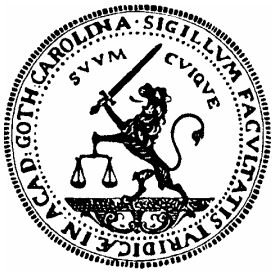

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The Justiciability of Socio Economic Rights
–
Courts as Protectors of Economic and Social Rights: The Case of South Africa

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Contents

Summary

Socio-economic rights have been described as the “underdeveloped stepchild of the human rights family”. There has been a tendency to treat them as merely aspirational and it is frequently argued that they may not deserve the name of rights as they lack content and are considered ill-suited for enforcement. Owing to this, and because of the fact that their enjoyment has by their very nature, been considered as more resource-demanding than enjoyment of civil and political rights and hence involving sensitive questions of political resource allocation, they have been considered to not belong in constitutions in other forms than aspirational goals and especially not in any justiciable bill of rights documents.
Consequently, issues related to enjoyment of socio-economic rights have been considered to be the prerogative of the executive and legislative branches of government as courts do not posses the same democratic legitimacy in regard to the allocation of resources.

Therefore, given the above context, it is remarkable that post-Apartheid South Africa opted for inclusion of socio-economic rights alongside civil and political rights in its first democratic constitution of 1996. Moreover, subsequently, its Constitutional Court has not shied away from adjudicating on cases pertaining socio-economic rights. Some of the Court’s decisions have been described as the most far-reaching decisions concerning socio-economic rights.

This thesis analysis the Court’s jurisprudence against the backdrop of the debate and controversies related to the justiciability of socio-economic rights. It shows that the Court has demonstrated that such rights are in fact justiciable, but that their adjudication, in general, is more politically sensitive and to some extent more complicated than adjudication of civil and political rights and that the Court therefore inevitable has had to treat such rights differently from civil and political rights. This has especially had bearing on remedies, and the Constitutional Court has not, despite giving general effect to the rights in question, been in a position to offer relief to the individual. This would support the stance that socio-economic rights are different to their nature and enjoyment when compared with civil and political rights.

Sammanfattning

Det har funnits en tendens att behandla sociala och ekonomiska rättigheter som enbart aspiratoriska. Många har därför hävdat att sådana rättigheter inte är riktiga rättigheter, eftersom deras innehåll är alltför vaga för att vara utkrävbara. Dessutom är deras åtnjutande för individen ofta beroende av att det finns tillräckliga ekonomiska och materiella resurser, vilkas fördelning/omfördelning bör vara föremål för politiska beslut. Av dessa anledningar har det ofta hävdats att sociala och ekonomiska rättigheter inte hör hemma i konstitutioner i annan form än aspiratoriska mål. Ekonomiska och sociala rättigheter har huvudsakligen betraktats som tillhörandes de verkställande och lagstiftande organens ansvarsområden. På grund av deras politiska prägel har ekonomiska och sociala rättigheter ansetts vara ett område som domstolarna så långt som möjligt bör hålla sig ifrån, eftersom domstolar inte har samma demokratiska legitimitet som den verkställande och lagstiftande makten.

Mot denna bakgrund är det anmärkningsvärt att Sydafrika efter Apartheid-regimens fall valt att inkludera utkrävbara ekonomiska och sociala rättigheter i sin första demokratiska konstitution. Dessutom har den konstitutionella domstolen i Sydafrika inte tvekat att besluta i mål om sociala och ekonomiska rättigheter som grundar sig på sådana rättigheter i konstitutionen.

Denna uppsats analyserar, mot bakgrund av den generella debatten som funnits angående sociala och ekonomiska rättigheter, den sydafrikanska konstitutionella domstolens praxis rörande utkrävbarheten av sociala och ekonomiska rättigheter som har sin grund i den sydafrikanska konstitutionen. Uppsatsen visar att den sydafrikanska konstitutionella domstolen i sina beslut visat att sociala och ekonomiska rättigheter är utkrävbara, men att sådana rättigheters skiljer sig från civila och politiska rättigheter, eftersom domstolarna ovillkorligen i högre grad får ta hänsyn till att deras beslut inte ska betraktas som politiska.

Abbreviations

ANC	African National Congress
CERD	Convention ion the Elimination of Racial Discrimination
CRC	Convention on the Rights of the Child
ESC	Economic, social and cultural (rights)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Social, Economic and Cultural Rights
ILO	International Labour Organisation
UDHR	Universal Declaration of Human Rights
UN	United Nations

1 Introduction

Economic and social rights have been recognised at the international level since the 1948 Universal Declaration of Human Rights (UDHR). On 16 December 1966 the United Nations (UN) adopted the first global treaty that established states' legal obligations to protect a number of economic, social and cultural rights, i.e. the International Covenant on Economic Social and Cultural Rights (ICESCR). Almost three decades later, during the 1993 World Conference on Human Rights, it was concluded that all Human Rights are universal, interdependent, interrelated and indivisible. Still, there remains much ambivalence and much debate, both internationally and nationally in regard to the character and concept of socio-economic rights.[1]

One scholar has expressed it as "even brief acquaintance with the academic literature is enough to indicate that there is a deep and enduring disagreement over the proper status of economic, social and cultural rights".[2] Moreover, outside the academic sphere, many governments have had an ambivalent relation to them, both domestically and in international fora.[3]

Especially, domestically in many countries, there have been constitutional debates on the justiciability of socio-economic rights as the issue of inclusion of judicially enforceable socio-economic rights in constitutions has generally been considered controversial as many people have considered such rights as inherently non-justiciable and not suited for judicial enforcement. It has been argued that in most legal documents these rights are vaguely worded and not sufficiently defined, or in other words, that they lack determinate content. Therefore they have been perceived as merely aspirational and ill-suited for domestic application and not belonging in democratic constitutions.[4]

Furthermore, it has been argued that socio-economic rights are inherently resource demanding and that their fulfilment depend on the availability of public resources which by their very nature are always limited and that many states do not possess. Decisions on the use of such limited resources and related prioritizations and allocations are by many seen as the prerogative of the executive and legislature. Consequently, the constitutionalisation of such rights would result in an undesired transfer of political power from these two branches of government to the judiciary, which does not enjoy the same democratic legitimacy to make decisions on issues relating to the allocation of social and economic resources.

[1] Sunstein, C. R., p. 4.
[2] H. Steiner and P. Alston, p. 256.
[3] Ibid,. p. 249.
[4] Pieterse, M. (2004) p. 884.

The above concerns and disagreement have historically negatively influenced the implementation of socio-economic rights both internationally and within nation states. As a result, in the area of human rights, generally speaking, the advances made have traditionally been in the area of civil and political rights.

From a constitutional law perspective, the issue highlights one of the paradoxes of modern constitutional theory, as, on the one hand, in general, in modern democracies, enforcement of human rights by an independent and unelected judiciary is considered essential.[5] While, on the other hand, such judicial enforcement also has the potential to undermine representative political processes.

The discursive devaluation of socio-economic rights and the ineffective enforcement of these rights has prompted some commentators to describe socio-economic rights as the "normatively underdeveloped stepchild" of the human rights family.[6] However, and perhaps somehow paradoxically, African states have in the 1990s succeeded in giving more attention and renewed status to socio-economic rights by putting focus on poverty and their right to development coupled with highlighting the integral role socio-economic rights play for the enjoyment of equality and democracy.[7]

South Africa is a country previously infamous for its persistent violation, through its Apartheid policy, of the civil and political rights of its majority black people accompanied by a related dispossession of socio-economic rights.

However, today, post-Apartheid South Africa is considered to have taken one of the most radical initiatives with regard to protection of socio-economic rights by including them alongside civil and political right in its first new democratic Constitution of 1996. The Constitution is widely seen as one of the most sophisticated and comprehensive systems of constitutional protection of socio-economic rights in the world and its Constitutional Court has made some of the most far-reaching decisions concerning these rights. Owing to this, the South African experience is very useful for any lawyer interested in analysing the character and justiciability of socio-economic rights.

1.1 Purpose

The inclusion of justiciable socio-economic rights in the Constitution and the willingness of its Constitutional Court to adjudicate socio-economic rights have been described the main distinctive elements of the South African Constitutional system and a number of cases before the Court have shaped the scope of actual protection of socio-economic rights in the country. Its jurisprudence has attracted much interest outside South Africa

[5] Klare, K. E., p. 148.
[6] Bilchitz, D., p. 1.
[7] Yigen, K., p. 13.

and in particular in relation to the discussion on the constitutionalisation and justiciability of socio-economic rights.[8]

South Africa is therefore a very interesting case study when discussing and analysing the character of socio-economic rights and the challenges related to their justiciability and constitutionalisation. There are also close textual similarities between the socio-economic rights enumerated in the South African Constitution and the ICESCR (which is ironic as the country has not ratified the ICESCR), which make the case of South Africa even more interesting for a lawyer interested in international constitutional law.

The subject matter is such that before being able to embark on an analysis of the South African example, it is important to gain deeper knowledge about the history of such rights, the legal and political controversies surrounding them and how they are protected on the international level.

Hence, the intention of this thesis is three-fold.

Firstly, it will provide the reader with a general introduction to the traditional discourse on the categorisation of human rights and the nature of socio-economic rights. This includes an exposition of the theoretical discourse on the controversy and challenges associated with the justiciability and constitutionalisation of such rights, i.e. mainly issues related to separation of powers and institutional legitimacy, resource allocation/polycentric issues and the content and character of socio-economic rights. Moreover, it will briefly describe how such rights are protected on the international level.

Secondly, it will look at the empirical case of South Africa, which is a country where socio-economic rights are included in the constitution and where such rights have been made judicially enforceable, and in particular discuss and analyse how the South African Constitutional Court has dealt with the various challenges discussed in the introductory part and its suggested role as a protector of socio-economic rights.

Lastly, based on the empirical study of the South African jurisprudence, a more general analysis will be conducted focusing on providing some more general conclusions regarding the character, justiciability and constitutionalisation of socio-economic rights based on the South African jurisprudence.

1.2 Method and material

While the South African Constitutional Court has dealt with the socio-economic rights provisions of the Constitution in a number of instances, it is widely regarded that the core of its substantive jurisprudence on socio-economic rights is manifested in four fundamental cases, namely,

[8] Christiansen, E., p.1.

Soobramoney v Minister of Health (1998), *Government of South Africa and Others v Grootboom and Others* (2001), *Minister of Health and Others v Treatment Action Campaign and Others* (2002) and *Khosa v Minister of Social Development* 2004.[9]

In order to analyse the jurisprudence on socio-economic rights of the South African Constitutional Court, I will analyse the four cases mentioned above. In order to gain deeper understanding of the general subject matter, I have also studied the works of prominent academics and practitioners in the fields of international human rights law and constitutional law.

In order to understand the South African context, I have in particular studied the legal works of South African academics and lawyers. Among these, works of scholars like Justice Pillay, Marius Pieterse, David Bilchitz and Justice Albie Sachs, have been a good point of departure for such a journey.

In the text the notions "economic and social rights" and "socio-economic rights" are used interchangeably, meaning that they, in substance, have the same meaning.

[9] Christiansen, E. p. 5, Bilchitz, D. p. 5-15 and Sachs, A. p. 8.

2 Different categories of rights

2.1 The traditional distinction between civil and political rights and economic, social and cultural rights

Traditionally it has been common to offer a twofold classification of human rights into two main categories, i.e., on the one hand, classical civil and political rights such as freedom of speech and liberty of the person and, on the other hand, economic, social and cultural rights such as the right to work and to housing.

The above categorization has also often been referred to as "negative" and "positive rights" where the former are rights held only against the state which, in this respect, is restrained from certain actions against all individuals, while the latter requires the state to take positive action by awarding some form of benefit or delivering some service to the individual. Such positive rights may also apply against other individuals as well as against the government.

A typical example of a negative right is the right to not be subjected to torture. The right to free and equal access to education for all is a typical positive right.

The reasons behind the separation between the two sets of rights have been debated. Some commentators explain the separation as mainly emanating from differences in the political ideologies of the two blocks during the Cold War (see 2.2). Others, however, stress the fact that civil and political rights, on the one hand, and socio-economic rights, on the other hand, differ from each other in terms of judicial enforceability and state obligations.[10] The latter view implies that socio-economic rights are not "feasible through the concept of rights in the same way as civil and political rights.[11] These views will be explained in more detail in chapter 4.

It has also been common to divide human rights into three "generations" or dimensions. Here, civil and political rights refer to the first generation while the second generation comprises economic, social and cultural rights. The importance of the former was championed mainly by the Western countries while the latter had its proponents among the former socialist states. Southern states, or developing nations, on their part, put the human rights discourse in the context of colonialism and imperialism and they stressed the importance of a third generation of rights such as the right to self-

[10] Yigen, K., p. 14-15.
[11] Ibid., p. 15.

determination and the right to development. This historical backdrop will be explained below.

