national context are considered justiciable. The enjoyment of these rights can be achieved meaningfully when there are judicial remedies in place.[40] The Committee has also stressed that where there is legislation that has been adopted, it will be incumbent upon the state parties to inform the Committee of the effect that those policies are having. The Committee also wishes to receive information about whether or not in those countries that expressly provide for social and economic rights the rights are considered justiciable or not.[41]

The need to take legislative and other measures should not be viewed to preclude any government from introducing a social or economic system that facilitates the achievement of social rights. Any type of economy that does not violate the terms of the Covenant will be acceptable to the Committee.[42] The Constitutional Court has held that mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well directed policies and programmes implemented by the executive. The development of the programme is only the first stage. It must be reasonably implemented because 'an otherwise

[39] UNGA No 3 para 4.

[40] UNGA No 3 para 5.

[41] UNGA No 3 para 6.
[42] UNGA No 3 para 8.

reasonable programme that is not implemented will not constitute compliance with the state's obligations.'[43]

3.4 SETTING MINIMUM STANDARDS FOR REALISATION OF SOCIO-ECONOMIC RIGHTS-THE 'MINIMUM-CORE' OBLIGATION OF THE STATE

Paragraph 9 of the Maastricht Guidelines states that:

> 'Violations of the ICESR occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as "minimum core" obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of these rights
> […] Thus, for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, violating the Covenant.'

Progressive realisation of social and economic rights will no doubt mean different things to different societies of the world for a long time to come. What the precise requirements for their attainment are will vary from case to case and will perhaps remain an issue for debate for the entire lifespan of the Constitution.[44] But the task that faces the judiciary is at least identifying what the minimum requirements for compliance are in a given case.

The core content of the right has to be viewed not in isolation but account should be taken of other relevant factors. The important factor is the availability of resources on the part of the state. The minimum standards will not be properly set except if reliance is had on the available resources of the state. In this regard the Maastricht Guidelines state that the state violates the terms of the Covenant if it fails to satisfy the Committee about the achievement of the 'minimum core obligation to ensure the satisfaction of, at least, minimum essential levels of each

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[43] Per Yacoob J in *Grootboom* (note 1 above) para 42.

[44] See F Ka Mdumbe 'Van Biljon versus Soobramoney' (1998) 13 *SAPL* 460, 470. In that article the writer concludes that 'perhaps the last word on socio-economic rights will never be spoken'.

right'. Thus for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie violating the terms of the Covenant. These minimum core obligations apply irrespective of the resources in a country.[45]

The Limburg Principles recognise that the scarcity of the resources does not relieve the state of some minimum core obligations with regards to the implementation of social and economic rights.[46] But a country has to strike a balance between the ideal and the realistic. An ideal society is the one where there is equality for all. A realistic society aims to achieve an equitable distribution of resources.

In the case of *Van Biljon v Minister of Correctional Services*[47] the court interpreted the term 'adequate' for the purposes of section 35(2)(e)[48] of the Constitution. In this case, four HIV positive prisoners brought an application to direct the state to provide them with the prescribed treatment for their condition. The state argued that it did not have sufficient funds to provide for the treatment that the applicants wanted. The state further argued that what is 'adequate medical treatment' for prisoners should be construed in the context of all other people who were outside prison. Just as it is not the duty of the state to provide prescribed medical treatment for HIV positive people outside the prison, it cannot not be held that the prisoners are entitled to something more.

Brand J rejecting the argument on behalf of the state held

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[45] Maastricht Guidelines para 9.

[46] Limburg Principles paras 23-28.

[47] *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C).

[48] This section provides:

> ' 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'.

> '…lack of funds cannot be an answer to the prisoners constitutional claims. Therefore, once it is established that anything less than a particular form of medical treatment would not be adequate, the prisoner has a constitutional right to that form of medical treatment and it would be no defence for the prison authorities that they cannot afford to provide that form of medical treatment. I do not, however, agree that financial conditions or budgetary constraints are irrelevant in the present case. What is ''adequate medical treatment'' cannot be determined *in vacuo.* In determining what is ''adequate'' regard must be had to *inter alia*, what the state can afford. If the state authorities should therefore make out a case that as a result of budgetary constraints they cannot afford a particular form of medical treatment or that the provision of such treatment would place an unwarranted burden on the state, the court may very well decide that the less effective medical treatment which is affordable to the state must in the circumstances be accepted as ''sufficient'' or ''adequate medical treatment''. After all [the Constitution] does not provide for ''optimal medical treatment'' or ''the best medical treatment'' but only for ''adequate medical treatment''.'[49]

The approach seems to be that in determining the content of the right due regard must be had to the availability of resources. The onus is on the state to prove that the resources are unavailable. The Constitutional Court in *Soobramoney* put this matter in the following language

> 'What is apparent from these provisions is that the obligations imposed by the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependant upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of lack of resources. Given this lack of resources and the significant demands placed on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.'[50]

Sachs J who delivered a separate but concurring judgment cautioned against being too generous in the interpretation of the rights guaranteed by section 27.

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[49] Note 47 above para 43.

[50] Note 2 above para 11.

He was of the view that the courts needs to be careful not to feel pressurised by the fear of being perceived as gambling with the lives of the people and eventually guaranteeing the most expensive and unaffordable medical treatment at the expense of others.[51] Yacoob J in *Grootboom*[52] held that it is difficult to determine what the minimum core is with respect to the right of access to adequate housing in terms of section 26(2). This is so because the needs of the people in the context of access to adequate housing differ. There are those who need land; others need both land and houses; yet others need financial assistance in the form of housing subsidies. The criterion to determine the obligations under the constitution is whether or not the measures adopted by the state are reasonable.

3.5 PROGRESSIVE REALISATION OF THE RIGHT OF ACCESS TO ADEQUATE HOUSING UNDER THE ICESCR AND THE SOUTH AFRICAN CONSTITUTION

The Committee of the ICESCR functions on the basis of reports that are regularly submitted by the State parties detailing the measures they have taken to fulfil their obligations under the Covenant. This process has three objectives: (1) to develop the normative content of the rights in the Covenant; (2) to develop benchmarks for the role of the state in achieving these rights as well as devising mechanisms for accountability and remedies for vulnerable groups in society and; (3) to hold the states accountable at international level by examining and commenting on their reports.

3.5.1 What information does the Committee require?

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[51] Id paras 58-59.

[52] Note 1 above para 33.

The questionnaire that the Committee sends to state parties is a valuable guideline about the measures that the state party needs to undertake in order to comply with the Covenant. The Committee has developed some guidelines about the type of information that the states must provide. The state must provide statistical information about the housing situation in the country.

It must also supply detailed information about those groups within society that are vulnerable and disadvantaged with regard to housing in particular; the number of homeless individuals; the number of individuals and families currently inadequately housed and without ready access to basic amenities; the number of persons currently classified as living in 'illegal' settlements or housing and; the number of persons evicted from houses and settlements within the last five years.

The states are requested to provide information with regard to the existence of any laws affecting the realisation of the right to housing and the measures that have been taken to fulfil the right of access to adequate housing including: measures taken to encourage 'enabling strategies' whereby local community-based organisations and the 'informal sector' can build housing and related services and whether such organisations are free to operate and receive funding from government; measures taken by the state to build housing units and to increase other construction of affordable, rental housing; measures taken to release unutilised, under utilised or mis-utilised land; financial measures taken by the state including details of the budget of the Ministry of Housing or other relevant Ministry as a percentage of the national budget. The state parties are also required to give details of any difficulties or shortcomings encountered in the fulfilment of the right to adequate housing.[53]

[53] Committee on Economic, Social and Cultural Rights, Reporting Guidelines UN Doc. E/1991/23, Annex IV (hereafter '*Reporting Guidelines*'). See also Committee on Economic, Social and Cultural Rights 'Concluding Observations on the Report by the Dominican Republic' UN Doc E/C 12/1/1994/15 at para 3.

3.5.2 The Interpretation of the Right by the Committee

The Committee has recognised that everyone has a right to an 'adequate standard of living for himself and his family (sic), including adequate food, clothing and housing, and to the continuous improvement of living conditions'.

The Committee makes a distinction between housing and shelter and suggests that the right of access to adequate housing should not be equated with shelter. Shelter means that everyone must have a roof over their head. The right to adequate housing means 'the right to live somewhere in security, peace and dignity'.[54]

It is also acknowledged that whilst 'adequacy' should take into account social, economic, cultural and climatic factors, there are certain central elements of the right that must be considered in determining what 'adequacy' means for the purpose of the Covenant. These, although not exhaustive, include the following:

(a) Legal security of tenure

Tenure may be in the form of rental accommodation (whether private or public), co-operative housing, lease, emergency housing, informal settlements, including occupation of land or property. All persons should, notwithstanding the type of tenure, possess a degree of tenure which protects them against forced evictions and harassment either by the state or private actors.

(b) Availability of services, materials, facilities and infrastructure

In order for housing to be adequate, there must be certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe

[54] *Reporting Guidelines* para 7.

drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;

(c) Affordability

The costs associated with housing should not threaten the very attainment of the right. At the same time the resources that are spent on ensuring that housing is affordable to the most vulnerable and marginalised should not be to the detriment of the realisation of other rights.

(d) Habitability

The inhabitants should be protected from cold, damp, heat, rain, wind, or other threats to health and other structural hazards. These factors ought to be taken into account when determining what is habitable.

(e) Accessibility

Those groups that are deserving because of their social status should be given access to adequate housing without unjustifiable inhibition.

(f) Location

Adequate housing must be in a place which allows access to employment options, health care services, schools, child care centres, and other social facilities. This is true both in large cities and in rural areas where the financial costs of getting to and from the place of work can place excessive demands on the budgets of the poor households. Housing should not be built on polluted sites or in immediate proximity to pollution sources that threaten the right to health of inhabitants;

(g) Cultural adequacy

Housing should be constructed in a way that allows different cultural formations to express themselves in their different cultures.[55]

State parties are further encouraged to adopt housing strategies in consultation with all the affected communities including the homeless and the inadequately housed. These guidelines, it is submitted, could serve as an important reference point in determining the minimum core content of the right of access to adequate housing in South Africa in a given case.

3.5.2 The Government of the RSA and Others v Grootboom and Others[56]

(a) The Background

The Constitutional Court of South Africa had occasion to deal with the provisions of section 26 of the Bill of Rights in *Government of the RSA and Others v Grootboom and others*, an appeal against a judgment of Davis J in the Cape High Court. Mrs. Grootboom and most of the respondents previously lived in an informal squatter settlement called Wallacedene in the Western Cape, under the municipal area of Oostenberg. Half of the population comprised of children under the age of 18. The conditions under which they lived were sub human. There was no water, no toilet facilities and about 95% had no access to electricity. Most of the people were unemployed and those who were employed earned meagre wages of less than R500 per month. They had applied to be given access to low cost housing from the municipality and some had waited for periods in excess of five years. They started moving out of the squatter camp to find themselves

[55] See UNGA No 4 (1991) UN Doc E/1992/23 Annex III for the full text of the guidelines.

[56] Note 1 above.

alternative accommodation at a place called 'New Rust' because of the intolerable conditions they were living under. There, they built shacks and other forms of informal dwelling. The owner of New Rust applied for their eviction since they had no permission to occupy his land. He was successful and bulldozers were sent to demolish the shacks. Their shacks were destroyed with scant regard to their possessions and they had to leave. They left with their possessions and occupied land, which was owned by the municipality. The winter rains now destroyed their shacks, and they requested the municipality to provide them with some form of shelter and protection. The municipality did not oblige and they applied to the high court for assistance. They were successful as the municipality was ordered to make provision for shelter for the children of the adult squatters and since it is in the interests of the children that they be looked after by their parents, they parents should go in with their children. In doing so Davis J said

> '…an order, which enforces a child's right to shelter should take account of the need of the child to be accompanied by his parent. Such an approach would be in accordance with the spirit and purport of section 28 as a whole.'[57]

The Municipality, the Provincial government and National government appealed against this decision to the Constitutional Court.

(b) The Constitutional Court Hearing

The Constitutional Court was asked not only to consider the correctness or otherwise of the finding in the court *a quo* but also to examine the full extent of the obligations placed on the state by section 26 of the Constitution. The court made extensive reference to international law and specifically the ICESCR and the UN General Assembly comments. It held that it was important that a distinction be drawn between the provisions of the ICESCR and the South African Constitution particularly on the right to housing. The ICESCR provides for

[57] *Grootboom v Oosternberg Municipality and Others* 2000 (3) BCLR 277 (C) s289F-G.

the right to adequate housing whereas the Constitution provides for the right of *access* to adequate housing. In this sense the Constitution 'recognises that housing is more than a matter of bricks and mortar.'[58] For a person to have access to adequate housing all of these considerations must be met: there must be land, there must be services, there must be dwelling. Access to housing also means that it is not only the state that must make housing available, but also non-state actors and other agents within society. Individuals must be assisted by state policy to have access to housing. The policy of the state must take into account the different economic levels in society. For those who can afford housing on their own means, the state must make policy that facilitates access to housing schemes. For those who cannot afford, the state must make specific provision for them because they are the most vulnerable and marginalised in society.

The court further held that it did not consider it necessary to deal with the requirement of the minimum core obligation of the state. It did, however, hold that when a challenge against the government is based on section 26 regard must be had to whether or not the measures the government has taken reasonable legislative and other measures. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question is whether the measures that have been adopted are reasonable. In determining the reasonableness of the measures the court must look at housing programmes in their social, economic and historical context. The state ought to develop a programme to deal with these social and economic problems. The programme must be reasonably implemented. The programme only constitutes the first stage of the compliance and is not necessarily total compliance. The court held further that a programme that excludes a significant segment of society cannot be said to be reasonable. Reasonableness in South Africa would mean for instance that

[58] Note 1 above para 35.

those whose needs are most pressing and whose lives are in peril should receive first priority over those who can manage without direct state assistance.

The court in analysing the national housing plan and policy of the government concluded that it did not make provision for people in desperate and crisis situations. On this basis it did not comply with the constitutional obligation placed on the state to realise progressively the rights of access to adequate housing through legislative and other measures within its available resources. In making this point the court asked itself

> '…whether or not a housing programme that leaves out of account the immediate amelioration of the circumstances of those in crisis can meet the test of reasonableness established by the section.'[59]

The court found that it was necessary for the national housing policy to make provision for people in crisis situations. At that moment the housing policy fell short because of the absence of the component that dealt with amelioration of crisis situations. The precise allocation of the budget for this purpose, the court held, should be left to the executive.[60]

(c) Conclusion of the Court

The court concluded that the judgment of the court a quo had the potential to produce an anomalous result. People who have children have a direct and enforceable right under section 28(1)(c), while others who have none or whose children are adult are not entitled to housing under that section, no matter how old, disabled or otherwise deserving they may be. The requirement of progressive realisation would make little sense if 'it could be trumped in every case by the rights of children to get shelter from the state on demand'. Children could be used as 'stepping stones' to housing for their parents instead of being

[59] *Ibid* para 64.

