

**Enforcing the Economic, Social and Cultural Rights in the
South African Constitution as Justiciable Individual Rights:
The Role of Judicial Remedies**

By

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7 May 2007

DECLARATION

I declare that **Enforcing the economic, social and cultural rights in the South African Constitution as justiciable individual rights: The role of judicial remedies** is my work and has not been submitted for any degree or examination in any other university or academic institution. All sources and materials used are duly acknowledged and are properly referenced.



Christopher Mbazira

7 May 2007

Signed

LIST OF ABBREVIATIONS

ALP	-	Aids Law Project
ARV	-	Antiretroviral
AIDS	-	Acquired Immune Deficiency Syndrome
BCLR	-	Butterworths Constitutional Law Reports
CC	-	Constitutional Court
CESCR	-	Committee on Economic, Social and Cultural Rights
GDP	-	Gross Domestic Product
GNP	-	Gross National Product
HIV	-	Human Immunodeficiency Virus
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
ICCPR	-	International Covenant on Civil and Political Rights
ILO	-	International Labour Organisation
NGO	-	Non-governmental Organisation
PAJA	-	Promotion of Administrative Justice Act
SCA	-	Supreme Court of Appeal
UDHR	-	Universal Declaration of Human Rights
UN	-	United Nations
USA	-	United States of America

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All mistakes, omissions and errors are mine.

DEDICATION

To the memory of my late mother Mwasitti Kiwanuka



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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND TO THE STUDY

The inclusion of economic, social and cultural rights (socio-economic rights) in the 1996 Constitution of South Africa (the Constitution)¹ is aimed at advancing the socio-economic needs of the poor in order to uplift their human dignity.² The constitutional protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform society, amongst others, from a society based on socio-economic deprivation to one based on equal distribution of resources.³ This is evidence of a commitment to establish a society based on equality in all respects including socio-economic wellbeing.

It was not until 1994 that South Africa adopted a bill of rights. Before this, human rights did not enjoy constitutional protection as justiciable rights.⁴ The apartheid era was characterised by wide-spread socio-

¹ Act 108 of 1996.

² Liebenberg, S., 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool to challenging poverty?' (2002) 2 *Law, Democracy & Development* pp 159 – 191 [Hereinafter referred to as Liebenberg: 2002], at p 160.

³ See generally Klare, K., 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* pp 147 – 188; Langa, P., 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* pp 351 – 360, at p 352; and Van der Walt, AJ., 'A South African reading of Frank Michelman's theory of social justice' (2004) 19 *SA Public Law* pp 253 – 307, at p 255.

⁴ However, this is with the exception of the homelands that had been created as independent states for the blacks. Most homelands had adopted their own constitutions

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economic deprivation in all its forms. Even when provision was made for some socio-economic goods and services, these did not reach all the citizens because of the practices of racial discrimination. The white minority enjoyed access to better quality goods and services while the black majority either had access to only poor quality services or did not have access to services at all.⁵

It is within this context of deprivation and discrimination that the struggle for human rights was conducted. The struggle against apartheid was a struggle for both political and socio-economic equality. As early as 1955, the *Freedom Charter* (the Charter),⁶ in addition to civil and political rights, made the call for socio-economic justice. It called for the removal of restrictions on land ownership, and equal access to work, housing and education related rights.⁷ The Charter was later to become the blueprint for a future South African constitution with a bill of rights. It recognised the need for people to exercise their civil and political rights while having their socio-economic needs met as well. I do not intend to go into the details of the events leading up to the inclusion of socio-economic rights in the Constitution. What is apparent, however, is that the inclusion of socio-economic rights in the Constitution was a product of much

with a bill of rights. Nevertheless, these bills protected only traditional civil and political rights.

⁵ Steytler, N., 'Local government in South Africa: Entrenching decentralised government' in Steytler, N., (ed.) *The place and role of local government in federal systems* (2005) Konrad-Adenauer-Stiftung pp 183 – 212, at p 184.

⁶ The *Freedom Charter*, adopted by the Congress of the People at Kliptown on 26 June 1955, sourced at <<http://www.anc.org.za/ancdocs/history/charter.html>> (accessed on 17 May 2005). The Charter was adopted by the liberation movements to exemplify what they considered to be the ideal bill of rights for South Africa. See generally Steytler, N., (ed.) *The Freedom Charter and beyond: Founding the principles for a democratic South African legal order* (1991) Community Law Centre, University of the Western Cape.

⁷ Education would be 'free, compulsory, universal and equal for all children'.

controversy. As discussed in chapters two and three,⁸ socio-economic rights were rejected by some scholars on the basis of their conception as human rights and the role that the courts would play in their enforcement.⁹

The obstacles to the inclusion of socio-economic rights in the Constitution as justiciable rights were surmounted during the negotiation and drafting of the Final Constitution. This was followed by the inclusion of a wide

⁸ See particularly section 3.2.1 of chapter three.

⁹ In April 1986, the government requested the South African Law Commission (the SALC) to investigate the possibility of protecting human rights. Parallel to this development was the African National Congress (ANC)'s adoption of *The Bill of Rights for a Democratic South Africa* in 1988. Like the report of the SALC, the ANC Bill of Rights sketched traditional civil and political rights. The point of departure, however, was with respect to socio-economic rights. The ANC acknowledged various socio-economic rights, a position reflected also in its 1991 Constitutional Principles for a Democratic South Africa. According to the Commission, making socio-economic rights justiciable would be juridically futile and plunge the country into a serious constitutional crisis. The Commission was concerned that socio-economic rights could undermine the credibility of the bill of rights as a whole because they were not rights as such. Later, the SALC conceded the enforcement of certain socio-economic rights by positive action. It contended that certain socio-economic rights had crystallised. Such crystallised rights were clearly definable rights and, therefore, could be directly enforced, and that those rights that had not yet reached a stage of clarity could not be enforced directly but would instead be enforced as directive principles of state policy. The ANC on the other hand wanted all rights to be enforced directly. This controversy explains the inclusion of very limited socio-economic rights in the Interim Constitution. This is because the immediate desire was to achieve a compromise in order to agree on a workable transitional document. See African National Congress, *Constitutional Principles for a Democratic South Africa* (1991), sourced at <<http://www.anc.org.za/ancdocs/policy/constprn.htm>> (accessed on 18 May 2005); African National Congress, *The bill of rights for a democratic South Africa* (1988), sourced at <<http://www.anc.org.za/ancdocs/policy/constprn.htm>> (accessed on 18 May 2005); South African Law Commission *Interim Report on Group and Human Rights*, Project 58 (August 1991), and South African Law Commission, *Final Report on Group and Human Rights*, Project 58 (October 1994). See also Dlamini, C., *Human rights in Africa: Which way South Africa* (1995) Butterworths Publishers pp 110 – 113.

range of these rights on the same basis as civil and political rights in the Bill of Rights as justiciable rights. Subsequent attempts to block these rights in during the certification of the Constitution also failed.¹⁰

The Constitution has received international acclaim for its inclusion of socio-economics rights as justiciable rights on the same basis as civil and political rights.¹¹ The Constitution's commitment to the protection of socio-economic rights is made clearer in the preamble which declares that the Constitution has been adopted so as to lay the foundation for a democracy based on social justice and fundamental rights. The preamble also includes a commitment to improve the quality of life of all citizens and to free the potential of each person.¹² To achieve these values, the Bill of Rights protects three categories of socio-economic rights: rights with internal limitations, rights without internal limitations and the negative rights, respectively.¹³ As seen in chapter four,¹⁴ the obligations

¹⁰ See *In re Certification of the Constitution of the Republic of South Africa (First Certification case)* 1996 (10) BCLR 1253 (CC).

¹¹ Yigen, K., 'Enforcing social justice: Economic, and social rights in South Africa' (2002) 4 *International Journal of Human Rights* pp 13 – 29 [Hereinafter referred to as Yigen: 2002], at p 21.

¹² In *State v Mkhungu* (1995) (7) BCLR 793 the CC held that the preamble was not a mere aspirational and throat clearing exercise of little interpretational value. Instead, it connects up, reinforces and underlines the text which follows; it helps to establish the basic design of the Constitution and indicates its fundamental purpose (para 112).

¹³ The first category of rights include the right of everyone to have access to adequate housing (section 26) and rights of everyone to have access to health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependents, appropriate social assistance (section 27). What is common with these rights is that they are all subject to an internal limitation. By this limitation, the state is required 'to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights' (sections 26(2) and 27(2)). The second category of rights protects what have been crafted as basic rights not subject to any

engendered by these rights have been interpreted as justiciable. It is especially in respect of the first category that the CC has developed the reasonableness review approach in order to give relief to those whose rights have been violated.

The realisation of socio-economic rights means amelioration of the conditions of the poor and the beginning of a generation that is free from socio-economic need. In this context, litigants in socio-economic rights litigation expect their victories to be followed by immediate amelioration of their socio-economic conditions. However, this may sometimes not be the case; court victories may either be followed by very minimal improvements or no improvements at all. While this state of affairs may be blamed on the normative construction of the rights, it has also been blamed on the weaknesses of the remedies ordered by the courts in socio-economic rights litigation. Although the South African Constitutional Court (the CC) has been praised for confirming the justiciability of socio-economic rights,¹⁵ it has also been admonished for issuing remedies that

internal limitations. These include the children's rights to basic nutrition, shelter, basic health care services and social services (section 28(1)(c)). They also include everyone's right to basic education (section 29(1)), including adult education, and the rights of detained persons to adequate accommodation, nutrition, reading materials and medical treatment (section 35(2) (e)). The commonality with this category of rights is that their realisation is not subject to the state taking reasonable legislative and other measures within its available resources to progressively realise them. The third category, the prohibition rights, prescribe a number of prohibitions which includes everyone's right not to be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances. Additional to this is the affirmation that no legislation may permit arbitrary evictions (section 26(3)). The other right in this category is prohibition of refusal of emergency medical treatment to anyone (section 27(3)).

¹⁴ Section 4.2.

¹⁵ Yigen: 2002, at p 21; Liebenberg: 2002, at pp 177 – 178.

are incapable of translating these rights into individual entitlements.¹⁶ The CC has been criticised for its failure to develop a jurisprudence which is pro-poor.¹⁷ To support these submissions, the case of *Government of the Republic of South Africa v Grootboom & Others*¹⁸ has often been used as a point of reference. Many commentators are of the view that even though the Grootboom community litigated successfully their socio-economic condition has not improved dramatically.¹⁹ The CC has been admonished for its failure to exercise supervisory jurisdiction in order to ensure that

¹⁶ Bilchitz, D., 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* pp 1 – 26 [Hereinafter referred to as Bilchitz: 2003]; Roux, T., 'Understanding *Grootboom* – A response to Cass Sunstein' (2002) *Constitutional Forum* pp 41 – 51 [Hereinafter referred to as Roux: 2002], at p 42. Bilchitz, D., 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *South African Law Journal* pp 484 – 501 [Hereinafter referred to as Bilchitz: 2002], at p 485; Liebenberg, S., 'Violations of socio-economic rights: The role of the South African Human Rights Commission' in Andrews, P., and Ellman, S., (eds.) *The Post-apartheid Constitutions: Perspectives on South Africa's basic law* (2001) Witwatersrand University Press and Ohio University Press pp 405 – 443 [Hereinafter referred to as Liebenberg: 2001], at p 419; and Pieterse, M., 'Resuscitating socio-economic rights: Constitutional entitlement to health services' (2006) 22 *South African Journal on Human Rights* pp 473 – 502 [Hereinafter referred to as Pieterse: 2006], at p 483, amongst others.

¹⁷ See Swart, M., 'Left out in the cold? Grafting constitutional remedies for the poorest of the poor' (2005) 21 *South African Journal on Human Rights* pp 215 – 240 [Hereinafter referred to as Swart: 2005]; and Liebenberg, S., 'Basic rights claims: How responsive is "reasonableness review"?' (2005) 5 *ESR Review* pp 7 – 11.

¹⁸ 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC). For a detailed discussion of this case see chapter four at section 4.2.

¹⁹ See Pillay, K., 'Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights' (2002) 2 *Law, Democracy and Development* pp 225 – 277 [Hereinafter referred to as Pillay: 2002]; Swart: 2005; and Davis, D., 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *South African Journal on Human Rights* pp 301 – 327 [Hereinafter referred to as Davis: 2006].

the government carries out the judicial orders handed down against it.²⁰ It is criticisms of this nature that prompted this research.

This thesis is intended to examine, in-depth, the foundations upon which the selection of judicial remedies is based. The thesis uses these foundations to critique the approach of the courts as regards remedy selection and enforcement mechanisms in socio-economic rights litigation. However, the research takes note of the fact that finding effective judicial remedies for the violation of socio-economic rights is also influenced by deeper problems relating to their justiciability. Socio-economic rights are perceived by some as engendering only positive obligations, as opposed to the negative obligations engendered by civil and political rights.²¹ Socio-economic rights are also perceived as vague and incapable of precise definition in terms of the obligations they engender.²² This is in addition to assertions that they lack the essential characteristics of rights per se: they lack universality and are not completely available on the basis of one being a human being as their realisation is subject to a number of conditions.²³ These conditions

²⁰ See Davis, D., 'Socio-economic rights in South Africa: The record of the Constitutional Court after ten years' (2004) 5 *ESR Review* pp 3 – 7 [Hereinafter referred to as Davis: 2004]; Davis: 2006; Heywood, M., 'Contempt or compliance? The *TAC* case after the Constitutional Court judgment' (2003) 4 *ESR Review* pp 7 – 10 [Hereinafter referred to as Heywood: 2003]; Bilchitz: 2003; and Swart: 2005.

²¹ See Dlamini, C., 'The South African Law Commission's Working paper on group and human rights: Towards a bill of rights for South Africa' (1990) *S A Public Law* 96; Didcott, J., 'Practical workings of a Bill of Rights' in Van der Westhuizen, J., and Viljoen, H., (eds.) *A bill of rights for South Africa* (1988) Butterworths [Hereinafter referred to as Didcott: 1988], at pp 59 – 60

²² See Neier, A., 'Social and economic rights: A critique' (2006) 13 *Human Rights Brief* pp 1 – 3 [Hereinafter referred to as Neier: 2006], at p 3.

²³ See generally Bossuyt, M., 'International human rights systems: Strengths and weaknesses', in Mahoney, K., and Mahoney, P., (eds.) *Human Rights in the twentieth century* (1993) Martinus Nijhoff; Cranston, M., 'Human rights real and supposed' in

include realisation of the rights progressively and subject to the available resources.²⁴

Many arguments have been advanced in response to the above objections, and to support socio-economic rights as legally enforceable rights. However, most of these arguments concentrate on showing similarities between civil and political rights and socio-economic rights.²⁵ It has been argued by some scholars that socio-economic rights, like civil and political rights, engender negative and positive obligations.²⁶ In addition to this, both categories of rights are believed to have resources

Raphael D, (ed.) *Political theory and rights of man* (1967) Macmillan; and Cranston, M., *What are human rights* (1973) Bodley Head.

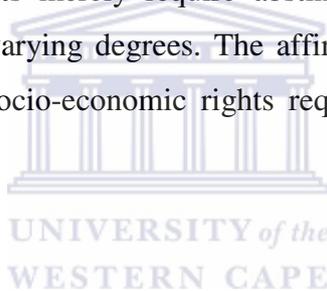
²⁴ Robertson, B., 'Economic, social and cultural rights: Time for a reappraisal' *New Zealand Business Roundtable* September 1997. First published in 1997 by New Zealand Business Roundtable, Wellington, New Zealand, sourced at <<http://www.nzbr.org.nz/documents/publications/publications-1997/nzbr-rights.doc.htm>> (accessed on 23 January 2005).

²⁵ Brand, D., 'Introduction to socio-economic rights in the South African Constitution' in Brand, D., and Heyns, C., (eds.) *Socio-economic rights in South Africa* (2005) Pretoria University Law Press pp 1 – 56 [Hereinafter referred to as Brand: 2005], at p 20. See also Pieterse, M., *A benefit-focused analysis of constitutional health rights* Ph.D thesis submitted to the University of Witwatersrand [December 2005], at p 3.

²⁶ Craven, M., 'Assessment of the progress on adjudication of economic, social and cultural rights' in Squires, J., Langford, M., and Thiele, B., (eds.) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) Australian Human Rights Centre and Centre on Housing Rights and Evictions pp 27 – 42 [Hereinafter referred to as Craven: 2005], at p 31; Fredman, S., 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 *South African Journal on Human Rights* pp 163 – 190, at pp 163 and 166. *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* 2005 (4) BCLR 301 (CC), at paras 70 – 71; and *First Certification* case, at para 78.

implications and are to a certain extent vague.²⁷ In spite of this, I submit in this thesis that these similarities should not be overstated with the result that the difficulties of enforcing socio-economic rights are underestimated.²⁸ There is need for a concession that the nature of socio-economic rights, to a certain extent, varies from that of civil and political rights. This notwithstanding, I demonstrate that the typology of the obligations to ‘respect’, ‘protect’, ‘promote’ and ‘fulfil’ the rights provides a mechanism for clarifying the obligations engendered by these rights. Yet, this mechanism is applicable to all categories of rights, including civil and political rights.

In spite of the above, however, generally, socio-economic rights require more affirmative action than inaction.²⁹ This, though, does not mean that civil and political rights merely require abstinence; they also require positive action but in varying degrees. The affirmative action necessary for the realisation of socio-economic rights requires more resources to



²⁷ Alston, P., and Quinn, G., ‘The nature and scope of States Parties obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 8 *Human Rights Quarterly* pp 156 – 229 [Hereinafter referred to as Alston & Quinn: 1987]; *First Certification case*, at para 78.; See also Viljoen, F., The justiciability of socio-economic and cultural rights: Experience and problems [Unpublished paper on file with author], at pp 3 and 36; and Raes, K., ‘The Philosophical basis of economic, social and cultural rights’ in Van der Auweret, P., De Pelsmaeker, T., Sarkin, J. & Vande Lanotte, J. (eds.) *Social economic rights: An appraisal of current European and international developments* (2002) MAKLU pp 43 – 53, at p 48.

²⁸ Chapter two, section 2.3.1.1.

²⁹ See De Vos, P., ‘Pious wishes or directly enforceable rights?: Social and economic rights in South Africa’s 1996 Constitution’ (1997) *South African Journal on Human Rights* pp 67 – 101 [Hereinafter referred to as De Vos: 1997], at p 71; and Abramovich, V., ‘Courses of action in economic, social and cultural rights: Instruments and allies’ (2005) 2 *SUR – International Journal on Human Rights* pp 181 – 216, at p 183.

carry out than those of civil and political rights.³⁰ It should, therefore, be conceded that, generally, the realisation of socio-economic rights requires significant resources.³¹

The most controversial objection to the judicial enforcement of socio-economic rights, however, has been based on the doctrine of separation of powers. It has been submitted that socio-economic rights are by their nature ideologically loaded, and as a result politicise constitutionalism and the judicial task.³² It is argued that the realisation of these rights involves making ideological choices, which, amongst others, impact on the nature of a country's economic system. This is because these rights engender positive obligations and have budgetary implications which require making political choices.³³ In contrast, civil and political rights are believed to be ideologically neutral and do not, therefore, politicise



³⁰ See Sepúlveda, M., *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) INTERSENTIA [Hereinafter referred to as Sepúlveda: 2003]

³¹ Craven: 2005, at p 32.

³² See Haysom, N., 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 8 *South African Journal on Human Rights* pp 451 – 63, at p 456; Horowitz, D., *The courts and social policy* (1977) The Brookings Institution [Hereinafter referred to as Horowitz: 1977], at p 9; and Fletcher, W., 'The Discretionary Constitution: Institutional remedies and judicial. Legitimacy' (1982) *Yale Law Journal* pp 635 – 697 [Hereinafter referred to as Fletcher: 1982]

³³ Lester, L., and O'Conneide, C., 'The effective protection of socio-economic rights' in Cottrell, J., and Ghai, Y., (eds.) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* (2004) INTERRIGHTS pp 17 – 22 [Hereinafter referred to as Lester and O'Conneide: 2004], at p 20; and Horowitz: 1977, at p 18.

constitutionalism.³⁴ Judicial enforcement of socio-economic rights is also viewed as undemocratic because the judges are unelected, yet they set aside the decisions of the democratically elected representatives of the people.³⁵ Accordingly, the courts lack not only the institutional legitimacy but also the institutional capacity to adjudicate socio-economic rights.³⁶ It has, therefore, been contended that the role of making decisions as regards the realisation of these rights should, in accordance with the doctrine of separation of powers, be preserved for the elected organs of state.³⁷

³⁴ Pieterse, M., 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* pp 382 – 417 [Hereinafter referred to as Pieterse: 2004], at p 395.

³⁵ Neier: 2006, at p 2; Lester and O'Conneide: 2004, at p 20; Zulman, R., 'South African judges and human rights' paper presented to the *Supreme Court History Society*, Queensland, Australia on 4 July 2001, sourced at <<http://www.courts.qld.gov.au/publications/articles/speeches/2001/Zelman040701.pdf>> (accessed on 8 February 2006); Sachs, A., *Protecting human rights in a new South Africa* (1990) Oxford University Press [Hereinafter referred to as Sachs: 1990], at p 20. See also Sachs, A., 'A Bill of Rights for South Africa: Areas of agreement and disagreement' (1989) 21 *Columbia Human Rights Law Review* pp 13 – 44 [Hereinafter referred to as Sachs: 1989], at p 25; and Didcott: 1988.

