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Social and Economic Rights: The Struggle for Equivalent Protection

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Introduction

Social and economic rights broadly defined are those necessary to sustain life including shelter and adequate housing, food, clothing, water, health care, social security and an adequate standard of living. These rights could be described as the most fundamental of human rights, essential for continued survival. However, they are not afforded the same legal status and protection as civil and political rights in international, regional and domestic systems. They are often seen as subordinate to civil and political rights and it has been argued that they should not be justiciable, meaning that they should not be enforceable in a court of law.

This chapter charts the development of social and economic rights in international law from the creation of the International Covenant on Economic Social and Cultural Rights and its subsequent legacy, before considering the contemporary debates surrounding the legal status of these rights. This chapter takes a legalistic approach towards the protection of rights. While not dismissing or diminishing the impact that policy and grass-roots movements can have on the furtherance of all human rights, as a lawyer I believe that justiciability as a safety net against violations is pivotal in the effective protection of all human rights. To that end the main focus of this chapter is illustrating the positive impact that the courts have had when they have deigned to intervene. Further, that without elevating social and economic rights to within the purview of the judiciary the result is that these rights will remain perceived as less important than their civil and political counterparts. To illustrate this point, the main focus of this chapter is examining the moves in international, regional, and domestic towards justiciability and the resultant positive impact.

The ICESCR

In the aftermath of World War II and the failed the League of Nations, the Charter establishing the United Nations (UN) entered into force on 24 October 1945.[i] The primary purpose of this new institution was twofold; to maintain international peace and stability and to protect human rights. On the 10th December 1948 the United Nations General Assembly adopted the Universal

Declaration of Human Rights (UDHR) which for the first time provided a comprehensive catalogue of human rights, encouraging their protection by the rule of law. This is reflective of the legalistic approach to human rights which affirms that rights are meaningless unless they can be enforced in a court of law.

No distinction is made in the UDHR between civil and political rights and social and economic rights; rather the document is a thorough account of the rights which states *ought to* strive protect. This demonstrates that at the commencement of the modern human rights movement social and economic rights were recognized as being equally as important as civil and political rights, theoretically at least. Thus, it can be argued that international law does not support a division of the rights and such division is grounded in national law perspectives which cling to a negative model of human rights. Political and civil rights are "negative" rights in that they restrain the actions of states, whereas economic and social rights require "positive" investments by states. In other words, if the state merely has to avoid an interference with your rights (for example, not kill you) then this will not have significant budgetary implications; whereas, if the state is required to provide you with healthcare or housing it will be costly.

Unfortunately, the UDHR was not a legally binding document. It did not require that any of the rights mentioned be transposed into national law. Negotiations in the United Nations began in 1949 to transpose the rights in the UDHR into legally binding obligations, but in the context of Cold War tensions, the discussions devolved into polemics and the attempts to create one document were abandoned.[ii]

There have been recent disputes about the pivotal moment for human rights history in international law. Samuel Moyn argues that the 1970s are a turning point for international human rights law as this is when the first UN human rights treaties come into force[iii] while Steven Jensen persuasively posits that the 1960s anti colonial movements had a significant yet often overlooked impact on the development of international human rights.[iv] Jensen's position has considerable merit because, although negotiations to transpose the UDHR began in 1949, it was only during the 1960s that these were concluded, establishing the persistent divide in international law between the two sets of fundamental rights.

Despite maintaining the official position that the two sets of rights are universal, interdependent, interrelated and indivisible,[v] there arose a deep disagreement regarding the proper status of social and economic rights with both sides adopting extreme and discordant views. One side of the argument believes that the social and economic rights are superior to civil and political rights in chronological terms, meaning that without the fulfilment of social and economic rights the civil and political rights cannot be realized. The other side of the argument states that social and economic rights are not rights in the traditional and classic sense of the term rights and to treat them as such undermines individual freedoms and distorts the free market. The western states, led by the United States, were opposed to their inclusion and expressed concern over the scope of the obligations while many eastern European and emerging third world nations strongly advocated for the inclusion of these rights. Those European states who at the time still held colonies were concerned about the cost of securing social and economic rights supported their exclusion. As a result, in 1966, the rights were split, the International Covenant on Civil and Political Rights (ICCPR)[vi] containing civil and political rights and the International Covenant on Economic Social and Cultural Rights (ICESCR)[vii] consisting of social and economic rights were adopted by the General Assembly.

The effect of the ultimate compromise cannot be overstated. The two categories of rights were set on divergent paths with different importance ascribed to each and, in the geo-political balance of power, social and economic rights were relegated to a subordinate status.[viii] This subordination created significant difficulties in the propagation of, and force accorded to, these rights in international, regional and domestic contexts.

Social and economic rights on the other hand were to be realized progressively, subject to available resources,[ix] a "programmatic"[x] approach not applied to civil and political rights. The absence of immediate and concrete obligations in the ICESCR coupled with the lack of any complaints mechanism, [xi] were powerful factors contributing to continued violations compounding the inferior status of the rights on an international level.[xii] In contrast, the ICCPR contains more compulsory wording such as: "all peoples have the right," and that states must "ensure" these rights.[xiii]

The state has three core obligations under the ICESCR: to respect, protect and fulfill the rights contained therein.[xiv] The duty to respect is a passive obligation and requires the state to avoid interfering, by law or conduct, with the enjoyment of the rights contained within the Covenant. The duty to protect however is more active in nature and requires the state to take positive steps to protect against violations by third parties. This requires that the state put effective measures in place by way of legislation or policy to prevent abuses from more powerful actors against the individual such as landlords or banks. The duty to fulfill is the most contentious as it requires the state to provide for those who cannot support themselves, through ensuring access to existing services and providing services directly where access through existing structures is unavailable.

The Committee on Economic Social and Cultural Rights was established in 1985 to monitor state compliance with the Covenant.[xv] The primary functions and objectives of the Committee are to develop the normative content of the rights, develop state benchmarks and to hold states accountable for failure to implement. In addition, the Committee produces general comments which clarify the contents of rights and direct how they should be interpreted. These general comments again are of a non-binding nature and do not create enforceable obligations; they are merely an authoritative interpretations setting out what steps should be taken and are published with a view to assisting each state in its implementation.

