

Inclusion by Exclusion? An assessment of the justiciability of socio-economic rights under the 2005 Interim National Constitution of the Sudan

Dissertation submitted in partial fulfilment of the requirements for the degree LLM (Human Rights and Democratisation in Africa) Faculty of Law, University of Pretoria

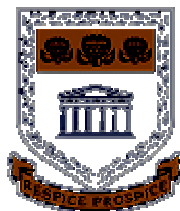
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Dedications

To my darling wife Mrs. Alina Ramona for loving without reserving some for herself, my son Crystal Sokifasi, who daily reminds me of millions of weak and powerless people whose only guarantee for a future is their faith in the values and virtues of others, and to my mother Mrs. Margreat Abugu Baradio for her resilience in spite of all odds.

Declaration

I, Remember Philip Daniel Miamingi declare and certify that this work is a product of my thoughts. Where works of other scholars have been used to situate these ideas in context, such works have been duly acknowledged. To the best of my knowledge, this work has not in part or in whole been presented to any institution(s) other than this one. Errors either of omissions or commissions are mine.

Signed at----- on this----- day of November 2008

Remember Philip Daniel Miamingi

LLM candidate 2008

I, Professor Julia Sloth-Nielsen confirm that this work was done under my direct supervision. Having considered that this work has satisfied the requisite standards, I approve it.

Signed

Professor Julia Sloth-Nielsen

(Supervisor)

Acknowledgment

Even though the Bible declares that there is nothing new under the sun, God has graciously granted me the opportunity to witness new things daily. The honour of participating in this award-winning program was another new and rewarding experience for which I remain grateful to God.

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List of Abbreviations

ACHPR	African Commission on Human and People's Rights
CC	Constitutional Court of the Sudan
CESCR	International Covenant on Economic, Social and Cultural Rights
CHRGJ	Centre for Human Rights and Global Justice
CPA	Comprehensive Peace Agreement
CPR	Civil and Political Rights
CRC	United Nations Convention on the Rights of the Child
ESCR	Committee on Economic, Social and Cultural Rights
GPD	Guiding Principles and Directives
GoS	Government of the Sudan
ICCPR	International Covenant on Civil and Political Rights
IHRIs	International Human Rights Instruments
INC	Interim National Constitution
IT	International Treaties
SA	South Africa
SACC	South African Constitutional Court
SAJHR	South African Journal on Human Rights
SER	Socio-economic rights
SERAC	Social and Economic Rights Action Centre
SPLM	Sudanese People's Liberation Movement
TAC	Treatment Action Campaign
UN	United Nations

TABLE OF CONTENTS

Title page

Dedication;	II
Declaration	III
Acknowledgment;	IV
List of abbreviation;	V
Table of content;	VI
Abstract	X

Chapter one: Introduction

1.1 Background to the study.....	1
2. Statement of the research problem and questions	4
4. Purpose and significance of the study.....	6
5. Scope and limitation of the study	6
6. Hypothesis.....	7
7. Literature review.....	7
8. Methodology.....	7
9. Chapter Overview.....	8

Chapter two: Are socio-economic rights human rights? Conceptual clarification;

2.0 Introduction.....	9
2.1 Philosophical barriers to justiciability of socio-economic rights	10
2.1.1 Socio-economic rights are different from civil and political rights.....	10

2.1.2 Civil and political rights engender negative obligations whereas socio-economic rights impose positive obligations.	10
2.1.3 Socio-economic rights are costly whereas civil and political rights are not	11
2.1.4 Socio-economic rights are vague whereas civil and political rights are precise.....	12
2.2 Practical problems with the justiciability of socio-economic rights	13
2.2.1 Socio-economic rights adjudication and anti-democratic concerns	13
2.2.2 Adjudication of socio-economic rights as a violation of the principle of separation of powers.....	14
2.2.3 The competency of courts to adjudicate on socio-economic rights.....	15
2.2.3.1 The concern regarding information.....	15
2.2.3.2 The question of expertise	15
2.2.3.3 Polycentric concerns.....	16
2.3 The implied rights doctrine: A practical response to justiciaphobia?	17
2.4 Conclusion	18
 Chapter three: Justiciability of socio-economic rights under the Interim National Constitution	
3.0 Introduction.....	19
3.2 Theories of interpretation	22
3.2.2 Value based approach	23
3.2.3 Presumptions of interpretation.....	23
3.3 The nature, scope and limitation of the Sudanese Bill of Rights	24
3.3.1 ‘All rights and freedoms enshrined in international human rights...ratified by the Sudan’: Meaning and effects	25
3.3.2 The domestic status of IHRs in the Sudanese legal order	27
3.3.2.1 The legal force of treaties.....	27

3.3.2.2	The internal effect of treaties.....	27
3.3.2.3	The direct effect of treaties.....	28
3.3.2.4	Precedence of treaties	28
3.4	‘All rights and freedoms...shall be an integral part of this Bill’: Meaning and effects.....	30
3.5	The relationship between sections 22 and 27 (3) and the justiciability of socio-economic rights in the Sudan	32
3.6.1	Obligations under the Bill of Rights	35
3.6.1.1	Duty to respect	35
3.6.1.2	Duty to protect	36
3.6.1.3	Duty to fulfil and promote.....	36
3.6.1.4	The obligation to guarantee.....	36
3.6.1.5	Obligation to implement.....	37
3.6.2	Limitation of the Bill of Rights.....	37
4.	Conclusion.....	37

Chapter four: Judicial enforcement of socio-economic rights: South Africa as a case study

4.0	Introduction.....	39
4.1	Constitutional framework	40
4.1.1	Socio-economic rights in the Constitution.....	40
4.1.2	Interpretation of constitutional socio-economic rights	41
4.2	Statutory socio-economic rights.....	41
4.3	Breathing life into socio-economic rights through adjudication	43
4.3.1	Types of adjudication.....	43
4.3.2	The Constitutional Court and socio-economic rights adjudication.....	44

4.3.2.1 Standard of Review in socio-economic rights	44
4.3.2.2 The minimum core approach.....	45
4.2.2.3 Reasonableness approach	47
4.3 Analysis of the SACC approach to adjudicating SER	48
4.3.1 The first generation: Creating a culture of justification?.....	49
4.3.2 A Value-based approach to adjudicating SER: A conflating of constitutional rights?	50
4.4 South Africa's evolving jurisprudence on socio-economic rights: Lessons for the Sudan.....	52
4.4.1 Constitutionalisation of socio-economic rights.....	52
4.4.2 Hierarchy of norms	53
4.4.3 Standards of review	54
4.5 Conclusion	55
Chapter five: Conclusion and recommendations	
5.1 Recommendations	57
5.1.1 The status of international law.....	57
5.1.2 Recommendations for the Legislature.....	58
5.1.3 Recommendation to the future Constitutional Assembly	58
5.1.4 Constitutionalisation of SER.....	58
Bibliography	60

Abstract

This research is an attempt to ascertain whether or not socio-economic rights provided for in the International Covenant on Economic, Social and Cultural Rights(CESCR), (and by implication all other international human rights instruments ratified by the Sudan) are justiciable and enforceable before the courts in the Sudan. The concern to determine the legal status of these rights in the Sudan is informed by the fact that, whereas section 27 (3), the first and the founding section of the Sudan Bill of Rights incorporates all international human rights instruments and makes them an integral part of a justiciable and enforceable Bill of Rights; section 22 which is the last section to the Guiding Principles and Directives, ousts the jurisdiction of the court with respect to socio-economic rights provided for in that chapter. Incidentally, socio-economic rights provided for under the Guiding Principles and Directives chapter, are equally contained in the CESCR. This creates a legal tension between these two sections, leading to reasonable uncertainty. This work resolves this tension in favour of the justiciability of all socio-economic rights provided for in the CESCR notwithstanding the fact that they are contained in the Guiding Principles and Directives chapter. Proceeding on this premise, the author proposes a theoretical framework for the justiciability of socio-economic rights that combines the South Africa's reasonableness test to enforcing SER with the minimum core approach of the Committee on ESCR for the Sudan.

Key words

Constitution -International human rights law -Bill of Rights -Socio-economic rights-justiciability-enforcement-remedy- the Sudan.

Chapter One

1.0 Introduction

1.1 Background to the study

On 9 July 2005 the Sudan ushered in an Interim National Constitution ('Constitution'). The Constitution was a part of a Comprehensive Peace Agreement (CPA) which was concluded between the government of the Sudan (GoS) and the Sudanese People's Liberation Movement (SPLM) in Naivasha, Kenya, on the 5 January 2005. The agreement brought to an end one of Africa's longest and most brutal civil wars. The Constitution will be in force in the Interim Period, which began on 9 July 2005 and ends in January 2011.

Part I of the Constitution deals with the nature of the State and the Constitution. This part has two chapters. Chapter one, titled 'The State and the Constitution' has 9 sections covering: nature of the State;¹ sovereignty;² supremacy of the Constitution³; fundamental bases of the Constitution⁴; sources of legislation⁵, religious rights⁶; citizenship and nationality⁷; language and National symbols⁸.

Chapter two is the 'Guiding Principles and Directives' (GPD) section. It has 12 sections covering a range of issues including socio-economic rights(SER) such as: the right to clean environment;⁹ employment,¹⁰ the rights of physically disabled persons to participate in social, vocational, creative or recreational activities,¹¹ the right to establish educational institutions;¹² the right of children to welfare and protection from abuse and abandonment;¹³ the right to culture;¹⁴ the right to language;¹⁵ the right to marry and found a family;¹⁶ gender equality;¹⁷ and access to primary health care.¹⁸

¹ Sec 1
² Sec 2
³ Sec 3
⁴ Sec 4
⁵ Sec 5
⁶ Sec 6
⁷ Sec 7
⁸ Sec 8
⁹ Sec 11
¹⁰ Sec 12(1)
¹¹ Sec 12(2)
¹² Sec 13(1)(a)
¹³ Sec 14
¹⁴ Sec 13
¹⁵ Sec 8
¹⁶ Sec 15(1)
¹⁷ Sec 15(2)
¹⁸ Sec 19

Section 22, the last section of chapter two contains a 'saving' clause which provides:

unless this *Constitution otherwise provides*,¹⁹ or a duly enacted law guarantees the rights and liberties described in this chapter, the provisions contained in this chapter are not *by themselves* (emphasis is mine) enforceable in a court of law; however, the principles expressed therein are basic to governance and the State is duty-bound to be guided by them, especially in making policies and laws.

Part II of the Constitution contains a justiciable Bill of Rights. The Bill of Rights has 22 sections. It provides for civil and political rights (CPR) and some SER. The following are the rights provided for under the Sudan Bill of Rights: the right to life and dignity;²⁰ personal liberty;²¹ sanctity from slavery and forced labour;²² equality before the law;²³ the right of women and children;²⁴ sanctity from torture;²⁵ the right to fair trial;²⁶ the right to litigation;²⁷ restriction on death penalty;²⁸ the right to privacy;²⁹ freedom of creed and worship;³⁰ freedom of expression and media;³¹ freedom of assembly and association;³² the right to vote;³³ the freedom of movement and residence;³⁴ the right to own property;³⁵ the right to education;³⁶ the rights of persons with special needs and the elderly;³⁷ public health care;³⁸ and the right of ethnic and cultural communities.³⁹

Section 27 which is the first and founding section of the Bill of Rights provides:

- (1) The Bill of Rights is a covenant among the Sudanese people and between them and their governments at every level and a commitment to respect and promote human rights and fundamental freedoms enshrined in this Constitution; it is the cornerstone of social justice, equality and democracy in the Sudan.
- (2) The State shall protect, promote, guarantee and implement this Bill.
- (3) All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill.

¹⁹ The emphasis mine. The intention is to show later on that s.27 (3) is already anticipated here.

²⁰ Sec 28

²¹ Sec 29

²² Sec 30

²³ Sec 31

²⁴ Sec 32

²⁵ Sec 33

²⁶ Sec 34

²⁷ Sec 35

²⁸ Sec 36

²⁹ Sec 37

³⁰ Sec 38

³¹ Sec 39

³² Sec 40

³³ Sec 41

³⁴ Sec 42

³⁵ Sec 43

³⁶ Sec 44

³⁷ Sec 45

³⁸ Sec 46

³⁹ Sec 47

- (4) Legislation shall regulate the rights and freedoms enshrined in this Bill and shall not detract from or derogate any of these rights.

Section 48 is the last provision in the part dealing with the Bill of Rights provides for the 'Sanctity of the Rights and Freedoms' as follows:

No derogation from the rights and freedoms enshrined in this Bill shall be made except in accordance with the provisions of this Constitution and only with the approval of the National Legislature. The Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts; the Human Rights Commission shall monitor its application in the state.

Section 27 (3) has been a subject of an ongoing scholarly debate with scholars lining up on both sides of the debate. There are at least two issues that can be distilled from this academic intercourse: the first is what does the Constitution mean when it says: '*All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill?*

Does it mean that 'all the rights and freedoms' provided for in all human rights instruments ratified by the Sudan form substantive provisions of the Constitution thereby actionable before courts in the Sudan? Or should this subsection be construed to mean that those human rights instruments referred to do not form substantive provisions, but interpretative tools for construing the meaning of the 20 rights and freedoms expressly provided for in the Bill of rights? The second bone of contention is the meaning of the word 'ratified' as used in this subsection. Does it refer to human rights instruments that were ratified before the Constitution came into force or only those ratified after the Constitution entered into force?

Arising from the first issue are other conceptual concerns. If all the international human rights instruments (IHRIs) form substantive part of the Constitution, what are the legal implications? What in essence is constitutionalised – the instruments themselves, and would this include the standards as well as the Decisions and General Comments of their monitoring bodies? Or only the substantive provisions of these instruments form integral part of the Constitution? Furthermore, in the events of conflict between the explicit text of the Constitution and those of the IHRIs, which one takes precedence?

Even though the Sudan has ratified many IHRIs, the International Covenant on Economic, Social and Cultural Rights (CESCR)⁴⁰ will be the focus of this work. This is primarily because it is relevant to the subject matter of this investigation⁴¹ - that is the justiciability and enforceability of SER in the

⁴⁰ The Sudan has *inter alia* ratified the African Charter on Human and People's Rights and the United Nations Convention on the Rights of the Child all of which provide for SER.

⁴¹ Any conclusion reached with respect to it is likely to be valid for all other instruments.

Sudan. Central to this enquiry is the relationship between sections 27 (3) and 22 of the Constitution. There is a tension between these two provisions.

This conflict arises from the fact that whereas the CESCER forms an '*integral part*' of a justiciable and enforceable Bill of Rights, the provisions of the GDP are merely 'code of conducts' for the state, and not enforceable.⁴² Consequently, even though, the SER provided for under GDP are equally contained in the CESCER, section 22 provides that they cannot be subjects of adjudication by the courts. Can section 22 limit the extent of the Sudan's obligations under CESCER or its operation as part of the Constitution? On the other hand can CESCER trumps section 22 with respect to mutually shared SER?

2. Statement of the research problem and questions

Constitutional interpretation is not a zero-sum game. A constitutional value may not be realised at the expense of a competing constitutional value.⁴³ Practical concordance i.e. the harmonisation of constitutionally protected legal values when such values conflict with one another is vital to constitutional optimisation.⁴⁴ Thus, unless the relationship between and the legal effect of sections 22 and section 27(3) are clarified, the smooth interpretation of constitutional rights will likely be hampered.

The legal implication of section 22 is that no right or liberty provided for under the GDP can be enforced, in the absence of any enabling legislation, before courts in the Sudan. The intention of section 22 then is for it to serve as an exception or a limitation clause probably with implication for section 27(3). This would mean that, even though international human rights instruments (IHRI) are an integral part of the Bill of Rights in the Sudan, with regard to SER expressly mentioned in the GDP, the Sudan has reserved for itself the right not to render them justiciable and enforceable constitutionally, unless the legislature deems it fit in the future. If section 22 is a limitation, is it not an absolute one, given that it already provides that '*unless the Constitution otherwise provides*', has the Constitution not indeed provided otherwise in section 27(3)?