³⁶ See Sachs, A., 'The judicial enforcement of socio-economic rights: The *Grootboom* case' in Peris, J., and Kristian, S., (eds.) *Democratising development: The politics of socio-economic rights in South Africa* (2005) Martinus Nijhoff Publishers pp 131 – 152, at p 140; Scott, C., and Macklem, P., 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* pp 1 – 148 [Hereinafter referred to as Scott & Macklem: 1992], at p 24.

³⁷ See Cottrell, J., and Ghai, Y., 'The role of the courts in the protection of economic, social and cultural rights' in Cottrell, J., and Ghai, Y., (eds.) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* (2004) INTERRIGHTS pp 58 – 89 [Hereinafter referred to as Cottrell & Ghai: 2004], at p 89; Mureinik, E., 'Beyond a charter of luxuries: Economic rights in the constitution' (1992) 8 *South African Journal on Human Rights* pp 464 – 475 [Hereinafter referred to as Mureinik: 1992], at pp 465 – 467; and Lester and O'Conneide: 2004. It is, however, demonstrated in this thesis that civil and political rights may be as

Socio-economic rights are also believed to be beyond the capacity of the judiciary because of their polycentric nature. It is argued that a socio-economic rights decision has many repercussions implicating a number of interests of persons who may not be before the court. The courts do not have the capacity to appreciate and attend to all these interests.³⁸ Because of this lack of capacity, judicial decisions may have unintended consequences affecting persons not before the court.

In spite of the inclusion of socio-economic rights in the Constitution the above objections have endured and continue to have an impact on the way socio-economic rights are being enforced. Chapter four shows, for instance, that the CC has been very careful not to construe the rights in a manner that imposes undue financial burdens on the state.³⁹ It is also true that, to a certain extent, the approach of the CC in constructing the socio-economic rights in the Constitution has been influenced by the doctrine of separation of powers.⁴⁰ The Court has in some respects chosen to defer to

ideologically loaded as socio-economic rights. Some of these rights touch on issues that relate directly to contested political space like political representation. Such ideologically loaded issues include, for instance, definition of such rights as the right to vote and the attendant understanding of the notion of democracy. There have always been many ideological arguments on the true meaning of the notion of democracy and whether the right to vote includes, for instance, the right of prisoners to vote. See *August and Another v The Electoral Commission and Others* 1999 (3) SA 1 (CC) and *Minister of Home Affairs v National Institute of Crime Prevention (Nicro) and Others* 2004(5) BCLR 445 (CC). This is in addition to the true meaning of multiparty democracy, and whether it sanctions legislation allowing for floor crossing under a system based on proportional representation. See *United Democratic Movement v President of the RSA and Others* (2) 2002 (11) BCLR 1213 (CC).

³⁸ See Fuller, L., 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* pp 353 – 409.

³⁹ See chapter four, section 4.2.

⁴⁰ Pieterse, M., 'Possibilities and pitfalls in the domestic enforcement of socio-economic rights: Contemplating the South African experience' (2004) 26 *Human Rights Quarterly*

the executive and legislative branches of state on some issues and has avoided constructions that would put it in confrontation with these branches.⁴¹ This reason has, for instance, been advanced as an explanation for the CC's rejection of the minimum core obligations approach.⁴² The CC's approach has not only been motivated by the need to avoid confrontation by defining the rights as individual rights but is also conscious of its institutional incapacity to define the minimum core.⁴³ In this regard, the reasonableness review approach has been viewed as the most appropriate because it accommodates separation of powers concerns. The reasonableness review approach is believed to embrace the notion that a public body should be given appropriate leeway to determine the best way of meeting its constitutional obligations.⁴⁴

pp 882 – 905 [Hereinafter referred to as Pieterse: 2004a], at p 903; Davis: 2006, at pp 316 – 317.

⁴¹ Roux, T., 'Legitimizing transformation: Political resource allocation in the South African Constitutional Court' (2003) 10 *Democratization* pp 92 – 111 [Hereinafter referred to as Roux: 2003], at p 96. See also Brand, D., 'The proceduralisation of South African socio-economic rights jurisprudence, or "what are socio-economic rights for?"' in Botha, H., Van der Walt, A., and Van der Walt, J., (eds.) *Rights and democracy in a transformative constitution* (2003) Sun Press Stellenbosch pp 33 – 56 [Hereinafter referred to as Brand: 2003], at p 51.

⁴² Roux: 2003, at p 96. See chapter four, section 4.2.1.

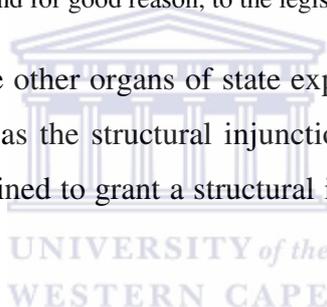
⁴³ *Grootboom* case, at para 32.

⁴⁴ Steinberg, C., 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *South Africa Law Journal* pp 264 – 284, at p 277. See also Sunstein, C., *Designing democracy: What constitutions do* (2001) Oxford University Press [Hereinafter referred to as Sunstein: 2001], at pp 221 – 222; Sunstein, C., 'Social and economic rights? Lessons from South Africa' *John M. Olivin Law and Economic Working Paper No. 124, Public Law and Legal Theory Working Paper No 12*, (Preliminary draft) sourced at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=269657> (accessed on 20 May 2005); and Liebenberg, S., 'Enforcing positive socio-economic rights claims: The South African model of reasonableness' in Squires, J., Langford, M., and Thiele, B., (eds.) *The*

Separation of powers concerns could also be used to explain the CC's approach to defining what are considered to be 'appropriate, just and equitable' remedies for socio-economic rights violations.⁴⁵ It is especially at the remedial stage of litigation that concerns about the competence of the courts become pronounced.⁴⁶ The CC has explicitly cautioned that in determining an appropriate remedy, regard must be paid to the roles of the legislature and the executive in a democracy.⁴⁷ According to the CC:

[A] consideration a court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature.⁴⁸

The need to defer to the other organs of state explains why the Court has rejected remedies such as the structural injunction. In the *TAC* case, for instance, the Court declined to grant a structural injunction because, in its



road to a remedy: Current issues in the litigation of economic, social and cultural rights (2005) Australian Human Rights Centre and Centre on Housing Rights and Evictions pp 73 – 88 [Hereinafter referred to as Liebenberg: 2005], at p 82.

⁴⁵ Currie, I., and De Waal, J., *The Bill of Rights handbook* (2005) Juta & Company [Hereinafter referred to as Currie & De Waal: 2005], at p 197.

⁴⁶ See Shane, P., 'Rights, remedies and restraint' (1988) 64 *Chicago-Kent Law Review* pp 531 – 571 [Hereinafter referred to as Shane: 1988]

⁴⁷ *Minister of Health and Others v Treatment Action Campaign* 2002 (5) SA 721 (CC), (*TAC* case), at para 137.

⁴⁸ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (1) BCLR 39 (CC), at para 66. See also *Van Rooyen and Others v S and Others* 2002 (8) BCLR 810 (CC), at para 48.

opinion, ‘the government has always respected and executed orders of this Court’ and that there was ‘no reason to believe that it will not do so’.⁴⁹

However, this thesis posits that in addition to the nature of socio-economic rights and the doctrine of separation of powers, the CC’s approach could be explained by the notion of justice to which the Court is inclined. In broad terms, the different remedial approaches adopted by the courts have been directed either by corrective or distributive forms of justice. On the one hand, the theory of corrective justice demands that victims be put in the position they would have been in but for the violation of their rights.⁵⁰ The corrective justice theory, based on the philosophy of libertarianism, is not concerned with the impact of the remedy on third parties and other interests. Its only objective is to restore the position of the victim. The distributive justice theory, on the other hand, represents that domain of justice concerned with the distribution of benefits and burdens among members of a given group.⁵¹ Unlike the libertarian based corrective justice, distributive justice is based on the philosophy of utilitarianism. A court inclined toward the distributive justice theory takes into consideration third party and other legitimate interests that may be affected by a remedy.⁵² The tension between these

⁴⁹ Para 129.

⁵⁰ See chapter five, at section 5.2.1. See also Modak-Truran, M., ‘Corrective justice and the revival of judicial virtue’ (2000) 12 *Yale Journal of Law & Humanities* pp 249 – 298 [Hereinafter referred to as Modak: 2000], at p 250; and Roach, K., *Constitutional remedies in Canada* (1994) Law Book Inc [Hereinafter referred to as Roach: 1994], at p 3-17

⁵¹ See chapter five, at section 5.2.2.

⁵² See Sandel, M., *Liberalism and the limits of justice* (1998) Cambridge University Press [Hereinafter referred to as Sandel: 1998], at p 16; Cooper-Stephenson, K., ‘Principle and pragmatism in the law of remedies’ in Berryman, J., (ed.) *Remedies, issues and perspectives* (1991) Thomson Professional Publishing pp 1 – 48 [Hereinafter referred to as Berryman: 1991, and Cooper-Stephenson: 1991 respectively], at p 19.

two notions of justice is reflected not only in the remedies, but also in the arguments in support and those against socio-economic rights. When examined critically, the arguments against socio-economic rights represent an objection to using property in a distributive manner, and promote the philosophy of libertarianism, which treasures civil and political rights.⁵³ In contrast, the arguments in support of socio-economic rights derive from the philosophy of utilitarianism. This philosophy is based not only on belief in an individual's wellbeing, but also lays emphasis on the common good of society and the wellbeing of all its members.⁵⁴ This philosophy supports socio-economic rights because it strengthens the argument that no member of society should live in

Distributive and corrective forms of justice have had a great influence on a host of factors that determine the nature of the remedies selected by a court. These include such factors as the relationship attached to rights and remedies (see generally Gewirtz, P., 'Remedies and resistance' (1983) 92 *Yale Law Journal* pp 585 – 680); the form and procedures of litigation (see generally Chayes, A., 'The role of the judge in public law litigation' (1979) 89 *Harvard Law Review* pp 1281 – 1316 [Hereinafter referred to as Chayes: 1979]); and the manner of implementing the remedies. In addition to this, they also influence the liability rules adopted to determine whether or not there is a wrong and whether the plaintiff has suffered as a result. It is, therefore, important that one understand these forms of justice and how they have influenced the courts in determining what they consider to be 'appropriate, just, and equitable' remedies.

⁵³ See Boaz, D., 'The coming of libertarian age' (1997) 19 *CATO Policy Report*, sourced at <<http://www.heartland.org/pdf/63011a.pdf>> (accessed on 25 June 2006); Sandel: 1998; Garret, J., *The limits of libertarianism and the promise of a qualified care ethic* (2004), sourced at <<http://www.wku.edu/~jan.garrett/ethics/libcrit.htm>> (accessed on 25 June 2006); and Ryan, A., 'Liberalism' in Goodin, E., and Pettit, P., (eds.) *A companion to contemporary political philosophy* (1995) Blackwell Publishing Ltd pp 291 – 311.

⁵⁴ Rawls, J., *Political liberalism* (1993) Columbia University Press [Hereinafter referred to as Rawls: 1993], at p 16. See also Scheffler, S., 'Rawls and utilitarianism' in Freeman, S., (ed.) *The Cambridge companion to Rawls* (2003) Cambridge University Press pp 426 – 459; and Mulhall, S., and Swift, A., *Liberals & communitarians* (1996) Blackwell Publishers Ltd [Hereinafter referred to as Mulhall & Swift: 1996], at p 10.

deprivation. Society's resources have to be employed in a manner that realises the happiness of all in socio-economic terms.

To be able to critique the remedies granted in support of socio-economic rights, it is important for advocates of these rights to understand the philosophies of justice referred to above. Many of the criticisms of the remedies granted by the CC in socio-economic rights cases are based on the failure of the remedies to realise the rights as individual rights. These criticisms, however, appear to unconsciously promote the notion of corrective justice and are oblivious to the fact that the decisions of the CC are based on the ethos of distributive justice. I contend in this thesis that this is because of the fact that the socio-economic context demands that the rights be enforced in accordance with the theory of distributive justice.⁵⁵ Criticisms based on corrective justice by advocates of socio-economic rights may be self defeating because they fail to appreciate the reality as presented by the socio-economic context.⁵⁶ They demand redistribution of resources for the benefit of all yet when it comes to remedies they insist on resources being used maximally for the benefit of selected victims who are able to litigate.

This thesis uses the two forms of justice to assess the appropriateness of remedies such as declarations, damages and injunctions as used by the CC.⁵⁷ As will be seen in chapter six,⁵⁸ generally, damages may be well

⁵⁵ Chapter six, section 6.2.

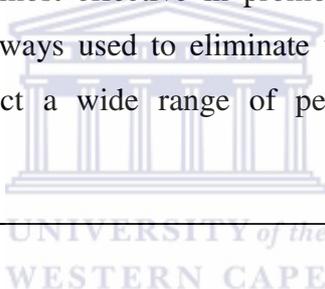
⁵⁶ It is contended in chapter six (section 6.2) that the socio-economic rights context is represented by the widespread poverty prevalent in South Africa. The majority of South Africans are socio-economically deprived and cannot afford to meet such basic needs as housing, food and health services. While there is a constitutional commitment to eradicate this deprivation the state is financially constrained and cannot meet everyone's needs immediately.

⁵⁷ See chapters six and seven.

⁵⁸ Section 6.3.1.

suited for corrective purposes and less appropriate to advance the notion of distributive justice.⁵⁹ They are, however, not suited for the promotion of distributive justice and inappropriate for litigation that calls for a redistributive outcome.⁶⁰ Rather than put money in the hands of one individual, socio-economic rights may require that such money be employed for the benefit of all in need of the service(s) in issue.⁶¹ This does not, however, mean that damages cannot be used for distributive purpose. They may, for instance, be awarded as preventive damages that go to causes that promote the enjoyment of the rights by all.⁶²

Injunctions play a dual role: they can promote both corrective and distributive forms of justice as they can be used to address not only individual but also collective needs. The structural injunction has displayed itself as the most effective in promoting distributive justice. This is because it is always used to eliminate violations of a systemic nature and which affect a wide range of persons.⁶³ In spite of its



⁵⁹ See Wells, M., and Eaton, T., *Constitutional remedies: A reference book for the United States Constitution* (2002) Praeger Publishing [Hereinafter referred to as Wells & Eaton: 2002], at p 170.

⁶⁰ Trengove, W., 'Judicial Remedies for violations of socio-economic rights' (1999) *ESR Review* pp 8 – 10 [Hereinafter referred to as Trengove: 1999], at p 8.

⁶¹ Shelton, D., *Remedies in international human rights law* (1999) Oxford University Press, at p 79.

⁶² See chapter six, at section 6.3.1.3. See also Varney, H., 'Forging new tools: A note on *Fose v Minister of Safety and Security* CCT 14/96' (1998) 14 *South African Journal on Human Rights* pp 336 – 349 [Hereinafter referred to as Varney: 1998], at p 343; and Trengove: 1999.

⁶³ See chapter seven, at section 7.3. See also Chayes: 1979, at p 1298; Sturm, S., 'A normative theory of public law remedies' (1991) 79 *Georgetown Law Journal* pp 1355 – 1446 [Hereinafter referred to as Sturm: 1991], at p 1357; and Fiss, O., 'Foreword: The

usefulness, however, there are factors that constrain the use of the structural injunction as a readily available remedy. The prime factor is the need to uphold the separation of powers doctrine and not to overlook the institutional constraints of the courts. It is on the basis of this that I contend that the structural injunction should be used only as a remedy of last resort and where there is evidence of failure on the part of the other branches of the state.⁶⁴ This thesis explains the approach of the South African courts in the use of the structural injunction and points out the absence of a set of clear norms and principles to determine the appropriateness of this type of remedy.⁶⁵ I therefore develop a list of norms and principles that could be employed in the South African context to guide the use of the structural injunction.⁶⁶

1.2 STATEMENT OF THE PROBLEM

Judicial remedies are, amongst others, a vehicle through which respect, protection, promotion and fulfilment of human rights can be delivered to those who need them. A remedy is the perspective from which litigants judge either the success or failure of judicial decisions. Judicial remedies make the rights whole, they complete the justiciability of human rights because without them human rights remain statements of legal rhetoric. Judicial remedies are also the commanding voice of the courts and the way through which the success or failure of the judicial enforcement of human rights standards may be judged. Constitutional protection of socio-

forms of justice' (1979) 93 *Harvard Law Review* pp 1 – 58 [Hereinafter referred to as Fiss: 1979], at p 2.

⁶⁴ Chapter seven, at sections 7.4.2 and 7.6.1.

⁶⁵ Chapter seven, at section 7.5

⁶⁶ Chapter seven, at section 7.6.

economic rights is one thing and their realisation through judicial enforcement is another. Weak judicial remedies may weaken the substantive rights protected, yet improperly calculated strong remedies may lead to the same result.⁶⁷ It is from this perspective that the nature and effectiveness of judicial remedies should be assessed.

The problem is that assessments of judicial remedies are often parochial and ignore the deeper factors that influence the approaches of the courts in granting remedies. The nature of the remedies that the courts grant is not only based on the normative nature of the rights they seek to enforce. They are also influenced by factors such as the goals and objectives of judicial remedies as defined, amongst others, by the ethos of either corrective or distributive forms of justice. The courts are also influenced by demands to respect the doctrine of separation of powers and by their own institutional constraints.

This thesis explores these factors and their impact on judicial remedies. The discussion is placed in the South African context and, although most discussions apply to human rights generally, they are addressed to socio-economic rights specifically. Stress is put on the impact of the separation of powers doctrine, institutional competence concerns and on the forms of justice pursued by the courts. To be able to influence the remedies that the courts grant we must understand and influence perceptions based on these factors.

1.3 SCOPE OF THE STUDY

The study is based on the judicial enforcement of the socio-economic rights protected in the South African 1996 Constitution. The socio-economic rights in this regard include the right to an environment that is

⁶⁷ Tushnet, M., 'Enforcing socio-economic rights: Lessons from South Africa' (2005) 6 *ESR Review* pp 2 – 6 [Hereinafter referred to as Tushnet: 2005].

not harmful to health and wellbeing,⁶⁸ rights of access to land,⁶⁹ access to adequate housing,⁷⁰ access to health care services, sufficient food and water, and social security.⁷¹ This is in addition to the children's rights to basic nutrition, shelter, basic health care services and social services,⁷² and the right of everyone to education.⁷³ This notwithstanding, I do refer to case law dealing with civil and political rights. This is because some of the principles that the courts have enunciated in these cases apply to all constitutional litigation, including litigation in the area of socio-economic rights.

South Africa has been selected as the focus of this thesis because of its extensive protection and judicial enforcement of socio-economic rights. However, in spite of such protection and enforcement, the country still faces a number of challenges in the eradication of poverty through justiciable socio-economic rights. In this respect, South Africa offers a number of lessons to be learnt not only by other domestic jurisdictions but also by international human rights bodies. Indeed, South Africa's socio-economic rights jurisprudence is being referred to in scholarly literature all over the world and may soon be cited by domestic and international judicial bodies. This means that although the study is South African based, I deem it relevant to international and many other domestic jurisdictions. Many of the challenges it addresses are not exclusive to South Africa. South Africa is merely presented as a 'guinea pig' for the domestic enforcement of socio-economic rights.

⁶⁸ Section 24.

⁶⁹ Section 25(5).

⁷⁰ Section 26.

⁷¹ Section 27.

⁷² Section 28(1)(C).

⁷³ Section 29.

Comparative case-law from Canada, the United States of America and India is employed because these countries are considered to have a very rich experience with judicial enforcement of human rights standards. These jurisdictions have used a variety of constitutional remedies with varying successes, challenges and failures. It is from these that lessons are drawn.

1.4 SIGNIFICANCE AND OBJECTIVES OF THE STUDY

While a lot has been written on the subject of the judicial enforcement of socio-economic rights, there is no comprehensive research that has been done on judicial remedies for these rights. The research undertaken here is intended to guide scholars, legal practitioners and judicial officers who confront socio-economic rights issues as part of their daily work. The study not only investigates the kinds of remedies that the courts award but tries to develop theories that can be used to assess the appropriateness and successes or failures of these remedies.

The study has been guided by the following objectives:

- (a) To investigate the obstacles to the judicial enforcement of socio-economic rights and how these obstacles influence the crafting of judicial remedies for the violation of these rights;
- (b) To investigate the meaning and theoretical foundations of judicial remedies in constitutional litigation in general and human rights in particular;
- (c) To craft a remedial theories and foundations upon which the effectiveness of the remedies granted for socio-economic rights violations can be assessed;

- (d) To assess the effectiveness, to socio-economic rights violations, of the different remedies available in constitutional litigation;
- (e) To design norms and principles that could be used by the courts to determine the appropriateness, to socio-economic rights, of the different types of remedies; and
- (f) To critique the remedial approach of the South African courts in socio-economic rights litigation.