2.2 History of socio-economic rights

The historical origins of socio-economic rights are difficult to trace although many different religious traditions express that people in need and who cannot look after themselves should be cared for.[12] Similar considerations can also be identified in the philosophical analyses and political theories of scholars as diverse as Immanuel Kant, Karl Marx and John Rawls and, *inter alia*, the political programmes of late nineteenth century socialists in Britain, social insurance schemes introduced by Chancellor Bismarck in Germany and the first Soviet Constitution.[13]

From an international human rights law perspective, an appropriate point of departure can be traced to the establishment of the International Labour Organisation (ILO) in 1919. Which according to the Treaty of Versailles of 1919, should work for the abolishment of "injustice, hardship and privation of workers". The establishment of the ILO was the response of Western countries to the challenges of the Russian Revolution and its Bolshevism and Social ideology that also gained followers in many countries outside Russia who primarily demanded more humane conditions of labour.[14]

In the inter-war years the great depression of the early 1930s brought about an awareness that there is a need to protect those who are unemployed, and economic scholars such as Milton Keynes advocated for full employment policies.[15] Owing to this and other developments, during the drafting of the UN Charter, the multilateral treaty that really started the internationalisation of human rights, various initiatives were taken on the international level to include provisions on "full employment" as a commitment to be undertaken by all Members States of the League of Nations. However, despite strong support from many countries, the United States successfully opposed an inclusion claiming that such an undertaking would constitute interference in the domestic and political affairs of states.[16]

Instead, it was eventually agreed by the Member States to include a provision (Article 55(a)) which states that the United Nations shall promote "higher standards of living, full employment, and conditions of economic and social progress and development, but which omits a follow-up mechanism at the international level.[17]

In 1948 the Universal Declaration on Human Rights (UDHR) was adopted by the General Assembly. It contained a number of socio-economic rights

[12] Alston & Steiner, p. 242.
[13] Ibid..
[14] Ibid..
[15] Ibid..
[16] Ibid and Burgenthal, Shelton and Stewart p. 31.
[17] Ibid..

such as the right to work, just and favourable conditions of work, protection against unemployment, education and social security. However, the UDHR was not a legally binding document and the opposition on the part of, mainly the United States, prevented the adoption of a more legally binding instrument.

The US resistance at the time should not be confused as implying that it totally rejected the concept of economic and social rights. In the contrary, President Roosevelt had declared that "freedom from want" was one of the four freedoms that should characterise the future world order.[18]

However, during the so-called Cold War period after the Second World War, western governments and the United States championed civil and political rights while the Communist Governments stressed the importance of economic, social and cultural rights as a counterweight to their obvious lack of civil and political rights.[19]

Owing to this ideological divide, insisting on the essential differences between the two sets of rights, western states successfully lobbied in the UN General Assembly that the UN Commission on Human Rights, which was established by the member states to gradually develop a universal human rights system, should draft two different monitoring mechanisms. This was not accepted by the socialist and southern states who managed to delay and water down the contents of the work of the Commission and it was not until 1966 that the two drafts, ICCPR and ICESCR, were adopted and a further 10 years before they entered into force.

With the collapse of the Soviet Union and the end of the Cold War, better opportunities were provided to move away from these polarised positions.

Industrialised nations in the north started to develop a human rights activism towards the south, which in practice was limited to civil and political rights such as "democratisation", "good governance" and "the rule of law".
Developing countries in their turn perceived this as a form of "human rights colonialism and pointed out the importance of the right to development.[20]

It was during this period the notion of the indivisibility and interdependence of all human rights surfaced as it was obvious that the universality of all human right would be accepted if it included all the different types of rights, including socio-economic rights. Hence, in order to safeguard the principle of universality and the related legitimacy of their international protection agenda, the north, including the United States, finally agreed to accept the principles of indivisibility and interdependence of all human rights and hence recognise rights such as the right to development and socio-economic rights.[21]

[18] Ibid.
[19] Robinsson, M,. P. 866.
[20] Ibid., p. 868.
[21] Nowak, M. p. 24-26.

This compromise is laid down in paragraph 5 of the Vienna Declaration of 1993.

"All human rights are universal, indivisible and interdependent and interrelated. The International community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."

However, with regard to the international protection of economic, social and cultural rights, there still exist several weaknesses if compared with the international protection of civil and political rights. This is reflected both in the different formulations of state obligations in Article 2 of the respective Covenants as well as in the adoption and prevalence of different monitoring mechanisms.

Under the ICCPR, state parties undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the covenant. Whereas, a state party to the ICESCR only undertakes to take steps, individually and through international cooperation, to the maximum of its resources and with a view to progressively realise the rights in the Covenant. In addition, there is an Optional Protocol to the ICCPR that gives a possibility for individuals to communicate human rights violations to the Human Rights Committee in situations where the violating state has signed the Protocol. Such an individual complaints mechanism in terms of an Optional Protocol does not yet exist within the ICESCR framework.

2.3 The significance of the dignity notion and the inherent value of socio-economic rights

During the last decades rights-based paradigms have gained influence and they stress the fact that the dignity of an individual should not be divided into two different spheres, i.e. one of civil and political and another of economic, social and cultural rights. The individual should enjoy both freedom from want as well as freedom from fear.[22]

Or in other words, the dignity of an individual cannot be realized unless that person is enjoying all of his or her rights.

Rights-based approaches stress the distinction between a right and a need. A right is something to which a person is entitled, simply by virtue of being a human, and which enables the person to lead a life in dignity. The government is obliged to honour the right and the right is enforceable before the government. A need, in the contrary, is something that a person can

[22] Circle of Rights, Economic, Social and Cultural Rights Activism, p. 4.

legitimately aspire to, but the government is not necessarily required to cater for it. The satisfaction of a need cannot be enforced.[23]

Owing to this, a right is defined on the basis of dignity and enjoyed on basis of "being a human". Whereas, needs are associated with "having". What a person "has" can be negotiated and form a part of social or economic program of a country, but rights and the dignity concept linked to them are non-negotiable.

Obviously, political programs are a prerequisite to obtain and honour human rights, but they cannot act as a substitute for them. Political programs and priorities change overtime while the dignity of an individual is unchanging and transcends cultural particularities.[24]

In many societies, and in line with the notion that socio-economic rights only constitute aspirations, entitlements such as right to food, health, housing and education are considered merely as instruments to achieving ends such as development and economic growth. As mentioned earlier, this conception of socio-economic rights leads to the idea that the realization of these rights can only be achieved progressively as their enjoyment is linked to the availability of resources. As a result, the old "negative and positive categorization of rights" is on the forefront. Here, as mentioned earlier, civil and political rights are immediately enforceable whereas socio-economic rights are subject to positive interventions by the state. However, such an approach to socio-economic entitlements undermines the fundamental principle that human rights are something that cannot be negotiated or taken away. Consequently, it is imperative to establish what can be described as the inherent value of socio-economic rights and the fact that they are an end in and of themselves.

The acclaimed economist Amartya Sen has provided valuable insights as to the inherent value of socio-economic rights.[25] He has put forward a "capability approach" that links capability with freedom, i.e. the possibility a person has to freely decide how to live his life. Poverty and, for instance, premature mortality circumscribes an individual's possibility to live a normal life and illiteracy hinders a person to enjoy his freedoms to read and write.[26]

Enjoyment of socio-economic rights increases the capabilities of individuals and hence their freedom. If poverty is viewed as a non-fulfilment of capabilities, the remedy could be the emergence of calls for pertinent social arrangements and placing of obligations on states. As illustrative examples, Sen has indicated five ways in which the entitlements of education and health increase the freedom of an individual.[27]

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[23] Ibid..
[24] Ibid., p. 7.
[25] Sen, A. K., p, 23.
[26] Ibid..
[27] Ibid., p. 18.

1. Being an educated and healthy person is directly linked to an individual's effective freedom and is also a valuable accomplishment in itself (inherent importance).
2. If an individual is healthy and educated, that also enables him or her to achieve many other valuable things, other than just being educated and healthy. The individual's good health can help him to obtain a job and to earn a livelihood. The increase in economic means can, in turn, result in enhanced freedom and better possibilities to obtain things that the individual in question values (instrumental individual role).
3. Literacy and education enables the individual to participate in public discussions on social needs and also encourage individuals to make collective demands. For the society as a whole this can in turn contribute to better use of the society's resources (instrumental social role).
4. Education, apart from its manifest role as formal education, can also, as a process, have other positive outcomes, such as making children interact with each other (instrumental process role).
5. With better education and improved literacy, disadvantaged groups have better possibilities to increase their ability to stand up to oppression and discrimination by way of political participation and organisation. With education and good health they would also be in a stronger position to obtain fairer allotments of other social goods (empowerment of distributive roles).[28]

[28] Ibid..

3 The nature of socio-economic rights

3.1 The normative framework

Today economic and social rights are recognised as an essential part of the international human rights law framework. The UDHR, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention on the Rights of the Child (CRC) and most importantly the ICESCR, all make explicit reference to economic and social rights.

Moreover, on the regional level, many human rights instruments such as the African Charter of Human and People's rights and the European Social Charter address economic and social rights. Socio-economic rights are also widely recognised in most legal systems, albeit not to the same extent as civil and political rights.

The ICESCR (1966) is the foundational international human rights instrument on socio-economic rights. It recognises the rights to:

- Self-determination (art. 1);
- Equality for men and women (art.3);
- Work and favourable conditions of work (arts. 6 and 7);
- Form and join trade unions (art. 8);
- Social security (art. 9);
- Protection of the family, mothers and children (art. 10);
- An adequate standard of living, including adequate food, clothing and housing (art. 11);
- The highest attainable level of health and health care (art. 12);
- Education (art. 13);
- Free and compulsory primary education (art. 14);

As of March 2009, 149 states were parties to the Covenant and had hence voluntarily committed themselves to implement and give effect to the norms and provisions established by the Covenant.[29]

South Africa has signed the Covenant in 1994, but has not yet ratified it.

The Committee on Economic, Social and Cultural (hereinafter the "Committee") is the international body designated to monitor states´ compliance with their obligations to the Covenant. States submit periodic reports to the Committee which issues its concluding observations on these

[29] This goes without saying that some states may have made reservations to one or more of the articles in the Covenant and are hence not bound by them.

reports. In addition, the committee has adopted a number of general comments on the application and interpretation of the different provisions of the Covenant.

Apart from the general comments adopted by the Committee, there are also several other authoritative documents that provide assistance when discussing the nature and substance of state obligations in regard to economic and social rights.

In 1986, in Limburg, a group of international experts on international law met and developed a number of principles, *the Limburg principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, on the obligations of states in relation to economic, social and cultural rights. The principles have gained significant normative authority and are widely used as a tool when interpreting the legal nature of the rights in the Covenant. An illustrative example of this is that the principles preceded the Committee's General Comment number 3 of 1990 on the nature of states parties' obligations under the Covenant and that the principles were very influential when the Committee prepared its comments.[30]

In 1997 the Limburg principles were complemented by guidelines prepared in another meeting in Maastricht when experts on international law agreed on the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*. The guidelines provide guidance on, *inter alia*, responsibility for violations of economic and social rights and the entitlements of victims to effective remedies.

3.2 State obligations

The basic obligations of states in regard to economic and social rights are outlined in article 2 of the ICESCR.

Article 2 provides:

1. *Each State party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, 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*
2. *The States Parties to the present Covenant undertake to guarantee that the right enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

[30] Chapman, A., p. 27.

3. *Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.*

The cited provision can be broken down to a number of important principles, namely:

- the state "*undertakes to take steps… by all appropriate means, including particularly the adoption of legislative measures";*
- *"with a view to achieving progressively the full realization of the rights";*
- *"to the maximum of its available resources";*
- *"without discrimination";*
- *"Through international assistance and cooperation".*
- The obligation to respect.
- The obligation to protect.
- The obligation to fulfil.

3.2.1 The state's obligations to take steps… by all appropriate means, including particularly the adoption of legislative measures

It is stipulated in article 2.1 of the ICESCR that states are required to immediately undertake measures aiming at full enjoyment by every one of the various rights in the Covenant.

In practice, in most cases, this requires some form of legislative measures, especially if the applicable rights are to be enforceable. However, legislation is not always a sufficient response to the obligations of the Covenant, especially if these rights are to be enjoyed by everyone without discrimination. Other necessary steps may include adoption of policies and administrative, judicial, educational, social and economic measures.

Legislative measures might, however, be obligatory when existing laws are manifestly inconsistent with the obligations of the Covenant. This could be the case when an existing law is discriminatory or when the law allows for the violation of a right enshrined in the Covenant.[31]

3.2.2 The progressive realization component

It is often assumed that the fact that the Covenant contains a progressive realization component implies that economic and social rights can only be realized when a country is economically developed or has reached a certain level of development.

[31] Limburg Principles 17-20.

