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MINI-DISSERTATION

The role of the judiciary towards enforcement of socio-economic rights in Africa:

(Lessons from South Africa)

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Rights: Theory and Practice

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SUMMARY

In this dissertation I investigated and argued that Socio-economic rights can be justiciable as against the popular view being conceived and proposed against this notion. I argued that this noble project of adjudication and enforceability of socio-economic rights can be readily achieved if the judiciary understands its role in the adjudicative process involving such rights. I further recommended that the judiciary should be more active, pragmatic and innovative when called upon to adjudicate the provisions of socio-economic rights. In the course of my investigation, I related the famous example of how the judiciary in South Africa and India took the bull by the horns and became an enviable example to emulate in the adjudication and enforceability of socio-economic rights.

It was the perpetual disfranchisement and the act of relegating socio-economic rights to a non-justiciable right; hence classifying it as secondary, that triggered my interest to embark on this work. As a result of the aforesaid, it became apparent that there is a need to reclaim the status quo of socio-economic rights to enable a meaningful enjoyment and exercise of political and civil rights. Interpretation, adjudication and enforceability of socio-economic rights are some of the most controversial issues amongst the judges, practitioners, scholars and government institutions hence a well carved theoretical solution would be invaluable.

In chapter 1, I explored the underlying reason why socio-economic rights ought to be justiciable. In the process, I brought to light the current status quo of these rights amongst nations and the manner in which issues relating to their adjudication have become a non-issue for most of the states. This chapter also justified the reasons why South African and Indian jurisprudence were chosen as case studies in the subsequent chapter. I argued in this chapter that the South African Constitution emerged as one of the first constitutions in the world that, despite criticism, included socio-economic rights in its constitution alongside socio-economic rights as justiciable rights. On the other hand, I highlighted that the Indian judges were very innovative and approached the interpretation of these rights in a manner worth glorifying. As part of the conclusion, I highlighted the literature gaps in the course of my literature review and indicated what the subsequent chapter would entail.

Chapter 2 examined the protection of socio-economic rights under the South African Constitution with a comparative analysis under the aegis of human rights law. It examines the status of socio-economic rights under the South African Constitution of 1996 and the historic debates and basis for their inclusion alongside civil and political rights in the Constitution.¹ Furthermore, it examined the relevance of this bold step taken by the South African new constitutional order in comparison with other nations who had achieved similar goals by adopting different techniques and methods that aided the process. The last aspect of this topic investigated the different levels of protection enjoyed by socio-economic rights in the context of the American legal regime and other Western world countries while a comparison was also made within the African context.

Chapter 3 focused on and investigated the core challenges associated with the justiciability and enforcement of socio-economic rights with a critical analysis on why the judiciary defers. This section focuses mainly on five major problems associated with adjudication and enforceability of socio-economic rights. In summary, these challenges may be categorized as follows: (a) institutional incapacity/capacity; (b) institutional integrity; (c) institutional legitimacy; (d) institutional security; (e) institutional comity and separation of powers influence. The above identified problems were examined in an attempt to ventilate the major problems and/or setbacks faced by the judiciary when called upon to make findings on issues pertaining to socio-economic rights. In so doing, the case of *Lindiwe Mazibuko and Others CCT 39/09[2009] ZACC* was employed to showcase how these challenges affected the adjudication of socio-economic rights and brief recommendations were made at the end.

In chapter 4, I focused on lessons that could be learnt from the adjudication and enforceability of Socio-Economic Rights in South African and Indian Jurisprudence; this was done in view of a comparative exercise. In so doing, I analysed the landmark Constitutional decision of *Government of the Republic of South Africa and Others vs. Grootboom 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)*, a case which became the forerunner of all cases dealing with adjudication of socio-economic rights as far as the history of South African jurisprudence relating to social

¹ *The Constitution of the Republic of South Africa 1996*

ordering is concerned. A comparison was then made to the Indian jurisprudence and a landmark case of *Olga Tellis V. Bombay Municipality Corporation Supreme Court of India* was examined in view of learning a lesson from the approach adopted by the judges in adjudicating the provisions of socio-economic rights. In view of the above, India provides one of the best examples in the world alongside South Africa in terms of Justiciability of economic, social and cultural rights. For example, the right to life was interpreted extensively by the Supreme Court of India to include the right to food. The broad analysis of the above was the primary focus of chapter 4.

Lastly, chapter 5 wrapped up the dissertation with proposed recommendations and conclusions drawn from the previous chapters. The recommendations were drawn from the lessons learnt from the manner in which the South African and Indian judiciary took a different but related stance towards adjudication and enforceability of socio-economic rights. It was as a result of these approaches that I recommended for a judicial activism and innovative interpretation of the core contents and application of the provisions of socio-economic rights as opposed to the stance usually adopted by the courts, being judicial deference would go a long way to ensure that the project of justiciability of social rights becomes achievable. Accordingly, I proposed for the theoretical understating of transformative democratic institutions, participatory democracy and representative democracy. In particular, judicial activism and innovative interpretations of socio-economic rights provisions would be the necessary tools needed to aid the enforcement and interpretation of the core contents of socio-economic rights by the judiciary.

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DECLARATION

1. I, Nwobi Ikechukwu Samart with student number: 29039755 hereby declare that I understand what plagiarism entails and am aware of the university policy in this regard.
2. I declare that the work submitted here is the result of my own original independent investigation. Where help was sought or someone else's work was used (whether in the form of a printed source, the internet or any other similar and/or related source) due acknowledgement was given and reference made according to the faculty's requirements and regulations.
3. I did not make use of another person's previous work and submitted it as my own.
4. I did not allow and will not allow anyone to copy my work with the intention of submitting it as their own work.

Signature:

.....

NAME OF STUDENT

Dated: October 2015

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CHAPTER ONE

1. Introduction

In a statement to the Vienna World Conference in 1993, the UN Committee on Economic, Social and Cultural Rights drew attention to the shocking reality that states and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action, in effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive direct denials of economic, social and cultural rights.

Statistical indicators of the extent of deprivation or breaches of economic social and cultural rights have been cited so often that they have tended to lose their impact. The magnitude, severity and constancy of that deprivation have provoked attitudes of resignation, feelings of helplessness and compassion fatigue.² Such muted responses are facilitated by reluctance to characterise the problems that exist as gross and massive denials of economic, social and cultural rights.³ Yet it is difficult to understand how the situation can realistically be portrayed in any other way.⁴

The Universal Declaration of Human Rights accords recognition to two categories of human rights namely: the 'customary civil and political rights' on the one hand and, on the other hand, 'the so-called economic, social and cultural' rights. Meanwhile, the contest remains the status of these rights mentioned above when it comes to application and implementation of their contents. Over the years, Civil and Political rights have enjoyed a high level of recognition in all facets, whereas, the status of economic, social and cultural rights still struggles to find its place on the map of rights. It is not soothsaying that socio-economic rights do not have a place in most if not all African states. With their wounded, staggering and limping status, can they nevertheless be saved from the impending doom of their status becoming a fairy-tale on the African soil?

² Henry J Steiner et al, 'International Human Rights in Context' at p.264

³ Ibid.

⁴ Ibid.

Come to think of it, of what use is the right to freedom of speech (example of Civil and Political Rights) to those who are starving and illiterate?

The homeless cannot register to vote; the illiterate cannot fully exercise their political rights.⁵ Of what use are the rights to privacy, freedom of assembly and other rights to those whose health is threatened and there is no access to basic health services to remedy their condition? The fight for equal status for Economic, Social and Cultural rights remains an issue in Africa and many justifications or arguments in view that they should not be treated equally in Africa alludes to the fact that most African states are poor while the majority, if not all, depend on aid to fulfil their budgetary allocations. It is the intention of the writer to counter these arguments and hence challenge the mediocrity surrounding proposition and to propose a mechanism towards ensuring the equal status of economic, social and cultural rights in Africa as a means of holding institutions, governments and stakeholders accountable to the plight of ordinary people.

South Africa has emerged to become a nation to envy and emulate when it comes to the attitude of its constitutional mandate in respect of socio-economic rights. The South African Constitution⁶ is enviably one of the constitutions in the world to include Socio-economic rights alongside with Civil and Political rights in its Bill of Rights.

The underlying philosophy that led to the inclusion of socio-economic rights alongside civil and political rights under the Bill of Rights in the South African Constitution could be attributed to the fact that the negotiating process that took place in Kempton Park pursuant to the 1994 election which saw the first black president, iconic *Nelson Mandela*, to power took into account the level of poverty and the state in which the devil known as 'apartheid' left the ordinary South Africa. The way was paved for the social, economic and cultural rights to find their way and be able to be accorded the status quo enjoyed at the moment. Despite the fact that socio-economic rights enjoy recognition, the government institutions nevertheless made several attempts to encroach on their terrain, to which the judiciary stood up to save them from the impending doom in a few landmark decisions that will be explored by this research.

⁵ Henry J Steiner et al, 'International Human Rights in Context' at p.263

⁶ 1996

Can economic, social and cultural rights be litigated at courts? This question remains debatable amongst African scholars owing to the nature and status of socio-economic rights in most African constitutions, particularly their non-justiciable nature.

Decisions of courts in countries from all regions of the world covering all economic, social and cultural rights demonstrate that these rights can be subject to judicial enforcement. Nonetheless, the justifiability of economic, social and cultural rights has traditionally been questioned for a number of reasons. First, economic, social and cultural rights have been seen by some as being too “vaguely worded” to allow judges to justify decisions on whether violations have occurred. While adjudicating over such rights may raise questions of what constitutes, for example, hunger, adequate housing, or a fair wage, judges have already dealt ably with questions of what constitutes torture, a fair trial or arbitrary or unlawful interference with privacy.

Filling in the gaps in legislation is a clear function of the judiciary, not only in human rights law but in any area of law.

It is the writer’s aim, amongst other things, to explore and propose a mechanism for the effective enforceability of socio-economic rights and to investigate and propose other workable mechanism to achieve this project.

1.2 Problem statement

The main research would include, but not be limited to, the following: what are Socio-Economic Rights; Are Socio-Economic Rights truly rights; Can Socio-Economic Rights be litigated at Courts; Does judicial enforcement of Socio-Economic Rights amount to interfering with the sacred principle of separation of powers; Can Socio-Economic Rights be re-enchanting/interpreted to impose more positive obligations on states; How do Socio-economic rights become a reality in Africa and What are other non-judicial means of ensuring their enforceability in Africa? What are the challenges encountered towards achieving such enforceability?

1.3 Research Methodology

The research methodology to be adopted will be mainly desk library research; working with scholarly articles, court precedents and other sources. The writer will therefore make use of primary sources like the Constitution of South Africa⁷ and case laws. Moreover, press reports will be used to incorporate current events as they relate to the subject matter in Africa.

This research will focus mainly on judicial precedents of enforceability of Socio-Economic rights in South Africa and India, taking into account theory and practice in the two countries, while investigating the rationale behind their eventual inclusion in the South Africa Constitution alongside the civil and political rights and the debates for their exclusion. This research will focus on how judicial interpretation hereinafter known as judicial enforcement was employed by these countries in order to enforce socio-economic rights and whether it is a viable project for African judges to emulate.

The use of comparative law and/or judicial precedents will be restricted to the extent that it is functional and useful to aid the comprehension of the subject matter.

1.4 Literature Review

There are indeed a handful of scholarly writings on judicial enforcement of socio-economic rights vis-a-vis the role of the judiciary in this regard. However, in these scholarly writings, there are a lot of disagreements and confusions not only on the legality of the judiciary when they embark on this project since to some it encroaches on the duty of the executive charged with responsibilities of making policies to progressively realise these rights. It is against this background of uncertainty, legality and legitimacy of judicial enforcement of socio-economic rights that this research is founded. The writer will therefore examine these contentious scholars' writings and proceed to provide an academic support to legal justification of judicial enforcement and thereby allaying the fears of the other organs that the judiciary will not necessarily usurp their roles in this exercise.

The strategic importance of socio-economic rights as tools in anti-poverty initiatives will be diminished if the courts interpret them as imposing weak obligations on

⁷ *The Constitution of the Republic of South Africa of 1996*

government and fail to protect them as vigorously as they do the other rights.⁸ Sandra's view was that socio-economic rights were included under the South African Constitution primarily to assist the poor to protect their fundamental socio-economic needs and interests. Therefore, the courts should play a role through interpretation to promote the objects of the Constitution⁹. Meanwhile, the inclusion of socio-economic rights in the South African Constitution did not materialise without contestation. At the time of the certification of the final Constitution, certain groups in civil society objected to their inclusion and argued that socio-economic rights were inconsistent with the separation of powers doctrine because they would require the judiciary to encroach upon the terrain of the legislature and the executive in policy and budgetary matters. They further argued that the rights were not justiciable because of their extensive budgetary implications¹⁰. The Constitutional Court overruled these objections in the first certification judgment.¹¹ .

Scholars have also raised concerns regarding the legitimacy of judicial enforcement of socio-economic rights and the democratic process. Accordingly, a scholar asserts that 'the concern I have with economic and social rights is when there are broad assertions ... of right to shelter or housing, a right to education, a right to social security, a right to a job, and a right to health care. ¹² There I think we get into a territory that is unmanageable through the judicial process and that intrudes fundamentally into areas where the democratic process ought to prevail.¹³ In my view, as the author reiterated... the purpose of the democratic process is essentially to deal with two questions: public safety and the development and the allocations of society resources...Economic and security matters ought to be questions of public debate.¹⁴

It is my humble view as I set to counter these assertions and scholarly contentions on the purpose of democratic process and the conflicting interests of those charged with responsibilities of ensuring their implementation while offering scholarly views in

⁸ Sandra Liebenberg, 'South Africa's evolving jurisprudence on socio economic rights: An effective tool in challenging poverty'

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa*. 1996 4 SA 744 (CC) at pars 76-78.

¹² Henry J Steiner et al, 'International Human Rights in Context' at p.284

¹³ *Ibid.*

¹⁴ *Ibid.*

opposition to the so-called counter-majoritarian argument as to the validity of judicial pronouncement what ought to be whereas they were not elected but appointed to offices. Amongst all, the judiciary should be encouraged to serve more as a watchdog towards the order organs of government to ensure accountability and transparency which form the bedrock of a democratic society. The judiciary should be able to oversee the steps that government institutions have taken to ensure the realisation of these rights and not just make bare claims that there are not enough resources to achieve the desired goal. They should be able to state with precision what it has done and how it tends to achieve the desired aim or, where necessary, what factors were taken into account in budgetary allocations and while the right(s) in question could not receive adequate consideration in such allocation.

In certifying the Constitution, the South African Constitutional Court resolved this question by concluding that socio-economic rights are indeed subject to judicial enforcement.¹⁵ The Court held that such rights “are, at least to some extent, justiciable.” The fact that resources would have to be expended on these rights was hardly decisive, for this was true of “many of the civil and political rights entrenched” in the Constitution. The Court correctly indicated that many rights, including so-called negative rights, “will give rise to similar budgetary implications without compromising their Justiciability.” But in a final sentence, the Court added new ambiguity, by suggesting that at “the very minimum, socio-economic rights can be protected negatively from improper invasion.” This last sentence did not add considerable ambiguity, because it did not state whether and when courts could go beyond the “minimum” to protect rights “positively”; nor did it make entirely clear what it would mean to invade socio-economic rights “negatively.” Perhaps the Court’s suggestion was that when the state, or someone else, actually deprived someone of (for example) shelter, for instance, by evicting them from the only available source of housing, judicial enforcement would be appropriate. But if this was what the Court meant, the socio-economic rights would be hardly justiciable at all. That would be an exceedingly narrow use of judicial authority in overseeing the relevant rights.

The judiciary had, in the past, raised concerns relating to institutional capacity, institutional legitimacy, institutional security, institutional integrity and institutional

¹⁵ Cass R. Sunstein ‘Social and Economic Rights? Lesson from South Africa’ p.4

comity as reasons its hands were tied when invited to deal and pronounce on the arbitrary infringements on socio-economic rights. These issues and fear can be seen from ample case law precedent on this subject. Some writers had identified this issue as one of the factors for the staggering status of Socio-Economic rights in Africa. I would entitle it '*between the Red Sea and Pharaoh*' or '*the Goliath*' that stands in the way of socio-economic rights from attaining their rightful position in the class of rights.

1.5 Identified Gaps in Literature

The following are literature gaps which most of the literature on this subject failed to address or had partially addressed, which will be my main focus and is addressed in the subsequent and substantive chapters:

Most judiciaries do not enforce Socio-economic rights because most African Constitutions do not guarantee their enforcement. The United Nations have expressed a divisionary role when it comes to the enforcement of these rights. The mechanism and other manners proposed for enforceability seem to be slow and sluggish towards achieving the desired goal of the project. However, one of the growing and effective instruments viable is the judiciary. Our courts stand in a very strategic position towards achieving this goal. Examples of Courts deemed as viable instruments towards enforceability of Socio-economic rights in Africa and elsewhere can be seen from South African jurisprudence and other nations like India and Brazil as would be made clear from this research. Another focus would be how to encourage states to adopt instruments to guarantee socio-economic rights. This thesis is an attempt to investigate the challenges faced by the courts when called upon to enforce socio-economic rights. These challenges include *deference*.¹⁶ Reasons why courts defer would include, but without limitation to, institutional integrity. Courts would like to maintain their integrity at all levels. If judgment is made and the other branches felt that such decisions are better left for the legislature or the executive, practical compliance becomes somewhat difficult and there is no compliance with the order, members of the public might not trust the judiciary. The

¹⁶ *Deference is an art of subjects or submits to another branch. Instead of dealing with a particular issue, one would prefer it to be dealt by another organ.*

same goes for reasons such as judicial security, judicial legitimacy and others. Amongst other things, I will propose other workable avenues towards ensuring the enforceability of Socio-Economic rights in Africa which include: Indirect Enforcement of Socio-Economic Rights; Prioritizing of the categories of human rights to reflect on state policy; Re-imagining or re-defining Socio-Economic rights from the African perspective and investigating their normative contents.

1.6 Conclusion

The enforceability or otherwise Justiciability of socio-economic rights is a huge problem in Africa and has raised a series of scholarly arguments from time immemorial as to why socio-economic rights ought to be scraped out or why they should not enjoy equal status alongside civil and political rights. However, most judiciaries do not attempt to enforce socio-economic rights or endeavour to entertain them due to the fact that their enforcement is largely not guaranteed under most African Constitutions. Meanwhile, one of the growing instruments is the judiciary towards the enforcement of these rights. The judiciary plays a vital role in achieving the desired aim. Moreover, there are challenges that put it on the back-seat in this project. These challenges include, but are not limited to, fear of jeopardising the judicial security; legitimacy; comity; and institutional capacity to ensure that when orders are granted, they are enforced effectively. This mini-dissertation, *inter alia*, is an attempt to investigate these challenges faced by the courts and to counter them with viable recommendations such a proposal to encourage states to adopt instruments in order to guarantee socio-economic rights as well as inventive and generous interpretation of civil and political rights that extends the core meaning of socio-economic rights which suggest that one cannot really exist without the other.

CHAPTER 2

The Protection of Socio-Economic Rights under the South African Constitution: A Comparative Analysis under Human Rights Law.

2.1 Introduction

This chapter examines the status of socio-economic rights under the South African Constitution¹⁷ and the historic debates and basis for their inclusion alongside civil and political rights in the Constitution. Furthermore, I will examine the relevance of this bold step taken by the South African new constitutional order in comparison with other nations who had achieved similar goals by adopting different techniques and methods that aided the process. The last aspect of this topic will examine the different levels of protection enjoyed by socio-economic rights in the context of the American legal regime and other Western world countries while a comparison will be made within the African context.