[60] *Ibid* para 66.

valued for who they are. The court therefore granted an order directing that steps be taken by the state to devise and implement a programme within its available resources which provides relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

(d) Commentary

The case was only the second socio-economic rights case for each the Constitutional Court. It raised an important socio-political issue regarding access to land and housing. The court recognised that housing shortages in this country will be with us for longer than many expected. The court kept a distance between itself and the making of policy. The court stated that its function is confined to whether or not the programmes that are in place are reasonable. It is for the government to develop policies and allocate money towards the implementation of its programmes.

The judgment has left the scope of further development of the socio-economic rights discourse open in many ways. It has made it clear that the existence of legislative measures alone does not mean total compliance with the Constitution. It is only the first step. Further steps must follow which should include the development and implementation of programmes to facilitate access to housing and those programmes should make provisions for people in crisis situations. This is a step forward in the sense that a litigant may now approach a court complaining that an organ of state either does not have a programme to deal with crisis situations or is not putting into effect its programme. This will apply to all socio-economic rights and will not necessarily be limited to access to housing.

The judgment, however, can be criticised because it did not provide concrete guidelines and timeframes as to when the housing programme by government should be developed and implemented. Given the increasing level of neglect of judicial orders, the court should at least have made an order directing that the

state must report frequently to the court on the measures it is taking to implement the order. There was evidence before the court about how the state had not only neglected the needs of the applicants but also harassed them. The court itself had in a period of less than a month before handing down the judgment, entertained an interlocutory application to compel the government to provide for water, toilet facilities and temporary shelter to the applicants. Although, the order was made by agreement, the application had been occasioned by the failure of the government to keep its promise to provide those facilities to the applicants pending the outcome of the Constitutional Court case. Those should have been reasons enough for the court to conclude that something more was called for and that it should retain a supervisory jurisdiction over the implementation of the order.[61]

The decision in *Grootboom* has demonstrated the need for a careful and detailed planning at all levels of government for the proper realisation of socio-economic rights. The reasons for the application illustrated both poor planning and untimely execution of plans by the three tiers of government. In an attempt to remedy this, the court stressed the importance of an integrated approach to programme delivery by the three tiers of government.[62] But the court made no mention of the need to include the beneficiaries of a housing programme in the consultation process. It should be noted that an accountable and responsive government is the cornerstone of our democracy and should not be given up because the issue at hand benefits the community concerned. The recently enacted Municipal Systems Act recognises this important principle when it refers to creating a culture of public participation in issues of development.[63]

[61] See Chapter 6 below for a discussion on judicial remedies in general and supervisory jurisdiction in particular.

[62] Note 1 above paras 50 -51.

[63] In its preamble. See note 64 below for number and year of the Act.

3.6 PROGRESSIVE REALISATION OF THE FUNDAMENTAL RIGHTS UNDER THE MUNICIPAL SYSTEMS ACT[64]

The Municipal Systems Act (the Act) introduces the concept of Integrated Development Planning (the IDP). This is a principal planning method, which ought to be used by municipalities in delivering services to the communities they serve. Section 23(1) (c) of the Act states

> 'A municipality must undertake developmentally oriented planning so as to ensure that it together with other organs of state contributes to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution'

Each municipal council must immediately after its assumption of office design a plan in consultation with the provincial and national government to facilitate access to the fundamental rights as contained in the relevant sections of the Constitution.[65] The IDP of each municipality must contain a short and long term developmental plan of the municipal area. The plan must be developed in consultation with communities and ratepayers.[66] The drafting and implementation of the IDP must be supervised by the provincial MEC for local government. The IDP must be reviewed and updated annually.

An IDP adopted by a municipality will be the principal planning instrument which guides and informs all planning and development, and all decisions with regard to planning and development, in the municipality. It will bind all persons except to the extent of any inconsistency with a provincial or national legislation in which instance such legislation has to prevail.[67]

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[64] Act 32 of 2000.

[65] Section 24 of the Act.

[66] Section 25 of the Act.

[67] Sections 25- 32 of the Act.

It is expected that IDPs will in the future direct the planning and delivery of basic services by the government.[68] A litigant who challenges the state for its failure to progressively realise the right of access to adequate housing, for instance will have to ask, as a starting point, two questions: Has the municipality adopted the IDP for its area of jurisdiction? If the answer is in the affirmative, the second point of attack will be whether or not the state is taking reasonable steps to implement the plan. Whether or not the municipality has adopted an IDP is related to access to information held by the state. Accessing such information ought not to be difficult in the light of the Constitution which promotes open and transparent governance and entitles everyone to information held by either state or anyone.[69]

3. 7 CONCLUSION

The challenges for the South African government are vast. The Constitutional Court has noted

> 'We live in a society in which there are great disparities of wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom an equality, lies at the heart of our new constitutional order. For as long as these conditions exist that aspiration will have a hollow ring'.[70]

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[68] Another point that can be made is that the spirit of the Systems Act is to locate the local government tier in a central role in the delivery of services to the people. This is also in keeping with the Constitutional Court's view of the role played by the new local government which view was expressed in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) paras 26 and 38.

[69] Section 32 of the Constitution. See also the Promotion of Access to Information Act 2 of 2000.

[70] Per Chaskalson P in *Soobramoney* (note 2 above) para 8. Cited with approval by Yacoob J in *Grootboom* (note 1 above) para 25. See also the findings of the Lund Committee about the poverty patterns in South Africa. The Committee found that poverty is racially distributed: 95% of poor people are Africans; poverty is spatially distributed: 75% of poor people live in rural areas although only half the entire population lives there; and poverty has a gender dimension: many of the very poorest households are headed by younger women in rural areas. Lund Committee Report –Child and Family Support 1996 page 10. The report can be found at http://www.polity.gov.za/reports/1996/lund3.htm.

The challenge to achieve the progressive realisation of social and economic rights requires the government to start making a deliberate move towards addressing the pressing needs of poor people. It is a concrete recognition that democracy itself will not be sustainable unless poverty and inequality is substantially reduced.

When the Constitution enjoins the state to take 'reasonable legislative and other measures to achieve progressively within its available resources' the rights under sections 26 and 27, it does not mean the same thing to everyone. Where income is fairly distributed and opportunities reasonably equal, individuals are in a better position to take care of themselves and not to rely on expenditure by the state. Where there is a skewed distribution of resources, there is a compelling need on the part of the state to balance the scale. This may include the state taking such measures as public taxation in order to fund public programmes. But these strategies must be sustainable and should seek to ensure that weaker and vulnerable groups in society not only have access to these resources but also are able to use them on a longer term sustainable basis. This may also mean that the government has to engage in strategies of land reform and land redistribution in order to facilitate access to land and provide security of tenure for vulnerable and marginalised groups in society. The Constitution gives the state the power to engage in land reform subject to certain legal constraints.[71] It is important that such measures be expedited.

Progressive realisation involves detailed and careful planning. The time needed for planning should not be excessively long so as to delay access to these programmes. The judiciary has an important role to play in monitoring to ensure that the state carries out its constitutional mandate fairly. But judicial interventions are no substitute for mass mobilisation and community

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[71] Section 25 of the Constitution.

participation. Civil society organisations play a significant role in ensuring that governments deliver on their social welfare programmes. It is concrete social programmes and fiscal arrangements that can provide a realistic solution to the problems of poverty and inequality. Abstract constitutional provisions cannot do this alone. They are, however, a strategic starting point and therefore should not be overlooked.

What government departments should do is draw up a framework for the realisation of socio-economic rights at the national level based on the needs and means of the communities they serve. They should identify within such frameworks the needs of groups which have the greatest difficulties in their access to basic needs and set specific goals to ensure sustainable satisfaction of such needs. In developing such frameworks and plans of action the government needs to consult with the people it serves. This process requires 'consistent vigilance to improve the conditions for the most vulnerable, without expecting dramatic and abrupt transformations of comprehensive and interlocking economic and social systems.'[72]

On the other hand it is imperative that there are effective judicial strategies to play an oversight role in the implementation of socio-economic rights. In the words of Geraldine van Bueren what we need is 'a judiciary with a vision,' 'an accessible and responsive Constitutional Court' and ' a legal profession with compassion.'[73]

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[72] A Eide '*Strategies for the Realisation of the Right to Food'* in Mahoney and Mahoney (eds) Human Rights in the Twenty First Century: A Global Challenge (Martinus Nijhoff Publishers1993) 459, 470.

[73] G Van Bueren 'Alleviating Poverty Through the Constitutional Court' (1999) 15 *SAJHR* 152. See also G Bellow 'Turning solutions into problems: The Legal Aid experience' (1977) www.garybellow.org. For H Echenberg and B Porter 'claimants of social and economic rights must begin to constitute a movement, both national and international, that incorporates political, social and judicial activity. The idea of movement is built into the legal definition of rights as being "progressively realised". The legal rights are validated only as they are sustained by a social and political movement that articulates their meaning and enforces them through public consensus.' H Echenberg and B Porter *'Poverty Stops Equality: Equality Stops Poverty'* RI Cholewinski (ed) *Human Rights in Canada: Into the 1990's and Beyond* (Human Rights Research and Education Centre: University of Ottawa: Canada 1990) 1, 14.

CHAPTER 5

JUDICIAL REMEDIES FOR ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS UNDER THE 1996 CONSTITUTION

5. 1 INTRODUCTION

This chapter deals with judicial remedies to enforce constitutional rights in general and socio-economic rights in particular. Various common law remedies will be discussed to provide a starting point for the developments brought about by the Constitution. It is noted in this respect that the principles of administrative justice and the remedies that flow from the application of these principles have played a significant role in protecting socio-economic rights before the adoption of the Constitution. It will be argued that these remedies are still relevant in the protection of socio-economic rights under the Constitution. It is argued that certain of the traditional common law remedies may still be suitable under the constitutional dispensation. They may in some instances, however, need to be reshaped to suit the dictates of the Constitution. The inherent powers of the courts to control and regulate their own process under the Constitution and how such powers should be used to enhance the promotion of social and economic rights are examined. This chapter also looks at the proposals that have been made regarding the development of new and creative remedies under the Constitution. Non compliance with judicial orders by public officials is also dealt with. Lastly this chapter deals with limitations to judicial remedies and examines methods of ensuring that such limitations are not an unreasonable bar to litigants asserting their fundamental rights.

5.1.1 The Received Assumptions

Private law litigation differs significantly from public law litigation. So do the remedies that exist under private law. Our South African law of remedies has developed along the lines of private law. As a result certain assumptions applicable in private law disputes have also been accepted to apply even in public law disputes. For instance, it is assumed that litigation is bipolar. In other words, it is a contest between two individuals who hold diametrically opposed positions and is decided on a winner-takes-all-basis. The issue they bring to court is an identified set of events. Often the question to be determined is whether or not those events indeed occurred and what the factual and legal consequences of those issues are. In this model rights and remedies are interdependent. The scope of the relief is derived logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendant's breach of duty. In a contractual dispute, the court that finds a contract to have been breached will award the plaintiff damages to place him or her in the position he or she would have been in had there been no violation. In this model, the judgment affects only those who are parties to the suit and nobody else.

But as early as 1976 Chayes[1] conceived of a different model of litigation which he termed a 'public law litigation model'. If constitutional values are to guide the courts in enforcing socio-economic rights (as they must) it will be imperative that the courts recognize that public law litigation is often different, and must be approached differently to private law disputes. Chayes suggested certain features which characterise the public law litigation model. In this model the scope of the lawsuit tends to be shaped by the parties and by the court. It tends not to be rigidly bilateral but sprawling and amorphous. The court does not confine itself to a factual inquiry on historical basis alone but also adopts a predictive and legislative approach. The relief that the applicant seeks tends not to be compensation for past wrong but is forward looking, fashioned *ad hoc* on

[1] Chayes A 'The Role of the Judge in Public Law Litigation' *Harvard LR.* [1976] (89) (7) 1281,1302 in DJ Galligan (ed) *Administrative Law* (Dartmouth 1992) (hereafter Chayes).

flexible and broadly remedial lines, often having important consequences for many people including those who are not parties. The remedy is often negotiated rather than imposed and the order granted by the court often does not terminate the involvement of the judge: its administration requires active participation of the court. The judge, in other words, tends not to be passive but is active in shaping the litigation to ensure a just and viable outcome.

In giving effect to socio-economic rights it will be important that some of these features should now characterise litigation on socio-economic rights cases. Froneman J in *Ngxuza and Others v Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another*[2] associated this paradigmatic shift in the role of the courts with the socio-political role that the law plays. He said that it was important for the courts to develop a flexible approach to give disadvantaged and poor communities access to means of judicial redress in public law disputes. This also has an effect of ensuring that public power is exercised in conformity with the rule of law.

5.2 COMMON LAW REMEDIES

In the case of *Harris v Minister of Interior & Others*[3] the court said:

> 'To call the rights entrenched in the Constitution constitutional guarantees and at the same time to deny to the holders of those rights any remedy in law would be to reduce the safeguards enshrined in [the constitution] to nothing. There can be no doubt in my mind that the authors of the Constitution intended that those rights should be enforceable by the Courts of Law. They could never have been intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. *Ubi jus, ibi remedium*.'

[2] 2000 (12) BCLR 1322 (E).

[3] 1952 (4) SA 769 (A), 780. In *Nelles v Ontario* (1989) 60 DLR (4th) 609 (SCC) 641-2. Lamer J said: 'When a person can demonstrate that one of his charter rights have been infringed, access to a court of competent jurisdiction to seek a remedy is essential for vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur'.

Wade and Forsyth[4] suggest that rights depend upon remedies. There are various remedies that are applicable in South African. In the following section we discuss the various remedies and highlight essential elements of each remedy.

5.2.1 Interdicts

An interdict is a court order prohibiting or compelling the performance of a particular act for the purpose of protecting a legally enforceable right which is threatened by continuing or anticipated harm.[5] An interdict may be used to prohibit the commission of an unlawful action by a public official or to remedy a consequence that has been commissioned by the unlawful conduct or omission of an erring official. In order for an interdict to be granted there must be a legally recognised duty to act on the part of the public official. In order for an applicant to succeed in an application for an interdict, he or she must establish a clear right; an injury actually committed or reasonably apprehended; and the absence of another satisfactory remedy.[6]

(a) Prohibitory Interdict

A prohibitory interdict seeks to prohibit the commission of an unlawful act. This form of an interdict can be used whether there has been actual or reasonably apprehended commission of an unlawful act. This remedy is common, for example, in cases involving police brutality and it is used as a protection to citizens against abuse of public authority.[7] *Wood v Ondangwa Tribal Authority*[8]

[4] Wade and Forsyth *Administrative Law* 8 ed 551 (Oxford University Press 2000). This idea of the interconnectedness between a right and a remedy has also been endorsed by the United States Supreme Court in *Freeman v Pitts* 503 U.S. 467, 489 where it was noted that '[the] nature of the violation determines the scope of the remedy.'