1.5 WORK DONE IN THIS FIELD

Much has been written with regard to the recognition and enforcement of socio-economic rights as justiciable rights. This literature spans both international and domestic jurisdictions. At the international level, there is a plethora of literature touching on such subjects as the development of the ICESCR and the nature of the obligations it engenders.⁷⁴ Specific topics of study have included the nature of the obligations engendered by

⁷⁴ See for example Arambulo, K., *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and procedural aspects* (1999) INTERSENTIA; Craven: 1995; Sepúlveda: 2003; Alston & Quinn: 1987; and Eide, A., 'Realization of social and economic rights and the minimum threshold approach' (1989) 10 *Human Rights Law Journal* pp 35 – 51. See also Craven, M., 'The International Covenant on Economic, Social and Cultural Rights' in Hanski, R., & Suksi, M., (eds.) *An Introduction to the international protection of human rights: A textbook* (1997) Institute of Human Rights Åbo Akademi University; Eide, A., 'Economic, social and cultural Rights as human rights' in Eide, A., Krause, C. and Rosas, A., (eds.) *Economic, social and cultural rights: A textbook*, (2001) Kluwer Law International; Raes, K., 'The Philosophical basis of economic, social and cultural rights' in Van der Auweret, P., De Pelsmaeker, T., Sarkin, J. & Vande Lanotte, J., (eds.) *Social economic rights: An appraisal of current European and international developments* (2002) MAKLU pp 43 – 53; and Chapman, A., and Russell, S., (eds.) *The core obligations: Building a framework for economic, social and cultural rights* (2002) INTERSENTIA.

specific rights in the ICESCR such as the right to adequate food,⁷⁵ right to the highest attainable standard of health,⁷⁶ the right to water,⁷⁷ and the right to education.⁷⁸ In the South African context, there is an excellent capture of the debates relating to the justiciability of socio-economic rights that preceded the adoption of the Interim and later Final Constitution.⁷⁹ In addition to this, a lot has been written on the nature of

⁷⁵ Alston, P., and Tomasevski, K., (eds.) *Right to food* (1984) Martinus Nijhoff; and Eide, A., (ed) *Food as a human right* (1984) United Nations University. See also Committee on Economic, Social and Cultural Rights, General Comment 12, *The right to adequate food* [article 11] (Twentieth session, 1999), U.N. Doc. E/C.12/1998/5 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 54 (2003).

⁷⁶ Committee on Economic, Social and Cultural Rights, General Comment 14, *The right to the highest attainable standard of health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003).

⁷⁷ Gleick, P., 'The human right to water' (1998) 1 *Water Policy* pp 487 – 503. See also Committee on Economic, Social and Cultural Rights, General Comment 15, *The right to water* (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 105 (2003).

⁷⁸ Coomans, F., 'In search of the content of the right to education' in Chapman, A., and Russell, S., (eds.) *The core obligations: Building a framework for economic, social and cultural rights* (2002) INTERSENTIA pp 217 – 246.

⁷⁹ See Didcott: 1988; Dlamini, C., *Human rights in Africa: Which way South Africa* (1995) Butterworths; Van der Westhuizen, J., & Viljoen, H., (eds.) *A bill of rights for South Africa* (1988) Butterworths; Van Wyk, D., Dugard, D., De Villiers, J., and Davis, D., (eds.) *Rights and Constitutionalism: The new South African legal Order* (1994) Juta & Company; and Sachs: 1990. See also Davis, D., 'The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles' (1992) 8 *South African Journal on Human Rights* pp 475 – 490 ; Davis, D., 'Democracy – its influence upon the process of constitutional interpretation' (1994) 10 *South African Journal on Human Rights* pp 103 – 121; De Wet, E., *The constitutional enforceability of*

the obligations engendered by the socio-economic rights provisions in the Constitution. This scholarly work has also considered and critiqued the CC's reasonableness review approach in enforcing these rights.⁸⁰

economic and social rights: The meaning of the German constitutional model for South Africa, (1996) Butterworths Publishers; De Villiers, B., 'Socio-economic rights in a new constitution: Critical evaluation of recommendations of the South African Law Commission' (1992) 3 *Tydskrif vir die Suid-Afrikaanse Reg* [*Journal of South African Law*] pp 421 – 436; and Mureinik: 1992.

⁸⁰ See Bilchitz, D., 'Health' in Woolman, S., Roux, T., Klaaren, J., Stein, A., & Chaskalson, M., (eds.) *Constitutional law of South Africa*, (1996) Juta & Company and Centre for Human Rights, University of Pretoria [2nd Edition, Original Service 2005] pp 56A-i —56A-47; Brand, D., and Russell, S., (eds.) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) Protea Book House; Brand: 2005; Sunstein: 2001; Brand: 2003; Govender, K., 'Assessing the constitutional protection of human rights in South Africa during the first decade of democracy' in Buhlungu, S., Daniel, J., Southall, R., & Lutchman, J., (eds.) *State of the Nation: South Africa 2005-2006* (2005) Human Sciences Research Council (HSCR) pp 93 – 122; Peris, J., and Kristian, S., (eds) *Democratising development: The politics of socio-economic rights in South Africa* (2005) Martinus Nijhoff Publishers; Liebenberg, S., 'The interpretation of socio-economic rights' in Woolman, S., Roux, T., Klaaren, J., Stein, A., & Chaskalson, M., (eds.) *Constitutional law of South Africa*, [2nd Edition, Original Service 12-03] (2005) Juta & Company and Centre for Human Rights, University of Pretoria pp 33 – 1 to 33 – 64; Liebenberg: 2001; Bilchitz: 2002; Bilchitz: 2003; Davis: 2004; Davis: 2006; De Vos: 1997; Liebenberg: 2005; De Vos, P., 'The economic and social rights of children in South Africa's transitional Constitution' (1995) 2 *SA Public Law* pp 67 – 101; Gabriel, A., 'Socio-economic rights in the Bill of Rights: Comparative lessons from India' (1997) 1 *The Human Rights and Constitutional Law Journal of Southern Africa* pp 9 – 14; Heywood, M., 'Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign's case against the Minister of Health' (2003) 19 *South African Journal on Human Rights* pp 278 – 315; Liebenberg, S., 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?' (2002) 6 (2) *Law Democracy and Development* pp 159 – 191; Liebenberg, S., 'The right to Social Assistance: The implications of *Grootboom* for policy reform in South Africa' (2001) 17 *South African Journal on Human Rights* pp 232 – 257; and Liebenberg, S., 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights*, pp 1 – 31.

In spite of this plethora of literature, only a handful of scholars have written on the subject of judicial remedies for the violation of socio-economic rights.⁸¹ Though this literature has proved very useful in providing some insights for this study, it does not canvass the subject in a comprehensive manner; it is either written in a general manner or addresses very specific issues and not remedies in a general and comprehensive way. Nonetheless, reliance has been placed on general writings on the subject of constitutional remedies.⁸² This is in addition to writings on specific remedies such as declarations, damages and injunctions.⁸³ This study is aimed at filling some of the gaps identified in the literature above.

⁸¹ Roach, K., and Budlender, G., 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable' (2005) 122 *South African Law Journal* pp 325 – 351; Pillay: 2002; Swart: 2005; Heywood: 2003; Trengrove: 1999; at pp 8 – 10; Tushnet: 2005; and Roach, K., 'Crafting remedies for violations of economic, social and cultural rights' in Squires, J., Langford, M., and Thiele, B., (eds.) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) Australian Human Rights Centre and Centre on Housing Rights and Eviction pp 111 – 126

⁸² See Berryman: 1991; Berryman, J., *The law of equitable remedies* (2000) Irwin Law; Burrows, A., *Remedies for torts and breaches of contract* (1994) Butterworths; Roach: 1994; Schuck, P., *Suing government: Citizen remedies for official wrongs* (1983) Yale University Press; Treitel, G., *Remedies for breach of contract: A comparative account* (1989) Oxford University Press; Walker, D., *The law of civil remedies in Scotland*, (1974) Green & Sons; Zakrzewski, R., *Remedies reclassified* (2005) Oxford University Press; Cooper-Stephenson: 1991; Gewirtz: 1983; Levinson, D., 'Rights essentialism and remedial equilibration' (1999) 99 *Columbia Law Review* pp 857 – 940; Shane: 1988; Sunstein, C., 'Suing government: Citizen remedies for official wrongs. By Peter Schuck' Book review (1983) 92 *Yale Law Journal* pp 749 – 761.

⁸³ Borchand, E., *Declaratory judgements* (1941) Banks-Baldwin Law Publishing Co; Fiss, O., *The Civil rights injunction* (1978) Indiana University Press; Cassels, J., 'An inconvenient balance: The injunction as a Charter remedy' in Berryman, J., (ed) *Remedies, issues and perspectives* (1991) Thomas Professional Publishing, pp 272 – 311; Chayes: 1979; Eisenberg, T., and Yeazell, S., 'The ordinary and the extraordinary in institutional litigation' (1980) 93 *Harvard Law Review* pp 465 – 517; Fletcher: 1982; Note, 'Implementation problems of institutional reform litigation' (1998) 91 *Harvard*

1.6 METHODOLOGY

This research has been based on a review and analysis of literature that is relevant to the subject of study. Such primary sources as international law instruments in the area of socio-economic rights have been relied on for the purposes of construing the nature of the obligations that these rights engender and how these may be enforced by the courts. A study of domestic legislation including the Constitution of South Africa has also been done with the same objective in mind. Great reliance has been placed on case-law not only from South Africa but from comparative jurisdictions such as Canada, United States of America and India. Comparative law has been used to deduce lessons, experiences and judicial approaches that are useful in understanding the theoretical basis and consequences of certain types of remedies. Reliance has also been placed on secondary sources such as scholarly work in the area of human rights and socio-economic rights generally. This is in addition to scholarly work on the subject of judicial remedies. The author has also attended a number of seminars, conferences, roundtable discussions and short courses on the subject of socio-economic rights.

1.7 LIMITATIONS OF THE STUDY

The study relies heavily on case-law from the South African Constitutional Court and less on case-law from the lower courts, which some might consider a limitation. While not ignoring the important contribution of the lower courts, this move has been motivated by the fact that the CC has been the one setting the pace in terms of the approach to the judicial enforcement of socio-economic rights. In spite of this, in some

Law Review pp 428 – 463; Pilkington, M., ‘Damages as a remedy for infringement of the Canadian Charter of Rights and Freedoms’ (1984) *Canadian Bar Review* pp 517 – 576; Special Project, ‘The remedial process in institutional reform litigation’ (1978) *Columbia Law Review* pp 784 – 929; and Sturm: 1991.

Introduction

respects, comparisons are drawn between the approaches of the CC and the various High Courts. This will, for instance, be seen in chapter seven on the discussion of the approaches of the courts to the structural injunction.

I also limit myself to the study of judicial enforcement of socio-economic rights and do not extend to other means through which these rights may be realised. I am aware of the fact that the judicial enforcement of socio-economic rights is, but one amongst many strategies, through which these rights may be enforced. Judicial enforcement has been chosen purely on the basis of the author's personal interests motivated also by the fact that, amongst the different strategies, it is the most controversial.

This research is also limited in the sense of not following up on cases in an empirical manner by ascertaining the impact that judicial remedies in specific cases have had on the litigants. The study is restricted to an assessment of the remedies themselves and their potential impact. An empirical study would have widened the scope of this study in such a way that research on the theoretical and philosophical foundations of judicial remedies, the primary interest of the author, would have been lost.

Reliance on comparative case-law is also to a certain extent limited especially as regards the date of the jurisprudence I refer to. This is especially so in respect of the study of structural injunctions in the United States of America. This study is restricted to the period when the use of the structural injunction became most visible and controversial in the United States. This was during the period of the civil rights struggle in the area of equal education opportunities, which intensified especially between the 1950s and 1970s.

1.8 OUTLINE OF THE STUDY

The study is divided into six chapters, excluding this introductory chapter and the conclusion. The thesis could be divided broadly into two parts: Part 1 [chapters 2, 3 and 4] deals with objections to the judicial enforcement of socio-economic rights and the nature of the obligations they engender. This is in addition to the manner in which they have been enforced by the courts. Part 2 [chapters 5, 6 and 7] deals with theoretical and philosophical foundations of judicial remedies and discusses the appropriateness of specific remedies. This part also analyses the approach of the South Africa courts on the issue of remedies.

Chapter two analyses the philosophical objections to the judicial enforcement of socio-economic rights based on their inherent nature. Socio-economic rights are objected to because they are believed to be positive in nature, vague and their realisation is resource based. In this chapter, the author submits that some of these objections are misconceived as socio-economic rights are similar to civil and political rights in many respects. However, it is submitted that there are certain characteristics that are peculiar to socio-economic rights and which have to be appreciated in their enforcement. Although these do not depreciate the justiciability of socio-economic rights, it needs to be acknowledged that, generally, these rights call for far more affirmative action and resources to realise when compared to civil and political rights.

Chapter three examines the objections to the judicial enforcement of socio-economic rights as based on the doctrine of separation of powers and the institutional role of the courts. Some authors have submitted that the courts are not suited for the enforcement of socio-economic rights because they are 'countermajoritarian'. The courts also lack the institutional competence to adjudicate these rights. It is submitted in this chapter that the courts have certain characteristics that make them well suited for the task of enforcing socio-economic rights and merely complement other organs. However, this does not mean that the courts are

not constrained in certain respects. This is especially so if they insist on traditional means of adjudication. It is also submitted that appropriate deference be accorded to the other organs of state where this is due.

Chapter four analyses the approach of the South African courts in construing the obligations engendered by the socio-economic rights provisions in the South African Constitution. The reasonableness review approach is critiqued and a number of shortcomings detected. Failure to properly apply the minimum core obligations approach, failure to give content to the rights and to question the reasonableness of resources allocated are but examples. This chapter proposes a proportionality test for the purposes of assessing the effectiveness of the means selected to realise the rights. The chapter also makes suggestions on how the reasonableness of resources could be interrogated.

Chapter five examines two important theories of justice, corrective and distributive justice. These two forms of justice influence the nature of remedies that may be granted in constitutional litigation. Corrective justice insists on full correction of the wrong, the victim must be put in the position he/she would have been but for the violation. Distributive justice only promotes full correction absent special circumstances. Special circumstances could be interests other than those of the victim that ought to be considered. Chapter five showcases how these two forms of justice influence the approach to constitutional litigation which includes their impact on the liability rules and the relationship they attach to rights and remedies.

Chapter six discusses how the remedial approach of the South African courts has been influenced by the theories of justice discussed in chapter five. The chapter demonstrates how the courts have been influenced by the notion of distributive justice. This influence is reflected in the courts' definition of what amounts to 'appropriate, just and equitable relief'. The remedies discussed are those commonly used in constitutional litigation, which includes declarations and damages. The injunction is preserved for

detailed consideration in chapter seven. The circumstances under which each of these remedies may be considered appropriate are discussed in detail in the chapter. This is in addition to a detailed description of the different forms that each of these remedies may take. This chapter also demonstrates how the South African Constitution is encrusted with ethos of distributive justice in its protection of collective values.

Chapter seven describes the injunction as used in constitutional litigation and its relevance and appropriateness in socio-economic rights litigation. However, much of the discussion is dedicated to the structural injunction and some of the controversies that surround its use. The chapter goes into this issue in great details to show the importance of this form of relief and the circumstances under which it may be used. The approach of the South Africa courts, which contrasts between the High Courts, on one hand, and the CC, on the other hand, is illustrated. The most important contribution of this chapter is its development of a set of norms and principles that may be used to determine the appropriateness of the injunction and the form it should take once ordered. The norms and principles describe the factors that may militate the granting of the injunction and issues that ought to be considered to determine its form.

1.9 CONCLUSIONS

This thesis makes the following conclusions:

- (a) In spite of the fact that socio-economic rights are justiciable, they are not exactly the same as civil and political rights. Generally speaking, socio-economic rights require far more positive action and resources in comparison to civil and political rights.⁸⁴ This is in addition to the fact that generally, socio-economic rights still

⁸⁴ See chapter two at sections 2.3.1.1. See also De Vos: 1997, at p 71.

remain a bit vague in some respects because of the fact that they have not been enforced by the courts to the same extent as civil and political rights.⁸⁵ These characteristics have an impact on the kinds of remedies that socio-economic rights violations may attract. It is submitted that it will be hard to realise socio-economic rights fully if their inherent character as human rights is not appreciated.

- (b) Judicial enforcement of socio-economic rights should not be viewed by either the legislature or the executive as an intrusion on their domain of administration and legislating. Instead, it should be viewed as a complementary effort undertaken to assist them to identify, understand and discharge their constitutional obligations.⁸⁶ It is also important to note that the judiciary possesses certain characteristics that make it an appropriate institution to deal with the enforcement of socio-economic rights.⁸⁷ However, this does not mean that the judiciary should override the legislature and the executive at all times. It is important for the judiciary to appreciate its institutional constraints and to defer to the other organs whenever appropriate. Highly intrusive interventions should only be justified where there is evidence that the other organs of state have failed to discharge their constitutional obligations to realise socio-economic rights. Even then, the courts should strive as much as possible to foster a

⁸⁵ See section 2.3.4.1. See also Craven: 1995, at p 128; and Chapman, A., and Russell, S., 'Introduction' in Chapman, A., and Russell, S., (eds.) *The core obligations: Building a framework for economic, social and cultural rights* (2002) INTERSENTIA pp 217 – 246, at p 245.

⁸⁶ See *People's Union for Democratic Rights and Others v Union of India and Others* (1982) 3 SCC 235.

⁸⁷ Chapter three, at section 3.2.

collaborative relationship between themselves and the other organs of state.

(c) To strengthen the judicial enforcement of socio-economic rights, there is a need for the courts to adopt and enforce a proportionality test. This test, similar in some respects to proportionality as used in South African jurisprudence under the general limitation clause, will enable the courts to interrogate the effectiveness of the means chosen to realise the rights.⁸⁸ The burden would be cast on the state to prove that the means it has selected to realise the rights are capable of realising the protected right(s). It is important to note, however, that use of this kind of test will only be effective if the rights are given content. This would help to define the goals towards which the state is working.⁸⁹

(d) The notion of distributive as opposed to corrective justice is more suited to guide the courts to enforce socio-economic rights. Poverty arising from socio-economic deprivation afflicts a number of people and can only be tackled holistically.⁹⁰ It is submitted that when applied to socio-economic rights violations in its strict sense, corrective justice may produce undesirable results. It may not be possible to put people in the position they would have been in but for the violations. This is because of such factors as the unavailability of resources in addition to the fact that there could be hordes of other people afflicted by the same deprivation. A court is, therefore, well advised if it looks beyond the interests of the individual victim(s) before it. This approach would also enable the court to effectively adjudicate polycentric tasks. However, this

⁸⁸ Chapter four, at section 4.2.3.2.

⁸⁹ See Bilchitz: 2003, at p 10.

⁹⁰ Chapter five, at section 5.2.2.

does not mean that there are no cases in which it is appropriate for the victim to be put in the position he/she would have been in but for the violation. This should apply in those cases that are discrete and without wide implications.

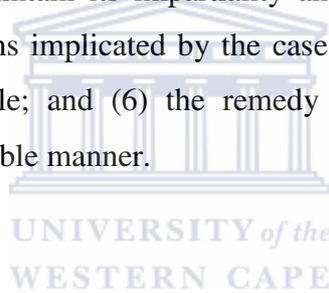
- (e) The courts should, therefore, be guided by the ethos of distributive justice in choosing an appropriate, just and equitable remedies for violations of socio-economic rights. There is a catalogue of remedies from which the courts can choose. These include declarations, damages and injunctions. However, the appropriateness of each of these is dependent on a number of factors. Declarations have proven appropriate in certain circumstances because of the latitude and margin of discretion they give to the state to determine how to eradicate a violation. However, declarations are only effective where government respects the rule of law and is in the habit of complying with court orders in good faith.⁹¹

Damages are suitable in cases where the violation is discrete and the victim has suffered harm that can be associated to a specific defendant in liability terms. Damages are inappropriate in those cases where the violation is indiscrete, that if the violation is of such a nature that not many people have suffered as a result. Damages are also inappropriate in socio-economic litigation because, other than enhance the capacity of the state, they have the potential of depleting resources that would otherwise have been used to realise the rights. In spite of this, damages could be creatively used, for instance as preventive damages ordered in such a manner that they do not go into individual pockets but instead go towards structured elimination of the violation.⁹²

⁹¹ Chapter six.

⁹² See Varney: 1998 and Trengrove: 1999.

- (f) The structural injunction is the most dramatic and controversial of the remedies available in constitutional litigation today. It is submitted that this kind of remedy should be ordered as of last resort when faced with government recalcitrance.⁹³ A number of norms and principles have been proposed to guide the courts in determining whether or not to grant this form of relief. These norms should also guide the courts once they have decided to use the structural injunction on the form it should take and the nature of its implementation. The norms and principles are: (1) intervention as of necessity; (2) participation of all interested persons as reasonably as possible; (3) the court should ensure as much as possible that there is reasoned decision-making; (4) the court should maintain its impartiality and independence; (5) the substantive norms implicated by the case should be developed as much as possible; and (6) the remedy should be ordered and applied in a flexible manner.



⁹³ Chapter seven, at section 7.6.1

CHAPTER TWO

THE LEGAL NATURE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: ARE THEY CAPABLE OF JUDICIAL ENFORCEMENT? THE INTERNATIONAL AND SOUTH AFRICAN PERSPECTIVES

2.1 INTRODUCTION

The adoption of the International Covenant on Economic, Social and Cultural Rights (the ICESCR)¹ in 1966 encountered a number of obstacles. These related mainly to objections as regards the legal nature of socio-economic rights. A number of countries, mostly from the 'West', argued that these rights were incapable of legal enforcement because they are imprecise in nature and their realisation is dependent on resources. The rights were also perceived as engendering only positive obligations as opposed to the negative obligations engendered by civil and political rights. In contrast, countries, mainly from the 'East', argued for the legal protection of socio-economic rights. They looked up to these rights to guarantee people's socio-economic development and for the protection of the basic needs of the poor such as shelter, food, clothing, access to medical care and work.²

¹ *International Covenant on Economic, Social and Cultural Rights*, adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York, came into force on 3 January 1976.

² See generally Craven, M., *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1998) Oxford University Press [Hereinafter referred to as Craven: 1998].