It is a cardinal constitutional principle that every word ought, *prima facie*, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or by the context.⁴⁵ Any interpretative exercise must give effect to a statutory provision which, when reasonably interpreted within the semantic limits of the terms used in the text of the law, should reflect the intention of legislature. One American Supreme Court justice has put it in these terms:

⁴² B De Villiers 'Directive principles of state policy and fundamental rights: the Indian experience' (1992) 8 *South African Journal on Human Rights (SAJHR)* 29.

⁴³ T Aleinikoff 'Constitutional law in the age of balancing' (1987) 96 *Yale Law Journal* 943.

⁴⁴ As above

⁴⁵ S Woolman *Constitutional law of South Africa* (2007)17.

When the court disregards the express intent and understanding of the Framers [of the constitution], it has invaded the realm of the political process to which the amending power was committed, and has violated the constitutional structure which is its highest duty to protect.⁴⁶

One exception to the rule that effect should be given to the plain meaning of the words used in a statute is, if giving:

the plain words of the statute their ordinary meaning would lead to an absurdity so glaring that it could never have been contemplated by the legislature... the courts may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the intention of the legislature.⁴⁷

It could be argued that, whichever way section 22 is interpreted, there is really no absurdity or ambiguity. Consequently, there is no reason to depart from the plain meaning of the words used.

Absurdity definitely is not the only reason; inconsistency within the instrument is another reason to warrant a departure from the ordinary meaning of the words. According to Lord Wensleydale:

The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no further.⁴⁸

The legislature did intend surely that the words used in section 27 (3) bear their natural meaning. It is suggested that the implication of this provision is that in order to know how many rights and freedoms are protected and enforced in the Sudan, the answer would be the 20 rights and freedoms explicitly provided for in sections 28 to 47 of the Bill of Rights of the Sudan, and those provided for in all IHRI's ratified by the Sudan. Certainly, asserting that SER which are provided for in these instruments are justiciable and enforceable in the Sudan whether or not they are also mentioned in the GDP is not a platitudinous act; otherwise section 27(3) will effectively be eviscerated of any real meaning.

Whatever way, one looks at it, even though there is no manifest ambiguity in section 22 of the Constitution, section 27(3) has introduced structural ambiguity and consequently uncertainty as to whether or not an aggrieved litigant can approach the Constitutional Court in the Sudan to enforce his socio-economic rights (SER). This work is an attempt to investigate the legal tension that exist between sections 22 and 27(3) of the Constitution and proffer a theoretical framework for robust and purposive interpretation of the two provisions aimed at affirming the justiciability and enforceability of SER in Sudan.

This research will attempt to answer the following questions:

⁴⁶ Per Harlan J *Oregon v. Mitchell*, 400 U.S. 112 (1970).

⁴⁷ *Thomsom Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission et al)* (1990) 167 DLR (4th) 161 (SCC) 192.

⁴⁸ *Grey & others v Pearson & others* [1843-60] ALL ER Rep 21 (HL) 36.

1. What is the scope and extent of the Sudan Bill of Rights?
2. What is the effect of section 27(3) on section 22 of the Constitution?
3. Does the Constitution provide for justiciable SER, if yes, can the South African model of rendering SER justiciable and their standard of review provide useful guide to the Sudan?

4. Purpose and significance of the study

The purpose of this work is to establish that all rights and freedoms provided for in all the IHRIs ratified by the Sudan form substantive part of the Bill of Rights. Consequently, all the rights and freedoms enshrined in them, having been clothed with constitutional status are justiciable and enforceable by the courts in the Sudan. As a result, SER provided for in the GPD which are also contained in the CESCRC are equally justiciable and enforceable in the Sudan.

There is presently a dearth of literature on the constitutionalisation and justiciability of SER with respect to the Sudan. This is presumably because the Constitution is a relatively new and an unknown document, and may be because the Sudan has other pressing issues that are presently engaging the minds and hearts of academics.

This study is significant in at least three ways: first, this work critically examines the Sudan model of constitutionalising SER by cross-reference, and the legal implications of this model. Secondly, it does not only prove justiciability of SER, it proposes theoretical framework for adjudicating not only the SER explicitly provided for in the Constitution, but also those incorporated by reference. It engages the South African SER jurisprudence and that of the Committee on ESCR to clarify and delineate the obligations the government of the Sudan has imposed on itself by constitutionalising SER and propose how the government can effectively and efficiently discharge these obligations. Thirdly, this work proposes an interpretative framework for the Constitution that permits the precedence of IHRIs without atrophying judicial activism and innovation domestically.

It is hoped that this research will serve as an interpretative guide for the judiciary in the Sudan and as an advocacy tool for civil society organisations. The study intends to provoke more research into this question, provide future researchers, judicial officers in the Sudan, constitutional drafting committee members, civil society activists and politicians with further research materials.

5. Scope and limitation of the study

This study covers the justiciability of SER as provided for under the Constitution of the Sudan. Reference to wider debate and jurisprudence in respect of the justiciability of SER is limited to the extent that they clarify and consolidate the position of these rights under the Constitution. The

study is not an attempt to delve into the wider debate around the relationship between international law and domestic legal systems; suffice to say that only aspects of that discourse relevant to section 27(3) that will be alluded to. Since this study is undertaken outside Sudan, only materials that are in libraries outside Sudan or accessible electronically will be consulted and used in this study.

6. Hypothesis

This work proceeds from the assumption that SER are constitutionally justiciable in the Sudan. This is founded on the presumption that a purposive, generous, robust or pro-rights interpretation of the sections 22 and 27(3) of the Constitution cannot escape this conclusion.

7. Literature review

Although the jurisprudence surrounding the constitutionalisation, justiciability and enforceability of SER at the international, regional and domestic levels is still evolving and dynamic, a number of scholars have written extensively on the subject in books and journals.

The writings of: Henry Steiner and Philip Alston,⁴⁹ Henry Shue,⁵⁰ Sandra Liebenberg,⁵¹ Graig Scott and Patrick Macklem,⁵² Marius Pieterse,⁵³ G Van Hoof,⁵⁴ Asbjørn Eide,⁵⁵ Etienne Mureinik,⁵⁶ and other notable scholars are invaluable sources of research materials on the constitutionalisation, justiciability and enforceability of SER.

As useful as they are, none of these works has considered the question of justiciability and enforceability of SER within the context of the Sudan. The author is equally not aware of any work that has specifically dealt with the subject matter of this investigation.

8. Methodology

This study is based on existing literature. There is a vast pool of literature on the justiciability of SER. This work intends to critically engage with relevant works in this field and juxtapose them with the

⁴⁹ H Steiner & P Alston *International law in Context: Law, politics and morals* (2008).

⁵⁰ H Shue *Basic rights: Subsistence, affluence and US foreign policy* (1996).

⁵¹ S Liebenberg 'Social and economic rights' in M. Chaskalson et al(eds) *Constitutional law of South Africa* (1996) 41.

⁵² C Scott & P Macklem 'Constitutional ropes of sand or justiciable guarantees: Social rights in the new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1.

⁵³ M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights'(2004)20 *SAJHR* 383.

⁵⁴ G Van Hoof 'The legal nature of economic, social and cultural rights: A Rebuttal of some traditional view' in P Alston & Tomsersk (eds) *the Right to food* (1994) 97.

⁵⁵ A Eide et al *Economic, social and cultural rights* (ed) (2001) 9, see also A Eide & Rosas *economic, social and cultural Rights: a Textbook* (2005).

⁵⁶ E Mureinik 'Beyond the charter of luxuries: Economic rights in the constitution' (1992)8 *SAJHR* 464.

provisions of the Constitution of the Sudan in order to establish whether or not SER are indeed justiciable in the Sudan. In addition, a comparative study of the South African experience in the field of SER is undertaken to elucidate the issues involved. South Africa has a lucid SER jurisprudence that is widely respected. Even though, South Africa has one of the world's international law friendly constitutions, it has nevertheless, evolve a unique SER jurisprudence different from international jurisprudence. These attributes combine to make it a suitable comparative case study.

9. Chapter Overview

This work is divided into five chapters.

Chapter one is an introduction to the study.

Chapter two considers the arguments for and against the justiciability and enforceability of SER. The concepts and contents of SER will be discussed within the general jurisprudential debate on their constitutionalisation. The intention is to demonstrate that in spite of all the arguments against their justiciability, they are nonetheless justiciable and judicially enforceable.

Chapter three will attempt to interpret sections 27(3) and 22 of the Constitution using principles and theories of constitutional construction. The justiciability of SER in the Sudan will be established in this chapter. Ratification as used in 27(3) will be explained and relying on the principles of international law, the precedence of the IHRIs will be proved.

Chapter four having established the justiciability of SER in chapter three, the question of how can the Constitutional Court of the Sudan successfully adjudicate them will be considered in this chapter. The experience of South Africa in the area of adjudicating SER will be used to chart the way forward for the Sudan.

Chapter five will conclude and make recommendations.

Chapter Two

Are socio-economic rights Human Rights? A conceptual Clarification

*All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis.*⁵⁷

*All animals are equal, but some animals are more equal than others.*⁵⁸

2.0 Introduction

The debate about whether or not SER are capable of judicial enforcement is as old as the history of the struggle for human rights. The anachronistic nature of the debate does not, however, mean that it has faded away. What is beginning to happen is that the debate is yielding more light than heat. Nevertheless, many scholars still see sharp distinctions between SER and civil and political rights ('CPR'). To them the concept and the content of SER exclude them from adjudication by courts. Others argue that the so-called distinctions are more of a political rather than legal nature.

The purpose of this chapter is not to advance the frontiers of these arguments by presenting novel ones, but to consider existing relevant *argumentum contra et pro* justiciability of SER. The arguments are divided into two groups: philosophical and practical concerns with the justiciability of SER. After examining the merits and demerits of the arguments against and the arguments for the justiciability of SER, the chapter concludes that instead of discrediting the judicial enforceability of SER, the arguments have provided good understanding of why and how SER should and can be judicially enforceable.

Concerns about the justiciability of SER centre on three general propositions:

- i) that SER are fundamentally different from CPR;
- ii) that it is inappropriate for the courts to intrude into the sphere of social and economic policy; and
- iii) That courts lack the capacity and expertise required to properly adjudicate and enforce SER.⁵⁹

⁵⁷ Vienna Declaration and Program of Action 25 June 1993, para 5

⁵⁸ G Orwell *Animal farm: A fairy story* (1996)137.

⁵⁹ A Nolan et al 'The justiciability of economic, social and cultural rights: An updated appraisal' (2007)15 Centre for Human Rights and Global Justice 1

2.1 Philosophical barriers to justiciability of socio-economic rights

2.1.1 Socio-economic rights are different from civil and political rights

Philosophically, human rights were traditionally conceived as inherent, fundamental, absolute and universal.⁶⁰ SER lack all such basic characteristics, therefore, SER are not human rights, it is argued.⁶¹ Human rights are said to be universal if they accrue to every individual by virtue of their humanity, rather than as a result of their position or role in society.⁶² SER accrue to a class of people and as such lack universality. They are mere aspirations and are not enjoyed by virtue of one's humanity.⁶³ A right is absolute if it is available to all human beings on the ground of their humanity without any prerequisite conditions. SER are said not to be absolute, because their realisation is subject to conditions, for example, available resources.⁶⁴ All human rights protect individual as well as collective interests. With respect to absoluteness of rights, there are CPR that are not absolute, whose enjoyment depend on other conditions. The right of freedom of expression, for example, is not absolute; it is limited by the rights of others. Any effort to discredit SER on this ground is therefore not tenable.

2.1.2 Civil and political rights engender negative obligations whereas socio-economic rights impose positive obligations.

The nature of a right and the obligation it imposes are of a paramount importance to adjudicating that right.⁶⁵ It is equally important from the remedial point to determine whether a right imposes a negative or positive obligation.⁶⁶ Negative obligations require the government to refrain or abstain from interfering with the enjoyment of a right, while positive obligations demand that government undertakes affirmative action to give effect to the right.⁶⁷

Consequently, negative remedies are less intrusive while positive remedies are more intrusive into the executive and legislative domains.⁶⁸

⁶⁰ K Raes 'The philosophical basis of economic, social and cultural rights' in P Van der Auweraeker et al(eds) *Socio-economic rights: An appraisal of current European and international developments* (2000)48.

⁶¹ M Cranston *What are human rights* (1973)67.

⁶² M Craven 'The protection of economic, social and cultural rights under the Inter-American human rights system' in D Harris *The Inter-American System of human rights* (1998)289.

⁶³ Cranston n 61 above 68.

⁶⁴ M Bossuyt 'The legal distinction between civil and political rights and economic, social and cultural rights' (1975) 8 *Human Rights Journal*783.

⁶⁵ J Berryman *The law of equitable remedies* (2000)40.

⁶⁶ As above.

⁶⁷ K Roach *Constitutional remedies in Canada* (1994) 3.

⁶⁸ C Mbazira 'Enforcing the economic, social and cultural rights in the South Africa Constitution as justiciable individual rights: The role of the judicial remedies' :Unpublished PhD thesis, University of the Western Cape, (2007) 48.

Some scholars argue that SER engender positive obligations. As such courts are not the appropriate forum to enforce them.⁶⁹

Henry Shue invented three typologies of obligations:

1. The primary obligation not to infringe the rights directly (the obligation to respect);
2. The secondary obligation to prevent a right from being infringed by private actors (the obligation to protect); and
3. The tertiary obligation to fulfil social rights (the obligation to fulfil)⁷⁰

The arguments that SER are different from CPR are based on the flawed assumption that the former entails only tertiary obligations and the latter primary obligations. The categorisation of rights into those with negative or positive obligations is erroneous and arbitrary.⁷¹ Neither SER nor CPR as a whole offer a single model of obligations or enforcement.⁷² No particular right can be reduced only to a single duty on the state, such as a duty to refrain from acting, or a duty to do or provide something.⁷³ Both CPR as well as SER establish an equally wide variety of obligations, positive and negative it is submitted. While it can be conceded that SER often require greater state action for their realisation than do CPR do, the difference between the two sets of rights is more one of degree than of kind.⁷⁴

2.1.3 Socio-economic rights are costly whereas civil and political rights are not

The core of this assertion is that CPR are 'rights that certain things not be done'; they are said to be largely realisable without much resources.⁷⁵ In contrast, realising SER depends heavily on resources, and when such resources are not available they cannot be realised. This claim is clearly unsustainable. It is the obligation a particular right engenders, rather than the classification of the right imposing that obligation that will to a large extent determine whether it will be costly or costless, and not whether we are dealing with CPR or SER.

⁶⁹ Bossuyt n 64 above 8783.

⁷⁰ Shue n 50 above 65

⁷¹ A Eide 'Realisation of social and economic rights and the minimum threshold approach' (1989) 10 *Human Rights Law Journal* 35

⁷² Nolan n 59 above 15.

⁷³ K Yegen 'Enforcing social justice: economic and social rights in South Africa' (2002) 4 *International Journal of Human Rights* 13.

⁷⁴ P Alston & G Quinn, 'The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156.

⁷⁵ R Plant 'Needs, agency and rights' in C. Sampford & D. Galligan (eds) *Law, Rights and the Welfare State* (1986) 22.

Bernard Robertson has taken this argument further: for him the question is not that of the quantity but the quality of government expenditures. He submits that the basic difference between SER and CPR lies in the quality of government expenditures on them. According to him:

Resources taken by the state through taxation and expended on realising the rights in the... [CESCR] are merely redistributed. No wealth is created directly by this process. The process itself, however, has costs, both in terms of the expenditure required to administer the system and in the deadweight costs from alteration of behaviour to reduce tax liability. Such redistribution therefore reduces the general welfare and reduces national income below what it might have been. The more resources are redistributed in this way, the greater will be these effects. The redistribution of resources in pursuit of the goals in the Covenant therefore inevitably has the effect of reducing the ability of the inhabitants of the state to achieve core goals, such as the continuous improvement of living conditions.⁷⁶

Even though realising SER could be capital intensive, one does not need a stretch of imagination to realise that all government expenditures have a redistributive effect, irrespective of the rights upon which they are spent. To protect life, the police have to be trained, equipped and prisons built and criminals tried. All these are capital intensive. It is equally not true that all SER require resources to realise. The right to join a trade union for, example requires no state intervention.