[5] Van Winsen et al *The Civil Practice of the Supreme Court of South Africa* 4 ed, (Juta &Co 1997) 1063 (hereafter Van Winsen).

[6] *Setlogelo v Setlogelo* 1914 AD 221.

[7] *Achada v Divisional Commissioner, SA Police Witwatersrand Division* 1981 (1) SA 658 (W).

provides a useful example of when and how a prohibitory interdict may be used. In that case the applicants succeeded in obtaining a prohibitory interdict against two tribal authorities to stop the brutality that was being meted out to South West African Political Organisation and Demkop members.[9]

(b) Mandatory Interdict

Mandatory interdicts are essentially used in two instances. The first is the *mandament van spolie*, which, because of its nature has often been applied in disputes between private parties. This of course does not mean that the remedy of the *mandament van spolie* does not avail an applicant against a public official.[10] The second is the *mandamus,* which compels the performance of specific functions by a public official. The mandamus will be invoked where the public official is under a statutory duty to do something and he or she fails to perform that duty.

5.2.2 Actions for Damages

An individual may sue a public authority for damages sustained through the unlawful exercise of public power. This form of remedy is frequently used in cases of police assaults and brutality.[11] This remedy stems from the liability of the state for contractual and delictual acts of its employees.[12] In a claim for damages, the plaintiff must in order to succeed, inter alia prove that the action or omission of the public official was unlawful. As the public official exercises public

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[8] 1975 (2) SA 294 (A). See also *Nanso v Speaker of The National Assembly for SWA and Others* 1990 (1) SA 617 (SWA).

[9] Baxter, *Administrative Law* (Juta and Co 1984) 687.

[10] See *Fredericks v Stellenbosch Divisional Council* 1977 (3) SA 113(C). In this case a *mandament van spolie* was issued against a municipal council to rebuild shacks that had been demolished on its instructions.

[11] See *Benett v Minister of Police* 1980 (3) SA 24 (C).

powers that are defined and limited by statute, establishing liability involves in effect, the judicial review of the exercise of the power concerned.[13] The nature of damages that the plaintiff would normally seek is monetary compensatory for a wrongful act that has already been committed.

5.2.3 Declaration of Rights

Declaratory orders are used in private law[14] as well as in public law. A declaratory action is intended at determining the rights or the legal meaning of the issue or document in question. The essence of a declarator is that it states the legal position of the parties as they stand without changing them in any way. The declarator is often sought together with another remedy. The great merit of a declarator is that it is an efficient remedy against *ultra vires* action by government authorities because a declarator to the effect that a certain action is *ultra vires* means that any consequence flowing from such action becomes a nullity. If the court declares that some action either taken or proposed is unauthorised by law, that concludes the point between the plaintiff and the authority. The effect, therefore of a declaration that a public official acted in excess of the statutory limits is that he did not act at all. In other words the consequences of his actions stand to be reversed and he must act again.[15]

A declarator will be granted where the applicant has a real interest in the matter, which is not merely hypothetical or abstract in an existing or future right or obligation and on whom the declarator will be binding.[16] A declarator can be

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[12] See the State Liability Act No 20 of 1927.

[13] Baxter (note 9 above) 705.

[14] An example of a declarator in a private law dispute may be about the interpretation of certain clauses of a will.

[15] See *Dyson v Attorney General* [1911] 1 KB 410.

[16] *Ex Parte Nell* 1963 (1) SA 754 (A).

claimed on its own without another accompanying remedy. In other words an applicant may seek a declarator with an intention, for instance, of launching an application for a mandamus in enforcement of his right that has been declared.[17]

Baxter tabulates at least four reasons why the remedy of a declarator is important in public law disputes. Firstly it does not require the parties to do or to refrain from doing certain acts. Where for instance the court does not want to unsettle the administrative arrangement through an interdict, it may just declare the unlawfulness of the act or omission and leave it to the administration to decide what the solution is for the problem. Secondly the declarator will be used in situations where the dispute has not yet arisen. The court may suggest an appropriate meaning for a statute and through that interpretation an administrator may be dissuaded from exercising the powers conferred by the statute. Also the declarator can be used in circumstances where a coercive order will be difficult to enforce because the court will have jurisdictional limitations. Fourthly a declaratory order may be granted where there are limitations on the part of the court from granting an interdict. This is not applicable in South Africa but it is the case in English law where injunctions may not be given against the Crown and against actions by Parliament. In both these instances the declarator can be used.[18]

5.3 CONSTITUTIONAL REMEDIES

5.3.1 Relevant Constitutional Provisions

Constitutional remedies are about what can be done when a constitutional right has been violated. When a constitutional right has been violated the court making the finding must grant a remedy. The purpose of a constitutional remedy is

[17] *Munn Publishing (Pvt) Ltd v Zimbabwe Broadcasting Corporation* 1995 (4) SA 675 (ZS).

[18] Baxter (note 9 above) 702.

> '…first to address the wrong occasioned by the infringement of the constitutional right; second to deter future violations; third, to make an order that can be complied with; and fourth, [to make an order that is fair] to all those who might be affected by the relief.'[19]

The Constitution is the supreme law of the land and law or conduct inconsistent with is invalid to the extent of such inconsistency.[20] One of the foundational values of the South African Constitution is the rule of law. For this reason a convenient staring point for a study on constitutional remedies is the constitutional supremacy clause. Section 2 states:

> 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

Section 38 of the Constitution empowers the courts to grant appropriate relief including declarations of rights whenever a right in the bill of rights has been violated or threatened. This section provides:

> 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.'

Section 165 vests judicial authority to the courts. Courts are independent and only subject to the Constitution and the law. The section enjoins the courts to apply the law without fear, favour or prejudice. Court orders or decisions bind all persons and organs of state on whom they have been made. Importantly this section recognises that courts will be unable to carry out their functions effectively without the co-operation of other organs of state. To this end section 165(4) provides:

> 'Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.'

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[19] Per Ngcobo J in *Hoffman v South African Airways* 2000 (11) BCLR 1211 (CC) para 45.

[20] Section 2.

Section 172(1) deals with various orders that a court can make when deciding a constitutional matter within its power. Of significance about this section for our purposes is the power that it gives to the courts to make any order that is just and equitable. The section provides

> 'When deciding a constitutional matter within its power, a court-
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency; and
> (b) may make any order that is just and equitable, including-
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

From this it follows that the courts have wide and nearly untrammeled powers to develop remedies in line with the Constitution.[21] These wide powers are also reinforced by section 173 of the Constitution. It reads:

> 'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice.'

The court may grant an appropriate remedy when a right in the bill of rights is infringed. Such an appropriate remedy is determined by what is 'just and equitable' under the particular circumstances of the case. The courts have power to safeguard the procedures that they put in place.

It is important for the courts to develop the common law remedies in line with the provisions of the Constitution. In *Amod v. Multilateral Vehicle Accidents Fund*[22] Mahomed CJ said:

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[21] This must also be understood in the light of the provisions of section 39(2) which enjoins the courts to develop the common law in a manner that promotes the spirit, purport and objects of the Bill of Rights.

[22] 1999 (4) SA 1319 (SCA) para 23.

> 'The common law is not to be trapped within the limitations of its past. If it does not do this it would risk losing the virility, relevance and creativity which it needs to retain its legitimacy and effectiveness in the resolution of conflict between and in pursuit of justice among the citizens of a democratic society. For this reason common law constantly changes to accommodate changing values and new needs.'

The Constitutional Court had this to say:

> 'The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common-law constitutional principles continue to have any application in matters not expressly dealt with by the Constitution, the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control.' [23]

Beyond the need for the common law to move away from the trappings of the past, the Constitution requires that the common law must now be developed with the objects of the Constitution in mind.

5.3.2 Orders of Constitutional Invalidity

Section 172(1)(a) empowers courts to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of such inconsistency. Where the interpretation of a statute will result in two plausible meanings, one offending the Constitution and the other not, the Constitutional Court has held that it would be desirable that the meaning that promotes the spirit, purport and the object of the bill of rights should be preferred.[24] On the other hand where the statute in question can only be construed to have one meaning and that meaning offends the spirit, purport and object of the Constitution such parts of the legislation will be declared invalid to the extent of such inconsistency.\

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[23] *Pharmaceutical Manufactures Association of SA and Others; In re Ex parte Application of President of RSA and Others* 2000 (3) BCLR 241 (CC) para 45.

[24] *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC) para 59; *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); paras 8-9 and 18; *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) para 85; and *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor*

(a) Suspension of Orders of Invalidity

Section 172(1)(b)(ii) of the Constitution provides that where a statute has been invalidated by reason of inconsistency with the Constitution, the court 'may make an order suspending the declaration of invalidity for any period of time on any conditions, to allow the competent authority to correct the defect'. In *Dawood and Others v Minister of Home* Affairs[25] the applicants who were non South African citizens applied to court to have certain sections of the Aliens Control Act declared unconstitutional. The basis for their contention was that they were required in terms of the Act to leave the country in order to apply for permanent residence permits. They alleged that since they were already married to South Africans they should not be ordered to leave the country and their spouses. They argued that the decision by the Director-General to require that they leave the country infringed their right to undisturbed family life, and in particular, their right to human dignity. The Constitutional Court, per O'Regan J, upheld this contention and held that the sections complained of violated the right to human dignity of the applicants under section 10 of the Constitution. Sections 25 and 28 of the Aliens Control Act were thus declared unconstitutional and Parliament was ordered to draft new provisions which complied with the Constitution.[26] The order of invalidity was suspended for 12 months to enable Parliament to comply with the court order. [27]

Distributors (Pty) Ltd and Others: In Re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) paras 22-6.

[25] 2000 (8) BCLR 837 (CC).

[26] See *Ferreira v Levin NO and Others* 1996 (4) BCLR 441 (CC) where certain sections of the Companies Act were held to be invalid to the extent that they provided that evidence adduced by an examinee under section 417 could be used against that examinee in criminal proceedings.

(b) Severance

Where a court finds a provision of a section inconsistent with the Constitution it could sever it from the rest of the statute. The test for severance is now well established in our law:

> '…where it is possible to separate the good from the bad in a Statute and the good is not dependant on the bad, then that part of the Statute which is good must be given effect to, provided that what remains carries out the main object of the Statute.' [28]

From this it can be deduced that the test has two parts: first, is it possible to sever the invalid parts of the legislation? and second, if so, does what remains give effect to the purpose of the legislation?

In *Coetzee v Government of the Republic of South* Africa[29] sections 65A to 65M of the Magistrates Courts Act No 32 of 1944 which provided for the imprisonment of debtors were challenged on the basis that they infringed the right to freedom and security of the person provided for by section 11 of the Interim Constitution. In a majority judgment written by Kriegler J, the Constitutional Court found that section 65 F-I of the Magistrates Court Act was unconstitutional. Having found that the sections did violate the rights concerned, the court then had to determine whether the provision was saved by the limitations clause. It found that there was a legitimate purpose served by the statute namely, to ensure that civil judgments

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[27] See *Executive Council, Western Cape Legislature and others v President of the RSA and others* 1995 (4) SA 877 (CC). In this case the Constitutional Court declared certain amendments to the Local Government Transition Act 209 of 1993 unconstitutional. The effect of the order was suspended because an immediate application of invalidity would have had disruptive effects on the local elections that had already been planned by the government and the Independent Electoral Commission.

[28] Per Centlivres CJ in *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A) at 822C-E. See also *S v Prefabricated Housing Corporation (Pty) Ltd & Another* 1974 (1) SA 535 (A) at 539 and *Kause v Minister of Home Affairs & Others* 1994 (3) BCLR 1 (NmH).

were complied with, but that the means used did not justify the ends sought to be realised. It had been contended during argument that the immediate striking down of the entire provisions would throw the whole debt collection procedure into chaos. As a result, the court was careful not to invalidate the sections in their entirety. Sections 65F, 65G and 65H were declared invalid to their entirety. The following words from section 65A(I) were severed: 'Why he should not be committed for contempt of court….' Sections 65A-M remained in force for all practical purposes save for the severed parts.

(c) Reading In

In some instances, the court may itself read into statutes provisions that the legislature omitted. In this way the court will be able to achieve a meaning of the statute that best suits the stated goals of the Constitution. In *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others*[30] the court considered whether the provisions of section 25(5) of the Aliens Control Act 96 of 1991 was inconsistent with the Constitution. Section 25 regulates the manner in which an immigrant may apply for an immigration permit to South Africa. Subsection 5 provided for the issuing of an immigration permit to a 'spouse or dependant child' of a person who is lawfully and permanently resident in South Africa. The definition of 'spouse' was limited to people in heterosexual relationships. It was contended by the respondents that the word spouse could be interpreted to include same sex partners. The court found that such a meaning if it were to be given would fly in the face of the intention of the legislature. In statutory interpretation one should be faithful to the intention of the legislature. The court found that the section violated the right to dignity and to undisturbed family life of same sex partners. The next question that the court considered was what the appropriate remedy would be under the circumstances. It noted that its remedial powers were couched widely by section 172 of the

[29] 1995 (4) SA 631(CC). See also *Tetrath-Gadoury v Canada* (1991) 81 D.L.R. (4th) 358.
[30] 2000 (1) BCLR 39 (CC).

Constitution. It found that striking down section 25(5) was not appropriate to cure the defect in the statute nor was severance desirable. The court then considered whether reading in was an appropriate relief in the circumstances. The defect in the section could be cured by reading in the words 'or partner, in a permanent same sex life partnership' after the word 'spouse' to the text of section 25(5). Consequently, the court made an order in those terms.

The reading in remedy is not peculiar to South Africa. The Supreme Court of Canada has on a number of occasions made use of this remedy. In fact it would seem that the South African model of reading in is largely based on similar considerations as those used in Canada. In *Miron v Trudel* [31] the Court applied the reading in remedy to include a common law spouse to insurance benefits in terms of the Ontario's Insurance Act. The exclusion of a common law spouse was held to be in breach of the equality clause in section 15 of the Canadian Charter of Rights and Freedoms. In *Vriend v Alberta*[32] the Court found the Individual Rights Protection Act of Alberta to be unconstitutional because it did not contain sexual orientation as a ground of discrimination. Instead of striking down the entire Act the Court read in 'sexual orientation' to the list of grounds of discrimination contained in the Act.

Hogg[33] states that this remedy is a twin of severance. Where the constitutional deficiency exists not in what the statute included (in which instance one employs severance if the test is met) but in what is excluded, reading in is a possible remedy.