The Bill of Rights in chapter two of the South of African Constitution was enacted bearing in mind the past struggle of the people with a definitive commitment to ensure that it never re-occurs in future. In simple terms, one can refer to this Constitution as transformative in nature. *Danie Brand*¹⁸ described the Bill as being retroactive in nature. The equality clause with the elements of affirmative actions is embedded in the Bill to ensure substantive equality. This is in line with the vision of the Constitution which, *inter alia*, includes re-ordering the social status of the majority of the poor South Africans and to fill up the vacuum that was created by the apartheid government in the social ordering.

The new South African Constitution¹⁹ evidently provides arguably the most sophisticated and comprehensive system for the protection of socio-economic rights of all the Constitutions in the world today.²⁰ This could be traced back in no small

¹⁷ *The Constitution of the Republic of South Africa (hereinafter referred to as 'the Constitution')*

¹⁸ *Danie Brand, 'Introduction to socio-economic rights in the South African Constitution'*153

¹⁹ *The Constitution*

²⁰ *See also Danie Brand, 'Introduction to socio-economic rights in the South Africa Constitution'*153

measure to the fact that one of the most hideous features of apartheid was the systematic violation of the norms of social and economic justice.²¹

However, the decision as to whether a country's constitution should make provisions for social and economic rights is a political one. The task of interpreting and enforcing such rights is undoubtedly judicial in nature.²² When interpreting and enforcing these rights, judges often face the unenviable task of weighing the critical needs of individual citizens against the legitimate budgetary constraints of the state. For purposes of this paper, I will give a brief historical account leading to the inclusion of socio-economic rights in South Africa's Constitution today, but this account should not be construed to mean that in order to enforce socio-economic rights in its Constitution, a nation must have had apartheid or a rough time in the past. It should be construed in the light that in order for a nation to enjoy civil and political rights and exercise them effectively, socio-economic rights must be justiciable through the courts. If it is giving a limping status from the on-set in the Constitution, the judiciary would be helpless and its hands would be tied when issues relating to the enforcement of these rights come to fore. I will attempt to give a brief account of the position of other regimes and enforcement of socio-economic rights in relation to but dissimilar to South Africa's account.

2.2 The Historic Debates for the Inclusion of Socio-Economic Rights under the South African Constitution

For more profound comprehension of the arguments leading to the inclusion of socio-economic rights alongside the civil and political rights in the South African Bill of Rights, one needs to investigate the root cause that necessitated the debate in question. In this regard, one must re-visit the position pre-1990, prior to the release of the first black president of South Africa, the iconic *Nelson Mandela*.

At this stage, the apartheid system of government represented the order of the day with a well-orchestrated disenfranchisement of the black population of South Africa on the one hand and on the other hand, a carefully institutionalized white domination

²¹ *Ibid* 4 *supra* at 2

²² See Richard J. Goldstone 'A South African Perspective on Social and Economic Rights' *Human Rights Brief* 13, no. 2 (2006): 4-7.

with special privilege in the political, economic, social and cultural spheres.²³ This was largely achieved at the expense of the black population which was deprived of access to land, subjected to underdevelopment in economically marginal reserves and 'homelands', and systemically discriminated against in the access to a range of social services and resources.²⁴

In the economic sphere, the apartheid regime provided full employment to white people through a combination of discriminatory labour market and educational policies, 'while channelling cheap African labour to unskilled jobs on the mines and on farms'.²⁵ The system of parliamentary sovereignty under the apartheid era Constitution did not allow for judicial review of legislation for consistency with human rights norms.²⁶ Against the background of the above brief exposition of historic position of the rooted memory of human rights violation and total denial of social justice, was the main reason pursuant to the negotiation of the South African Constitution in the 1990's.

2.3 The Debates vs Constitutional Negotiations

It is not my intention to examine all debates and arguments that were raised for and against the inclusion and/or exclusion of socio-economic rights, hence it is beyond the scope of this research but I shall selectively pick up two or more of the arguments in driving home my point.

The unbanning of the liberation movement and subsequent release of Nelson Mandela and some other political prisoners led to the process of negotiations towards a political settlement and new constitutional order for South Africa.²⁷ The way forward entailed the adoption of a negotiated transitional 'interim' Constitution which would be revised by newly elected members of parliament after a democratic election had taken place and subsequently certified by the Constitutional court. It means that leading to or prior to the actual negotiation, most major political parties, if

²³ See Sandra Liebenberg, *'Socio-Economic rights-adjudication under a transformative Constitution 2.*

²⁴ *Ibid* 6 *supra* at para 1 see also in this regards S Terreblanche, 'A History of inequality in South Africa 1652-2002 (2002) specifically chapter 5-8.

²⁵ J Seekings & N Nattrass *Class, Race and inequality in South Africa (2006) 6*

²⁶ *Ibid* 6 *supra* at 4

²⁷ For full account on the constitutional negotiations and process which facilitated the transition to democracy in South Africa, see L M Du Plessis & H Corder, *'Understanding South Africa's Bill of Rights' (1994) chapter 1.*

not all, were invited to submit a proposal for a future South African Constitution and the Bill of Rights as envisaged by them.

It was during this delicate stage that the question of the inclusion of socio-economic rights in the Bill of Rights came to the fore as a major issue of debate to be trashed out amongst the various political parties, civil society organisations and constitutional scholars.²⁸ For instance, in 1990, the ANC's Constitutional Committee published its working document for the constitutional negotiations, *A Bill of Rights for a Democratic South Africa*.²⁹ This draft Bill of Rights included both civil and political rights as well as economic, social and cultural rights. Article 10 specifically was entitled 'Social, Educational, Economic and Welfare Rights'.³⁰ The motivation for the argument of the ANC for supporting the inclusion of socio-economic rights is provided in a paper delivered by *Dullah Omar*, a member of the ANC's Constitutional Committee.³¹ He argued that failure to incorporate socio-economic rights in a Bill of Rights for a future democratic South Africa would have the effect, not only of making social and economic transformation impossible, but 'in reality actually nullifying first generation rights, *inter alia*, equality and democracy for the vast majority of South Africans'.³² He further identified two major objectives that a future constitutional framework for South Africa should promote. First, such framework 'should not prevent social and economic transformation and the achievement of social and economic rights'. Secondly, it must 'create mechanisms and structures which will empower the people of our country to achieve and defend such rights through the Constitution and their own organisations'.³³

Albie Sachs similarly argued in favour of including socio-economic rights, on the premise that it would promote the substantive enjoyment of all rights, and makes the transition to democracy meaningful to people, not only in a formal sense, but also in facilitating an improved quality of life.³⁴

²⁸ *Ibid* 6 *supra* (See in this regard the note in 7)

²⁹ *ANC A Bill of Rights for a Democratic South Africa: Working draft for Consultation reproduced in (1991) 7 SAJHR 110-123*

³⁰ *Ibid* art 10.

³¹ *D Omar 'Enforcement of social and economic rights' in A Bill of Rights for A Democratic South Africa (1991) 106-114.*

³² *Ibid* 14 *supra* at 112

³³ *Ibid supra*

³⁴ See *Sandra Liebenberg, 'Socio-Economic rights-adjudication under a transformative Constitution 2-9*

The same argument was echoed powerfully by Nelson Mandela:

‘A simple vote, without food, shelter and health is to use first generation rights as a smokescreen to obscure the deep underlying forces which dehumanize people. It is to create an appearance of equality and justice, while by implication socio-economic inequality is entrenched. We must provide for all the fundamental rights and freedoms associated with a democratic society’.³⁵ Liebenberg³⁶ was of the view ‘that the views of the ANC leading figures that suggested the inclusion of socio-economic rights in the Bill of Rights were perceived to be fundamental to the transformation of South African society in two interrelated ways. First, it promoted a substantive vision of human rights which would be responsive to all forms of subordination and injustice.’ In this vein, the ANC was clearly conscious of the need for the post-apartheid legal system to facilitate the redress of the socio-economic legacy of apartheid.³⁷ Secondly, it envisaged a constitutionally grounded process of transformation in which the citizenry is empowered to play an active role. The ability of the ordinary people to invoke civil and political rights such as the rights to freedom of association and speech as well as socio-economic rights were seen as an integral part to their active participation in the process of reconstruction and development.³⁸

Meanwhile, in 1986, the South African Law Commission (SALC) was tasked with investigating and making recommendations on groups and human rights in South Africa, SALC produced three reports, culminating in its final reports, it asserted that a Bill of Rights was not the best place for enforcing positive obligations against the state.³⁹ In its interim report, the SALC incorporated arguments against the inclusion of socio-economic rights as justiciable rights in the Bill of Rights. Its objections were based on the vision of a Bill of Rights as a protective device against the power of the state, and the fear that these rights would impose cost on the states which were beyond its available resources, and these rights would force the judiciary to intrude on the legitimate terrain of the legislature.⁴⁰

³⁵ N R Mandela ‘Address: on the occasion of the ANC’s Bill of Rights conference’ in *A Bill of Rights for Democratic South Africa: Papers & Report of a Conference Convened by the ANC Constitutional Committee, May (1991) 9-14.*

³⁶ *Ibid* 17 *supra* at 9

³⁷ *Ibid supra*

³⁸ *Ibid.*

³⁹ SALC, *Working Paper 25 Group and Human Rights (1989)*

⁴⁰ SALC, *Working Paper 25 Group and Human Rights (1989)*

Another argument or contribution which was very influential emerged from a group of academics and public interest law practitioners entitled 'A Charter for Social Justice'.⁴¹ This document, amongst other things, proposed the inclusion of socio-economic rights in the Bill of Rights in the form of directives of state policy.⁴² They were of the view that socio-economic rights be included with a directive obligation and the reason proffered for this was that if socio-economic rights should be made to be directly justiciable, it would have an implication that would force the courts to dictate on the budgetary questions of the executive and legislative branches of government. They further argued that socio-economics rights inherently contain a polycentric question which the courts are ill-suited to decided and when they do, they erode the institutional independence of the other branches of government and as a result, weaken democratic institution which is jealously enshrined in our Constitution. They strongly argue for its inclusion with a directive functioning as guidelines for the state in the formulation and implementation of policy, and as an interpretive mechanism and/or principles guiding the courts in interpreting legislation and reviewing executive action.⁴³

Some argued against the inclusion on the basis that entrusting the enforcement of socio-economic rights to an unelected, unaccountable judiciary would give the judiciary too much power and erode both representative and participatory democracy, thus Davis⁴⁴ argued:

'It elevates judges to the role of social engineers, concentrates power at the centre of the state and consequently erodes the influence of the civil society.'⁴⁵

Conversely, the argument suggests that the inclusion of socio-economic rights as directly justiciable rights would undermine, rather than facilitate the main project of democratic transformation.

At the end, the scale weighed in favour of those who proposed the inclusion of socio-economic rights alongside civil and political rights, but the question remains – is it

⁴¹ H Corder, S Kahanovitz, J Murphy, C O'Regan, J Sarkin, H Smith & N Steyter, 'A Charter for Social Justice': A Contribution of the South African Bill of Rights Debate (1992).

⁴² *Ibid*

⁴³ *Ibid*

⁴⁴ D M Davis 'The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles' (1992) 8 SAJHR 475-490

⁴⁵ *Ibid* 43 *supra*

directly justiciable or does it have a directive policy on the state? It can be seen that the ANC's Constitutional proposal clearly envisages an active role for the state in redistributing and promoting access to socio-economic resources and services by all. Nicholas Haysom argued that the ANC's commitment to constitutionalism was founded on recognition 'of the centrality of a participatory democracy for a thorough transformation for South Africa'.⁴⁶

Fortunately, chapter 3 of the interim Constitution⁴⁷ contained the traditional civil and political rights and a small but significant group of socio-economic rights. The socio-economic rights that were included were the following: the rights of detained persons, including sentenced prisoners, 'to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition, reading material and medical treatment at a state expense'.⁴⁸ Section 27⁴⁹ provides for the right to labour, the right of every person 'to an environment which is not detrimental to his or her health or well-being',⁵⁰ the right of every child⁵¹ 'to security, basic nutrition and basic health services. Right to education, including the right to basic education' and 'the right to instruction in the language of his or her choice where it is reasonably practicable'.⁵² Lastly, some other economic rights inserted in the interim Constitution were the right to engage freely in economic activity⁵³ and property rights.⁵⁴ These rights were internally limited so as not to preclude measures aimed at socio-economic redistribution and equity. Furthermore, the interim Constitution opines the right of everyone 'to use the language and to participate in the cultural life of his or her choice'.⁵⁵

It is without doubt that the scale tipped in favour of those who argued and proposed for the inclusion of socio-economic rights in the Constitution rather than their exclusion as it was made manifest from several provisions of the interim Constitution in the chapter as discussed above. Credit should be reserved for civil society

⁴⁶ Nicholas Haysom 'Democracy, Constitutionalism and the ANC's Bill of Rights for a New South African' (1991) 7 SAJHR 102-109 at 108

⁴⁷ *Interim Constitution of the Republic of South Africa 1993 chapter 3*

⁴⁸ Section 25(1) (b) of chapter 3 of the interim Constitution

⁴⁹ chapter 3 of the interim Constitution

⁵⁰ Section 29 of chapter 3 of the interim Constitution

⁵¹ Section 30(1) (c) of the interim Constitution

⁵² See Section 32 of the interim Constitution

⁵³ Section 26

⁵⁴ Section 28

⁵⁵ Section 31

advocacy, thus, it was their contribution that ensured the presence of a number of socio-economic rights in the Constitution during the drafting, debating and negotiation processes.⁵⁶ All the rights in chapter 3 were subject to judicial enforcement by the provincial divisions of the Supreme Court⁵⁷ and the Constitutional Court as the court of final instance over any alleged violation or threatened violation of any fundamental right in chapter 3.⁵⁸ Without much ado, the 1993 interim Constitution served as a forerunner to the final Constitution, the 1996 Constitution.⁵⁹ It paved greater way for the overall inclusion of socio-economic rights in the final draft and subsequent certification judgment.

2.4 The Negotiation and Adoption of the Final Constitution 1996

Subsequently, the 1996 Constitution was negotiated and adopted by the Constitutional Assembly which comprised of the two major houses of the democratically elected Parliament (the National Assembly and the Senate) sitting jointly on this special occasion.⁶⁰ It was thus, in compliance with the directives and principles contained in schedule 4 of the interim Constitution which had to be complied in order to validate the 1996 Constitution. It, *inter alia*, provides that the 1996 Constitution could not come into force until the Constitutional Court had certified that all the provisions of the text and the principles were complied with.⁶¹ It is worthy to reiterate the Primary Principle relevant to the drafting of the Bill of Rights in the 1996 Constitution. The Constitutional principle, Roman figure two, provides:

‘Everyone shall enjoy all universally accepted fundamental rights, freedom and civil liberties, which shall be provided for and protected by entrenched justiciable provisions in the Constitution, which shall be drafted after having due consideration to, *inter alia*, the fundamental rights contained in chapter 3 of the Constitution’. According to Liebenberg⁶² ‘the first major issue to be considered in relation to

⁵⁶ See also L M Du Plessis & H Corder, *Understanding South Africa’s Bill of Rights (1994) chapter 1.*

⁵⁷ Section 101(3) (a) of the interim Constitution

⁵⁸ *Ibid.*

⁵⁹ *The Constitution of the Republic of South Africa 1996 became the final and supreme Constitution of the land.*

⁶⁰ See section 68 of the interim Constitution 1993.

⁶¹ See section 71 of the interim Constitution in this regard.

⁶² See Sandra Liebenberg, *Socio-Economic rights-adjudication under a transformative Constitution at 16-17*

whether socio-economic rights should be included as justiciable rights in the Constitution was whether the Constitutional Principle obliged the inclusion of socio-economic rights alongside civil and political rights'. The response, as suggested, was that it depends on whether these rights could be classified as 'universally accepted fundamental rights'. The Technical Committee advising the Theme Committee of the Constitutional Assembly charged with the drafting of the Bill of Rights was asked to provide opinions on the meaning of the phrase.⁶³ Based on a survey of international and comparative law, the Technical Committee concluded that socio-economic rights were 'universally accepted fundamental rights', and recommended their inclusion as justiciable rights in the Constitution.⁶⁴ This recommendation by the Technical Committee came about as a result of the assessment submitted by the various political and relevant NGOS. It was gathered that much submissions were in favour of the inclusion of Socio-economic rights in the Bill of Rights as justiciable rights. Most political parties represented in the Constitutional Assembly were in favour of the recognition of socio-economic rights in some form or another'.⁶⁵

Moreover, the influence and visible support of the civil society cannot be underemphasized in the struggle for the inclusion of the Socio-economic rights in the final Constitution. For instance, an alliance of human rights development NGOs, academics, trade unions, women's organisations and church groups were eventually formed to lobby and campaign for the inclusion of this right in the Constitution. The alliance, termed the Ad Hoc Campaign for Social and Economic Rights, presented a petition to the Constitutional Assembly in which they argued that 'the struggle for democratization of South African Society included both the franchise as well as the recognition of social and economic rights'.⁶⁶ They further argued that socio-economic rights were critical to the reconstruction and development of South African society, and that disadvantaged groups 'should be granted every available means to protect and progressively realise these individual and collective human rights in South Africa'.⁶⁷

⁶³ *Ibid* 61 *supra*

⁶⁴ *Ibid.* see also *Technical Committee (Theme Committee 4) The meaning of 'universally accepted fundamental rights' in the Constitutional principle 2, schedule 4 to the Constitution of the Republic of South Africa Act 2002 of 1993 (1995) para 12*

⁶⁵ *Ibid*

⁶⁶ *Ibid* 64 *supra*

⁶⁷ *Ibid*

Meanwhile, the strong influence of international law, in particular, the International Covenant on Economic, Social and Cultural Rights (1996), shows clear evidence on how the provisions relating to this right in our Constitution were formulated. For instance, the qualified positive duty on the state to take ‘reasonable legislative and other measures within its available resources’ and the concept of ‘progressive realisation’ are largely based on article 2 of the International Covenant on Economic, Social and Cultural Rights.⁶⁸ Art2 (1)⁶⁹ reads as follows:

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

The above wordings of the covenant contributed heavily to how the socio-economic rights drafting and eventually inclusion should take shape and it indeed took a leaf from the above covenant.