This assumption is incorrect and is not in accordance with either the intent or the legal intention of the ICESCR. Paragraph 9 of General Comment number 3 of the Committee on Economic, Social and Cultural Rights on the nature of States Parties' obligations, clarifies that there is a duty upon states to, notwithstanding the level of national wealth, to move as quickly as possible towards the realization of economic and social rights. This implies that available resources should immediately be used equitable and effectively.[32]

The measures should not be contingent on the availability of resources, but available resources should be used effectively with a view to achieve the goal of implementing the rights of the Covenant.[33] While the rights in the Covenant can be achieved progressively, immediate steps have to be taken by the state to reach the goal of fulfilling is obligations.[34] In principle, this would mean that the state must develop targeted and sufficient policies that will progressively assure the rights of the Covenant.
Social and economic indicators are frequently used as a tool to measure progress in this regard. The Limburg principles stress that progressive implementation is not only dependent on the increase in resources, but also by the development of societal resources that are necessary for everyone's enjoyment of the rights of the Covenant.[35]

Some right in the Covenant are not at all linked to the progressive realization notion. The non-discrimination provision (Art, 2.2.) and the obligation of States Parties to refrain from actively violating the rights of the Covenant are obviously to be implemented immediately. The same applies to the obligation to refrain from withdrawing protection of these rights.[36]

The Committee on Social Economic and Cultural Rights has stressed that policies and legislation should not be designed to benefit already advantaged groups at the expense of other groups.[37]

3.2.3 To the maximum of its resources

When discussing a state's resources in the context of the "maximum of its resources" notion of the Covenant, it should be pointed out that the notion includes both national resources and international aid in terms of for instance economic and technical assistance.

According to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, resource scarcity is not a valid argument for lifting a

[32] Limburg Principle 21.
[33] Limburg Principle 23.
[34] Limburg Principle 16.
[35] Principle 24.
[36] Limburg Principle 22.
[37] General Comment number 4 on the right to adequate housing, paragraph 11.

State's minimum obligations as to the implementation of economic, social and cultural rights.[38]

What is important here is that even if the state cannot satisfy a right, it has to demonstrate a full commitment that, in aggregate, the measures it takes are sufficient to realize the right for every individual in the shortest time possible and in conformity with its maximum available resources.[39]

Many of the measures that are necessary will in one way or another include resource allocations and policy initiatives of a general nature.[40] In principle this means that states are obliged to give priority to treaty obligations before other policy areas. This has bearing on for instance taxation policies as states must collect enough tax revenues to be able to meet the rights in the Covenant. The Committee has stated that in cases where there is no visible identifiable justification for a limitation in public expenditure on programs aiming at realising socio-economic rights, the state might have violated the Covenant.[41]

Needless to say, this is a sensitive area and the Committee has had problems qualifying whether or when, within the framework of maximum resources, public expenditures geared towards fulfilment of the rights in the Covenant are sufficient in relation to overall expenditure. Nevertheless, in its comments it has implied that there must be a reasonable justification for a lowering of public expenditure.[42]

3.2.4 Without discrimination

Article 2.2 of the Covenant prohibits the state to apply discriminatory practices. The prohibition also applies to third parties on its territory, i.e. private persons and bodies. Those who are subjected to such discriminatory practices should have access to judicial and other resource procedures. The prohibited grounds for discrimination enumerated in the article, race, colour, language, sex, religion, political or other opinion, are not exhaustive. Discrimination in this context also includes all other grounds, such as age and income level, that may have a negative effect on an individual's enjoyment of the rights in the Covenant.

Limburg Principle 37 prescribes that when a state becomes party to the Covenant, it shall eliminate *de jure* discrimination by abolishing without delay any discriminatory laws and practices affecting an individual's enjoyment of the rights in the Covenant. *De facto* discrimination should be brought to an end as speedily as possible.[43]

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[38] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, guideline 10.
[39] The Committee on Economic, Social and Cultural Rights, General Comment number 4 on the right to adequate housing, paragraph 14.
[40] Ibid.. 15.
[41] Ibid..
[42] Ibid..
[43] Limburg Principle 38.

Special measures such as affirmative action schemes are not deemed as discriminatory provided that they are only temporary, i.e. they shall not be continued after their planned objectives have been met and when they do not lead to the maintenance of separate rights for different groups.[44]

3.2.5 Through international assistance and cooperation

The Covenant envisages that not all states have the resources they need to ensure the immediate and full realisation of all the rights in the document. Therefore, as described above, the covenant contains notions such as "progressive realisation" and "to the maximum of its resources". However, the Covenant requires that in those instances where a state cannot immediately fulfil all the rights in the Covenant, it should accept external assistance for its programme of progressive realisation. As mentioned earlier, external assistance is in this context considered as part of a state's available resources. Consequently, a state is not allowed to adopt isolationist policies when international assistance is available and, at the same, it is unable to meet its obligations in regard to economic and social rights.[45]

The stipulation on international assistance works both ways. States that possess adequate means to assist another state has an obligation to do so. If they do not, they should be held accountable for their omissions.[46]

3.2.6 The obligations to respect, to protect and to fulfil

Apart from the obligations explicitly mentioned in article 2.1 of the ICESCR, there are some general obligations, within the legal framework of economic and social rights.

Guideline 6 of the Maastricht guidelines states that, like civil and political rights, socio-economic rights impose three different types of obligations on states, i.e. the obligation to respect, to protect and to fulfil. If in default to perform any of these obligations, the state has violated one of the rights in the Covenant.

The obligation to respect economic and social rights implies that states must refrain from taking any actions that infringe on an individual's enjoyment of economic and social rights. This relates to for instance an individual's right to not be arbitrarily evicted or arbitrarily denied access to education or health care institutions or any other services related to socio-economic rights. An important aspect in this context is respect for the right to popular participation as the government must create economic and social conditions

[44] Ibid., principle 39.
[45] Ibid., principle 40
[46] Ibid..

that are conducive to self-help initiatives. The same applies to respect for freedom of assembly which is imperative for the assertion of demands by groups entitled to economic and social rights.[47]

The obligation to protect economic and social rights means that a state and is institutions must prevent that an individual's rights are violated by the other individuals or non-state entities.

Legal remedies must be available if a third party violates an individual's rights and the state should take measures to stop the violations from continuing. In this respect, it is also imperative that an individual is through active measures protected from all forms of discrimination, threats and harassment that could violate his enjoyment of economic and social rights.[48]

It is important to stress that private actors are capable of violating economic and social rights and that the state has an obligation to protect the individual. Any encouragement or neglect on part of the government in protecting an individual from acts perpetrated by, for instance, corporations, organisations, churches, teachers or any other private entity or individual constitute a situation in which the state has not fulfilled its obligation to protect.[49]

The obligation to fulfil implies that a state must, in a situation where earlier measures have not been sufficient or otherwise not been successful, to undertake positive measures with a view to ensure the full realisation of the right in question. Or in other words, fill the gaps in socio-economic rights protection.

In practice this implies for instance adoption of redistributive taxation policies, provision of basic public services, programs on infrastructure or simply legislative and policy reviews of pertinent laws or regulations having negative influence on the fulfilment of economic and social rights.[50]

3.3 Minimum core obligations

The Committee on Economic, Social and Cultural Rights stated in its General Comment No. 3 of 1990 that States have a minimum core obligation under the ICESCR to ensure that individuals enjoy a basic level of enjoyment of each economic, social and cultural right.

"…the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. 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

[47] Chapman, A, p. 43.
[48] Maastricht Guidelines 16 and 18.
[49] Ibid., and Limburg Principle 40.
[50] Maastricht Guideline 17.

of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d`etre."[51]

In the same document the Committee went on to qualify its statement by admitting that such a minimum core obligation must be considered in light of the resource constraints faced by a state. Hence it has concluded that;

"In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as matter of priority, those minimum obligations"[52]

Limburg Principle 25 states that parties to the Covenant are under the obligation "to guarantee respect for the minimum rights of survival for all" and independent of available resources.

The problem is however that there is no exact standard that indicates what constitutes the minimum norm of observance.

The Committee describes the minimum core obligation as an obligation upon states to realise minimum essential levels of a right which indicates that there are different levels to the realisation of a right. Consequently, this means that some levels are more essential than other levels.[53]

The Committee's approach was heavily influenced by academics such as Bart-Anders Andreassen who in their turn were inspired by Henry Shue's idea that it is possible to identify a list of basic rights that are necessary for the exercise of all other rights. Andreassen and other scholars applied this idea to the Covenant itself by establishing the notion that there was a level of effective self-provision. Reaching this level would make it possible for the poor to attain further progressive steps of development and enjoyment of the longer list of rights in the Covenant.[54]

The scholars exemplified this by giving the illustrative example of poor people living in rural Botswana. The prevalence of high malnutrition levels hindered these people in their efforts to bring in a good crop for a sustainable food security. The inadequate levels of nutrition created a situation where it was impossible for these people to achieve more adequate and higher levels of nutrition, health or education. Consequently, minimum levels or thresholds of a right are those that are imperative for a person's

[51] The Committee on Economic, Social and Cultural Rights, General Comment No. 3, para. 10.
[52] Ibid..
[53] Bilchitz, D., p. 186.
[54] Ibid..

enjoyment of other and higher levels of socio-economic rights in the future.[55]

In the context of the application of the Covenant and the interpretation of the minimum threshold obligation put forward by the Committee, there has been a discussion on whether this obligation mainly applies to a society-wide or communal level of enjoyment or whether it applies to the individual enjoyment of a right.[56] The advocates for a minimum threshold approach have favoured the former position suggesting, *inter alia*, that the scope of a violation of economic and social rights would refer to the percentage of the population not enjoying the right at the level of the minimum threshold.[57]

Under any circumstances, the minimum core obligations must be viewed as an initial step and not the conclusion of realising economic and social rights. It cannot be interpreted as suggesting that only the minimum core of a certain rights is justiciable.[58]

It goes without saying that the issue of defining what is the minimum core content of economic and social rights has been surrounded by a lot of controversy and much debate. On the one side, there are critics that base their arguments on the difficulties involved in establishing universally accepted standards. Whereas, on the other side, others have maintained the argument that there is a need to define the minimum core of every right in the Covenant as it would provide a uniform framework in which some identified baselines must be respected by all states, including those who operate under insufficient financial resources. According to them this would promote realisation of the right and ensure equity in regard to distribution of resources.[59]

3.4 Retrogressive measures

A retrogressive measure is one that directly or indirectly results in a negative backward step in relation to a right recognised by the Covenant. An example of such a retrogressive measure would be the introduction of new legislation that decreases public expenditure on education causing increased illiteracy.

The Committee discourages such measures but it has limited its criticism to only include deliberate retrogressive measures.

It has commented that retrogressive measures;

[55] Ibid..
[56] Office of the United Nations High Commissioner for Human Rights, p. 22.
[57] Ibid., p. 23.
[58] Ibid..
[59] Ibid..

"Would need to be 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".[60]

A measure that has the unintentional consequence of reducing the enjoyment of a right does not have to be a violation of a Covenant right in terms of a deliberate retrogressive measure. However, the state is obliged, under its general obligation under the Covenant, to immediately correct its measure once it becomes aware of the negative unintended consequences.

It is part of the obligation to progressively realise economic and social rights that no regression by concrete action or omission to a lower level of a right is permissible.[61]

[60] General Comment No 3., para. 9.
[61] Office of the High Commissioner for Human Rights, p. 28.

4 Constitutionalism and the role of the judiciary as protectors of socio-economic rights

4.1 The role of constitutions

Constitutions are often, in conventional institutionalist definitions seen as institutional frameworks that place constitutional limits in terms of a supreme law on the exercise of power by the government. Principles enshrined in the constitution to this end often include the separation of powers, strict requirements regarding amendments of the constitution, a bill of rights and establishment of bodies that enforce and guard the constitution such as a court with powers of judicial review.[62]

Therefore, in most legal systems, constitutions serve the roles of frameworks for the distribution and exercise of power. In liberal democracies constitutions are seen as protecting the rights of citizens from both infringements by the state and from majority decisions. These rights are often included in a so-called Bill of Rights that defines fundamental rights and liberties of citizens within a country as well as the obligations of the state pertaining to the applicable rights.[63]

However, there are several features that distinguish a Bill of Rights from other legal provisions of human rights character.

Firstly, it provides a stable framework for the political and legal institutions in the country as it forms part of the constitution, which is normally meant to be of long duration.[64]

Secondly, it is written and enshrined in one of a few written key legal documents-[65]

Thirdly, it is part of the superior law of the country and all other laws that are not in conformity with it are rendered invalid or inapplicable.[66]

Fourthly, it is justiciable, in the sense that it prescribes judicial procedures in which judges can test the compatibility of ordinary legislation with the constitution-[67]

[62] Van Huyssteen, E, p. 246.
[63] Hirschl, R., p. 3.
[64] Kavanagh, A., p. 960.
[65] Ibid.
[66] Ibid.

Lastly, it is relatively entrenched as to future amendments which are more difficult when compared with ordinary legislation.[68]

4.2 The separation of powers doctrine

Owing to the need to legitimise the exercise of state power in a democracy, constitutions serve as a tool to demarcate the extent of state power and to establish mechanisms to ensure that the persons and institutions that hold the power can be held accountable.[69]

The separation of powers doctrine is a basic feature of many democratic systems all over the world that have accepted that there is a vital need to, through a constitution, impose checks and balances on the three bodies of the state, i.e. the executive, the legislature and the judiciary.