As a compromise position, the ICESCR was adopted separately from the International Covenant on Civil and Political Rights (the ICCPR).³ This was in spite of earlier directions from the United Nations General Assembly (the GA) that a single covenant incorporating both categories of rights be adopted.⁴ The perceived distinction between the two categories of rights is also reflected in the manner in which their respective obligations are defined. The rights in the ICESCR are to be realised progressively subject to the maximum of the available resources.⁵ However, in respect of the civil and political rights, the states undertook to respect and ensure these rights, no express limitations were placed on this obligation.⁶ The distinction is also reflected in the enforcement measures provided for in the covenants. The ICCPR was adopted together with an optional protocol establishing an individual complaints mechanism.⁷ No such mechanism was put in place in respect of the

³ *International Covenant on Civil and Political Rights*, adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York, came into force on 23 March 1976.

⁴ See General Assembly Resolution 421 E (V), 14 December 1950, U.N. Doc. A/1775 (1950).

⁵ Article 2(1) of the ICESCR provides as follows:

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

⁶ Article 2(1) of the ICCPR provides as follows:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁷ *Optional Protocol to the International Covenant on Civil and Political Rights* adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York,

ICESCR. This was based on the misconception that the obligations engendered by the rights in the ICESCR were incapable of judicial enforcement. They would only be realised through international cooperation and through the work of intergovernmental organisations. This is because it was thought that these rights required extensive state action.⁸

The objection to the judicial enforcement of socio-economic rights has taken two dimensions. The first dimension is the legitimacy dimension, and the second dimension is the institutional competence dimension.⁹ The legitimacy dimension objection is rooted in the traditional conception of the philosophical foundations of human rights. The question posed here is one of whether it would be legitimate to confer constitutional status on socio-economic rights in light of their nature.¹⁰ In terms of this dimension, social justice can be viewed as illegitimate because it involves the redistribution of wealth and intervention of the state in the free market economy. It is believed that neither the redistribution of wealth, nor the direction of the free market, should be subjected to the discipline of the constitution. The market economy is based on state non-intervention and

came into force on 23 March 1976. This Protocol empowers the Human Rights Committee, as established by the ICCPR, to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of any of the rights set forth in the Covenant (article 1).

⁸ Liebenberg, S., 'The interpretation of socio-economic rights' in Woolman, S., Roux, T., Klaaren, J., Stein, A., & Chaskalson, M., (eds.) *Constitutional law of South Africa* (2005) Juta & Company and Centre for Human Rights, University of Pretoria [2nd Edition, Original Service 12-03] pp 33 – 1 to 33 – 64 [Hereinafter referred to as Liebenberg: 2005], at pp 33 -12 to 33 – 13.

⁹ Scott, C., & Macklem, P., 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* pp 1 – 148 [Hereinafter referred to as Scott & Macklem: 1992], at p 20.

¹⁰ Scott & Macklem: 1992, at p 21.

endorses those aspects of human rights that protect individuals against the state. Socio-economic rights are believed to engender affirmative features, which makes them dangerous to the market economy.¹¹

In terms of the institutional competence dimension, the judiciary is viewed as inappropriate to deal with the complex matters of social justice. This dimension, among others, draws on concerns of majoritarian democracy. Issues of social justice are viewed as matters whose determination is within the jurisdiction of the representatives of the people and not the unelected judges. According to Scott and Macklem:

The resistance to constitutionally entrenched social rights on grounds of institutional competence is often summarized in the view that social rights are said to be positive rights and therefore requiring governmental action; resource-intensive and therefore expensive to protect; progressive and therefore requiring time to realize; vague in terms of the obligations they mandate; and involving complex, polycentric, and diffuse interests in collective goods. Civil and political liberties, on the other hand, are said to be, paradigmatically, negative rights that are: cost-free; immediately satisfiable; precise in the obligations they generate; and comprehensible because they involve discrete clashes of identifiable individual interests. These characterizations, even when acknowledged to be overdrawn, support the view that civil and political liberties both are and ought to be seen as involving justiciable matters. Many of these characterizations do not go simply to concerns of institutional competence of the judiciary but also to legitimacy concerns, with conclusions relating to the lack of institutional competence circling back to reinforce impressions that a judicial role would be illegitimate.¹²

This chapter analyses the arguments that have been advanced by the legitimacy dimension objection to judicial enforcement of socio-economic rights. Objections arising from the institutional competence dimension

¹¹ Scott & Macklem: 1992, at p 23.

¹² Scott & Macklem: 1992 at p 24. See also De Vos, P., 'Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution' (1997) *South African Journal on Human Rights* pp 67 – 101 [Hereinafter referred to as De Vos: 1997], at p 68.

have been reserved for detailed consideration under chapter three.¹³ It is submitted in this chapter that the objections to socio-economic rights as justiciable rights are based on many wrong assumptions about these rights. These objections overstate characteristics which have moreover been found not to be exclusive to socio-economic rights. This chapter shows similarities between civil and political rights and socio-economic rights. This notwithstanding, the chapter also shows that there are certain features that are more prominent with respect to socio-economic rights and which impact on their implementation.

The chapter begins with an exploration of the historical origins of socio-economic rights at the international level.¹⁴ This is because the objections to the judicial enforcement of these rights are historically rooted. The historical perspective also helps to justify socio-economic rights as it provides evidence of the reasons that justify recognition of these rights as addressing human needs. This chapter is distinguishable from chapter four which is premised on the acceptance of the justiciability of the socio-economic rights in the South African Constitution. Chapter four discusses the approach that has been adopted by the Constitutional Court (CC) in defining the nature of the obligations these rights engender.

¹³ The impact that the doctrine of separation of powers [and the accompanying institutional and democracy based concerns] has had on the judicial enforcement of socio-economic rights is immense. It is for this reason that I have opted to discuss the institutional competence dimension separately before discussing the obligations of socio-economic rights and the remedies granted thus far. This, however, is not to suggest that the legitimacy and institutional dimensions are isolated from each other. What is apparent in the South African context is that the institutional competence dimension has endured constitutional protection of socio-economic rights. This dimension continues to present problems in the process of adjudicating socio-economic rights and finding appropriate, just and equitable remedies for their violation.

¹⁴ The historical origin of the rights in South Africa is detailed in chapter one, section 1.1.

2.2 TOWARDS A HUMAN RIGHTS SYSTEM FOR SOCIO-ECONOMIC RIGHTS PROTECTION

2.2.1 The French and Russian revolutions

The struggle for socio-economic rights can be traced as far back as the French revolution of 1789. The French revolution, in addition to the tyrannical nature of the French aristocracy, was precipitated by socio-economic exclusions and inequalities.¹⁵ One of the factors leading to the outbreak of this revolution was the shortage of bread in addition to socio-economic injustices such as limited access to land. The *French Declaration of the Rights of Man and Citizens* adopted on 26 August 1789 dealt strongly with the issue of social inequality.¹⁶ The declaration guaranteed equality of all men and women in all circumstances, including social equality. It also, in effect, abolished feudalism, thereby opening up access to resources. The French revolution was followed by the Russian Revolution of 1917.

One of the burning issues leading to the Russian revolution was the distribution of land. Access to land had previously been enjoyed by only a privileged few, thereby depriving the majority of livelihood. Another issue was the need to guarantee the rights of the workers who had

¹⁵ Jeffery, H., 'The new politics of economic and social rights' in Karin, A., and Mihyo, P., (eds.) *Responding to the human rights deficit: Essays in honour of Bas de Gaay Fortman* (2003) Kluwer Law International pp 61 – 72 [Hereinafter referred to as Jeffery: 2003 and Karin & Mihyo: 2003 respectively], at p 64.

¹⁶ For a discussion of the effect of the French declaration see De Wet, E., *The constitutional enforceability of economic and social rights: The meaning of the German constitutional model for South Africa* (1996) Butterworths Publishers, at p 3. According to De Wet, the Declaration was aimed at the radical elimination of the feudal and social class system.

previously been exploited.¹⁷ Issues such as low wages, poor conditions of work and exploitation of labour called for immediate attention.

2.2.2 From the ILO to the UDHR

The Russian Revolution coincided with the creation of the International Labour Organization (the ILO) in 1919.¹⁸ The ILO was created to ‘abolish the injustices, hardships and privation’ of labourers and to guarantee ‘fair and humane conditions of labour’.¹⁹ By this time, the momentum for the recognition of socio-economic deprivation as a human rights problem was gaining force. In his 1944 State of the Union address, President Roosevelt of the United States of America while advocating the adoption of an “Economic Bill of Rights”, said:

We have come to the realisation of the fact that true individual freedom cannot exist without economic security and independence. “Necessitous

¹⁷ See Smith, A., *The Russian Revolution: A very short introduction* (2002) Oxford University Press [Hereinafter referred to as Smith: 2002]. According to Jeffery: 2003, at p 64, the idea that material equity should be a primary objective of political and social life received an important impetus from the Russian Revolution.

¹⁸ In spite of this, the ideals of the ILO precede its creation. According to the ILO website, the need for such an organization had been advocated in the nineteenth century by two industrialists, Robert Owen (1771-1853) of Wales and Daniel Legrand (1783-1859) of France; see <<http://www.ilo.org/public/english/about/history.htm>> (accessed on 27 April 2005).

¹⁹ Steiner, H., & Alston, P., *International human rights in context: Law, politics, morals* (2000) Oxford University Press [Hereinafter referred to as Steiner & Alston: 2000], at p 242. According to Jeffery: 2003, at pp 64 and 65, the formation of the ILO was inspired by the events of the Russian revolution. It was feared that unless the needs of the workers were taken care of, demands for redistribution, as was the case in the Russian revolution, would emerge elsewhere. He also refers to the United Kingdom which rushed to authorise the formation of trade unions in all its colonies. This was done to avoid falling under the domination of disaffected people.

men are not free men". People who are hungry and out of job are the stuff of which dictatorships are made.²⁰

Later, in 1945, the United Nations (UN) was created with one of its proclaimed purposes being ‘... solving international problems of an economic, social and cultural nature [by among others] promoting and encouraging the respect for human rights’.²¹ This commitment within the UN set the stage for the proclamation of human rights, including socio-economic rights. In 1948, the Universal Declaration of Human Rights (UDHR)²² was adopted. The UDHR does not make a distinction between civil and political rights and socio-economic rights. The socio-economic rights the UDHR proclaims include: the right to work and its related rights,²³ the right to a standard of living adequate for health and well being,²⁴ the right to education,²⁵ the right to participate in one’s culture, and protection of interests resulting from scientific, literary or artistic production.²⁶ However, the UDHR is not a treaty; it is a mere resolution of the GA not subject to ratification.²⁷ In spite of this, the UDHR has

²⁰ As quoted by Eide, A., ‘Economic, social and cultural Rights as human rights’ in Eide, A., Krause, C., and Rosas, A., (eds.) *Economic, social and cultural rights: A textbook* (2001) Kluwer Law International pp 9 – 28 [Hereinafter referred to as Eide: 2001], at p 15.

²¹ Article 1(3) of the UN Charter.

²² Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

²³ Art 23.

²⁴ Art 25.

²⁵ Art 26.

²⁶ Art 27.

²⁷ This notwithstanding, the UDHR is evidence of a political commitment on the part of states. Many states have incorporated its (or some of its) contents in their national

formed the basis for the adoption of other more binding human rights treaties such as the ICESCR and ICCPR.²⁸

2.2.3 The ICESCR: Emerging disagreements

Immediately after the adoption of the UDHR, the GA deemed it necessary to include the rights it had proclaimed in a binding treaty.²⁹ The GA in 1948 requested the United Nations Commission (the Commission) to prepare, as a matter of priority, a draft covenant on human rights.³⁰ In 1950, the GA specifically asked the Commission to include in the draft Covenant a clear expression of economic, social and cultural rights.³¹ This marked the beginning of controversies on the nature of socio-economic rights. Many scholars have associated these disagreements with the

constitutions. There is, however, controversy among scholars as to whether this Declaration has over the years gained the status of a binding instrument. Those who subscribe to the school of thought in support of its binding nature argue that it enjoys the status of customary law. In contrast, those who support the school of thought in opposition argue that the establishment of customary international law requires the existence of general, uniform and consistent practice by states, followed by the emergence of an *opinion juris* (a conviction that the practice is obligatory). These, the opponents say, are absent with respect to the practice of human rights. See Kryzstof, D., 'The UN Charter and the Universal Declaration of Human Rights' in Hanski, R., & Suksi, M., (eds.) *An introduction to the international protection of human rights: A textbook* (1997) Institute of Human Rights, Åbo Akademi University pp 65 – 78 [Hereinafter referred to as Hanski & Suksi: 1997 and Kryzstof: 1997 respectively], at p 78.

²⁸ Kryzstof: 1997, at p 75.

²⁹ Craven, M., 'The International Covenant on Economic, Social and Cultural Rights' in Hanski & Suksi : 1997 pp 101 – 123, at p 101.

³⁰ GA Res 217 A, B, E (III), 10 December 1948.

³¹ GA Res. 421 E (V), 14 December 1950, U.N. Doc. A/1775 (1950).

ideological split of the 'cold war'.³² The Eastern states championed the cause of socio-economic rights because they associated these rights with socialistic ideals emphasising the fulfilment of the basic needs of all. In contrast, the Western states championed civil and political rights as the foundation of liberty in the free world.³³ It is because of these differences that the ICCPR was adopted differently from the ICESCR. This was done as a compromise, so that countries opposed to socio-economic rights would ratify the ICCPR and those opposed to civil and political rights would ratify the ICESCR.³⁴

The above notwithstanding, opposition to socio-economic rights has continued even after the end of the 'cold war'. In addition, states believed to have been socialist later joined in this opposition and the ratification record indicates that Eastern states have been as reluctant to ratify the ICESCR as are capitalist states. The record also indicates that most Western states were not in a rush to ratify the ICCPR.³⁵ Indeed, the UN

³² See Craven: 1998; and Kenneth, R., 'Defending economic, social and cultural rights: Practical issues faced by an international human rights organisation' (2004) 26 *Human Rights Quarterly* 63 – 73.

³³ Craven: 1998, at p 9.

³⁴ Robertson asserts that the whole structure was driven by the need for the UN to achieve apparent consensus and unity and was, therefore, a diplomatic decision. Robertson, B. 'Economic, social and cultural rights: Time for a reappraisal' *New Zealand Business Roundtable* September 1997, First published in 1997 by New Zealand Business Roundtable, Wellington, New Zealand sourced at <<http://www.nzbr.org.nz/documents/publications/publications-1997/nzbr-rights.doc.htm>> (accessed on 23 January 2005) [Hereinafter referred to as Robertson: 1997].

³⁵ For example, Denmark signed the ICESCR on 20 March 1968 and ratified it on 6 January 1972, Germany signed it on 9 October 1968 and ratified on 17 December 1973, the United Kingdom signed on 16 September 1967 and ratified on 20 May 1976. Yet, China signed the ICESCR on 27 October 1997 and ratified it on 27 March 2001 and

Committee on Economic, Social and Cultural Rights (the Committee) has stressed that the ICESCR is neutral in terms of economic and political systems. It neither prefers socialist, as opposed to capitalistic economies, nor centrally planned as opposed to *laissez-faire* economies.³⁶ It appears, therefore, that these disagreements did not result from the ideological differences, though there is no denying that the ideological differences influenced the debate.

The main reason for the split relates to differences in conception of the obligations engendered by the rights.³⁷ According to Scott and Macklem, the split was not influenced by the view that socio-economic rights are somehow inferior to civil and political rights. 'Rather, social rights were not viewed as justiciable because courts, or court-like bodies, were not thought to be competent bodies to deal with them'.³⁸ A reporting mechanism, As opposed to a complaints procedure, was considered most suitable for enforcement of the rights.³⁹ It is on this premise, as discussed

though Russia signed the ICESCR on 18 March 1968 it only ratified it on 16 October 1973.

³⁶ Committee on Economic, Social and Cultural Rights, General Comment 3, *The nature of States parties' obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003) (General Comment 3), at para 8.

³⁷ Dennis, J., and Stewart, P., 'Justiciability of economic, social and cultural rights: Should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health?' (2004) 98 *American Journal of International Law* pp 462 – 515 [Hereinafter referred to as Dennis & Stewart: 2004], at p 477.

³⁸ Scott & Macklem: 1992, at p 89.

³⁹ Arambulo, K., *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and procedural aspects* (1999) INTERSENTIA [Hereinafter referred to as Arambulo: 1999], at p 26.

in the next section, that socio-economic rights have been objected to and viewed as lacking the prerequisites of human rights in their pure form. The next section also discusses the responses to these objections.

2.3 ARGUMENTS FOR AND AGAINST SOCIO-ECONOMIC RIGHTS

2.3.1 Human rights engender negative obligations

The disqualification of socio-economic rights as justiciable rights has been based mainly on the philosophical understanding of human rights. Human rights are believed to derive from the inherent nature of human beings and, as fundamental freedoms, are universal and belong to all human beings.⁴⁰ Humanity deserves to be treated with respect and accorded dignity. This creates reciprocal obligations between humans to treat each other with respect. Historically, human rights have been conceived as a negative protection of the individual from the state and its subjects.⁴¹ The relationship between the state and its subjects has been viewed from the perspective of guaranteeing the subject negative freedoms.⁴² From this perspective, human rights are believed to derive

⁴⁰ Piechowiak, M., 'What are human rights? The concept of human rights and their extra-legal justification' in Hanski & Suksi: 1997 pp 3 – 24, at p 5.

⁴¹ Locke submits that all individuals find themselves party to two social pacts: *pactum unionis* and *pactum subjectionis*. The first is aimed at the establishment of civil society, while the second constitutes a framework in terms of which individuals agree that a government has a duty to protect the natural rights of everyone. Locke, J., *Two treatises of civil government* (1967), as quoted by De Villiers, B., 'Social and economic rights' in Van Wyk, D., Dugard, J., De Villiers, B., and Davis, D., (eds.) *Rights and constitutionalism: The new South African legal order* (1995) Juta & Company pp 599 – 628 [Hereinafter referred to as De Villiers: 1995], at p 601.

⁴² Raes, K., 'The Philosophical basis of economic, social and cultural rights' in Van der Auweret, P., De Pelsmaeker, T., Sarkin, J., & Vande Lanotte, J. (eds.) *Social economic*

from a natural law history concerned with natural rights. Natural rights are believed to focus on individual freedom and autonomy from the state based on the theory of individualism.⁴³ The state may not interfere with the individual's freedom and liberty; the individual must be placed in a bracket beyond unjustified intrusion by the state.⁴⁴ Those who believe in this philosophy restrict human rights to those norms that engender negative obligations on the state. Opposition has been directed to socio-economic rights on the ground that they engender positive obligations.⁴⁵

rights: An appraisal of current European and international developments (2000) MAKLU pp 43 – 53 [Hereinafter referred to as Raes: 2000], at p 48.

⁴³ See generally Macpherson, C., *The political theory of possessive individualism: Hobbes to Locke* (1967) Oxford University Press [Hereinafter referred to as Macpherson: 1967]. He goes to great length to expose this philosophy and criticises it for its focus on the individual to the exclusion of the society as a whole.

⁴⁴ See Peces-Barba, G., 'Reflections on economic, social and cultural rights' (1981) 2 *Human Rights Law Journal* pp 281 – 294 [Hereinafter referred to as Peces-Barba: 1981], at pp 281 – 283.

⁴⁵ This argument was also advanced in South Africa by the South African Law Reform Commission. The Commission endorsed the position that civil and political rights are negative while socio-economic rights are positive, which makes them hard to enforce. This view was supported by a number of legal scholars; see Dlamini, C., 'The South African Law Commission's Working paper on group and human rights: Towards a bill of rights for South Africa' (1990) *S A Public Law* 96 [Hereinafter referred to as Dlamini: 1990]. Didcott described a bill of rights as follows:

[It is a] protective device. It can state effectively and quite easily, what may not be done. It cannot stipulate with equal ease or effectiveness, what shall be done. The reason is not only that the courts, its enforcers, lack the expertise and infrastructure to get into the business of legislation and administration. It is also, and more tellingly, that they cannot raise the money. They cannot levy the taxes needed to finance those accomplishments they may like to see...'

Didcott, J., 'Practical workings of a Bill of Rights' in Van der Westhuizen, J., and Viljoen, H., (eds.) *A bill of rights for South Africa* (1988) Butterworths [Hereinafter referred to as Didcott: 1988], at pp 59 – 60 as quoted by the South African Law Commission in its Interim Report on Group and Human Rights, (August 1991) Project 58, at p 533.

However, there is little evidence to suggest that the modern human rights regime has been inspired by the natural law theory. The International Bill of Rights was inspired by a need for solutions to moral and political problems which the world faced at the time.⁴⁶ The ravages of the two world wars and the emergence of dictatorships highlighted this need.⁴⁷ The world wars left millions dead and more millions destitute, in addition to the massive destruction of property and the subsequent economic depressions. The modern human rights movement emerged as a response to these ravages, humanity could only be preserved if certain of its needs were protected. The first step towards this was recognition of the needs that merit protection.⁴⁸ The second step was to accord these needs legitimacy by accepting that it is the responsibility of the state to ensure that they are met. Collective agreement was necessary to achieve legitimacy. This prompted the signing of treaties between the states.⁴⁹

⁴⁶ Craven: 1998, at p 11.

⁴⁷ The emergence of fascism, the holocaust and the human disasters resulting from it made it necessary for human rights protection to be provided.

⁴⁸ The UN Charter and the UHDR are evidence of such recognition. Human rights are recognised as necessary for freedom, justice and peace in the world (UDHR preamble para 1). The UDHR further proclaims that a common understanding of rights and freedoms is of the greatest importance (para 7)). This position is also supported by Fortman and Goldewijk who contend that the human rights 'project' is 'a global effort to bind the execution of power to a set of norms based on a universal belief in human dignity'—geared towards realising 'the global common good' or public interest. Fortman, B., and Goldewijk, K., *God and the goods: global economy in a civilizational perspective* (1998) World Council of Churches Publications [Hereinafter referred to as Fortman & Goldewijk: 1998], at p 4, as quoted by Opschoor, H., 'Economic, social and cultural rights from an economist's perspective' in Karin & Miyo: 2003 pp 73 – 89, at p 79.