2.1.4 Socio-economic rights are vague whereas civil and political rights are precise

SER are alleged to be open ended and indeterminate, as a result, they are incapable of judicial enforcement.⁷⁷ Vagueness is usually attributed to the concept of obligations.⁷⁸ In this respect SER are supposedly variable and devoid of the certainty required for adjudication. The answers to questions, for example, as to what amounts to 'progressive realisation' or 'within available resources' or 'adequate standard of living', are difficult to ascertain, and until this is done it will be hard to predict with accuracy whether or not a state has acted in conformity with its obligations.⁷⁹

It can be conceded that some SER are vague, and that lack of specificity regarding their exact content and the legal obligations that stem from them could impede their judicial enforcement. The question of indeterminacy or vague content and scope of a right is not a problem exclusively related to SER. What constitutes the right to dignity, or inhuman and degrading treatment, in the absence of judicial interpretation would have been equally vague. The determination of the 'content of *every* right, regardless of whether it is classified as 'civil', 'political', 'social', 'economic' or

⁷⁶ B Robertson *Economic, social and cultural rights: Time for reappraisal* (1997) 8.

⁷⁷ C Scott & P Mecklem n 52 above 65.

⁷⁸ As above.

⁷⁹ L Scott 'Another step towards indivisibility: Identifying the key features of violations of economic, social and cultural rights' (1998) 20 *Human Rights Quarterly* 81.

'cultural', is mainly the job of the courts because many legal rules are expressed in broad terms.⁸⁰ SER are indeterminate because of lack of judicial interpretation.

As Sandra Liebenberg has pointed out:

It is through recourse to the conventions of constitutional interpretation and their application to the facts of different cases that the specific content and scope of a right emerges with greater clarity ... The fact that the content of many social and economic rights is less well defined than civil and political rights is more a reflection of their exclusion from processes of adjudication than of their inherent nature.⁸¹

2.2 Practical problems with the justiciability of socio-economic rights

Justiciaphobia of SER are not only rooted in philosophical scepticism, but also in the perceived impracticability of adjudicating and enforcing them. The undemocratic nature of such adjudication, and the institutional inadequacy of the courts to deal with the multiplier effects of social adjudication, has been cited as other concerns.

2.2.1 Socio-economic rights adjudication and anti-democratic concerns

Politics is about power and resource distribution. Politicians are voted in or out of power depending on how they promise to deal with the distribution of these resources, or how they have failed to deal with them.⁸² Having been entrusted with the right to deal with these issues through the ballot, only the elected representatives have the legitimacy to decide on resource allocation and needs prioritisation.⁸³ In addition to creating the possibility of the unelected judges substituting their values for those of the elected representatives, adjudicating SER will amount to courts legislating and deciding on policy issues.⁸⁴ This will create a counter-majoritarian tension, it is argued.⁸⁵

The concerns about the 'anti-democratic' nature of SER adjudication must be understood in light of the broader debate on the legitimacy of judicial constraints on democratically elected organs and the role human rights ought to play in enhancing, rather than undermining, democratic

⁸⁰ S Liebenberg n 51 above 35

⁸¹ S Liebenberg n 51 above.

⁸² P Brest 'The fundamental rights controversy: the essential contradictions of normative constitutional scholarship' (1981) 90 *Yale Law Journal* 1063.

⁸³ M Pieterse n 53 above.

⁸⁴ D Horowitz *The courts and social policy* (1977) 19.

⁸⁵ N Haysom 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 8 *SAJHR* 451.

governance. It is now widely accepted that human rights norms in democratic states restrain, limit or direct the actions of democratically elected representatives.⁸⁶

The idea of judicial review of government decisions to ensure conformity with fundamental human rights is a legitimate modification of the powers of the parliament and the executive.⁸⁷ The legitimacy of such a modification is derived from the need to protect minorities or politically powerless groups from the unfair impact of majoritarian decision making.

2.2.2 Adjudication of socio-economic rights as a violation of the principle of separation of powers

It has been contended that the courts' decisions on SER will inevitably have budgetary and policy implications which have the effect of prioritising government expenditures.⁸⁸ Rendering SER justiciable will therefore 'distort the traditional balance of the separation of powers between the judiciary and other branches of government'.⁸⁹

Separation of powers is an implied constraint, and it must be given a meaning in terms of some principled understanding of democracy. In its pure sense separation of powers was designed to fragment powers of government as a barrier to tyranny, and allocate responsibility as a mechanism of ensuring accountability.⁹⁰ Justification for government actions or inactions lies at the heart of that accountability.

In the words of Mureinik, the intention of the doctrine is 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'.⁹¹ Originally intended as a functional construct rather than a measure of the validity of government action, the doctrine of separation of powers has been modified through the concept of checks and balances of which judicial review is the most common and the most dramatic example.

As useful as the doctrine of separation of powers is to democracy, it will certainly defeat the purpose of democracy it is supposed to safeguard, if applied in isolation. It can only function

⁸⁶ Pieterse n 53 above 383.

⁸⁷ Horowitz n 84 above 19.

⁸⁸ As above.

⁸⁹ G Hogan 'Judicial review and social and economic rights' in W Binchy & J Sarkin (eds) *Human rights, the citizen and the state: South African and Irish Approaches (2001)* 8.

⁹⁰ E Wiles 'Aspirational principles or enforceable rights? The future for socio-economic rights in national law' (2006-2007) *22 American University International Law Review* 35.

⁹¹ E Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) *10 SAJHR* 31.

productively in interaction with the fundamental rules of democracy such as the rule of law, and, in constitutional democracies in line with the supremacy of the constitution.⁹²

2.2.3 The competency of courts to adjudicate on socio-economic rights

It has been submitted that SER are polycentric (they have multifaceted policy effects) in nature and as such are inappropriate for adjudication by the courts.⁹³ This is so, it is asserted, because the courts lack the relevant information, expertise and tools to adjudicate the rights.

2.2.3.1 The concern regarding information

The courts only adjudicate based on the information before them, and on the interests presented for decision. Their use of expert evidence is limited, and when they use expert evidence, only specialised information is presented in a highly regimented fashion, goes the argument.⁹⁴ Therefore, the courts do not have enough information to make decisions on SER. For this argument to be valid it is necessary to ask if there is any piece of information on the basis of which policy decisions are made by governments, which cannot be conveyed to the courts by way of evidence. If there is nothing that limits the court's ability to utilise available information, then this argument is overstated. Courts have residual powers to summon any information or sources of relevant information to appear before them. It is difficult then to think of any category of information which is the exclusive domain of the legislature, which is beyond the reach of the courts if and when they need it.

2.2.3.2 The question of expertise

It has been argued that courts lack the skills and experience necessary to deal with specialised information of a financial or policy nature and are, therefore, incapable of adjudicating SER claims competently. This argument assumes that rights claimants turn to the courts for some kind of superior expertise in policy issues. What a litigant seeks from the courts is expertise in reviewing government decisions or policies against the requirements of the law.

In highly specialised cases the courts in some jurisdictions are allowed to delegate to individuals and bodies, including special masters, advisory juries, and court appointed experts, to help them to, *inter*

⁹² Pieterse n 53 above 383.

⁹³ T Eisenberg & S Yeazell 'The ordinary and the extraordinary in institutional litigation'(1980) 93 *Harvard Law Review* 465.

⁹⁴ L Liebenberg n 51 above 93.

alia, evaluate evidence and resolve technical issues.⁹⁵ Where courts are presented with adequate information and are willing to do so, there can be no *prima facie* presumption that they lack the institutional capacity to deal with evidence of a statistical, scientific, financial, or other nature.

2.2.3.3 Polycentric concerns

The harm caused by violating constitutional rights is not merely harm to an individual applicant, but harm to society as a whole.⁹⁶ Constitutional litigation against the state in most cases arises from a violation of a structural nature implicating a number of interests; addressing such violation calls for significant structural and institutional changes not only involving, but also affecting, persons other than the parties.⁹⁷ Thus, SER cases involve complex issues for judges to analyse adequately, as the issues they raise tend to be 'embedded in a complex web of causes and effects.'⁹⁸ This phenomenon had been described as polycentricity.

Lon Fuller has postulated that legal adjudication cannot deal successfully with polycentric situations.⁹⁹ Money, and how it should be spent, are really what is at stake when talking about polycentricity. According to O'Regan J of the South African Constitutional Court:

Each decision to allocate a sum of money to a particular function implies less money for other functions. Any change in the allocation will have a major or minor impact on all the other decisions relating to the budget.¹⁰⁰

SER adjudication may also involve complex policy choices with far reaching social and economic ramifications, it is argued.

This concern is not, of course, one that is unique to SER. The CPR claims of one group may impact upon the rights of others. The fact that SER litigations have multiplier effects is not a sufficient reason not to adjudicate on them. Sandra Liebenberg has argued, and rightly so, that, 'the mere fact of far-reaching or unforeseen consequences should not imply total abdication by the judiciary of its primary responsibility of upholding the norms and values of the Constitution.'¹⁰¹ In the words of a South African High Court judge:

The problems of polycentricity must clearly act as important constraints upon the adjudication process, particularly when the dispute has distributional consequences. But polycentricity cannot be elevated to a jurisprudential mantra, the articulation of which

⁹⁵ Article 51 of the Federal Rules of the Canadian courts.

⁹⁶ I Currie & J de Waal *The bill of rights handbook* (2005) 196.

⁹⁷ As above.

⁹⁸ Wiles n 90 above 35.

⁹⁹ L Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353.

¹⁰⁰ K O'Regan 'Introducing Social and economic Rights' (1999)1 *ESR Review* 5.

¹⁰¹ Liebenberg n 51 above.

serves, without further analysis, to render courts impotent to enforce legal duties which have unpredictable consequences.¹⁰²

Ultimately, the concern with judicial enforcement of SER is that of legitimacy, meaning the ability of people to 'accept judicial decisions, even those they bitterly oppose, because they view courts as appropriate institutions for making such decisions'.¹⁰³ The belief is that by ruling on a non-justiciable SER courts risk losing this legitimacy. However, it is equally true that courts risk losing their legitimacy when SER appear side by side with CPR in a constitution and they fail to protect both, it is submitted.

2.3 The implied rights doctrine: A practical response to justiciaphobia?

In countries without express provision for SER, either as a GDP or a bill of rights provision, the existing framework of CPR has been used to secure the protection of SER. The so-called 'cross-cutting' rights such as, the rights to life, dignity and non-discrimination, which may 'straddle, underlie or facilitate' the protection of SER, as well as that of the CPR have been used to imply SER entitlements.¹⁰⁴

L Cavallaro and J Schaffer¹⁰⁵ took the doctrine of implied rights to an even higher dimension. According to them *less* direct litigation of social rights will lead to *more* on-the-ground implementation. In this view, instead of 'direct approaches' to social rights litigation advocates should adopt an indirect approach by re-casting social rights claims, including in their broadest, most structural or diffuse dimensions, as violations of classic CPR.

To posit that by formally re-naming a social rights claim as a civil-political rights case is sufficient to convert an otherwise 'non-justiciable' claim into a 'justiciable' one is an oversimplification of the complex dynamics involved in SER litigation, to say the least. At the practical level this approach will not only undermine SER's legal status, but also, it is also possible that the judiciary could lose legitimacy if seen to adjudicate what is formally viewed as none existent rights. Indirectly subordinating SER to the ingenuity of the bar and the whims and caprices of the bench has its own risks.

¹⁰² *Rail Commuter Action Group & Ors. v. Transnet Limited & Ors* 2006 (6) SA 68 (C) February 2003 Cape of Good Hope Provincial Division.

¹⁰³ J Gibson & G Caldiera 'Defenders of democracy? Legitimacy, popular acceptance, and the South African Constitutional Court' (2003) 2 *The Journal of Politics* 65.

¹⁰⁴ F Viljoen *International human rights law in Africa* (2007) 577.

¹⁰⁵ T Melish 'Less as More: Rethinking supranational litigation of economic and social rights in the Americas: a reply' (2007) 39 *International Law and politics* 171

It is, therefore, submitted that even though realising SER through indirect litigation has worked in many jurisdictions, suggesting that as the only acceptable way of adjudicating social rights is to concede the inferior legal status of these rights. As stated earlier, CPR and SER are so intractably linked that marginalising one will inevitably affect the effective and efficient adjudication of the other.

2.4 Conclusion

Those who argue against the justiciability of SER have capitalised on what they call core differences between the two sets of rights, whereas those who have maintained that socio-economic rights are justiciable have emphasised the similarities between the two sets of rights. Even though the latter have made it difficult for the former to deny justiciability to SER based on their inherent differences, they have nonetheless failed to remove the dichotomy between the rights. By emphasising similarities the idea of two separate sets of rights is re-enforced, since we can only compare two different things.

SER are human rights. They are vested with all the qualities of rights and suffer from the same challenges as other rights. Human rights are universal, interdependent and interrelated. Therefore, depriving one side of the human rights equation from justiciability will inevitably impact negatively on the realisation of the other rights. This is not to suggest that the debate with respect to the justiciability of SER is counterproductive. The debate has actually provided us with better understanding of SER in a way that civil and political rights did not benefit.

The understanding of the nature and the contents of SER should provide pathway for states to constitutionalise them in such a way that maximises their potentials and guard against their excesses through Constitutional crafting and design appropriate standard of review. The next chapter will investigate whether or not the Sudan's model of constitutionalising SER benefited from this understanding.

Chapter Three

Justiciability of socio-economic rights under the Interim National Constitution

*This court... is not the maker of laws. It will enforce the law as it finds it.*¹⁰⁶

*The Constitution makers have given us one of the most remarkable documents in history for ushering in a new socio-economic order...every word or phrase in the Constitution must be interpreted in a manner which would advance the socio-economic objective of the constitution.*¹⁰⁷

3.0 Introduction

The inclusion of a comprehensive Bill of Rights in the Constitution represents a 'remarkable divergence in Sudanese constitutional making.'¹⁰⁸ First, because this marks the first time the Sudan is providing for a comprehensive justiciable bill of rights. Secondly, this is equally the only occasion so far that a constitution not only acknowledges and recognises IHRI, but incorporates them as a part of a justiciable bill of rights. Defining with exactitude, however, what constitutes this Bill of Rights in the Sudan will likely engage scholars and human rights activists for a long time to come.

It was noted in chapter one that the Sudan Bill of Rights explicitly provides for 20 CPR as well as SER. In addition to this, the Constitution states that any right or freedom contained in any IHRI the Sudan is a party to automatically form 'an integral part of this Bill'. The question of what constitutes the Bill of Rights in the Sudan depends on what is meant by the phrase 'integral part'. Scholars are not agreed on the purport of these words. There are two groups of scholars: those who consider these IHRI as forming substantive part of the Bill of Rights and those who consider them as interpretative tools to it.

Both positions have implications for the justiciability of SER in the Sudan. If these IHRI are interpretative tools, it would mean that SER explicitly mentioned in the Bill of Rights should be interpreted along the lines of the jurisprudence of the Committee on ESCR. The problem though, with this position is that the textual contents of the SER in the Bill of Rights and those in the CESC are different. Take for an example, article 12 of CESC provides for the 'right of everyone to the

¹⁰⁶ *United Parties v minister of Justice, Legal and parliamentary Affairs* 1997 (2) ZLR 254; [1998] 1LRC 614.

¹⁰⁷ Pickard C J. In *Bongopi v Chairman of the Council of States, Ciskei* 1992 (3) SA 250 265.

¹⁰⁸ N Ibrahim 'The Sudanese Bill of Rights' (2008) 4 *International Journal of Human Rights* 613.

enjoyment of the highest attainable standard of physical and mental health; section 46 of the Constitution states 'the state shall promote public health...provide free primary health care and emergency services for all citizens. Which content of this right prevails?

If they form substantive part of the Constitution, this has even wider implications for the Bill of Rights adjudication in general and SER justiciability in particular. What forms part of the Bill: the rights and freedoms, the decisions and interpretations of the monitoring bodies? In an event of conflict which one has the final say? The Constitution is silent on the question of the legal status of these IHRLs as well as on their relationship to it or with it. To determine the nature, scope, application and limitation of the Bill of Rights can only be ascertained by constructive construction of the Constitution. It is the thesis of this work that the Sudan has not only provided for justiciable and enforceable SER in the Constitution, but the scope of justiciable SER has been widened to incorporate all SER in all IHRLs that the Sudan is a party.