The state must submit periodic reports to the Committee which it considers along with the shadow report (which is normally produced by independent NGOs from the state in question) and raises a list of issues. These are specific questions posed to the state and along with the organizations which compiled the shadow report, both submit their replies. The Committee then makes its concluding remarks which contains areas of good practice, recommendations on further implementation and areas where it is considered that the state is failing. The Committee has no power to enforce any of its recommendations. Given that the obligation is to progressively realize rights, it is a difficult task for the committee to determine whether the state has breached its obligations at all. The Maastricht Guidelines 1997 clarify that the state is in breach of its obligations if it fails to allocate the maximum of its resources to the realization of human rights.[xvi] Following from this principle, the Committee in 2007 made a statement entitled "An Evaluation

of the Obligation to Take Steps to the Maximum of Available Resources under an Optional Protocol to the Covenant" which regrettably did not define what constitutes available resources.[xvii]

The concept of progressive realization introduces an element of flexibility which imposes a continuing obligation of states to take steps towards full realization. There are three main elements to progressive realization. Firstly, there must be immediate and tangible progress towards the agreed on end and, therefore, the element of flexibility does not mean that the state can postpone implementation.[xviii] The second component is that the state cannot pursue regressive measures meaning that the state cannot reduce existing minimum levels of support. Such measures are only justified where it can be demonstrated as necessary to achieve equity in the realization of the right or to create a more sustainable basis for realization.[xix] The state is likely to be held to a higher standard here and the committee examines whether:

> (a)There was reasonable justification for the action (b) alternatives were comprehensively examined (c) there was genuine participation of affected groups in examining the proposed measures and alternatives (d) the measures were directly or indirectly discriminatory (e) the measures have a sustained impact on the realisation of the right …. and (f) whether there as an independent review of the measure at national level.[xx]

However, the committee offers little further guidance. At times, it will criticize a measure without identifying whether such as in fact breached the state's obligation which is problematic particularly during times of austerity measures.[xxi]

The third element for progressive realisation are the special measures which must be implemented for particularly vulnerable and disadvantaged groups. This requires the state to take positive steps to reduce structural inequality and to give preferential treatment to these groups.

The steps to be taken towards progressive realization vary depending on the resources of the state. The minimum core approach sets out that there is a minimum level which the state must

ensure. While the general application of the Covenant is one of progressive realisation subject to state resources, the obligation to implement minimum core rights is an immediate one.

As noted above, one of the committee's functions is to define the content and scope of rights through its general comments and the body has been most challenged when tasked with articulating this requirement in terms of a state's minimum core obligations. Members seek to establish a minimum content, asserting that people are entitled to a minimum standard and that it is unacceptable for individuals to live in conditions of extreme poverty and deprivation which fall below the minimum standard. The general comments, while useful in elaborating the content of the rights, fail to address adequately what the minimum core of each right is.[xxii]

General Comment No. 3 states that the state's responsibility is to provide:

> [a] minimum core obligation to ensure the satisfaction of, at the very least minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential food stuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.[xxiii]

However, this statement is partially qualified as the Covenant goes on to enunciate a number of preconditions that must be present before a state can be said to have breached its minimum core obligations. Originally, there had to be a significant number of people who were suffering from the particular deprivation. What constituted a significant number appeared impossible to quantify and the Committee subsequent clarified that minimum core obligations apply as an individual right thereby effectively obviating this initial requirement.[xxiv] Secondly, "any assessment as to whether a state has discharged its minimum core obligations must also take into account of resource constraints applying within the country concerned".[xxv]

As clear benchmarks for progressively meeting these rights have not been precisely delineated, nor have the content of minimum core rights been catalogued, legal academic Katherine Young has identified three separate approaches to understanding the minimum core rights and

obligations.[xxvi] Firstly, she explains the essence approach which seeks to establish the essential minimum of the right: "it is the absolute, inalienable and universal crux, an unrelinquishable nucleus that is the *raison d'etre* of the basic legal norm, essential to its definition."[xxvii] In this context the minimum core is to satisfy the basic needs of the individual, interpreted by the Committee as the essentials to survival and life.[xxviii] However, focusing on biological survival may also be problematic as it deteriorates into an exercise into the minimum requirements necessary for a human to survive. Moving towards a value based approach looks to one based on the dignity of the person, a concept which has flourished since the introduction of the UDHR.[xxix] This approach, however, also creates difficulties in that dignity can be measured either objectively or subjectively and further hampers a precise definition of the minimum core of the right.[xxx]

The second approach is the consensus approach which focuses on identifying where a consensus has been reached rather than on the normative content on the minimum core. The idea is that through an examination of jurisprudence, evidence of a consensus would emerge which would in turn develop the normative content of the right. Despite the significant lack of justiciability in many national jurisdictions the Committee has been able to ascertain a consensus (or an emerging one) from state reports. Arguably, the focus on a consensus itself adds to its legitimacy.

Finally, the minimum obligation approach focuses on the duties required to implement the minimum core right. While this approach is helpful in establishing the steps that states should be taking to implement the right, it does little in the way of establishing the normative content.

Practically, the difficulty in determining the minimum core of a given right has been played out in the South African Constitutional Court. In *Grootboom* where the court was considering the right to adequate housing, the court felt that it was impossible to say what the minimum threshold was without identifying the need which would vary depending on factors such as income, employment and availability of land and preferred to examine the case based on the reasonableness of the steps taken. Similarly, in the *Treatment Action Campaign* case the court rejected arguments that the minimum core right is not subject to resource constraints. These cases are considered in more detail below.

The concepts of progressive realisation and minimum core rights has to a large degree curtailed the development of social and economic rights. The steps required by the state may be minimal and subject to resource constraints. While the Committee has been highly critical of regressive measures, the global financial crisis since 2008 has resulted in less available resources and austerity has impacted significantly on the enjoyment of rights protected by the Covenant. Further, the minimum core content of each right not being met may be largely due to its imprecise and contested nature. Given that the role of the Committee has primarily been as a monitoring body, the introduction of the optional protocol to allow the court deliver opinions and decisions on particular cases may serve to clarify these areas.

Objections to justiciability

The main difference between the two sets of rights has been, and continues to be, their ability to be legally enforced. Initially during negotiations opposition arguments centered on whether social and economic rights could be classified as rights due to the understanding at the time that they carried positive and resource heavy obligations. This debate has been largely concluded with general acceptance of their status as human rights. Contemporary arguments focus now on which branch of the state should be responsible for their protection and vindication; the judiciary or the executive, or even the legislature. Essentially, objections to the legalization of social and economic rights can be categorized under three headings: characterization, legitimacy, and institutional capacity.

To briefly summarise these objections[xxxi]: characterization refers to the content, obligation and cost of the right. Essentially the objection is two-fold; first, the content of the right itself is vague and therefore a court could not make a determination, and secondly that social and economic rights necessarily carry positive (and therefore expensive) obligations. This is objection is easily countered; civil and political rights were historically also vague and imprecise and through the intervention of the court the parameters and scope of the rights have been defined. Further, all rights contain both an amalgamation of both positive and negative obligations. The second objection, legitimacy, again relates to the cost argument. It states that as these rights will cost the state, only the government has the power to decide how to allocate state resources.

Therefore, if the court were to determine these issues they would be breaching the separation of powers. Notwithstanding the fact that all rights contain both positive and negative obligations (for example the right to a fair trial can be costly to ensure as it requires an effective police force to investigate, an impartial judiciary, adequate representation etc) relegating an entire category of rights to a position beyond the scrutiny of the courts arguable creates a situation which the separation of powers was designed to protect against by placing all of the power for them within one arm of the state with no oversight. The final objection is centered on the capability of the court to deal with cases involving social and economic rights, primarily due to the polycentric or wide reaching effects nature of such claims. [xxxii] This is possibly the least persuasive of the objections as the vast majority of decisions will have an impact beyond the parties to the case, particularly where the case is taken against the state (or an organ thereof). Indeed, judges are often injected into controversies beyond their expertise; financial accounting, aviation, marine biology etc. To overcome this deficiency, experts in the field are brought in to explain, and the same could be done for cases of social and economic rights. Thus the arguments against justiciability are misplaced as is evidenced in the next section showing a clear trend toward court intervention and, importantly, proving that judicial intervention enhances protection.