2.5 Final phase: The Certification Process & Objections

The certification process is in line with the directives and principles laid down under the interim Constitution which provided that, in order for the final Constitution to be of any force and binding, *inter alia*, it must be certified by the Constitutional Court to ascertain its validity. One can only speak of a supreme Constitution once the certification process has been done. During the certification phase, more objections were raised against the inclusion of socio-economic rights in the Bill of Rights.⁷⁰ The major objectors were the South African Institute of Race Relations, the Free Market Foundation and the Gauteng Association of Chambers of Commerce and Industry. The Legal Resource Centre, the Centre for Applied Legal Studies and Community

⁶⁸ Article 2(1) of the International Covenant on Economic, Social and Cultural Rights

⁶⁹ International Covenant on Economic, Social and Cultural Rights

⁷⁰ In this regard see *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) (First Certification judgment) at para 76-78.*

Law Centre (UWC) however, argued in favour of the inclusion of socio-economic rights at the certification hearing.⁷¹

Meanwhile, the objections were threefold. First, it was argued that socio-economic rights were not 'universally accepted fundamental rights' for the purposes of Constitutional Principle item number two. Secondly, the inclusion of socio-economic rights was inconsistent with the doctrine of separation of powers which was required in terms of the Constitutional principle item number five.⁷² Thirdly, they argued that these rights were not justiciable. The first objection was disposed by the Constitutional Court on the ground that the Constitutional Principle item two 'allows the Constitutional Assembly to supplement the universally accepted fundamental rights with other rights not universally accepted'.⁷³ The arguments in respect of separation of powers objections were put forward on the basis that socio-economic rights would compel the judiciary 'to encroach upon the terrain of the legislature and executive and invariably compel to do so by dictating to the government how to allocate resources and how to structure its budgets'.⁷⁴ The Concourt did not shy away to concede that socio-economic rights may result in courts making orders which may have direct implications for budgetary cases. On the contrary, the court also made it known that the enforcement of civil and political rights such as freedom of speech, equality, right to a fair trial and a variety of other rights have the same implications on the budget. It however, came to a conclusion that the inclusion of socio-economic rights within the Bill of Rights did not directly place upon the court a task 'so manifestly divorced from that ordinarily conferred upon them by the Bill of Rights as it results in a breach of the separation of powers doctrine'.⁷⁵ Finally, in response to the final objection raised, the Constitutional Court correctly came to a conclusion that 'the fact that socio-economic rights have a budgetary implication should not be seen as an automatic bar (ipso facto) to the Justiciability concerns'. The court however, reiterated that, 'at very minimum, socio-economic rights can be negatively protected from improper invasion'.⁷⁶

⁷¹ *Ibid* annexure 3 to the judgment

⁷² *Ibid* annexure 3 to the judgment

⁷³ See first Certification Judgment para 76

⁷⁴ *Ibid*

⁷⁵ See first Certification Judgment para 76

⁷⁶ *Ibid* 74 *supra*

At the end, the socio-economic rights in section 26, 27, 28(1) (c) and 29 scaled through the first certification test. In fact, this is a huge success. The South African Constitution today represents an enviable Constitution in the world, having taken a bold step to include socio-economic rights alongside the traditional civil and political rights. What does this say to the people of South Africa and jurisprudence as a whole? It suggests a transformation in the wheel of a fast moving locomotive. According to Liebenberg, 'the inclusion of socio-economic rights in the Bill of Rights of the then South African Constitution represents the culmination of a process of struggle to recognise the socio-economic dimensions of human dignity, freedom and equality'.⁷⁷ This struggle is said and known to have deep roots in the anti-apartheid struggle, and was carried forward in the negotiating process primarily by the liberation movements in conjunction with a vibrant civil society campaign. It was in the hope and spirit that the inclusion of socio-economic rights would enrich participatory democracy and by providing those marginalized by poverty an opportunity to challenge decisions and omissions which have an impact on the socio-economic well-being of the people.⁷⁸ In addition, socio-economic rights were regarded as a crucial tool necessary to facilitating the fundamental transformation of South African society.

2.6 Significant Provisions of Socio-Economic Rights in the South African Bill of Rights

In conclusion to this very chapter, it is my intention to briefly explore some of the significant provisions in the South African Bill of Rights that opine social and economic rights with a positive obligation on the state to progressively realise them by maximizing the available resources at their disposal. Section 26(1)⁷⁹ entrenches the right of everyone 'to have access to adequate housing', and section 27(1) enshrines the right of everyone '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, and appropriate social assistance'. The subsection to the sections above qualified the later sections as follows:

⁷⁷ Sandra Liebenberg, 'Socio-Economic rights-adjudication under a transformative Constitution at 21.

⁷⁸ *Ibid* 76 *supra*

⁷⁹ Constitution of the Republic of South Africa 1996 (hereinafter referred to as 'the Constitution')

‘The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.’⁸⁰

Section 26(3) provides thus: ‘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’. Meanwhile, section 27(3) further provides that: ‘No one may be refused emergency medical treatment. Moreover, the Constitution confers and entrenches a range of socio-economic rights, notably the rights of children in terms of section 28, a special clause which is specifically devoted to children’s rights. Section 28(1)(c) confers on all children the rights to basic nutrition, shelter, basic health care services, basic education and other social services.

Section 29(1) provides for the right of education. It provides that everyone has the right ‘to basic education, including adult basic education; and (b) right to a further education, which the state, through reasonable measures, must make progressively available and accessible to all. Section 29(2) provides and confers on everyone the rights ‘to receive education in the official languages of their choice in public educational institutions where that education is reasonably practicable’. All ‘reasonable educational alternatives, including single medium institutions’ must be considered in order to ensure the effective access to and implementation of, this right’. The factors which must be taken into account in considering these alternatives are ‘(a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices’.⁸¹

Worthy to mention, are the people deprived of their freedom. Incarcerated persons have a guaranteed right which is regarded as a special set of socio-economic rights. In lieu of the foregoing, section 35(2) (e)⁸² confers on everyone who is detained, including every sentenced prisoner the right ‘to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at a state expense of adequate accommodation, nutrition, reading material and medical treatment’. The state is geared up to acutely, progressively realise the fulfilment of this right by making policy choices and by maximizing its available resources to

⁸⁰ *Ibid* 78 *supra*

⁸¹ See section 29(2) (a)-(c) of the Constitution

⁸² *The Constitution 1996 Republic of South Africa*

progressively realise them. Some of these rights contain internal qualifications and others are subject to the general clause of progressive realisation.

2.4 Conclusion

The South African Constitution arguably is one of the Constitutions in the world today which, despite concerns raised towards its inclusion, enshrined socio-economic rights as justiciable rights alongside civil and political rights in the Bill of Rights. This became a huge success towards the liberation of the poor and the marginalized of the past owing to various factors championed by apartheid.

Section 7(1), which introduces the Bill of Rights, affirms that it is 'a cornerstone of democracy in South Africa' and also affirms the democratic values of human dignity, equality and freedom. Section 7(2) places a duty on the State 'to respect, protect, promote and fulfil the rights in the Bills of Rights. It is a matter to be laid at the disposal of the judiciary to ensure that a holistic approach is adopted by them in enforcing the socio-economic rights and to be able to remind the State of the duty in terms of the supreme law of this land, hence a substantive interpretation and judicial activism is necessary in the project. Meanwhile, other regimes protect socio-economic rights in different methods. In most African Constitutions, if not all, socio-economic rights are given a separate place in the Constitution and labelled as non-justiciable rights. Socio-economic rights are specie of fundamental human rights and should be allowed to enjoy equal status like their counterparts, civil and political rights. The South African jurisprudence has had a major impact on the discussion of Socio-economic rights globally, with many commentators arguing that the Grootboom and TAC cases in particular, show the way forward for an effective and manageable approach to making these rights justiciable.⁸³ South Africa's Constitutional Court has successfully enforced the Constitution's provisions for social and economic rights while balancing the state's interest in managing its political affairs. Although this balancing approach is not always easy, the South African experience has been largely successful. The South African Constitutional drafters believed that the overwhelming majority of South Africans, in particular the previously oppressed black South Africans, would not be particularly concerned with

⁸³ See also in this regard 'Richard J. Goldstone 'A South African Perspective on Social and Economic Rights' Human Rights Brief 13, no. 2 (2006): 4-7.

so-called “first-generation” rights, such as freedom of speech, assembly, association, and movement. All of these first generation rights were thought not to be of great concern to individuals who did not have enough food to eat or a roof over their heads, or money to send their children to school. Rather, it was felt that for South Africa’s new Constitution in 1994 and its final Constitution in 1996 to be relevant to the majority of South Africans, it would have to include “third-generation” rights, such as rights to housing, health care, education and other essential socio-economic rights necessary for the achievement of the “first- generation” rights. It is virtually impossible for one to demonstrate or assemble without food in the stomach.

3. Comparative Analysis

3.1 The Protection of Socio-Economic Rights Regime under Inter-American System

The American Declaration on the Rights and Duties of Man, adopted at the conference of the Organization of American State (OAS) Charter, may be considered the founding instrument of the inter-American human rights system.⁸⁴ The American Declaration also holds the honour of being the first international human rights instrument of a general nature, having been adopted seven months before the Universal Declaration of Human Rights.⁸⁵ The American Declaration establishes a long list of rights, which OAS (Organization of American States) member states commit to respect. Like the Universal Declaration, the American Declaration makes no distinction between ESCR, on the one hand, and CPR, on the other.⁸⁶ It protects the rights to health, education, social security, work, fair remuneration, rest and leisure, property, inviolability of the home, special protection for mothers, children, and the family, and the benefits of culture just as fully and integrally as the rights to life, liberty, personal security, fair trial, vote, due process, equality, expression, religion, association, assembly, movement, and political participation. The lack of

⁸⁴ Tara Melish, *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System* at 9

⁸⁵ Prof. Michelo Hansungule, *Presentation made to LL.M students in the Human Rights Class on the 26th April 2013*

⁸⁶ *Ibid* at para 9

distinction between the two “sets” of rights is emphasized by the fact that the provisions are interspersed among each other, not categorized under separate sub-headings.⁸⁷

The Convention in the Inter-American legal regime specifically under the socio-economic rights context concretely, protects the following rights and they include: the rights to education, material well-being, work, fair wages, social security, strike, collective bargaining, participation in development decision making, and legal assistance.⁸⁸ The Charter also makes reference to State obligations to ensure the basic goals of proper nutrition and availability of food, adequate housing, a healthy urban environment, stability of domestic prices, fair wages, employment opportunities, acceptable working conditions for all, rapid eradication of illiteracy, expansion of educational opportunities, and equitable and efficient land-tenure systems, distribution of national income, and systems of taxation.⁸⁹

First, and most importantly, State Parties to the Convention are expressly obligated under article 26 to undertake to adopt measures with a view to achieving progressively the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the [OAS Charter]. The treaty may be interpreted directly or indirectly applied by the Court pursuant to three treaty authorizations: (1) Convention article 26; (2) Convention article 29(b); and (3) the Court’s advisory jurisdiction.⁹⁰ The Court’s primary mandate is to apply the provisions of the Convention to individual cases. Article 26 opens up the possibility of holding States accountable, under the Court’s contentious jurisdiction, for respecting, ensuring, and progressively achieving the rights implicit in the OAS Charter. As it can be deduced from the above, it is quite obvious and glaring to see the amount of protection the inter-American treaty affords socio-economic rights under their regime.

The Americans claimed that they were the first to adopt a charter that purports to protect human rights, especially the within the context being discussed. The inter-American Declaration, as it is held, was adopted in May 1948 while the (UDHR)

⁸⁷ *Ibid supra*

⁸⁸ *Ibid*

⁸⁹ *Ibid*

⁹⁰ *Ibid*

came into force in December 1948, just seven months earlier.⁹¹ It followed the establishment of the inter-American Commission in 1959 by a resolution (which we know as soft law) and whose headquarters are based in Washington DC. The Convention of 1969 gave the Commission of 1959 an extended mandate after it discovered the weaknesses inherent in its operation at the time of inception. This extended mandate acknowledged their existence as one of the institutions charged with responsibilities of monitoring the promotion of the rights contained in the Charter.

The Inter-American Charter recognises two sets of rights namely, the first generational rights (Civil and Political Rights) and the second generational rights (Socio-Economic and cultural Rights). Having pointed out earlier that the Declaration, *inter alia*, establishes a wide range of Economic, Social and Cultural Rights (ESCR), it does so, however, in a much more precise and detailed manner. The Declaration protects the rights to health, education, social security, work, fair remuneration, rest and leisure, property, inviolability of the home, special protection for mothers, children, and the family, and to the benefits of culture.

The Court has recently resolved two cases in which ESCR were implicated. In February 2001, the Court decided the Baena Ricardo case,⁹² which involved the arbitrary dismissal of 270 public workers for their participation in a labour demonstration. The Court found that, by arbitrarily dismissing the employees based on their union affiliation and the retroactive application of a hastily passed law, the State of Panama violated articles 8 (due process), 9 (legality principle), 16 (freedom of association), and 25 (judicial protection). It ordered that the State shall reinstate the dismissed workers to their jobs (or provide them with alternative employment at the same salary and benefits level), provide them with full back pay, grant each dismissed worker U.S. \$3,000 in moral damages, and pay all costs and expenses. The decision is a decisive victory for labour rights and ESCR justifiability in the inter-American system.⁹³

⁹¹ See Prof. Michelo Hansungule, 'Oral Presentation made to LL.M students' in the Human Rights Class on the 26th April 2013

⁹² *Inter-Am. Ct. H.R., Baena Ricardo et al. Case, Judgment of Feb. 3, 2001 (Ser. C) No. 72*

⁹³ *Ibid* 90 *supra*

Another interesting case to consider would be the Yanomami case,⁹⁴ when valuable mineral deposits were discovered under territory belonging to the Yanomami Indians, the Brazilian government approved a plan to extract the mineral resources and, in order to improve miners' access to the area, built a highway through Yanomami territory. The highway construction, which brought mining companies, independent prospectors, construction workers, and new farmers into Yanomami territory for the first time, resulted in the introduction of new diseases that killed hundreds of Yanomami. The tribe was forced to abandon its traditional land, its culture and social organization were fractured, and prostitution was introduced. The Brazilian government tried to resettle the tribe, but failed to respond with adequate social or health services. The Commission resolved that "the failure of the Government of Brazil to take timely and effective measures on behalf of the Yanomami Indians" resulted in violations of the right to life, liberty, and personal security (art. I); the right to residence and movement (art. VIII); and the right to the preservation of health and to well-being (art. XI) Under the Declaration.⁹⁵

In conclusion, the Inter-American regime has a well-drafted charter designed to protect Economic social and cultural rights and it is one of the reasons why they refused to be a signatory to the Universal Declaration on Human Rights (UDHR). They claimed and maintained that they had a better charter that protects human rights and need not sign another one. Meanwhile, the jury system under the American system could also be regarded as a mechanism built into its jurisprudence. The juries made up of the members of the public assist the court from the perspective of ordinary people when issues relating to social ordering come before a court for a decision.

3.1.2 Implementation of socio-economic rights under the Inter-American system

The main means by which socio-economic rights are implemented under the Inter-American system is by state party reporting. The Inter-American System for the protection of human rights is one of the world's three regional human rights systems, and is responsible for monitoring and ensuring implementation of human rights

⁹⁴ http://www.law.yale.edu/documents/pdf/Intellectual_Life/MANUAL_OAS_INGLES.pdf accessed 7th July 2015

⁹⁵ *Ibid* 92 *supra*

guarantees in the 35 independent countries of the Americas that are members of the Organization of American States (OAS).⁹⁶

The Inter-American System is composed of two entities: a Commission and a Court. Both bodies can decide individual complaints concerning alleged human rights violations and may issue emergency protective measures when an individual or the subject of a complaint is in immediate risk of irreparable harm. The Commission also engages in a range of human rights monitoring and promotion activities, while the Court may issue advisory opinions on issues pertaining to the interpretation of the Inter-American instruments at the request of an OAS organ or Member State.⁹⁷

On April 3, 2000, the Inter-American Commission on Human Rights (the “Inter-American Commission” or the “IACHR”) received a petition from the International Human Rights Clinic at American University and the Tennessee Office of the Federal Public Defender (the “petitioners”) against the United States of America (the “State” or the “United States”) on behalf of Phillip Ray Workman (“Mr. Workman” or the “alleged victim”) who was deprived of his liberty on death row in the state of Tennessee.⁹⁸

According to the petition, Mr. Workman was convicted and sentenced to death in March 1982. The petitioners alleged that domestic courts did not provide him with an opportunity to present new exculpatory evidence which they claim proved Mr. Workman’s innocence. They further claimed that Mr. Workman’s clemency proceedings did not safeguard his rights to due process set forth in the American Declaration; that felony murder does not qualify as a “most serious” crime to which capital punishment can properly be applied; and that Mr. Workman’s time, conditions and treatment on death row have amounted to cruel, infamous and unusual punishment.⁹⁹

The State opposed the petition on the basis that the claims made by the petitioners would place the Commission in the role of an appeals court contrary to the Commission’s “fourth instance formula,” and because the petition fails to state facts

⁹⁶ <http://www.ijrcenter.org/regional/inter-american-system/> assessed 18th January 2016

⁹⁷ *Ibid* 95 *supra*

⁹⁸ <http://www.oas.org/en/iachr/decisions/2014/USAR12261EN.pdf> assessed 20th January 2016
(REPORT No. 80/14 CASE 12.261 DECISION TO ARCHIVE PHILLIP RAY WORKMAN UNITED STATES 1 AUGUST 15, 2014)

⁹⁹ *Ibid* 97 *supra*

that tend to establish a violation of the American Declaration and is manifestly groundless.¹⁰⁰

On April 3, 2000, the Inter-American Commission received the petition, which was transmitted to the State on January 22, 2001. In the same communication the Inter-American Commission granted precautionary measures on behalf of the alleged victim and asked the State to stay the execution until it had the opportunity to examine the merits of the case. On March 3, 2005, the IACHR conducted a public hearing on this case. On March 14, 2006, the Commission adopted admissibility Report No 33/06 which was transmitted to the parties on March 21, 2006. On May 16, 2006, the Commission received the petitioner's additional observations on the merits, which were duly transmitted to the State. By letter dated January 22, 2007, received on January 26, 2007, the State presented its response to the petitioners' observations. On May 1, 2007, the IACHR reiterated the request for precautionary measures to the State given that Mr. Workman's execution had been scheduled for May 9, 2007. The state of Tennessee executed Mr. Workman as scheduled. On November 19, 2010, the IACHR received a communication from the petitioners indicating their wish to withdraw the petition.¹⁰¹

Article 42 of the Rules of Procedure of the IACHR establishes that, at any time during the proceedings, the Inter-American Commission shall ascertain whether the grounds for the petition still exist; and that if it considers that they do not exist or subsist, it may decide to archive the file. In addition, Article 42.1.b of the Rules of Procedure establishes that the IACHR may also decide to archive a case when the information necessary for the adoption of a decision is unavailable. In the present case, the petitioners expressly indicate their wish to desist from pursuing the matter before the Commission given that Mr. Workman has been executed. In accordance with Article 41 of its Rules, which indicates that a petitioner may desist from a petition at any stage, the IACHR hereby decides to archive the present case.¹⁰²

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid supra*

¹⁰² *Ibid.*

3.2 The Optional Protocol to the Economic, Social and Cultural Rights

On 10 December 2008, the United Nations General Assembly unanimously adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. The Optional Protocol ensures that, just like victims of civil and political rights violations, victims of economic, social and cultural rights violations have access to remedies at the international level.¹⁰³

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights hereinafter referred as the OP-ICESCR is of particular importance for the effective international protection of the rights embedded in the International Covenant on Economic, Social and Cultural Rights. As a matter of fact, the OP-ICESCR establishes three international protection procedures: a procedure involving individual communications, a procedure involving inter-State communications, and an inquiry procedure for investigating,¹⁰⁴ grave or systematic violations of economic, social and cultural rights.

The Preamble to the OP-ICESCR is an important interpretative tool since it fulfils the purpose and intentions behind the adoption of this instrument. However, the Preamble begins by highlighting the important role played by fundamental human rights and the ideal of the value and dignity of human beings in the United Nations system. It goes on to recall that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights enshrined in the Universal Declaration of Human Rights which, it is worth making note of that it makes no distinction between civil and political rights and economic, social and cultural rights.¹⁰⁵

Article 1¹⁰⁶ establishes the principle that informs the fundamental aim of the Optional Protocol: that the ESCR Committee is recognized as competent to receive and consider communications. Since it is an optional instrument, it means that the

¹⁰³ Lilian Chenwi 'Commentary on the optional Protocol' AHRJ Volume 9 No 1 2009 23 – 51, see also <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx> assessed 20th January 2016

¹⁰⁴ In this regard see, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx> assessed 20th January 2016. see also the Preamble to the OP-ICESCR.

¹⁰⁵ See also, <http://icj.wpenetdna-cdn.com/wp-content/uploads/2009/07/Commentary-OP-ICESCR-publication-2009-eng.pdf> assessed 19th January 2016, also see the commentary to the optional protocol on OP-ICESCR 'The Inter-American Institute on Icesr 1-37

¹⁰⁶ OP-ICESCR

Committee can only receive communications from those States which, as parties to the ICESCR, become parties also to the Optional Protocol.