Reading Down

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[31] [1995] 2 S.C.R. 418.

[32] [1998] 1 S.C.R. 493.

[33] PW Hogg *Constitutional Law of Canada* 3ed (Carswell 1992) Rev Service 2000 looseleaf ed 37-14.

Where there are two possible interpretations to a statute, one offending the Constitution and the other not, the courts should adopt the interpretation that conforms with the Constitution. This process is called 'reading down' or 'reading in conformity'. The courts generally use this remedy in the case of overbroad provisions and it entails giving a restrictive meaning to the provisions of a statute without reading in additional words which were not included by the legislature. In *Case and Another v Minister of Safety and Security and Others*[34] Mokgoro J stated:

> 'Reading down is a narrower remedy than severance: it is appropriate only where the language of the provision will fairly bear the restricted reading. Otherwise it amounts to naked judicial law-making.'

The use of this remedy is limited to cases where the suggested meaning will promote the spirit, purport and objects of the Bill of Rights while not distorting the true meaning of the words.[35] The Supreme Court of Appeal in *Govender v Minister of Safety and Security*[36] considered section 49(1) of the Criminal Procedure Act 51 of 1977 (the CPA). The section makes provision for use of lethal force in preventing a suspect from fleeing. In its finding the court held that there was a need to give a fresh meaning to the section in the light of the Constitution and the rights to life and to human dignity in particular. It held that the pre-constitutional interpretation of the section made no reference to the requirement of proportionality between the nature of the offence, the danger (present or future) posed by the fleeing suspect and the means used to effect the

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[34] 1996 (3) SA 617 (CC) para 76. For instance in *Nel v Le Roux NO and Others* 1996 (4) BCLR 592 (CC) the Constitutional Court stated that sections 189 and 205 of the Criminal Procedure Act 51 of 1977 could and ought to be interpreted in a manner that is in conformity with the Bill of Rights.

[35] In *S v Bhulwana* 1995 (12) BCLR 1579 (CC), the Constitutional Court stated that the statute must be 'reasonably capable' of being read in the manner suggested. In that case the Court, per O' Regan J was of the view that section 21(l) (a) (i) of the Drugs and Drug Trafficking Act 140 of 1992 was not reasonably capable of being read in conformity with the Constitution and therefore was declared invalid. See also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) paras 23-24.

[36] 2001 (4) SA 273 (SCA).

arrest (ie shooting). This, the SCA said was now incompatible with the new Constitution which requires that reasonableness should be used as a benchmark in determining whether or not lethal force was warranted in certain circumstances. It therefore held that the section should generally speaking be interpreted to exclude the use of lethal force in effecting arrest except in certain specific circumstances.

It is not altogether clear why reading down is classified as a remedy which is species of an 'order of invalidity'. Reading down is used at the interpretation stage and not at a remedy stage. In a sense, there is no 'finding' of invalidity. In actual fact such a finding is avoided through an interpretation that 'saves' the statute from invalidity. It could be that such a classification is a misnomer and it seems that reading down is more an interpretative tool than a remedy. According to Hogg[37] reading down is 'simply a canon of construction (or interpretation)' which is based on the presumption of constitutionality: the enacting legislative body is presumed to have meant to enact provisions which do not transgress the limits of its constitutional powers; general language which appears to transgress those powers must therefore be 'read down' so that it is confined within those limits.

5.4 NEW REMEDIES

5.41 Constitutional Damages

The case of *Fose v Minister of Safety and Security*[38] dealt with the question whether or not under the Constitution a person can claim for constitutional damages in addition to common law delictual damages. The appellant sued the respondent for damages arising out of alleged assaults perpetrated by members of the South African Police Services. In his particulars of claim the appellant

[37] Hogg (note 33 above) 15.7.

[38] 1997 (3) SA 786(CC).

(plaintiff in the court a quo) alleged that his right to human dignity, freedom and security of the person and privacy had been violated. He alleged that such violations were persistent and widespread in the Vanderbijlpark Police cells. The plaintiff claimed damages arising out of alleged assault for pain and suffering, loss of amenities of life, insult and for past and future medical expenses. In addition a sum of R 200 000 was claimed under the heading 'constitutional damages' which amount included an element of 'punitive damages'. The defendant excepted to the particulars of claim on the grounds that such damages did not exist in law and that an order for payment of such damages did not qualify as 'appropriate relief' for the purposes of section 7(4)(a) of the Interim Constitution. The court considered two questions. The first was the judicial definition of 'appropriate relief' and the second was whether 'punitive damages' could be claimed under the Constitution in addition to the common law damages. The court *a quo* upheld the exception.

The Constitutional Court concluded that the claim for punitive damages could not avail the plaintiff in this particular case. The damages that were sought were constitutional rather than delictual which had as its objective (a) the vindication of the fundamental right itself so as to promote the values of the constitution; (b) the deterrence and prevention of future infringements of fundamental rights by the legislative and executive organs of the state, at all levels of government; (c) the punishment of those organs of State whose officials had infringed fundamental rights in a particularly egregious fashion; and (d) compensation for harm caused to the plaintiff in consequence of the infringement of the plaintiff's fundamental rights.

The court made it clear that it did not intend that the scope for the development of the law on constitutional damages should be closed by the judgment and that there was no reason why an appropriate remedy should not include the award of constitutional damages. The court held, however, that in the particular

circumstances of the case the award of such damages was not desirable and that appropriate relief depend on the circumstances of each case.[39] The courts must be ready to create new remedies where the dictates of the Constitution so require. In the South African context:

> '…an appropriate remedy must mean an effective remedy, for without effective remedies of breach, the values underlying and the right entrenched in the constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.'[40]

5.4.2 Preventative Damages

In order not only to remedy past violations, but also to deter future violations, Howard Varney[41] suggests that the courts consider preventative damages rather

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[39] The idea of reparation in damages for infringements of constitutional rights is usefully discussed by M L Pilkington in 'Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms' (1984) 62 *Canadian Bar Rev* 517. In that article the author traces the history of the United States Supreme Court in awarding damages for violations of constitutional rights. She concludes that the Canadian Charter of Rights and Freedoms allows the courts of Canada more scope compared to their US counterparts. See also the decision of the Supreme Court of India in *Rudul Shah v Bihar* AIR 1983 SC 1086 where the Court per Chandrachud CJ permitted damages to the petitioner who had been unlawfully kept in prison for an unacceptably long period of time without being tried. In the South African Constitutional Court case of *Carmichele v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC) a claim was made for an award in damages for loss suffered as a result of omissions by the members of the police and public prosecutors. Although the damages claim itself was unsuccessful, the Court agreed with the applicant that there was a need to develop the common law of State liability for omissions by its employees in the light of the Constitution. It held that the High Court and the Supreme Court of Appeal were wrong in not applying the Constitution when deciding the case. The Court overturned an earlier finding of the Supreme Court of Appeal absolving the defendant from the instance and remitted the case back to the High Court for the trial to continue on the basis that the plaintiff had made a *prima facie* case.

[40] *Fose* (note 38 above) para 69 per Ackerman J. See also the comments of Ngcobo J in *Hoffman* (note 19 above) para 45 and the case of *Mbanga v MEC for Welfare and Another* 2001 (8) BCLR 821 (E). In *Mahambehlala v MEC for Welfare and Another* 2001 (9) BCLR 890 (SE) 910, Leach J suggested that the applicant should be entitled to what he loosely referred to as a 'constitutional relief' where common law relief of an award of damages will be insufficient to remedy the effects of the violation of the right (*in casu*, the unreasonable delay in the processing of the applicant's application for a social grant by the Department of Welfare.)

[41] H Varney 'Forging New Tools: A Note on Fose v Minister of Safety and Security' (1989) 14 *SAJHR* 336, 343.

than punitive damages. Punitive damages were rejected by the court in the case of *Fose* on the basis that there was no reason to believe that the plaintiff would not be sufficiently compensated by delictual damages and that the scarce resources which were at the disposal of the state would rather be utilised more effectively elsewhere than in compensating the plaintiff. The award of preventative damages should not necessarily be given to the individual concerned but to organisations and bodies capable of monitoring the violations of human rights. Organisations like the Legal Resources Centre[42] and Lawyers for Human Rights, which have championed the defence of human rights both under the old and the new governments are examples of such human rights organisations. This may encourage such human rights organisations to step up their work. Preventative damages would be more appropriate where the organisation concerned has joined in the litigation as an *amicus curiae*. This is because such an organisation has a better understanding of the issues involved in the suit and therefore will be better placed to utilise the money received as damages in its monitoring work. Trengove[43] supports this idea and adds that the order of compensatory damages only deals with past violations and does not address the threat of continuous and future violations. An order of preventative damages, on the other hand, recognises and addresses the existing threat and seeks to prevent future violations rather than give solace to victims.

Such organisations need not only be non governmental organisations but may also be state institutions which are sufficiently independent from government. The South African Human Rights Commission could be a suitable example.

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[42] See A Chaskalson 'The Past Ten Years: a Balance Sheet and Some Indicators for the Future' (1989) 106 *SALJ* 293, where Chaskalson recounts on the work and the vision of the Legal Resources Centre as it was at the time. He says: 'The stated aim of the Legal Resources Centre was to encourage belief in the value of law as an instrument of justice, and to achieve its goal by practical demonstration through provisions of legal and educational services in the public interest'.

[43] W Trengove 'Judicial Remedies For Violations of Socio-Economic Rights' (1999) 1 *ESR Rev.* 8.

There may be other organisations like the Commission on Gender Equality, Independent Complaints Directorate and the Public Protector.[44]

5.4.3 Reparation in Kind

Trengove[45] suggests that the courts should develop a new award of reparation in kind. The award of compensatory damages seeks to compensate the victim of the injustice in cash for the harm caused to him or her. But in the context of socio-economic rights the situation may be different. Social justice may not be achieved by cash lump sums to all individuals who are party to the *lis.* This situation is illustrated by means of the right to education. If many people establish that their right to education (and to equality) has been violated because they have received education inferior to that provided to other people the court may compensate each person by awarding damages in cash. But it may be difficult to quantify and prove damages caused by the violation. Secondly the compensation may not be an effective remedy and therefore not an appropriate remedy because it does not address the plight of victims of inferior education through providing skills and training. In order for the court to grant an effective remedy it may have to look at providing better facilities for education to all those affected by the violation. The state may be ordered to make remedial education available to the victims of past discrimination.[46]

5.4.4 Supervisory Jurisdiction

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[44] See *Esack NO and Another v Commission for Gender Equality* 2000 (7) BCLR 737 (W) on the relationship between 'state' and the 'state institutions supporting constitutional democracy' as established in terms of section 181 of the Constitution.

[45] Note 42 above.

[46] See for instance the decision in the United States Supreme Court case of *Milliken v Bradley* II 433 US 267 (1977) in the context of race discrimination in the United States schooling system.

Sometimes it is essential that in order for the courts to effectively vindicate the rule of law, they must make orders with an effective enforcement mechanism. The practical reason for this is that sometimes the form of violation that the court is dealing with may just be too wide to put an end to it with a single court order. It may be necessary to order in some instances that steps be taken and that the court monitors the implementation thereof. In *Sheela Barse v State of Maharashtra*[47] a writ petition complaining about the lack of protection for women in police custody was brought. The Supreme Court of India granted various orders, which required the violations by police to stop. A woman judicial officer was appointed to visit the police lock ups to ensure that the directives were being carried out. The court also ordered that she reports periodically to the court about the extent to which the prison officials were implementing the order.

The court is not always able, on its own, to monitor its orders prohibiting violations of rights, as its orders are not self executing.[48] In the context of the delivery of social security to deserving pensioners in the rural areas, for instance, the court may in addition to making an order appoint a community leader who will report to court on whether the grants have been paid out or not. But without the cooperation of other branches of government, there may be difficulties in the implementation of such orders. The case of *Uppendra Baxi v State of Uttar Pradesh*[49] illustrates such difficulties. In that case after the court had spent five years in supervising improvements to the Agra Protective Home for women, the provincial government, without notice to the court, moved the home to another location which was every bit as bad as the original home ever was. When the

[47] 1983 SCC 96. See also *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C) where Davis J required the Municipality to report to the court on the steps that it has taken to make provision for shelter to the applicants and their children.

[48] This is probably one of the reasons behind the injunction in section 165(4) of the Constitution which requires other organs of state to assist the courts to ensure that courts are independent, impartial and effective.

[49] 1986 (4) SCC 106

matter was brought before the Supreme Court of India Bhagwati J was clearly upset. This is what he said:

> 'It is obvious that what has been done has the effect of subverting the authority of this court and unless proper and adequate expression of regret is forthcoming from the concerned officials, we may have to consider whether we should adopt appropriate proceedings against the erring officials …. Despite our anguish at shifting the Protective Home from the old building to the new building, we cannot do anything about it …and the best that can be done is to start the process all over again and commence giving directions for improving the living conditions in the new building.'[50]

The court still went ahead with its supervision of the process despite the governmental action. An order was made to restart the process of building the Agra Protective Home. The District Judge of Agra was appointed to visit the Protective Home every month and to submit monthly inspection reports to the court.[51] The court retained a supervisory role over the implementation of its order.

In order to avoid such situations as in the above case, it may be necessary that monitoring be done by statutory bodies like the Human Rights Commission especially in the South African context. This is because the Human Rights Commission is empowered by the Constitution to monitor the implementation of social and economic rights.[52] Secondly, the Human Rights Commission has powers under the Human Rights Commission Act to investigate human rights violations and provide appropriate redress where it finds violations.[53]

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[50] *Ibid* 115.

[51] *Ibid* 115-116. See also Chayes (note 1 above) 1302-1303. There are a numerous other cases where the Supreme Court of India used its supervisory jurisdiction to monitor the implementation of its orders. In a case involving bonded labour, the court appointed a government minister to visit the quarries where bonded labour occurred to ensure its discontinuance.(*Bandhu Murkti Morcha v Union of India* 1984 AIR 802 (SC)). In another case involving environmental pollution caused by a gas leak from a chemical plant, the court appointed a technical team to retrain staff in the plant, to allocate them specified safety functions within the plant and to monitor the plant regularly with both planned and surprise visits. (*Mehta v India* (1986) 2 SCC 176.

[52] See section 184 of the Constitution.

Supervisory jurisdiction[54] is also a remedy that is used in North America particularly in the United States. Its foundations can be traced from the Supreme Court case of *Brown v Board of Education*[55] where the Court held that racial discrimination in schools was unconstitutional and ordered the government to implement measures to eradicate racial discrimination in the schooling system. The court in its order stated that during the period of transition when the government was putting into effect the terms of the order it would retain jurisdiction and would require the government to report to it on the steps taken.[56]

Rufo v Inmates of Suffolk County Jail[57] was another case where the supervisory jurisdiction was used by the Court. This case dealt with a complaint that prison conditions for pre trial inmates in the Suffolk County of Massachusetts were constitutionally deficient because of overcrowding and other poor conditions. An agreement had been reached between the applicants and the respondents in the court below that steps would be taken to improve such conditions. The applicant applied to the Supreme Court to have the terms of that agreement changed because the prison population had increased. In particular the government wanted to renege on the agreement of putting male inmates in single cells into double cells. The Supreme Court per White J held that in exercising supervisory

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[53] See section 7 of the Human Rights Commission Act 54 of 1994.