Moving towards Justiciability

International Law: The Optional Protocol to the ICESCR

From 1990, the Committee began calling for the introduction of an optional protocol, which would establish an individual complaints mechanism. With a complaints mechanism in place, the Committee would be empowered to offer more effective protection in instances of concrete abuse, issue more definitive guidance on the interpretation of rights, and increase the stature afforded to the Covenant. [xxxiii] The continuing opposition to justiciability was apparent at the outset of negotiations on the optional protocol. [xxxiv] Delegates argued that a complaints mechanism would be impractical, given the imprecise nature of the rights and would undermine the democratic process in policy and budgetary matters. [xxxv] Despite objections, in June 2008, the protocol was approved by the Human Rights Council, adopted by the General Assembly, opened for signature in December 2008[xxxvi] and entered into force on 5 May 2013.

There are numerous admissibility criteria which must be met before a complaint can be addressed by the Committee. These include the exhaustion of domestic remedies, a time limitation of one year and the requirement that the claim must not be anonymous, vexatious or an abuse of the right to petition.[xxxvii] While the Committee does have the power to request interim measures to protect against continuing and on-going violations,[xxxviii] it only has the jurisdiction to hear claims where the breach occurred, or continued, after the protocol came into effect, confirming the principle of non-retrospectivity.[xxxix]

The optional protocol does have two main weaknesses. Firstly, the wording of the treaty itself remains the same: overwhelmingly the rights are to be realized progressively subject to resources and rather than by way of immediate obligation. Therefore, it may be a difficult task to show that a state has breached these obligations.[xl]

There is currently no jurisprudence from the Committee as to how it will interpret state obligations or, how influential the General Comments will be in defining them. Legal analysts anticipate that this ambiguity will decline once it begins to deliver its opinions. The weak wording of the optional protocol itself (which resulted from political, rather than legal considerations) is equally of concern. The inclusion of extensive admissibility criteria were inserted to assuage fears of opening the floodgates which to my mind evidences that the Committee is aware of the vast and significant violations of these rights. Further, it requires the Committee to take account of the "reasonableness" of any steps which the state has taken.[xli] The interpretation of reasonableness may have a considerable impact upon the efficacy of the optional protocol, which in turn could influence the interpretation in regional and domestic systems. If it is interpreted minimally by the Committee so too will the individual states.[xlii]

Another issue relates to the enforcement and sanction powers of the Committee, which extend to making recommendations; it has no authority to enforce the decisions or to impose sanctions on the offending state. The only requirement is that the state party gives due consideration to its views.

Despite its inherent weaknesses, the introduction of the optional protocol is a significant step in approximating the treatment of all rights, regardless of derivation and classification. It elevates

social and economic rights to a level comparable to civil and political rights in international law, providing a forum whereby violations of rights can be voiced and adjudicated upon, albeit in a non-enforceable manner.[xliii] This step marks a considerable advancement of these rights and categorically affirms their status as rights.

Regional Developments

The Council of Europe was established in the wake of World War 2 as a sister institution to the European Union. The European Union was charged with ensuring economic stability within the union while the Council of Europe had responsibility for protecting human rights., Disappointed at the delays in transposing the UDHR, set about creating the European Convention on Human Rights (ECHR) which entered into force in 1953. Again, the same arguments arose in relation to the status of social and economic rights and in order to ensure that the convention could enter into force as quickly as possible members agreed that only the rights that all easily accepted would be included.

The ECHR textually protects only civil and political rights. While from its very early cases it found that there could be no watertight division of rights, it was relatively stagnant on developing this line of judicial reasoning for many years.[xliv] In the last decade or so there has been considerable activism on the part of the ECHR in reading social and economic rights into the Convention. Effectively its approach is that where the violation of social and economic right is such that it materially effects the enjoyment of a civil and political right right it will adjudicate on it, as the following case law illustrate. The Court has considered primarily housing, health and social assistance cases initially placing negative obligations on the state. In *Moldovan v Romania* it determined that while the state does not have to provide houses for all homeless, where it is complicit in creating that homelessness they may have a positive obligation[xlv] and in *Connors v UK*[xlvi] and *Yardonova v Bulgaria*[xlvii] it was affirmed that the state cannot arbitrarily evict without adequate safeguards; the state does not have to provide benefits, but where it does it must do so without discrimination[xlviii] and questioned whether the state can deport those with medical conditions.[xlix] In recent cases however more positive obligations have been placed on the state.

In *Soares de Melo v Portugal*, a complex case involving the ultimate removal of the applicant's children for neglect due to poverty stricken condition, the court found such action to be a breach of the right to family life.[l] Of particular note in this case, the court was critical of the state's knowledge of the applicant's living conditions yet did not intervene to ameliorate the situation.

This approach has not been confined to the European Court and despite the embodiment of social and economic rights in the American Declaration of the Rights and Duties of Man 1948[li] (such as the right to health,[lii] education,[liii] rest and leisure[liv] and the right to social security[lv]) these were not integrated into the judicially enforceable American Convention on Human Rights.[lvi] In the absence of specified protection, the Inter-American Court has interpreted civil and political rights in a manner that renders social and economic rights justiciable through the right to life.[lvii] One of the first cases that dealt with social and economic rights, known as the *Street Children*[lviii] case, involved the plight of children living on the streets of Guatemala where it was reasoned that the right to live a dignified existence was implicit in the right to life.[lix]

By applying the Convention in a manner harmoniously with its additional protocol (commonly referred to as the Protocol of San Salvador),[lx] this notion of a decent and dignified life came to encompass social and economic rights, particularly the right to health.[lxi] The integrated approach to interpreting the Convention—not as a stand-alone document, but rather as an integral part of a system of human rights documents—has made social and economic rights justiciable.

Not only is the manner in which the Inter-American Court has encompassed social and economic rights jurisprudence important in this context, so too are the remedies which it has awarded. This court does not confine itself to the award of damages where the breach has occurred; rather it has developed a practice of ordering positive obligations at the interim stage. The court has ordered immediate measures to prevent violations of rights, rather than waiting for the violation to occur and acting in a reactionary manner. Thus far, these provision measures have primarily involved ordering medical treatment and improved living conditions for those under the care or control of the state.[lxii] However, the potential to extend this precedent to those dependent on state resources might be expected. Thus the Inter-American Court has indirectly given effect to social and economic rights through an expansive interpretation of existing civil and political rights

contained within the Convention, confirming the indivisibility and interdependence of the two sets of rights in a manner which was "always intuitive."[lxiii]

Domestic Jurisprudence

Within domestic systems, more recent national constitutions have explicit protection for social and economic rights.[lxiv] The Croatian Constitution,[lxv] the Charter of Fundamental Rights and Freedoms of the Czech Republic (which is justiciable under the Constitution of the Czech Republic)[lxvi] the Constitution of Finland,[lxvii] the Constitution of Moldova,[lxviii] the Constitution of Hungary,[lxix] the Constitution of Poland,[lxx] the Constitution of Serbia,[lxxi] and the Swiss Constitution[lxxii] provide express protection for various social and economic rights and, for their judicial enforcement.