Although the Constitution does not provide a guide for interpreting it,¹⁰⁹ the ingredients of constitutional interpretation are basically the same in many jurisdictions: 'the ordinary or technical meaning of words, evidence of their original meaning or purpose, structural or underlining principles, judicial precedents, scholarly writings, comparative and international law, and contemporary understandings of justice and social utility.'¹¹⁰ The differences lie in the priorities and weights given to each of these sources in the final interpretative recipe.

There is a dichotomy between a positivistic, literalistic, legalistic, textualistic, formalistic, and black-letter law approach to interpreting constitutions on one hand (largely representing the canons of interpretation); and a generous, dynamic, purposive, structuralistic, sociological, teleological, and activist approach on the other hand (representing some modern theories in constitutional interpretation). While the former 'relies on the certainty and explicitness of a written text to avoid the exercise of an independent judicial will; the latter accepts some degree of judicial discretion in building up an unwritten and implicit constitution.'¹¹¹ This work will adopt the latter as a method of interpreting the Constitution. This is informed by a seemingly seismic shift in legal scholarship from seeing a constitution as a dead legal document to seeing it rather as a 'living constitution'.¹¹²

This chapter is divided into four parts. The principles of constitutional interpretation are discussed in part I. The canons of interpretations and their limitations with respect to constitutional construction

¹⁰⁹ The Constitutional Court of the Sudan has for now been using the 1974 Interpretation Statute, which actually was not meant for constitutional interpretation, but ordinary statutes.

¹¹⁰ J Goldworthy (eds) *Interpreting constitutions: A Comparative study* (2006) 5

¹¹¹ As above

¹¹² J Tsen-Ta Lee 'Interpreting bills of rights: The value of a comparative approach' (2007) 5 *International Journal of Constitutional Law* 122; J Müller 'A general theory of constitutional patriotism' (2007) 6 *International Journal of Constitutional Law* 72.

will be highlighted. A case for a more liberal value-based approach to constructing the Constitution will be proposed in part II. The limitations of monist and dualist schools with respect to section 27(3) will be used to make a case for construing it along the legal pluralist school in Part III and the last part will consider the relationship between sections 22 and 27(3) of the Constitution.

3.1 Canons of interpretation

There are three canons or rules of interpretation: the literal rule, the golden rule and the mischief rule. According to the literal rule, 'if the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity.'¹¹³ The golden rule states that the plain and natural meaning of the words used by the legislature should be assigned to the text, unless it is manifest from the general scope and intention of the statute injustice and absurdity would result.¹¹⁴ The mischief rule lays down a four stage approach to interpreting the text: what was the Common Law before the making of the Act; what was the mischief and defect for which the Common Law did not provide; what remedy the Parliament hath resolved; the true reason of the remedy according to the true intent of the makers of the Act¹¹⁵.

Scholars have expressed concerns about the suitability of these canons for interpreting a more complex *lex generis* like a constitution.¹¹⁶ This is because, as a quintessential law, constitutions mostly provide rules and principles mainly of general and abstract nature that a straightjacket approach, like the ones provided for in the canons or even their combination might not address adequately. Even though, the rules of construction might have worked with measured success with respect to interpreting ordinary enactment, courts have cautioned against the use of this 'austerity of tabulated legalism'¹¹⁷ in constructing constitutional provisions. This is because the rational for enacting ordinary statutes and constitutions are different. While:

A statute defines present rights and obligations. It is easily enacted and easily amended. A constitution by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties.¹¹⁸

¹¹³ *Becke v Smith* (1836) 2 M & W 195.

¹¹⁴ *Grey & Ors v Pearson & Ors* (1843-60) ALL ER Rep 21(HL) 36.

¹¹⁵ *Heydon's case* (1584) 3 CO REP 7a.

¹¹⁶ N Jayawickrama *The judicial application of human rights law: National, regional and international jurisprudence* (2002) 159.

¹¹⁷ *Minister of Home Affairs v Fisher* [1980] AC 319 328H, [1979] 3 All ER 21, [1979] 2 WLR 889 (PC)

¹¹⁸ *Hunter et al v Southam Inc* (1985) 11 DLR (4th) 641 649.

This does not, however, mean that the canons play no role in modern constitutional construction. *In Minister of Home Affairs v Fisher*¹¹⁹, the Privy Council held that:

A constitution is a legal instrument... Respect must be paid to the language which has been used and to the traditions and usages which has given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms...¹²⁰

Instead of limiting constitutional interpretation to these canons, the extent to which the canons should be used to construe constitutional provision should in fact be limited by a constitution it is submitted.

3.2 Theories of interpretation

The inherent limitations of the canons of interpretation have given rise to new methods and theories of constitutional interpretation some of which are discussed briefly below.

3.2.1 Originalist approach

According to this theory, the court must search for and identify the intention of the drafters of the constitution and give that intention primacy. Consequently, current legislatures and court must conform to earlier choices made by those who drafted it. There are two problems with this approach: first, there is serious doubt as to whether or not the intention of the drafters can accurately be ascertained, and secondly, even if it were ascertained, should future generations be bound by the choices or intents of generations past?

These flaws certainly make this theory of interpretation inappropriate for construing the Constitution it is submitted. This is because it must be allowed to be a living document capable of adapting to unforeseen future situations. The values, beliefs and intentions of yesterday should not be allowed to enslave generations yet unborn.

¹¹⁹ [1980] AC 319 328 H [1979] 3 ALL ER 21.

¹²⁰ As above.

3.2.2 Value based approach

This approach to interpreting a constitution does not seek meaning in the intention of the drafters. Instead, the interpreter must excavate and give expression to the underpinning values that the constitution attempts to guarantee. This is what Mahomed J probably was referring to when he said 'all constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation, the values which bind its people...'¹²¹

A purposive or value-based approach would most certainly raise the question of limits upon possible interpretations. Because while it is important to be conscious of the values underpinning the constitution:

It is nonetheless our task to interpret a written instrument. ...it cannot be too strongly stressed the Constitution does not mean whatever we might wish it to mean... if the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination.¹²²

It is submitted that such limits must be found within the constitution itself and not solely in some technically rules.

3.2.3 Presumptions of interpretation

Some rebuttable presumptions have been devised to help guard against the risk inherent in value-based interpretation amongst which are the following presumptions: presumption of consistency, against redundancy, consistency of meaning and compliance with international obligations.

The *presumption of consistency* states that the legislature is presumed to be consistent with itself, such that if there are two sections in an Act which seems to clash, but which could be interpreted to give full force and effect to each, then such an interpretation is to be adopted, rather than the one that destroys the effect of one of them.¹²³ The presumption *against redundancy* states that the legislature does not intend to enact a useless, purposeless or redundant act or section of an act.¹²⁴ The *presumption of compliance with international obligation* on the other hands believes that the legislature does not intend to enact a statute in conflict with international law.¹²⁵ The *presumption of consistency in meaning*, here it is presumed that the same word, in the same enactment, means the same thing.¹²⁶

¹²¹ *S v Makwanyane & others* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) para 262

¹²² *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) paras 17 – 18.

¹²³ J de Ville *Constitutional and statutory interpretation* (2000) 67.

¹²⁴ As above.

¹²⁵ De Ville n 123 above 68.

¹²⁶ As above.

Having described the appropriateness of a value-based approach for construing the Constitution, the author will now apply it to determine the nature, scope and limitation of the Bill of Rights. The presumptions will be used to explain some of the rationale of the submission of this work.

3.3 The nature, scope and limitation of the Sudanese Bill of Rights

Section 27, the first and founding provision of the Bill of Rights is the starting point in answering the question what constitutes the Bill of Rights in the Sudan. In addition to the 20 rights and freedoms provided for in the Bill of Rights,¹²⁷ paragraph (3) of section (27) provides that '*all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill.*' The words 'ratified' and 'integral part' are decisive to answering this question.

The word 'ratified' as used in paragraph (3) of section 27(3) has generated a lot of controversies among jurists.¹²⁸ The areas of concern have been with what does 'ratified' mean? Does it mean exactly what it means in public international law? Does it refer to treaties ratified before the Constitution or those that will be ratified after it came into effect? Will it mean the same thing as accession, adherence, adhesion or acceptance of an international treaty? When does a ratified instrument become an integral part of the Bill of Rights, when Sudan ratifies it or when it comes into force after the requisite number of ratifications at the international level?¹²⁹ There are no final answers to these concerns until the Constitutional Court (CC) has pronounced on them. However, the sanctity of the Bill of Rights and the sanity of the right-holders, to a large extent, depend on reasonable answers to these questions. Section 27 (3) will be analysed in two parts: the meaning and effect of ratification and the meaning and effect of 'integral part'

¹²⁷ Arts.28-47 of INC.

¹²⁸ As above.

¹²⁹ For a detailed discussion of these various positions see Max Planck Institute for Comparative Public law and International Law Report of two seminars they organised between 2006 and 2007 to resolve some of these issues. It is accessible

at http://www.mpil.de/shared/data/pdf/manual_papers_and_proceedings_of_the_heidelberg_seminars_on_potential_disputes_before_the_sudanese_constitutional_court.pdf

3.3.1 'All rights and freedoms enshrined in international human rights...ratified by the Sudan': Meaning and effects

The word 'ratification' appears four times in the Constitution. The usage tends to suggest different meanings. The Constitution uses the verb form of the word 'to ratify' three times, first in section 58(1) (k) assigning to the President of the Republic the power to '*ratify treaties and international agreements with the approval of the National Legislature*'. However, section 91(3) (d) empowers the National Assembly '*to ratify international treaties, conventions and agreements*'. Section 109(4) goes on to say that the National Assembly may delegate to the President the '*power to ratify international conventions and agreements*' while it is not in session. The attempt by sections 58(1) (k) and 91(3) (d) to assign one competency to two organs of the government, needs further interpretation. The word 'ratify' in the two provisions must be constructed differently to be logically meaningful.

Even though, there is a presumption of consistency of meaning, it is submitted that this situation presents an exception. This is because; consistency of meaning here will conflict with another presumption against absurdity. That is the lawgiver did not intend an absurd consequence. It is absurd for two organs of the government competent to exercise a constitutional power, and yet make a provision for one of these organs to delegate that same power to the other competent organ. The concept of delegation presupposes, usually, a flow of power or authority from a superior to a subordinate, which is not the case here.

Some scholars have suggested, and rightly so, that, since the combined effects of section 58(1) and (j) is that the President is the head of state and foreign representative of the country, it follows logically that s/he has the power to legally bind the country through international treaties.¹³⁰ Therefore, the word 'ratify' in sections 91 (3) (d) and 109(4) must be understood to mean 'approval', as used in 58(1) (k) of the Constitution, which would then refer to the internal procedures which have to be fulfilled before ratification by the president takes place.¹³¹ The possibility that the word 'ratification' could have more than one meaning within the Constitution to include 'approval' suggest that its use in section 27(3) could mean more than one methods of becoming a party to an IT is contemplated.

The Vienna Convention on the Law of Treaties 1969 is the main international instrument regulating the law of treaties. It provides for different ways of becoming a party to an International Treaty

¹³⁰ see generally Max Planck Compilation of the report on proceedings of the Heidelberg seminars on potential disputes before the Sudanese Constitutional Court (compilation) available at www.mpil.de/shared/data/pdf/manual_proceedings_of_the_Heidelberg_seminars_on_potential_disputes_before_the_Sudanese_constitutional_court.pdf (accessed 4 September 2008)

¹³¹ As above.

(IT). A state could express its intention to be bound through a 'signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession or by any other means if it so agree'.¹³²

In a bilateral treaty, ratification is effected when the instruments of ratification are exchanged between the state parties, while in a multilateral treaty this is done when the instrument of ratification is deposited with the depository. For states which were not parties to the negotiation of the IT, they can express their consent by accession which has the combined effect of signing and ratification. Sometimes the words 'acceptance' and 'approval' could be used instead of accession.¹³³

It is submitted, therefore, that the word 'ratified' in article 27(3) should be interpreted to encompass all the methods of assuming legal obligations under IT. This interpretation is consistent with paragraph 1.6.1 of the Protocol on Power Sharing between the Government of Sudan (GOS) and the SPLM which, is an integral part of CPA and is incorporated into the Constitution by virtue of section 225 of the Constitution. According to this paragraph:

The Republic of the Sudan, including all levels of government throughout the country, shall comply fully with all its obligations under the international human rights treaties to which it is or becomes a party.

The word 'ratification' is not mentioned. The emphasis is, therefore, not on how Sudan becomes a state party to the treaty, but on its membership and compliance with its obligations under the IT. Even though the word 'ratified' is used in its past tense in article 27(3) of the Constitution, it does not refer only to ITs that Sudan ratified before the Constitution, as some scholars have suggested, neither does it refer only to those it will ratify after the Constitution.¹³⁴ The words used in the CPA are 'to which it is or becomes' a party, which suggests pre and post the Constitution ITs ratified by Sudan.

¹³² Art. 11 of the Vienna Convention on the Law of Treaties 1969.

¹³³ Max Report n 130 above.

¹³⁴ Judge Abdallah Ya'qoub of the Constitutional Court of the Sudan is of the opinion that only post INC treaties are referred to in art.27 (3) see his submission at page 49 of the report referred to at n 130 above.

3.3.2 The domestic status of IHRI; in the Sudanese legal order

The relationship between international law and municipal law is a minefield. According to Lambertus Erades 'the relation between international law and municipal law is a subject with which many generations of lawyers have wrestled, are wrestling and will continue to wrestle.'¹³⁵ Before discussing the internal effect of the IHRI in the Sudanese legal order, it is important to clarify: the legal force, the internal effect, the direct effect and precedence of treaties domestically.

3.3.2.1 The legal force of treaties

This is determined by whether or not the treaty has entered into force, both in general and for the particular state party. Once the IT has entered into force, the state is bound by its obligations under it. These obligations vary from treaty to treaty and even within treaties.

3.3.2.2 The internal effect of treaties

This relates to the effect given to the treaty in domestic legal order of a state. Treaties generally embody the obligation on the part of state parties to give effect to them in their domestic legal systems.¹³⁶ It is always an obligation of result, meaning that, the state party is given the margin of discretion in choosing the means of achieving the result.¹³⁷ There are mainly three ways of giving effects internally to IT obligations: adoption, incorporation and transformation.

In a system of adoption, treaty provisions have legal effect *as such* in the domestic legal order. These provisions retain their international character within the national order wherein they are applied. Underpinning this system is the view that international and municipal laws are concomitant aspects of a single legal order.¹³⁸ This is mainly the position of the monist believers.

Incorporation refers to the integration and application of international obligations into domestic law. Transformation on the other hands refers to the transformation of a treaty obligation using legislation to amend or supplement domestic law. Both are versions of dualism. Dualists regard

¹³⁵ L Erades 'International law and the Netherlands legal order' in F Haro et al (eds) *International Law in the Netherlands* (1980) 375.

¹³⁶ *Advisory Opinion No.10 Exchange of Greek and Turkish Populations*, 1921 P.C.I.J. (Ser. B) No. 10 21.

¹³⁷ Erades n 135 above.

¹³⁸ See H Triepel *International law and national law* (1889) 12-22 for a seminal discussion on dualism, and H Schermers & D Waelbroeck *Judicial protection in the European Communities* (1987) 105-110 for the discussion of monist school.

international law and domestic law as two separate systems operating at two different levels.¹³⁹ As long as the internal transformation of the IT has not taken place, its internal effect is limited in terms of the 'rule of presumption' which states that when applying and interpreting IT, courts should start from the presumption that, the legislature did not intend to act contrary to the state's international obligations.¹⁴⁰

A constitution of a state is what stipulates which system is applicable internally. The Constitution does not in clear terms provide for which system should prevail in the Sudan. What this author is submitting is that once ratified, international human rights treaties take direct effect in the Sudan. Since these IHRI are incorporated into the Constitution without altering their contents, the provisions of these human rights treaties retain their international character in the Sudan, in the absence of any contrary provision, it is submitted.

3.3.2.3 The direct effect of treaties

This refers to the applicability by domestic courts of treaty provisions without further need for authorisation from national or international authorities.¹⁴¹ This is what is referred to as self-executing treaties. Whether or not a treaty is self-executing is a matter of interpretation by the courts.¹⁴² This author is of the opinion that section 27(3) properly interpreted renders human rights treaties ratified by the Sudan self-executing domestically. First, because of their wholesale constitutionalisation by the Sudan; and secondly, there is no need for enabling legislation to give effect to their provisions in the Sudan.