[54] In the United States this remedy is called 'structural injuction'. Supervisory jurisdiction there refers to the supervisory role of the Supreme Court over all other lower courts. For the present purposes I will use the term supervisory jurisdiction when dealing with this remedy.

[55] 349 U.S. 294 (1955).

[56] Id 300-301. The factors that the court should consider in formulating the remedy were dealt with in *Milliken v Bradley* (note 46 above) which case dealt with discrimination in the Detroit's schooling system. The Court held that in applying the principles set out in *Brown v Board of Education* (note 55 above) it had to be guided by the 'equitable principles'. Such principles may require that there must be proof that the conduct in question offends the constitution, secondly the remedy should be designed to restore the victims of discrimination to the position they would have been in had there been no violation and thirdly the court should take into account the interests of the state as well as the local community which is likely to be affected by the remedy. (280-281).

[57] 502 U.S. 367 (1992).

jurisdiction, a court should adopt a flexible approach that takes into account the changing circumstances in which government functions. In this case, however, there was no need to change the terms of the agreement. The Court refused to change such terms and ordered the government to comply with such terms and to report to the Court on the steps that it was taking.

There have also been other cases where the United States Supreme Court has utilised its supervisory jurisdiction[58] and in some instances the state departments have shown some reluctance in implementing court orders aimed at restructuring some of the governmental programmes.[59] In the final analysis though this remedy is now well settled in the United States legal system.[60]

5.5 NON-COMPLIANCE WITH JUDICIAL DECISIONS

An unfortunate reality is that judicial orders are not always properly and timeously complied with. History is replete with examples where parties have had to seek coercive measures to ensure the implementation of an order of court. Courts therefore do not only have to grant orders but also have to ensure, from time to time, that such orders are put into effect. The simple reason for this is that in order for the institution of the courts to be taken seriously it must safeguard its own process by ensuring that its decisions are implemented. If the decisions of the court are not implemented that would make the people lose faith in the judicial system and ultimately, lose respect for the Constitution itself. It is therefore necessary to ensure that not only do the people have access to court

[58] Most of these cases dealt with discrimination in the schooling system. See for instance *Green v County School Board of New Kent County* 391 U.S. 430 (1968), *Swann v Charlote-Mecklenburg Board of Education* 402 U.S. 1 (1971), *Keyes v School District No. 1, Denver* 413 U.S. 189 (1973), *Board of Education of Oklahoma City Public Schools v Dowell* 498 U.S. 237 (1991).

[59] See for instance *Missouri v Jenkins* 495 U.S. 33 (1955).

[60] See an interesting critique on the ability of the courts to monitor the reforms they initiate as a result of their orders in M Schlanger 'Beyond the Hero Judge: Institutional reform litigation as Litigation' (1999) 97 *Michigan LRev* 1994. See also R Katzmann 'Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy' (1980) 89 *Yale LJ* 513.

but also that their rights are properly and effectively vindicated when a remedy is granted. An effective judicial system, where there is respect for law, is a necessary ingredient for a just and democratic society. This was put aptly by Mokgoro J when she said:

> 'The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help. The right of access to court is a bulwark against vigilantism, and chaos and anarchy, which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance.' [61]

The right therefore of the successful party to a *lis* to have his/her order implemented constitutes an essential element of the right of access to court. For without implementation of judicial orders the function of the courts will be significantly undermined.

5.5.1 Inability to Comply

A distinction has to be drawn between instances where the state is unable to comply with the order and where it is unwilling to implement the order. Whereas it is unlikely that a court will grant an order that cannot be implemented, cases may arise where a party to litigation does not understand what the terms of the order require it to do. If a person can demonstrate that he acted in good faith but was just unable to comply with the order, he can bring a valid defence against a charge of contempt of court: that he lacked *mens rea*. Courts generally will not punish parties who can demonstrate that it was not possible to comply with the order and also that they did everything within their power to comply with such an order.[62]

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[61] *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) para 22.

[62] Experience from other countries shows that courts do not take kindly to excuses for non compliance with their orders. In the Zimbabwean case of *Commissioner of Police v Commercial Farmers' Union* 2000 (9)

5.5.2 Unwillingness to Comply

Deliberate refusal to obey court orders is viewed in a very serious light by courts. This is particularly the case when it is done by public officials. In *State of Himachal Pradesh v Sharma*[63] after several unsuccessful attempts by the court to compel the provincial government to construct a road for citizens of Bukkho, a hilly area, the Indian Supreme Court became frustrated at the attitude of the government. It expressed this frustration in this way:

> 'The High Court may not take further action and must leave it to the judgment of the priorities and initiative both of the executive and the legislature to pursue this matter. The High Court has served its high purpose of drawing attention to a public need and indicated a feasible course of action. No further need be done by the High Court in this matter.'

The following section examines the range of measures that a court may use to deal with willful disobedience with its decisions. From the outset it has to be stressed that part of constructing a fair and just society should encompass respect for judicial decisions. For this reason, it is generally undesirable for a court to be forced to resort to these measures because a person has not complied with an order of court.

5.6 PERSONAL LIABILITY OF PUBLIC OFFICIALS FOR DERELICTION OF DUTY

In England as early as 1922 the courts made use of the procedure to commit public officials for contempt of court for deliberate disobediance of judicial orders. In the case of *R v The Council of the Metropolitan Borough of Poplar. Ex Parte*

BCLR 956 (Z), Chinhengo J held that the lack of resources could not be used as a justification by the police for their failure to stop unlawful occupation of farms belonging to white farmers by the 'war veterans'.

[63] 1986 (2) SCC 68.

The London City Council.[64] the court held that individual members of the municipal council must be attached for contempt of court. In that case a mandamus was obtained against the local municipal council requiring it to pay certain sums or to levy rates for that purpose. The authorities did not perform according to the terms of the writ. Another application was made again to court to compel performance with the terms of the mandamus or to face committal for contempt. The application was not only brought against the municipality as a corporate entity but also against every member of the council. The members of the council made an affidavit to court stating the reasons why they did not comply and indicating that they were also not willing to comply. The court directed that a writ of attachment be issued against the council and all its individual members. This decision was appealed against and on appeal it was held that the writ of attachment could not be upheld against the council in the corporate sense but should be upheld against the individual members who were responsible to implement the decision of the court. Lord Sterndale[65] held that a corporate or notional body could not be attached and put in prison. The court stated that where an order has been made and the respondent clearly understood what was expected of it but nonetheless decided not to implement the court order, there was nothing prohibiting the court from holding the erring official personally liable for such an action. The court set out some conditions that were required to be present for an application of this kind to be successful. The requirements of natural justice had to be fulfilled where the liberty of the individual was interfered with. The application must specify the nature of the contempt, for which it was proposed to attach an erring official who must have demonstrated an unwillingness to comply and, with full appreciation of the consequences of the disobedience, must have decided not to comply. Stressing the importance of compliance with court orders by public officials, Lord Younger stated:

> 'Now the contempt so brought home to the appellants, regarded as we must alone regard it, taking no account of outside conditions at all, is, I

[64] [1922] 1 KB 95.

[65] *Ibid* 110.

> think, a very glaring and flagrant one. It is a reasoned and deliberate flouting of the Court's order. That is to say, it is a disobediance to the law of the land as declared by the King' Courts set up to declare it; it has moreover been committed by persons exercising public functions regardless of their duty faithfully to discharge them. They are by law left with no discretion as to their action in this matter; the responsibility for this rate that they were directed but have refused to levy is not theirs. […] if the appellants will not carry out the duties they have undertaken by accepting election to this body, it is their duty to make way for others who will. Deliberate disobediance of this order cannot, in my judgment be overlooked.'[66]

The learned judge went on to add:

> 'I cannot help but think that the reluctance which they feel in making this rate is because temporarily they have unduly magnified this subordinate office of theirs, and in a sphere in which it is their duty to obey they have arrogated to themselves the right to rule.'[67]

In *Mjeni v Minister of Health and Welfare, Eastern Cape*[68] an application was made to commit the MEC for Welfare for contempt of court after the Department of Welfare had failed to comply with a court order to pay costs of the applicant arising from a settlement agreement. The agreement was reached after the appellant had launched an application for the reinstatement of his disability grant and the respondent had agreed to reinstate the grant. The application for committal was opposed on the grounds that not every order of court can be enforced through committal for contempt. The respondent argued that the order sought by the applicants was for payment of money and that it could not be enforced by a committal for contempt.[69] The difficulty that faced the court was that the respondent was a state functionary and therefore enjoyed protection

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[66] *Ibid* 122.

[67] *Ibid.* See also the decision of the Supreme Court of Canada in *Roncarelli v Duplessis* 16 D.L.R. (2d) 689 where the Court awarded damages personally against Premier Duplessis for instigating the Quebec Liquor Commission to cancel the licence of Jehovah's Witness.

[68] 2000 (4) SA 446 (Tk).

[69] See *Cape Times Ltd v Union Trades Direcotorates (Pty) Ltd and Others* 1956 (1) SA 105 (N), *BJBS Contractors (Pty) Ltd v Lategan* 1975 (2) SA 590 (C), *Naidu and Others v Naidu and Another* 1993 (4) SA 542 (D).

from attachment of property in execution of the order in terms of the State Liability Act.[70]

The court held in favour of the applicant holding that the respondent had to appear in court to show cause why she should not be committed for contempt of court. In coming to this conclusion the court considered that the state, in civil litigation is different to private individuals. The state has a constitutional duty to assist persons to enforce their rights which duty is extra-ordinary.[71] A deliberate refusal by an organ of state to implement an order of court amounts to a breach of that constitutional duty. The court also emphasised the need for not only an independent, but also an effective, judiciary: the absence of which '…would render meaningless the whole process of taking disputes to courts for adjudication and that is a recipe for chaos and disaster.'[72]

In dealing with the protection afforded to the state by s 3 of the State Liability Act, the court found that 'arrest for contempt' could not be construed to mean 'attachment' for the purposes of the section. The denial to the applicant's right to hold public officials liable for their failure to comply with court orders would amount to a denial of justice to litigants involved in justiciable disputes against the state. This could not have been intended by the Constitution. The court found the relief sought by the applicants — to declare that the Member of the Executive Council concerned was in contempt of the court order and that she had to show cause why she should not be committed for contempt — was competent. There are two possible penalties where a person is found guilty of contempt, namely a fine or imprisonment. It is left to the discretion of the court to decide which penalty is appropriate. A sentence of imprisonment can in certain instances be suspended.

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[70] Section 3 of the State Liability Act 20 of 1957.

[71] Note 68 above 452C-G. See also *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) para 31; *Bernstein and Others v Bester and others NNO* 1996 (2) SA 751 (CC) para 105.

[72] Note 68 above 458B-C.

The precedent that this decision sets is that a public official can be held personally liable for deliberate failure to comply with a court order against the government department.[73]

Plasket[74] suggests that the courts should consider the option of punitive costs orders against public officials not in their public capacity but in their personal capacity. He says that this type of costs orders is best suited for the vindication of constitutional rights where the public interest in this relief is either apparent or obvious. It is also suited where the unconstitutional conduct of the administrative functionary does not only harm the individual to whom it is directed but also impedes the realisation of our constitutional promise. Indeed it our constitutional promise that the public be served by an efficient, responsive and accountable public administration.[75] If an administrative official acts in a manner that discloses bad faith of a sufficiently gross degree, then it may be appropriate for the court to order that the official concerned must repay the state for the costs incurred in defending his or her deliberate flouting of his or her obligations in addition to paying the individual whose constitutional right was infringed by the official's conduct. These costs ought to be paid directly from his pocket and not from the public purse.

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[73] In the Eastern Cape, the Legal Resources Centre has used this measure on behalf of its clients to compel the Welfare Department to comply with judicial orders. Most of these applications for committal for contempt of court have in fact been helpful although they have been settled out of court. In the case of *Njongo Booi and Others v Nomsa Jajula and Others* ECD Case No 431 &433/99, the Member of Executive Council for Welfare was cited personally as a respondent in the contempt application along with her Permanent Secretary and two other officials. This prompted an urgent response from the Department, which led to the settlement of the orders, which had been outstanding for about 14 months.

[74] C Plasket 'Protecting the Public Purse: Appropriate Relief and Costs Orders Against Officials' (2000) 117 *SALJ* 151. He argues that this type of costs order although it has not been used in the South African scene is not novel. It was applied in the Canadian case of *Re West Nissouri Continuation Board* (1917) 38 Ontario Law Reports 207.

[75] See section 195(1) of the Constitution.

This approach may play a significant role in ensuring that public officials carry out their duties with honesty and diligence as required of them by the Constitution. In such an application, the applicant must demonstrate that he or she has a constitutional right whose vindication depended on the action by the official. Secondly the applicant must show that he or she could not exercise such a right because of the action or inaction by the official. The official must have acted in bad faith and without any lawful justification. In *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government*[76] the court ordered that respondents appoint a specific official who would be responsible and account to the court for the implementation of the order. This is an effective strategy of avoiding potential non-compliance with the order of the court and perhaps litigants themselves could in appropriate cases ask the court to make an order requiring the state department concerned to appoint such an official.

One has to add a word of caution against the overzealous use of this measure of holding public officials personally accountable for breaches of public duty. By its very nature this measure is punitive and therefore should be reserved for the most deserving cases. Governance is a complex process sometimes requiring a careful balancing of conflicting interests. Government officials often have to make quick decisions on complicated matters depending on the exigencies of the case in hand. A court has to be sensitive to these factors and its orders should not in effect leave officials feeling vulnerable and consequently reluctant to take decisions at all.[77]

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[76] Note 1 above.

[77] Compare for instance (albeit in a different context) the remarks made by O'Regan J in *Premier, Mpumalanga, and Another v Executive Committee, Association of State Aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC) para 41 ('[in] determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively…'). See also *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2000 (7) BCLR 652 (CC) para 102.

5.7 LIMITATIONS TO JUDICIAL REMEDIES

5.7.1 Section 3 of the State Liability Act

Where a party succeeds in a civil action against the state, the expectation is that the organ of the state will implement the terms of the order. In situations where the state is not a defendant the plaintiff may execute against the property of the defendant in order to satisfy the judgment debt. But property belonging to the state is protected by section 3 of the State Liability Act. The section provides:

> 'No execution, attachment or like process shall be issued against the defendant in any such action or proceedings or against any property of the State, but the amount, if any which may be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any action or proceedings may be paid out of the National Revenue Fund or a Provincial Revenue Fund as the case may be.'