South Africa provides the foremost example of a domestic system which enshrines social and economic rights within their Constitution[lxxiii] and confers full justiciability on them.[lxxiv] Rights such as housing,[lxxv] healthcare, food, social security and shelter[lxxvi] are of equal rank and dignity to civil and political rights, a measure intended to transform the post-apartheid nation.[lxxvii]

The first substantive case[lxxviii] on the issue of social and economic rights before the Constitutional Court was *Soobramoney v Minister for Health, KwaZulu-Natal,* which challenged the denial of dialysis treatment to prolong life.[lxxix] The applicant relied on the provision that "no one may be refused emergency medical treatment"[lxxx] which was rejected by the court. It was determined that the provision could not be extended to prolonging the life of terminally ill patients. The right had to be weighed against the limited resources of the state,[lxxxi] and it was justified in restricting this treatment to non-terminal patients. This decision was measured and caused concern about the future of social and economic rights jurisprudence as it appeared to defer excessively to the executive.[lxxxii]

The case of *Government of the Republic of South Africa v Grootboom*, noted earlier and decided two years post Soobramoney, injected fresh hope …[lxxxiii] This case sought to enforce the right to housing under section 26.[lxxxiv] It arose when the applicant and several hundred other residents of an informal settlement left due to dismal living conditions and settled on private land. An

eviction order was granted by the court and during its enforcement the temporary shelters and possessions of the applicants were destroyed forcing them to return to the informal settlement. The High Court found that the Constitution did not confer an enforceable individual right to a minimum entitlement to temporary shelter but found that where parents were unable to provide basic shelter, section 28 imposed an obligation on the state to provide "tents, portable latrines and a regular supply of water",[lxxxv] and made declaratory orders in that regard, requiring the respondents to provide within three months temporary accommodation particularly for the children.[lxxxvi]

In upholding the decision, the Constitutional Court found that the state was in breach of section 26(2) as its housing plan failed to provide reasonable measures "to provide for relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations",[lxxxvii] and that "it is essential that a reasonable part of the national housing budget be devoted to the homeless".[lxxxviii] However it merely granted declaratory orders and did not assert what measures would satisfy this reasonableness test.

The limits of enforceability for social and economic rights remained in question following this judgment,[lxxxix] however its paramount significance is in confirming that they contain both negative and positive dimensions and obligations. In the negative, cases such as *Jaftha v Schoeman & Ors*,[xc] *City of Johannesburg v Rand Properties Ltd*,[xci] and *Abahlali BaseMjondolo Movement SA and Ors v Premiere of the Province of Kwazulu and Others*[xcii] all involving evictions where the courts, while not placing a positive duty to provide for housing, struck down legislation and procedures which allowed for arguably arbitrary eviction. This approach has not been confined to cases of housing, and in *Khosa v Minister for Social Development* the court found unconstitutional the exclusion of permanent residents from receiving certain social assistance benefits.[xciii]

While the court in *Grootboom* did not elaborate on the specifics of the positive obligations it did confirm that the Constitution placed such a duty on the state to ameliorate the lamentable living conditions[xciv] and the court reserves the ability to enforce such by virtue of mandatory orders. These mandatory orders were granted in the High Court in the *Treatment Action Campaign*

case.[xcv] This case challenged the policy restricting a drug called Nevirapine to certain pilot areas.[xcvi] In the first instance, the High Court ordered that the drug be made available to all infected mothers giving birth in state institutions and that the state develop a comprehensive plan, and report back to the court within three months in relation to its development and implementation.[xcvii] On appeal to the Constitutional Court, the ruling of the High Court was upheld in that it affirmed the state's duty to remove restrictions. However in terms of the obligation to develop and implement the plan, the court preferred to grant declaratory relief with no time frame for completion.[xcviii]

This deference can be seen in the *Mazibuko* case , which involved a challenge to the introduction of pre-pay water meters in the poverty stricken area of Soweto.[xcix] The applicants argued that this was a breach of their constitutional rights to adequate access to water.[c] In the High Court, Justice Tsoka held that the installation of the pre-paid water meters constituted a violation of the right to water in that, "To deny the applicants a right to water is to deny them the right to lead a dignified human existence".[ci] The case was subsequently appealed to the Supreme Court of Appeal. It upheld the order of the High Court, stating that the city had no authority to install pre-paid meters and, *a fortiori*, that the discontinuance of water when the free limit had been reached was unlawful.[cii]

The case was appealed once more to the Constitutional Court, which overturned the previous orders issued by the High Court and the Supreme Court of Appeal.[ciii] It determined that the installation of meters did not breach any rights and it further refused to declare what amount of water was a sufficient daily allowance.[civ]

The position in South Africa evidences that social and economic rights can be textually placed within the constitution but this approach does not mean that they will be upheld in every case. Rather they will be subject to the same balancing act and tests applied to all other rights, and of particular note is that the availability of resources is a paramount concern to the court.

In contrast, India has been the most assiduous in reading social and economic rights into their constitution through an expansive interpretation of the right to life. A pivotal moment in this

regard came when it expanded Article 21 to make their Directive Principles of State Policy justiciable, and thus initiated the era of social and economic rights jurisprudence in India.[cv]

The first case to test the position of social and economic rights in the Indian Constitution came in *Olga Tellis v Bombay* where issues involving housing and shelter were laid before the court.[cvi] This public interest litigation was brought on behalf of pavement dwellers against eviction, without notice or compensation, to the outskirts of the city. They argued that this eviction deprived them of their livelihood, and that this displacement from their source of income would infringe their right to life under Article 21 of the Constitution. Chief Justice Chandrachud observed that it would be "sheer pedantry to exclude the right to livelihood from the content of the right to life".[cvii]

In *Shantistar Builders v Narayan Khimalal Totame* the court further entrenched its position observing that the right to food, clothing and reasonable accommodation were encompassed under the right to life,[cviii] interpreting it as being a right to live with dignity, and to flourish intellectually and materially.[cix] The theme of protecting poverty stricken and vulnerable sections of society in housing issues continued in *Chameli Singh v State of Uttar Pradesh*[cx] where the court upheld a policy which infringed on the rights of the privileged for the benefit of the marginalized.[cxi]

The court's activism continued in expanding the parameters of the right to life in order to guarantee the right to health. In *Consumer Education and Research Centre v Union of India*, the court held that the right to health and medical care was an integral part of the right to life.[cxii] This ruling established the foundations of a positive obligation on the part of the state to ensure certain standards of good health.[cxiii]