3.3.2.4 Precedence of treaties

When a treaty provision applies directly as international law, the issue of its legal status in relation to domestic law arises. In a dualist system, an incorporated or transformed treaty provision is on par with domestic legislation of the same kind and the rule of *lex posterior derogate legi priori* applies. When the provisions of the treaty apply as international law, if the constitution does not offer guidance and the status is not so self-evident, then the courts will have to determine the relationship.¹⁴³ It is submitted that the Constitutional Court in interpreting these IHRI, should give

¹³⁹ Triepel n 110 above.

¹⁴⁰ O Schacter 'The obligation to implement the Covenant in domestic law' in L Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 311.

¹⁴¹ J Winter 'Direct applicability and direct effects: Two distinct and different concepts in Community law' (1972) 9 *Common Market Law Review* 425.

¹⁴² Erades n 135 above 93 above.

¹⁴³ Erades n 135

precedence to their provisions over domestic norms. By according precedence to a treaty provision, courts do not nullify, repeal or amend domestic law; the courts only refrain from applying it.¹⁴⁴

In both systems (monist and dualist), a treaty is only effectively applied if its provisions take precedence over domestic law, and a state is responsible internationally if its domestic law results in a violation of treaty obligations, because it cannot invoke its law as an excuse for the violation.¹⁴⁵ According to the Permanent Court of International Justice:

It is a general accepted principle of international law that in relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.¹⁴⁶

The Constitution does not provide for the relationship between international law and domestic law in terms of which legal norm is superior. Monists and dualists schools of thought have monopolised this discourse. The multiplicities and interconnectivities of legal norms in today's world are stretching these schools to their limits. Section 27(3) is one that monist and dualist schools approaches do not adequately resolve the tension it creates vertical i.e. with international norms and horizontally i.e. within the Constitution. This contention finds support from other scholars.¹⁴⁷

Monist postulations and dualist articulations of the relationship between international and domestic laws have outlived their usefulness in this era of internationalisation of constitutional law and legal pluralism, according to some scholars.¹⁴⁸ They assert that monism and dualism offer only hermetic arguments which offer little or no help in solving legal issues,¹⁴⁹ that they should 'cease as doctrinal and theoretical notions for discussion the relationship between international law and national law',¹⁵⁰ and rather be used in depicting a more open or more hesitant disposition toward international law.¹⁵¹

They advocate for a process which on one hand considers the principle of self-executing international norms as balancing of constitutional principles and on the other hand, given the nature of international law, states should have the capacity to limit the effect within domestic legal

¹⁴⁴ As above.

¹⁴⁵ Art. 27 of *Vienna Convention*

¹⁴⁶ *Advisory Opinion No. 17 Interpretation of the Covenant between Greece and Bulgaria Respecting Reciprocal Immigration*, 1930 PCIJ (Ser.B) No. 17 32 (July 31).

¹⁴⁷ A von Bogdandy 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law' (2008) 6 *International Journal of Constitutional Law* 396

¹⁴⁸ N Walker 'Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders' (2008) 6 *International Journal of Constitutional Law* 373.

¹⁴⁹ C Tomuschat 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999)9, *RECUEIL DES COURS* 363.

¹⁵⁰ Von Bogdandy n 119 above.

¹⁵¹ E de Wet 'The reception process in Belgium and Netherlands' in H Keller & A Stone-Sweet(eds) *The reception of the European Convention on Human Rights* (2008) 11- 25.

order of a norm or an act under international law if it conflicts sharply with constitutional principles.¹⁵²

It is submitted that this position reflects the correct understanding of the Constitution as postulated below. Only legal pluralism could adequately account descriptively and normatively for the diversities of legal sources anticipated under 27(3) with respect to human rights protection and the implied links between the Constitution and international law. This is so because, it is only legal pluralism that could accommodate the self-executing nature of the IHRI under section 27(3), while at the same limit the extent to which they can operate domestically.

This work has established that the word 'ratified as used in section 27 (3) includes other methods of undertaking international obligations. Additionally, it has justified the submission that section 27 (3) encompasses all IHRI ratified before or after the coming into force of the Constitution. More importantly the precedence of the IHRI has reasonably been suggested. The one of the remaining issues in this part is what is the legal effect of section 27(3)?

3.4 'All rights and freedoms...shall be an integral part of this Bill': Meaning and effects;

The Oxford English Dictionary defines the word 'integral' to mean 'of or pertaining to a whole'; 'a constituent, component necessary to the completeness or integrity of the whole'; 'forming portion or element, as distinguished from an adjunct or appendage.'¹⁵³ Proving that all IHRI ratified by the Sudan forms an integral part of the Constitution is therefore the same thing as saying these instruments form substantive provisions of the Constitution. If the drafters of the Constitution intended these IHRI to be mere interpretative tools, it is submitted that that intention is not communicated here.

What is conveyed in section 27(3) is what the Committee on the International Covenant on Civil and Political Rights, rightly observed in its concluding observation on the Sudan 'pursuant to article 27 of the Interim National Constitution of 2005, the Covenant is binding and may be invoked as a constitutional text.'¹⁵⁴ It is very unlikely that the Committee on ESCR would arrive at a different conclusion. This is even more so, when the government of the Sudan had in its state report of 2006 to the African Commission on Human and People's Rights stated that:

¹⁵² As above.

¹⁵³ Oxford English Dictionary 2008 edition available online at www.dictionary.oed.com. (accessed 1 November 2008)

¹⁵⁴ The CPPR Committee Concluding Observations for 2007 available at <http://www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.SDN.CO.3.CRP.1.pdf> (accessed 4 September 2008) Para 8.

The Sudan has ratified numerous covenants and chapters[instruments] relating to human rights and considered to be part and parcel of the National Legislation[Constitution] under the provision of article 27(3) of the Constitution. These include Covenant Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights (ICCPR), African Charter on Human and People's Rights (ACHPR), Convention on the Rights of the Child (CRC)...¹⁵⁵

The Arabic words rendered 'part and parcel' and National Legislation should in its technical sense be translated to mean integral and Constitution respectively.

In its state report to the African Commission in 2008, the Sudan repeated that the rights and freedom which are not expressly stated in the Constitution 'form part and parcel of the Constitution.'¹⁵⁶ The government went on to state that 'the Constitution commits the state to protect, promote, guarantee and implement all the freedoms provided for in this chapter (article 27)'.¹⁵⁶

It is difficult to avoid the irresistible conclusion that all rights and freedoms provided for in the IHRI to which the Sudan is a party are 'full-fledged constitutional provisions'¹⁵⁷, and therefore, actionable before the courts in the Sudan in its own rights. Consequently, all SER in the CESC, the ACHPR or the CRC are justiciable and enforceable in the Sudan.

Everyone living in Sudan is not only entitled to the protection provided by the Bill of Rights and those in all the IHRI the Sudan has ratified, but also has the choice (depending on which instrument offers higher protection) of which instrument to invoke before the CC.

The legal effect of section 27(3), it is submitted, is that, each time Sudan ratifies an IHRI, it is at the same time, amending the Constitution to that effect.¹⁵⁸ As such, human rights and fundamental freedoms provided for in that IHRI attain the position of a constitutional norm.¹⁵⁹ Those rights and freedoms can automatically be invoked before the courts in the Sudan and be enforced by them.

This submission raises another question: what in essence form the substantive part of the Constitution is it just the rights and freedoms or also the decision and procedures given or provided for under these instruments? I would submit that the provision of article 27(3) is explicit on the issue. The section refers to 'rights and freedoms' and not ICCPR or CESC, for example. What is,

¹⁵⁵ The Report is available at www.achpr.org/english/state_reports/sudan/sudan%2550_3_Rrport.pdf (accessed 1 November 2008) para 70

¹⁵⁶ See the full report at http://www.achpr.org/english/state_reports/Sudan/Sudan%20_3_Report.pdf (accessed 1 November 2008) para 13

¹⁵⁷ Ibrahim n above

¹⁵⁸ Article 5(8) of the Brazilian Constitution provides for similar arrangement.

¹⁵⁹ This is exactly what article 5(8) of the Brazilian Constitution expressly states.

therefore, binding on Sudan, within this context, is the content of these instruments i.e. the rights and freedoms and not the procedures provided for, under them. The decisions of the monitoring bodies of these instruments, it is submitted, are not binding on the Sudan or its courts, but, nonetheless, are persuasive authorities before the Sudanese courts.

It is clear now that the rights and freedoms in the CESCER are judicially justiciable and enforceable in the Sudan. What is the legal implication of this on the SER which are provided for both in the CESCER and the GPD? The relationship between sections 27(3) and 22 needs to be clarified.

3.5 The relationship between sections 22 and 27 (3) and the justiciability of socio-economic rights in Sudan

It would be recalled that section 22 the 'saving' clause provides:

unless this *Constitution otherwise provides*,¹⁶⁰ or a duly enacted law guarantees the rights and liberties described in this chapter, the provisions contained in this chapter are not *by themselves* enforceable in a court of law; however, the principles expressed therein are basic to governance and the State is duty-bound to be guided by them, especially in making policies and laws.

In the light of the conclusions reached so far, with respect to SER has section 27 (3) not rendered section 22 redundant? It is the submission of this author that it has. Since this conclusion runs contrary to the presumption of consistency, it must be justified why it is not valid in this context.

Even though nowhere in the Bill of Rights is it made explicit that the provisions of the Bill of Rights is justiciable and enforceable in the court of law; it is submitted that, since section 22 of the Constitution is the only provision in the Constitution ousting the jurisdiction of the courts with respect to human rights, an *argumentum e contrario* will suggest that, for the rest of the Constitution, the binding effect is accompanied by justiciability and enforceability. It follows that, CESCER having been incorporated into the Bill of Rights, which is justiciable, the rights and freedoms contained in it are equally justiciable and enforceable before the CC.

The picture is not that simple. Section 22 of the Constitution must be there for a purpose. As a constitutional provision, it places a limitation or provides an exception, limiting or directing the application and binding effects of the Constitution. What section 22 of the Constitution attempts to do is to break the connection between the rights and freedoms before it and those that follow it. The legal consequence could be that while the provisions under the GPD bind the legislature and the executive, judicial oversight is ousted. It would mean, then, that the courts in the Sudan cannot hold the executive or the legislature accountable for a violation of the SER provided for in the GPD.

¹⁶⁰ The emphasis is mine.

It is the contention of this work that even though section 22 of the Constitution demarcates the rights before it from those after it, section 27 (3) of the Constitution provides the bridge over which rights under the GDP which are equally provided for in the IHRI incorporated via sections 27(3) crosses over into the Bill of Rights. This submission is predicated on the following premises:

First, there is no intention in section 27(3) to limit the extent to which these instruments will take effect in the domestic legal system. The section rather provides for the incorporation of '*all the rights*' in these instruments. Having provided for same as self-executing norms, the only acceptable legal process under international law available to the Sudan to limit the effect of these instruments is reservation or declaration to that effect. It is submitted that section 22 cannot replace this.

It is important to note that, similar intention is conveyed in section 32(5) which provides that 'the state shall protect the rights of the child as provided for in the international and regional conventions ratified by the Sudan'. What can be seen from these provisions is that the intention of the drafters of the Constitution was to extend the protection offered by the Bill of Rights to the international level and not to limit international protection to the domestic provision.

Secondly, the wording of section 22 supports this submission. The Constitution where it intends to limit or prejudice the provision of another section has demonstrated this by providing that '*notwithstanding section...below*';¹⁶¹ or '*without prejudice to*';¹⁶² unlike these provisions; section 22 rather provides '*unless this constitution otherwise provides*'; making section 22 a self-limiting provision. This it is submitted implies that section 22 anticipates section 27 (3), rather than limiting it. Consequently, by incorporating '*all the rights*' in CESCER section 27 (3) has already provided otherwise.

This work has successfully demonstrated that the scope of the Bill of Rights has been extended by section 27 (3) to include all the rights and freedoms in all IHRI's ratified by the Sudan. In addition by incorporating the CESCER all SER which are provide for both in CESCER and the GDP are justiciable and enforceable in the Sudan. Since all the SER provided for in the GDP are also provided for in the CESCER, section 22 is redundant to the extent it purports to exclude SER from judicial enforcement.

3.6 Application, obligation; and limitation of the Bill of Rights

Article 27(1) provides that '*the Bill of Rights is a covenant among the Sudanese people and between them and their government at every level...*' The words 'among' and 'between' would suggest a vertical and horizontal application of the Bill of Rights in the Sudan. In other words, as

¹⁶¹ See for example arts 58(2), 60(2), 66 (e), 79 where this expression is used.

¹⁶² Arts. 91(2), 93(2), 132

much as the provisions of the Bill of Rights are binding on all organs of government, it is equally binding on private individuals as well.

Traditionally, a bill of rights regulates the relationship between the individual and the state. It confers rights on individuals and imposes duties on the state. This was premised on the realisation that the state is far more powerful than individuals.¹⁶³ This is what scholars refer to as the vertical application of the bill of rights.

However, over time, it was recognised that private entities or individuals may abuse human rights of others, especially the weak and the marginalised sector of the society. The scopes of bills of rights were gradually extended to cover their activities as well. This is what is often called horizontal application of the bill of rights which, essentially, means that individuals are conferred rights by the bill of rights, but also, in certain circumstances, have duties imposed on them by the bill of rights to respect the rights and freedoms of other individuals.¹⁶⁴ Whether or not a bill of rights should apply to private parties is hotly contested.

In *Retail, Wholesale and Department Store Union Local 580 v Dolphin Delivery Ltd*,¹⁶⁵ the Supreme Court of Canada held that the bill of rights provisions did not apply, as the case was between individuals without any government involvement. This decision has severely been criticised as offering screen behind which private power could flourish on human rights abuses.¹⁶⁶

The Republic of South Africa put an end to this debate within its jurisdiction, when it provided in its 1996 Constitution that:

8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state.
- 8.(2) A provision of the Bill of Rights binds a natural or jurisdiction person, if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

In the world of today, in which private entities exercise so much power relative to the individual, excluding them from the ambit of a bill of rights cannot make a human rights protection sense. As a Botswana Court held:

¹⁶³ *Jimson v Botswana Building Society* (2005) AHRLR 3 (BwIC 2003).

¹⁶⁴ As discussed in the above case.

¹⁶⁵ (1987) 33 DLR (4th) 174.

¹⁶⁶ D Beatty 'The coercive authority of courts' (1987) *Toronto Law Journal* 186.

In today's world there are private organizations that wield so much power, relative to the individuals under them that to exclude those entities from the scope of the bill of rights would in effect amount to a blanket license for them to abuse human rights.¹⁶⁷

It is, therefore, submitted that the Bill of Rights binds all duty bearers and anyone who has the capacity to benefit from its provisions.

3.6.1 Obligations under the Bill of Rights

The IHRI provide for three typologies of obligations which are: the obligation to respect, protect, promote or fulfil.¹⁶⁸ According to the African Commission:

All rights both civil and political rights and social and economic generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties.¹⁶⁹

Section 27(1) of the Constitution binds all duty bearers to a commitment to '*respect and promote human rights and fundamental freedoms enshrined in this Constitution*'. Subsection (2) provides further the duty to '*guarantee, protect and implement this Bill*'. Therefore, unlike the CESC which imposes obligation to respect, protect and promote or the South African Constitution (SA Constitution) which adds the obligation to fulfil to these typology; it is submitted that, the Sudan Bill of Rights imposes additional and novel obligation to 'guarantee'.

3.6.1.1 Duty to respect

The duty to respect requires the state to refrain from interfering with the enjoyment of SER.¹⁷⁰ Interference could be explicit or implicit. Therefore, the duty to respect imposes a negative obligation upon the state, but it could, nevertheless, require the state to take proactive measures, for example, to prevent state agents from acting in certain ways, or to provide reparation if a duty has been breached.¹⁷¹

¹⁶⁷ n 163 above.

¹⁶⁸ *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication No. 155/96 (2001) (SERAC)

¹⁶⁹ As above para 44.

¹⁷⁰ Maastricht Guidelines (1998) 20 *Human Rights Quarterly* 693 para 6.