The section effectively means that the ordinary procedure of an application for a warrant of execution does not apply in cases where the state is the defendant. A successful litigant against the state cannot attach state assets where the state fails to honour the judgment debt. In turn the state guarantees to pay all its debts.[57] But of late there is a growing trend by the government to disobey court orders. Jafta J in the course of expressing his displeasure at this trend in *Mjeni*'s case said:

> 'The difficulty I was faced with was compounded by the fact that I was unable to find decisions dealing with the issue despite a diligent search for them, nor were we referred to any by counsel. The fact that this issue only now came before the courts for decision may indicate that until recently government departments complied with orders issued by courts of law. Therefore it has not become necessary for the courts to deal with the matter. However the attitudes of state departments towards court orders have changed lately. The number of similar applications brought before this court has arisen at an alarming rate and regrettably that is a cause for concern.'[78]

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[57] See Treasury Instructions issued in terms of the Provincial Exchequer Acts. In the Eastern Cape the Treasury Instructions are made in terms of section 35(1) of the Provincial Exchequer Act 1994. See also section 213 of the Constitution.

[78] Note 68 above 452 A-C.

State functionaries should not be allowed to believe that they may ignore orders of court until they are forced to comply. The prompt and timely implementation of court orders constitutes an essential component of the duty to uphold the values in the Constitution.[79]

5.7.2 The Duty to Exhaust Internal Remedies

The public has meaningful access to most socio-economic rights like social security, housing and other benefits through the state administration.[80] For instance, it is the state administration that administers and pays out cheques for pensions and gives instructions for the building of roads and houses. In this sense the principles of administrative law play an important role in dealing with access to those benefits. Provision of access to these benefits is governed by various statutes, like the Social Assistance Act, of 1992 which make provision for the granting of pensions and grants and the circumstances under which it will be permissible for a person to be deprived of a pension or grant.

The Social Assistance Act creates an internal appeal procedure where persons who are aggrieved by the decisions of the Director General to either suspend or decrease the amount of their grant can lodge an appeal in writing.[81] In *Maluleke v MEC for Health and Welfare (Northern Province*)[82] the court found that the

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[79] See the Principles of Public Administration in section 195 of the Constitution.

[80] See C Plasket 'Accessibility Through Public Interest Litigation' in Corder & Maluwa (eds) *Administrative Justice In Southern Africa* (Department of Public Law: UCT, Cape Town 1997) 119.

[81] Section 10 (1) of the Social Assistance Act 59 of 1992 reads: 'If an applicant is aggrieved by a decision of the Director General in the administration of this Act, such applicant may within 90 days after the date on which he was notified of the decision appeal in writing against such decision to the Minister, who may confirm, vary or set aside that decision'. See too DM Pretorious 'The Wisdom of Solomon: The Obligation to Exhaust Domestic Remedies in South African Administrative Law' (1999) 116 *SALJ* 113

[82] *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T) 372G-H.

existence of the right to an internal appeal did not preclude the applicant from seeking judicial intervention.

Section 7(2)(a) of the Promotion of Administrative Justice Act[83] provides that the court shall not entertain an application for judicial review unless the applicant has exhausted all internal remedies. But the Act also states that such a requirement for exhaustion of domestic remedies may be waived if the applicant makes an application to this effect and shows that 'exceptional circumstances' exist and the interests of justice so require. Effectively this means that a person is debarred from going to court and hence from obtaining judicial relief unless he/she has exhausted internal remedies. He or she can approach a court only after the functionary has made a decision and he or she is still aggrieved by the decision. The Act does not define exceptional circumstances nor does it spell out the factors to be taken into account when considering an application for condonation. This is presumably left to the courts to give content to. Poor people by and large depend upon the administration to facilitate access to socio-economic rights. The rich are in a position to take care of themselves and may not need the administration to provide these basic services to them. The section places an onerous burden on poor people who want to vindicate their rights using the legal process. The courts in dealing with cases of this nature will have to take the socio-economic realities of the country into consideration. Didcott J in the case of *Mohlomi v Minister of Defence*[84] stated the need for the courts to take into account these circumstances in the following language:

> '… the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and the differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographic reasons.'

[83] Promotion of Administrative Justice Act 3 of 2000.

[84] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 14.

In many instances, it will be difficult if not impossible to prove that there are exceptional circumstances and the interests of justice favour an applicant. This will be especially so when a person does not have the benefit of legal representation. Thus the requirement may in certain instances effectively deny a person the right of access to court.

5.7.3 Standing

Standing is another limitation to judicial remedies. In terms of the common law, an applicant, to have standing was required to demonstrate that he or she had a direct and substantial interest in the subject matter of the dispute. If the applicant failed to establish this, the court would deny him or her standing and the matter would not be entertained. The Constitution has broadened the test for standing in the administrative law context and, indeed, whenever it is alleged that fundamental rights have been infringed or threatened. A broader category of persons can now litigate either as members of a class or in the public interest.[85]

The Constitution and the proposed legislation on class actions and public interest suits is no universal solution to problems of access to courts. The courts may still deny standing to an applicant for judicial review under certain circumstances. It is however, clear that the new mode of thinking directs that the courts should adopt a flexible approach to standing in cases involving violations of constitutional rights.[86]

5.7.4 Prescriptive Periods

[85] See section 38 of the Constitution.

[86] See Chapter 4 above for a detailed discussion on standing.

Where there are time limits set for the institution of an action, and the claimant fails to sue within that period the claimant is *ipso facto* barred from instituting the claim. Our common law has always recognised this limitation.[87] The object of this limitation is to ensure that claims are instituted in good time when evidence is still fresh and witnesses, if there are any, can recall the events clearly. There is also a broader issue that is in the public interest which is that cases should be brought to finality and cannot be left open perpetually.

In South Africa, there is plethora of pre-constitutional statutes designed to protect the state through the imposition of prescriptive periods which are shorter than the ordinary prescriptive period of three years.[88] The purpose of such provisions as recently set out by Marais JA in *Abrahamse v East London Municipality and Another; East London Municipality v Abrahamse*[89] is

> '… to protect a local authority against precipitate citation of it in a lawsuit by a litigant seeking to obtain payment of a debt allegedly due by the local authority. It is aimed at providing a local authority with an opportunity of investigating the matter sooner rather than later when investigations might prove more difficult, of considering its position, and, if so advised, of paying or compromising the debt before being embroiled in a costly litigation.'

Since the enactment of the Constitution legislation of this kind has been subject to attack primarily because of the limitations it places on the exercise of the right of access to courts. In *Mohlomi* for instance, the six-month limitation period

[87] Save for specific exceptions that are contained in the Prescription Act 68 of 1969, a money debt arising out of a civil claim prescribes after three years in terms of section 11(d) of the Act.

[88] For instance section 343(1) of the Merchant Shipping Act, 57 of 1951; section 90(2) of the Correctional Services Act, 8 of 1959; section 96(1) of the Customs and Excise Act, 91 of 1964; section 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act, 94 of 1970; section 25(1)(a) of the National Roads Act, 54 of 1971; and section 57(2) of the South African Police Service Act, 68 of 1995.

[89] 1997 (4) SA 613 (SCA) 624D-E. An investigative report of the South African Law Commission said in 1985: 'The circumstances under which the State can incur liability are legion. Because of the State's large and fluctuating work force and the extent of its activities, it is impossible to investigate an incident properly long after it has taken place….' Further the report states: 'The State acts in the public interest and not for gain….Because public funds are involved the State must guard against unfounded claims….[T]he State is an attractive target for unfounded claims.' Report: Project 42; *Investigation into Time Limits for the*

contained in section 113(1) of the Defence Act 44 of 1957 was declared unconstitutional. In *Moise v Transitional Local Council of Greater Germiston and Others*[90] the three-month period within which to serve a written notice was also considered 'a real impediment to the prospective claimant's access to a court.'[91] The Court struck down section 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act[92] despite the fact that the unfair impact of the section is attenuated by section 4 of the Act which provides that a plaintiff may apply to court to condone his or her non compliance with the three month notice period and the court will if its in the interests of justice condone such non-compliance with the time period.

Section 5 of the Promotion of Administrative Justice Act provides that a party seeking reasons for a particular administrative action may request written reasons from the functionary concerned within a period of three months from the date the administrative action was taken. Section 7(1) of the Act provides that proceedings for judicial review must be instituted within six months of the cause of action. Under section 9 both periods (ie 90 or 180 days) may be extended by agreement of the parties to a fixed period. If there is no such agreement between the parties, it may be extended by a court of law after an application if the interests of justice so require.

Institution of Actions Against the State. The report can be accessed at www.law.wits.ac.za/salc/disussn/discussn/html

[90] 2001 (8) BCLR 765(CC). Another relevant Constitutional Court decision is *Potgieter v Die Lid Van Die Uitvoerende Raad: Gesondheid, Provinsiale Regering Gauteng En Ander* Case No CCT 26/01 delivered on 8 October 2001 (unreported) where section 68(4) of the Mental Health Act 18 of 1973 was declared unconstitutional because it violates section 34 of the Constitution. This section limited the period within which a person who had been detained in a mental institution could sue for damages suffered to three months after their release.

[91] *Moise* (note 90 above) para 13. In this case, it must be noted that the State did not put up argument in justification of its legislation in terms of s 36(1) of the Constitution. Had that occurred, it is clear from the language of the judgment that a different approach to the balancing process under section 36(1) would have occurred. Whether that would have resulted in a different conclusion is of course a different matter.

[92] Act 94 of 1970.

From the text of the Promotion of Administrative Justice Act it is not stated what purpose these time limits seek to achieve. It can be assumed that the same purpose highlighted in the *Abrahamse* case is applicable. Ordinarily any time limit has the effect of limiting a person's right of access to a court. But that on its own does not make the time limit unconstitutional. The time limits imposed by the Promotion of Administrative Justice Act have an affect of significantly encroaching upon a person's rights of access to court. This is probably more so in the case of illiterate and poor people. They are first required to request written reasons of an action that they might not even been aware that it has been taken. Secondly, they are required to make that request within a relatively short period of time. Further, they are expected to institute the action within six months after exhausting the internal remedies or after the cause of action arose. These are significant impediments to a person's exercise of the right of access to court. Such a limitation on the right is attenuated by the fact that the period can be extended by agreement (a process that I think will hardly work in litigation against the State)[93] or by application to court. This is the only mitigating factor in the statute. It may well be that although the Promotion of Administrative Justice Act imposes such a limitation, it is nevertheless a justifiable limitation especially if regard is had to the fact that firstly, there is a legitimate purpose that the Act seeks to achieve and the period may if it is in the interests of justice be extended by a court of law.[94]

5.8 CONCLUSION

Democracy can only be strengthened when the ordinary people know that they can resort to courts to complain about infringements of their constitutional rights. Otherwise they resort to self-help, a recipe for chaos. Secondly, it is when

[93] See the remarks of Cameron JA in *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and others* (note 2 above) paras 14 and 15.

[94] See the remarks of Somyalo AJ in *Moise* (note 90 above) para 19.

government departments are aware that they will be held accountable for dereliction of their public duty that they will execute their functions properly. But the importance of the role of courts should not be over-emphasised. The existence of judicial remedies should not be a substitute for government not to deliver on their constitutional obligations.[95]

Respect for the rule of law on the part of government departments means respect for the courts as the only institutions charged with the duty of interpretation of Constitution. Disrespect for the decisions made by the courts demonstrates not only disrespect for the courts as institutions, but also disrespect for the Constitution as the fundamental law of the country. It is reason enough for concern when government departments deliberately disobey court orders. Justice Brandeis of the Supreme Court of the United States of America made this point even more eloquently when he said:

> 'In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. ... Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.'[96]

Experience elsewhere has shown that when the executive arm of the state fails in its duty to respect the rule of law, a country can be torn apart. Anarchy and chaos is bound to erupt.[97] The state and its institutions should act as role models for ordinary citizens. They should be the first to demonstrate concern for the poor, the underprivileged and the weaker classes of society. They should not

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[95] See Chaskalson A 'Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 194, 204-205(italics mine).

[96] *Olmstead v United States* 277 US 438, 484-485.

[97] See the comments of Chinhengo J on the refusal of the Zimbabwean Police to enforce a court order to evict illegal farm occupiers in *Commissioner of Police v Commercial Farmer's Union* (note 61 above) at 964-967 and *Chavunduka and Another v Commissioner of Police and Another* 2000 (9) BCLR 949 (ZS).

only develop policies which display this concern, but must *act* in a manner that demonstrates respect for the views of the voiceless in society.

CHAPTER 6

NON-JUDICIAL REMEDIES

6.1 INTRODUCTION

This chapter deals with non judicial remedies that are available to enable everyone to have access to their social and economic rights. Two institutions created by the Constitution are used as examples. Those institutions are the South African Human Rights Commission (the Commission) and the Public Protector. These institutions are part of a cluster of institutions created by the Constitution to safeguard constitutional democracy. Collectively these institutions are referred to as State Institutions Supporting Constitutional Democracy. In this chapter the role of the Public Protector and the Human Rights Commission is assessed in the context of the implementation of social and economic rights. It is observed that both these institutions have weaknesses which could potentially undermine their effectiveness in upholding human rights. These weaknesses, it is argued are not insurmountable. In fact they can be overcome through proper planning and effective utilization of resources. To achieve the most impact, it is suggested that these institutions should consider ways of cooperating with each other.

6.2 THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Under the Constitution various institutions are created for the purposes of supporting constitutional democracy.[1] The Human Rights Commission is the only institution whose role is specifically to monitor the performance of government in the provision of socio-economic rights.

[1] Section 181 of the Constitution provides for the creation of State Institutions Supporting Constitutional Democracy. These are: the Human Rights Commission, the Public Protector, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor General, and the Electoral Commission.

This role is only part of the general constitutional mandate of the Commission to promote, monitor and assess the observance of human rights in South Africa.[2] The Commission in discharging the mandate is given wide powers to investigate and to report on the observance of human rights and furthermore to take steps to secure appropriate redress where human rights have been violated.[3]

The first part of chapter examines the role of the Commission as a monitoring institution in the delivery of socio-economic rights under the Constitution. In so doing regard will be had to the way in which the Commission monitors and reports on the performance of government in the provision of socio-economic rights. We shall also look at how the people can access the Commission to report rights violations. Lastly, we shall also deal with how the Commission has played its role under the Constitution in promoting human rights generally and socio-economic rights in particular.

6.2.1 The Constitutional Provisions

Section 184(3) of the Constitution states:

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

Section 184(2) contemplates the enactment of an Act of Parliament to regulate the powers of the Commission as contained in section 184(1) of the Constitution. The section provides:

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[2] Section 184(1) of the Constitution.