In its original form, as described in the works of Locke and Montesquieu, the doctrine guards against an over-concentration of power by dividing the powers and functions of the state in the three mentioned sectors.[70]

This does not imply that the separation of powers is absolute.[71] On the contrary in most cases its boundaries are changeable and undetermined in order to enable, *inter alia*, administrative expedience. The stringency of the original doctrine has been ameliorated by the development of practices more geared towards "checks and balances" as can be seen in the American constitutional system where the different government branches monitor and counterbalance the exercise of power by one another.[72]

In constitutional democracies the legislature usually performs several distinct functions. First, it is a representative body whose members are elected directly by the public and it provides a mechanism through which citizens can participate in public affairs and government. Second, it is a forum in which governments can be held accountable for their actions. Third, it acts as a law-making body.[73] Therefore, in the human rights field, as in other policy areas, it is generally accepted that the legislature has the main role with regard to giving content to human rights by means of legislation and policies. The problem is that it cannot be expected that popularly elected laymen possess the technical expertise required to deal with all complex aspects concerning human rights and social rights in particular. In addition, there is no guarantee that popular mandate guarantees respect for human rights and the social needs of marginalised and vulnerable groups in society such as for instance minorities.

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[67] Ibid.
[68] Ibid.
[69] Pieterse, M., p. 4.
[70] Ibid..
[71] Pieterse, M., p. 5.
[72] Ibid.
[73] Evans C. and Evans S, 2006, p. 548.

Much owing to the fact that the legislature has lost some of its political dominance in many political systems due to the technical and specialist nature of law-making, much of the political power and influence on giving content to human rights today rests with the executive as it controls the finance and manpower of the state administration.

The role of courts in such constitutional systems that include separation of powers involves allowing judges to examine legislative or executive acts for their conformity with the constitution including the Bill of Rights, and then to rule that such acts are invalid if they are not in conformity with the constitution. Such powers imply that judges provide authoritative interpretations of the constitution and the Bill of Rights which can result in rendering actions taken by the executive and legislature as invalid if the actions violate principles and rights in the constitution. It should be noted though that this does not mean that decision-making by the majoritarian institutions, the legislature and the executive, is replaced by judicial decision-making. It is rather a question of review as the initial policy decisions have already been taken by the majoritarian institutions. An obvious counter-majoritarian problem is however inherent in such a review as a final decision concerning a specific issue can be imposed by the court against the will of the majority in a society.

Evidently, such counter-majoritarian decisions by judges could be regarded as non-democratic. However, in constitutional theory there are several justifications for giving review powers to courts. Firstly, it is argued that such a review enhances democracy as it guards the boundaries of democracy by policing that also the minority can exercise its democratic rights such as the right to vote. Secondly, there are rights-based justifications building on the concept of fundamental rights that must be guaranteed to all individuals in any society, even if the majority does not have any interest whatsoever to recognise these rights.[74]

Such justifications are in most instances readily accepted by people with regard to civil and political rights. However, politically more salient controversies are frequently raised over the judiciary's role, within a system of separation of powers, in social rights cases.

4.3 The issue of political resource allocation and polycentric problems

Decisions on the allocation of limited resources between different interests and questions such as "who gets what, when and how" are very central elements in everyday politics.[75] Therefore, such decisions have been regarded as belonging to the spheres of political economy and, in accordance with the separation of powers doctrine, strictly assigned to the elected executive and legislatures who can be held accountable for their

[74] Bilchitz, D., p. 104.
[75] Syrett, K., p. 2.

decisions in general elections. Unelected and unaccountable courts whose function it is to simply declare and interpret the law and who do not have the required expertise to decide on matters such as resource allocation, have been viewed as unsuitable to assume such a managerial role.

Furthermore, inherent in all decisions concerning resource allocation is that it involves a complex weighting of possible competing uses of the resources against each other, which requires that the decision-maker has access to all the information and what can be described as the "full picture". However, in most cases the information available to the court will be limited and insufficient and it will not be able to take in to account the whole situation of interacting interests and repercussions of its adjudication on the matter.[76]

On the other side, the legislature and executive have access to a wide range of expertise on economic issues. The problem is closely linked to the concept of polycentricity introduced by Lon Fuller.[77]

Fuller describes a polycentric problem as one that involves a complex web of interrelated relationships where a change in one factor produces a series of unintended/incalculable changes to other factors. These relationships have centres that interact and in which different actors interact with each other in different ways such as like by means of negotiation. A problem that has a profusion/blend of such interacting centres is one that can be described as "many-centred" or "polycentric". An example of a polycentric question is how to fix an appropriate wage. Setting the wage of an employee affects the demand for employment, and consequently affects several other costs and factors[78].

Fuller's intention was to show what social tasks are suitable for courts to handle and which are not. Those tasks which were not would better be left to legislatures or the market because of their unsuitability for adjudicative disposition and the legislature's better position to strike a balance between rival claims. Consequently, he developed what can be viewed as a theory of adjudication:

This whole analysis of the optimum and essential conditions for the functioning of adjudication will derive from one simple proposition, namely, that the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favour… Whatever destroys that participation destroys the integrity of adjudication itself.[79]

Inherent in Fuller's theory is the issue of complexity. He puts great importance to the mode of participation that is accorded to the affected party

[76] Ibid.
[77] Pieterse, M., p. 12.
[78] King, J., p. 4.
[79] Ibid., p. 6.

in the adjudication. However, the issue at stake here is not what can be called the moral or ethical aspects of participation, but rather the fact that the greater the number of affected but unrepresented parties, the more complex the issue becomes with regard to unintended consequences and adverse impacts. It is important to stress that, on the one hand, something can be complex without being polycentric as many scientific questions can be highly complicated without being polycentric as the answer may only affect one person and, on the other hand, that issues are often complex in the sense that it is difficult to know who will be affected by a change of a circumstance in one particular context. Hence, it is a cumbersome task to even identify who should be called to the court or allowed to intervene in the proceedings.[80]

In conclusion, the realisation of social rights is often resource dependent and decisions related to them tend to deal with "distributive justice" i.e. how scarce resources should be allocated between different sectors such as between health and infrastructure or health and education. Moreover, especially in less developed countries, the necessarily progressive realization of these rights is dependent on a complex interaction of policies and programs in different policy areas and institutions.[81]

Nevertheless, it should be borne in mind that judicial review on civil and political rights has rarely been questioned in the same manner, despite the fact that the realization of many of these rights also often requires massive expenditure and which consequently can have an influence on the overall allocation of resources.[82] For instance, court orders on the holding of elections, provision of legal aid and rights related to jail sentences all have budgetary consequences.

4.4 Inclusion of socio-economic rights in a constitution and their justiciability

Today most constitutions contain rights provisions and especially provisions that relate to civil and political rights. However, the traditional notion of the separation of powers doctrine discussed above and the problems with decisions related to resource allocation become intense where a Bill of Rights containing socio-economic rights is included as that would involve the judiciary in decisions which have budgetary impact.

Some critics allude that when social and economic guarantees are enshrined in a constitution, courts risk assuming a role for which they are ill-suited and what can be described as an untenable managerial position.[83]

[80] J. King describes it as "…the network of cause and effect relationships is scarcely comprehended". King, J. p. 5.
[81] Robinsson, M. P. 871.
[82] Bilchitz, D., p. 129.
[83] Sunstein, p. 14.

Some commentators have stated that the inherent institutional logic of social and economic rights imply that they cannot be included in a constitution as judges lack the democratic legitimacy and competence to deal with such issues.[84] These commentators concerns, that the judiciary does not have the legitimacy do adjudicate social and economic rights, are twofold.

Firstly, if placed in that position, courts would have to interfere with the drawing of the budget which is considered as one of the main prerogatives of the legislature. Secondly, as resources are always, to at least some extent, scarce, interests protected by social and economic rights are therefore likely to conflict. Consequently, judges should exercise self-restraint towards economic issues and it is therefore doubtful whether such "choice-intensive" decisions should at all be subject to legal deliberation which raises the question of whether such rights are at all justiciable. Otherwise, they should only be subject to political deliberation.

Justiciability has been defined as;

"… a contingent and fluid notion dependant on various assumptions concerning the role of the judiciary in a given place at a given time as well as on its changing character and evolving capability, but may be broadly defined as the extent to which a matter is suitable for judicial determination"[85]

The issue of justiciability and enforcement must be distinguished from the implementation of a court's decision. In all legal systems courts normally maintain a role to enforce a remedy contained in a decision, should the remedy not be implemented. However, it applies to all rights, both civil and political as well as socio-economic rights that they are not always enforced. Justiciability is not the same as enforcement or implementation although the linkage between them is obvious.[86]

Furthermore, the issue of whether socio-economic rights are justiciable is not a question of whether such rights can or should be the subject of national legislation or whether they can be enforced where such legislation exists. Obviously, legislation addressing rights such as right to education, health care, housing, pensions, social benefits and welfare and other socio-economic concerns is commonplace and imperative in countries that generally respect human rights and whose national institutions including courts are accustomed to deal with issues related to such rights.

The principle discussion and debate, as it exists, however, takes place at a different level. Should positive obligations to fulfil socio-economic rights be included in a constitution?

[84] Fabre, Cecile p. 280.
[85] C. Scott & P Macklem, p 17.
[86] Viljoen, F., p. 2., Mabulanga-Hulston, J., p.36.

As can be deduced from the above discussions much of the justiciability issues focus on the question of legitimacy. Is the nature of such rights such that they should at all be included in a constitution and are courts institutionally competent to enforce them?[87] Normally, constitutional norms constitute superior law that may invalidate or rectify national legislation or policies. They can also serve as guides to implementation of statutory provisions.[88]

In practice, justiciability of a right is contingent on whether a court or an administrative body regards it as amenable to judicial scrutiny.

As has been seen above, the unwillingness to accept economic and social rights as justiciable rights is closely linked to the idea that they are vaguely worded and resource demanding. Moreover, in the context of the separation of powers doctrine it is often argued that the judiciary does not have the necessary democratic legitimacy and that the judiciary therefore must exercise self-restraint towards economic issues.

Nevertheless, also the protection of civil and political rights is a resource demanding enterprise, and such rights can also be vaguely worded. In this respect, all rights are positive rights in the sense that they have budgetary implications.[89] Civil and political rights are not immune against delicate power balance issues between the judiciary and the legislature. However, these considerations are of quite limited practical value when discussing the justiciability of rights as the issues at stake is not whether a right has resource implications, but whether there are substantial legal grounds for asserting that a state has an obligation to ensure that resources are allocated for a certain end.[90] Here it is unavoidable to not focus on the wording of the right and it is obvious that the acceptance of a right as a justiciable right is strengthened by the precision of the particular right. Consequently, the judiciary plays a role in enforcing what the legislature has positively and clearly decided as regards all rights, expensive and cost-free, be it economic and social or civil and political rights.[91]

Arguments such as that the courts are already involved in matters that have resource implications are therefore not necessarily valid arguments supporting the justiciability of economic and social rights. In most cases the role of the courts is to verify that the legislature adheres to its human rights obligations and that the state's institutions respect human rights law. If the law has clear and manifest budgetary implications then public spending will be a result of the courts' judgements.[92] The power balance between the judiciary and the legislator becomes highly relevant only in situations when

[87] Pieterse, p. 8.
[88] Viljoen, F., p. 5-9.
[89] Koch, I. E., p. 406.
[90] Ibid..
[91] Agbakwa, S, p. 187.
[92] Ibid..

the judiciary can decide on resource-demanding issues without a very clear legal basis.[93]

Other commentators have argued that the real question is one of degree and that what matters is the size of the consequences court decisions have on budgets.[94] Court orders enforcing socio-economic rights have almost always significant budgetary consequences while decisions on other rights are more likely to only have occasional or less severe implications.

However, other commentators have objected to the argument that size matters. The size of the budgetary implications does not provide a strong argument for the judiciary to adopt a hands-off approach to adjudicating socio-economic claims. In the contrary, the judiciary needs to be particularly vigilant in seeing that the interests of individuals are protected when there are significant budgetary interests at stake, as it is here that governments are most likely to violate the interests of individuals.[95]

Nevertheless, the size of the budgetary consequences may be a consideration that needs to be taken into account by the judiciary in its decisions, especially when translating conditional rights into unconditional rights. If the budgetary consequences are significant, it has bearing on polycentric outcomes and issues such as scarcity of resources which might result in that in some circumstances unconditional rights are never implemented. In these situations, it might be appropriate for the judiciary to give weight to the decisions made by other branches of government that have better competence to deal with these complex issues and who can better undertake the balancing act. This does not imply that the size of the budgetary consequences impacts on the urgency of human needs. Nor does it provide arguments for the executive and the legislator to neglect the priorities of the interests protected by economic and social rights.[96]

In conclusion, the judiciary will have an important role, irrespective of the size of the budgetary consequences, in ascertaining that the government adhere to its obligations with respect to economic- and social rights.[97] This does not mean that there is no general objection to judicial review when it comes to the judiciary determining the overall allocation of resources.