¹⁷¹ SERAC n 168 above

3.6.1.2 Duty to protect

With respect to the duty to protect, the state is required to prevent third parties from unduly interfering with the right-holder's enjoyment of a particular freedom or entitlement. The state is expected to act in such a way that is necessary to prevent, stop, or obtain redress or punishment for, third party interference.¹⁷² In *Commission Nationale des Droits de l'Homme et des libertés v Chad*,¹⁷³ the African Commission held that the failure by Chad to protect its citizens against rebel attacks was a breach of its obligation to protect under the African Charter.

3.6.1.3 Duty to fulfil and promote

Duty to 'fulfil' and 'promote' impose on a state obligations to 'facilitate, provide and promote access to rights. This is particularly the case when such access is limited or nonexistent.'¹⁷⁴ It is positive in nature and requires great resources. It requires the state to adopt legislative, judicial or administrative and budgetary measures towards the fulfilment or full realisation of the rights.¹⁷⁵ In *People's Union for Civil Liberties v. Union of India and others*¹⁷⁶ the Supreme Court of India found the government of India in violation of its obligation to fulfil, when it failed to provide emergency grains from its reserves for the inhabitant of Rajasthan where many people were dying of starvation.

3.6.1.4 The obligation to guarantee

The word guarantee means a formal assurance that certain conditions will be fulfilled; it is a promise with certainty.¹⁷⁷ Therefore, Sudan, as a guarantor of the Bill of Rights by virtue of this obligation, undertakes formally to ensure that every person living within its jurisdiction will benefit from the provisions of the Bill of Rights. But is this not what justiciability of a bill of rights is all about? What new value is added? It is suggested that some value is added. As a surety of the Bill of Rights, the Sudan must ensure its implementation and can offer no excuse in defense of why it could not. It is also making a formal and legal undertaking that it will certainly ensure that no 3rd party violates the provisions of the Bill of Rights. Its value, therefore, is not in its content, but the certainty it brings to bear on the realisation of the traditional obligations.

¹⁷² SERAC para 15.

¹⁷³ (2000) AHRLR 66 (ACHPR 1995).

¹⁷⁴ International Commission of Jurist Report on Socio-economic Rights 2008, available at http://www.icj.org/publi_multi.php3?lang=en.

¹⁷⁵ Committee on ESC General Comments No.14E/C.12/2000/4, CESCR para 33.

¹⁷⁶ 2004 3 SCC 363

¹⁷⁷ Compact Oxford English Dictionary available online at http://www.askoxford.com/concise_oed/guarantee?view=uk (accessed 1 September 2008).

3.6.1.5 Obligation to implement

Implementation refers to the ‘putting in effect’¹⁷⁸ of the provisions of the Bill of Rights. This obligation mandates the government to design programs and policies to give effect to the provisions of the Bill of Rights, it is submitted. As it will be argued later on, this obligation ensures that government plays a purposive and proactive role in giving effect to provisions of the Bill of Rights.

3.6.2 Limitation of the Bill of Rights

Although INC does not provide for a general limitation clause to the Bill of Rights, section 27(4) provides for its ‘regulation’. If the word regulation here is interpreted to mean restriction by law, then it will seriously limit the application of this Bill of Rights. It does seem, from the wording of the subsection, that it was intended to specify or fortify or support the actualisation of these rights, since it goes on to provide that the legislature ‘*shall not detract from or derogate any of these rights*’. Specific rights are limited either in ‘*accordance with procedures prescribed by law*’¹⁷⁹, or ‘*in accordance with the law*’¹⁸⁰ or ‘*shall be regulated by the law as necessary in a democratic society*’.¹⁸¹ The African Commission in *Media Rights Agenda and other vs. Nigeria*¹⁸² held that law in this context cannot be just any national law, but national law that is in conformity with international standards.

4. Conclusion

This chapter has established successfully that the scope of the Sudan Bill of Rights has been widened by section 27 (3) to include all rights and freedoms enshrined in all the IHRIs to which the Sudan is a party. These IHRIs includes those ratified before the Constitution came into force and those that will be ratified after it has entered into force. The implication of this has been identified to include the fact that these rights and freedoms are justiciable and enforceable by the courts in the Sudan.

Even though the Constitution has provided for justiciable SER, it has failed to provide guidance for the courts on how to adjudicate them. The question of appropriate standard of review, of limitation or qualification of these rights is probably left for the courts to determine. It is expected that the legislature and courts in the Sudan will have to look for guidance elsewhere. It is in light of the need for appropriate SER jurisprudence to help the Constitutional Court of the Sudan discharge its obligations that South Africa’s approach to adjudicating will be engaged in the next chapter.

¹⁷⁸ As above.

¹⁷⁹ Art. 34 (3).

¹⁸⁰ Art. 37.

¹⁸¹ Art.40 (2).

¹⁸² Communication No. 224/98, November 2000.

Relevant jurisprudence of the Committee on ESCR will be discussed where necessary to provide a better understanding of the issues involved.

Chapter Four

Judicial Enforcement of Socio-economic Rights: South Africa as a Case Study

*It cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by the bill of rights...*¹⁸³

*In the apartheid years, the invasion of the civil and political rights of the individual enjoyed priority... today, poverty and the failure to deliver essential services to the majority of South Africa's people, constitute the main threat to human rights. South African courts, particularly the Constitutional Court, have been too little involved in such matters.*¹⁸⁴

4.0 Introduction

South Africa has one of the richest and advanced SER case law and jurisprudence.¹⁸⁵ In addition to having SER in the Constitution, it has translated these constitutional SER into legislation making their realisation effective. In spite of similarities between the drafting style of the SER in the CESC and those in the SA Constitution, the South African Constitutional Court (SACC) has opted for a model of review different from the one of the Committee on ESCR. South Africa's successful experience in adjudicating SER and the uniqueness of its approach lies credence not only to the fact the SER like CPR are justiciable, it offers pathways to follow and indicates pitfalls to avoid for the Sudan in its bid to adjudicate SER. An in depth analysis and a critical engagement with the length and breadth of the South Africa's SER jurisprudence is beyond the scope of this work. This work will examine the SER constitutional and legislative frameworks as well as the SACC's approach to adjudicating SER. Only those aspects of the SER cases that are relevant to the subject matter of this investigation will be considered.

This chapter is divided into three parts. The first part will sketch the legal framework for realising SER in South Africa. Constitutional provisions and legislative measures designed to ensure the realisation of SER will be discussed. The intention is to demonstrate the symbiotic relationship that exists between constitutional SER and statutory SER and how this impacts positively on the adjudication of SER.

¹⁸³ *Ex parte Chairperson of Constitutional Assembly: in Re Certification of the Constitution of the Republic of South Africa*, 1996 4 SA 744 (CC), 1996 10 BCLR 77.

¹⁸⁴ J. Dugard 'Human rights in South Africa: Past, present and future', public lecture at the Centre for Human Rights, University of Pretoria, 27 March 2007, available at <http://www.chr.up.ac.za/about/news.html#dugard>.

¹⁸⁵ A Eide n 161 above.

In the second part, the enforcement mechanism for SER will be examined. The focus will be on how the SACC has construed and enforced the SER. The strengths and weaknesses as well as the opportunities and threats provided by the South African model for the Sudan, and the lessons that could be learnt from the SACC's approach to adjudicating SER, will be the mainstay of the third part.

4.1 Constitutional framework

The 1996 Constitution of the Republic of South Africa (SA Constitution) was 'shaped by history',¹⁸⁶ of the country and 'reinforced the aspirations' of all South Africans. The Constitution not only places limits on the exercise of government powers, but requires government power to be used to achieve collective values of freedom, dignity, equality and social justice.¹⁸⁷

The SA Constitution has a holistic justiciable Bill of Rights.¹⁸⁸ The Bill of Rights was designed to be an 'historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence of all South Africans, irrespective of colour, race, class, belief or sex.'¹⁸⁹ It is holistic because it provides for civil and political rights as well as SER.¹⁹⁰

4.1.1 Socio-economic rights in the Constitution

Constitutionalising SER is one of the most effective means of protecting and realising them.¹⁹¹ Their formulation in a constitution will determine the duties they impose and the entitlements they create. According to Sandra Liebenberg, SER provided for in the Bill of Rights 'follow three main drafting styles'.¹⁹² These are:

1. The qualified socio-economic rights: the right of 'everyone' to 'have access to';¹⁹³ with respect to these rights the state is expected 'to take reasonable legislative and other measures, within its available resources to achieve progressive realisation of each of these rights.'¹⁹⁴

¹⁸⁶ A Chaskalson et al (eds) *Constitutional law of South Africa* (2005) 12.

¹⁸⁷ D Brand (ed) *Socio-economic rights in the South African Constitution*(2005) 1; P de Vos 'Grootboom, the rights of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights* 258; A Van der Walt 'Tentative urgency: Sensitivity for the paradoxes of stability and change in social transformation decisions of the Constitutional Court' (2001) 16 *South Africa Public law* 1.

¹⁸⁸ Chapter 2 of the Constitution.

¹⁸⁹ E Mureinik 56 above.

¹⁹⁰ Arts.26 (2); 27(2) and 28(1) (1).

¹⁹¹ A Eide n 55 above.

¹⁹² S Liebenberg 'The Interpretation of socio-economic rights' in Chaskalson et al (eds) *Constitutional law of South Africa* (2005) 33.

¹⁹³ Secs .26(1) & 27(1).

¹⁹⁴ Secs 26(2) & 27(2).

2. The unqualified socio-economic rights: these are basic socio-economic rights of children, basic education, adult education, socio-economic rights of detained persons and sentenced prisoners.¹⁹⁵
3. Socio-economic rights that prohibit certain state action: these are rights prohibiting arbitrary evictions,¹⁹⁶ and 'right to emergency medical treatment' which prohibits any duty bearer from denying emergency medical treatment to anyone in need of it.

4.1.2 Interpretation of constitutional socio-economic rights

Sections 39(1) and 7(2) of the Constitution provide for guidance on how the Bill of Rights, which includes the SER, should be interpreted.

John Dugard has described the provisions of section 39(1) as a 'jewel in the Constitution'.¹⁹⁷ This is probably because, first, it enjoins the courts to see the Bill of Rights as a coherent document and promote interpretation that seeks to promote its structural unity;¹⁹⁸ and, secondly, it ensures that the values of public international law percolate through the South African legal system. Section 39 provides that the courts, when interpreting the Bill of Rights must consider international law, and may consider foreign law, and must ensure that, when interpreting other legislation or developing the common law or customary law, the spirit, purport and objects of the Bill of Rights are promoted.

Section 7(2) of the Constitution imposes the obligation on the state to 'respect, protect, promote and fulfil' the rights in the Bills of Rights. In turn the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.¹⁹⁹ The fact that these obligations refer to all the rights in the Bill of Rights affirms that all the rights in the Bill of Rights engender positive as well as negative obligations for their realisation. Secondly, it provides a conceptual framework for identifying claims and entitlements arising from these rights.

4.2 Statutory socio-economic rights

Article 2(1) of CESCR enjoins member states to adopt legislative measures to give effect to SER. The Committee recognises legislation as 'highly desirable and in some cases...even indispensable'.²⁰⁰ This is because legislation could provide precise and detailed definition of the content and scope of the

¹⁹⁵ Secs 28(1)(c); 29(1)(a) & 35(2)(e), although it is difficult to sustain this categorisation after the decision in *Grootboom* which is discussed below.

¹⁹⁶ Secs 26(3) & 27(3).

¹⁹⁷ J Dugard "International law and the 'Final' Constitution" (1995) 11 SAJHR 242.

¹⁹⁸ D Davis 'Interpretation of the Bills of Rights in Chaskalson n 186 above.

¹⁹⁹ General Comment No. 12.

²⁰⁰ General Comment No. 3 Para 3.

rights, provide with exactitude the functions and responsibilities of duty-holders, 'create a coordinated and coherent institutional framework for their realisation',²⁰¹ and provide for concrete and sometimes cheaper, speedier and more accessible remedies.²⁰²

In South Africa the, Constitution commands the legislature to enact legislation to give effect to all constitutional rights.²⁰³ Specifically with respect to SER, sections 26(2) and 27(2) enjoin the legislature to take, among other things, 'reasonable legislative... measures'. These measures could include creating and empowering structures and institutions, and putting in place processes and policies designed to give effect to SER.²⁰⁴

A number of detailed and fairly comprehensive laws have been passed by the legislature to give effect to constitutional SER.²⁰⁵ The courts generally are inclined to enforce statutory SER more robustly than they would the broadly phrased constitutional rights, because the rights and duties are defined by the legislature itself. Consequently, the courts are not faced with the questions of separation of powers, institutional legitimacy, and technical competency that would otherwise have arisen under the Constitution.²⁰⁶

The case of *Port Elizabeth Municipality v. Various Occupiers (PE Municipality)*²⁰⁷ demonstrates how effective statutory SER could be. The case dealt with the interpretation of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE),²⁰⁸ whereby the municipal authorities sought the eviction of some 68 people who occupied shacks erected on privately owned land within the municipality. The Court held that before it could grant an eviction order it must be 'just and equitable to do so, after considering all relevant circumstances'.²⁰⁹ The possibility of a 'reasonable alternative...even as an interim measure pending ultimate access to housing in the formal housing program'²¹⁰ should be taken into consideration in determining whether or not the eviction was equitable.

Legislative SER have also proved very effective in countries without constitutional SER.²¹¹ However, without an overarching constitutional SER, the protection of statutory SER is often precarious.²¹²

²⁰¹ S Liebenberg n 192 above

²⁰² S Liebenberg n 192 above.

²⁰³ Sections 9, 32 and 33 of the SA Constitution.

²⁰⁴ Brand n 187 above.

²⁰⁵ The following are some of the legislation: The Promotion of Equality and Prevention of Unfair Discrimination Act 407 of 2000; Social Assistance Act 13 of 2000; Housing Act 107 of 1997; Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; National Health Act 61 of 2003; National Water Act 36 of 1998 and Education Laws Amendment Act 1 of 2004

²⁰⁶ A Eide n 55 above.

²⁰⁷ 2004 12 BCLR 1268 (CC).

²⁰⁸ No. 19 of 1998.

²⁰⁹ Sec. 6 (1) of PIE.

²¹⁰ N 207 above para 42

²¹¹ Liebenberg n 51 above.

²¹² Brand n 187 above.

This is so because the legislature is prone to unnecessarily interfere in the realisation of SER.²¹³ The South African model, wherein statutory SER were intended, in the first place, to give effect to constitutional SER, could provide for a symbiotic interaction where each component reinforces the other, and results in more effective protection and realisation of SER. Legislation also has an added advantage of possibly preventing any challenge to statutory SER on constitutional grounds.²¹⁴

4.3 Breathing life into socio-economic rights through adjudication

Enforcing SER claims through the courts seriously compromises the legitimacy of the courts and the entire human rights project, some scholars have submitted.²¹⁵ The SACC's successful adjudication of SER claims has demonstrated that not only can the negative obligations be enforced judicially, but even with regard to positive duties, SER can be subject to adjudication.

4.3.1 Types of adjudication

Two provisions of the Constitution regulate how and under what circumstances conduct or a law can give rise to a potential SER case. Sections 8 and 39 (2) indicate the kind of SER claims that can be entertained by the courts, and against whom, and how, the courts should discharge their duties in this regard.

Pursuant to section 8 (1), the Bill of Rights 'applies to all law' including the common law and customary law;²¹⁶ and 'binds the legislature, the executive, the judiciary and all organs of the state. Section 8 (2) brings the private sphere within the reach of the Bill of Rights, stating that if the 'nature of the right and the nature of any duty imposed by the right' permits the right to 'bind a natural or a juristic person' then they will be bound.²¹⁷

If a court in a dispute involving private parties finds that the Bill of Rights applies, and that a right has been breached, then it must give effect to that right by first using a statutory or common law remedy, and in the absence of an effective common law remedy, develop the common law in order to give effect to the right breached.²¹⁸ In interpreting or applying the common law, the courts 'must promote the spirit, purport and objects of the Bill of Rights.'²¹⁹ Consequently, the Bill of Rights anticipates public as well as private legal actions.

²¹³ L Williams 'Welfare and legal entitlements: the social root of poverty' in D Kairys (eds) *The politics of law: A progressive critique* (1998) 570, W Simon 'Rights and redistribution in the welfare system' (1986) 38 *Stanford Law Review* 1467.