In *Parmanand Katara v Union of India* the court addressed the issue of emergency medical care as an iteration of the right to life.[cxiv] Here it ordered that legal impediments which prevented hospitals treating medico-legal cases be removed following the death of a man who had been refused hospitalization on this basis. The court further ordered that its decision be publicized thereby creating a general awareness of the state's responsibility to provide emergency medical care.[cxv] In *Paschim Banga Khet Mazdoor Samity v State of West Bengal*, the court reiterated the

duty to provide emergency medical care as an integral part of the preservation of life.[cxvi] Undeterred by the significant cost implications, it ordered that equipment and facilities be provided to ensure the preservation of life in emergency medical situations.[cxvii]

However, resource implications have been considered by the court and accepted as a legitimate reason to restrict access in certain limited circumstances. When faced with the question of whether a reduction in the entitlement to be reimbursed for medical expenses breached Article 21, the court accepted the state's contention that such was necessary in light of financial constraints.[cxviii] Arguably this outcome may have differed if the benefit was entirely removed rather than reduced as medical care must be affordable so as to be within the reach of all.[cxix]

The case of *Laxmi Mandal v Deen Dayal Harinagar Hospital & Ors* expands again on the *Paschim Banga* judgment.[cxx] The case, brought on behalf of a woman who had died as a result of carrying a dead foetus in her womb, was the first case worldwide to recognize preventable maternal mortality as a human rights violation.[cxxi] She had been refused access to emergency maternal care as her husband was unable to show a valid ration card, to which he was entitled. The court found that there had been a systematic failure on the part of the state. Declaring that it was the responsibility of the state to ensure valid ration cards were circulated the court ordered an overhaul of the system. This included requiring the state to actively seek out those in need of ration cards. Moreover, it mandated the establishment of monitoring systems to ensure that its orders were being fully implemented. Since this judgment, a plethora of cases involving maternal healthcare have arrived before the court.[cxxii] Notably, the court's initial activism in this area has not diminished and in 2010, on its own motion, brought a case against the Union of India following reports of a destitute woman who died several days after giving birth on the street.[cxxiii] After a preliminary hearing, the court ordered the Government of Delhi to open five homes exclusively for pregnant or lactating destitute women, establish a helpline to promote the homes, make food and medical care available 24 hours per day in the shelters, disseminate information about the shelters, host awareness camps, mobilize medical units to bring women to the shelters, and to involve NGOs. The state took issue with the expansive nature of the orders and filed objections to this effect. Nevertheless, and pending final determination of the appeals process,

they were ordered to implement immediately two of the shelters with food and medical care. In 2013, the conditions of those shelters were brought before the court following the death of a baby.[cxxiv] Following a thorough inspection of the facility, and a finding of unsatisfactory conditions,[cxxv] the court ordered several remedial measures, including: a dedicated space for ante-natal check-ups, supplemental nutrition, and adequate hot water and heating in winter.[cxxvi]

These extensive measures in relation to emergency medical care and maternity care are not without precedent. The ongoing public interest litigation in *People's Union for Civil Liberties* is a stark illustration of the dramatic measures taken to protect social and economic rights.[cxxvii] This case, instigated in 2001, initially sought an order on behalf of those dying from starvation in the state of Rajasthan to compel the government to release food stocks. The underlying principle that this case establishes is that the right to food is intrinsically linked with the right to life as protected by the Constitution. The litigation continues, and a plethora of orders have issued (and continue to issue) from the Supreme Court. The court has made orders in relation to grain allocation, implementing a midday meal scheme in schools, ration cards those living below the poverty line and directions for the operation of ration shops. In addition, orders have issued for a price-setting mechanisms for grain, and for grain allocation in the 'work for food' scheme to be doubled and financial assistance for these schemes to be increased.

This activism has been criticized by those who argue that the court is pursuing its own political agenda, acting outside of its mandate and breaching the separation of powers. Equally the efficacy of its orders have been scrutinized, and in many instances, found wanting. However, in a system rife with corruption, it has had an impact on ensuring, at least in part, that these directive principles are followed in implementing law and policy.

Providing somewhat of a midway point between South Africa and India is Canada. The main instrument protecting human rights is the Charter of Rights and Freedoms 1982,[cxxviii] which incorporates seven classes of rights and freedoms.[cxxix] There is no explicit provision for social and economic rights. However, sections 73, guaranteeing equality, and 15, ensuring life, liberty and security of the person,[cxxx] have been interpreted as encompassing social and economic rights, a possibility apparent from the earliest cases.

One of the defining cases for social and economic rights in Canada was *Victoria City v Adams,* which challenged the constitutionality of a bye-law enacted to prohibit temporary shelters in a public park.[cxxxi] In seeking to enforce the prohibition and remove the temporary structures which had been erected by homeless people, the city argued that this was a justified measure to prevent damage. Evidence was adduced as to the overcrowding and lack of availability in homeless shelters in the city.[cxxxii] Ross J, holding that sleep and shelter were necessary preconditions to life, and rejecting the contention that Charter rights could not be engaged without positive action from the state,[cxxxiii] struck down the legislation as a breach of s 7 of the Charter.

While this judgment does not impose positive obligations on the state to provide for adequate shelter, it does impose negative obligations.[cxxxiv] The court did not order the provision of more spaces in homeless shelters, nor did it require that the park dwellers be housed in public housing. Rather, where these were not available, the state could not arbitrarily remove the temporary structures, which were deemed to be essential to life. Early cases involving applications to have the state fund healthcare under s 7 of the Charter were unsuccessful, with the court holding that the provision did not include a guarantee to *enhance* life, liberty or security of the person.[cxxxv] However, restrictions on access to healthcare were struck down. For example, criminal restrictions on therapeutic abortions were regarded as unconstitutional,[cxxxvi] as was the denial of sign language support in medical care, as it impeded access and resulted in inferior care.[cxxxvii]

The case of *PHS Community Services v Canada*, known as "*The Insite Case"* and decided by the Supreme Court in September 2011, has served to entrench the status of social and economic rights within the Charter.[cxxxviii] The case related to a drug consumption room, established as a harm reduction mechanism due to an endemic addiction problem in the city. It operated under an exemption to the criminal law for an initial three years, extended by fifteen months. Following a change in government, plans were announced to discontinue the exemption and close the facility.[cxxxix]

Insite brought a claim to the British Columbia Supreme Court, claiming that the state would be in breach of s 7 of the Charter if the exemption was terminated and the facility closed.[cxl] The court

found that, as the staff managed and prevented the spread of disease and provided services which amounted to healthcare,[cxli] the withdrawal of the exemption by the state would prevent access to healthcare and therefore engage the right to life and s 7. The Court of Appeal upheld the ruling, determining that the right to life was engaged, as the service prevented death by overdose, and, further, that the injection of drugs without medical supervision posed a risk to life.[cxlii] On final appeal to the Canadian Supreme Court, it was unanimously held that the removal of the exemption would breach Charter rights. McLachlin CJ stated that, "where the law creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out."[cxliii]