[93] Ibid..
[94] Tushnet, M. p. 1896.
[95] Bilchitz, p. 130.
[96] Ibid..
[97] Ibid..

5 The constitutionalising of socio-economic rights in the South African Constitution

Today, internationally, many states, including European states, have constitutions that contain some safeguards for the protection of socio-economic rights.

India and South Africa are most frequently quoted as the countries with the most advanced constitutional law jurisprudence on such rights.[98] The Indian system has mainly developed through judicial interpretation of civil and political rights in the constitution such as the right to life, whereas in South Africa, by contrast, an express catalogue of economic, social and cultural rights has been included in the Constitution.

5.1 The legacy of Apartheid

In order to understand the South African Constitutional process it is important to understand the long legacy of inequality and poverty in the country that was the result of the previous Apartheid policies.

Economic disparities were entrenched by Apartheid and during the last 15 years of that era massive transfers of wealth took place from the poor to the rich. During the period 1975 to 1991 the income of the poorest dropped with 60% while that of the whole population only dropped with 35%. In 1996 the gap between the rich and the poor was even larger as the poorest quintile received 4% of the total income, compared to 65% received by the richest quintile and 46% by the richest 10%.[99]

Still today, South Africa is ranked as one of the most unequal societies in the world with great disparities in wealth. Millions of mainly black people are living in appalling circumstances and in abject poverty. Unemployment is high and many do not have access to clean water or to adequate health services.[100]

The inclusion of a broad range of economic, social and cultural rights in the 1996 South African Constitution is supposed to reflect the new democracy's commitment to reconstruct development and social justice for all.

[98] Chetty, K., p. 2.
[99] UNDP 2002 *Human development report: 2002* New York: Oxford University Press as quoted in Chetty, K., p. 4.
[100] Chetty, K., p. 3.

However, Justice Albie Sachs of the Constitutional Court has described the sometimes ambivalent approach many black South Africans have had to a Bill of Rights and constitutionally protected human rights.

In the mid 1980s a group of black law students at the University of Natal-Durban in South Africa, created an association named the *Anti-Bill of Rights Committee*. First, Sachs was intrigued by the fact that the association comprising of idealistic students from the oppressed community chose to establish an association that was opposing the notion of a Bill of Rights instead of an association opposing Apartheid. However, when having understood the true motives of the students he felt some sympathy for their arguments. The group saw a bill of rights as a tool for the privileged white minority to maintain a status-quo by preventing future moves towards social and economic change. A Bill of Rights would effectively maintain the prevailing unfair distribution of socio-economic wealth created by the Apartheid regime and especially secure property rights. During the time, whites owned 87% of the land and 95% of all productive capital. A Bill of Rights was perceived by the black students as a hindrance for the state to equalise access to wealth resulting in that the underprivileged would remain poor, albeit formally emancipated. According to Sachs one commentator put it as that the Bill of Rights would in effect be a "Bill of Whites".[101]

The new interim South African Constitution of 1993 aimed to heal the divisions of the past and to establish a society based on democratic values and social justice. A number of economic and social rights were included, but rights such as the rights to housing and health care were not included. When preparing the final Constitution, one of the major issues was whether justiciable economic and social rights would be included in the Bill of Rights together with civil and political rights.[102]

Therefore, it is understandable that consultations, participation and compromise involving all sectors of South African society were a significant characteristic and imperative part of the constitutionalisation process.

Human rights groups, church groups, civil society organisations and trade groups strongly lobbied for the inclusion of economic and social rights in the bill of rights and 55 different organisations presented a joint petition to the Constitutional Assembly arguing that a constitution that did not recognise economic and social rights was not a constitution of the people. They were concerned that if only civil and political rights were included, the rich and powerful would succeed in maintaining the unequal distribution of wealth in the country by using civil rights such as the right to property to hinder social transformation. Instead they argued that the new democratic government should be given the constitutional mandate to redistribute resources by means of implementing economic and social rights. The

[101] Sachs, A. p. 19.
[102] Heyns, C., p. 15.

argumentation of the group was successful and economic and social rights were included in the draft final Constitution.[103]

However, before the final Constitution could be adopted, the Constitutional Court had to certify that the provisions in the final Constitution were in conformity with the 34 constitutional principles enumerated in the interim Constitution and most importantly that it protected universally accepted fundamental rights, democracy and cultural diversity and prohibited all forms of discrimination.[104]

During the certification process, some groups such as the Gauteng Chambers of Commerce and Industry and the Free Market Foundation entered the stage and fiercely called into question the inclusion of socio-economic rights. Their main arguments were that an inclusion would violate the constitutional principle of separation of powers as an inclusion would give judges the power to dictate what would be the social policies and budget principles of the parliament and the executive. Furthermore, according to the group, economic and social rights were not proper justiciable rights as they were not universally accepted fundamental rights. This argument was contested, in consultations, by organisations such as the South African Legal Resources Centre, Centre for Applied Legal studies and the Community Law Centre of the University of the Western Cape who all defended the inclusion of economic and social rights.[105]

In its first certification judgement the Constitutional Court held that:

- Many civil and political rights such as equality, freedom of speech and the right to a fair trial may also result in courts making orders that affect budgets.
- The inclusion of socio-economic rights does not automatically mean breaking the principle of a separation of powers.[106]
- The fact that socio-economic rights affect the budget does not mean that they cannot be enforced by the courts.
- At the very minimum the courts can protect socio-economic rights from "improper invasion".[107]

Upon certifying the final Constitution on 4 December 1996 the Constitution came into force on 4 February 1997.

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[103] Jagwanth, S., pp. 8-14.
[104] Ibid..
[105] Ibid..
[106] *Ex parte Chairperson of the Constitutional Assembly: In the Certification of the Republic of South Africa, 1996,* 1996 (1), BCLR 1253 ('the First Certification Judgment'). At para.77. *"It cannot be said that by including socio-economic rights.… …a task is conferred upon the Courts so different from that ordinarily conferred upon them.… …that it results in a breach of the separation of powers".*
[107] *Ibid.*.

5.2 Constitutional supremacy in South Africa

The constitutional form of democracy chosen in post-Apartheid South Africa can be described as one of constitutional supremacy with judicial review.[108] Constitutional supremacy gives significant formal influence to the judiciary with regard to decisions on as varied subjects as abortion, the death penalty and the distribution of social benefits.

In the South African context this is particularly interesting as the legislature's broad and ambitious socio-economic transformation agenda became open to judicial review by the courts when it was democratically representative for the first time in South African history.[109]

The Constitutional Court in South Africa is the highest court in all constitutional matters.

5.3 Constitutional interpretation in South Africa

In two early judgements the Constitutional Court outlined its theoretical method to constitutional interpretation.

In South Africa v. Zuma[110] the judges stated that they would adopt a purposive and generous approach to interpreting the Bill of Rights. However, in the case, judge Kentridge, stressed that:

"Whilst 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 and intellectual and moral preconceptions. Yet it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean".[111]

In a second case, South Africa v. Makwayne[112], judge Chaskalson reiterated the Court's generous and purposive approach to constitutional interpretation and that the interpretation should give expression to the underlying values of the Constitution. In this he emphasised that the "Constitution must be interpreted in the light of our own history and conditions with due regard to aspirations articulated in it".[113] In the judgement it was recognised that the

[108] Jagwanth, S., p. 9.
[109] Ibid..
[110] South Africa v. Zuma, 1995 (2) SA 642 (CC).
[111] Ibid., para 17.
[112] South Africa v. Makwayne, 1995 (3) SA391 (CC).
[113] Ibid., para 9.

social context of the case, high level of criminality in South Africa, must be taken into consideration. In the case Chaskalson refers to the underlying values of the Constitution and here it should be noted that the Constitution itself identifies some central values underlying the Bill of Rights, namely human dignity, equality and freedom.

Section 7(1) of the Constitution provides that

This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

5.4 Judicial independence in South Africa

In early 2005 the ANC (African National Congress) National Executive Committee issued a statement that the "collective mindset" of the country's judiciary had to change to keep with the "vision and aspirations" of the majority of South Africa's population.

This statement was by many interpreted as being a direct assault by the executive on the independence of the judiciary in the country. The statement was later played down by the ANC which claimed that it only wanted to stress the continuing importance of the need to transform the judiciary.

Today, the discussion of the independence of the judiciary is intertwined with the perceived need to change the gender and racial compositions of the judiciary.[114] The concerns are twofold.

Firstly, both the superior and lower courts are predominantly composed by white men which fuel a popular perception that judges and magistrates are biased as to race and gender and hence not "independent". There have been allegations that white male judges have failed to convict persons charged with inter-race crimes and to impose correct sentences.[115]

Secondly, government programs aiming at rapidly transforming the racial and gender compositions of the courts have resulted in concerns that competent white male lawyers have been unfairly excluded from appointment to the court system and especially the High Court. Allegedly, the indirect result of this could be that the judicial independence is threatened as young inexperienced black judges and magistrates are in a weaker position to resist pressure from the executive and the legislature.[116]

In 2005 just over half of South Africa's 207 superior court judges were white men and only 28 women of all races. The Constitutional Court was one of the most racially representative courts in the country with five black

[114] AfriMap and Open Society Foundation for South Africa, p. 7.
[115] Ibid..
[116] Ibid..

men, one black women and one Indian man out of a complement of eleven.[117]

Rules concerning removal of judges are governed by Section 177 of the South African Constitution. It stipulates that a judge may only be removed from office before his or her term of office expires on grounds of incapacity, gross incompetence or gross misconduct, or if two-thirds of the National Assembly demands for such a removal. No judge has been subjected to such a removal since the enactment of the 1996 Constitution.

5.5 The socio-economic rights enshrined in the South African Constitution

The South African Constitution does not make any explicit distinction between civil and political rights and economic, social and cultural rights in terms of their traditional division and categorisation. The Constitution contains a number of both categories of rights but the rights do not appear in any particular order which would indicate that there is a hierarchy among them.

The provisions in the Constitution dealing with economic and social rights are the following.

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

Section 27
- *(1) Everyone has the right to have access to-*
- *(a) health care services, including reproductive health care;*
- *(b) sufficient food and water, and*
- *(c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.*
- *(1) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*
- *(2) No one maybe refused emergency medical treatment.*

Section 29
- *(1) Everyone has the right-*
- *(a) to a basic education, including adult basic education, and*

[117] Ibid..

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(1) Everyone has the right to receive education in the official language or their language of choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-

(a) equity,

(b) practicability; and

(c) the need to redress the results of past racially discriminatory laws and practices.

(1) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that-

(a) do not discriminate on the basis of race;

(b) are registered with the state, and

(c) maintain standards that are not inferior to standards at comparable public educational institutions

As seen the rights are formulated in typical textual formulations of such rights, i.e. declaration of the right followed by textual limitations such as "progressive realisation" and subject to "available resources".

In the Constitution particular emphasis has been put on the rights of children and with regard to economic and social rights this means.

Section 28

(1) Every child has the right-

…

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

5.6 The role of international law in interpreting the rights in the Bill of Rights

International law played a key role in the drafting of both the interim and the final Constitutions and several provisions in the Bill of Rights are similar to the articles in the ICESCR.

However, as mentioned earlier, South Africa has not yet ratified the ICESCR despite signing the instrument already in 1994.

Art. 2 of the ICESCR states that states must "take steps … with a view to achieving progressively the full realisation of the rights recognised" while Section 27(2) of the South African Constitution stipulates that in regard to the right of access to health care, food, water and social security, the State

“must take reasonable measures to … achieve the progressive realisation of each of these rights”.

International human rights law is given a strong position in the interpretation of rights included in the Bill of Rights. Section 39 of the Constitution prescribes that when a court or other institution interprets a right in the Bill of Rights, it "must consider international law".

In the case South Africa v. Makwanyane the Constitutional Court stated that both binding and non-binding international law can guide the interpretation of the rights in the Bill of Rights.[118]

[118] Ibid, para 36-37).

6 Judicial review of socio-economic rights in practice: The jurisprudence of the South African Constitutional Court

6.1 The jurisprudence of the South African Constitutional Court

Since the adoption of the new South African Constitution including the Bill of Rights, the Constitutional Court's interpretation of the Constitution has generated a rights jurisprudence that covers the issue of whether socio-economic rights are justiciable and what the character of some of these rights is.

Although a significant number of cases have appeared before the different courts in South Africa, commentators consider the following four decisions by the South African Constitutional Court as the existing framework for within which the judicial enforcement of socio-economic rights can be assessed.[119]

6.1.1 Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC)

In Soobramoney v. Minister of Health, a 41-year-old unemployed terminally ill patient, Mr. Soobramoney, had been denied dialysis treatment by a public hospital in Durban. His life could be prolonged by means of regular renal dialysis and his argument was that, based on several constitutional provisions, the state was obliged to provide him with such treatment.

Dialysis treatment takes four hours and is considered a time consuming exercise as an additional two hours are required after the treatment to clean the machine.