²¹⁴ Brand n 187 above.

²¹⁵ A Neier 'Social and economic rights : A critique', in H Steiner & P Alston(eds) *International human rights in context: Law, politics morals* (2008)283, D Kennedy *A critique of adjudication (Fin de siècle)* (1997)33; J Lyotard *The different: Phases in dispute* (1988) 13; K Arambulo *Strengthening the supervision of the international covenant: Theoretical and procedural aspects* (2002)78.

²¹⁶ *Du Plessis v. De Klerk* 1996 5 BCLR 658 (CC).

²¹⁷ *Khumalo v. Holomisa* 2002 5 SA 401 (CC).

²¹⁸ Sec.8 (3).

²¹⁹ Sec.39 (2).

Although how the Bill of Rights regulates and under what circumstances it applies 'to law and conduct' is most contentious,²²⁰ it can be used to challenge law and conduct in any of the following ways:²²¹

- To challenge the constitutionality of law whether statutory, common law or customary law rule. A successful challenge to legislation overturns and reverts to the situation before the legislation was enacted. *Khosa v Ministry of Social Development (Khosa case)*²²² a piece of legislation excluding permanent residents from social security was successfully challenged and declared invalid to the extent to which it excluded permanent residents.
- Challenge a conduct inconsistent with constitutional SER. If the challenge is successful, the conduct will be declared invalid and appropriate remedy given by the court. A good example is *Treatment Action Campaign v Minister of Health (TAC case)*.²²³ Governments program to prevent mother to child transmission of HIV that excluded many would-be beneficiaries were successfully challenged, and government ordered to extend the Nevirapine program beyond to pilot sites.
- The bill of rights can be used as an 'objective normative value system'²²⁴ to argue that a particular rule of law although not inconsistent with a specific right, it conflicts with the 'general tenor of the Bills of Rights'.²²⁵

4.3.2 The Constitutional Court and socio-economic rights adjudication

4.3.2.1 Standard of Review in socio-economic rights

One of the most contentious issues in SER adjudication is designing appropriate and acceptable judicial standard of review.²²⁶ There are different standards of review depending on the applicable legal systems in different countries. The minimum core approach and reasonableness test are some of the fairly known standards. While the Committee on the ESCR has consistently used the former, the SACC has opted for the latter.

²²⁰ S Woolman 'Application' in Chaskalson et al (eds) *The Constitution of South Africa* (1998) 10.

²²¹ Discussed in Brand n 187 above.

²²² 2004 6 BCLR 569 (CC).

²²³ 2002 5 SA 721 (CC), 2002 10 BCLR 1033 (CC).

²²⁴ See *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 56

²²⁵ see D Brand n above 187 for full discussion of the modes of adjudication of SER

²²⁶ S Yeshanew 'Combining the "minimum core" and "reasonableness" models of reviewing socio-economic rights' (2008) 9 *ESR Review* 8.

4.3.2.2 The minimum core approach

The CESCR historically, and to a certain extent remains, 'the normatively underdeveloped stepchild of the human rights family'.²²⁷ The Committee, in order to ensure that it does not remain merely hortatory, started to 'distil its considered views on an issue which arises out of the provisions of the [CESCR] whose implementation it supervises, and presents those view in the context of a formal statement'²²⁸ called the General Comments.

The normative value of General Comments in international law is extremely contentious.²²⁹ According to Philip Alston some scholars:

seek to portray them as authoritative interpretations of the relevant treaty norms, though others see them as a de facto equivalent of advisory opinions which are to be treated with seriousness but no more, to highly critical approaches that classify them as broad, unsystematic statements which are not always well founded, and are not deserving of being accorded any particular weight in legal settings.²³⁰

Nevertheless, the General Comments are the most significant and influential normative tools in international human rights law.²³¹

Although the concept of minimum essentials was already known to development economists and the UN in general, it was the Committee on CESCR that popularised it through its General Comment No.3 of 1990 on 'The nature of States parties' obligations (Article 2[1]) of the International Covenant on Economic, Social and Cultural Rights'.²³² It was then further elaborated by an International Committee of Experts in 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights';²³³ and 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights'.²³⁴

Initially, the Committee understood the minimum core as 'minimum essential levels of each of the rights' which required the satisfaction 'of essential foodstuffs, of essential primary healthcare, of basic shelter and housing, or of the most basic forms of education'.²³⁵ According to the Committee, a state in which 'a significant number of people is deprived of essential [needs] is, *prima facie*, failing to discharge its obligations'.²³⁶ This might be taken to mean that the minimum core does not

²²⁷ C Blake 'Normative instruments in international human rights law: Locating the General Comment' (2008) 17 Working Papers of the Centre for Human Rights and Global Justice.

²²⁸ P Alston, "The Historical Origins of 'General Comments' in Human Rights Law," in L Boisson De Charzournes and Vera Gowlland-Debbas (eds) *The International Legal System in Quest of Equity and Universality* (2001) 764.

²²⁹ Blake n 201 above.

²³⁰ Alston n 49 above 731

²³¹ As above.

²³² 5th sess., 1990, UN Doc.E/1991/23, Annex III 10.

²³³ *Human Rights Quarterly* (1987) 9 122.

²³⁴ *Human Rights Quarterly* (1998) 20 691.

²³⁵ General Comment No.3 (1990), para 10.

²³⁶ As above.

establish individual rights but looks at society as a whole from a relative perspective.²³⁷ But the Committee has also said in respect to the right to water, that ‘the water supply for each person must be sufficient and continuous for personal and domestic uses’ and that ‘water facilities and services have to be accessible to *everyone* without discrimination’²³⁸ suggesting individual entitlement.

The Committee has not only oscillated between describing the minimum core as collective and individual entitlements, it has also seemed to have shifted from regarding the minimum core as essentials of the rights in the Covenant, to using the concept to clarify duties needed to implement the rights.²³⁹ Relying on the notion of minimum core, it has produced a template of ‘core obligations’ that straddle different rights, duties of positive provision, and wider institutional strategies as necessary steps to ‘operationalise’ the rights. It has, furthermore, equated these obligations with nonderogable rights and obligations of strict liabilities.²⁴⁰

Mathew Craven has summarised the features of the notion of a minimum core as follows:

- Minimum threshold - that every rights contains within it a core element associated with survival, and which should be guaranteed to all in every circumstance.
- Minimum core obligations – these are actions or omissions required from the state in any circumstance, and are not contingent on resource availability;
- And finally, minimum content of rights – which is incapable of limitation without violation.²⁴¹

The minimum core concept has been criticised for being amorphous,²⁴² indeterminable²⁴³ and context insensitive.²⁴⁴ It is not easily ascertainable whether ‘minimum core’ is an immediate individual entitlement or progressive collective right. In the absence of specific statutory provisions and sufficient information, imposing a minimum core by the courts is likely to push them beyond their perceived competency, it has been argued.²⁴⁵ This has been used to justify the resort to reasonableness as a standard of review.

²³⁷ M Wesson ‘*Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court’ (2004) 20 *SAJHR* 284.

²³⁸ General Comment No.15 (2002) E/C.12/2002/11 para.12(c).

²³⁹ K Young ‘The Minimum core of economic and social rights: A concept in search of a content’ (2008) 33 *Yale Journal of International Law* 113.

²⁴⁰ As above.

²⁴¹ M Craven n 62 above.

²⁴² C Scott & P Alston ‘Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney’s* Legacy and *Grootboom’s* Promise’ (2000) 16 *SAJHR* 206, 250.

²⁴³ *Grootboom* para 32.

²⁴⁴ K Lehmann ‘In defence of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core’ (2006-2007) 22 *American University International Law Review* 163.

²⁴⁵ D Davis ‘Adjudicating the socio-economic rights in the South African Constitution: Towards “deference

4.2.2.3 Reasonableness approach

There is no consensus among scholars as to which standard of review the SACC is using just as there is no agreement on its appropriateness or inappropriateness. Some have suggested policentrism,²⁴⁶ others democratic-existentialist,²⁴⁷ others still administrative law review standards.²⁴⁸ The Court has said it uses reasonableness review. The court will hold a government program or policy unreasonable unless it:

- is comprehensive and coordinated with a clear delineation of responsibility amongst the various spheres of government, with national government having overarching responsibility;
- is capable of facilitating the realisation of the right;
- is reasonable both in conception and implementation;
- is balanced and flexible and make appropriate provision for crisis and for short, medium and long term needs;
- does not exclude a significant segment of society;
- Must include a component which responds to the urgent needs of those in the most desperate situations and the state must plan, budget for and monitor measures to address immediate needs and the management of crisis.²⁴⁹

Reasonableness has been as praised as it has been criticised. It has been praised as an appropriately nuanced and balanced standard of review, because it deals carefully with separation of powers and institutional-competency concerns.²⁵⁰ The proponents insist that it gives appropriate limited effects to SER, they contend, by 'strengthen[ing] the hands of those who might be unable to make much progress in the political arena'²⁵¹; while, by deferring reasonable priority-setting to the government, such an approach respects 'democratic prerogative and the simple fact of limited budget'.²⁵²

lite"?) (2006) 22 *SAJHR* 301.

²⁴⁶ B Ray 'Policentrism, Political Mobilization and the Promise of Socioeconomic Rights' (2008) 1 available at www.works.bepress.com/cgi/viewcontent.cgi?article=1000&content=brianray (accessed 26 October 2008)

²⁴⁷ M Tushnet 'Marbury v. Madison around the World' (2004) 71 *Tenn. Law Review*. 251 see also M Tushnet 'Alternative Forms of Judicial Review' (2003) 101 *Michigan Law Review* 2781; M Tushnet 'New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries' (2003) 38 *Wake Forest Law Review* 813.

²⁴⁸ C Sunstein *Designing Democracy: What constitutions do* (2001) 224; see also D Bilchitz 'Placing basic needs at the centre of socio-economic rights' (2003) 4 *ESR Review* 1.

²⁴⁹ Liebenberg n 192 above.

²⁵⁰ Sunstein n 248 above 225

²⁵¹ Sunstein n 250 above 245

²⁵² As above.

It has been criticised because it 'places no clear restrictions on the [court's] role in socio-economic rights; neither does it define the content of each right thereby failing to provide 'clear and principled bases for the evaluation of the state's conduct by judges or other branches of government in the future.'²⁵³ It therefore, leaves the government with an amorphous standard with which to judge its own conduct.²⁵⁴ Consequently, orders given by the Court are merely 'remedy without sanction and therefore without any practical relevance for people whose socio-economic rights constitute their sole claim to citizenship.'²⁵⁵

Despite these shortcomings, Sandra Liebenberg has opined that reasonableness is capable of creating a legal platform for participation by citizens in government decision making, ensure constitutional dialogue between different organs of government with respect to SER.²⁵⁶

She suggests that this can be done in three ways: first, basic needs could, through the use of proportionality test within the framework of reasonableness, ensure greater protection for individuals and groups suffering systemic deprivations. Secondly, the Court could shift attention from obligations to the duty to alleviate poverty and ensure the protection of the constitutional value of dignity. And finally, it could help in deconstructing some fundamental private law concepts that have until now preserved the legacy of apartheid.²⁵⁷ Whether or not the courts have used reasonableness in this way is the next preoccupation of this work.

4.3 Analysis of the SACC approach to adjudicating SER

For analytical purposes, the SER cases decided so far by the SACC will be grouped into two generations: the first generation and the second generation. The approach and the rationale of the decisions of the SACC are the distinguishing factors in these two classes of cases. In the former the SACC employed a concept of rationality which is 'rooted in international law, fashioned in domestic administrative law, and packaged as reasonableness'²⁵⁸; in the latter the SACC seems to have taken a value-based approach.²⁵⁹

²⁵³ Bilchitz n 248 above.

²⁵⁴ As above.

²⁵⁵ T Roux '*Understanding Grootboom—A response to Cass Sunstein*' (2002) 12 *Forum Constitutionnel* 41.

²⁵⁶ Liebenberg n 192 above.

²⁵⁷ As above.

²⁵⁸ D Davis 'Socio-economic rights: Do they deliver the goods?' (2008) 6 *International Journal of Constitutional Law* 687.

²⁵⁹ As above.

4.3.1 The first generation: Creating a culture of justification?

*Soobramoney v Minister of Health, KwaZulu-Natal ;(Soobramoney)*²⁶⁰ *Government of Republic of South Africa v Grootboom and Others (Grootboom)*,²⁶¹ and *(TAC)*,²⁶² were the first three major cases that came before the SACC. First, these cases revolve around the core clusters of SER in sections 26, 27 and 28 of the SA Constitution. The rights provided for under each of these sections are, with the exception of section 28, limited by subsections (2) which requires the state to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'. Secondly, these cases were purely constitutional challenges to government programs and policies.

While some scholars have argued that these cases demonstrate a consistent pattern of decision making by the SACC,²⁶³ others have highlighted some degree of inconsistencies.²⁶⁴ Dennis Davis, arguing in favour of a uniform approach by the SACC, identified three main features common to these cases: they share in common a one-sided-emphasis on obligations, availability of resources and limitations, and weak orders that leave no room for the beneficiaries to return to the Court to ensure their enforcement.²⁶⁵

Other scholars have, however, indicated that there are some differences between *Soobramoney* and *Grootboom* and between these two and *TAC*.²⁶⁶ In *Soobramoney* the Court applied the standard of rationality, in *Grootboom*; the Court went beyond rationality to an elaborate reasonableness test. *TAC* went beyond the *Grootboom's* paradigm: first, the Court demonstrated greater willingness to impose greater financial obligations on the state in the event of its non compliance with its obligations under SER;²⁶⁷ and secondly, it heightened the standard of reasonableness.²⁶⁸

There is however, another seemingly substantive difference between *Soobramoney* and *Grootboom* on one side and *TAC* on the other according to these scholars. There is evidence in *TAC* that the SACC is 'starting to retreat from its stance against affirming and enforcing individual entitlements

²⁶⁰ 1998 1 SA 765 (CC).

²⁶¹ 2000 11 BCLR 1169 (CC).

²⁶² 2002 5 SA 721 (CC), 2002 10 BCLR 1033 (CC).

²⁶³ Davis n 258 above.

²⁶⁴ M Wesson n 237 above.

²⁶⁵ Davis n 258 above.

²⁶⁶ J Sloth-Nielsen & C Mbazira 'Incy wincy spider went climbing up again –prospects for constitutional(re) interpretation of section (28)(c) of the South African Constitution in the next decade of democracy' (2007) 2 *Speculum Juris* 147; M Pieterse 'Resuscitating socio-economic rights: Constitutional entitlements to health care services' (2006) 22 *SAJHR* 473.

²⁶⁷ Wesson n 237 above.

²⁶⁸ Sloth-Nielsen n 266 above.

inherent to socio-economic rights'.²⁶⁹ The reasoning is that, ultimately, in *TAC* individual pregnant women were the beneficiaries of the Nevirapine.

Nevertheless, with respect to those three cases the Court seems to follow an invisible policy of 'dealing with socioeconomic rights that seeks to maximize the autonomy of the other branches of the state'.²⁷⁰ In this approach, government is expected to be accountable to the citizenry. This seems to confirm to Etienne Mureinik's template of justification.²⁷¹ In his reasoning, the inclusion of SER in the constitution would embolden the judiciary to ensure that government was held accountable for its performance in complying with constitutional obligations.

The SACC in using SER as tools to ensure accountability in public decision making has in some ways given meaning to SER. This approach has also allowed the Court to adjudicate SER without unduly encroaching on the prerogative of the elected officials to make laws and fashion social policies. However, this justificatory approach is failing the poor and inevitably the Court in relieving the burden of poverty and restore dignity. This may explain why the Court is charting a new way.

4.3.2 A Value-based approach to adjudicating SER: A conflating of constitutional rights?

The virtues of value - based - approach to adjudicating SER have been praised by many scholars.²⁷² First, because a value-based approach goes further than the 'basic needs' inquiry by emphasising not what is strictly required for life, but rather what it means to be human.²⁷³ The value of dignity, for example, evokes the individual's claim to be treated with respect and to have one's intrinsic worth recognized.²⁷⁴ Secondly, a value - driven adjudication would emphasise the interrelatedness, interconnectedness and interdependence of all rights and de-emphasise their distinctions.