⁴⁹ This is what prompted the concretisation of the rights recognised in the UDHR as obligations proclaimed by treaties. The ICCPR and the ICESCR underwrite the rights as

According to Pieterse, '[a]rticulating claims to social goods as rights clothes the interests that the claims represent in a measure of political significance'; in his opinion, '[r]ights entail enforceable obligations for those against whom they are claimed and demand justification for their non-fulfilment'.⁵⁰

Provisions of the UN Charter acknowledge the existence and need to solve problems of a socio-economic nature. One of the purposes of the UN is to solve problems of an economic, social, cultural or humanitarian nature.⁵¹ Such problems include those that deny people access to socio-economic goods and services such as food, shelter, health care services and employment, among others. The obligations to meet these needs may either be negative or positive. This, however, is irrelevant to the question of whether or not the needs have to be met. It only remains relevant in determining the means of meeting the needs. Yet it does not vitiate one category of needs as incapable of resolution as human rights problems.

entitlements and obligate states to ensure their realisation. It is on the basis of this that Fortman & Goldewijk: 1998 have developed a need-based theory of human rights. They submit that for a need to be a right, two conditions must be satisfied. The first is general acceptance of the existence of a need and the second is the notion that the need should be met. The question that one poses then is whether socio-economic rights advance such needs. The answer is in the affirmative. There is no doubt that people need water, shelter, food and good health, which transforms them into rights. Also, Baehr believes that the rejection of socio-economic rights is caused by a failure to recognise phenomena such as poverty, malnutrition, illiteracy and unemployment as human rights problems. Using the example of the right to life, he demonstrates the close linkage between civil and political rights and human needs such as food, water, housing and health care. Baehr, P., 'Controversies in the current human rights debate' (2000) 2 *Human Rights Law Review* pp 7 – 72, at p 14.

⁵⁰ Pieterse, M., *A benefit-focused analysis of constitutional health rights* Ph.D. thesis submitted to the University of Witwatersrand [December 2005], at p 2.

⁵¹ UN Charter, art. 1(3). In addition to this, the preamble expresses the determination to promote social progress and better standards of life.

Indeed, closer scrutiny reveals that civil and political rights too engender positive obligations. It is on the basis of this that Sepúlveda submits that all human rights impose a ‘continuum’ or ‘spectrum’ of obligations. On the one side of the spectrum is the obligation of non-interference by the state and on the other side is the obligation requiring positive action.⁵² Both civil and political rights and socio-economic rights should, therefore, be viewed through this spectrum.

2.3.1.1 Negative and positive obligations for all categories

In remedial terms, it is important to understand whether an obligation is either negative or positive. This is because, generally speaking, negative violations call for negative remedies such as prohibitions, while positive violations call for positive remedies such as mandatory injunctions. It is also true that negative remedies are thought to be less intrusive into the executive and legislative domain while positive remedies may be far more intrusive. Most courts in South Africa and elsewhere have, for instance, had no problem granting negative or prohibitory injunctions; yet they have been reluctant to issue positive or mandatory injunctions. This is because such negative remedies do not draw the courts into the controversies generated by ordering government to undertake affirmative action.⁵³

It is, therefore, true that an order enjoining an activity by requiring the state to desist from doing something, is seen as less complicated when compared to one enjoining affirmative action requiring the state to do or

⁵² Sepúlveda, M., *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) INTERSENTIA [Hereinafter referred to as Sepúlveda: 2003], at p 125; quoting Shue, H., ‘The interdependence of duties’, in Alston, P., and Tomaševski, K., (eds.) *The right to food* (1984) Martinus Nijhoff Publishers pp 83 – 96 at p 84, she concludes that attempting to classify every right either flatly negative or positive, is an artificial, simplistic and arid exercise.

⁵³ See chapter seven, section 7.2.

undo something.⁵⁴ This means that wholesome acceptance of socio-economic rights as engendering only positive obligations risks these rights being labelled highly intrusive and as instruments that facilitate interference in the way government is run. However, negative violations may also attract positive remedies in certain circumstances and so may positive obligations demand negative remedies.⁵⁵ It is also true that sometimes negative remedies may be as intrusive as positive remedies, and yet, in some situations, positive remedies may not be intrusive.⁵⁶ Forbidding government action by way of a negative injunction may intrusively constrain government action in the same way as a mandatory injunction. Consider, for instance, an order that stops government from building a road on somebody's land. If the government thinks the road a necessity, it will have to engage in positive action by getting alternative land and planning for the road on that land. Alternatively, government may have to pay compensation in order to expropriate the land, which in itself is an affirmative action.

Socio-economic rights also engender negative obligations and civil and political rights engender positive obligations as well.⁵⁷ The obligations

⁵⁴ Berryman, J., *The law of equitable remedies* (2000) Irwin Law [Hereinafter referred to as Berryman: 2000], at p 40. See also Cooper-Stephenson, K., 'Principle and pragmatism in the law of remedies' in Berryman, J., *Remedies, issues and perspectives* (1991) Thomson Professional Publishing Canada pp 1 – 48, at p 35; and Horowitz, D., *The courts and social policy* (1977) The Brookings Institution, at p 19.

⁵⁵ Roach, K., *Constitutional remedies in Canada* (1994) Canada Law Book Inc [Hereinafter referred to as Roach: 1994], at p 3-9. See also Berryman: 2000, at p 40.

⁵⁶ Roach: 1994, at p 3-10, gives the example of damages, which are considered to be a positive remedy, yet there is contention that they are intrusive (at p 3-12).

⁵⁷ See *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* 2005 (4) BCLR 301 (CC), at paras 70 – 71. A number of examples will show that socio-economic rights too have negative duties: the right to food includes the right of everyone to procure their own food supply without interference; the right to housing implies the right not to be a victim of forced evictions, the right to work encompasses the individual's right to

under the ICCPR are not restricted to state abstinence but also extend to the obligation of the state to undertake specific activities to realise the rights.⁵⁸ Take the right to life for example, it is not guaranteed by mere abstinence from unjustifiable taking of life. It is also guaranteed by putting in place a police force to maintain law and order and by establishing hospitals to treat illnesses.⁵⁹ Additionally, it also requires

choose his/her own work and also requires the State not to hinder a person from working and to abstain from measures that would increase unemployment; the right to education implies the freedom to establish and direct educational establishments; and the right to adequate health implies the obligation not to interfere with the provision of health care. See Sepúlveda: 2003, at pp 125 – 126. See also Davis, D., ‘Adjudicating the socio-economic rights in the South African Constitution: Towards “deference lite”?’ (2006) 22 *South African Journal on Human Rights* pp 301 – 327, at p 305.

⁵⁸ In its General Comment No.3, the Human Rights Committee has said that:

The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights. This is obvious in a number of articles (e.g. art. 3 which is dealt with in General Comment 4 below), but in principle this undertaking relates to all rights set forth in the Covenant.

Para 1 of General Comment No. 03: *Implementation at the national level (Art. 2)*, 29 July 1981 in *Compilation of general comments and general recommendations adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.7. 12 May 2004. According to Alston and Quinn, to say that civil and political rights merely require abstention is at odds with reality. This is because civil and political rights heavily depend on availability of resources and the development of the necessary societal structures. Alston, P., and Quinn, G., ‘The nature and scope of States Parties obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 8 *Human Rights Quarterly* pp 156 – 229 [Hereinafter referred to as Alston & Quinn: 1987], at p 172.

⁵⁹ According to De Villiers, the right to life should be interpreted not only as protection against being arbitrarily deprived of life but should, for instance, also include the right to medical assistance, hospitalisation and nutrition. De Villiers: 1995, at p 605. Elsewhere, De Villiers argues that a dogmatic approach of classifying rights into ‘positive’ and ‘negative’ rights should be avoided because it is not possible to distinguish between

building and staffing of courts and prisons to punish those who unjustifiably end life. To protect the rights to free speech and property requires a government apparatus whose construction and maintenance calls for a great deal of positive action.⁶⁰

Similarly, the right to vote, a classical civil and political right, engenders both negative and positive obligations. In *August and Another v The Electoral Commission and Others*,⁶¹ the CC held that the right to vote as guaranteed by section 19(3) ‘imposes a positive obligation upon the legislature and executive’.⁶² This is because ‘[a] date for elections has to be promulgated, the secrecy of the ballot secured and the machinery established for managing the process’.⁶³ The CC observed that it is for this reason that the Electoral Commission (the Commission) is established with affirmative duties imposed upon it. The petition in this case was brought by two prisoners, on their own behalf and on behalf of other prisoners, to enforce their right to vote. Though the law did not exclude prisoners from voting, the Commission had not made any arrangements for the registration and voting of prisoners. The CC found this to be a violation of the prisoners’ right to vote and was also against the

rights by means of such classification and leads to rigidity rather than flexibility. De Villiers, B., ‘Socio-economic rights in a new constitution: Critical evaluation of recommendations of the South African Law Commission’ (1992) 3 *Tydskrif vir die Suid-Afrikaanse Reg* pp 421 – 436, at p 435.

⁶⁰ Sunstein, C., *Social and economic rights? Lessons from South Africa* (May 2001). Public Law Working Paper No. 12, University of Chicago Law & Economics, Olin Working Paper No. 124 available at <http://paper.ssrn.com/sol3/papers.cfm?abstract_id=269657> (accessed on 27 July 2004), at p 1.

⁶¹ 1999 (3) SA 1 (CC).

⁶² Para 16.

⁶³ As above.

foundational value of universal adult suffrage on a common voters roll. The Commission was ordered to ‘make all reasonable arrangements necessary to enable the applicants and other prisoners ... to register as voters’.⁶⁴

The right to equality as guaranteed by section 9 also engenders negative and positive obligations on the part of the state. The section does not only impose a negative duty on the state not to discriminate on the basis of the listed grounds but also imposes positive obligations. The state is required to promote the achievement of equality by adopting ‘legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination’.⁶⁵ The effect of this provision is that it compels the state to look beyond the notion of formal equality and to embrace substantive equality, which cannot be achieved without positive measures being undertaken. Substantive equality requires the state to undertake positive measures to enable those who have suffered discrimination in the past to surmount the obstacles that hamper their enjoyment of the rights. This concept of equality, therefore, challenges the notion that human rights provide only negative protection.⁶⁶ Understanding equality from this perspective not only justifies positive dimensions of civil and political rights but also those of socio-economic rights that are intended to uplift the socio-economic position of victims of past discrimination. Yet, a closer scrutiny of socio-economic rights reveals that they too engender negative obligations. The duty on states to

⁶⁴ Para 42(3.4). Yet, as is demonstrated below, making such arrangements for prisoners to exercise their right to vote would require resources. See *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and Others*, 2004 (5) BCLR 445 (CC) (NICRO case).

⁶⁵ Section 9(2).

⁶⁶ Fredman, S., ‘Providing equality: Substantive equality and the positive duty to provide’ (2005) 21 *South African Journal on Human Rights* pp 163 – 190, at pp 163 and 166.

‘respect’ human rights, both civil and political, and socio-economic rights, as discussed below,⁶⁷ engenders a negative obligation.⁶⁸

Nevertheless, one needs to concede that, by and large, the fulfilment of socio-economic rights calls for more extensive state action in comparison to civil and political rights.⁶⁹ This is what makes judicial review of socio-economic rights far more difficult in comparison to civil and political rights. As already noted, generally, negative violations call for negative remedies and positive violations for positive remedies. In the *First Certification* case,⁷⁰ the CC held that at ‘the very minimum, socio-economic rights can be negatively protected from improper invasion’.⁷¹ This notwithstanding, in most cases, the state’s violation of socio-economic rights emerges from failure to take positive steps.⁷² A socio-economic right violation can occur when the state engages in prohibited acts, but in the majority of cases, it is always failure to act that is under

⁶⁷ Section 2.3.4.2.

⁶⁸ Viljoen, F., *The justiciability of socio-economic and cultural rights: Experience and problems* [Unpublished paper on file with author; hereinafter referred to as Viljoen: 2005], at pp 3 and 36; see also Liebenberg: 2005, at pp 17 – 18; De Vos: 1997, at p 80 refers to parts of the socio-economic rights provisions in the South African Constitution that carry express prohibitions as evidence of the fact that these rights carry negative duties as well. Examples of these provisions include section 26(3) which prohibits evictions without a court order and section 27(3) which prohibits denial of emergency medical services.

⁶⁹ De Vos: 1997, at p 71.

⁷⁰ *In re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC).

⁷¹ At para 77.

⁷² Abramovich, V., ‘Courses of action in economic, social and cultural rights: Instruments and allies’ (2005) 2 *SUR – International Journal on Human Rights* pp 181 – 216 [Hereinafer referred to as Abramovich: 2005], at p 183.

scrutiny. In contrast, in the majority of civil and political rights cases, the state is taken to task to explain why its action infringes a civil and political right. This should not be understood to mean that civil and political rights litigation does not challenge inaction. The issue is one of differences in degree as is illustrated by the examples of the right to health care and the right to liberty immediately below.⁷³

Maintenance of a health care system requires well co-ordinated action and community-wide participation. It also requires a great deal of resources and expertise. It is only the state that is well placed to meet these requirements.⁷⁴ Whereas violation of this right may result from state negative interference, it mainly arises from inaction. There is a legitimate expectation that the state will put in place a functional health system. This requires the necessary expertise. The state is also expected to use its resources to build the necessary infrastructure. By using its expertise, the state will achieve co-ordination. The state will also use both its coercive and non-coercive means to achieve community participation where necessary.⁷⁵ All these processes call for a great deal of state positive action. The same may be said of other socio-economic rights such as education, housing, water and food.

Some civil and political rights may require similar measures but in varying degrees. To realise the right to personal liberty, the state needs to restrain it-self; which imposes a negative duty. However, the state may also require co-ordinated action to investigate and punish violators, which

⁷³ See Abramovich: 2005, at p 183.

⁷⁴ There is no doubt that it is a human need that people enjoy good health. It is also true that this need should be met by the state. It cannot be left exclusively to the individual without state aid. This is because it requires a great deal of expertise and resources not at the individual's disposal.

⁷⁵ This may include laws that prohibit practices that are harmful to health, and health education to encourage health practices.

imposes a positive duty. This positive duty, however, may, generally speaking, not require the same level of co-ordination and community participation as does a health system. In terms of Sepúlveda's 'spectrum' of obligations,⁷⁶ this right will attract more negative points while the right to health will attract more positive points. If these points are expressed in terms of resources, the right to health care will be more expensive. One may argue that maintaining a sound police force requires the same level of resources as maintaining a health care system. Whereas this is true, there is a major difference: the cost of maintaining a police force will result in protection of other rights such as property, life, and protection from servitude. This results in spreading the costs with a high level of economies of scale. Maintenance of a health care system is different. It may protect life but not so many other rights directly, thereby restricting the economies of scale. This makes the right to health more expensive.⁷⁷

2.3.2 Universality of human rights

Cranston submits that socio-economic rights are not human rights because they lack the essential characteristics of *universality and absolutism*.⁷⁸ 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.⁷⁹ Socio-economic rights are said to accrue to classes of people

⁷⁶ See Sepúlveda: 2003, at p 125. See also Abramovich: 2005, at pp 186 – 187.

⁷⁷ Lenta submits that court orders enforcing socio-economic rights will have significant budgetary implications on nearly every occasion that the court finds against the state, whereas in the case of other rights budgetary implications will be a more occasional and less severe consequence of the order. Lenta, P., 'Judicial restraint and overreach' (2004) 20 *South Africa Journal on Human Rights* pp 544 – 615, at p 567. See also Tushnet, M., 'Social welfare rights and the forms of judicial review' (2004) 82 *Texas Law Review* pp 1895 – 1919, at p 1895.

⁷⁸ See Cranston, M., 'Human rights real and supposed' in Raphael, D., (ed.) *Political theory and rights of man* (1967) Macmillan.

⁷⁹ Craven: 1998, at p 13.

and, therefore, lack universality. Additionally, it is submitted that socio-economic rights are not enjoyed by virtue of one's humanity. Cranston describes socio-economic rights as 'mere utopian aspirations'. On the other hand, civil and political rights are said to be morally compelling; they belong to a human being simply because he or she is human.⁸⁰

Cranston's objection could more theoretically be described as being based on the idea of 'sustentative universality' as opposed to 'conceptual universality'. The theory of conceptual universality is not intended to prove the existence or even justiciability of certain categories of rights. It is merely based on the belief that by their very nature human rights once accepted apply to all human beings equally simply by virtue of their being human.⁸¹ In contrast, substantive universality is intended to prove or disprove certain norms as having all the qualifications that make them human rights.⁸²

Cranston's use of substantive universality to discredit socio-economic rights, however, lacks merit. Both categories of rights have elements that focus on the individual as the beneficiary, but they also have elements that are intended to protect collective interests. A number of civil and political rights are only meaningfully enjoyed in groups. For instance, the freedoms of association and assembly become useful only when exercised by a group. Furthermore, groups of people can demand collective exercise of their civil and political rights. Members of the media profession may through their professional bodies demand respect for their freedom of speech. Academics, scientist, politicians, minority groups and artists, too, may make similar demands for freedoms of expression and association. Additionally, even the so-called collective rights empower the individual:

⁸⁰ Cranston, M., *What are human rights* (1973) Bodley Head, as quoted by Arambulo: 1999, at p 58.

⁸¹ Donnelly, J., 'The relative universality of human rights' (2007) 29 *Human Rights Quarterly* pp 281 – 306 [Hereinafter referred to as Donnelly: 2007, at p 283.

⁸² See Donnelly, as above.

better health, freedom from hunger, and the proceeds of employment all benefit the individual in as much as they are also necessary for the promotion of societal cohesion. In this line, Raes has submitted that:

[T]he fact that human rights are the rights of individuals does not make these rights “individualistic rights”. To say that human rights discourse focuses on individuals as bearers of those rights and thus places individuals at the centre of the world is not to say that human rights discourse is intrinsically individualistic Although human rights are rights of individuals, they are not mainly meant to serve only individual interests. On the contrary they facilitate rational, non-violent change of existing communities by means of exercising democratic rights.⁸³

It is also true that, to protect the common wellbeing, several restrictions are imposed on number of civil and political rights. The freedom of expression is restricted in several countries to prevent hate speech.⁸⁴ It is also restricted to avoid outraging public morals and decency, for instance, by restricting the distribution of pornography in certain circumstances. The freedom of religion, too, cannot be exercised to promote terrorist activities or to use prohibited narcotic substances.⁸⁵ The list is endless. All

⁸³ Raes: 2000, at p 44. Raes’s view can be likened to the African value laden concept of ‘ubuntu’ [discussed in detail in chapter six, section 6.2]. This value views an individual as part of a bigger whole, who cannot live in isolation from society. It therefore calls for compassion, honesty, love and care in relationships between individuals. Human rights in South Africa have been integrated with this concept. See Justice Sachs in *Dikoko v Mokhatla* 2007 (1) BCLR 1 (CC). The views expressed by Orwin and Pangle are, therefore, misplaced. Orwin and Pangle argue that the introduction of socio-economic rights carries with it a danger of moving human rights away from the individual as the focal point. In their opinion, this will make it possible for the justification of infringements upon the individual’s freedom in the name of the common good. They argue that this will be detrimental to the practical achievements of the established human rights tradition. Orwin, C., and Pangle, T., ‘The philosophical foundation of human rights’ in Plattner, M., (ed.), *Human Rights in our time – Essays in memory of Victor Baras* (1984) Westview Press pp 1 – 22 [Hereinafter referred to as Orwin & Pangle: 1984], at p 16.

⁸⁴ Section 16(2) of the South African Constitution provides that the right to freedom of expression does not extend to propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. See *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294.

⁸⁵ See *Prince v President of the Law Society of the Cape of Good Hope* 2002 (3) BCLR 231 (2002 (2) SA 794) (CC).

rights, therefore, in addition to protecting the individual promote collective interests as well.⁸⁶ The individual is part of a bigger social entity though he or she enjoys some liberty to determine his or her fate.⁸⁷ Human rights, whether civil and political or socio-economic, are aimed at creating an environment in which individuals flourish and decide how they want to live. Nevertheless, in doing this, human rights do not isolate the individual from his society because such an environment can only be created through collective effort. It is in line with this that the notion of distributive justice, as discussed in chapter five,⁸⁸ becomes relevant and useful in human rights litigation. In finding remedies for the violation of human rights, a court basing its decision on distributive justice will focus beyond the needs of the individual victim. Consideration will also be had on the needs of other individuals and on the needs of society as a whole.

⁸⁶ Macpherson: 1967, at p 3, submits that the individual is not a moral whole but part of a larger social whole—and not owner of himself. The individual is part of a bigger social entity. The establishment of smooth interactions and the protection of all members of this social setting call for a degree of collectivism.

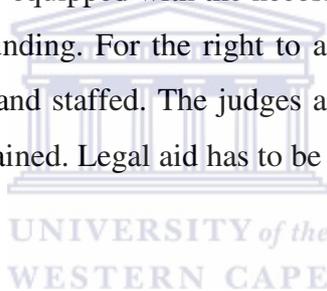
⁸⁷ According to Macpherson: 1967, at p 3, society becomes a lot of free individuals related to each other as proprietors of their own capacities and of what they have acquired by their exercise. This notwithstanding, it consists of relations of exchange between proprietors and political society becomes a calculated device for the maintenance of orderly relations of exchange. In the same line, Freedman submits that a crucial dimension of human nature is its dependence on social, historical and behavioural contexts and that this negative understanding of the obligations adheres to a further assumption about human rights as axiomatic, when it is merely optional. It presents individuals as self-determining, as best capable of preserving their own interest, as indeed self-developing. This evokes a theory of human nature as self-sufficient, independent and capable of rational pursuit of enlightened self-interest. It encourages an overly formal and abstract discussion of human rights. Freedman, M., 'Human rights and welfare: A communitarian view' (1990) *Ethics* pp 489 – 502, at p 490 as quoted by De Villiers: 1995, ft 21 at p 603.