Article 2,¹⁰⁷ provides that Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent. It sets out the scope of the communications procedure at three different phases. Firstly, it defines the subject matter jurisdiction of the Committee, in other words the extent to which the purpose of a communication relates to the content of the ICESCR. Secondly, it defines the question of locus standi (standing) to present communications, in other words who is permitted to submit communications to the Committee. Lastly, it refers to “individuals or groups of individuals, under the jurisdiction of a State¹⁰⁸Party”; it raises the issue of the territorial scope of the protection provided for in the communications procedure.

Article 3,¹⁰⁹ provides for the admissibility of the communications, it provides thus; The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted. This shall not be the rule where the application of such remedies is unreasonably prolonged. The Committee shall declare a communication inadmissible when : (a) It is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit; (b) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date; (c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement; (d) It is incompatible with the provisions of the Covenant; (e) It is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media; (f) It is

¹⁰⁷ OP-ICESR

¹⁰⁸ *Ibid* 97 *supra*

¹⁰⁹ OP-ICESR

an abuse of the right to submit a communication; or when (g) It is anonymous or not in writing.

For a communication to be deemed admissible, domestic remedies must have been exhausted the communication must have been submitted within one year following the exhaustion of domestic remedies, and there must be no case pending concerning the same matter in the Committee itself or under another procedure of international investigation or settlement. Also inadmissible are communications based on facts that occurred prior to the entry into force of the present Protocol for the State Party concerned, anonymous communications, communications that are not submitted in writing, and communications that do not comply with the minimum substantive requirements.¹¹⁰

The Optional Protocol also provides for the possibility of interim measures in 'exceptional circumstances',¹¹¹ allows for the friendly settlement of disputes,¹¹² creates an inter-state complaints procedure¹¹³ and an inquiry procedure,¹¹⁴ and provides for follow-up mechanisms.¹¹⁵ It requires state parties to 'take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee'.¹¹⁶ This provision ensures that the rights and safety of those who use the communication procedure are guaranteed and protected.

In conclusion, individual complaints procedures are important in that they further develop and strengthen international human rights law, create precedents, and draw attention to the specific, concrete human rights violation, making the problem and the victim more visible and laudable in the cause, and the remedy more specific and

¹¹⁰ *Ibid* 101 *supra*, See also, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2009/07/Commentary-OP-ICESCR-publication-2009-eng.pdf> assessed 20th January 2016

¹¹¹ Art 5.

¹¹² Art 7

¹¹³ Art 10

¹¹⁴ Art 11 & 12

¹¹⁵ Art 9 (follow-up of the views of the ESCR Committee), and art 12 (follow-up to the inquiry procedure)

¹¹⁶ Art 13

implemental.¹¹⁷ Though some writers have questioned the establishment of this new international adjudicative mechanism,¹¹⁸ the benefits of having the Optional Protocol to CESCR are numerous: It would encourage state parties to ensure more effective local remedies; promote the development of international jurisprudence which would in turn promote the development of domestic jurisprudence on economic, social and cultural rights; strengthen international accountability; enable the adjudicating body to study concrete cases and thus enable it to create a more concise jurisprudence; help empower vulnerable and marginal groups; and would combat arguments against the justiciability of economic, social and cultural rights.¹¹⁹ These and other valuable factors would go a long way in combating arguments against the justiciability of economic, social and cultural rights.¹²⁰

3.3 The Protection of Socio-Economic Rights under the European System

The European Committee of Social Rights was established under the auspices of the Council of Europe, pursuant to Articles 24 and 25 of the 1961 European Social Charter. The Committee monitors implementation of the 1961 Charter, the 1988 Additional Protocol, and the 1996 Revised European Social Charter. It is unique among regional human rights mechanisms for its collective (as opposed to individual) complaint mechanism, and the flexibility it allows States in deciding which provisions of the Charter to accept.¹²¹

The Committee is designed to complement the European Court of Human Rights, which oversees compliance with the civil and political rights-centered European Convention on Human Rights. The Committee, for its part, oversees compliance with

¹¹⁷ A Pennegård 'Overview over human rights: The regime of the UN' in G Alfredsson et al (eds) *International human rights monitoring mechanisms* (2001) 27-28 see also 'A de Zayas 'The examination of individual complaints by the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights' in Alfredsson et al

¹¹⁸ M Dennis & D Stewart 'Justiciability of economic, social and cultural rights: Should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health' (2004) 98 *American Journal of International Law* 462-515

¹¹⁹ *Ibid* 110 *supra*

¹²⁰ Report of the First Session of the OEWG, paras 23 & 67-70. See also P Alston 'Establishing a right to petition under the Covenant on Economic, Social and Cultural Rights' in *Collected Courses of the Academy of European Law* (1995) 107, quoted in H Steiner et al *International human rights In context: Law, politics, morals* (2007) 363-364.

¹²¹ <http://www.ijrcenter.org/european-committee-of-social-rights/> assessed 22nd January 2016.

the economic and social rights-centered Social Charter. It does this by managing a State reporting system and a collective complaints procedure.¹²²

Unlike the European Convention on Human Rights, ratification of the European Social Charter is not required as a condition of membership in the Council of Europe. As a result, of the 47 Member States of the Council of Europe, 10 have ratified the 1961 Charter and an additional 33 have ratified the 1996 Revised Charter. The Committee reviews compliance with the Social Charter by these 43 States, with notable exceptions. The Charter itself allows States to submit article-specific reservations, limiting the Charter provisions by which the State is bound, and to decide whether or not to participate in the innovative collective complaints procedure.¹²³

Right from the beginning, human rights conceptualist(s) began to divide rights into three separate categories, that is: civil, political and social. The legal status of Economic, social and cultural rights have been controversial amongst European scholars.¹²⁴ This disagreement in views is owed to the decision of the council of Europe in 1950 to protect civil and political rights through judicial means. Whereas, they resolved that Economic, social and cultural rights should be addressed separately through the European social charter with merely a reporting mechanism to the European Committee of Social Rights.

It was after the Second World War that a European Convention on fundamental human rights was adopted in the year 1950. Prior to the adoption, the council of Europe was established in 1949 which is the first of its kind and to operationalise the council, the adoption of the convention of 1950 was effected.

In the Inter-American system, the declaration contained and provided for the Economic, social and cultural rights in article 26. Whereas in the European Convention there is no mention or reference to socio-economic rights, only civil and

¹²² *Ibid supra*

¹²³ *Ibid.*

¹²⁴ See: Prof. Michelo Hansungule, 'Oral Presentation made to LL.M students' in the Human Rights Class on the 26th April 2013

political rights were expressly provided for because of the European scholar's view that real rights are only political and civil and not socio-economic rights.¹²⁵

However, in 1951 they adopted the first protocol to further elaborate on the rights in the Convention, where they recognized and added right to education and other socio and economic rights. Thus under Europe one cannot claim socio-economic rights based on the Convention apart from the right to education.¹²⁶ Meanwhile, the European Commission was established to monitor and safeguard the rights enshrined in the Charter. Interestingly, individual victims have no standing and it was the commission that represented the affected individual(s) after such individual(s) had exhausted local remedies. It is worthy of note that you do not have to be European in order to claim violation of this right. Everyone is entitled provided you find yourself within the borders. The Economic, social and cultural rights were not formerly recognized in the European Convention. It was only later in 1961¹²⁷ that they adopted what is known as the European Social Charter or work related charter to monitor some socio-economic rights and it is not legally binding according to the charter. It is more like a declaration.

In 1966 came the modernization of the European Social charter but not as individual rights but as a group right. Consequently, in 1998, the European Commission was abolished on the grounds that it created bureaucracy. Protocol number two abolished the Commission and only the court remained. The consequence of this is now that anyone on European soil can take their matter to the European Court directly.

Historically, it may be deduced that due to philosophical and ideological differences and owing to other factors, led Europe not to classify socio-economic rights at the same level to that of civil and political rights in the Convention and its lackadaisical behaviour. Meanwhile, it is also noteworthy to state that their attitude towards socio-economic rights has gradually changed. Presently, socio economic rights are now enforceable under the European law and one can claim it in an open court just like civil and political rights.

¹²⁵ *Ibid* 94 *supra*

¹²⁶ *Ibid*

¹²⁷ *Ibid*

Each year, States Parties to the European Social Charter submit a national report describing how they are implementing specific provisions of the Charter. The Charter provisions have been divided into four thematic groups and States report on one group each year, with the result being that a review of all of the provisions is accomplished for each State every four years. The four thematic groups are: employment, training, and equal opportunities; health, social security, and social protection labour rights children, families, and migrants. The Committee evaluates the reports and publishes conclusions about whether each State is in conformity with the Charter. Moreover, if a State does not act in response to the Committee's decision as part of the collective complaints procedure, and if, as a result, the State is not in compliance with the Charter, the Committee will also issue a recommendation to the State.¹²⁸ Following the conclusion of the national reporting procedure, the Council of Europe's Committee of Ministers adopts resolutions to close the supervision cycle and issues recommendations to the States calling on them to conform their activities to the Charter. Since the Committee of Ministers comprises government representatives from all Council of Europe Member States, this practice forms a method of enforcement of the Charter.¹²⁹

3.4 The Protection of Socio-Economic Rights under the African System

The African Charter contains a number of provisions pertaining to socio-economic rights.¹³⁰ Its Preamble reaffirms the commitment of African states to adhere to the fundamental rights enshrined in the UDHR. The African Charter does guarantee the right to work. Its Article 15 states that every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work. Article 16(1) of the African Charter on the other hand states that, every individual shall have the right to enjoy the best attainable state of physical and mental health. Subsection (2) of Article 16 places a duty on the state to take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. Article 17 of the African Charter

¹²⁸ *Ibid*

¹²⁹ *Ibid*

¹³⁰ See http://www.memoireonline.com/04/10/3363/m_A-jurisprudential-analysis-of-the-enforceability-of-socio-economic-rights-in-South-Africa-a-constit2.html accessed 7th July 2015.

provides the right to education to every individual. The right to life is also guaranteed by Article 4 of the African Charter.

Unlike the CESCER which establishes a Committee on ESCR to monitor the implementation of the Covenant, the African Charter vests in the African Commission on Human and People's Rights (Commission) has the powers to hear matters pertaining to violations of rights recognized in its provisions.¹³¹

The main objective of the Commission is to monitor and protect the rights provided in the African Charter. The functions of the Commission are, *inter alia*, to promote human and people's rights and in particular, to collect documents, undertake studies and research on African problems in the field of human and people's rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and people's rights, and, should the case arise, give its views or make recommendations to governments, to formulate and lay down principles and rules aimed at solving legal problems relating to human and people's rights and fundamental freedoms upon which African governments may base their legislation, co-operate with other African and international institutions concerned with the promotion and protection of human and people's rights.¹³²

Despite the formulations of the African Charter, Africa remains the worst continent where socio-economic rights receive adequate protection. Africa remains the youngest, newest and most useless when it comes to the protection of these rights. There is no compensation in the African charter system unlike the inter-American and the European system. Compensation is only recommended by the Committee to the violating state since the Charter is only morally binding. From 1963-1981, Africa had no human rights system and at the OAU it dared not discuss anything about human rights apart from issues surrounding colonization, so the issue is to first get liberated from colonization and go about others issues later. They never discussed issues of human rights because they considered it to be an internal matter or issue of sovereignty.

¹³¹ See also, 'The African Charter on Human and People's Right'

¹³² Prof. Michelo Hansungule, 'Oral Presentation made to LL.M students' in the Human Rights Class on the 30th April 2013

In July 1979 at the OAU general Assembly in Monrovia, Liberia and the agenda was to include the issue of human rights. Binaiasa was the first to bring the matter of another state in the OAU but the Nigerian government opposed the motion and said that there was no discussion of matters of another state and other countries agreed.¹³³ Professor Hansungule described the African Charter as an indecent woman; she wears a short skirt which is too short to provoke the interest of men but sufficiently long to cover the essentials. Qualifying this metaphor, one could see that the methods used in qualifying the rights enumerated in the charter is so limited with only three qualifications and most times we are at the mercy of the Commission. Unlike the European in a fair trial that has twelve qualifications.

The Protocol on Women's Rights in Africa as another important source of socio-economic rights:

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter the Women's Protocol), was adopted in Maputo, Mozambique, in 2003 and entered into force on 25 November 2005. It provides for the protection of women's human rights. In terms of its preamble the protocol was adopted to address the concerns that 'despite the ratification of the African Charter on Human and Peoples' Right and other international human rights instruments by the majority of the states ..Women in Africa still continue to be victims of discriminations and harmful practices.

The African Women's Protocol contains both civil and political rights and social, economic and cultural rights.¹³⁴ For instance, it is the first human rights instrument to have substantial provisions on reproductive rights and even more importantly for this study, to confront HIV/AIDS head-on. In brief, the African Women's Protocol requires states to: ensure that the right to health of women, including sexual and reproductive health is respected and promoted;¹³⁵ provide adequate, affordable, and accessible health services to women;¹³⁶ establish and strengthen prenatal, delivery, and postnatal health and nutritional needs services for women during pregnancy and

¹³³ *Ibid* 100 *supra*

¹³⁴ See Arts.5, 6,12,13,15,16,17,18 & 19.

¹³⁵ See Art.14.

¹³⁶ Art.14(2)(a)

while breastfeeding;¹³⁷ prohibit all medical and scientific experiments on women without their consent;¹³⁸ guarantee women's right to consent to marriage;¹³⁹ set the minimum age of marriage at 18 years;¹⁴⁰ ensure equal rights of men and women in marriage;¹⁴¹ protect women against all forms of violence during armed conflict and consider such acts war crimes;¹⁴² enact and enforce laws prohibiting all forms of violence against women, unwanted or forced sex;¹⁴³ and reform laws and practices that discriminate against women.¹⁴⁴ These and other kinds of rights are clearly enshrined under the protocol aimed particularly towards the protection of the rights of woman in our society. It is an invaluable source of socio-economic right in Africa.

The Role African Court in enforcing socio-economic rights In Africa.

The African Court has important role to play in enforcing socio-economic rights when cases start flowing given these rights are already guaranteed under the African Charter. The African court of justice and human rights was originally intended to be the “principal judicial organ of the Union” (Protocol of the Court of Justice of the African Union, Article 2.2) with authority to rule on disputes over interpretation of AU treaties.¹⁴⁵ A protocol to set up the Court of Justice was adopted in 2003, and entered into force in 2009. It was, however, superseded by a protocol creating the African Court of Justice and Human Rights , which will incorporate the already established African Court on Human and Peoples' Rights and have two chambers — one for general legal matters and one for rulings on the human rights treaties.¹⁴⁶ The merger protocol was adopted in 2008. The united court will be based in Arusha, Tanzania.¹⁴⁷

¹³⁷ Art.14 (2) (b)

¹³⁸ See Art.4 (2)(h)

¹³⁹ Art.6(a)

¹⁴⁰ Art.6(b)

¹⁴¹ Art.6(a).

¹⁴² Art.11.

¹⁴³ Art.4(2)(a)

¹⁴⁴ Art.2.

¹⁴⁵ See the AU'S website '<http://www.africanlii.org/node/53> assessed 24th January 2016, see also Michelo Hansungule in' Human Rights in Africa' 233-271

¹⁴⁶ Ibid

¹⁴⁷ Ibid 145 supra

The position of socio-economic rights under Egyptian jurisprudence

The 2013 Egyptian draft Constitution includes several socio-economic rights, including the right to adequate housing. Constitutions themselves are normative documents: they spell out what a nation aspires to be rather than what a nation is presently, they serve as a criterion against which to measure the performance of the government, and they give citizens recourse against governments that fail to fulfil their constitutional obligations.¹⁴⁸ The South African Court's common-sense approach to enforcing these socio-economic rights may prove immanently useful for civil society organizations, community groups, and other advocates in Egypt to enforce their rights that will ultimately be guaranteed in the forthcoming constitution.¹⁴⁹

The Egyptian jurisprudence on socio-economic and cultural rights is yet to be developed and the attitude and or the roles of the judiciary are nothing to write home about, For instance, Egyptian court in Case 34 for Judicial Year 15, the Court notes that the State is limited in its provision of its "cultural, social and health services according to Article 16 of the Constitution."¹⁵⁰ In Case 30 for Judicial Year 16¹⁵¹, however, the Court refers to the limitations on the State's "guarantee of economic and social rights. In Case 34 for Judicial Year 15 the realization of the "services" or "rights" under Article 16 of the Egyptian Constitution¹⁵² was also deemed to be limited by resources and by progressive realization of socio –economic rights. The courts was guided by its constitution not use the term 'right' but 'service' in the wording of its decisions relating to social rights.

The sustainability of Egypt's democratic transition depends on addressing the socio-economic grievances which fuelled the revolution, yet the policies of successive governments, pushed by donors and international institutions, have hindered the meaningful structural changes needed to eradicate entrenched patterns of poverty, inequality and exclusion. To date, socio-economic reforms in Egypt have focused on

¹⁴⁸ <http://www.tadamon.info/2014/01/05/the-landmark-case-of-grootboom-versus-the-republic-of-south-africa/?lang=en#.VqX78PI97IU> assessed 24th January 2016.

¹⁴⁹ *Ibid.*

¹⁵⁰ Case 34, Judicial Year 15

¹⁵¹ Case 30 for Judicial Year 16

¹⁵² Art 16 Egyptian Constitution, see also http://www.academia.edu/1844847/The_Road_Not_Taken_-_The_Supreme_Constitutional_Court_of_Egypt_and_Socio-Economic_Rights assessed 24th January 2016

budget cuts, privatization and other austerity measures that risk undermining economic and social rights and further exacerbating inequalities. This reflects a common trend of either ignoring or trading off demands for social justice and economic and social rights in the agenda of post-conflict or democratic transitions.

In November 2014, Egypt appeared before the Human Rights Council's Universal Periodic Review (UPR). CESR supported the Egyptian Center for Economic and Social Rights to coordinate a joint submission endorsed by 51 non-governmental organizations and 79 labour unions examining the continuing failure of successive governments to address continuing human rights deprivations in Egypt. CESR and its partners also produced a series of 11 short briefing papers that summarize key concerns and suggest questions and recommendations on the state of economic, social and cultural rights in Egypt.¹⁵³

In conclusion, it is unfortunate that Africa is the worst when it comes to the protection and enforcement of socio-economic rights. However, South Africa is good example and best practice so far that has recognized and granted relief to applicants of socio-economic rights by directly invoking the underlying philosophy and mandate of the constitutional text.

¹⁵³ See <http://cesr.org/section.php?id=60> assessed on the 24th January 2016.

CHAPTER 3

The Challenge of Justiciability & Enforcement of Socio-Economic Rights: **Critical Analysis of Judicial deference**

3.1 Introduction:

This chapter interwoven alongside its counterpart will examine the core challenges associated with adjudication of socio-economic rights and more particularly challenges which the adjudicators (judges) encounter when called upon to deal with cases concerning social ordering.

I will focus mainly on five major problems associated with adjudication and enforceability of socio-economic rights. In summary, these challenges may be categorized as follows: (a) institutional incapacity/capacity; (b) institutional integrity; (c) institutional legitimacy; (d) institutional security; (e) institutional comity and separation of powers influence. The above highlighted and identified problems will be examined in an attempt to ventilate the major problems and/or setbacks faced by the judiciary when called upon to make a finding on issues pertaining to socio-economic rights. These challenges are what I metaphorically termed 'the Goliath' that stood in the way of successful adjudication and enforcement of socio-economic rights and as a matter of fact, the major reason why the courts defer to other institutions.

The critical question is thus whether courts should become involved in instructing the legislature or the executive on how to allocate funds or to what extent to be provided. Many believed that it is not within the premise of the judiciary to do so.