There were limited facilities for renal dialysis in South Africa and the hospital in Durban was unable to provide dialysis to all those suffering from renal failure. Therefore, the hospital had had to adopt a policy that meant that only those with acute renal failure that could be treated and remedied by renal dialysis, or those who were eligible for kidney transplant, would be treated.

[119] Mubangizi, J. C., p.6.

Mr. Soobramoney requested that the Court would instruct the State to avail funds for the renal clinic to provide dialysis for him.

In the majority judgement, judge Chaskalson elaborated on the application of section 27(1) of the Constitution and commenced with explaining the context of the decision.

He explained that there existed great disparities in wealth in South Africa and that there existed a high level of unemployment. Millions of people were living in abject poverty. Many of these people did not have access to drinking water or health care. He stressed that these conditions already existed before the adoption of the Constitution and that there was a commitment to address these problems with the adoption of the new Constitution. The aim was to transform the society in a way that there was human dignity, freedom and equality for all and that these principles would be at the heart of the new constitutional order.[120]

He continued with stressing that the state's obligations in regard to section 27 were dependent on the availability of resources and that the right to health care itself is limited due to lack of resources. The problem with insufficient capacity concerning renal dialysis was a nationwide problem.[121]

However, the guidelines and policies that had been adopted were fair and rational. They gave priority to patients that benefited the most and were geared towards curing of patients.[122]

If, in the contrary, everyone in the same condition as Mr. Soobramoney were to be provided with the treatment, the sustainability of the existing programmes would be jeopardized as they would collapse and no one would benefit. The fact that if Mr. Soobramoney would be treated, others, in similar circumstances, would also have to be treated was stressed by the Court. Something that was not feasible given the lack of resources.[123]

The Court held that it would be very slow to interfere with rational decisions taken in good faith by the political organs and medical authorities who have the responsibility to deal with such matters.[124]

The State is required at times to adopt a holistic view taking into account the larger needs of society, as it is required to manage its limited resources in order to address all the existing basic needs rather than to focus on the needs of certain individuals.[125]

[120] Soobramoney at para 20-22.
[121] Ibid., para. 24.
[122] Ibid..
[123] Ibid., para 28.
[124] Ibid., para 29.
[125] Ibid., para 31.

Consequently, the Court decided that the failure on the part of the state to provide renal dialysis to persons suffering from chronic renal failure did not constitute a breach of the state's obligation in terms of section 27 of the Constitution.

6.1.2 Government of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)

Mrs. Grootboom, her two children and her sister who had three own children, all lived in a shack in an area near Cape Town. The area was water-logged and she and her family decided that they could not bear another season in the shack. Altogether, some 5,000 individuals lived in similar circumstances basically without electricity and without clean water, sewage or waste removal services. A large number of these individuals had previously applied with the municipality for subsidised low-cost housing, but despite having been included on a waiting list for many years, no other action had been taken on the part of the authorities.

Instead, Mrs. Grootboom and some 1,000 adults and children chose to move to a vacant hillside in the vicinity that had already been designated for low-cost housing. There they built makeshift houses by their own means.

However, negotiations with the land-owner and the local council was to no avail and eventually a court order was issued declaring that the occupation of the land was inadmissible and that the occupants should be evicted.

Subsequently the occupants were forcibly removed from the area and their makeshift houses were bulldozed. The group, now desperate and homeless, moved on to a local sports field. As the harsh winter rains of the Cape Province were approaching and the group only had minimal shelter living in what can only be described as intolerable conditions, they approached a local attorney who wrote to the council and demanded that the council meets its constitutional obligations by providing the group with temporary accommodation. Yet, the municipality's response was in the negative and instead the group launched an urgent application to the High Court.[126]

The question that was presented before the Court was whether economic and social rights could be regarded as flowing directly from the Constitution and be enforceable directly by the courts and how this would come about in practice? The case concerned the state's obligations under section 26 of the Constitution which deals with the right to adequate housing and section 28(1)(c) which gives children the right to shelter.[127]

Section 26 of the South African Constitution provides that

> *(1) Everyone has the right to have access to adequate housing.*

[126] Sachs, A.,
[127] Grootboom, para 15.

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

In order to not be compelled to decide on the case under pressure caused by the expected heavy rains, the High Court ordered that, as an interim measure, the municipality should provide temporary shelter to the applicants pending the final decision.

The state acknowledged at the hearings that the applicants were living under dire circumstances, but that it was a consequence of past injustices in form of Apartheid and not because of the state's failure to respect current constitutional obligations. Instead, the state stressed the fact that it had implemented a large housing programme which gave millions of poor people without secure tenure the chance to move from makeshift shacks to proper housing with full title. According to the state, 750,000 families had already moved into subsidised housing of adequate standard and many more would benefit from the programme in the future.[128]

In its decision the High Court concurred with the state that the latter had met its obligation to progressively realise the right of access to adequate housing in accordance with section 26(2) of the Constitution. However, the court decided that the state had not fulfilled its obligations in accordance with Section 28(1)(c) of the Constitution, i.e.

Every child has the right… …to basic nutrition, shelter, basic health care services and social services.

In this respect, the High Court highlighted that a child's right to shelter was not qualified and there was no reference to progressive realisation within available resources. On the one hand, the shelter did not have to be of adequate standard, but on the other hand, the state had an obligation to provide children with some kind of shelter from the elements. In addition, since the children in question could not be separated from their parents, as a consequence, all people concerned should be given at least some basic protection.[129]

The state appealed the case to the Constitutional Court.

In arriving at his decision, judge Yacoob (all the other justices concurred in his judgement) undertook an analysis of the right to adequate housing in section 26(1).

[128] Ibid..
[129] Para. 12.

In the case it had been argued that the Court should seek guidance from the interpretations given to the economic and social rights under the ICESCR and the General Comments of the Committee on Economic, Social and Cultural Rights. In its General Comment 3 the Committee has asserted that economic and social rights include a minimum core obligation that state parties need to fulfil. Otherwise, the state's failure constitutes a *prima facie* failure to fulfil its obligations under the ICESCR.

Justice Yacoob did not completely reject the minimum core approach[130], but he concluded that "it is not necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core of a right".[131]

In contrast, he held that the real issue is whether in terms of the South African Constitution, the measures adopted by the government to realise the right to adequate housing are reasonable.[132] Reasonable measures would entail establishment and implementation of well-coordinated and coherent comprehensive programmes geared towards the progressive realisation of the right to access to adequate housing.

Yacoob stressed that a court does not have to investigate whether there are more desirable or favourable measures that could have been adopted as it is necessary to recognise that a wide range of possible measures are always available for the state when trying to meet its obligations. However, in order to comply with its obligations, it is not enough to simply adopt legislation. The state is also compelled to act with a view to achieve the intended objectives of the legislation. In order to be reasonable, a program must also be balanced and flexible. In the context of access to adequate housing this would necessitate that the program makes appropriate provision for attention to housing crises and to short, medium and long term needs. According to Yacoob, a programme that excludes a significant segment of society cannot be deemed to be reasonable.[133]

In the Grootboom case the programme adopted by the state was not reasonable. Although the state had put in place an integrated housing development policy whose medium and long term objectives could not be criticised, it was deemed to be void of any component that provided for those in desperate need.

Consequently, Yacoob, in his decision, ruled that absence of such a component was unreasonable. In conclusion, the nationwide housing programme was insufficient as it failed to provide relief for those most desperately in need.[134]

[130] Bilchitz, p. 140 - Yacoob thus leaves room for its adoption in the future.
[131] Grootboom, para 33.
[132] Ibid.. Para. 41.
[133] Ibid.. Para. 43.
[134] Ibid.. Para. 66.

In its unanimous decisions the Court emphasised that the judgement should not be interpreted as approving any conduct aiming at invading land for the purpose of forcing the state to provide housing on a preferential basis to people who participated in any such exercise.

The Court issued a declaratory order that made it incumbent on states to devise and implement a programme that contained initiatives aiming at providing relief for those most desperate in need and who had not earlier been catered for in the existing programmes.

6.1.3 Minister of Health and Others v Treatment Action Campaign and Others (No. 2) 2002 (5) SA 721 (CC)

In this case the Constitutional Court addressed the issue of the government's prohibition to provide the drug, Nevirapine, in the public health system, save for provision to a very limited number of test sites.

The drug, that was available in the private health sector, prevents mother to child transmission of the HIV virus and it had been determined to be safe and effective. Moreover, the reason for not providing the drug was not contingent on the availability of resources as South Africa would receive free supplies of the drug for a minimum of five years.

However, the government's stance was that although the procurement of the drug did not incur any costs, the implementation of providing the drug to the public would require counselling and other support services. Services that cost money.

The complainants, the Treatment and Action Campaign and Others, argued that notwithstanding the fact the provision of the drug under ideal circumstances would require support services, the drug in itself was still life saving. As a consequence, it would be illogical to preclude its use.

The complaints argued that it should be left to the discretion of the involved physicians working in the public sector whether the patient's circumstances merited the use of the drug.

According to Section 27(1) of the Constitution.

Everyone has the right to have access to… health care services, including reproductive health care; and… the state must take reasonable steps legislative and other measures within its available resources, to achieve the progressive realisation of this right.

The government argued before the Constitutional Court that courts in South Africa are constrained by the doctrine of separation of powers from issuing

anything else than a declaratory order in economic and social rights cases.[135]

This argument was rejected by the Court which reiterated that the separation of powers intrinsic in the 1996 Constitution can not be considered as absolute. The different branches of government have an obligation to respect the boundaries of their respective domains. However, this does not imply that courts are prevented from making orders that have an impact on policy.[136] In the contrary, the Constitution has places an obligation on courts to do so.

"The primary duty of Courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice." Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar, as this constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself. There is also no merit in the argument advanced on behalf of the Government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of State can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so".[137]

Consequently, the Court rejected the argument that the only power it was endowed with in the actual case was to issues a declaratory order. In cases where a breach of a right, including economic and social rights, has taken place the court is obliged to make sure that effective relief is given. The court will be guided by the nature of the transgression what concerns the pertinent relief in a particular case.[138] According to the Constitutional Court, South African courts have a wide range of powers to safeguard that the principles of the Constitution are respected. It depends on the circumstances of a particular case how those powers are discharged.

Nonetheless, caution must be exercised to the roles of the legislature and executive in a democratic society. It is clear, however, that when appropriate, courts must use their wide discretion to make orders that have consequences on legislation and policy.[139]

Hence, the Court was compelled to elaborate on its constitutional role as to the protection of economic and social rights and interpreted that the

[135] TAC para 96-97
[136] Ibid.. Para., 98.
[137] Ibid.. Para 99.
[138] Ibid.. Para 116.
[139] Ibid.. Para., 113.

Constitution requires it to adopt a restrained and focused role, i.e. to require that the state takes measures to meet its constitutional obligations and to test the reasonableness of these measures through judicial evaluation. Although the outcome of such an evaluation may have budgetary implications, they are not in themselves geared towards changing the budget. By adopting this position, the Court would ensure that the constitutional balance between the judiciary, the legislator and the executive is adhered to.

With regard to how the "reasonableness "standard of adopted measures should be interpreted in the context of progressively implementing economic and social rights, the Court stated that:

"To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those, whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right".[140] *"A programme for the realisation of socio-economic rights must be balanced and flexible and make appropriate provision for attention to… crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable".*[141]

Furthermore, the Court stressed that as far as socio-economic rights are concerned, the state must take reasonable legislative and other measures. It is not sufficient to only take legislative measures and they are not likely to by themselves constitute constitutional compliance. Instead, appropriate policies and program implementation by the executive must support the legislative measures. It is imperative that these policies and programmes are reasonable both as to implementation and conception. A program that is reasonable but which is not implemented reasonably will not be sufficient to meet the state's constitutional obligations.[142]

In addition, in the case, the Court also noted that the state has at least a negative obligation to refrain from preventing or impairing the right.[143]

By adopting these standards, the Court decided that owing to the fact that Nevirapine was safe and would undoubtedly save a significant number of lives even when prescribed under non-ideal conditions, the prohibition of the use of medications was unreasonable and consequently unconstitutional.

It should be noted that when the case reached the appeal stage, and was handled by the Constitutional Court, there had been positive changes with regard to the national programme to prevent HIV transmission, which was now better developed and more advanced. However, still the state had to avail, if necessary, pertinent training for the counsellors based on public

[140] Ibid..
[141] Ibid..
[142] Ibid..
[143] Ibid..

hospitals and clinics, on the use of Nevirapine to reduce the risk of mother-to-child transmission of HIV and take other related reasonable measures to the extent that clinics and hospitals throughout the public sector would be able to facilitate and expedite the use of Nevirapine.

In conclusion, the Court stated that the orders made did not preclude the state from adopting policies in a manner consistent with the Constitution if improved methods became available to it for prevention of mother-to-child transmission of HIV.[144]

6.1.4 Khosa v Minister of Social Development 2004 (6) SA 505 (CC)

In Khosa v. Minister of Social Development, the question was whether a certain provision in the Social Assistance Act 59 of 1992 was constitutionally invalid as it disqualified non-South African citizens residing in South Africa from receiving certain welfare entitlements.