⁸⁸ Section 5.2.2.

2.3.3 Absolutism and resources limitations

Absolutism is the notion that a right is available to all human beings on the ground of their humanity without any pre-requisite conditions. Socio-economic rights are said not to be absolute. Instead, their realisation is subjected to conditions; unlike civil and political rights, their realisation is dependent on resources.⁸⁹ Bossuyt goes as far as submitting that civil and political rights can be realised immediately because their realisation does not require resources; all the state has to do is to abstain from infringing them.⁹⁰

This opinion, however, is misconceived. Implementation of civil and political rights, just like the socio-economic rights, requires resources.⁹¹ For the right to life to be protected, a police force and army have to be trained. They have to be equipped with the necessary logistics and require regular and adequate funding. For the right to a fair trial to be enjoyed, courts have to be built and staffed. The judges and members of the legal profession have to be trained. Legal aid has to be provided to the indigent;



⁸⁹ See Bossuyt, M., 'La distinction juridique entre les droits civil et politiques et les droit économiques, sociaux et culturels' [The legal distinction between civil and political rights and economic, social and cultural rights]: *Revue des Droits de l'Homme* [*Human Rights Journal*] (1975) 8 pp 783 – 820.

⁹⁰ Bossuyt, M., 'International human rights systems: Strengths and weaknesses' in Mahoney, K., and Mahoney, P., (eds.) *Human rights in the twentieth century* (1993) Martinus Nijhoff pp 47 – 55, at p 52.

⁹¹ Alston & Quinn: 1987, at p 172. Eide has submitted that the argument that socio-economic rights require resources yet civil and political do not is only tenable in situations where the focus on socio-economic rights is on the tertiary level (duty to fulfil), while civil and political rights are observed on the primary level (duty to respect). In Eide's opinion, socio-economic rights can, in many cases, best be safeguarded by non-interference; Eide, A., 'Realization of social and economic rights and the minimum threshold approach' (1989) 10 *Human Rights Law Journal* pp 35 – 51 [Hereinafter referred to as Eide: 1989], at p 41.

all this is done at state expense.⁹² The *NICRO* case clearly demonstrates the concerns that the State has in relation to realising some civil and political rights on the ground that they require redistribution of scarce resources. In this case, a group of prisoners, with the backing of NICRO, challenged legislation that excluded convicted prisoners from exercising the right to vote. In defence, the State, amongst others, argued that the exclusion was justified on the ground that [r]ather than putting the scarce resources of the State at the disposal of convicted prisoners, such resources should ... be used for the provision of facilities to enable law-abiding citizens to register and vote'.⁹³ While the Court declined to deal with this issue, since facilities for voting already existed at prisons,⁹⁴ the case goes to prove the redistributive effect, in resource terms, of realising some civil and political rights.

It is also true that not all levels of socio-economic rights require resources to be realised. The right to join and belong to a trade union may only require state non-interference. So also is a person's freedom to seek employment or provide for his/her means of survival. This imposes on the state an obligation to respect the right; all that this obligation requires is state non-interference with the enjoyment of the right.⁹⁵

⁹² Yigen, K., 'Enforcing social justice: Economic, and social rights in South Africa' (2002) 4 *International Journal of Human Rights* pp 13 – 29, at p 18. According to Robertson: 1997:

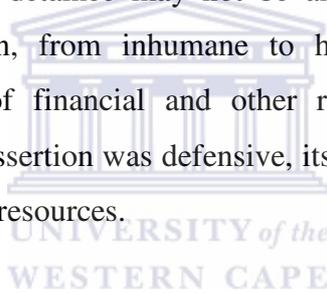
[T]he distinction does not therefore depend upon the fact of government expenditure. Since all governmental activity costs money, a claim that civil and political rights can be implemented cost free is equivalent to a claim that there should be no government. Nor does the distinction depend upon the amount of money spent. There is no magic figure, whether in absolute terms or as a percentage of GDP, that crosses the line from the implementation of the one kind of right to the other.

⁹³ Para 44.

⁹⁴ Para 49.

⁹⁵ See section 2.3.4.2 below for discussion on this typology.

According to Wells and Eaton, using the constitution in a defensive manner is not controversial as it imposes no cost: ‘when someone raises the constitution defensively ... no issue arises as to why he/she is allowed to do so; no legitimate cost is inflicted by such a remedy’.⁹⁶ This submission may convince those who associate civil and political rights with negativity and socio-economic rights with positive obligations. However, even if one were to assume this to be correct, it is not true that negative remedies do not have budgetary implications. Consider a case in which a litigant successfully asserts his/her right not to be detained under inhumane conditions. While the court may not expressly compel the state to improve the conditions of detention, this may be the ultimate action that the state must undertake. This is because, considering the public interest, release of the detainee may not be an option. Improving the conditions of detention, from inhumane to humane, may require a considerable amount of financial and other resources. Meaning that though the right in its assertion was defensive, its vindication has become offensive and requiring resources.



A distinction is always made on the basis of differences in the quality or type of government expenditure.⁹⁷ Robertson asserts that positive rights require rationing and a compulsory transfer of resources and that negative rights on the other hand require only the provision of services equally to all at all times.⁹⁸ On this basis, he criticises redistributive expenditure as counter-productive because, rather than enhance the standard of living, it reduces it. Robert submits that:

⁹⁶ Wells, M., and Eaton. T., *Constitutional remedies: A reference book for the United States Constitution* (2002) Praeger Publishing, at p xxv

⁹⁷ Robertson: 1997.

⁹⁸ Robertson: 1997.

[R]esources taken by the state through taxation and expended on realising the rights in the ... [ICESCR] 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.⁹⁹

It appears that by positive rights Robertson is referring to socio-economic rights and by negative rights he means civil and political rights. As stated above,¹⁰⁰ this is a skewed understanding of human rights as both categories of rights engender both positive and negative obligations. All government expenditure has a redistributive effect which is irrespective of the nature of the right upon which it is being spent. Expenditures on civil and political rights too have redistributive implications. As Robertson concedes, the state does not create wealth through taxation.¹⁰¹ This applies to expenditure on socio-economic rights as well as civil and political rights. A few examples will demonstrate that expenditure on civil and political rights also entails resources redistribution. Expenditure to feed and maintain prisoners is taken from the taxes raised from everyone. In order to ensure speedy and fair trials, expenditure is incurred on the transporting of suspects and witnesses to court. State expenditure from taxes may be used on structures to regulate trade unions. The same may

⁹⁹ Robertson: 1997.

¹⁰⁰ Section 2.3.1.1.

¹⁰¹ It should be noted, however, that there are certain exceptional circumstances where the state may create resources. For instance, the state may engage in exploitation of the country's natural resources. Many African countries depend on export of minerals such as gold and diamonds. Additionally, a state may raise revenue from external sources through seeking donor funding not subject to repayment. This, however, is not to ignore the fact that most states, by and large, depend on taxation as the source of funding.

be done for other professional bodies. Such expenditure will include taxes raised from persons who are not criminals themselves, or members of the unions or of the professional bodies. This in effect is redistribution.¹⁰²

It should also be noted that the objection to socio-economic rights on the basis of resources confuses two things: justiciability and implementation or enforcement.¹⁰³ While enforcement may require resources, recognition of socio-economic rights as inherently justiciable does not. It is also true, as indicated above, that not all levels of implementation of all socio-economic rights require resources. In addition to this, as seen in chapter four,¹⁰⁴ the state is only expected to act within the available resources to progressively realise socio-economic rights.

Robertson contends that the limitations imposed on the two categories of rights are different. He submits that '[h]owever encrusted with exceptions civil and political rights may be, those exceptions are set down prospectively and become part of the definition of the right'. He goes on: 'what is thus defined is thereafter, within its limits, absolute'. In his opinion, the same cannot be said of socio-economic rights; '[socio-economic rights] require to be rationed and no principle can tell us in advance what the appropriate degree of rationing is'.¹⁰⁵ However, in my

¹⁰² Mark Tushnet contends that some elements of free speech law in the United States of America call into the question of distribution of wealth. These are the requirements that some public property be made available for political activity subject only to reasonable time, place, and manner regulations, and the problem of the heckler's veto. For instance, where the police is deployed and logistics consumed to protect speakers at a political rally; Tushnet, M., *Enforcing social and economic rights* [Unpublished paper on file with author], at p 4. A summarised version of this paper has been published under the title 'Enforcing socio-economic rights: Lessons from South Africa' (2005) 6 *ESR Review* pp 2 – 6 [Hereinafter referred to as Tushnet: 2005]

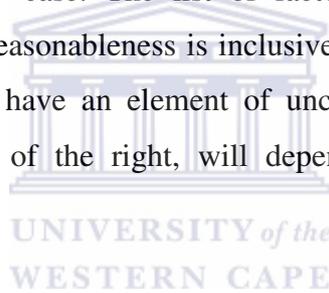
¹⁰³ Viljoen: 2005, at p 13.

¹⁰⁴ Section 4.2.

¹⁰⁵ Robertson: 1997.

opinion, this is not true because civil and political rights too have limitations that are not part of their definition. Most constitutions now have a limitation clause which restricts the exercise of all the rights it protects.

The South African Constitution contains such a limitation clause. Section 36(1) allows the state to limit the rights if ‘the limitation is reasonable and justifiable in an open and democratic society based on humanity dignity, equality and freedom’. This provision has, as a matter of fact, been used mostly in adjudicating civil and political rights.¹⁰⁶ Contrary to Robertson’s supposition, this limitation is open-ended and the inquiry as to whether an infringement is justifiable is a factual one.¹⁰⁷ Though there are fixed rules for determining this question, the result is dependent on the circumstances of every case. The list of factors that the court must consider to determine reasonableness is inclusive and not exclusive. This means that the results have an element of uncertainty. Every case, in addition to the nature of the right, will depend on its own peculiar circumstances.



¹⁰⁶ This clause has been included as one of the steps of adjudicating a violation of a right in the Bill of Rights. After determining that a right has been infringed, the court then has to apply section 36 in order to determine whether or not the infringement is justified. Some of the reasons that may justify such infringement include maintenance of public order, safety, health and democratic values. See Currie, I., and De Waal, J., *The new constitutional and administrative law* Volume 1 (2001) Juta & Company [Hereinafter referred to as Currie & De Waal: 2001], at p 339.

¹⁰⁷ Currie & De Waal: 2001, at p 339.

2.3.4 Vagueness of socio-economic rights

The other objection to the enforcement of socio-economic rights is their vagueness. In some circles socio-economic 'rights are seen as more controversial and, therefore, more indeterminate'.¹⁰⁸ The provisions of the ICESCR are said to be vague to the extent that a judge cannot determine the precise scope of the right,¹⁰⁹ whereas the ICCPR provisions are said to be precise.¹¹⁰ Similarly, it has been submitted by some scholars, even very

¹⁰⁸ Scott & Macklem: 1992, at p 45. See also Andreassen, B., Skålnes, T., Smith, G., and Stokke, H., 'Assessing human rights performance in developing countries: The case for a minimum threshold approach to economic and social rights' in Andreassen, B., and Eide, A., (eds.) *Human rights in developing countries 1987/88: A Yearbook on human rights in countries receiving Nordic aid* (1988) Chr. Michelsen Institute, Danish Center for Human Rights and Norwegian Institute of Human Rights pp 333 – 355 [Hereinafter referred to as Andreassen *et al*: 1988], at p 335. They argue that such phrases as 'just and favourable conditions of work', 'fair wages', 'decent standard of living', 'safe and healthy working conditions', 'adequate standard of living' and 'adequate food, clothing, and housing' as used in the ICESCR do not greatly help analysts in determining the substantive contents of these rights, or measuring empirically the degrees of implementation of specific rights (pp 335 – 336).

¹⁰⁹ Robertson: 1997 gives the example of the right to housing. The right to housing could mean that 'the state must not interfere with the tenure of householders' or 'the state must provide everyone with a house of a certain standard' or 'the state must ensure that everyone can afford access to adequate housing'. Orwin and Pangle: 1994, at p 15 describe the rights as open-ended and containing unclear standards. To them, these are merely things that the poor wish they could persuade the rich to do for them, they are utopian endeavours and ideals which cannot be given the status of rights. What these authors ignore, however, is the fact that the Committee has been able to define the content of each of these rights. See, for instance, Committee on Economic, Social and Cultural Rights General Comment 4 *The right to adequate housing* (article 11 (1)) Sixth session, 1991) U.N. Doc E/1992/23 [Hereinafter referred to as General Comment No. 4], reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003).

¹¹⁰ This objection has been maintained even presently. This is seen at the first session of the Open-ended Working Group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights (Open-ended working group). Some delegates argued that some of the provisions of the

recently, that socio-economic rights are merely broad assertions, which puts them in unmanageable territory for the courts.¹¹¹ The most immediate response to this objection has been that civil and political rights are no different.¹¹² It is not true, as has been suggested, that civil and political rights mean exactly the same thing everywhere.¹¹³ Some civil and political rights such as freedom of speech, and right to protection of human dignity or protection from inhuman and degrading treatment are also vague. The question as to what amounts to inhuman or degrading treatment cannot be answered with precision. It may mean what right-thinking members of society consider as being inhuman or degrading¹¹⁴ which is in itself vague. The same can be said of free speech.¹¹⁵ In most cases it is limited by the interests of those in power. Whilst to a certain extent the vagueness of civil and political rights has partly been cleared up through many years of adjudication, socio-economic rights have not

Covenant are drafted in imprecise terms, which gives rise to a lack of predictability on the part of the Committee. See para 53 of the Report of the working group, UN Doc E/CN.4/2004/44, dated 15 March 2004.

¹¹¹ See for instance Neier, A., 'Social and economic rights: A critique' (2006) 13 *Human Rights Brief* pp 1 – 3 [Hereinafter referred to as Neier: 2006], at p 3.

¹¹² Some of the delegates at the session of the Open-ended working group argued that the ICESCR differs from the ICCPR in this respect; that it was for the interpreters of the treaty to apply a particular provision of the Covenant to concrete cases as is the practice of the Committee in considering state reports; UN Doc E/CN.4/2004/44, at para 53.

¹¹³ Neier: 2006, at p 2 has suggested that the right to free speech, right to assemble and right not to be tortured mean the same thing in every place of the world.

¹¹⁴ Robertson: 1997.

¹¹⁵ Raes: 2000, at p 48 elaborates the vague nature of the freedom of speech; that the right is silent about the content of free speech and that acts that are protected are both moral and immoral.

had a similar advantage.¹¹⁶ This is one of the reasons why the adoption of a complaints procedure to the ICESCR has been proposed.¹¹⁷ To deny the justiciability of socio-economic rights is to limit the opportunities of elaboration of the obligations they engender. According to Scott:

As national courts and institutions expand their attention to alleged violations of economic, social and cultural rights and as similar advancement occurs within regional human rights systems, further clarity will emerge, both with respect to what is prohibited and what behavior is considered conducive or mandatory to ensure the full realization of these rights.¹¹⁸

Like civil and political rights, socio-economic rights are also capable of clarification using the multilayered obligations structure generated by all rights.¹¹⁹ This structure has successfully been used within the UN to

¹¹⁶ Sepúlveda: 2003, at p 132, submits that the sharp contour of a right and the obligations that it imposes are the result of repeated years of application and that socio-economic rights have not had such an advantage, which explains their vagueness. In a similar regard, Scott & Macklem: 1992, at p 72 – 73, contend that '[t]he specific shape and contour of a right is the result of years of repeated applications of practical reasoning to facts at hand'. They add that '[t]he lack of precision associated with many socio-economic rights should not be held up as a justification for their nonentrenchment'; that:

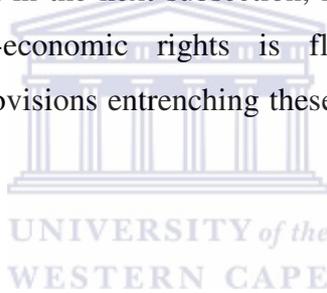
On the contrary, nonentrenchment is to a very large extent the reason for the lack of precision. Historical, ideological, and philosophical exclusions of social rights from adjudicative experience have resulted in a failure to accumulate experience that would render the imprecision of social rights less and less true as time goes on.

¹¹⁷ See Alston, P., 'No right to complain about being poor: The need for an optional protocol to the economic rights Covenant' in Eide, A., & Helgesen, J., (eds.) *The future of human rights protection in a changing world: Fifty years since the four freedoms address: Essays in honour of Torkel Opsahl* (1991) Norwegian University Press, at p 88. See also Chenwi, L., and Mbazira., C., 'The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) *ESR Review* pp 9 – 12.

¹¹⁸ Scott, L., 'Another step towards indivisibility: Identifying the key features of violations of economic, social and cultural rights' (1998) *20 Human Rights Quarterly* pp 81 – 124 [Hereinafter referred to as Scott: 1998], at p 88.

¹¹⁹ Scott & Macklem: 1992, at p 73.

clarify the obligations engendered by the rights as has been done by the Committee with regard to the different socio-economic rights protected by the ICESCR. This has been in the form of General Comments, which have extensively defined the scope of most of the rights. The multilayered structure imposes on the state the obligations to respect, protect, promote and fulfil the protected socio-economic rights.¹²⁰ These duties, as is discussed below,¹²¹ define, in precise terms, the nature of the negative and positive obligations imposed on the state by each right. Yet, they apply to both civil and political rights and, to a certain extent, blur the differences between civil and political rights and socio-economic rights. Additionally, as is seen in chapter four,¹²² the South African courts have, through the reasonableness review approach demonstrated that the obligations engendered by socio-economic rights are capable of judicial clarification. This, though, as is seen in the next subsection, is not to suggest that the formulation of socio-economic rights is flawless. Some of the phraseology that the provisions entrenching these rights carry is, to some extent, problematic.¹²³



¹²⁰ See Eide, A., 'Universalisation of human rights versus globalisation of economic power', in Coomans, F., Westendorp, I., and Willems, J., (eds.), *Rendering justice to the vulnerable: Liber amicorum in honour of Theo van Boven* (2000) Kluwer Law International pp 99 – 120.

¹²¹ Section 2.3.4.2

¹²² Section 4.2.

¹²³ See Andreassen *et al*: 1988, at pp 333 – 335.

2.3.4.1 Clarifying the obligations engendered by the rights

It is true that the content of most of the rights in the ICESCR has not been given judicial clarification, but this is not linked only to the absence of a complaints procedure. One would also not go as far as attributing the vagueness to their nature as rights. Rather, their vagueness is related to the manner in which the obligations they engender are formulated. What amounts to ‘progressive realisation’ remains hard to define precisely, as does what amounts to acting within ‘available resources’. ‘[C]ertain provisions [such as] “an adequate standard of living” or “adequate food, clothing, and housing” are somewhat vague and general[ly] word[ed]’.¹²⁴ In this chapter I do not object to the judicial enforcement of socio-economic rights. However, I submit that there is still need for the clarification of the obligations that these rights engender.¹²⁵ This is an essential step for the realisation of socio-economic rights.¹²⁶ Unless this is done, it will be impossible to predict, with accuracy, whether or not a state has acted in conformity with the obligations.¹²⁷ The Committee should be commended for the steps it has taken to clarify several of the

¹²⁴ Craven : 1998, at pp 118 and 129. See also Eide: 1989, at p 49. In his first report, the Independent Expert, appointed by the United Nations Commission on Human Rights to examine the possibility of adopting a complaints procedure under the ICESCR, cautioned on the vagueness of some of the rights in the ICESCR. However, while he called for further study of the rights, he said that this did not affect their intrinsic value as human rights. See *Report of the independent expert on the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, Commission on Human Rights Fifty-eighth session, E/CN.4/2002/57, 12 February 2002.*

¹²⁵ A similar view is held by Sepúlveda: 2003; Arambulo: 1999; Scott: 1998 at pp 87 – 8. See also Eide: 1989, at p 51; and Andreassen *et al*: 1988.

¹²⁶ Craven: 1998, at p 118.

¹²⁷ Craven: 1998, at p 128. See also Coomans, F., ‘In search of the content of the right to education’ in Chapman, A., and Russell, S., (eds.) *The core obligations: Building a framework for economic, social and cultural rights* (2002) INTERSENTIA pp 217 – 246, at 245.

rights in the ICESCR. The CESCR has done this by adopting a number of General Comments defining elements of specific rights.¹²⁸ In spite of this, the Committee still faces a number of challenges in measuring compliance with the Covenant.

Attempts have been made by the Committee to determine formulae for measuring resource allocation. One such formula is the measurement of the proportion of the Gross National Product (GNP) committed to socio-economic services. The second one is by comparing the resource allocations of different states. This has been done by considering the proportion of the GNP spent on a specific service by countries in the same region and with the same development index as the country in issue.¹²⁹ These approaches, though innovative, have a number of weaknesses.¹³⁰ The committee lacks the necessary expertise to verify and analyse the amounts of the resources allocated to the rights. Reliance is placed on the information provided by the states without independent verification. In addition, the figures may be deceptive since GNP does not adequately reflect the income inequalities that exist in all societies. The poor are always the majority in many countries yet they only benefit from the smallest proportion of the Gross Domestic Product (GDP). Similarly, the

¹²⁸ See General Comment 4, General Comment 13, *The right to education* (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999); Committee on Economic, Social and Cultural Rights, General Comment 14, *The right to the highest attainable standard of health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000) [Hereinafter referred to as General Comment No. 14]; and General Comment 15, *The right to water* (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002) [Hereinafter referred to as General Comment No. 15]; all reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 (2003).