[3] Section 184(2) of the Constitution.

'The Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power –

(a) to investigate and to report on the observance of human rights;
(b) to take steps to secure appropriate redress where human rights have been violated;
(c) to carry out research; and
(d) to educate.'

6.2.2 The Human Rights Commission Act[4]

The powers and functions of the Commission are contained in the Human Rights Commission Act, a statute which establishes the Commission. The statute makes provision for powers and appropriate measures that the Commission may employ where rights have been violated and under the Act it has powers to redress the violations. Its preamble provides:

> '…the Human Rights Commission shall, inter alia, be competent and obliged to promote the observance of, and respect for and the protection of fundamental rights; to develop an awareness of fundamental rights among all people of the Republic; to make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution; to undertake such studies for report on or relating to fundamental rights as it considers advisable in the performance of its functions; to request any organ of state to supply it with information on any legislative or executive measures adopted by it relating to fundamental rights; and to investigate any alleged violation of fundamental rights and to assist any person adversely affected thereby to secure redress;…'

The preamble of the Act thus sets the tone for the wide nature of the powers vested in the Commission to monitor the observance of human rights in general and socio-economic rights in particular. The Commission has to ensure that there is public awareness about human rights and that state organs carry out their duties according to the Constitution. The powers of the Commission to monitor the respect of fundamental rights must be read in the light of the provisions of the

[4] Act No 54 of 1994 (the HRC Act or the Act).

Constitution, which enjoins the state to respect, protect and to promote and fulfil fundamental rights.[5]

The members of the Commission must serve the Commission impartially and independently. They must perform their duties and functions in good faith and without fear, favour, bias, or prejudice and subject only to the Constitution and the law.[6] The members of the Commission are in this sense placed in a similar degree of trust to the courts of law. They must serve the public and in so doing should instill confidence in the public that they are carrying out their mandate consistently with the Constitution. In order for this task to be sufficiently carried out and public confidence gained by the Commission, it is necessary that state organs assist the Commission to carry out its functions. They should offer support for the Commission and should not unduly interfere with the work of the Commission.[7]

Section 7 of the Act confers powers to the Commission to receive views and recommendations from the public, concerning fundamental rights. This is important as a means to ensure that the Commission is accessible to ordinary people and it understands their concerns. The Commission, is in the same spirit, authorised to obtain reports from organs of state about their observance of fundamental rights as enshrined in the Constitution.

6.2.3 Investigative Role of the Commission

[5] Section 7 (2) of the Constitution. The specific role of the Commission in relation to the section 7(2) responsibilities of the State is usefully analysed by S Liebernberg in *Identifying Violations of Socio Economic Rights Under the South African Constitution –The Role of the South African Human Rights Commission* (University of Western Cape: Cape Town 1997). For our purposes the section 7(2) obligations of the State are discussed in Chapter 2 above. Accordingly, it serves no useful purpose to traverse those issues again.

[6] Section 4(1) of the HRC Act.

[7] Section 4(2) of the HRC Act.

Perhaps, the most significant powers conferred upon the Commission are in terms of section 9. The Commission may in terms of this section conduct or cause to be conducted any investigation which is necessary to enable the Commission to carry out its duties and functions. The Commission may subpoena any person whose presence will facilitate its investigation and in the subpoena it must explain why such a person's presence is necessary.[8] Any person who is subpoenaed in this manner is required to answer any questions that are put to him by the Commission.[9]

The Act makes it an offence for anyone to refuse to co-operate with the Commission without good cause. A person who is convicted of this offence is liable to a fine or to be imprisoned for a period not exceeding six months. Members of the state also commit this offence if they fail to co-operate with the Commission under the Act.[10]

6.3 THE MONITORING ROLE OF THE COMMISSION

The Commission is mandated by the Constitution to monitor the measures taken by state departments to implement social and economic rights. The Commission has developed a monitoring system to enable it to carry out this mandate. This system has been in place since 1997.[11] The system involves the development of protocols which are sent to various government departments for their reply. The government departments have to report on these areas:

- Policy measures
- Legislative measures
- Outcomes measures

[8] Section 9(1) (c) of the HRC Act.

[9] Section 9(2) (a)(i) of the HRC Act.

[10] Section 18 of the HRC Act.

[11] See the Third Annual Report on Economic and Social Rights 1999/2000 of the Commission which can be accessed at www.sahrc.org.za .

- National action plan
- Monitoring
- Additional information

Specific questions are then addressed to the departments in relation to measures adopted to address the plight of socially and economically vulnerable groups. These groups include:

- Persons in rural areas
- Persons in informal settlements
- Homeless persons
- Female-headed households
- Women
- Children
- Persons with disabilities
- Older persons
- Persons living with HIV/Aids[12]
- Previously disadvantaged racial groupings including indigenous groups

Where departments fail to respond to the protocols sent to them without justification, the Commission has power to subpoena the various departments. Indeed in the third monitoring cycle of the Commission it has used these powers. Some departments including the Departments of Health and Education of the Eastern Cape were subpoenaed to appear before the Commission to answer

[12] Section 34 (1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 provides:

> 'In view of the overwhelming evidence of the importance, impact on society and link to systematic disadvantage and discrimination on the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status—
> (a) special consideration must be given to the inclusion of these grounds (in the definition of "prohibited grounds")'.

HIV status is presently not included in the listed grounds in section 9 of the Constitution. In *Hoffman v South African Airways* 2000 (11) BCLR 1211 (CC), however, the Constitutional Court held that the refusal by the South African Airways to employ a person to a position of cabin attendant on the grounds that he was HIV positive amounted to unfair discrimination in terms of s9 of the Constitution.

charges of failing to report to the Commission on their section 7(2) obligations. The Commission reported[13] that the process of hauling these departments before it is effective as most submitted their reports before the scheduled dates of the hearings. After receiving reports the Commission then makes an analysis of the reports and compiles its own report for submission to the President or Parliament.

6.4 SECURING APPROPRIATE REDRESS FOR VIOLATIONS OF SOCIO-ECONOMIC RIGHTS

The Human Rights Commission Act gives the Commission powers to obtain information from any person in the performance of its functions. The Act also makes it an offence for anyone to willfully and without proper justification refuse to co-operate with the Commission when it is carrying out its duties both under the Constitution and under the Act.

The experience of the Commission, however, shows that in some instances it will be difficult to deal with the state administration. The problems that the Commission faced in dealing with the arbitrary suspensions of disability grants in the Eastern Cape is a case in point. The Chairperson of the Commission detailed in an affidavit filed in support of the applicants in the case of *Ngxuza*[14] how it had warned the Department of Welfare that grants should not be suspended without notification and a proper hearing to the beneficiary. He stated that the Department's response was most unhelpful and he concluded that the Commission had failed in its efforts. An unco-operative state administration will undoubtedly seriously impede the work of the Commission.

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[13] In its Third Annual Report (note 11 above) 11.

[14] *Ngxuza and others v Secretary Department of Welfare, Eastern Cape and another* 2000 (12) BCLR 1322 (E) 1326E-F.

In order for the Commission to deal with this problem it is necessary that it works in partnership with non-governmental organisations (NGO's) and other state institutions. This has an effect of broadening the challenge to the state which puts pressure on the government to respond to the problems before it. Secondly, the advantage of this cooperation is that the resources of the Commission may be complemented by resources from NGO's thus easing the strain on the Commission's resources. Thirdly, the Commission as an organ of state is precluded from suing other organs of state without trying other measures first.[15]

The work of the Commission should not be limited to litigation. It ought to be broader than that. The Commission ought to raise public awareness about what socio-economic rights are and how the public can gain access these rights. In so doing, the Commission may also include government departments in its educational programmes. The benefit of such a programme is two-fold. Firstly, it will reduce the level of ignorance with which officials approach the whole notion of rights. Secondly, if they are aware of the rights of everyone and why they should be respected they are likely to deal with the public more humanely and in a 'rights oriented' way. This will go a long way in inculcating a rights based culture among government employees thus creating a society which lives by the rule of law and which is firmly governed by the principles of constitutional democracy.

On funding, it is suggested that perhaps the Commission should not depend on the allocation from government only. It should also seek funding from international donors.

One should also add that the reporting process of the Commission is not altogether satisfactory. After going through the Commission's 1999/2000 report

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[15] Section 41 (1) (h) (vi) of the Constitution provides: 'All spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by avoiding legal proceedings against one another.' See also s 41(3) of the Constitution.

on socio-economic rights one is left with the impression that the reports from state departments are collected merely in order for the Commission to make its own report to Parliament. There seems to be no critical analysis of the concrete measures that the government has put in place. There also seems to be no analysis of the effects of such measures on poverty alleviation. The Commission seems also to have relied only on information from the state departments. In my view the process could also benefit from inputs from NGO's. The Commission should take active steps to encourage NGO's to submit their own assessment of the impact of the measures put in place by the government departments.

These are problems that could be addressed. In the final analysis the inclusion of an institution like the Human Rights Commission in the Constitution is an important development in our constitutional democracy. Already it plays a significant role not only in relation to socio-economic rights but also with regards to issues like elimination of xenophobia and racism in our society. The Commission should be assisted to carry out its functions independently and without undue pressure and criticism from the Executive. The Commission should itself jealously guard its own independence and impartiality. This is how it can win and maintain public confidence.

6.5 THE PUBLIC PROTECTOR

The Public Protector came into existence through the Interim Constitution[16] and was given permanence by section 182 of the final Constitution. Section 182 of the Constitution reads:

> 'The Public Protector has the power, as regulated by national legislation-

[16] The establishment of the office of the Public Protector was provided for by section 110 of the interim Constitution.

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) to report that conduct; and
to take appropriate remedial action'.

The Public Protector is one of the institutions supporting constitutional democracy. It has a general mandate to investigate and report on improper exercise of public power and can take 'appropriate remedial action' where there has been improper exercise of such power. Public power is exercised in many ways and improper exercises also manifest themselves in various ways. It is not the focus of this study to discuss those ways. Access to many if not most of the rights categorised as socio-economic rights like, for instance, the payment of social grants, is regulated through the exercise of public power. In some instances the people who are unlawfully denied access to these rights may not have access to judicial remedies. This is where the role of institutions like the Public Protector is important: to provide appropriate redress for such people.

6.5.1 The Public Protector Act

In terms of the Public Protector Act 23 of 1994 the office of the Public Protector is established to:

> 'investigate matters and to protect the public against matters such as maladministration in connection with the affairs of government, improper conduct by any person performing a public function, improper acts with respect to public money, improper or unlawful enrichment of a person performing a public function and an act or omission by a person performing a public function resulting in improper prejudice to another person.'[17]

The general public ought to have access to the office of the Public Protector. A person may approach the office of the Public Protector by means of a written or oral declaration under oath or affirmation specifying (i) the nature of the matter in question; (ii) the grounds upon which he/she believes that the investigation is

necessary; and (iii) any other information that is known to him or her that is relevant to the investigation. The office of the Public Protector may devise any means that are reasonable in order to enhance the accessibility of the office to the public.[18]

The Public Protector has powers to investigate abuse, unjustifiable exercise of power or unfair, capricious, discourteous, or other improper conduct or undue delay by a person performing a function connected with his or her employment by the State.[19] In this way, the Act creates a mechanism for remedial action if public officials do not carry out their duties diligently and without delay. An investigation and a finding by the Public Protector that a public official has conducted him/herself improperly may result in the employee facing disciplinary action and a possible dismissal.

The Public Protector has powers to direct any person who is being investigated to appear in person before the Public Protector to answer allegations placed to him or her. Any person who without just cause refuses to co-operate with the Public Protector in his investigation commits an offence and may be sentenced or fined upon conviction.[20]

6.5.2 The Public Protector at Work

6.5.2 (a) The Case of Social Grants in the Eastern Cape

The office of the Public Protector functions through a system of referrals. When a complaint is sent to the office it is acknowledged and a commitment to investigate is made. Thereafter, the Public Protector determines whether the law

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[17] The Preamble of the Act.

[18] Section 6 (1)(a)(i)-(iii) and (b).

[19] Section 6(4)(b).

allows his office to investigate the matter. It is only after such a determination has been made that the Public Protector communicates in writing to the person against whom the complaint has been made.

In the *Ngxuza* case[21] one of the applicants' legal representatives chronicled how the applicants' lawyers had attempted to seek redress through the office of the Public Protector without success. It was alleged that when disability grants of some members of the class were suspended, this was brought to the attention of the Public Protector. Some of the complaints had been with the office of the Public Protector for a period well in excess of two years and not much was done except a letter acknowledging receipt of the said complaints. This prompted the applicants' lawyers to arrange a meeting with the Public Protector to deal specifically with the problem of delays in the processing of applications for social grants in the Eastern Cape. This meeting was not productive as many problems relating to pensions were left unresolved. Some if not most of the pension problems were not only referred to the Public Protector's office but also to the South African Human Rights Commission and not much could be done to solve them.[22]

The social grant problems in the Eastern Cape and the fact that the Public Protector's office could not come to the aid of the disabled in the wake of gross abuse of public power, raises pertinent questions about the effectiveness of the Public Protector. The first issue that it raises is the extent of public awareness about the existence of the office of the Public Protector and the related issue of accessibility to the office by the public. Secondly, it raises questions about the

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[20] Section 11.

[21] *Ngxuza* (note 14 above).

[22] In fact the Chairperson of the Commission, Dr Barney Pityana, filed an affidavit stating that the Commission had done everything in its power to encourage the Welfare Department to follow a fair process in canceling grants but these efforts could not achieve the desired results. See *Ngxuza* (note 14 above) 1326E-F.

effectiveness of the Public Protector in remedying problems that have been channeled to him. Thirdly, it raises the importance of co-operation between the section 181 institutions. These matters will receive attention in the discussion that follows and suggestions will be made in appropriate cases.

6.5.2 (b) Accessibility and Effectiveness

The office of the Public Protector must be accessible to as many people as possible. It must be accessible especially to poor people because often they do not have immediate access to lawyers. They also are often at the receiving end of governmental abuse of power. The bureaucracy that is supposed to facilitate access to socio-economic rights in many instances does the opposite. The experiences of the grant beneficiaries in provinces like the Eastern Cape is that without the intervention of lawyers or other institutions it is most unlikely that their problems will be resolved by the state administration in a satisfactory manner.

For this reason alone, if an institution like the Public Protector is to be made more accessible to many people it would assist the people themselves and would lead to a more effective administration. The establishment of regional offices of the Public Protector is a step in the right direction. It is important, however, that these offices should make their services known and accessible.