The South African Constitution¹⁵⁴ is quite vocal in its vision and instructions regarding the socio-economic rights. It, *inter alia*, provides that everyone is entitled to reasonable access to housing, healthcare, education and shelter.

The Constitutional Court has held, however, that “reasonable access” does not mean that an individual is entitled to these provisions. Rather, these provisions should be progressively realized, taking into account the financial ability of the state. Indeed, the Constitution is carefully worded to give appropriate deference¹⁵⁵ to the legislature, and it can be very difficult for courts and judges in the context of that careful wording to determine at what point the legislature or executive can be faulted and told that it is acting unconstitutionally.

In this case study I will endeavour to evaluate the manner in which these factors directly or indirectly stood in the way of the judiciary when faced with adjudication of constitutional socio-economic rights cases. I will focus mainly on two of the factors that prompted the court to deliver its judgment in the manner it did in the case of *Lindiwe Mazibuko and Others*¹⁵⁶, namely; institutional capacity and institutional legitimacy. In the *Mazibuko* case, I will critically examine the court’s approach when arriving at its decision hence deferring to the other branches of government to make an appropriate decision on the provisions of services and raise criticism in this regard. Decisions of courts have demonstrated a considerable level of deference - that is, avoiding the making of decisions on issues the courts felt should be reserved for other institutions. In most cases, courts prefer to make declaratory orders.

To achieve the above objective, the case study consists of the introduction which provides a brief description or an overview of what the chapter is all about. The second part will consist of the summary of the case study. The third part will consist of the evaluation of the case study and discussion of the identified factor(s) for deference and/or challenges in this particular case and the last part will consist of a brief criticism and recommendation on what the judiciary ought to have done or should do when faced with such a technical problem in future.

¹⁵⁴ *The Constitution of the Republic of South Africa of 1996*

¹⁵⁵ See Kirsty Mclean, ‘Towards a framework for understanding Constitutional deference’ (2010) 25 *SAPL* 445

¹⁵⁶ *Lindiwe Mazibuko and Others v City of Johannesburg and Others* Case CCT 39/09[2009] ZACC 28f

3.2 *Lindiwe Mazibuko and Others v City of Johannesburg and Others Case CCT 39/09[2009] ZACC*

The applicants are five residents of Phiri in Soweto. They are poor people living in separate households. The first applicant, Mrs Lindiwe Mazibuko, who has sadly passed away since the litigation commenced, lived in a brick house on her mother's property. There were two informal dwellings in the backyard of her mother's home for which the tenants paid low rentals. Altogether 20 people lived on the stand. The second applicant is Mrs Grace Munyai, who shares a home with her husband, two children and two grandchildren. The third applicant is Mrs Jennifer Makoatsane who shares her home with her mother, brother and six other families. The first and second respondents are the City of Johannesburg (the City) and Johannesburg Water (Pty) Ltd (Johannesburg Water), a company wholly owned by the City which provides water services to the residents of the city. The third respondent is the National Minister of Water Affairs and Forestry (the Minister). The Centre on Housing Rights and Evictions has been admitted as *amicus curiae*.¹⁵⁷

This is a judgment concerning the right of access to water entrenched in section 27 of the Constitution¹⁵⁸, which provides that everyone has the right to "sufficient water". The case considers the lawfulness of Operation Gcin'amanzi, a project the City of Johannesburg piloted in Phiri in early 2004 to address the severe problem of water loss and non-payment for water services in Soweto. This project involved re-laying water pipes to improve water supply and reduce water loss as well as installing pre-paid meters to charge consumers for use of water in excess of the 6 kilolitre per household monthly free basic water allowance. Mrs Mazibuko and four other residents of Phiri, Soweto (the applicants) challenged, firstly, the City of Johannesburg's Free Basic Water policy in terms of which 6 kilolitres of water are provided monthly for free to all households in Johannesburg and, secondly, the lawfulness of the installation of pre-paid water meters in Phiri. The three respondents are the City of Johannesburg (the City), Johannesburg Water and the National Minister of Water Affairs and Forestry.

¹⁵⁷ *Lindiwe Mazibuko and Others v City of Johannesburg and Others Case CCT 39/09[2009] ZACC at para 4-5 see also in this regard <http://www.saflii.org/za/cases/ZACC/2009/28.pdf> accessed on 02/June/2015*

¹⁵⁸ *The Constitution of South Africa of 1996 (hereinafter referred to as the Constitution)*

The applicants succeeded in the South Gauteng High Court. The Court found that the installation of pre-paid water meters in Phiri was unlawful and unfair. It also held that the City's Free Basic Water policy was unreasonable and therefore unlawful. It ruled that the City should provide 50 litres of free basic water daily to the applicants and "similarly placed" residents of Phiri.

On appeal, the Supreme Court of Appeal varied this order. The Supreme Court of Appeal held that 42 litres of water per day would be "sufficient water" within the meaning of the Constitution, and directed the City to reformulate its policy in light of this conclusion. The Supreme Court of Appeal also held that installation of the pre-paid water meters was unlawful on the ground that the City's by-laws did not make provision for them in these circumstances. The Court gave the City two years to rectify the by-laws. The Supreme Court of Appeal did not consider whether the manner in which the meters were installed was fair.

The applicants applied to Court for leave to appeal against the judgment of the Supreme Court of Appeal and, in effect, sought reinstatement of the High Court order. All the respondents also sought leave to cross-appeal the order of the Supreme Court of Appeal. All the parties before the Court, including the applicants, accepted that the old system of water supply to Soweto was unsustainable and had to be changed. The applicants however asserted that the City's policy and the manner in which it was implemented is unlawful, unreasonable, unfair and in breach of their Constitutional right to sufficient water. Once the City had opted for Operation Gcin'amanzi, there was extensive consultation with communities about what the project would entail and how it would be implemented. The initial implementation in early 2004 caused unhappiness amongst residents. By the time the applicants brought their challenge in the High Court eighteen months later, the vast majority of residents had accepted pre-paid water meters. According to a survey the City undertook, they were satisfied with the new system. Moreover, the amount of unaccounted for water in Soweto had been successfully curtailed.

The City provided a detailed account of Operation Gcin'amanzi and how it came to be adopted and implemented. It also made plain that its Free Basic Water policy has been under constant review since it was adopted. In particular, the City sought to ensure that those with the lowest incomes are provided not only with an additional

free water allowance, but also with assistance regarding the charges levied for other services provided by the City, such as electricity, refuse removal and sanitation. The City accepted that it is under a continuing obligation to take measures progressively to achieve the right of access to sufficient water.

The Constitutional Court held that the obligation placed on government by section 27 is an obligation to take reasonable legislative and other measures to seek the progressive realisation of the right. In relation to the Free Basic Water policy, therefore, the question is whether it is a reasonable policy.¹⁵⁹ The Court noted that it is implicit in the concept of progressive realisation that it will take time before everyone has access to sufficient water.

The Constitutional Court concluded, in contrast to the High Court and the Supreme Court of Appeal, that it is not appropriate for a court to give a quantified content to what constitutes “sufficient water” because this is a matter best addressed in the first place by the government.¹⁶⁰ The national government has adopted regulations which stipulate that a basic water supply constitutes 25 litres per person daily; or 6 kilolitres per household monthly (upon which the City’s Free Basic Water policy is based).

The Court concluded that it cannot be said that it is unreasonable for the City not to have supplied more, particularly given that, even on the applicants’ case, 80% of the households in the City will receive adequate water under the present policy. The Court noted that 100 000 households within Johannesburg still lack access to the most basic water supply that is a tap within 200m of their household.

On pre-paid water meters, the Court held (contrary to the High Court and the Supreme Court of Appeal) that the national legislation and the City’s own by-laws authorise the latter to introduce pre-paid water meters as part of Operation Gcin’amanzi. The Court concluded that the installation of the meters was neither unfair nor discriminatory.

¹⁵⁹ *Lindiwe Mazibuko and Others v City of Johannesburg and Others Case CCT 39/09[2009] ZACC at 160-163 see also in this regard <http://www.saflii.org/za/cases/ZACC/2009/28.pdf> accessed on 02/June/2015*

¹⁶⁰ *Court reasons for its decision in Lindiwe Mazibuko and Others v City of Johannesburg and Others Case CCT 39/09[2009] ZACC at 160-163*

The Court affirmed the democratic value of litigation on social and economic rights. It noted that the applicants' case required the City to account comprehensively for the policies it has adopted and establish that they are reasonable. During the litigation, and perhaps because of it, the City has repeatedly reviewed and revised its policies to ensure that they do promote the progressive achievement of the right of access to sufficient water. The Court thus upheld the appeal by the City and Johannesburg Water and the Minister. The orders of the High Court and Supreme Court of Appeal were, therefore, set aside.¹⁶¹

3.3 Critical Evaluation of the case study

It is so glaring from our Constitutional Court's reasoning in *Mazibuko* that it is not willing or prepared to compromise its institutional integrity on the altar of making a direct order as to what constitutes reasonable sufficient water on the basis that it lacked the institutional capacity and/or legitimacy to pronounce on such deadly terrain, which, according to the court, should be better dealt by another institution or branch of government. The courts were not ready to engage in the argument at all and appeared to feel that such issues should not be debated hence it should be reserved for the appropriate institution capable of dealing with such issues.¹⁶² Deference is seen manifesting itself and representing the Goliath in the way of the claimants in this case. The manner in which the court formulated the reasonable test in a quite absolute procedural and structural way rather than adopting a generous interpretation that embraces a substantive term raises a huge concern for the Constitutional adjudication of socio-economic rights. It is implicit in the reasoning by O'Regan J which provides in this case that matters that deal with contents of social provisioning measures should be left to the other branches of government due to problems of institutional incapacity and illegitimacy on the part of the judiciary, with the role of the courts constrained to evaluation of form and process only.¹⁶³ One can easily conclude that when courts defer as a result of one of these reasons, the claimants are left without any relief. Then what is the point of approaching the court in the first instance? This could be seen as a major setback in the whole project of

¹⁶¹ *Lindiwe Mazibuko and Others v City of Johannesburg and Others Case CCT 39/09[2009] ZACC at 87-88 see also in this regard <http://www.saflii.org/za/cases/ZACC/2009/28.pdf> accessed on 02/June/2015*

¹⁶² *See in this regards Danie Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa at 619*

¹⁶³ *Ibid 113 supra at para 619*

ensuring the enforceability of socio-economic rights. One can easily conclude that the attitude of the court is a blatant rejection of the claim by abstaining or declaring itself unfit to engage in certain issues because of fear of criticism by other branches. O'Regan J in *Mazibuko* is quoted saying 'ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executiveIndeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic choice.'¹⁶⁴ The Constitutional Court in *Mazibuko* distanced itself from making a decision on the account that other branches are legitimately endowed with gifts and powers to make such decisions and not the judiciary, owing to the fact that they are democratically elected by the people and given such mandate by the electorate and if the judiciary which lacks the institutional capacity to engage the people on the grass root should pronounce precisely on the exact quantum of what is reasonable and sufficient, it will be tantamount to usurping or crossing the line of its duties as the judiciary. It appears that our courts are so mindful of the principles of separation of powers and functions that underlie a democratic society, the values of which are further enshrined in the letters of our Constitution.¹⁶⁵ Here is my argument; one has to look in depth of what democratic principles actually entail and not the normative principles or paying lip service to its norms. Democracy presupposes the will and input of everyone. Looking at the structure or procedural manner in which modern democracy is organized, one cannot categorically conclude that the few members of parliament or the executive, despite the fact that they were elected by the majority, is a sure guarantee that the will of the electorate will eventually be met by them at the end of the day. The other reason given by the courts in this case was that the other branch is accountable to the electorate and the judiciary is not. One can counter this argument by reiterating the primary functions of the Constitutional Courts and the judiciary as a whole, which duties, *inter alia*, include upholding the Constitution and representing the voice of the voiceless –the minority in this regard. Marius¹⁶⁶ was of the view that the debates of

¹⁶⁴ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) at para 61

¹⁶⁵ *The Constitution of the Republic of South Africa of 1996*

¹⁶⁶ *Marius Pieterse 'Coming to terms with judicial enforcement of socio-economic rights* 388-389

Justiciability of socio-economic rights typically focus in the first place on their legitimacy (i.e. whether their nature and content is suitable for Constitutionalisation) and secondly, whether courts are institutionally competent to enforce them.¹⁶⁷ According to Marius, legitimacy-based objections to the Constitutionalisation of socio-economic rights typically relates to broader ideological concerns of redistribution of wealth and state intervention in market economies. It has, for instance, been claimed that socio-economic rights are ‘choice-sensitive’ issues that are better left to political, rather than legal deliberations.¹⁶⁸ I would take a closer examination of the major concerns for deference in the case namely institutional legitimacy.

3.3.1 Institutional Legitimacy Concerns

In the literature on judicial review, ‘legal legitimacy’ refers to the plausibility (rather than correctness) of a judicial decision according to applicable standards of legal reasoning.¹⁶⁹ Legal legitimacy may be distinguished from sociological legitimacy, which has three distinct meanings in the literature: ‘institutional legitimacy’ (public support for court despite disagreement with particular decisions), ‘substantive legitimacy’ (public support for particular decisions), ‘and, ‘substantive legitimacy’ (acquiescence in particular decisions, with or without a belief in their correctness).¹⁷⁰ It is apparent in the Constitutional judgment of Mazibuko¹⁷¹ that the judiciary in its attempt to reach a decision was wary of institutional legitimacy. This, in my opinion, was a narrow understanding of the principle of legitimacy. The judicial inventiveness, substantive legitimacy and appropriate thoughtful relief meant for judicial transformation was sacrificed at the altar of so-called judiciary illegitimacy hence defence for its judicial deference.

O’ Regan J by all indications did not shy away from the popular view why the judiciary defers, he categorically stated that this is a terrain that the judiciary was not fit and legitimate enough to entertain. This concern for institutional legitimacy relates to both the boundaries imposed by the separation of powers and the ideological

¹⁶⁷ *Ibid supra* at 15

¹⁶⁸ *Ibid supra* at 389

¹⁶⁹ *Theunis Roux, ‘Principle and Pragmatism on the Constitutional Court of South Africa 109 see abstract*

¹⁷⁰ *Ibid 18 supra* at para 2

¹⁷¹ *Court reasons for its decision in Lindiwe Mazibuko and Others v City of Johannesburg and Others Case CCT 39/09[2009] ZACC*

arguments concerning democracy, majoritarianism and judicial accountability.¹⁷² The argument is thus that the judiciary in most jurisdictions is not elected nor is it directly accountable to the citizenry in the same way as the legislature and the executive. Owing to these factors, how then would the un-elected judiciary be legitimate in its actions to strike down legislation or policy conceived by a democratic branch of government? This attitude, if to be allowed, would be anti-democratic and would be a direct opposition to the letters of our Constitution which enshrines democratic principles unequivocally by all standards. The understanding of democracy by the judiciary and the respect it accords to the institutions is a result of ideological influences. The judiciary is acutely aware of its position as the least democratically accountable branch of government. It defers to the other branches because, in doing so, it believes it respects the democratic will of which the political branches are the repositories.¹⁷³ *Danie*¹⁷⁴ was of the view that the conception of democracy or of politics which underlies this concern is a peculiarly limited one and I am in agreement with this position on the basis that democracy and politics should be understood beyond the letters or inscription but to the extent of what it underlies as an entire principle. The court's concern with Constitutional legitimacy (comity) supports what *Nancy Fraser* has described as an institutional understanding of politics and democracy, in terms of which a matter is deemed political if it is handled directly in the institutions of the official governmental system, including parliaments, administrative apparatuses, and the like.¹⁷⁵ Contrary to this belief and ideological basis for judicial deference, it is common parlance that the legislatures has the primary duties of giving contents to human rights through development of legal and policy frameworks. Owing to the fact that its members are directly elected to office by the electorate, the legislature is also the most typically fairly large body made up of popularly elected 'laymen' who often lack the technical expertise necessary for effective socio-economic policy making.¹⁷⁶ Given the overall executive and legislative stranglehold, citizens increasingly look to the judiciary to ensure executive accountability and for the protection of basic interest. Today the judiciary acts as a watchdog over the other branches of government, adherence to the doctrine of

¹⁷² *Marius Pieterse 'Coming to terms with judicial enforcement of socio-economic rights 390*

¹⁷³ *Danie Brand 'The 'Politics of need interpretation and the adjudication of socio-economic rights claims in South Africa 32-33*

¹⁷⁴ *Ibid supra at 19*

¹⁷⁵ *Ibid*

¹⁷⁶ *Marius Pieterse 'Coming to terms with judicial enforcement of socio-economic rights 387*

separation of powers as well as a primary protector of the citizens' rights within its confines.¹⁷⁷ This should be counter-reliance for the judiciary instead of deferring on the account of institutional legitimacy or rather that the judiciary is illegitimate to entertain issues of social ordering. I am of the opinion that it is due to the narrow interpretation and understanding of what democratic principles underlie which the main factor was contributing largely to judicial deference on the account of illegitimacy.

3.3.2 Institutional Competency Concerns

Institutional competency is one of the major challenges mitigating the Justiciability of socio-economic rights. One would refer to this as the institutional competence of the judiciary to make complex economic and social policy decisions.¹⁷⁸ Liebenberg was of the view that institutional competence has two distinct dimensions, the first being the concerns raised against the competence of the judiciary to make decisions which entails specialized expertise in matters of social policy and public finance. The usual argument is that judges lack the special training to make sensible decisions in these spheres.¹⁷⁹ In rebuttal of this view, one has to consider the role of judges when dealing with commercial litigation, delictual claims; the review of administrative action and tax disputes. All these entail judges assessing evidence and argument in a range of specialized knowledge or fields. Argument of judicial incompetence on social ordering in my view would not stand the test of time. It is not required that the judge should be skilled to determine what is reasonable. Experts are called and evidence is presented, thereafter the judge will make an informed decision. Meanwhile, the mere fact that the subject matter of a case is complex and entails specialized knowledge does not absolve a judge from responsibility for adjudicating the dispute in the light of the normative requirements of the Constitutional rights and the evidence presented.

The second dimension of institutional competence concerns was described by *Liebenberg* as 'the unforeseeable ramification of socio-economic rights adjudication'. It was gathered, *inter alia*, that in litigation, a court is restricted to a limited spectrum

¹⁷⁷ *Ibid* 22 *supra* at 388

¹⁷⁸ See S Liebenberg 'Socio –Economic Rights adjudication under a transformative Constitution 71-

75

¹⁷⁹ *Ibid supra* at 129

of facts and arguments relevant to the particular dispute between parties. However, a judiciary decision enforcing human rights could also have a 'knock-on' effect causing budgetary and policy distortions and affecting a range of rights and interests of the parties who are not before the court.¹⁸⁰

Judicial capacity cannot be dealt with in isolation; the concern of institutional competency is directly or indirectly linked to institutional security and the consequences that flow therefrom. In other words would the judiciary be able to survive political attacks on its independence. If the Constitutional Court should adopt authoritative legitimacy as a philosophy behind its social decisions, what is the guarantee that the other branches will acquiesce to its judgment hence its institutional reputation becomes at stake.