¹²⁹ See Sepúlveda: 2003, at pp 317 – 319.

¹³⁰ See generally Robertson, E., ‘Measuring state compliance with the obligation to devote the “maximum available resources” to realizing economic, social and cultural rights’ (1994) 16 *Human Rights Quarterly*, pp 693 – 714.

figures will also not reflect the accurate position of the marginalised groups in society.¹³¹ This is in addition to the fact that the Committee has not been consistent in applying the above criteria.

The same problems are prevalent at the domestic level. The South African courts have yet to devise formulae for measuring the reasonableness of resources allocated to a right. So far, the CC has engaged with resources allocation only indirectly, *viz* when the government's programme is criticised under the reasonableness test. However, unless this test incorporates an element testing appropriateness of resources, it will remain incomplete. This issue is discussed in detail in chapter four.¹³²

*2.3.4.2 Duties to respect, protect, promote and fulfil the rights*¹³³

Section 7 of the South African Constitution requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights. This typology of obligations, as approved by international human rights law, has been adopted not only to clarify the nature of human rights obligations but also their varied intensity.¹³⁴ The typology has also made it possible to establish accountability and to identify violations of socio-economic rights.¹³⁵ Originally articulated by Shue,¹³⁶ this typology defines human

¹³¹ Craven: 1998, at pp 118 and 138.

¹³² Chapter four at section 4.2.4.

¹³³ The material in this section has recently been published under my name in the *East African Journal of Peace and Human Rights*. See Mbazira, C., 'Translating socioeconomic rights from abstract paper rights to fully fledged individual rights: Lessons from South Africa' (2006) 12 *East African Journal of Peace and Human Rights* pp 183 – 231. This paper also includes excerpts from chapter four of this thesis.

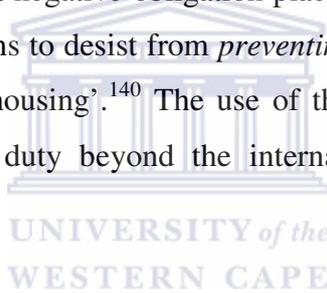
¹³⁴ Scott: 1998, at pp 90 – 91. See also The *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, adopted by a group of experts at Maastricht, 22 – 26 January 1997 [Hereinafter referred to as the Maastricht Guidelines] , para 6.

¹³⁵ Scott: 1998, at p 91 – 92.

rights obligations at three levels: the primary level, duty to respect; the secondary level, duty to protect; and the tertiary level, duties to promote and fulfil.

I. Duty to respect

According to the Maastricht Guidelines, the obligation to respect requires states to refrain from interfering with the enjoyment of socio-economic rights.¹³⁷ Such interference may either be direct or indirect and may include conduct that erects obstacles to the enjoyment of the rights. The state must respect the free use of resources by individuals or groups for the purpose of satisfying human needs.¹³⁸ However, in South Africa the duty to respect has been broadened. In the case of *Government of the Republic of South Africa v Grootboom & Others*,¹³⁹ the Court held that at the very least there is ‘a negative obligation placed upon the state and all other entities and persons to desist from *preventing or impairing* the right of access to adequate housing’.¹⁴⁰ The use of the phrase ‘preventing or impairing’ places this duty beyond the international standards which



¹³⁶ See Shue, H., *Basic rights: Subsistence, affluence, and U.S. foreign policy* (1980) Princeton University Press.

¹³⁷ Maastricht Guidelines, para 6.

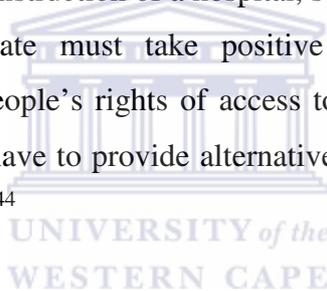
¹³⁸ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Communication No. 155/96 of the African Commission on Human and Peoples’ Rights, in the Fifteenth Annual Report of the African Commission on Human and Peoples’ Rights, 2001 – 2002 pp 47 – 73, para 45 [Hereinafter referred to as *SERAC* case].

¹³⁹ 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC) (*Grootboom* case).

¹⁴⁰ Para 34 [Emphasis mine].

engage only with direct or indirect interference with the enjoyment of the rights.¹⁴¹

The duty to respect is a negative duty, which makes it easy to grasp because it corresponds to the traditional conservative view of the nature of human rights as a shield against state interference.¹⁴² Because of its negativity, the duty to respect may not require resources to fulfil and in the context of the South African Constitution is, therefore, not subjected to the internal limitations in sections 26(2) and 27(2).¹⁴³ In spite of this, there are certain instances in which the duty to respect may invoke positive obligations as well. For instance, in certain circumstances the state may have no option but to carry out an eviction in the public interest. The public interest may include the necessity to use occupied land for public works such as construction of a hospital, school or road. But in this case, however, the state must take positive steps to mitigate the interference with the people's rights of access to adequate housing. The state may for instance have to provide alternative accommodation for the people to be displaced.¹⁴⁴



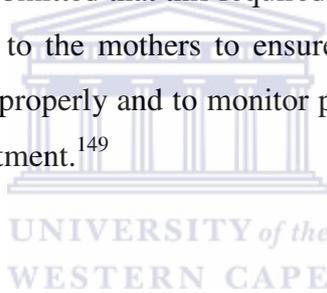
¹⁴¹ Liebenberg: 2005, at p 33-18. Liebenberg has argued that 'preventing or impairing' access to socio-economic rights could well cover policies that constitute a barrier to an individual or a mere interference with their existing access to rights.

¹⁴² De Vos: 1997, at p 80 See discussion at section 2.3.1.

¹⁴³ Liebenberg: 2005, at pp 33-18 – 33-19; De Vos: 1997, at pp 93 – 94; Viljoen.: 2005, at p 3.

¹⁴⁴ Brand, D., 'Introduction to socio-economic rights in the South African Constitution' in Brand, D., and Heyns, C., (eds.) *Socio-economic rights in South Africa* (2005) Pretoria University Law Press pp 1 – 56 [Hereinafter referred to as Brand: 2005], at pp 9 – 10 see also Hunt, P., *Reclaiming social rights: International and comparative perspectives* (1996) Ashgate Publishing Limited [Hereinafter referred to as Hunt: 1996], at p 31.

The case of *Minister of Health and Others v Treatment Action Campaign*,¹⁴⁵ provides a good example of a case in which the duty to respect may invoke negative as well as positive obligations.¹⁴⁶ This case arose from a government programme intended to reduce mother to child transmission (MTCT) of HIV by HIV positive mothers during child birth.¹⁴⁷ The programme involved the provision of nevirapine, a drug believed to reduce MTCT, at selected research sites consisting of two public hospitals in every province. Only doctors at these hospitals, with the exception of doctors in private practice, would prescribe this drug. The department of health argued that the efficacy of the drug was still being tested and it was, therefore, not yet safe to roll it out to all public hospitals.¹⁴⁸ The state also argued that the effective use of the drug demanded provision of breast substitutes to avoid transmission during breast feeding. It was submitted that this required infrastructure to provide advice and counselling to the mothers to ensure that the substitute and supplements were used properly and to monitor progress to determine the effectiveness of the treatment.¹⁴⁹



¹⁴⁵ 2002 (5) SA 721 (CC) (*TAC case*).

¹⁴⁶ See also case of *Residents of Bon Vista v Southern Metropolitan Council* 2002 (6) BCLR 625 (W), as example of a case in which the duty to respect is enforced in a purely negative sense. The Court held that the disconnection of the applicants' water by the Council without justification amounted to violation of the duty to respect the right of access to sufficient water.

¹⁴⁷ For review of this case, see Mizikenge, D., 'Minister of Health and Others v. Treatment Action Campaign: Its implications for the combat of HIV/AIDS and the protection of economic, social and cultural rights' (2003) 19 *East African Journal of Peace and Human Rights* pp 174 – 193.

¹⁴⁸ Para 58.

¹⁴⁹ Para 51.

In their challenge, the applicants argued, amongst others, that the government programme was defective because it prohibited the administration of the drug outside the research sites.¹⁵⁰ The applicants were here arguing for enforcement on the state of a negative duty to refrain from preventing or impairing the enjoyment of the right to health.¹⁵¹ However, one finds that the effective discharge of this negative duty still required some positive steps to be taken. While the drug was available to the state at no cost, it was not disputed that there was need for counselling infrastructure if the treatment was to be effective. Establishment of this infrastructure is a positive element; this is in addition to training the counsellors and transporting the drug to the hospitals. Thus, the effect of the Court's order was that the state should, without delay, remove restrictions that prevent the drug being made available and prescribed at hospitals other than the research sites.

II. Duty to protect

The duty to protect requires the state to prevent third parties from violating the rights of individuals or groups.¹⁵² This requires the state to take measures, either by way of legislation or regulations, to prohibit third parties from interfering with the enjoyment of socio-economic rights. Such legislation and regulations should also grant individuals the legal status and privileges required to enable them to effectively protect their rights.¹⁵³ In addition, the state should put in place an effective framework through which those whose rights have been violated can seek redress from the guilty third party.¹⁵⁴ The enforcement of human rights against

¹⁵⁰ Para 44.

¹⁵¹ Liebenberg: 2005, at p 33-18.

¹⁵² See Maastricht Guidelines, para 6.

¹⁵³ De Vos: 1997, at p 83.

¹⁵⁴ *SERAC* case, para 46.

third parties, either individuals or juristic persons, has been made more effective in the South African Constitution. The Constitution makes provision for the application of the Bill of Rights to 'a natural or juristic person if and to the extent that, it is applicable taking into account the nature of the right and the nature of the duty imposed'.¹⁵⁵ In addition to this, there are a number of provisions in the Constitution that compel the state to undertake specific action to prevent violation of some rights.¹⁵⁶

¹⁵⁵ Section 8(2); this provision has challenged the traditional perceptions that a bill of rights applies only vertically between the state and the individual so as to protect the latter from the former. This traditional perception of the application of the bill rights was approved in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) in which the CC held that the substantive provisions of the Interim Bill of Rights were generally not capable of being applied to any legal relationship other than that between legislative and executive organs and the individual or natural persons. From contemporary perspectives, it is clear that human rights violations may take place at the horizontal level of relations in addition to the vertical level. Individuals or juristic persons may violate the rights of other individuals or juristic persons. This makes it necessary that provision for horizontal application of human rights standards be made. See Currie, I., and De Waal, J., *The Bill of Rights handbook* (2005) Juta & Company, at p 43 [Hereinafter referred to as Currie & De Waal: 2005]; see also Woolman, S., (2004) 'Application' in Woolman, S., Roux, T., Klaaren, J., Stein, A., & Chaskalson, M., (eds) *Constitutional law of South Africa*, [2nd Edition, Original Service] Juta & Company and Centre for Human Rights, University of Pretoria, pp 31-1 — 31-158. See also Chirwa, D., *Towards binding economic, social and cultural rights obligations of non-state actors in international and domestic law: A critical survey of emerging norms* (2005) [LLD, University of the Western Cape]. According to Craven, though there is no evidence in the ICESCR to suggest that it was intended to apply horizontally there is equally no evidence to suggest that it was not supposed to. Craven believes that it is this horizontally upon which we should assume that the drafters of the Covenant intended to ensure that the state protects rights of individual against violation by others; Craven: 1998, at 112.

¹⁵⁶ For instance, section 24(b) compels government to adopt legislation to prevent environmental pollution, degradation and to secure ecologically sustainable development.

The case of *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another*¹⁵⁷ presents a good example of how vigorously the state may protect socio-economic rights. The facts of the case are briefly as follows: a group of residents of Alexandra Township had had their homes destroyed by flooding following heavy rains. As an immediate relief the government had moved them to a safe piece of land where they stayed in tents and later huts constructed to accommodate them. However, the conditions at this site were not favourable; there was poor sanitation and overcrowding amongst others. In order to ameliorate the condition of the victims, government decided to set up a Camp in another location with better houses and sanitation facilities. This move was, however, resisted by a group of residents adjoining the prison farm on which the camp was to be established. The resident argued that the process of establishing the camp had not followed the processes prescribed by town planning and environmental protection laws, and that they had not been given a hearing to air their objections. However, their biggest concern appears to have been that the choice of a prison farm in the neighbourhood as the site of the transit camp would affect the character of the neighbourhood and reduce the value of their properties.¹⁵⁸

One could read the residents as having argued that their right to property should in the circumstances trample the flood victims' right of access to adequate housing. The government in order to protect the rights of the flood victims vigorously defended its decision. The CC held that in a case like this, where conflicting interests have to be reconciled and choices made, proportionality, which is inherent in the Bill of Rights, is relevant to determining what fairness requires.¹⁵⁹ In the circumstances, the Court

¹⁵⁷ 2001 (3) SA 1151 (CC).

¹⁵⁸ Paras 93 – 94.

¹⁵⁹ Para 101.

weighed up the right of the flood victims to adequate housing against the residents' rights to property and a clean and healthy environment.¹⁶⁰ In this case, both the government and the Court discharged their constitutional duty to protect the right of access to adequate housing. The state would have failed in its duty had it not effectively defended its decision and merely conceded the arguments of the applicants. Similarly, the Court would have failed to discharge its duty to protect the rights had it ruled otherwise.

III. Duty to promote

This is the least discussed of the duties; the Committee itself did not include the duty to promote in its initial General Comments.¹⁶¹ Recently, however, the Committee has defined this duty as a component of the duty to fulfil. In its General Comment on the right to water, the Committee has said that the 'obligation to fulfil can be disaggregated into the obligations to facilitate, promote and provide'.¹⁶² It is notable that while some authors have set out to discuss the typology of the obligations in section 7(2) of the South African Constitution they have not touched on the meaning of the duty to promote at all. What is most common is lumping of the duty to promote with the duty to fulfil. For instance, De Vos in elaborate terms

¹⁶⁰ Para 105.

¹⁶¹ For instance, in elaborating the obligations and content of the right to adequate food, the Committee says that the right imposes three types or levels of obligations on the state: respect, protect, and fulfil; General Comment 12, *The right to adequate food* [article 11] (Twentieth session, 1999), U.N. Doc. E/C.12/1998/5 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 54 (2003), para 15, [Hereinafter referred to as General Comment No. 12]. Even such internationally renowned discussions on the nature of the obligations engendered by socio-economic rights do not discuss the duty to promote; see Craven: 1995, at pp 109 – 114; and Eide: 2001, at pp 23 – 25.

¹⁶² General Comment 15.

discusses the nature of the duties to respect and protect socio-economic rights separately but immediately lumps promotion and fulfilment together.¹⁶³ What is evident in his subsequent discussion, however, is that De Vos discusses the duty to fulfil without mention of the duty to promote, either independently or as a component of the duty to fulfil.¹⁶⁴ Brand has argued that the duty to promote is difficult to distinguish from the duty to fulfil.¹⁶⁵ But Brand does not give any reasons to back his conclusion. Some authors immediately after the duty to protect instead discuss the duty to facilitate as requiring the state to facilitate opportunities by which the rights are enjoyed.¹⁶⁶ This is even more confusing since elsewhere, as I have indicated above; the duty to facilitate has been discussed as a component of the duty to fulfil.¹⁶⁷

It could never have been the intention of the drafters of the Constitution that section 7(2) is read as if the duty to promote was non-existent. Yet, if it had been their intention to read the duty to promote as a component of the duty to fulfil, then there would have been no need spelling it out besides the duty to fulfil. I am of the view that the duty to promote can be read separately from the duty to fulfil. It imposes an obligation on the state, amongst others, to ensure awareness of the existence of the rights

¹⁶³ De Vos: 1997, at p 86. Viljoen: 2005, at p 3. does not mention the duty to promote at all.

¹⁶⁴ De Vos; 1997, at pp 86 – 91; see also Liebenberg, S., ‘Socio-economic rights’ in Chaskalson, M., Kentridge, J., Klaaren, J., Marcus, G., Spitz, D. & Woolman, S., (eds) *Constitutional law of South Africa* (1999) Juta & Company, pp 41-1 — 41-56, at p 41-33.

¹⁶⁵ Brand: 2005, at p 14.

¹⁶⁶ Sepúlveda: 2003, at p 162.

¹⁶⁷ According to the Committee, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide; General comment No. 12, para 15. See also Eide: 2001, at p 24.

through public education campaigns.¹⁶⁸ In this respect, the state must not only educate the public but also its officials on the existence and the nature of the various rights. All public officials should be informed of the Constitutional obligations and the nature of their administrative duties with regard to these rights.¹⁶⁹ The CC has given effect to the duty to promote by holding that for a programme to pass the test of reasonableness its contents must be made known.¹⁷⁰ This requires the state not only to promote awareness about the existence of the rights in a cursory manner but to detail the criteria and steps of accessing the rights in the programme. In the case of *Soobramoney v Minister of Health (KwaZulu-Natal)*,¹⁷¹ Madala J observed that perhaps the solution in that case was for the state to embark on a massive education campaign to inform citizens generally about the causes of renal failure, hypertension and diabetes.¹⁷² The duty also requires the state to create an enabling environment to allow people to exercise their rights.¹⁷³ This requires adoption of appropriate legislation and regulations for that purpose.

¹⁶⁸ Otto, D., and Wiseman, D., 'In search of "effective remedies": Applying the International Covenant on Economic, Social and Cultural Rights to Australia' (2001) Faculty of Law, the University of Melbourne, Public Law and Legal Theory Working Paper No.15, [Hereinafter referred to as Otto & Wiseman: 2001].at p 8, sourced at <http://papers.ssrn.com/paper.taf?abstract_id=270908> (accessed on 10 April 2006).

¹⁶⁹ Budlender, G., 'Justiciability of socio-economic rights: Some African experiences' in Ghai, Y., and Cottrell, J., (eds.) *Economic, social & cultural rights: The role of judges in implementing economic, social and cultural rights* (2004) INTERIGHTS pp 33 – 41[Hereinafter referred to as Budlender: 2004], at p 37.

¹⁷⁰ *TAC* case, para 123.

¹⁷¹ 1998 (1) SA 765 (CC). For a detailed discussion of this case, see chapter four, section 4.2.

¹⁷² Para 49.

¹⁷³ See Budlender: 2004, at p 37; and *Grootboom* case para 35.

IV. Duty to fulfil

This is the most controversial of the four duties because of its positive nature and heavy reliance on resources to discharge. This duty requires the state to adopt legislative, administrative, budgetary, judicial and other measures towards the full realisation of the rights.¹⁷⁴ The state must make provision of socio-economic goods and services to those persons who currently lack access to them and are unable to access them using their own means.¹⁷⁵ Within the South African Constitution, the extent to which the state may be found to have violated this obligation is dependent on whether the state has acted within the internal limitations in sections 26(2) and 27(2). However, this does not apply to the duty to fulfil the basic rights in sections 28(1)(c), 29(1)(a), and 35(2)(e). As already demonstrated in chapter one,¹⁷⁶ these rights are crafted without any internal limitations. To understand the manner in which the duty to fulfil has been implemented in South Africa one needs to understand how the courts have interpreted the internal limitations in sections 26(2) and 27(2). One needs also to understand how the courts have interpreted the basic rights, especially the children's rights as have been enforced in the *Grootboom* and *TAC* cases. These issues form the bulk of the discussion in chapter four.

¹⁷⁴ General Comment 14, para 33. See also Maastricht Guidelines, para 6; and *SERAC* case, para 47.

¹⁷⁵ Liebenberg: 2005, at 33-6.

¹⁷⁶ Section 1.1.

2.4 CONCLUSION

Though this chapter grounds the objections to socio-economic rights on legal notions, in South Africa these objections also had political dimensions. The divergence was between those that advocated for limited state powers; this would only call for state non-interference. Those who supported this philosophy discouraged the inclusion of socio-economic rights in the South African constitution. On the other hand, those who believed in the philosophy of extensive state power saw great relevance of socio-economic rights.¹⁷⁷ However, contemporary problems and needs have led to a redefinition of the role of the modern state. New social and economic demands and the interaction of the people and the state in this sphere call for a more active state.¹⁷⁸ This is only made effective if the state is placed under a justiciable and legal obligation to do so through recognition of socio-economic rights. Excluding socio-economic rights from the constitution would exclude the interests they protect from the process of social, economic, and political interchange and will foreclose the forums for redressing socio-economic injustices.¹⁷⁹

¹⁷⁷ De Villiers: 1995, at p 599. The National Party was bent towards avoiding an activist and interventionist state.

¹⁷⁸ De Villiers: 1995, at p 599. Cappelletti argued that to exclude social rights from a Bill of Rights would be to stop history at the time of *laissez-faire* and to forget that the modern state has greatly enlarged its reach and responsibilities into the economy and the welfare of people. Capelletti, M. 'The future of legal education. A comparative perspective' (1992) 8 *South African Journal on Human Rights* 1, at p 10.

¹⁷⁹ Scott & Macklem: 1992, at p 28. Scott and Macklem argue that in the absence of entrenched social rights, it would be unwise to expect that values left unconstitutionalised could hold their own in wider political discourse. That such rights will be marginalised and categorised as second-class arguments and those most dependent on them for basic survival and for integration into society at large will become or remain second-class citizens (at p 36).