The Canadian courts have not, to date, declared positive obligations in respect of social and economic rights, although such an outcome is possible. In *Gosselin v Quebec*, McLachlin J felt that the Charter should be allowed to develop incrementally and that its content should not be constricted by previous cases,[cxliv] and, in *Insite,* the language used by the court is indicative of future possibilities.[cxlv] However, a more recent attempt to impose positive obligations was rejected without hearing. The case of *Tanudjaja v Canada* was brought by a group of housing activists alleging that legislative and policy changes taken by the Ontario government resulted in inadequate housing and increased homelessness.[cxlvi] In essence, it was asking the court to determine whether ss 7 and 15 of the Charter carried a positive obligation to be housed. The petition was initially rejected and the Court of Appeal upheld this determination, as the challenge did not point to a specific piece of offending law, but rather to a complex matrix of policies. As the majority agreed with the lower court's decision, it did not enter into further discussion of whether or not positive obligations *could* be placed on the state on the issue of homelessness. In her dissenting judgment, however, Feldman J opined that it was too early to decide whether or not this case contained circumstances which would merit the court imposing positive obligations, advocating strongly for the case to be heard.[cxlvii] Leave to appeal to the Supreme Court in this case was rejected in 2015. Despite this, as Canada has shown, it is possible to protect social and economic rights adequately without imposing excessively burdensome positive obligations.

Conclusion

As social and economic rights continue to struggle for equivalent protection it has become clear that judicial intervention is a necessary step in the approximation of rights. Without this oversight or enforcement they remain overlooked, neglected and at worst denied by governments. As evidenced by the jurisprudence, justiciability enhances accountability which in turn makes a significant difference to the protection and vindication of these most fundamental of human rights.

[i] United Nations, Charter of the United Nations, 24 October 1945 1 UNTSXVI.

[ii] Primarily due to pressure from the Western dominated Commission UN Doc A2929 (1955) 7.

[iii] Samuel Moyn, *The Last Utopia* New York: Harvard University Press, 2012.

[iv] Steven Jensen, *The Making of International Human Rights Law: The 1960's, Decolonization and the Reconstruction of Global Values* Cambridge: Cambridge University Press 2017.

[v] Vienna Declaration, 1993 second World Conference on Human Rights [5].

[vi] 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 /6 ILM 368 (1967), adopted on 16 December 1966 and entered into force on 23 March 1976.

[vii] 993 UNTS 3 / [1976] ATS 5 / 6 ILM 360 (1967), adopted on 16 December 1966 and entered into force on 3 January 1976.

[viii] Daniel J Whelan and Jack Donnelly, 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight' *Human Rights Quarterly* 29, 908, 2007, p 931.

[ix] ICESCR Part II Article 2.1.

[x] Henry Steiner, Ryan Goodman and Philip Alston, *International Human Rights Law in Context: Law Politics Morals*, Oxford: 3rd Ed, Oxford University Press 2007 p284.

[xi] In contrast to the ICESCR, the ICCPR contained within its first optional protocol (999 UNTS 171 adopted on 16 December 1966 and entered into force on 23 March 1976) an individual complaints mechanism to the Human Rights Committee.

[xii] Catarina de Albuquerque, 'Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic Social and Cultural Rights – The Missing Piece of the International Bill of Human Rights' *Human Rights Quarterly* 32, 2010 p 144.

[xiii] See Article 2(3)

[xiv] Maastrict Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997 [6].

[xv] ECOSOC Resolution 1985/17 of 28th May 1985

[xvi] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26 1997.

[xvii] UN Doc E/C.12/2007/1.

[xviii] Limburg Principles on the Implementation of the ICESCR UN Doc E/CN4/1987/17, Annex, [21].

[xix] Sandra Liebenberg, *Socio-Economic Rights Adjudication under a Transformative Constitution* Claremont: Juta, 2010 p 190.

[xx] General Comment 19 [42]

[xxi] Colm O'Cinneide, 'Austerity and the Faded Dream of a Social Europe' in Aoife Nolan (ed) *Economic Social and Cultural Rights after the Global Financial Crisis* Cambridge: Cambridge University Press, 2014 p 21.

[xxii] Mesenbet Assefa, 'Defining Minimum Core Conundrums in International Human Rights Law and Lessons from the Constitutional Court of South Africa' *Mekelle University Law Journal* 1, 48, 2010 p 50.

[xxiii] General Comment No. 3 [10].

[xxiv] General Comment No. 15 [44].

[xxv] General Comment No. 3 [10].

[xxvi] Katharine G Young, 'The Minimum Core of Social and Economic Rights: A Concept in Search of Content' *Yale Journal of International Law* 33, 113, 2008.

[xxvii] Ibid 126.

[xxviii] General Comment No. [10].

[xxix] E.g in *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) the South African Constitutional Court emphasized the connection between dignity and social assistance; *Social and Economic Rights Action Centre v Nigeria*, Comm No 155/96 2001-2002 The African Commission held that the right to food is inseparably linked to dignity.

[xxx] Oscar Schachter, 'Human Dignity as a Normative Concept' *American Journal of International Law* 77, 1983 p 848.

[xxxi] For a full analysis of these see Claire-Michelle Smyth, Social and Economic Rights in a Post Neo-Liberal Society in Claire Michelle Smyth and Richard Lang (eds) *The Future of Human Rights in the UK* Cambridge: Cambridge Scholars Publishing, 2017.

[xxxii] Lon Fuller, 'The Forms and Limits of Adjudication' *Harvard Law Review* 92, 1978 p 353; JWF Allison 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' *Cambridge Law Journal* 53, 1994 p 367.

[xxxiii] Tara Melish, 'Introductory Note to the Optional Protocol to the International Covenant on Economic Social and Cultural Rights' *International Legal Materials* 48, 2009 p 256.

[xxxiv] For an overview of the main arguments used in negotiations see Malcolm Langford, 'Closing the Gap? – An Introduction to the Optional Protocol to the International Covenant on Economic Social and Cultural Rights' *Nordic Journal of Human Rights*, 27, 1, 2009 pp 9-18.

[xxxv] UN Economic and Social Council, Report of First Session E/CN.4/2004/44 (Geneva 15 March 2004) 7; UN Economic and Social Council, Report of Fourth Session A/HRC/6/8 (Geneva 30 August 2007) 5.

[xxxvi] Resolution of the Human Rights Council 8/2 of 18 June 2008 adopted by the General Assembly under resolution A/RES/63/117 10 December 2008. For a detailed analysis of the background to the drafting of the optional protocol see Claire Mahon, 'Progress at the front: The Draft Optional Protocol to the International Covenant on Economic Social and Cultural Rights' *Human Rights Law Review* 8, 2008 p 617.

[xxxvii] Art 3(1) and (2).

[xxxviii] Art 5.

[xxxix] Art 3(2)(b).

[xl] Claire-Michelle Smyth, 'The Optional Protocol to the International Covenant on Economic Social and Cultural Rights in Ireland; Will it make a difference?' *Socio Legal Studies Review* 2, 2013 1.

[xli] Article 8(4). Brian Griffey, 'The Reasonableness Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic Social and Cultural Rights' *Human Rights Law Review* 11, 275, 2011, pp 291-304.

[xlii] Bruce Porter, 'The Reasonableness of Article 8(4) – Adjudicating Claims from the Margin' *Nordic Journal of Human Rights*, 27, 1, 2009 pp39-40.