The applicants were Mozambican citizens living in South Africa as permanent residents. In the interest of the general public, included in their case were other people belonging to the class of permanent residents who could not litigate personally. If the group would have had South African citizenships they would have been qualified for social welfare entitlements under the mentioned Act. They were all destitute and would have been entitled to pension grants and other social assistance entitlements such as child-support grants.

The applicants argued before the High Court that their constitutional rights to equality, social rights and the rights of their children had been violated because of the citizenship requirement in the Social Assistance Act. They claimed that section 27 of the Constitution guaranteed the right to social security for everyone, including permanent residents. Hence the legislation excluding the group should be rendered unconstitutional.

Their application was unopposed in the High Court.

The High Court ruled in favour of the applicants and struck down on a number of challenged provisions in the Act relating to old-age grants, child-support grants and care-dependency grants. Moreover, it ordered the authorities to pay to the applicants the grants in question and certain outstanding payments. It also instructed the authorities to receive and process applications for grants from the other persons on whose behalf the applicants had acted.

The Minister of Social Development appealed the decision and the majority of the Constitutional Court held that the South African Constitution endows

[144] Ibid..

the right to social security to everyone including non-citizens who are permanent residents.

The Court reasoned that certain rights in the Constitution such as political rights (section 19) and the right to have access to land (section 25(5)) have been explicitly limited to citizens. However, section 27 did not contain such a limitation. Judge Mokgoro, writing for the majority, held that the word "everyone" could not be interpreted as only referring to citizens.[145]

The Court also investigated the issued whether the exclusion of permanent residents from access to social assistance grants was reasonable.

Here the Court elaborated on what purpose social security served and what impact the exclusion has on the situation of permanent residents and how relevant it was to apply a citizenship requirement.[146]

The Court concluded that the underlying reason for including the right to social security was that "as a society we value human beings and want to ensure that people are afforded their basis needs".[147] Such a reason included the needs of non-citizens and there were no valid reasons for making a distinction between citizens and permanent residents in this regard. As permanent residents have the same obligations as citizens, it is illogical that they do not also have the same rights as citizens.[148]

The Court also concluded that an inclusion of permanent residents in the scheme would not incur an excessive burden on the state.[149] However, the exclusion of permanent residents had considerable impact on those excluded as it forced them into a situation where they were dependant on their families, relatives and communities.

For them "the denial of the right is total and the consequences of the denial are grave. They are relegated to the margins of society and are deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution".[150]

Based on these considerations, the Court reached the conclusion that the exclusion of permanent residents was inconsistent with section 27 of the Constitution.[151]

In a dissenting opinion, Judge Ngcobo with judge Madala concurring found that limitations on the access to the right to social security in the Act were reasonable as the state has insufficient resources to provide for everyone and

[145] Khosa, para 47.
[146] Ibid., para 49.
[147] Ibid., para. 52.
[148] Ibid., para 59.
[149] Ibid., para 60-62.
[150] Ibid., para 77.
[151] Ibid., para 85.

was entitled to give priority to its own citizens. They added that it was important that the provision of benefits would not create a pull-factor resulting in incentives to migrate to South Africa. Furthermore, the Act had the legitimate aim of encouraging self-sufficiency among immigrants. The dissenting minority also stressed that the limitation on eligibility for social security was only temporary owing to the fact that it was possible for a permanent resident to be naturalised and become a citizen after five years.[152]

[152] Ibid., para 113.

7 Analyses

7.1 Introduction

On the one hand, the jurisprudence of the Constitutional Court on socio-economic rights has attracted much criticism from some academic and social activists. Their main argument has been that the Court has not gone far enough in protecting economic and social rights and has hence not adhered to its constitutional mandate.[153] They argue that the Court has been too complaisant to government and that its interpretative strategies give too much room and discretion to government when it comes to implementing economic and social rights.

Moreover, the Court has in particular been criticised for not sufficiently focusing on remedies. Mr. Soobramoney passed away shortly after his request was rejected by the Constitutional Court and some critics claimed that the Court's approach was utilitarian, which is problematic from a rights perspective as it is premised on a hypothesis of fixed and limited resources. Naturally, the Court also attracted criticism as it was asserted that by not offering relief in a case as extreme as that pertaining Mr. Soobramoney, the Court was refusing to exercise its duty to implement the economic and social rights provisions of the Constitution.[154]

However, there have also been complaints that the Constitutional Court has gone too far and that it has threaded into areas that are the prerogatives of the legislature and executive and that its decisions in particularly *Grootboom, TAC* and *Khosa* have had negative consequences in terms of increases in the nation's public expenditure.

Others claim that the Court has successfully negotiated its review function with regard to socio-economic rights and that it has actively sought possibilities to expose political resource allocation to constitutional standards.[155]

The various comments, to a high extent, resemble various arguments that were presented already during the drafting of the Constitution. Clearly, a lot of people arguing for an inclusion had high hopes that the inclusion would give immediate and noticeable results in terms of changing the situation of those most desperately in need – that if the Constitution would have any legitimacy, it would deal with the fundamental needs of the people. Moreover, on the other side, commentators criticise the Court for having gone too far and for, in its judgements, having entered into the domains of the executive and the legislature.

[153] Thiruvengadam, A.K, p. 5.
[154] Ibid., p. 4.
[155] Roux, T. 95.

7.2 How has the Court in its judgements defined the character of the applicable socio-economic rights?

In general, and particularly in *TAC* and *Grootboom*, the Court has held the view that despite the fact that the obligations placed on the state are subject to the availability of resources, the state must create broad policies and inclusive programs that pay particular attention to those who are most in need. The state must demonstrate that it tries to implement these programs, i.e. take "all reasonable steps necessary to initiate and sustain" such programs.[156]

The approach in Grootboom built on the premise that the government programme in regard to housing had to be reasonable to pass the constitutional test. Owing to the fact that the programme failed to provide for those in most desperate need in the short term, the programme was deemed to be unreasonable and hence unconstitutional.

Despite the fact that reasonableness appears in a number of aspects of law, it is an elusive concept that is not always very well defined.[157]

Sunstein has referred to the approach adopted in the Grootboom case as being an "administrative law model of socio-economic rights".[158] Administrative review is similar to constitutional review as the judiciary deals with reviews of decisions taken by another branch of government.

Bilchitz has made an attempt to summarise what the reasonableness test in administrative law generally implies and concludes that most commentators agree that the notion of reasonableness is created to refer to that what lies between the limits of reason and what allows for a legitimate diversity of views.[159] Reasonableness is not synonymous with what is "correct", but includes situations which lie between "correctness" and "inconsistency".[160] A decision is reasonable if it is supported by evidence and reasons that are logically connected to a purpose.

Justice Albie Sachs who was one of the with the majority concurring judges in the cases of *Soobramoney*, *Grootboom* and *TAC*. He has explained the reasoning behind the "reasonableness concept" as follows. All the economic and social rights cases discussed have by their very nature entailed discussions on "rationing".

[156] Grootboom, para 67.
[157] Bilchitz, p. 142.
[158] Sunstein, C., p. 23.
[159] Bilchitz, pp. 142-144.
[160] Ibid. p. 142.

Rationing should not be understood as a restriction of or limitation of a right such as the right to health care, but "the very condition for its proper exercise".[161] In this respect economic and social rights are different as to "their mode of enjoyment, if not in their essence, from civil and political rights".[162]

On the one hand, the right to free speech is not, by its very nature, rationed as anybody can whenever that persons wants say what he or she wants. The right is fully-fledged from the start and not subject to any progressive realisation. On the other hand, as economic and social rights are realised within available resources and progressive realisation, "a system of apportionment is fundamental to their very being".[163]

This would indicate that the Court's jurisprudence imply that economic and social rights do have different characteristics from classical individual civil right as the latter are autonomous and complete by themselves, whereas economic and social rights are shared often under circumstances of competition for limited resources.[164] In this respect the right to treatment cannot be equated with the right to vote.

Obviously, this does not justify the conclusion that the right to health care is subordinate to the right of vote or of lower quality. However, there is a difference in the mode of protection of these rights as illustrated by the four judgements.[165]

In the *Grootboom* case the Court was expressly asked to adopt a minimum core approach as outlined by the UN Committee on Economic, Social and Cultural Rights, but it declined to do so. Moreover, it has not explicitly applied such an approach in the other cases.

According to Albie Sachs, the South African Constitution is expressive enough to provide basic guidance on how the government's obligations should be interpreted which renders a minimum core approach superfluous. Moreover, the judges had great difficulties in establishing clear evidence on how the minimum core could be identified other than "by reference to people dropping below the level that basic requirements of human dignity necessitated."[166] Thus, it seems that the Court has domestically encountered the same problem as has the Committee on Economic, Social and Cultural Rights on the international level, i.e. to establish the minimum core content or standards of socio-economic rights.

Instead, the Court unanimously held that the Constitution provided an obligation on the state to take reasonable legislative and other measures and

[161] Sachs, A., p. 14.
[162] Ibid..
[163] Ibid..
[164] Ibid..
[165] Ibid..
[166] Ibid., p. 15.

that the concept of "reasonable measures" was one that could be adjudicated on by the Court. In the case the government measures failed to meet the standard of reasonableness, the state would have failed to meet its constitutional obligations. Such a determination by the Court had to take into account the special expertise of the government in the area of housing and that a large number of policy alternatives would be consistent with the reasonableness standard.[167]

In the Grootboom case the Court found that although the government's housing program was impressive, it was void of provision for persons most desperately in need. These people were subjected to such conditions and crisis that their dignity was seriously disturbed. Although the program was reasonable in a broad sense, it had a serious gap which prevented it from being in conformity with the constitutional requirement of being reasonable.

In its jurisprudence, the Court has been strongly influenced by the way in which the various rights of the Bill of Rights are interrelated and interdependent as for instance the right of housing can not be seen isolated from the right to human dignity.

A more quantitative approach such as the minimum core approach could have implied in the case of Grootboom that the state would have met its obligations by international standards as it had obviously adopted an extensive policy on provision for formal housing. However, the qualitative element of economic and social rights would not have been identified. Instead the Court stressed that, when interpreting the Bill of Rights, it must promote the values of human dignity, equality and freedom.[168] Consequently, these values guided the Court when identifying the Government's obligations with regard to the right to adequate access to housing and what could be regarded as reasonable.

In the TAC case, the Court did not reject the minimum core approach as such. However, it concluded that the minimum core obligation could be met through broad governmental programmes that tried to meet the minimum needs.

When compared with the three other cases, it is obvious that the reasoning and application of the reasonableness approach in *Khosa* is different. In the other three cases, the reasonableness approach had been applied to the question of the normative content of the socio-economic right in question. However, in *Khosa* the approach was applied to the question who is the beneficiary of such rights.[169] In this perspective, the fundamental question in *Khosa* could also have been interpreted as an equality issue in accordance

[167] Ibid..
[168] Section 10 of the Constitution states that "everyone has inherent dignity and the right to have their dignity respected and protected.
[169] Bilchitz, D,, p. 172.

with section 9 of the Constitution, i.e. a group could be identified who were excluded from the scheme.[170]

In the *Grootboom* and *TAC* cases it was concluded that the subjects of the rights were entitled to reasonable government action to realise their socio-economic rights, whereas in *Khosa* the question was who are the beneficiaries of the reasonable government action? This is confusing as that would imply that the reasonableness approach applies to both questions of scope and content.

The Courts reasonableness approach has been criticized on several grounds by David Bilchitz. He claims that it lacks the content necessary to make determinations on socio-economic rights and hence results in decisions that are not adequately justified. Moreover, there is a risk that the approach deflects the constitutional enquiry from concentrating on the rights at stake and instead results in a general balancing of various considerations.[171]

These are valid arguments as the process becomes very obscure and some of the judgements, like in *Khosa* tend to be mere stipulations. Thus, when discussing the contours and content of the socio-economic rights in the Constitution, the judgements have provided very little guidance to the other branches of government regarding their obligations with regard to the realisation of socio-economic rights.

7.3 How has the Court delineated its institutional role in the context of the separation powers doctrine and how has it approached the issue of polycentric issues?

In the *Treatment Action Campaign* case the Court argued on appeal to the Constitutional Court that the separation of powers doctrine constrained the Court from issuing anything but a declaratory order in economic and social rights cases.[172] Hence, the High Court had gone too far when it ordered a specific government response to what it perceived was unconstitutional practice on the part of the government. However, the Constitutional Court stated that

"The question in the present case … is not whether socio-economic rights are justiciable. Clearly they are".[173]

Hence, the Court strongly stressed that economic and social rights are justiciable and rejected the government's arguments.

[170] Ibid..
[171] Ibid., p. 176.
[172] Treatment Action Campaign v. Minister of Health at paras 96-97.
[173] Ibid. at para. 25.