Judicial competency or incapacity is used interchangeably and it refers to the situation wherein the judiciary defers another branch of government on account skills and or problems posed by polycentricity.¹⁸¹ Given the finite nature of budgets and the fact that there are multitudes of seemingly valid ways in which to distribute them, decisions concerning the realisation of socio-economic rights are, due to their society-wide impact and almost inevitable budgetary implications, typically regarded as 'preponderantly polycentric'.¹⁸² Several factors point towards reasons why courts are not the appropriate forum to determine with precision socio-economic matters and as result deferring on this account would save the courts from embarrassment for want of effective compliance with its orders and also to maintain the courts' integrity. Judiciaries are presumed not to be suited and to be incapable of making polycentric decisions on the basis on numerous unique features of the litigations and what it entails before an informed decision could be reached that would ensure a sound resolution of the matter and compliance from litigators. For instance, the 'triadic' nature of the average judicial proceedings (consisting of two feudal parties appearing before a single judge), its adversarial nature and limits on the quantity and types of evidence before the court (whether due to the presentation of the case, the resources of the parties or the rules of evidence) make litigation unsuitable for the

¹⁸⁰ S Liebenberg ' Socio –Economic Rights adjudication under a transformative constitution 71-75

¹⁸¹ See also Marius Pieterse 'Coming to terms with judicial enforcement of socio-economic rights 396 for further analysis of the terms.

¹⁸² Ibid 24 supra at 393

resolution of polycentric issues.¹⁸³ Reasons such as large participations, logistics, policy options, complex issues that require different levels of engagement and the likes are not within the parameters of the judiciary and these factors make it more incapable of making an outright order. Factors such as judges' lack of economic expertise in deciding matters with budgetary consequences and/or specific specialist expertise in cases where the realisation of social rights involve specific technical/specialist field(s),¹⁸⁴ and, importantly, the fact that the judiciary is unable to execute its judgments itself and is therefore dependent on executive co-operation for its judgment to have credibility or impact reality.¹⁸⁵ I disagree with the notion that judges should defer on account of competency owing to the so-called polycentric issues. Judges do not have to be experts in the field. They could be inventive in nature by ordering that experts should be invited to make written submissions on the matter, even more, the court could actually set up a pre-litigation panel or a pre-trial conference where issues are reduced to give the court more room to make a finding on the matter rather than totally rendering itself incapable of adjudicating due to the aforementioned reasons. In comparison, civil and political rights issues are not less polycentric as to the socio-economic rights issues. Courts are experts in interpretation and are thus ideally suited to lend content to social rights and standards of compliance they impose. Meanwhile, the legal process is rational deliberation and is tailored towards producing fair and well-reasoned results.¹⁸⁶ Judges are educated, experienced and skilled in legal application and interpretation, and have the time and resources to properly deliberate issues before them. The judicial institutions should be progressive and transformed and should be creative towards finding ways to deal with polycentric issues instead of the foul cry and deferring on that account, suggesting lack of responsibility and transformation in our judiciary. The Indian courts, for example, have themselves played a pivotal role in this regard by appointing 'fact finding' commissions to get sufficient information before them.¹⁸⁷ More conventional options, such as requiring additional argument on certain issues, making more effective use of expert evidence or parties making

¹⁸³ J Hlope 'The role of judges in a transformed South Africa-problems, challenges and prospects' (1995) 112 SALJ

¹⁸⁴ *Ibid supra* at 58

¹⁸⁵ Marius Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' 394

¹⁸⁶ *Ibid supra*

¹⁸⁷ See PN Bhagwati 'Judicial activism and public interest litigation' (1985) 23 *Columbian J of Transformational L* 561. 574-75

more effective use of available access to information remedies should be explored.¹⁸⁸ Moreover, changes in the modus operandi when it comes to polycentric issues or adopting the inquisitorial system as opposed in cases of this nature could bring about needed transformation. Records show that the attitude and manner in which the Constitutional Court has in the past handled certain cases brought before it for adjudication especially matters pertaining to socio-economic rights. It is a clear indication that it does not want a direct confrontation with other government institutions. What the courts are after is to ensure that their institutional integrity remains intact. *Theunis Roux*¹⁸⁹ was of the view that ‘an examination of some of the Constitutional Court’s major decisions reveals that it, indeed, has acted strategically in this way, both in politically controversial cases, where it has used its flexible separation of powers doctrine to avoid direct confrontation with the political branches, and in more routine cases, where it has developed a number of context-sensitive review standards’.

Another important aspect to be considered in rebuttal of the reason proffered in support of judicial competence concerns is the issue of polycentric. Polycentric problems are not only limited to socio-economic rights enforcement but extends to the enforcement of virtually all rights, for instance, a decision of right to life requires the abolition of the death penalty. It requires provision for the re-sentencing of prisoners currently sentenced to death, as well as for the construction and maintenance of high security imprisonment facilities for those convicted of serious crimes.¹⁹⁰ This of course has implications for the justice system, for penal policy as well for the State’s budget. However, for the fact that a decision has polycentric implications does not necessarily render such matter unsuitable for judicial consideration and subsequent adjudication thereof. The only time it would be unwise and considered intrusive by the judiciary to step into the arena complicated polycentric issue is where a court does not have information or evidence relating to the far-reaching consequences of its order for other rights and State responsibility. Institutional competence concerns should be relaxed and should not be a bar against

¹⁸⁸ Marius Pieterse ‘Coming to terms with judicial enforcement of socio-economic rights 396

¹⁸⁹ *Theunis Roux* ‘Principle and pragmatism on the Constitutional Court of South Africa’ (2009) 7 106 see notes on the abstract

¹⁹⁰ See the illustrations given in *S Liebenberg* ‘Socio –Economic Rights adjudication under a transformative Constitution 71-75

the role of the judiciary in discharging their constitutional mandate and should not be a justification for the State's failure to provide certain social services.

Meanwhile, *Liebenberg*¹⁹¹ had argued thus, 'where a court does have a factual basis for reasonably predicting the consequences of the relief claimed and assessing its justifiability in the light of the constitutional requirements, institutional competence does not represent a barrier to the enforcement of the relevant right.' Failing to adjudicate in such case would represent an abdication of its duty to adjudicate and grant relief for violation of rights in the Bill of Rights.¹⁹² A substantive and transparent evaluation of the rights and values at stake and the facts placed before the court in a particular case is required to determine the nature and degree of judicial intervention that is reasonable and appropriate in a certain circumstance.¹⁹³ The fact that an issue is complex or has policy and resource implications is not a sufficient justification for the judiciary to abdicate its responsibility to interpret and enforce socio-economic rights whenever called upon to do so.¹⁹⁴

In a nutshell, the institutional competence often raised as a barrier against the adjudication and enforcement of socio-economic rights is a mere smoke-screen. A court stands in an impartial position and does not get involved in bureaucracy and politics often engaged by legislatures when issues of social ordering are being considered. The judiciary through its adjudicative role represents the voice of the poor masses and the marginalized in decision-making relating to their social status.

3.3.3 The Separation of Powers Concern:

The doctrine of separation of powers is a constitutional tool aimed at allocating powers and functions to different organs and spheres of government towards achieving a common goal for the State. These organs or what is sometimes loosely referred to as tiers of government are the executive, legislature and judiciary arms of government with distinctly defined boundaries and functions. They are said to be interdependent on one another in the execution of the government's constitutional mandate.

¹⁹¹ *S Liebenberg ' Socio –Economic Rights adjudication under a transformative constitution 71-75*

¹⁹² *Ibid 42 supra*

¹⁹³ *See Manqele v Durban Transitional Metropolitan Council 2002 (6) SA 423 (D), (2002) 2 All SA 39*

¹⁹⁴ *Ibid 44 supra*

The executive and legislative arms of government are elected by the electorate through the poll at the general elections and are entitled a certain period in office whereas the executive arms of government are appointed and not elected. Each of these arms must serve as a watchdog over the other branches in order to curtail abuse of power and/or related incidence; these are some of the founding principles and ideals underlying the separation of powers doctrine in a constitutional democracy. Meanwhile, the primary function of the legislature is to make law, amend law and repeal laws, the executive is primarily tasked with the enforcement and/or execution of the law, the judiciary on the other hand is mandated to interpret and adjudicate on what constitutes the law and related matters.

*Barber*¹⁹⁵ described the doctrine as ‘distinctively constitutional tool. It addresses itself to the authors of the Constitution; it enjoins them to match function to form in a way as to realise the goals set for the state by political theory.¹⁹⁶ Having decided that a particular goal ought to be striven after in a society, the doctrine then focuses our attention on the manner in which they may be achieved.¹⁹⁷

The separation of powers doctrine had been used as a basis of argument by other institutions claiming that the judiciary in its attempt to adjudicate and determine socio-economic rights in the society is usurping the powers and functions of other institutions that are legitimately entitled to decide on such issues. The proponent had argued and still argues that by so doing the judiciary is over-stepping its boundaries and such act is aimed at destroying the cherished democratic institution which is the cornerstone of a constitutional democracy. This position is directly linked to the counter-majoritarian argument. The counter-majoritarian were of the view that the judiciary lacked the legitimacy of setting aside the decision made by elected legislatures and executives in that the former were only appointed.

I will debunk this argument as baseless for lack of foundational comprehension of what the doctrine of separation of powers entails and the Constitutional roles of the judiciary in a constitutional democracy. In order to legitimise the exercise of state power in a democracy, constitutionalism must not only demarcate the extent of state

¹⁹⁵ *NW Barber ‘Prelude to the Separation of Powers’ (2001) 60 Cambridge LJ 59, 71-2*

¹⁹⁶ *Ibid 43 supra*

¹⁹⁷ *Ibid 147 supra*

power, but also establish mechanism aimed at ensuring that wielders of power are held accountable.¹⁹⁸

Etienne Mureinik summarized this idea by saying, 'that the new South African constitutional order was intended to create a culture of justification - 'a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decision, not the fear inspired by the force at its command.'¹⁹⁹ However, the need for accountability and justification exists also in relation to the exercise of state power in the socio-economic paradigm, where government decisions impact greatly on the enjoyment of several fundamental rights.

The separation of powers doctrine's core aim is to enhance democracy, increase accountability and efficiency and protecting the fundamental rights of the citizenry against tyranny.²⁰⁰

3.4 Conclusion

Legal legitimacy, public support, and institutional security are clearly interrelated, in a democratic state such as ours; the Constitutional Court should endeavour to do everything in its power to garner public support. This would counter the majoritarian argument. Judicial pragmatism, creativeness and radicalness and more so, inventiveness is needed. The approach of the Constitutional Court of India lends credence to this view. Wherein the judiciary will engage the services of fact-finding commissions to submit reports to it, to enable it to arrive at an informed decision on the matter, should be emulated. Expert evidence on the subject matter should be requested and submission made in that regards. More evidence should be ordered by the court on a particular issue to enable it apply its mind instead of deferring to the other branches. The *Mazibuko* case illustrated the court's unwillingness to make a precise finding on what constitutes 'adequate sufficient water' per day for a family. The court rather ruled that this kind of decision would be better left off for the other branches because as a court, it lacked the institutional capacity and competence to

¹⁹⁸ M Beutz 'Functional Democracy: Responding to Failures of Accountability' (2003) 44 *Harvard Int LJ* 387;430, see also Marius Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' 394

¹⁹⁹ E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31

²⁰⁰ See PB Kurland 'The Rise and Fall of the 'Doctrine of Separation of Powers; (1986) 85 *Michigan LR* 592, 600-03

reach such finding. In so doing, the court was trying to safeguard its integrity and security of the judiciary. In my view, instead of the court deferring on this account, there are other ways in which this could be avoided, making it possible for the court to make such decision without fear of the concerns it customarily raises when called upon to decide socio-economic rights cases and the answer is definitely yes. I am of the view that our courts could be more creative in carrying out their duties by inviting the parties to engage with each other practically, making use of expert findings on the issue(s) at hand and, if need be, appoint a fact-finding commission to assist the court. The Constitutional Court is the custodian of our law and at the same time, acts as a watchdog over the executive and legislative branches of government.

Accordingly, in *Mazibuko v City of Johannesburg*,²⁰¹ the court held that ‘Ordinarily it is institutionally inappropriate for a court to determine precisely what the achievements of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budget and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.’²⁰² There is a considerable burden on the shoulders of the judiciary to come up with a substantive means of holding the state accountable for the positive obligations of socio-economic rights. My view is that the judiciary should as a matter of necessity stop falling back on the flimsy excuses which suggest that it is precluded from making a decision on this terrain on the account of the formulation of separation of powers doctrine which it has adopted in the jurisprudence which forms my subject matter. In *Mazibuko v City of Johannesburg*²⁰³ the court had to define its role when faced with the enforcement of socio-economic rights. The courts were of the view that their role is secondary. It held: ‘the purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing litigation of this sort fosters a form of a participatory democracy

²⁰¹ 2010 4 SA 1 (CC)

²⁰² *Ibid supra* at para 60

²⁰³ 2010 4 SA 1 (CC)

that holds government accountable and requires it to account between elections over specific aspects of government policy.²⁰⁴

When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy; its investigation and research, the alternative considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held accountable to an impossible standard of perfection nor does it require courts to take over the tasks that, in a democracy, should be properly reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and in particular, the principles that government should be responsive, accountable and open'.²⁰⁵ This approach and understanding loses sight of the fact that litigants approach courts after the democratic process has failed. They do so on the basis that their interests are worthy of legal protection notwithstanding the fact that they are unpopular or have been overlooked in the democratic process.

I have also come to align my thoughts with the proposal made by *Danie Brand*²⁰⁶, which courts should rather adopt, an approach which he described as 'judicial prudence'. This approach would be a more coherent response to the institutional problem with reference to the institutional legitimacy and capacity concerns which often raise a Goliath to bar and/or deny claimants of their Constitutional rights. A further proposal made in this regard within the exercise of the judicial prudence is the idea of the judiciary to ensure that it carries the public along but not to only raise institutional concerns. The elements of substantive participatory democracy²⁰⁷ too should be seen more from the reasons of the courts' decision(s) on matters pertaining to socio-economic rights in order to avoid the exaggerated institutional problems as a reason for deference.

²⁰⁴ *Ibid*

²⁰⁵ *Ibid supra*

²⁰⁶ See in this regards, '*Danie Brand Judicial Deference and Democracy in Socio-Economic Rights cases in South Africa* 632 633

²⁰⁷ *Ibid* 157 *supra*

In a nutshell, institutional illegitimacy and capacity was the *Goliath* before the claimants in the decision of *Mazibuko* which the judiciary heavily relied on to refuse to make an order in favour of the claimants and the recommendation in this regard is that the judiciary should have been more prudent in its exercise when faced with issues of this nature.

CHAPTER 4

Lessons from the Adjudication & Enforceability of Socio-Economic Rights in South African and Indian Jurisprudence: A Comparative Exercise

1. INTRODUCTION

This chapter examines different landmark case laws within the South African jurisprudence, and India specifically, for successful account of pragmatic and creative measures adopted by the judiciary in an attempt to enforce socio-economic rights. In so doing, I will endeavour to provide a clear analysis of the different cases while highlighting the innovative and creative measures adopted by the judiciary in each of these accounts within its constitutional mandate, taking cognizance of the limitation and boundaries to ensure that it nevertheless does not encroach on other institutions.

The first case that would be considered, being my point of departure, would be the case of *Government of the Republic of South Africa and Others vs. Grootboom*²⁰⁸. This case is the first of its kind and regarded as a landmark case as far as South African jurisprudence dealing with socio-economic rights is concerned.

The above quoted case that would be considered subsequently is of greater importance and approach adopted by the judiciary in its adjudication is worthy of emulation towards enforcement of socio-economic rights

²⁰⁸ 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)

Notably, the Constitutional Court's ruling in *Grootboom* is unique in that it differentiates between those who can afford to acquire adequate housing and those who cannot, which Sunstein calls "a novel approach to socio-economic rights... uses sensible priority setting, with particular attention to the plight of those who are the neediest".²⁰⁹ The issue of adequate housing must be approached on a case-by-case basis and it is the state's obligation to provide a program that is flexible enough to respond to these needs.²¹⁰ The Constitutional Court's judgment was novel in a different respect because it linked socio-economic rights, rights traditionally seen as unenforceable by the judiciary with political and civil rights. It has been further emphasized that 'there can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in the Constitution.'²¹¹

In India, the case of *Olga Tellis V. Bombay Municipality Corporation Supreme Court of India* represents a landmark decision as far as social ordering is concerned. This case is quite importance and serves as a great example to other nations and the judiciary when called upon to interpret or adjudicate the provisions or contents of socio-economic rights. In this case, the court interpreted the right to life to include the right to livelihood and what makes life liveable in terms of Article 21 of the Indian Constitution²¹² and ordered the State to provide the petitioners with alternative accommodation. In a similar vein, in the case of *People's Union for Civil Liberties v. Union of India and Others 2001 (PUCL)*²¹³, the Supreme Court held that 'the anxiety of the court is to see that the poor and the destitute and the weaker sections of the society do not suffer from hunger and starvation'. The prevention of the same is one of the prime responsibilities of the government –whether central or state. It was the court's view that mere schemes without any implementation are of no use. These case studies will be analysed in search of lessons worth learning.

²⁰⁹ See also in this regard the work of Sunstein, Cass R. 2001. 'Social and Economic Rights? Lessons from South Africa'. John M. Olin Law and Economics Working Paper No. 124.

²¹⁰ *Government of the Republic of South Africa and Others vs. Grootboom (Grootboom) 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).*

²¹¹ *The Constitution of the Republic of South Africa 1996*

²¹² *The Indian Constitution of 1950*

²¹³ *People's Union for Civil Liberties v. Union of India and Others 2001 (PUCL)*

4.2 Government of the Republic of South Africa and Others vs. Grootboom (Grootboom) 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)

The facts of the case briefly are that the applicant(s) (Grootboom), including a number of children, had moved onto private land from an informal settlement owing to the "appalling conditions" in which they were living.²¹⁴ They were evicted from the private land that they were unlawfully occupying. Following the eviction, they camped on a sports field in the area. However, they could not erect adequate shelters as most of their building materials had been destroyed. They applied to the Cape High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. The order was granted pursuant to section 28(1) (c) of the Constitution²¹⁵, which guarantees the right of children to, among other things, shelter.

On appeal by all three spheres of government (national, provincial and local) to the Constitutional Court, the South African Human Rights Commission and the Community Law Centre (University of the Western Cape) intervened as amici curiae in the case. Although the parties to the case focused their arguments on section 28(1)(c) of the Constitution (the right of every child to shelter), the amici broadened the issues to include a consideration of section 26 of the Constitution, which provides for the right of access to housing. They essentially argued that all members of the community, including adults without children, were entitled to shelter because of the minimum core obligation incurred by the State in terms of section 26 of the Constitution.

The Constitutional Court, after due consideration of all submissions made by parties to the proceedings held, *inter alia*, gave reasons for its decision, "that the question was not whether socio-economic rights were justiciable under the Constitution, but "how to enforce them in a given case." This could not be decided in abstract, but would have to be "carefully explored on a case-by-case basis."²¹⁶ The Court held that the state had an obligation to ensure, at the very least, that the eviction was executed humanely. The fact that the eviction was carried out a day earlier and that

²¹⁴ *Government of the Republic of South Africa and Others vs. Grootboom (Grootboom) 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).*

²¹⁵ *The Constitution of the Republic of South Africa 1996 (hereinafter referred to as 'The Constitution').*

²¹⁶ *Ibid 1 supra at (para 20)*

the possessions and building materials of the respondents were destroyed and burnt amounted to a breach of the negative obligation embodied in the right of access to adequate housing recognised under section 26(1) of the Constitution.

It further held that housing "entails more than bricks and mortar". It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have "access to" adequate housing, all of these conditions must be met: "there must be land, there must be services and there must be a dwelling."²¹⁷ A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of housing, "but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing." The state's duty is to "create the conditions for access to adequate housing for people at all economic levels of our society."²¹⁸

The Court rejected the contention that section 26(1) created a minimum core obligation to provide basic shelter enforceable immediately upon demand. It held that section 26(1) should be read together with subsection 2, which enjoins the state to realise this right progressively within available resources. Thus, in any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be "whether the legislative and other measures taken by the state are reasonable."²¹⁹ The Court emphasised that it would not enquire "whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The housing programme must include measures that are reasonable both in their conception and in implementation. A given measure will pass the reasonableness test if it is comprehensive and well-coordinated; is capable of facilitating the right in question, albeit on a progressive basis; is balanced, flexible and does not exclude a significant segment of society; and responds to the urgent needs of those in desperate circumstances.