[xliii] Catarina de Albuquerque, 'Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic Social and Cultural Rights – The Missing Piece of the International Bill of Human Rights' Human Rights Quarterly 32, 144, 2010 p 177.

[xliv] *Airey v Ireland* [1979] 2 EHRR 305.

[xlv] [2005] ECHR 458.

[xlvi] [20014] ECHR 223.

[xlvii] App No 25446/06 (24 September 2009).

[xlviii] *Petrovic v Austria* App No 20458/92 (27 March 1998).

[xlix] *D v UK* (1997) 24 EHRR 423; *N v UK* App No 26565/05 (27 May 2008) *SJ v Belgium* [2015] ECHR 543; *Paposhvilli v Belgium* App No 41738/10 (13 December 2016).

[l] [2016] ECHR 186.

[li] OEA/Ser.L./V.II.23, doc.21,rev.6 adopted by the Ninth International Conference of American States, Bogota, 1948. See Philip Alston and Ryan Goodman, *International Human Rights: The Successor to International Human Rights in Context* (Oxford University Press 2013) 978.

[lii] Article XI.

[liii] Article XII.

[liv] Article XV.

[lv] Article XVI.

[lvi] Organisation of American States (OAS), American Convention on Human Rights (Pact of San Jose) (Entered into force on 22 November 1969) OAS Treaty Series No 36.

[lvii] For a full discussion see Melish, *Protecting Economic Social and Cultural Rights in the Inter American Human Rights System* (n 91).

[lviii] *Villagran Morales et al case*, Inter-Am Ct. H.R (ser C) No. 63 192 (19 November 1999).

[lix] Monica Feria Tinta, 'Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions' *Human Rights Quarterly* 29, 431, 2007 p 446.

[lx] Organisation of American States (OAS), Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights (Protocol of San Salvador)(entered into force 16 November 1999) OAS Treaty Series No 69.

[lxi] Advisory Opinion on Juridical Condition and Human Rights of the Child, Int-Am Ct H.R., Series A: No 17 Advisory Opinion OC-17/2002 (28 August 2002).

[lxii] *Cesti Hurtado Case* Int-Am Ct H.R Series E (21 January 1997) the court ordered the provision of proper medical treatment for a detainee with heart disease and in the *Mendoza Prison Case* Int-Am Ct H.R Series E (22 November 2004) and *Febem' Prison Case* Int-Am Ct H.R Series E (30 November 2005) the court made orders in relation to overcrowding, sanitation and nutrition to ensure conditions for detainees and workers compatible with their dignity.

[lxiii] Colm O'Cinneide, 'The Constitutionalization of Social and Economic Rights' in Helena Alviar Garcia, Karl Klare and Lucy A Williams (eds), *Social and Economic Rights in Theory and in Practice: Critical Enquiries* (London: Routledge, 2014 p 268.

[lxiv] Identification of these provisions have been found through a search of world constitutions on <www.constitution.org/cons/natlcons.htm> last accessed 18 June 2017.

[lxv] Entered into force on 22 December 1990 and protects the right to social assistance (Article 58), the right to healthcare (Articles 59 and 70) and the right to education (Article 66).

[lxvi] Entered into force 1 January 1993 and protects the right to social assistance (Article 30), the right to health (Article 31) and the right to education (Article 33).

[lxvii] Entered into force 1 March 2000 and protects the right to social security and housing assistance (Section 19) and the right to education (Section 16).

[lxviii] Entered into force 29 July 1994 and protects the right to education (Article 35), the right of health security (Article 36), the right to live in a healthy environment (Article 37) and the right to social assistance to include food, clothing, shelter and medical care (Article 47).

[lxix] Entered into force 25 April 2011 and protects the right to education (Article XI), social security (Article XIX) the right to health (Article XX) and the right to decent housing conditions (Article XXII).

[lxx] Entered into force 2 April 1997 and protects the right to health (Article 68).

[lxxi] Entered into force 8 November 2006 and protects the right to health (Article 68), the right to education (Article 71) and Social Protection (Article 69).

[lxxii] Entered into force 18 April 1999 and protects the right to social assistance (Article 12) and the right to basic education (Article 19).

[lxxiii] The Constitution of the Republic of South Africa 1996 approved by the Constitutional Court on 4 December 1996 and entered into force on 4 February 1997.

[lxxiv] For an in depth analysis of the debate on constitutionalising social and economic rights in the South African Constitution see Craig Scott and Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' *University of Pennsylvania Law Review* 141, 1992 pp1-148; Sandra Liebenberg, *Social and Economic Rights: Adjudication under a Transformative Constitution* Claremont: Juta, 2010

[lxxv] S 26.

[lxxvi] S 27.

[lxxvii] Marius Pieterse, 'Beyond the Welfare State: Globalisation of Neo-Liberal Culture and the Constitutional Protection of Social and Economic Rights in South Africa' *Stellenbosch Law Review* 14, 3, 2003 p 9.

[lxxviii] The first case *Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (C) found that the inclusion of social and economic rights in the Constitution did not breach the separation of powers and was Constitutional. See Jeremy Sarkin, 'The Drafting of South Africa's Final Constitution from a Human Rights Perspective' *American Journal of Comparative Law* 47, 1999 p 67.

[lxxix] 1997 (12) BCLR 1696 (CC).

[lxxx] S 27(3).

[lxxxi] This is expressly provided for in Section 27(2) which states 'the state must take reasonable legislative and other measures, within its available resources to achieve progressive realisation'.

[lxxxii] Eric C Christiansen, 'Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitution' *Columbia Human Rights Law Review* 38, 2770 p 321.

[lxxxiii] 2000 (11) BCLR 1169 (CC).

[lxxxiv] S 26(1) 'Everyone has the right to have access to adequate housing.'
S 26(2) 'The state must take reasonable legislative and other measures, within its available resources to achieve the progressive realization of this right.'
S 26(3) 'No one may be evicted from their home or have their home demolished without an order of the court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

[lxxxv] High Court Judgment of Davis J referred to in 2000 (11) BCLR 1169 (CC) [25-26].

[lxxxvi] For a full history of the case see Rosalind Dixon, 'Creating Dialogue about Socio-Economic Rights: Strong-Form verses Weak-Form Judicial Review Revisited' *International Journal of Constitutional Law* 5, 2007 p 391.

[lxxxvii] 2000 (11) BCLR 1169 (CC) [99].

[lxxxviii] *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) [66].

[lxxxix] Marius Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' *South African Journal of Human Rights* 20,2004 p 383.

[xc] 2005(1) BCLR 78 (CC).

[xci] Unrep Case No 04/10330, 3 March 2006.

[xcii] 2010 (2) BCLR 99 (CC).

[xciii] 2004 (6) BCLR 569 (CC).

[xciv] 2000 (11) BCLR 1169 (CC) [93].

[xcv] *Treatment Action Campaign v Minister for Health and Others* 2002 (4) BCLR 356.