According to the Court the separation of powers inherent in the Constitution are not absolute. While the branches of government shall respect the respective areas of other branches, this do not imply that courts are prevented from making orders that impact on policy.[174] In the contrary, the Constitution places an obligation on the courts to do so.

Moreover, in the case the court identified its primary duty as being to the Constitution and the law. The law should be applied in an impartial manner and without fear, favour of prejudice.[175]

"Where a state policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar as this constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself. There is also no merit in the argument advanced on behalf of the government that a distinction should be drawn between the declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of State can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so".[176]

The Court rejected the argument that it would only be endowed with powers to issue declaratory orders. It has stressed that when a violation of a right has occurred, including economic and social rights, the Court is bound by a duty to safeguard that an effective remedy is provided. In these cases the Court will be guided by the nature of the infringement and the nature of the right violated, when deciding on the appropriate relief in a particular case.[177]

According to the Court it has a wide range of powers at its disposal to safeguard that the Constitution is protected. How this is done in practice depends on the particularities of the case.[178]

"Here due regard must be paid to the roles of the Legislature and the Executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, Courts may – and if need be, must, use their wide powers to make orders that affect policy as well as legislation".[179]

[174] Ibid. at para. 98.
[175] Ibid. At para. 99.
[176] Ibid..
[177] Ibid. at para.106. See also Pieterse, M., p. 23.
[178] Treatment and Action Campaign V. Ministry of Health, para. 113.
[179] Ibid..

According to Marius Pieterse this indicates that the only restrictions envisaged by the Court on judicial powers are those which it deems appropriate considering the circumstances in a particular case.[180]

In addition, the Court seems to place much emphasis on Court orders being phrased in a fashion that does not reduce the flexibility of the policy to such an extent that the executive is hindered from exercising its legitimate powers to change or adapt the policy if the need arises.[181]

It is interesting to note that the Court has interpreted the Constitution as it is *obliged,* not only *allowed* to decide on the validity of policy and legislation concerning economic and social rights. However, at the same time, in its jurisprudence, the Constitutional Court has also adopted a position where it shows some deference to the other branches of government and especially with regard to decisions on economic and social rights compared with civil and political rights.[182]

In all the four cases, the Court has in its decisions focused on the state's programs and policies instead of on the individual's call for relief.[183] This approach can partly be explained by inherent practical problems in regard to adjudication of economic and social rights cases in general, i.e. the procedural limitation in terms of concerns about the suitability of any particular plaintiff and hence the problem with regard to identifying appropriate remedies.[184] However, it is also obvious that the Court has adopted an approach where it shows great sensitivity for legitimacy concerns and the fact that remedies could be politically inappropriate.

"If unremediable, this failure of socioeconomic rights would mean that our reliance on rights as tools for social change is misplaced and that we should instead create and pursue other avenues towards socioeconomic upliftment".[185]

The Court has recognised the information problem inherent in decisions pertaining polycentric issues and has in all the cases regularly requested additional information before and after hearing the oral arguments of the parties. In addition, it has been hesitant to decide on issues where it lacks adequate data. This has resulted in a quite narrow interpretation of its substantive decision-making area and the Court has only made decisions in very precise areas where it has determined that it has sufficient information to adjudicate.[186] Justice Albie Sachs of the Constitutional Court has expressed that the biggest problem concerning judicial enforcement and adjudication of the economic and social rights cases has not been one of

[180] Pieterse, M., p. 23.
[181] Ibid., p. 24.
[182] Pieterse, p. 25 and Christiansen, E., p. 8.
[183] According to Christiansen no individual relief has yet been granted in a case conserning economic and social rights. Christiansen, E. p. 8.
[184] Christiansen, E., p. 8.
[185] Pieterse, M, (2007), p. 804.
[186] Khosa, para 120 and TAC para. 128.

institutional legitimacy as the Constitution requires that the courts ensure the respect of such rights.[187] According to him, the real problem has been with institutional capacity and that there is a risk that judges are likely "to get it all wrong" as there is little doubt that judges in general have limited knowledge of the practicalities of housing, land and other social realities.[188] Owing to this, it can be inappropriate to pronounce on such issues. Instead, the parliament, which can arrange hearings and receive inputs from a variety of sources and experts in different areas is much more suitable to adopt such a role.[189]

Furthermore, it is important to remember that the very nature of political processes is one of compromises and balancing of interests. It is a matter of give-and-take rather than of all-or-nothing. Yet, Albie Sachs warns that compromises on matters of deep principle are dangerous. Here he draws a distinction between the mobilisation of maximum support in political processes and the principled balancing in matters of fundamental rights which is central to the function of the judiciary.[190] Although judges are institutionally inapt to decide on electricity, houses, hospitals and schools as they lack the know-how and capacity, they do have knowledge about "human dignity". In Sach`s words this means that judges "know about oppression" and what "reduce a human being to a status below that which a democratic society would regard as tolerable".[191]

In general, and particularly in the *Soobramoney*, *TAC* and *Grootboom* cases, the Court has adopted the position that notwithstanding the fact that the obligations placed on the state are contingent on the availability of resources, the Court will require the establishment of broad policies and inclusive programs that pay special attention to those who are considered as the most vulnerable in society. This is in a way an acknowledgement of the fact that the Court is aware of its limitations in regard to ensuring the fulfilment of economic and social rights and that it can not act alone. The Court is only one of out of a total of three branches of government that cooperate in the process of achieving economic and social rights for large sections of the South African nation.

However, the Constitutional Court has demonstrated that it is not powerless in the context of the separation of powers doctrine and that it is tasked with domestic enforcement of socio-economic rights, although it is aware that it needs to show hesitancy to alter and disturb processes related to policy and budget.

[187] Sachs, A., p. 9.
[188] Ibid..
[189] Ibid..
[190] Ibid..
[191] Ibid..

8 Conclusions

When analysing the Constitutional Court's jurisprudence on socio-economic rights from a more broad and general perspective, it is evident that its rulings have demonstrated that such rights are, in principle, constitutionally justiciable.

In this context, it is important to remember that "justiciability" is not synonymous with "enforceability". Obviously, there is a close relationship between the two, but enforceability of human rights is more linked to the identification of entitlements and duties created by the state which have to be maintained and executed, whereas justiciability requires that there is a review mechanism to assess non-compliance with the rights regime.

In this respect the Court has demonstrated that it is equipped and capable of giving effect to socio-economic rights without necessarily violating the boundaries of the separation of powers doctrine. It has successfully negotiated its review function in socio-economic cases and avoided open political confrontation. In general, its decisions are legal to their nature and one cannot accuse the Court for having resorted to politics.

That said, the Court's judgements have also highlighted that adjudication of constitutional socio-economic rights is complicated and that courts are in practice forced to treat such rights differently from civil and political rights.

Despite the fact that members of the Court have expressed that problems related to institutional legitimacy have been of limited concern and although it has managed to subject issues of resource allocation to judicial scrutiny, it is evident from the judgements that this is an area where courts have to be more vary of the institutional dangers and potential legitimacy concerns associated with the separation of powers doctrine.

This has a tendency to result in situations where the Court has to more often adopt a position of deference. Or in other words, it has to frame its decisions in a manner that avoids major confrontation with the other branches of government. This affects the content of its judgements in socio-economic rights cases. The reason is that courts seem to inevitable encounter various capacity problems when adjudicating socio-economic rights as they tend to work under circumstances of insufficient information and inadequate understanding of the polycentric issues involved.

Judges are afraid of getting it all wrong and in South Africa the Constitutional Court has adopted an approach where it shows great sensitivity for legitimacy concerns and the fact that remedies could be politically inappropriate.

The problems associated with lack of adequate data or the full picture have resulted in a narrow interpretation of its substantive decision-making area and the Court has therefore only made decisions in very precise areas where it has determined that it has sufficient information to adjudicate. Moreover, contrary to what applies in regard to most adjudication of civil and political rights, there tend to be procedural concerns in relation to the suitability of any particular plaintiff. Overall, this has a tendency to limit the scope of a court's judgements in socio-economic rights cases and particularly with regard to a court's willingness to decide on remedies with regard to violations of such rights.

From a rights perspective this could be discomforting. As mentioned in chapter 3.2.6, states do have an obligation to respect, protect and to fulfil the human rights of individuals. Or in other words, rights are concerned with individuals and their situation. Consequently, in theory, litigation on socio-economic rights should be concerned to remedy injustices faced by individuals. Socio-economic rights would only be useful to rights-bearers when the rights in question have the likelihood to bring about a positive change in people's lives. In this context, individual rights-bearers should be able to rely on socio-economic rights and the legal process for the alleviation of their socio-economic immediate needs. However, if such a legal process is unable to bring about such a positive change for the individual, the individual has very few incentives to initiate such legal proceedings in the first place. Thus undermining the whole idea of a rights-based discourse in the context of socio-economic rights.

One could argue that the Constitutional Court has found that socio-economic rights are not separately enforceable rights relating to certain socio-economic needs, but rather general guarantees that a state's socio-economic policies may be reviewed against certain benchmarks or relational standards which show if the state has performed in conformity with principles of good governance. This would mean that socio-economic rights would only serve the purpose of assuring that the government is doing its best in trying to alleviate problems such as poverty and other socio-economic hardships.

In all cases the Court has in principle dismissed the minimum-core approach. Furthermore, its jurisprudence has not been particularly content-driven and it has had problems identifying the content of socio-economic rights.

This could support the view that socio-economic rights such as the rights to adequate housing and health care are inherently vague and lack concrete content with regard to entitlements to the individual. This means that the Court has not been able to overcome the problem of absence of an exact standard that indicates what constitutes the minimum norm of observance of a socio-economic right in an individual case.

That said, however, it has indicated in both Grootboom and TAC that some levels of enjoyment are more essential than others pointing in the direction that there are thresholds, especially when looking at the total or part of a population, which could be identified through the reasonableness-approach. In Grootboom the programme adopted was deemed unreasonable as it did not provide for those "most desperately in need".

However, when adjudicating alleged violations of rights, it is a question of a particular type of failure that we are concerned with. Namely, it is about addressing certain vital interests that people have. One of the major theoretical weaknesses of the reasonableness approach is that it fails to focus on the fundamental interests of individuals at the very centre of its enquiry into such cases.[192]

Within the context of the notion of indivisibility, interdependence and interrelatedness of all human rights, it is difficult to find good reasons for including socio-economic rights in a constitution if it is not envisioned, like in the case of civil and political rights, that they are designed to protect the fundamental interests of individuals in having access to essentials such as food, housing and health care.

An objection to this critic against the reasonableness approach could be that it might be wise and more sustainable to adopt a phased jurisprudence on the protection of socio-economic rights. It would be possible to build on the findings of the analysed cases in the future and determine guidelines as to decision-making on reasonableness. A contrary approach would by necessity require that the Court would assign a very detailed and specific content to each of the socio-economic rights in the Constitution. This is not only difficult, but also sensitive as it would run the risk of rigidifying the law too swiftly. By adopting an approach where the Court, limits its decisions to narrow limited areas of a particular case, it manages to avoid making too general pronouncements that could in the future lead to wrongful decisions in different situations and circumstances.

It seems that the above would support the argument by commentators such as Sean Archer that there are greater margins of error attached to socio-economic rights than civil and political rights.[193]

Nevertheless, what is certain is that the Court has in all cases confirmed that, like civil and political rights, economic and social rights in the Constitution are justiciable. This is most clearly stated in *TAC* as the Court dismissed the government's argument that Courts were not empowered to make other decisions than declarations on human rights in polycentric socio-economic rights cases.

Read together the four decisions clearly show that socio-economic rights are in principle equally suitable for judicial vindication as their civil and

[192] Bilchitz, D., p. 160.
[193] Archer, S., p. 19.

political counterparts. However as resources are always limited, there enjoyment are always subject to some form of rationing, which has an impact on courts' possibilities to provide relief for a particular individual. As mentioned, the Court has, in all cases, been reluctant to provide relief to individuals and instead focused on the reasonableness of government policies. Consequently, this would indicate that socio-economic rights are different in regard to their mode of enjoyment, perhaps in their essence, when compared with civil and political rights.

In this respect, one adverse consequence of the approach adopted by the South African Constitutional Court, could be that the Court's inability/unwillingness to offer individual relief undermines the role of litigation in terms of generally protecting individuals by ensuring good governance as individuals' willingness to bring cases grounded in socio-economic claims to the Court would be reduced. Most likely, deserving individuals have few incentives to initiate constitutional cases for the sole reason of changing general government policies as their immediate concern is to see some positive action taken to improve their own individual situation. This stresses the importance of the existence and mobilization of interest groups, such as in the cases of Khosa and TAC, who could initiate socio-economic rights cases before the courts Cases that could eventually improve the enjoyment of socio-economic rights of individuals through improved government polices.

However, if, in practice, the adjudication of socio-economic rights is contingent on the existence of such groups, that would in a way run contrary to the endeavours to protect those who are most marginalised and vulnerable as there are no guarantees that their specific needs are the most "fashionable" to be supported or likely to be identified and heard by groups that have the capacity and interest to bring cases to the courts.

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