The Court interpreted the phrase "progressive realisation" in section 26(2) to impose a duty on the state to progressively facilitate the accessibility of housing by

²¹⁷ *Ibid* at (para 33)

²¹⁸ *Ibid. see* (para 35) in this regard

²¹⁹ *Ibid* at para 46

examining legal, administrative, operational and financial hurdles and, where possible, lowering these over time. Housing should be made accessible "not only to a larger number of people but to a wider range of people as time progresses". The phrase "within available resources" was interpreted to mean that "both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. According to the Court, section 26²²⁰ "does not expect more than what is achievable within (the state's) available resources".

In the present case, it was held that, although the programme satisfied all the other requirements of the reasonableness test, it was nevertheless unreasonable in that "no provision was made for relief to the categories of people in desperate need". The state was therefore found to be in violation of section 26(2) of the Constitution. Accordingly, a declaratory order was made requiring the government to act to meet the obligations imposed on it by section 26(2), which included the obligation to devise, fund, implement and supervise measures aimed at providing relief to those in desperate need.

The Court found no violation of the right of children to shelter in terms of s 28(1) (c), contrary to the High Court's decision, holding that the State incurs an immediate obligation to provide shelter only in respect of those children who are removed from their families. The primary duty to fulfil the children's socio-economic rights as envisaged in section 28(1)(c) rests on the parents or family and only, failing such care, on the State. As children in this case were under the care of their parents or families, the Court did not grant any relief based on section 28(1) (c). However, the court emphasised that this did not mean that the state incurred no obligation towards children who were being cared for by their families. The state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated in section 28²²¹. In addition, the state is required to fulfil its obligations to provide families with access to land in terms of section 25 of the Constitution, access to adequate housing in terms of section 26 of the Constitution as well as access to health care, food, water and social security in terms of section

²²⁰ *The Constitution of the Republic of South Africa 1996*

²²¹ *Ibid*

27 of the Constitution. These sections require the state to provide this access on a programmatic and coordinated basis, subject to available resources.

In the this present case, after considering submissions made by counsels in support and against the relief sought, the court accordingly, for the first time, found the state to be in violation of section 26(2) of the Constitution. Accordingly, a declaratory order was made requiring the government to act to meet the obligations imposed on it by section 26(2), which included the obligation to devise, fund, implement and supervise measures aimed at providing relief to those in desperate need. The kind of order that was made in this case is worth analysing. A declaratory order was made by the court for the provision of relief for the categories of persons in that situation. This case is a landmark case in international jurisprudence, marking the first time in any nation that a Constitutional Court enforced the constitutionality of a socio-economic right, giving legitimacy to the so called second-generation of citizen rights.²²² As can be seen from the above decision, the court did not interpret the right to adequate housing as an obligation of the state to provide housing for everyone, but “require[d] special deliberative attention of the State to those whose minimal needs are not being met.”²²³ Socio-economic rights such as the right to housing, the right to food and clothing, and the right to education were widely considered a no go area for the judiciary and claimants. In other words, they were regarded to be judicially unenforceable prior to Grootboom owing to principles of “democratic prerogatives and the limited nature of public resources.” Furthermore, on account of separation of powers and other related factors, the adjudication of socio-economic rights was rendered worrisome. Firstly, socio-economic rights were inherently vague and lacked juridical precedent. They lacked precedents and most judiciaries were wary of being labelled and thereby undermined the legitimacy and security of the judiciary institution. For example, some of the concerns being nurtured were, if a government guarantees the right to adequate housing, what does “adequate housing” mean? Is it shelter alone? Shelter and access to water? Shelter, water, electricity and sewer services? Or does it include all of these in a community with access to job opportunities as well? How a country defines this for itself has wide implications.

²²² Williams, John J. 2005. *“The Grootboom case and the constitutional right to housing: the politics of planning in post-apartheid South Africa*

²²³ See also in this regard the work of Sunstein, Cass R. 2001. *‘Social and Economic Rights? Lessons from South Africa.* John M. Olin Law and Economics Working Paper No. 124.

Secondly, socio-economic rights are “positive” rights as opposed to civil-political rights which are “negative” rights, the difference being that positive rights oblige others to act whereas negative rights require others to restrain themselves from acting.²²⁴ For example, the right to healthcare is a positive right. The state or other healthcare providers must take some action to fulfil this right. The right to freedom of speech is a negative right. Here, the obligation of both the state and citizens is to do nothing to impede the expression of anyone else. Positive rights generally have resource implications; they require the provision of a good or a service; whereas negative rights have far fewer implications. Finally, opponents of socio-economic rights have argued that the judiciary has no place to enforce social justice in a representative democracy since that should be the purview of the legislative branch.²²⁵

The Constitutional Court’s ruling in *Grootboom* is unique in that it differentiates between those who can afford to acquire adequate housing and those who cannot, which Sunstein calls “a novel approach to socio-economic rights... uses sensible priority setting, with particular attention to the plight of those who are the neediest”²²⁶. For those who can afford to pay, the state’s obligation lies in providing access to housing stock and implementing enabling legislation to make finance more accessible and changing master plans and zoning ordinances to allow for the construction of homes. For those who cannot afford to pay, the state’s obligation depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.²²⁷ The

²²⁴ See also <http://communitylawcentre.org.za/projects/socio-economic-rights/Cases/South%20African%20Cases/Constitutional%20Court%20Cases/summary-of-cas> accessed on 27th August 2015

²²⁵ Mbazira, Christopher. 2009. *Litigating Socio-economic Rights in South Africa; A Choice Between Corrective and Distributive Justice*. Pretoria, South Africa: Pretoria University Law Press.

²²⁶ See Sunstein, Cass R. 2001. *Social and Economic Rights? Lessons from South Africa*. John M. Olin Law and Economics Working Paper No. 124.

²²⁷ *Government of the Republic of South Africa and Others vs. Grootboom (Grootboom) 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)*. Court’s interpretation of the obligation on the state as may be deducted from court’s reasoning for its decision

issue of adequate housing must be approached on a case-by-case basis and it is the state's obligation to provide a programme that is flexible enough to respond to these needs. The Constitutional Court's judgment was novel in a different respect because it linked socio-economic rights, a right traditionally seen as unenforceable by the judiciary with political and civil rights.²²⁸ It further emphasized that there can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in the Constitution.²²⁹

In conclusion, Irene Grootboom died in 2008; penniless and homeless, still waiting for a decent home for herself and her family. It is indeed tragic and coincidental that the name of the first case enforcing a state's obligation to fulfil a socio-economic right would herself die before she attained that right, but Irene Grootboom was just one woman among millions of others living in deplorable conditions in nations that guarantee a right to housing. Today, millions of South Africans still live in circumstances similar to Irene Grootboom. However, the ruling did provide a powerful tool for communities under threat of eviction to fight for their rights and constituted the first building block of an expanding right-to-housing law. It was the beginning of a juridical precedent that had been absent from the enforcement of socio-economic rights.²³⁰ The South African government also implemented an emergency housing assistance programme as mandated by Grootboom which "aims to be a responsive, flexible and rapid programme to address homelessness, hazardous living conditions, and temporary or permanent relocation of vulnerable households or communities" through on-site assistance, relocation assistance, formal housing repairs or reconstruction.

4.3 OLGA TELLIS V. BOMBAY MUNICIPALITY CORPORATION SUPREME COURT OF INDIA, 1985 (AIR 1986 SUPREME COURT 18)

²²⁸ *Ibid* 14 *supra*

²²⁹ *Ibid* 15 *supra* at para 19

²³⁰ *Government of the Republic of South Africa and Others vs. Grootboom (Grootboom) 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).*

Olga Telis²³¹, case provides a classic illustration of the Court's activism relating the successful adjudication of socio-economic rights despite its limping status within this regime. However, before I consider this case, I would give a brief exposition of the Indian constitutional principles as far as civil and political rights are concerned.

The Indian Constitution of 1950²³² contains one chapter dealing with 'fundamental rights' which consists largely of civil and political rights which figure in litigation shows a wide range of claims, and another chapter dealing with 'directive principles of state policy'.²³³ Article 21²³⁴ provides that 'no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 37 contains directive principles contained in part five of the Constitution, provides that this part shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws. For instance, Article 39²³⁵ provides that 'the state, in particular, direct its policy towards securing

- (a) That the citizens, men and women equally have the right to an adequate means of livelihood;
- (b) That the ownership and control of the material resources of the community are distributed as best to subserve the common good;
- (c) That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
- (d) That there is equal pay for equal work for both men and women;
- (e) That the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength ;
- (f) Those children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

²³¹ *Olga Tellis V. Bombay Municipality Corporation Supreme Court of India*

²³² *The Indian Constitution of 1950 (hereinafter referred to as the Constitution)*

²³³ See Henry J. Steiner et al 'International Human Rights in Context' 3rd ed (Oxford Press) 321-327

²³⁴ *Ibid* 23 *supra*

²³⁵ *Ibid* 23 *supra*

Article 41 in the same spirit and purport provides ‘ that the state shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want’.

4.3.1 Summary of the facts and the Court’s decision

The petitioners here challenged certain Provisions (Sections 312 to 314) of the Bombay Municipal Corporation Act, 1888 as being violative of Articles 14, 19 and 21 of the Constitution.²³⁶ The first two provisions insisted that the permission of the Municipal Commissioner had to be obtained before constructing permanent or temporary constructions on public streets/ways. The last provision, which was the most contentious one, gave the Commissioner the power to evict, without notice, such occupants of public ways who had violated the other two provisions. The petitioners consisted mostly of slum dwellers, pavement dwellers and some socially conscientious journalists. The pavement dwellers had come to the city for purposes of employment in various industries and had settled down on roads and pavements which gave them proximity to their places of work. They contended that if they were evicted, it would amount to depriving them of their livelihood and deprivation of livelihood was akin to deprivation of life itself which was guaranteed by Art. 21. The court, in its oft quoted ruling affirmed that the right to life included right to livelihood and eviction from their dwellings was indeed a deprivation of livelihood. Consequently, the decision to be made was whether the procedure involved in such deprivation was in fact just, fair and reasonable, in order to bring it within the ambit of Art. 21.

The court, at the very outset, declared that the provisions were not arbitrary considering the fact that the occupants who would fall within the swathe of section 314 were illegal dwellers and they had created considerable public nuisance and obstruction. The court then proceeded to understand the tenor of the impugned provision. The provision merely says that the commissioner ‘may’ without notice evict illegal occupants. It was only an enabling provision. By necessary implication, it meant that if ordinary course notice was to be given and it was only in special and

²³⁶ See *Olga Tellis V. Bombay Municipality Corporation Supreme Court of India*

extraordinary circumstances that he could dispense with the need for a notice. The onus of proof would then fall on the state to prove such exceptional circumstances.

Taking into consideration the special nature of the case, the court went on to undertake the role of the commissioner. It ordered that the dwellers would be evicted only one month after the end of the rainy season (date specified). The state was also directed to give alternate accommodation to certain dwellers. This was not a condition precedent for eviction and was merely to give effect to certain earlier assurances by the government.

4.3.2 Analysis and discussions

Over the years, the Indian courts as well as the legislature have redefined the relationship between fundamental rights and directive principles contained in the Indian Constitution of 1950. The court has approached the two in an integral manner, one the result of which is to give some directive principles the status of fundamental rights.²³⁷

The facts of the case as being described by Henry Steiner²³⁸, were that the petitions before the court portrayed the plights lakhs (hundreds of thousands) of persons who live on pavements and in slums in the city of Bombay, just as it can be seen in our streets today such as Hilbrow in Johannesburg, Sunnyside in Pretoria and many other places. These people constitute half the population of the city. Some of those who have made pavements their home exist in the midst of filth and squalor, which has to be seen to be believed. The situation of these homeless thousands that live on the pavement in the city of Bombay had been described as 'rabid dogs in search of stinking meat and cats in search of hungry rats keep them company'.

The city of Bombay wanted to evict these people without alternative shelter or the like being made available. It was these men and women who approached the court to ask for a judgment that they not be evicted from their squalid shelters without being offered alternative accommodation.

²³⁷ See in this regard Henry J. Steiner et al 'International Human Rights in Context' 3rd ed (Oxford Press) 321-327

²³⁸ Ibid 28 supra

They relied, *inter alia*, for their rights in terms of Article 21 of the Constitution which guarantees that no person shall be deprived of his life except according to procedure established by law. Meanwhile, they did not aver that they had rights to dwell on the pavements. Their main contention was that they had a right to live, a right which cannot be exercised without means of livelihood which is ultimately shelter.²³⁹

The court, after considering the submissions from counsels for the city of *Bombay* and that of the applicants, cited the following as reasons for its decision. At para 32, the court asserts that 'for the purpose of argument, it will assume the factual correctness of the premise that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood'²⁴⁰. Upon assumption, the question which has to be considered is whether the right to life includes the right to livelihood. The court responded in the affirmative, indeed that it does. The court further held that the 'sweep of the right to life conferred by Article 21 is wide and far-reaching'. The court held convincingly, 'that that which alone makes it possible to live, leaving aside what makes life liveable, must be deemed to be an integral component of the right to life.'²⁴¹ It was the court's view, that if a person is deprived of his or her right to livelihood, that person is ultimately deprived of his/her right to life which is fundamental.

These are the major reasons why most people migrate from rural to big cities in search of greener pastures and do not care if they sleep under the bridge or on the pavements. This they do in anticipation to make life liveable.

The court referred to Article 39(a) which is a Directive Principle of the State Policy to buttress its decision. In terms of this article, it is provided that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. The court reiterated that the Principles contained in Article 39(a) and 41 of the Constitution must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. The court further held that, 'if there is an obligation upon the State to secure for the citizens an adequate means of livelihood and the

²³⁹ *Olga Tellis V. Bombay Municipality Corporation Supreme Court of India, see also Henry J. Steiner et al 'International Human Rights in Context' 3rd ed (Oxford Press) 321-327*

²⁴⁰ *Ibid.*

²⁴¹ *Ibid 31 supra*

right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life.²⁴² It held further in paragraph 35 that ‘it would be unrealistic on the part of the court to reject the petitions on the ground that the petitioners have not adduced evidence to show that they will be rendered jobless if they are evicted from the slums and pavements’. Common sense, which is a cluster of life’s experience, is often more dependable than rival facts presented by warring litigants. As a result of the above reasons, the court found in favour of the applicants that they city of Bombay had a duty to provide these homeless people with alternative accommodation.

Two conclusions inevitably emerged from the this case, firstly, that the right to life which is guaranteed by Article 21, includes the right to livelihood; secondly, that it is made firm that if the petitioners are evicted from their dwellings, they would be deprived of their livelihood. One should be reminded that the Constitution does not put an absolute bar on the deprivation of life or personal liberty. In terms of Article 21 of the Constitution, such deprivation has to be according to procedure established by law.²⁴³

4.4. Conclusion:

In view of the above, India provides one of the best examples in the world alongside South Africa in terms of Justiciability of economic, social and cultural rights. For example, the right to life was interpreted extensively by the Supreme Court of India to include right to food.²⁴⁴ In 2001, the PUCL approached the Supreme Court on behalf of starving people. The original petition filed only addressed the situation in six states, but the Supreme Court broadened its scope to cover the entire country.²⁴⁵ For the Supreme Court, the government has a direct responsibility to prevent starvation. In the case of *People’s Union for Civil Liberties v. Union of India and Others 2001 (PUCL)*, the Supreme Court held that ‘ the anxiety of the court is to see that the poor and the destitute and the weaker sections of the society do not suffer

²⁴² *Ibid supra*

²⁴³ See also the comments in Henry J. Steiner et al ‘*International Human Rights in Context*’ 3rd ed (Oxford Press) 321-327 in this regard.

²⁴⁴ See <http://www.righttofood.org/wp-content/uploads/2012/09/ECN.42006441.pdf> accessed 30th August 2015. (Jean Zeigler, ‘Report on the Special Rapporteur on the Right to food, mission to India. See also Steiner et el ‘*International Human Rights in Context*’ 3rd ed (Oxford Press) 321-327 in this regard.

²⁴⁵ *Ibid 35 supra at 324*

from hunger and starvation. The prevention of the same is one of the prime responsibilities of the government, whether central or state.²⁴⁶ It was the court's view that mere schemes without any implementation are of no use.²⁴⁷ To ensure the fulfilment of the right to food, the Supreme Court directed that all destitute people be identified and included in the existing food-based schemes and directed that government should implement fully all these schemes.²⁴⁸

The Grootboom case a huge lesson as far as socio-economic rights litigations in the South African jurisprudence and other cases that emerged afterwards such as the case of Mazibuko²⁴⁹ serve as proof that socio-economic rights can be litigated and enforced by the judiciary. However, the ruling did provide a powerful tool for communities under threat of eviction to fight for their rights and constituted the first building block of an expanding right-to-housing law. It was the beginning of a juridical precedent that had been absent from the enforcement of socio-economic rights. Despite the fact that socio-economic rights are not guaranteed as justiciable rights in the Indian Constitution, Indian jurisprudence on social ordering through judicial activism and innovative judgment represent a system to be emulated.

The question thus remains, whether socio-economic rights can be litigated and enforced. The answer is obviously yes. We can learn a lot from the above jurisprudence. The other question that is often asked is that since most African Constitutions render these rights non-justiciable, how do we progressively encourage their adjudication and subsequent enforceability? In brief, one need not change its Constitution in order to encourage enforceability of these rights. The proposal is thus that the judiciary should adopt a common sense. It is said that common sense is not always common. Once the common sense was adopted in the above case studies, so was the indirect interpretation of socio-economic rights to that of civil and political rights, since one cannot exist without the other. For example, the right to life cannot be successfully enjoyed if one is deprived of shelter or right to food. Judicial activism and innovative interpretation are useful tools needed in this project.

²⁴⁶ *People's Union for Civil Liberties v. Union of India and Others 2001 (PUCL)*

²⁴⁷ *Ibid supra*

²⁴⁸ See *Henry J. Steiner et al 'International Human Rights in Context' 3rd ed (Oxford Press) at 325 in this regard*

²⁴⁹ *Mazibuko v City of Johannesburg 2010 (4)SA 1 (CC)*

CHAPTER 5

DISSERTATION CONCLUSIONS AND RECOMMENDATIONS

Firstly, judicial activism and innovative interpretation of the core contents and application of the provisions of socio-economics rights as opposed to the stance usually adopted by the courts, being 'judicial deference', would go a long way to ensure that the project of justiciability of social rights becomes achievable. In so doing, the theoretical understating of transformative democratic institutions, participatory democracy and representative democracy in particular, judicial activism and innovative interpretations of socio-economic rights provisions are the necessary tools needed to aid the enforcement and interpretation of the core contents of socio-economics rights by the judiciary.