²⁶⁹ Pieterse n 266 above.

²⁷⁰ Davis n 258 above.

²⁷¹ Mureinik n 56 above.

²⁷² S Liebenberg 'The Value of human dignity in interpreting socio-economic rights' (2005) 21 *SAJHR* 1; P De Vos 'Grootboom, the right of access to housing and substantive equality as contextual fairness' (2001) 17. *SAJHR* 259.

²⁷³ As above.

²⁷⁴ S Liebenberg (n 246 above).

In *Jaftha v Schoeman and others, Van Rooyen v Stoltz and others, (Jaftha)*²⁷⁵; *Khosa case; President of the Republic of South Africa v Modderklip Boedery (Pty) Ltd*²⁷⁶ *Rail Commuters Action Group and Others v Transnet Limited t-a Metrorail and Others*²⁷⁷ and *PE Municipality*²⁷⁸ the SACC demonstrated this approach. These cases have two common features: first, with exception of *the Rail Commuters* case, these cases were primarily challenges to legislation or based on legislative claims. Secondly, the Court's decisions were substantially based on constitutional values of dignity, equality and liberty.

In *Khosa* the Court held that the exclusion of permanent residents from the social security grant available to all South Africans had a 'serious impact on [their] dignity.'²⁷⁹ Finding that the legislation violated the right to equality, the CC ordered the government to include all permanent residents in the program. Using dignity and equality rather than the text of section 27, the CC ensured that SER benefited individuals.

In *Modderklip*, the Court found it 'unreasonable of the State to stand by and do nothing in circumstances where it was impossible for *Modderklip* [the land owner] to evict the occupiers because of the sheer magnitude of the invasion and the particular circumstances of the occupiers';²⁸⁰ the Court in recognition of the positive obligation flowing from the SER ordered the state to compensate the landowner at market value for the use of his land, and ordered that the squatters remain on the land until the state finds alternative land for them.²⁸¹ The constitutional rights of dignity, life, freedom and security of person were used in *Rail Commuters* to obligate the Rail Corporation to provide Commuters with safe and dignified transport system.

Central to a value - based approach is the belief that dignity, equality and freedom will remain aspirational until socio-economic conditions are transformed. This way, this approach ensures that SER adjudication is not only a means to achieve transparency, accountability and participation; but also a way of affirming the Bill of Rights as truly a moral objective order.

The author's concern with regard to value-based approach is SER could be reduced to mere interpretative tools for realising civil and political rights. This approach in essence could just be a tacit acceptance by the judiciary that after all SER is not properly suited for objective adjudication.

²⁷⁵ 2005 1 BCLR 78 (CC).

²⁷⁶ 2005 8 BCLR 786 (CC).

²⁷⁷ 2005 2 SA 359 (CC).

²⁷⁸ 2004 12 BCLR 1268 (CC).

²⁷⁹ Para 76.

²⁸⁰ Para 48.

²⁸¹ See *L Chenwi Eviction in South Africa: Relevant international and national standards*(2008) 71; L Chenwi 'Taking those with special housing needs from the doldrums of neglect: A call for a comprehensive and coherent policy on special needs housing' (2007) 11 *Law Democracy & Development* 1; also L Chenwi & S Liebenberg 'The constitutional protection of those facing eviction from "bad buildings"'(2008) 9 *ESR Review* 12

Conflating SER with civil and political rights has implications for the transformative project of the SA Constitution if not properly circumscribed.

The SACC has put beyond any doubt that by providing for SER within a bill of rights, no new 'task is conferred upon the courts so different from that ordinarily conferred upon them by the bill of rights.'²⁸² The South African experience has also shown that SER are 'adjudicable' without destabilising the democratic equilibrium; and that in order to do this, a standard of review that is sensitive to democratic imperatives like separation of powers, which nevertheless, defines the legal content of these SER, and demarcates the contours of government's obligations in their respect thereof is desirable.

The South African experience is nevertheless, a dire warning that irrespective of the merits of adjudication, the political process remains the most appropriate way of influencing and taking decisions with distributional consequences, because 'even when armed with progressive texts, judges retreat into models of adjudication that are based on earlier traditions of legal practice and that reduce the potential promise of the text'.²⁸³

4.4 South Africa's evolving jurisprudence on socio-economic rights: Lessons for the Sudan

4.4.1 Constitutionalisation of socio-economic rights

The wholesale incorporation of CESCER by the Interim National Constitution of the Sudan (INC) though commendable will likely be problematic in practice. First, the protection and adjudication of SER in the Sudan is eternally tied to international jurisdiction. This may lead to exponential increase in pressure to harmonise national laws and could make it difficult to maintain independent and divergent domestic jurisprudence.²⁸⁴

Secondly, such incorporation inevitably gives the interpretations of the CESCER by the Committee and its General Comments an authoritative standing in the domestic legal. The General Comments which has been described as 'broad, unsystematic statements which are not always well founded' would likely not be fit for adjudication in all circumstances.²⁸⁵

The South African model of selectively constitutionalising SER and providing adequate guidance to the judiciary on how to interpret them is seductive. The judgments of the courts which are root in a

²⁸² *Certification Judgement* n 184 above

²⁸³ Davis n 258 above.

²⁸⁴ M Toufayan 'Human rights treaty interpretation: A postmodern account of its claim to "speciality"' (2005) 2 Centre for Human Rights and Global Justice Working Papers Series 1.

²⁸⁵ M Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) 141.

constitution that is context- specific are likely to command more respect from the government and the public than the statement of an external body.

4.4.2 Hierarchy of norms

The relationship between municipal and international law is of vital importance to the smooth running of a legal system.²⁸⁶ There is no mention in the INC of international law, except in relation to article 27(3). The position of international law with respect to the Constitution is not clear. A Constitution that incorporates all international human rights instruments to which the state is a party without defining which one is supreme, or even what role is assigned to the international norm in the municipal jurisdiction, is surely dangerous.

The SA Constitution is a good model. It provides for the process through which international treaties are incorporated into municipal law,²⁸⁷ the relationship between the two norms²⁸⁸ and the role assigned to the international norm in the domestic jurisdiction,²⁸⁹ and, finally, recognises customary international law as law in the Republic unless it is inconsistent with the Constitution or an Act of the Parliament.²⁹⁰

Section 39 (1) makes it mandatory for the courts to *consider* international law when interpreting the Bill of Rights.²⁹¹ The obligation to consider international law includes treaty law as well as customary international law, both binding and non-binding treaty law.²⁹² This does not mean however, that South African courts are bound to apply international law.²⁹³

With respect to international human rights instruments, the INC, unlike the SA Constitution, does not provide for them as a mere tool of interpretation, but as substantive constitutional provisions as has been submitted earlier on.²⁹⁴ The implication is that their provisions are actionable before local courts in the Sudan. Despite this difference, it is still desirable that clear stipulations of the position of international law in general, and its role in the domestic jurisdiction, are outlined in the new Constitution of the Sudan, in clear terms.

²⁸⁶ H Waldock (ed) *The Law of nations* (1963) 1; J Dugard *International law: A South African perspective* (2005) 45; R Wallace *International law* (1997) 37; M Shaw *International law* (2003) 123; I Brownlie *Principles of public international law* (2003) 489.

²⁸⁷ Sec. 231.

²⁸⁸ Sec. 231 (4).

²⁸⁹ Secs.233 & 39.

²⁹⁰ Sec.232.

²⁹¹ M Olivier 'South Africa and international human rights agreements, policy and practice' (2003) 2 *Journal of South African Law* 293.

²⁹² H Strydom & K Hopkins 'International law', in Chaskalson et al (eds) *Constitutional law of South Africa* (2005) 30.

²⁹³ *S v. Williams* 1995 3 SA 632 (CC), 1995 7 BCLR 861 (CC).

²⁹⁴ See chapter three.

4.4.3 Standard of review

The South African model of review suggests reasonableness alone is not an effective review standard. First, it entitles an individual to a right to reasonable government policies and programs and not individual benefits. When programs or policies are not in place, SER adjudication is difficult. Secondly, it throws the burden of proving the unreasonableness of government programs or policies on the litigant who may not have the means to do that. Thirdly, it lacks clear principled basis for decision in SER because it means whatever a court wants it to mean.²⁹⁵ In failing to define the minimum content of the SER, the test fails to provide government with a goal or direction with respect to realising SER.²⁹⁶

It does however, offer advantages because by evading the concern with legitimacy and competency of the court to adjudicate SER, it allows the courts to scrutinise only the programs and policies of government for compliance with reasonableness without directing solutions or prescribing policy choices.²⁹⁷ A combined standard of review that uses reasonableness as well as minimum core is recommended for the Sudan.

Whereas the minimum core model seem best suited to the adjudication of negative obligation, the reasonableness model as potential for a review of positive obligations.²⁹⁸ A combination of the two models will ensure that the content of the rights are defined on principled bases and offer a framework for evaluating measures taken by the state to realise SER. The Committee on ESCR have announced that it will use a combined model as described above while entertaining individual communications under the Optional Protocol.²⁹⁹

²⁹⁵ Bilchitz n 248 above

²⁹⁶ M Pieterse n 17 above 383.

²⁹⁷ D Brand 'Socio-economic rights and courts in South African: Justiciability on a sliding scale' in F Coomans (ed) *Justiciability of economic and social rights: Experiences from domestic systems* (2006) 227; F Michelman 'The constitution, social rights and liberal political justification' (2003) 1 *International Journal of Constitutional Law* 13.

²⁹⁸ S Yeshanew n 200 above.

²⁹⁹ See L Chenwi 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2008) 9 *ESR Review* 21; An evaluation of the obligation to take steps 'to the maximum available resources' under an optional protocol to the covenant. Statement, UN Committee on CECSR 38th Session, 30th April-18 May 2007. UN doc.E/C.12/2007/1.

4.5 Conclusion

Even though the Sudan has provided for a justiciable SER, the method it has chosen is different from the South African model. The challenges of adjudicating SER will in some ways be similar. Carefully translating the constitutional SER into specific legislation as South Africa has done is worth emulating. An appropriate review process that ascribes minimum contents to SER and evaluates compliance against a reasonable standard is lacking in the South African model, but highly desirable for the Sudan. This is because it will offer the Sudan an opportunity to benefit from the strides made by South Africa without losing from the richness of international jurisprudence.

Chapter Five

Conclusion and Recommendations

5.0 Conclusion

This work has demonstrated successfully that all rights and freedoms in all IHRI's ratified before or after the Constitution by the Sudan form a substantive provision of the Bill of rights. Arising from this determination, this work concluded the SER provided for in the CESCRR are justiciable and enforceable by the courts in the Sudan. Having established that section 22 cannot and was not intended to limit section 27 (3), all the SER provided for under the GDP, but also contained in the CESCRR are justiciable. Since all the SER under the GDP are incidentally also provided for under the CESCRR, section 22 is redundant with respect to SER. Consequently, what section 22 purported to exclude, section 27 (3) has included.

The implications of this constitutional arrangement for the Sudanese legal system are dramatic as they are challenging. The judicial has a wider choice of tools from which to choose in their task of enforcing SER and so also the individual could choose at will which instrument best protect his/her interest and decide to bring his or her claim under that particular instrument. There is however, the challenge of interpreting these myriad of legal instruments with decades of history of interpretation and even adjudication in other jurisdictions.

A theoretical framework for analysing and delineating the nature of government obligations under the Bill of Rights that encompasses IHRI's was proposed. By critically engaging with South African and international SER jurisprudence, this work suggested a mixed model for the Sudan and proposed how it could be used to adjudicate SER in the Sudan. This work identified serious inconsistencies and *lacunae* in the Sudanese model of constitutionalising SER by cross-reference. In addition to recommendations made already in the courses of the work, the following ones are made with the aim of mitigating these limitations and provide guidance for future constitutional making in the Sudan.

5.1 Recommendations

5.1.1 The status of international law

Vertical and horizontal constitutional compatibility is an essential element of modern constitutional design.³⁰⁰ Whereas the former refers to compliance with international obligations, the latter refers to internal compatibility with human rights norms embedded in the constitution.³⁰¹

Even though the nature and scope of effective protection of human rights in the Sudan are intractably tied to the international standards, the intercourse between international law and the domestic norms is confusing, to say the least.

Countries deal with this issue in different ways. In some jurisdictions, a constitution stipulates which norm takes precedence and under what circumstances.³⁰² In others, it is the duties of the courts to determine, with reference to the text of the treaty, whether or not it should take precedence over domestic norms.³⁰³

The INC has made international human rights laws constitutional norms in the Sudan and Acts of the National Assembly cannot derogate from their provisions.³⁰⁴ The crucial issue is that of interpretation. In a constitution that is so silent on international law, which meaning should prevail: the ones the courts of the Sudan will determine or the international meaning assigned to the rights?

It is recommended that IHRI should take precedence over domestic norms. The courts should also be allowed to consider foreign laws without an obligation to be bound by them. Customary international law especially in the field of human rights should be law in the Sudan. This should be done in a way that gives the last say of what is binding, and under what circumstances, to the judiciary, which must, through a process of reasoning and justification, allot weight to these different international norms.

³⁰⁰ See A Peters 'The globalization of state constitutions' in A Nollkaemper (ed) *New perspectives on the divide between national and international law* (2007) 260, for a panoramic survey of national constitutions' reaction to international law and techniques employed; and T Ginsburg 'Locking in democracy: Constitutions, commitments and international law' (2006) 38 *New York University Journal of International Law and Politics* 707 for a discussion of international commitment as function of domestic constitutional design; J Tully 'The Imperialism of modern constitutional democracy' in M Loughlin & N Walker (eds) *The paradox of constitutionalism: Constituent powers and constitutional form* (2007) 315-338; D Held *The global covenant* (2004); M Kumm 'Democratic Constitutionalism encounters international law: terms of engagement' in S Choudhry (ed) *The migration of constitutional ideas* (2006) 256.

³⁰¹ Peters n 300 above 260

³⁰² Secs 231 -233 of the SA Constitution.

³⁰³ Kum n 300 above 321

³⁰⁴ Sec 27 (4) of INC.

5.1.2 Recommendation; for the Legislature

The INC commands the legislature to enact laws to give effect to these constitutional rights.³⁰⁵ Legislation provides a very effective means of clarifying the ambiguities in the INC, defining and delineating these rights, identifying right holders and duty bearers, and stipulates ways and means of enforcing them.

5.1.3 Recommendation to the future Constitutional Assembly

The dense connections and significant overlaps of today's legal systems as a result of the proliferation of new legal orders at subnational, supranational and international level makes it practically impossible for a constitution to ignore international law. The failure of the INC to make a commitment to international engagement is serious. It is important that, in drafting a permanent constitution for the Sudan, the Constitutional Assembly should decide on the position and effect of international and foreign laws within the Sudan.

Even though the INC framework with respect to IHRI that reasonably suggests a kind of direct effect of these instruments in the Sudan is commendable, it does have its shortcomings. It might stifle innovative judicial activism. The South African model discussed earlier on is recommended. This is done because it offers a balanced approach that ensures international law, foreign law and customary international law trickles down to the national legal system without necessarily erasing the national identity in law making and law enforcing.

5.1.4 Constitutionalization of SER

Offering constitutional protection for SER is an effective method of protecting them.³⁰⁶ How this is done is crucial to the effective realisation of SER. Ideally, the wholesale incorporation of CESC, as the INC has done, is a plausible method. Pragmatically, however, this style of incorporation by reference to CESC may turn out to offer little or no meaningful protection for SER.

This is so because of two reasons, there is no denying the fact that the nature and content of SER make judicial adjudication of them, in the absence of comprehensive and targeted constitutional and legislative provisions, an uphill task. This is exacerbated in the African context where resources are extremely finite.

³⁰⁵ As above.

³⁰⁶ Liebenberg n 192 above.

Secondly, the Economic Covenant is a *portmanteau* legal instrument. It is likely to be very difficult for courts to adjudicating cases purely on the bases of the CESCR in the absence of a contextualising legal instrument. The South African model which would provide for a selective approach that will, for example, constitutionalise rights to health, education, housing, nutrition, portable drinking water, social security, and work, with clearly defined obligations and mechanism for enforcing them will offer greater protection to SER in the Sudan.

(17, 000 word; excluding abstract, table of content, footnote, and bibliography)

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