[xcvi] This drug dramatically reduces the infection of HIV to the child during childbirth. At this time South Africa was in the midst of a HIV epidemic and the manufacturers had agreed to freely provide the drug to the state for five years.

[xcvii] 2002 (4) BCLR 356 [85-87].

[xcviii] *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC), 135.

[xcix] *Mazibuko & Ors v The City of Johannesburg & Ors* High Court of South Africa 30 April 2008, Case No. 06/13865.

[c] S 27(1)(b) states 'everyone has the right to have access to sufficient food and water'.

[ci] *Mazibuko* (n 121) [160].

[cii] 2009 8 BCLR 781.

[ciii] 2010 (4) SA 1.

[civ] 2010 (4) SA 50.

[cv] The court had previously engaged the right to life to determine cases involving bail (*Maneka Ghandi v Union of India* AIR 1978 SC 597) and treatment in custody (*Mullin v Union Territory of Delhi* AIR 1981 SC 746).

[cvi] AIR 1986 SC 180.

[cvii] AIR 1986 SC 180, 194.

[cviii] (1990) 1 SCC 520.

[cix] Jessie Hohmann, 'Mumbia; the Struggle for the Right to Housing' *Yale Human Rights and Development Law Journal* 13, 2013 p135.

[cx] (1996) 2 SCC 549.

[cxi] Hohmann, 'Mumbia; the Struggle for the Right to Housing' p 140.

[cxii] (1995) 3 SCC 42.

[cxiii] Shah Skeetal, 'Illuminating the Possible in the Developing World; Guaranteeing the Human Right to Health in India' *Vanderbilt Journal of Transnational Law* 32, 1999 p 435.

[cxiv] AIR 1989 SC 2039.

[cxv] Sarvapelli Radhakrishnan, 'Development of Human Rights in an Indian Context' *International Journal of Legal Information* 36, 2008 pp303-315.

[cxvi] 1996 3 SCJ 25.

[cxvii] Jennifer Sellin, 'Justiciability of the Right to Health- Access to Medicines – The South African and Indian Experience' *Erasmus Law Review* 1, 2009 pp 445-462.

[cxviii] *State of Punjab v Ram Lubhaya Baga* (1998) 4 SCC 117.

[cxix] *Vincent Panikurlangara v Union of India* (1987) 2 SCC 165.

[cxx] WP (C) 8853/2008.

[cxxi] Sukti Dhital and Jayshree Satpute, 'Claiming the Right to Safe Motherhood Through Litigation: The Indian Story' in Helena Alviar Garcia, Karl Klare and Lucy A Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries* London: Routledge, 2014 p159.

[cxxii] ibid 164 notes that 25 cases were lodged between 2010-2013.

[cxxiii] *Court on its own Motion v Union of India* (WP 5913/2010).

[cxxiv] *Priya Kale v NCT of Delhi* WP (C) 641/2013.

[cxxv] Fact Finding Report: *Priya Kale v NCT of Delhi* WP (C) 641/2013 available at www.hrln.org/hrln/reproductive-rights/reports/1632-fact-finding-report-priya-kale-vs-gnct-of-delhi-and-ors-w-p-c-6412013.html last accessed 15 June 2015.

[cxxvi] Dhital and Satpute, 'Claiming the Right to Safe Motherhood Through Litigation: The Indian Story' in Garcia, Klare and Williams (eds) p 165.

[cxxvii] *People's Union for Civil Liberties & Ors v India* Writ No 196 of 2001.

[cxxviii] The Constitution Act 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11. See Patrick Macklem, 'Social Rights in Canada' in Daphne Barak-Erez and Aeyal M Gross (eds) *Exploring Social Rights: Between Theory and Practice* (Hart 2007) 213-242.

[cxxix] Section 2: fundamental freedoms, ss 3 to 5: democratic rights, s 6: mobility rights, ss 7 to 14: legal rights, ss 15 and 28: equality rights, ss 16 to 22: language rights and s 23: minority language education rights.

[cxxx] Section 7 'everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'. Section 15(1)'every individual is equal before the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.

[cxxxi] 2008 BCSC 1363.

[cxxxii] The case of *Chaoulli v Quebec (Attorney General)* [2005] 1 SCR 791 was relied upon in this regard. Here, the Supreme Court struck down a provision which prohibited individuals from obtaining private health care. Evidence of long delays in accessing medical care was adduced and the court found that the provision engaged the right to life. While it did not require the state to provide the care, it could not prevent the procurement of private treatment. See generally, Christopher P Manfredi and Antonia Maioni, 'The Last Line of Defence for the Citizen: Litigating Private Health Insurance in Chaoulli v Quebec' *Osgoode Hall Law Journal* 44, 2006 p 249; Thomas MJ Bateman, 'Legal Modesty and Political Boldness: The Supreme Court of Canada's Decision in Chaoulli v Quebec' *Review of Constitutional Studies* 11, 2006 p 317; Jamie Cameron, 'From the MRV to Chaoulli v Canada: The Road Not Taken and the Future of Section 7' *Supreme Court Law Review* 34, 2006 p 105.

[cxxxiii] 2008 BCSC 1363 [39], where the Attorney General claimed that the deprivation must arise from state action, and, since the government did not cause the homelessness, the Charter could not be invoked.

[cxxxiv] Margot E Young, 'Rights, The Homeless and Social Change: Reflections on Victoria City v Adams (BCSC)' *British Columbia Studies* 164, 2009 p 103.

[cxxxv] *Brown v British Columbia (Minister for Health)* (1990) 6 DLR (4th) 444 BCSC.

[cxxxvi] *R v Morgentaler* [1988] 1 SCR 30. The restriction required a woman to obtain the approval from a committee of an approved hospital. Failure to do so could result in criminal prosecution.

[cxxxvii] *Eldridge v British Columbia* (1997)151 DLR (4th) 577 (SCC); See also, Isabel Grant and Judith Mossof 'Hearing Claims of Inequality – Eldridge v British Columbia' *Canadian Journal of Women and Law* 10, 1998 p 229.

[cxxxviii] 2011 SCC 44.

[cxxxix] For a full background to the case, see Margot Young, 'Context Choice and Rights: PHS Community Services v Canada (Attorney General)' *University of British Columbia Law Review* 44, 2011 p 221; Claire-Michelle Smyth and Siobhan Kelly, 'Drug Consumption Rooms: Towards the Right to Health for Addicts' *Irish Law Times* 31, 2013 p 197.

[cxl] *PHS Community Services Ltd v Canada (Attorney General)* [2008] BCSC 661.

[cxli] Including the provision of ante natal classes for pregnant women who otherwise may not have received this due to their addictions.

[cxlii] 2010 BCCA 15, 314 DLR (4th) 209.

[cxliii] 2011 SCC 44 [93].

[cxliv] [2002] SCC 42 [79].

[cxlv] Matthew Rottier Voell, 'PHS Community Services Society v Canada (Attorney General) Positive Health Rights, Health Care Policy and Section 7 of the Charter' *Windsor Review of Legal and Social Issues* 31, 2011 pp 41-56.

[cxlvi] 2014 ONCA 852.

[cxlvii] ibid [49].