Access to the office of the Public Protector is related to the question of effectiveness of the remedies that people may get from the office. The Public Protector has powers both under the Constitution and its own statute. If the public is to have confidence in the institution, the Public Protector must use its powers to secure appropriate redress when public power is abused. If it does not, the public is likely to lose confidence in the office and it may not serve the role that the Constitution envisages it must play. Plasket[23] suggests that the office of

the Public Protector should consider co-operating with lawyers and para-legal advice offices in resolving cases where appropriate. It submitted that this system helps in many ways. Firstly, where lawyers and advice offices are involved, they are likely to know that a particular complaint does not fall within the mandate of the Public Protector and therefore channel the case elsewhere. This reduces the time the Public Protector spends informing the public that their cases cannot be handled by it. In carrying out its constitutional function, the Public Protector ought to assert its independence and execute its task without bias, fear nor prejudice.

6.5.3 Co-operation with Other Institutions Supporting Constitutional Democracy

The role of the Public Protector under the Constitution is in essence to control the exercise of public power and to protect the public against improper exercise of such power. On the other hand the function of the Human Rights Commission is to monitor the implementation of human rights. In the arena of socio-economic rights, there is a potential overlap of roles. The example, for instance, of the suspension of a person's pension without following fair procedure is a case in point. This is a violation of the constitutional obligation on the state to respect socio-economic rights. At the same time it amounts to an improper exercise of public power.

In these instances, members of the public are likely to refer their complaints to both institutions for a remedy. These institutions should develop a systematic way of dealing with such cases without compromising their separate identities. They would share experiences and develop more creative remedies geared at improving each other's work and thus delivering proper remedial action. They should also refer appropriate cases to each other. It is not suggested that such

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[23] See C Plasket *'Accessibility Through Public Interest Litigation'* in Corder & Maluwa (eds) Administrative Justice In Southern Africa (Department of Public Law: UCT, Cape Town 1997) 119, 124. See also G Budlender 'The Accessibility of Administrative Justice' (1993) *Acta Juridica* 128.

co-operation should only be limited to the offices of the Human Rights Commission and the Public Protector. Other institutions like the Commission for Gender Equality could also be a valuable source of information on certain issues.

6.6 CONCLUSION

The establishment of the office of the Public Protector, the Human Rights Commission and all the Chapter 9 institutions was an important step in the attempt to create a stable and democratic society. There is a possibility that these institutions might fail in performing their constitutional duties and thus fail to help the public. The sorry state of affairs concerning social grants in the Eastern Cape is a case in point. It demonstrated the difficulties that poor people face on a day to day basis as they try to assert their constitutional rights and the failure of the Public Protector and the Human Rights Commission to remedy the situation. It is therefore important that these institutions take steps to be of greater assistance to people who are victims of abuse of public power. These bodies can do this not only, by means of an increase in their annual budgets but also through carefully crafted work-plans. They should organise their work properly so as to ensure that their work achieves an impact. In so doing it is critical that they establish and maintain links with non-governmental human rights organisations like the Legal Resources Centre. This will help boost their public profile and make them more effective in strengthening constitutional democracy.

CHAPTER 7

CONCLUSIONS

The purpose of this study was to investigate how the judicial process can contribute to the vision of attaining social justice, as articulated in the Constitution. The study examined the provisions dealing with socio-economic rights in the Constitution and how the courts should give effect to those rights in a given situation. It was also about how the Constitution can be used as an instrument for the eradication of poverty, a scourge which if not addressed may be a threat to national cohesion and democracy.

The second chapter dealt with historical recognition of socio-economic rights as legal rights. Throughout, the world there has been a debate on whether or not socio-economic rights qualify to be called 'rights'. Some countries contend that because socio-economic rights require expenditure of public resources and require the state to take positive measures on a progressive basis for their implementation, they are not legally enforceable. Owing to their unenforceability through the courts, so the logic goes, they are not rights *per se* but social goals of the state. In South Africa, these rights are recognised as legally enforceable rights. The Constitutional Court has stated that all the objections to enforceability of socio-economic rights do not detract from the fact that these are rights, which can be enforced through the courts. Central to the recognition of these rights as rights is the need to respect the inherent human dignity of everyone. The Universal Declaration of Human Rights and other human rights instruments which came after it declare human dignity as being of fundamental importance. Courts in some democratic countries have also been using human dignity as a central interpretative tool of their constitutions.[1] The South African Constitution

[1]The German Constitutional Court in dealing with the importance of dignity said:

> 'It is contrary to human dignity to make the individual the mere tool of the state. The principle that "each person must always be an end in himself" applies unreservedly to all areas of the law; the

expressly recognises social and economic rights as justiciable rights. These rights impose both negative and positive obligations on the state. They have to be met and therefore cannot be said to exist only on paper. The state has a duty to work towards the realisation of these rights.

In the third chapter, the discussion focused on the meaning of the concept 'progressive realisation'. The concept of progressive realisation as expressed in sections 26(2) and 27(2) is directly imported from the International Covenant on Economic, Social and Cultural Rights[2](the ICESCR). In its interpretation, the United Nations Committee on Economic, Social and Cultural Rights has said that it is essential that all the State parties strive towards the fulfillment of a minimum core obligation by ensuring the satisfaction of a minimum essential level of social and economic rights.[3] What is 'minimal' for everyone depends on the circumstances of each individual case and on the resources available on the part of the state.[4] The Constitutional Court has noted that it may be undesirable for a

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intrinsic dignity of the person consists in acknowledging him as an independent personality.' 45 BverfGE 187, (1977) 228 (*Life Imprisonment* case).

In *Olga Tellis and Others v Bombay Municipal Corporation and Others* (1985) 3 SCC 545 para 47, the Supreme Court of India stated that the actions of the Municipal Corporation of Bombay in evicting homeless squatters without providing them with alternative accommodation and without affording them an opportunity to be heard was inimical to a society which considers human dignity as paramount. In *Law v Canada (Minister of Employment and Immigration)* [1999] 170 D.L.R. (4th) 1 (SCC) para 53 the Supreme Court of Canada commented:

> '[Human dignity] is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.'

The centrality of human dignity was also expressed by Yacoob J of the South African Constitutional Court when he stated: 'There can be no doubt that human dignity, …[is] denied those who have no food, clothing or shelter.' In *Government of the RSA and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 23.

[2] In particular Article 2(1) of the ICESCR.

[3] General Comment No 3 Issued in 1990.

[4] *Grootboom* (note 1 above) para 46. See also *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C) para 43.

court to determine what the minimum core is in the initial instance without evidence on statistics and spending priorities to that effect.[5] What is minimum in any given situation is better left to the executive in the initial instance. The court will intervene when there is evidence that the state has failed to take reasonable legislative and other measures to achieve the progressive realisation of the right in question. The government must adopt policies and programmes to give effect to these rights. They have to be rational policies and there should be reasonable measures aimed at their implementation. Progressive realisation is also about planning. In planning, the state has to prioritise the needs of those people who are marginalised and vulnerable because of their socio-economic conditions.

In order to achieve social justice, there is a need to enhance access to justice. One of the important elements of achieving access to justice is that courts have to be made accessible to many people especially poor people. Chapter four discussed the relaxation of the standing rules and its significance in enhancing access to courts and thereby access to justice for everyone. It was noted that in the past because of the restrictive interpretation of standing many people, especially the poor, could not have their legitimate concerns articulated and adjudicated upon by impartial courts of law. Section 38 of the Constitution expands the scope of people who can sue for the enforcement of constitutional rights. It provides for the introduction of class actions and public interest suits. This development is important in promoting social justice. It is also significant for the creation of a stable and peaceful society where people respect the rights and dignity of others because everyone can rely on the courts to adjudicate their disputes through a fair and transparent process. Class actions and public interest suits are new in South African law. In some countries they have been used in a very significant way.

[5] In *Grootboom* (note 1 above) para 33. See also *Soobramoney v Minister of Health and Welfare, Kwazulu Natal* 1998 (1) SA 765 (CC) para 29.

Complaints and objections to use of class actions and public interest suits have related to the abuse of class actions and public interest suits by irresponsible litigants.[6] Some have pointed to the difficulties of managing class actions and argued that they should not be allowed.[7] But as Pickering J in the *Wildlife Society* case pointed out 'the floodgates are normally a spectral figure rather than reality.'[8] What has also been contended for in this chapter is that denying standing to a litigant who brings a constitutional claim does not address the potential problem of floodgates. It is the imposition of an adverse costs order that has the effect of ensuring that only litigants who have genuine claims are before court. Another important aspect as highlighted by Froneman J in *Ngxuza* is that a party should seek leave to sue as a class from a court before embarking on that terrain.[9]

Chapter five deal with judicial remedies for the implementation of socio-economic rights. There is no rigid wall separating remedies against the infringement of other constitutional rights and socio-economic rights. What is of importance is that when one is dealing with socio-economic rights, one has to appreciate that these rights require a different approach to litigation and enforcement. An infringement of these rights through government inaction like failure to provide adequate housing or water or social security will affect a large number of people. These people are in many occasions the weaker and vulnerable sections of the population who cannot provide for themselves and depend almost entirely on the state for the provision of basic services like water,

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[6] See the decision of the Indian Supreme Court in *Pandey v State of West Bengal* [1988] LRC (Const) 241 (SC). See also William H. Pryor Jr. 'A Comparison of Abuses and Reforms of Class Actions and Multigovernmental Lawsuits' (2000) 74 *Tulane LR* 1885.

[7] See J Cassels 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible' (1989) 37 *American J of Comparative L* 495.

[8] See *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the RSA* 1996 (3) SA 1095 (Tk) 1106D-G.

[9] See *Ngxuza and Others v MEC for Welfare, Eastern Cape Provincial Government and Another* 2000 (12) BCLR 1322 (CC) 1332D-F. This is also the current thinking of the legislature if one has regard to section 5 of the Bill on Class Actions and Public Interest Action in South Africa (1998).

food, and shelter. When giving an order against the state to give effect to these rights, a court will require the state to perform a positive duty. The implementation of these rights will require massive expenditure of the budget. These are important considerations that practitioners and the courts alike should keep in mind.[10]

The question that a court will ask is whether or not there is a rational program in place that can be implemented through reasonable means.[11] The traditional remedies have to be developed to accommodate these rights. The courts are also mandated by the Constitution to give appropriate relief where any constitutional rights have been infringed. Appropriate relief is relief that remedies the violation, prohibits future violations and grants just satisfaction to the aggrieved party.[12] In this chapter new remedies which have been used in other jurisdictions and which would also fit our new constitutional order were proposed. It was also emphasised that it is important for the government to give effect to judicial rulings without unreasonable delay. This is important in order to respect the constitutionally mandated separation of powers doctrine and is in keeping with the doctrine of the rule of law, a cornerstone of the Constitution.

The Constitution creates a number of institutions to compliment constitutional democracy. Some of these are of importance in giving effect to and promoting human rights generally and socio-economic rights in particular. In chapter six a specific focus was given to the role of the Public Protector and the Human Rights Commission in the promotion and observance of socio-economic rights. The Human Rights Commission has a specific mandate under the Constitution to

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[10] The effectiveness of litigation in the context of the United States welfare reform litigation is discussed by Chris Hansen in 'Making It Work: Implementation of Court Orders Requiring Restructuring of State Executive Branch Agencies' in S. Randall Humm et al (eds) *Child, Parent, and State: Law and Policy Reader* (1994 Temple University Press) 224.

[11] See *Grootboom* (note 1 above) para 41.

[12] See *Hoffman v South African Airways* 2000 (11) BCLR 1211 (CC) para 45.

monitor the implementation of socio-economic rights. The Public Protector monitors the abuse of public resources by the executive. It is also charged with the responsibility of reporting to Parliament on maladministration in the public service. These functions are both important to ensure that public officials do their work properly in a manner that is consistent with the Constitution.[13] One must also note that judicial interventions even supplemented by these institutions is by no means adequate to realise the vision of social justice. Of importance is the role that civil society through non governmental organisations and other institutions can play in poverty alleviation.[14] Havi Echenberg and Bruce Porter suggest that socio-economic rights can best be articulated and sustained if those people concerned with their implementation organise themselves into a movement that will articulate their concerns.[15]

The Constitution presents new and interesting challenges for everyone. The socio-economic rights provisions will sound a hollow ring if steps are not taken towards their fulfillment. The vision of a society founded upon social justice is

[13] Although, the role of the Commission on Gender Equality was never discussed, it is important to note that this institution has an important role to play in the observance of socio-economic rights specifically relating to women.

[14] L Sossin in 'Salvaging the Welfare State?: The Prospects for Judicial Review of the Canada Health & Social Transfer' (1998) 21 *Dalhousie LJ* 141 talks about the problems for judicial interventions in the determination of budgetary allocations by the Canadian federal government. A Sajo in 'How the Rule of Law Killed Hungarian Welfare Reform' (1996) *East European Constitutional Rev* 31 is critical of the Hungarian Constitutional Court for pursuing a 'social gospel' without paying regard to the needs and interests of the market.

[15] H Echenberg and B Porter 'Poverty Stops Equality: Equality Stops Poverty' in I Ryszard in Cholewinski (ed) *Human Rights in Canada: Into the 1990's and Beyond* (1990 Human Rights Research and Education Centre: University of Ottawa) 1, 14-15. See also N Stammers 'Social Movements and the Social Construction of Human Rights' (1999) 21 *Human Rights Quarterly* 980. But see Piven and Cloward in *Poor Peoples Movements, Why They Succeed, How They Fail* (1977 Pantheon Books New York) 264. In the latter work the authors explain how and why the Welfare Rights Movement failed in the United States. They state that it essentially failed because it became a bureaucracy whose leaders could no longer relate to the needs of their members. See also an interesting work on the role of civil society in general and NGO's in particular in Africa in the promotion of the rule of law and human rights in C E. Welch, Jr *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organizations* (University of Pennsylvania Press 1995). M Mutua's concern in 'Savages, Victims and Saviors: The Metaphor of Human Rights' (2001) 42 *Harvard Int LJ* 201 is that one has to be careful in uncritically accepting ideas from international NGO's because some of them were not established in order to respond to the pressing social problems of the third world and Africa in particular.

indeed an important vision for a society still trapped in the legacy of inequality created by previous governments. The creation of that society presents a daunting challenge indeed. It is by no means an impossible challenge. It is the responsibility of everyone to make the Constitution work. As Arthur Chaskalson has stated

> 'The Constitution offers a vision for the future. A society in which there will be social justice and respect for human rights, a society in which basic needs of all our people will be met, in which we will live together in harmony, showing respect and concern for one another. We are capable of realising this vision….Too many of us are concerned about what we can get from the new society, too few with what is needed for the realisation of the goals of the Constitution. What is lacking is the energy, the commitment and the sense of community that was harnessed in the struggle for freedom…. All of us have an obligation to make the Constitution work, and it is in all of our interests that this be done. It is important that we regain the energy, the commitment and the sense of community that we once had, and use it to give effect to the values and aspirations of the Constitution.' [16]

[16] A Chaskalson 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 193, 205.