Democracy may be defined as the government by the people, of the people and for the people. Traditionally speaking, democracy is divided into two namely; direct and indirect democracy. Direct democracy may be described as a situation where the members of the community or the state participate directly in the decision-making that affects their day to day life activities. This kind of democracy is suitable for homogeneous communities (smaller communities). On the other hand, indirect democracy, which is notoriously referred to as representative democracy, may be described as a situation where individuals elect or appoint two or more persons to represent and make decisions on their behalves. The later form of democracy is suitable and designed for a more complex society such as the majority of the country as we have it today. Representatives are elected or appointed to represent. The individuals give up their right to participate directly in the decision-making owing to the practical impossibilities that mars this form of democracy. Elected representatives derive their mandates on the account of majority votes garnered during election(s). Questions ought to be considered such as how the voices and interests of the minorities would be ensured and guaranteed in decision-making since such decisions are made in the form of the highest/majority votes. The second question that needs to be considered is how one would know if the decisions made by the representatives would suit the interests of the electorate, or put differently, how can I be sure that the decisions taken by someone I elected to make decisions

on my behalf would have been what I would have decided if I was given the opportunity to directly participate in such decision-making. How does one cure this lacuna (gap) or ensure that the helpless minority interests and voices are catered for? These questions and thoughts shaped my proposal in relation to workable measures which ought to be adopted towards the enforcement of socio-economic rights *vis-a-vis* the challenges and opposition raised against their enforceability. How does one hold the executive and the legislative arms of government accountable for their indecision regarding un-reasonability of social ordering? In lieu of the foregoing I propose for: (a) a representative-participatory democracy; (b) transformative constitutional democracy; (c) judicial activism and innovative interpretation; and (d) public interest oriented decisions.

5.2 Representative–Participatory Democracy

A representative-participatory democracy as envisaged by me would include the situation whereby the Constitution of a nation would make provisions, amongst other things, for the opportunity wherein the electorate is given the opportunity to air views regarding any proposed legislation or decision ought to be taken by the elected representatives. For instance, in the decision of *Mazibuko*²⁵⁰ wherein the Constitutional Court was invited to make a decision as to what would constitute sufficient water, it can be reiterated that the court declined to make this decision on the basis that this sort of issue would be better dealt with by the policy makers, that is, the institution equipped with such capacities. Against this background, I propose for a representative–participatory democracy which would ensure that the policy makers endeavour to garner the opinion of the people on the ground during the stage of policy drafting and determinations. A constitution should not only envisage a procedural representative democracy but also one that takes the substance into account. Substantive participatory democratic principles are a viable option and would ensure that the interests of the vulnerable amongst us are taken into account in the process of policy formulation that shape our social ordering and the likes.

²⁵⁰ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC)

This idea requires that not only the process of electing representative members or only the institutions should be left with the duty of social ordering or making the decisions that affect all lives to the exclusion or to the detriment of the voiceless and minority amongst us. Opportunity for participation should be made available for people to make use of if they so wish. It also requires that the state agencies should work to enhance the capacity of the people to participate in political life and social decision-making.²⁵¹ The ideal of representative participatory democracy should be encouraged or adopted to aid the enforcement and adjudicative interpretation of socio-economic rights.

5.2.1 Transformative Constitutional Democracy:

In a seminal article published by Karl Klare in the year 1998, Karl described the Constitution²⁵² as entailing a project of ‘transformative constitutionalism’. He further described the project which the constitutions had set to achieve as:

A long-term project of constitutional enactment, interpretation and enforcement committed to transforming a nation’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.²⁵³ Transformative constitutional democracy connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.²⁵⁴ The Constitution does not provide a comprehensive blueprint for a transformed society nor stipulate the precise processes for achieving it. Instead, it provides a set of institutions, rights and values for guiding and constraining processes of social change. Active debate and contestation concerning the nature of social change, and the political and legal reforms necessary for achieving it, should not be viewed as antithetical to transformation, but rather as integral to its achievement.²⁵⁵

²⁵¹ See also Danie Brand ‘Judicial deference and Democracy in Socio-Economic Rights Cases in South Africa’ 615 -637

²⁵² *The Constitution of the Republic of South Africa 1996* (hereinafter referred to as ‘the Constitution’)

²⁵³ K Klare ‘Legal Culture and transformative constitutionalism’ (1998) 14 SAJHR 146- 188 at para 150

²⁵⁴ *Ibid* 204 *supra*

²⁵⁵ See Sandra Liebenberg ‘Socio-Economic Rights adjudication under a transformative constitution’ 24- 40

The South African Constitution, with its transformative agenda in mind, aimed not only towards re-dressing the injustices of the past, but also embodied a forward-looking Constitution that needed to shape the future and social status of its citizenry and, as a result, created various mechanisms for holding the State and private actors accountable for violations of socio-economic rights. States institution supporting democracy, such as the South African Human Rights Commission, the Commission for Gender Equality and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, are given particular constitutional obligations in relation to promoting, monitoring, investigating and reporting on human rights.²⁵⁶ The Constitution further accords the Human Rights Commission the specific task to monitor socio-economic rights.²⁵⁷ The status of socio-economic rights in the South African Constitution signifies Justiciability and, as a result, the Constitution vests an important role with the judiciary to interpret these rights and consider claims based on these rights seriously towards developing new and innovative remedies for a breach or a threatened breach of these rights.²⁵⁸ Through the interpretation of the socio-economic rights, courts have a limited, but nevertheless significant role to play in facilitating democratic transformation.²⁵⁹

Developing the normative content of socio-economic rights and highlighting the nature and scope of the duties they impose on public and private actors are fundamental responsibilities of the courts under a transformative constitutional democratic dispensation of a nation. Paying much attention to the substance of these rights by employing a more generous and substantive interpretation would be a needed tool to drive this project. *Sandra Liebenberg* was of the view that 'a substantive interpretation of socio-economic rights is central to promoting the transformative agenda of the South African Constitution for a number of reasons. Some of the reasons proffered, for instance, were where people lack access to

²⁵⁶ These institutions are created in chapter 9 of the South African Constitution 1996 and are regulated by specific statutes such as the Human Rights Commission Act 54 of 1994, the Commission on Gender Equality Act 39 of 1996, and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002.

²⁵⁷ See section 184 (3) of the Constitution; D G Newman 'International monitoring of social and economic rights: A South African case study and new research agenda' (2003) 19 SAJHR 189-216

²⁵⁸ It's common parlance that the Constitution vests in competent courts a broad discretion to grant 'just and equitable remedies for breaches of any provision in the Constitution, see also section 172(1)(b)

²⁵⁹ See Sandra Liebenberg 'Socio-Economic Rights adjudication under a transformative constitution' 24- 40

important socio-economic needs; the deliberative and participatory purposes of the Constitution are undermined. Hence the courts are given the power to determine the scope and applications of these rights. If the court adopts a narrow interpretation, the human rights guaranteed in governance would be diminished and transformation would be dragged or would not materialize.

A transformative constitutional democratic principle is a necessary tool to be used towards the progressive and successful interpretation, adjudication and enforcement of socio-economic rights.

5.2.2 Judicial Activism and Innovative Interpretation

Judicial activism and innovative interpretation of the provisions of socio-economic rights is necessary and very useful tool towards adequate enforcement and adjudication of socio-economic rights. Judicial activism, in my view, is a process whereby the judiciary should be more committed with regards to its mandate to ensure that justice is done and seen to be done in all sectors taking into account all the surrounding circumstances. It should rise up to the occasion and discharge its functions by asking certain questions with a view of holding the other institutions accountable through the principles of check and balances. The judiciary in this guise should actually serve as a watch-dog over the executive and the legislative bodies to ensure that they deliver in line with the dictates of the Constitution.

Well-structured innovative interpretive tactics and robust remedies are what the judiciaries are expected to arm themselves with when called upon to adjudicate the provisions of socio-economic rights. India is good example despite the fact that socio-economic rights are non-justiciable in terms of its Constitution. However, the judges interpreted the provisions generously to determine the constitutional demands of the state with regards to the normative contents of socio-economic rights of the Indian citizenry. In India, the case of *Olga Tellis V. Bombay Municipality Corporation* (Supreme Court of India) represents a landmark decision as far as social ordering is concerned. The court interpreted the right to life to include the right to livelihood and what makes life liveable in terms of Article 21 of the Indian Constitution and ordered the State to provide the petitioners with alternative

accommodation.²⁶⁰ Upon assumption in this case, the question which had to be considered was whether the right to life includes the right to livelihood. The court responded in the affirmative. The court further held that the ‘sweep of the right to life conferred by Article 21²⁶¹ is wide and far-reaching’. It held convincingly, ‘that that which alone makes it possible to live, leaving aside what makes life liveable, must be deemed to be an integral component of the right to life. The same approach was adopted in the case of the Constitutional Court’s ruling in *Grootboom*²⁶², which is unique in that it differentiates between those who can afford to acquire adequate housing and those who cannot, which Sunstein calls “a novel approach to socio-economic rights, using sensible priority-setting, with particular attention to the plight of those who are the neediest.”²⁶³

However, the enforcement of socio-economic rights often requires the imposition of positive duties on the State, and sometimes on the private parties, to extend access to social and economic resources to those who currently lacks such access. The enforcement of socio-economic rights may also require mandatory orders against the executive, and even in appropriate cases, structural interdicts involving ongoing judicial supervision of their implementation.²⁶⁴ Meanwhile, the broad powers of the court to grant ‘just and equitable’ remedies to remedy constitutional defects provide ample scope for innovative remedies in the context of socio-economic rights litigation.²⁶⁵ Courts are however, required to evaluate, in the circumstances of each socio-economic rights case, which type of remedy would be most effective in protecting the rights and values at stake. In this guise, courts are at liberty to craft transformative remedies which are in line with the spirit and purport of a transformative democratic institution, taking into account the practical realisation of its remedies proposed in each given case.

Public interest oriented judgment rests on the notion and argument being raised by the executive and legislative bodies that the ‘judiciary lacks the legitimacy to decide

²⁶⁰ See *Olga Tellis V. Bombay Municipality Corporation Supreme Court of India*

²⁶¹ *The Indian Constitution of 1950*

²⁶² *Government of the Republic of South Africa and Others vs. Grootboom (Grootboom) 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)*

²⁶³ See also in this regard the work of Sunstein, Cass R. 2001. ‘Social and Economic Rights? Lessons from South Africa’. John M. Olin Law and Economics Working Paper No. 124.

²⁶⁴ *Ibid* 10 *supra* at 76

²⁶⁵ *Ibid* 17 *supra*

socio-economic rights issues. On the basis of this argument and in an attempt to debunk it, I proposed that the judiciary should ensure that the public rallies behind its judgement. In this vein, later argument would hold little or no water since the judiciary represents the interests of the population or those without the means to challenge the policies of the government. When decisions regarding social ordering are made, the judiciary should ensure that it conforms to the will of the people.

5.3 DISSERTATION CONCLUSIONS

The judiciary had in the past raised concerns relating to institutional capacity, institutional legitimacy, institutional security, institutional integrity and institutional comity as reasons why its hands are tied when invited to deal and pronounce on the arbitrary infringements of socio-economic rights. These issues and fear can be seen in ample case laws on this subject. Some writers had identified this issue as one of the factors for the staggering status of Socio-Economic rights in Africa, which I had entitled 'between the Red Sea and Pharaoh' or the 'Goliath' that stands in the way of socio-economic rights from attaining their rightful position in the class of rights. These fears would be a thing of the past if the judiciary would become more active and innovative when going about its duties.

For the effective and progressive enforcement of socio-economic rights, the judiciary needs to re-valuate the purpose and philosophical ideals on which a democratic principle is built, especially a democratic constitutional democracy that aims to alleviate poverty and transform the social status of its citizenry.

In so doing, the judiciary would require certain mechanisms or tools to successfully interpret, adjudicate and enforce the provisions of socio-economic rights within the ambit of transformative constitutional democratic order. These tools include, but are not limited to: a representative-participatory democratic ideology and philosophical comprehension; judicial activism and innovative interpretation; public interest oriented decisions; domestic and institutional monitoring mechanisms.

Most countries' jurisprudence does not enforce socio-economic rights because their Constitutions do not guarantee their enforcement nor pave the way for their enforceability. The United Nations have been expressing a divisionary role when it

comes to the enforcement of such rights. The mechanism and other manners proposed for their enforceability seems to be slow and sluggish towards achieving the desired goal of the project. However, one of the growing and effective instruments viable is the judiciary. Our courts stand in a very strategic position towards achieving this goal. Example of Courts seen as viable instrument towards enforceability of socio-economic rights in Africa and elsewhere can be seen in South African jurisprudence and other nations like India.

The notion of indirect enforcement of socio-economic rights; prioritizing of the categories of human rights to reflect state policy; re-imagining or re-defining socio-economic rights from a transformative participatory democracy vantage and investigating its normative contents as was indicated in this research would ensure the successful adjudication and enforcement of socio-economic rights.

BIBLIOGRAPHY

Constitutions:

The Constitution of the Republic of South Africa 106 of 1996

The Interim Constitution 1993

The Indian Constitution of 1950

Case Law:

Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 1996 (4) SA 744 (CC), 1996 (10)

BCLR 1253 (CC)

Inter-Am. Ct. H.R., Baena Ricardo et al. Case, Judgment of Feb. 3, 2001 (Ser. C) No. 72

Lindiwe Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC)

Manqele v Durban Transitional Metropolitan Council 2002 (6) SA 423 (D), (2002) 2 All SA 39

Government of the Republic of South Africa and Others vs. Grootboom (Grootboom) 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

OLGA TELLIS V. BOMBAY MUNICIPALITY CORPORATION SUPREME COURT OF INDIA, 1985 (AIR 1986 SUPREME COURT 18)

People's Union for Civil Liberties v. Union of India and Others 2001 (PUCL)

Statutes:

Human Rights Commission Act 54 of 1994, the Commission on Gender Equality Act 39 of 1996, and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002.

Books:

Henry J Steiner et al, 'International Human Rights in Context'

Yash Ghai & Cottrell, 'Economic, Social & Cultural Rights in Practice: The role of judges in implementing Economic, Social and Cultural Rights'

Jones and Stokke, 'Democratising Development: The Politics of Socio-Economic Rights in South Africa' 2005 Martinus Nijhoff Publishers and vsp.

Danie Brand and Sage Russell, 'Exploring the core content of Socio-economic rights: South African and international perspectives.'

Fons Coomans, 'Justiciability of Economic and Social Rights: Experience from Domestic Rights.'

Sandra Liebenberg, 'Socio-Economic rights-adjudication under a transformative constitution'

L M Du Plessis & H Corder, 'Understanding South Africa's Bill of rights (1994) chapter 1.'

J Seekings & N Nattrass Class, 'Race and inequality in South Africa (2006) 6'

Journals/Articles:

DM Davis 'Adjudicating the Socio-economic Rights in the South African Constitution: Towards 'Deference Lite'? (2006) 22 SAJHR 301'

Stuart Wilson, 'Judicial Enforcement of the right to protection from Arbitrary Eviction: Lesson from Mandelaville'. (2006) 22 SAJHR 535'

Marius Pieterse, 'Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services'. (2006) 22 SAJHR 473'

Marius Pieterse, 'Coming to terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 SAJHR 383'

Kelvin Iles, 'Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses' (2004) 20 SAJHR 448.

Thomas J Bollyky, 'R IF C =P+B: A Paradigm for Judicial Remedies of Socio Economic Rights Violations' (2002) 18 SAJHR 161.

Sandra Liebenberg, 'South Africa's evolving jurisprudence on socio economic rights: An effective tool in challenging poverty'

South African Law Journal on Human Rights', Vol.22 (2006)

Christopher Heyns, 'South African Law Journal on Human Rights', Vol.22 (2006) p673-677

South African Law Journal on Human Rights', Vol.20 (2004)

South African Law Journal on Human Rights', Vol.18 (2002)

Danie Brand, 'Introduction to socio-economic rights in the South Africa Constitution'153

D Omar 'Enforcement of social and economic rights' in A Bill of Rights for A Democratic South Africa (1991) 106-114.

S Terreblanche 'A History of inequality in South Africa 1652-2002 (2002) specifically chapter 5-8

D M Davis 'The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles' (1992) 8 SAJHR 475-490

ANC A Bill of Rights for a Democratic South Africa: Working draft for Consultation reproduced in (1991) 7 SAJHR 110-123

N R Mandela 'Address: on the occasion of the ANC's Bill of Rights conference' in A Bill of Rights for Democratic South Africa: Papers & Report of a Conference Convened by the ANC Constitutional Committee, May (1991) 9-14 (unreported)

H Corder, S Kahanovitz, J Murphy, C O'Regan, J Sarkin, H Smith & N Steyter, 'A Charter for Social Justice': A Contribution of the South African Bill of Rights Debate (1992).

Tara Melish, 'Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System' 9-21.

Richard J. Goldstone 'A South African Perspective on Social and Economic Rights' Human Rights Brief 13, no. 2 (2006): 4-7.

Danie Brand 'Judicial Deference and Democracy in Socio-Economic Rights cases in South Africa' (2011) 22 Stellenbosch Law Review 614.

Marius Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) South African Journal on Human Rights 383

Stuart Wilson, 'Taking poverty seriously: The South African Constitutional court and socio-economic rights 670-671

Theunis Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) International journal of Constitutional Law 106

Danie Brand 'The 'Politics of need interpretation and the adjudication of socio-economic rights claims in South Africa' in AJ van der Walt (ed) Theories of social and economic rights (2005) Stellenbosch: Sun Press 17.

J Hlope 'The role of judges in a transformed South Africa-problem, challenges and prospects' (1995) 112 SALJ

Kirsty Mclean, 'Towards a framework for understanding constitutional deference' (2010) 25 SAPL 445

NW Barber 'Prelude to the Separation of Powers' (2001) 60 Cambridge LJ 59, 71-2

M Beutz 'Functional Democracy: Responding to Failures of Accountability' (2003) 44 Harvard Int LJ 387;430

E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31

PB Kurland 'the Rise and fall of the 'Doctrine of Separation of Powers; (1986) 85

Sunstein, Cass R. 2001. 'Social and Economic Rights? Lessons from South Africa. John M. Olin Law and Economics Working Paper No. 124

Williams, John J. 2005. "The Grootboom case and the constitutional right to housing: the politics of planning in post-apartheid South Africa."

Mbazira, Christopher. 2009. Litigating Socio-economic Rights in South Africa; A Choice Between Corrective and Distributive Justice. Pretoria, South Africa: Pretoria University Law Press

D G Newman 'International monitoring of social and economic rights: A South African case study and new research agenda' (2003) 19 SAJHR 189-216

K Klare 'Legal Culture and transformative constitutionalism' (1998) 14 SAJHR 146-188 at para 150

M Dennis & D Stewart 'Justiciability of economic, social and cultural rights: Should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health' (2004) 98 American Journal of International Law 462-515

A Pennegård 'Overview over human rights: The regime of the UN' in G Alfredsson et al (eds) International human rights monitoring mechanisms (2001) 27-28

'A de Zayas 'The examination of individual complaints by the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights' in Alfredsson et al

International Law:

International Covenant on Economic, Social and Cultural Rights

The African Charter on Human and People's Right.

Optional Protocol to the Economic – Socio and Cultural rights.

Online Resources:

Can socio economic rights be litigated at courts?

<http://www.ohchr.org/EN/Issues/ESCR/Pages/CanESCRbelitigatedatcourts.aspx>
accessed 20th August 2015

http://www.memoireonline.com/04/10/3363/m_A-jurisprudential-analysis-of-the-enforceability-of-socio-economic-rights-in-South-Africa-a-constit2.html *accessed 7th July 2015.*

http://www.law.yale.edu/documents/pdf/Intellectual_Life/MANUAL_OAS_INGLES.pdf
accessed 7th July 2015

<http://communitylawcentre.org.za/projects/socio-economic-rights/Cases/South%20African%20Cases/Constitutional%20Court%20Cases/summary-of-cas> *accessed on 27th August 2015*

Implementation of Emergency Housing.” 2012. Housing Development Agency, Johannesburg, South Africa. (Accessed 27th August 2015)

<http://www.righttofood.org/wp-content/uploads/2012/09/ECN.42006441.pdf> *accessed 30th August 2015.*

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx> *assessed 20th January 2016.*

<http://icj.wpenline.netdna-cdn.com/wp-content/uploads/2009/07/Commentary-OP-ICESCR-publication-2009-eng.pdf> *assessed 19th January 2016.*

<http://www.ijrcenter.org/european-committee-of-social-rights/> *assessed 22nd January 2016.*