Socio-economic rights are capable of judicial enforcement. In many respects, they are similar to civil and political rights. Civil and political rights, like socio-economic rights, engender positive obligations in addition to negative obligations. Additionally, civil and political rights have resource implications. It is, therefore, not proper for one to argue that socio-economic rights are not justiciable because they are resource dependent. Socio-economic rights cannot also be discredited on the ground of their vagueness. Many elements of civil and political rights remain vague though they have benefited from so many years of judicial enforcement.

In spite of this, it must be admitted that socio-economic rights present difficulties for courts that have to enforce them. These are difficulties that may not be as strongly associated with the judicial enforcement of civil and political rights. Though the realisation of civil and political rights also requires resources, it is true that the realisation of socio-economic rights requires far more resources. For instance, the right to free speech, a civil and political right, cannot by its nature require rationing as is with the right to vote, though problems may arise in putting in place structures to exercise these rights. Sachs explains this point by using the following analogy:

If A expresses him or herself or votes in a certain way, this does not prevent B from expressing him or herself or from voting in the same or different way. The progressive realisation of socio-economic rights within available resources, on the other hand, indicates that a system of apportionment is fundamental to their very being ... I am convinced that the exercise of a right that by its nature is shared, often competitively, with other holders of the right, must have different legal characteristics from the exercise of a classical individual right that is autonomous and complete in itself.¹⁸⁰

¹⁸⁰ Sachs, A., 'The judicial enforcement of socio-economic rights: The *Grootboom* case' in Peris, J., and Kristian, S., (eds.) *Democratising development: The politics of socio-economic rights in South Africa* (2005) Martinus Nijhoff Publishers pp 131 – 152, at p 144. Sachs is, however, quick to add that this does not mean that the socio-economic right is inferior in any qualitative sense to the civil and political right; that rather it means that the two require different modes of protection.

In a country with wide-spread socio-economic inequality, the realisation of socio-economic rights calls for a great deal of positive action. Again, this is not to say that civil and political rights do not call for positive action; they too call for such action but in varying degrees. Unlike socio-economic rights, civil and political rights litigation seldom challenges government inaction. Even when civil and political rights litigation challenges inaction, it is not always wide-spread inaction affecting a wide range of people.

There is a need for a further understanding of the nature of the obligations engendered by socio-economic rights and how to apply them to concrete cases. The meaning of the terms ‘progressive realisation’ and ‘available resources’ should be explored further.¹⁸¹ It is only then that successful socio-economic rights litigation will attract meaningful remedies. The rights have been defined only as programmatic without any individual entitlements. However, even with the programmatic definition, the rights are yet to be realised even by groups of people. Socio-economic rights are to be realised progressively subject to available resources. But what amounts to progressive realisation remains hard to apply to concrete cases. So is what is meant by the phrase available resources. The courts are yet to devise, and apply consistently, indicators to measure appropriateness of resources allocated to specific rights. In addition to their institutional incompetence, the courts lack the necessary expertise to assess such resources. Furthermore, this places the courts at the deep-end of enforcing socio-economic rights, because resource determination and budgetary allocation matters are believed to be within the executive and legislative domain. The effective implementation of these rights has, therefore, been affected by the courts’ own institutional competence which has also been looked at from the perspective of the doctrine of

¹⁸¹ See generally Dennis & Stewart: 2004. They contend that the question for all human rights advocates and activists is one of whether, and how, socio-economic rights can be given meaningful content and made applicable to individual cases (at p 464).

separation of powers. This has been used as a ground to object to the judicial review of socio-economic rights in what has been referred to as the institutional competence dimension. This dimension is discussed in the next chapter.



CHAPTER THREE

THE JUDICIAL ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS AND THE INSTITUTIONAL COMPETENCE CONCERNS

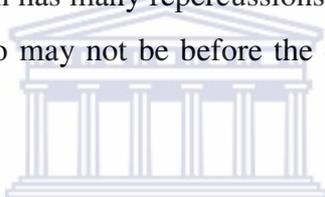
3.1 INTRODUCTION

In the previous chapter I have discussed the legitimacy concern dimension as relates to the judicial enforcement of socio-economic rights. This chapter deals with the institutional competence dimension. It has been fairly easy for advocates of judicial enforcement of socio-economic rights to overcome legitimacy dimension objections. The same cannot be said in respect of the institutional competence dimension. This dimension has been more controversial and presents more obstacles in comparison to the legitimacy dimension. The institutional competence dimension of justiciability is concerned with the nature of the judiciary as an institution.¹ The question posed by those who advance objections based on this dimension is one of whether or not the judiciary possesses the institutional capacity and competence to adjudicate socio-economic rights. This dimension is a product of what Scott and Macklem refer to as 'a progressive vision of social justice'.² This vision, unlike its counterpart, the conservative vision, does not have objections to the protection of

¹ Scott, C., and Macklem, P., 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* pp 1 – 148 [Hereinafter referred to as Scott & Macklem: 1992], at p 20.

² Scott & Macklem: 1992, at pp 22 – 23.

socio-economic rights in a constitution.³ It is, however, opposed to empowering the judiciary to overrule the decisions of the elected representatives of the people.⁴ Judicial enforcement of socio-economic rights is viewed as undemocratic because courts, whose judges are unelected and not accountable, are empowered to set aside the decisions of the democratically elected representatives of the people. In addition to being undemocratic, the judiciary is viewed by some as lacking the institutional capacity to enforce socio-economic rights. This is because these rights are believed to be positive in nature and have budgetary implications. This is a matter of practical technical deficiency on the part of the courts to enforce these rights. Socio-economic rights are also believed to be beyond the capacity of the judiciary because litigation of these rights has polycentric consequences. It is submitted that a socio-economic rights decision has many repercussions implicating a number of interests of persons who may not be before the court. The courts do not

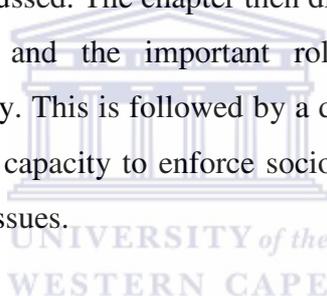


³ The conservative vision, discussed in chapter two, is opposed to the constitutionalisation of socio-economic rights because the rights by their nature deal with redistribution of wealth and intervention in market. This conservative view is reflected in philosophical objections to socio-economic rights mainly on grounds that unlike the human rights so-called, these rights engender positive obligations, are vague in nature and call for positive state action which makes their judicial enforcement a problem. Jeffery Harrod associates these objections to the movement of neo-liberalism, which is opposed to the attainment of material equity. This movement distinguishes socio-economic rights from human rights because they are considered to be inimical to political and economic freedoms derived from the market and the construction of a society characterised by diversity. See Jeffery, H., 'The new politics of economic and social rights' in Karin, A., and Mihyo, P., (eds.) *Responding to the human rights deficit, essays in honour of Bas de Gaay Fortman* (2003) Kluwer Law International pp 61 – 72, at p 67.

⁴ See Schauer, F., 'The calculus of distrust' (1991) 77 *Virginia Law Review* 653, at pp 664 – 67. See also Haysom, N., 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 8 *South African Journal on Human Rights* pp 451 – 463.

have the capacity, so it is submitted, to appreciate and attend to all these interests.⁵

It is submitted in this chapter that the institutional competence objections are based on a misconception of both democracy and the separation of powers doctrine. The separation of powers doctrine has evolved since its conception; it is not possible to strictly apply the doctrine as initially conceived. And democracy should be understood beyond the notion of majoritarian democracy. The chapter begins by highlighting the relevance of the institutional competence concerns to the process of determining remedies for socio-economic rights violations. It then sets out the nature of the objection and its implications. As a preface to the response to the objections, the evolving nature of the doctrine of separation of powers and its implications are discussed. The chapter then discusses the nature of the notion of democracy and the important role of the courts in a constitutional democracy. This is followed by a discussion of the issue of the court's institutional capacity to enforce socio-economic rights and to respond to polycentric issues.



3.2 RELEVANCE OF INSTITUTIONAL COMPETENCE CONCERNS

Any discussion of judicial remedies in constitutional law would be incomplete without a discussion of the institutional competence objections. It is especially at the remedial stage of litigation that the concern about the competence of the courts and their place as dictated by the doctrine of separation of powers becomes more pronounced.⁶

⁵ See Fuller, L. 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* pp 353 – 409 [Hereinafter referred to as Fuller: 1978].

⁶ See generally Shane, P., 'Rights, remedies and restraint' (1988) 64 *Chicago-Kent Law Review* pp 531 – 571.

Disagreements about the appropriate role of the judiciary, therefore, lie at the heart of the debate about remedial purposes and constraints.⁷ In designing an ‘appropriate, just and equitable relief’, one of the factors that the courts have always taken into consideration, though sometimes implicitly, is the need to defer to the other organs of state.⁸ A court’s understanding of its institutional competence may dictate the kind of remedies that it is prepared to grant. The lack of technical expertise in certain matters may not only prevent courts from awarding certain remedies, such as injunctions, but may also dictate the scope of the selected remedy. As chapter seven shows,⁹ this consideration has played a very important role in determining the circumstances under which a court may consider injunctive relief, especially of a structural nature, appropriate. Sometimes, courts consider themselves better suited to make declaratory orders than when they engage in on-going supervision of their orders. This, in some cases, is because of the technical expertise that the task of monitoring administrative functions may require.

However, it is not only the lack of expertise that may militate against certain remedies, but also the need to maintain the boundaries between organs of state and to avoid countermajoritarian tensions. The Canadian case of *Doucet-Boudreau and Others v Attorney General of Nova Scotia*¹⁰ provides evidence of how strongly some judges believe their remedial powers to be constrained by the separation of power doctrine. Four out of nine judges of the Supreme Court of Canada, in a dissenting judgment, dismissed a trial judge’s retention of supervisory jurisdiction on the

⁷ Roach, K., *Constitutional remedies in Canada* (1994) Canada Law Books Inc [Hereinafter referred to as Roach: 1994], at p 3-2.

⁸ Currie, I., and De Waal, J., *The Bill of Rights handbook* (2005) Juta & Company [Hereinafter referred to as Currie & De Waal: 2005], at p 197.

⁹ Section 7.4.

¹⁰ [2003] 3 S.C.R. 3, 2003 SCC 62.

ground that it violated the doctrine of separation of powers. The dissenting judges held, amongst others, that:

A court purporting to retain jurisdiction to oversee the implementation of a remedy, after a final order has been issued, will likely be acting inappropriately on two levels. First, by attempting to extend the court's jurisdiction beyond its proper role, it will breach the separation of powers principle. Second, by acting after exhausting its jurisdiction, it will breach the *functus officio* doctrine.¹¹

The minority also held that by purporting to assume a managerial role:

[The trial judge] undermined the norm of co-operation and mutual respect that not only describes the relationship between the various actors in the constitutional order, but defines its particularly Canadian nature, and invests each branch with legitimacy.¹²

Although the majority held that the boundaries of separation of powers are not demarcated by bright lines, they also warned courts against assumption of functions which their institutional design and expertise prevent them from leaping into.¹³ In South Africa, the Constitutional Court (CC) has rejected the doctrine of separation of powers as a constraint to its powers to make mandatory and structural injunctions and has, indeed, awarded this form of relief in some cases.¹⁴ However, in practice, the Court in socio-economic rights cases has, without elaborate justification, refused to exercise supervisory jurisdiction. This could be linked to the CC's expression of concerns about its institutional capacity

¹¹ Para 105.

¹² Para 121.

¹³ Para 56. For a detailed discussion of this case see McAllister, D., 'Doucet-Boudreau and the development of effective section 24(1) remedies: Confrontation or cooperation?' (2004) 16 *National Journal of Constitutional Law* pp 153 – 173.

¹⁴ See *August and Another v The Electoral Commission and Others* 1999 (3) SA 1 (CC); *Walker v Pretoria City Council* 1998 (3) BCLR 257 (CC), 1998 (2) SA 363 (CC); and *Sibiya and Others v DPP, Johannesburg High Court and Others*, 2006 (2) BCLR 293 (CC).

to redirect policy choices and the need to defer to the executive organs of the state. This point is discussed in detail in chapter seven.¹⁵

It is, therefore, important that we explore the submissions that have been advanced to object to the judicial enforcement of socio-economic rights on the basis of the doctrine of separation of powers and institutional competency. It should be noted, however, that by and large there is agreement on the need for the courts to have powers to enforce constitutional norms. The disagreements boil down to the question of how far the courts may go in exercising this power and at what point they will encroach on the functions preserved for other branches of government.¹⁶ According to Chayes, though judges should not ‘be thrust directly into political battles’ this is a consideration that ‘should be undertaken as cautionary, not decisive; for despite its well rehearsed inadequacies, the judiciary may have some important institutional advantages’.¹⁷



¹⁵ Section 7.5.

¹⁶ Sturm, S., ‘A normative theory of public law remedies’ (1991) 79 *Georgetown Law Journal* pp 1355 – 1446 [Hereinafter referred to as Sturm: 1991], at p 1405.

¹⁷ Chayes, A., ‘The role of the judge in public law litigation’ (1976) *Harvard Law Review* pp 1281 – 1316 [Hereinafter referred to as Chayes: 1976], at p 1307.

3.3 SEPARATION OF POWERS AND COUNTERMAJORITARIANISM

3.3.1 Statement of the objection

The objection to the judicial enforcement of socio-economic rights has a political but also legal dimension. The political dimension, which is the most predominant, finds its place in the notion of democracy. As stated above,¹⁸ it has been submitted that decisions regarding the allocation of resources and the prioritisation of needs should be left for the democratically elected representatives of the people. This is because of the political accountability that such representatives owe their constituencies. The courts are considered to be undemocratic because they set aside decisions reached through a democratic process, and they, therefore, act in a countermajoritarian manner:

The root difficulty is that judicial review is a counter-majoritarian force in our system ... [;] when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens.¹⁹

¹⁸ Section 3.1.

¹⁹ Bickel, A., *The least dangerous branch: The Supreme Court at the bar of politics* (1962) Bobbs-Merrill [Hereinafter referred to as Bickel: 1962], at pp 16 – 7. This objection has received support from other scholars such as Ely, J., *Democracy and distrust* (1980) Harvard University Press [Hereinafter referred to as Ely: 1980]. Ely perceives the effect of judicial review as amounting to the courts telling the people's representatives that they cannot govern as they would like (at pp 4 – 5). Bogart has submitted that in socio-economic welfare terms, the legislature and the executive have done more than the judiciary in ensuring poor people's welfare services, which should justify support for democratic institutions. In contrast, Bogart submits that history reveals that rather than protect the poor, the courts have been uncaring to them. This, in his opinion, is because state regulation and programmes designed to be responsive to the concerns of the poor have often been cut back by courts under the guise of interpretation. Bogart W., "And the courts which govern their lives": The judges and legitimacy' in Berryman, J., (ed.) *Remedies: Issues and perspectives* (1991) Thomas Professional Publishing Canada pp 49 – 67, at p 56.

However, those that pursue the objection from a political dimension could still find refuge in the legal dimension as based on the doctrine of separation of powers. Crudely put, following legal principles, every organ of government should only discharge those functions designated to it by the doctrine of separation of powers. It is at this stage that an intersection between objections based on separation of powers and those based on the notion of democracy becomes evident. The objectors use the doctrine of separation of powers to submit that by their institutional character it is only the executive and legislature that are well suited to deal with socio-economic matters.²⁰

Although the objections present themselves as objections to judicial review generally, they are more pronounced with judicial enforcement of socio-economic rights because of the perceived nature of the obligations engendered by these rights. It has been submitted that the questions that these rights give rise to, by their very nature, need to be resolved by debate through the established democratic systems.²¹ The enforcement of socio-economic rights is believed to have budgetary implications and raises questions regarding the prioritisation of socio-economic needs.

²⁰ See generally Horowitz, D., *The courts and social policy* (1977) The Brookings Institution [Hereinafter referred to as Horowitz: 1977]

²¹ According to Neier, to withdraw these rights from the democratic process is to carve the heart out of that process, this is because everybody has an opinion on what should be done to protect the public safety, and everybody has a view as to what is appropriate in the allocation of resources and economic burdens. In Neier's opinion, such questions should not be settled by some person exercising superior wisdom and who comes along as a sort of Platonic guardian and decides that this is the way it ought to be. Neier, A., 'Social and economic rights: A critique' (2006) 13 *Human Rights Brief* pp 1 – 3, at p 2.

In South Africa, this objection was put forward by some legal scholars at the eve of transformation to the new legal order.²² During the negotiations leading to the new legal order, it was contended that what South Africa needed was strengthening of its democracy. This required that the powers of enforcing the constitution be conferred on democratically elected institutions.²³ While consensus emerged that South Africa needed a bill of rights that also contained socio-economic rights, there was intense disagreement on the manner the enforcement of these rights should take.²⁴ As seen in chapter one,²⁵ it was

²² See, for instance, Davis, D., 'Democracy: its influence upon the process of constitutional interpretation' (1994) 10 *South African Journal on Human Rights* pp 103 – 121 [Hereinafter referred to as Davis: 1994], at p 104. See also Forsyth, C., and Elliot, M., 'The legitimacy of judicial review' (2003) *SA Public Law* pp 286 – 307 [Hereinafter referred to as Forsyth & Elliot: 2003], at p 286.

²³ One of the factors leading to this suggestion could be found in South Africa's history of political struggles. These struggles were launched mainly on the political front with little reliance on the courts to advance equality rights. Those fighting apartheid had very little faith in the judicial process as it was viewed by many as an accomplice to promotion of racial discrimination. See Klug, H., *Constituting democracy: Law, globalism, and South Africa's political reconstruction* (2000) Cambridge University Press [Hereinafter referred to as Klug: 2000], at pp 30 and 47; Dugard, J., *Human Rights and the South African legal order* (1978) Princeton University Press [Hereinafter referred to as Dugard: 1978]; Corbett, M., 'Representations to the Truth and Reconciliation commission' (1998) 115 *South African Law Journal* pp 17 – 21; Zulman, R., 'South African judges and human rights' paper presented to the *Supreme Court History Society*, Queensland, Australia on 4 July 2001 sourced at <<http://www.courts.qld.gov.au/publications/articles/speeches/2001/Zelman040701.pdf>> (accessed on 8 February 2006); Corder, H., 'Seeking social justice: Judicial independence and responsiveness in a changing South Africa' in Russell, P., and O'Brien, M., (eds.) *Judicial independence in the age of democracy: Critical perspectives from around the world* (2001) University Press of Virginia pp 194 – 206, at p 201; and Motala, Z., and Ramaphosa, C., *Constitutional law: Analysis and cases* (2002) Oxford University Press [Hereinafter referred to as Motala & Ramaphosa: 2002], at pp 75 – 78.

²⁴ See Sachs, A., *Protecting human rights in a new South Africa* (1990) Oxford University Press [Hereinafter referred to as Sachs: 1990], at p 20. See also Sachs, A., 'A Bill of Rights for South Africa: Areas of agreement and disagreement' (1989) 21

contended, among others, that making socio-economic rights justiciable would be juridically futile and would plunge the country into a serious constitutional crisis.²⁶ It was suggested that socio-economic rights be included in the constitution as directive principles of state policy enforceable not by the courts but by the Human Rights Commission.²⁷ However, some scholars objected to this on the basis that it would have subjected the rights to the wishes of transient majorities as the principles would only serve as presumptions of statutory interpretation.²⁸ On the other hand, subjecting these rights to the wishes of the majority is exactly what the objectors were advocating.

Columbia Human Rights Law Review pp 13 – 44 [Hereinafter referred to as Sachs: 1989], at p 25; and Didcott, J., 'Practical workings of a bill of rights' in Van der Westhuizen, (ed) *A bill of rights for South Africa* (1988) Butterworths [Hereinafter referred to as Didcott: 1988].

²⁵ Section 1.1.

²⁶ See South African Law Commission, *Interim Report on Group and Human Rights*, Project 58, August 1991 [Hereinafter referred to as SALC Interim Report: 1991], at p 664.

²⁷ South African Law Commission (SALC), *Final Report on Group and Human Rights*, Project 58, October 1994 [Hereinafter referred to as SALC Final Report: 1994] at p 195. See also Davis, D. 'The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles' (1992) 8 *South African Journal on Human Rights* pp 475 – 490.

²⁸ See Mureinik, E., 'Beyond a charter of luxuries: Economic rights in the constitution' in (1992) 8 *South African Journal on Human Rights* pp 464 – 475 [Hereinafter referred to as Mureinik: 1992]. Scott & Macklem: 1992, at pp 39 – 40, warned that if social rights are phrased merely as directive principles of state policy or as state responsibilities or obligations, a political discourse may emerge that avoids notions of individual need and entitlement and instead remains at the level of generalised policy considerations. This would carry the risk of treating individuals as abstract, passive units of policy and not as active agents suffering hardship with legitimate claims of constitutional right. Sunstein warned that directive principles would be mere 'parchment barriers', meaningless, empty and could not protect human rights. Sunstein, C., 'Social and economic rights? Lessons from South Africa' *John M. Olivin Law and Economic Working Paper No. 124, Public*

This objection was fuelled especially by the nature of the legal system that had been in place for many years. Before 1994, the state adhered to the doctrine of parliamentary supremacy which upheld the legislature above all other organs. This doctrine, within legal circles, nurtured and sustained a culture of legal positivism. Lawyers and judges became ‘mechanics’ of the law and applied it in a manner that adhered to its letter and the strict intention of Parliament.²⁹ What this meant was that the capacity of the courts to develop the law in order to advance human rights was limited, which was also exacerbated by the absence of a Bill of Rights in the Constitution. For those who opposed the judicial

Law and Legal Theory Working Paper No 12, (Preliminary draft) sourced at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=269657> (accessed on 20 May 2005) [Hereinafter referred to as Sunstein: 2001], at p 3. See also De Villiers, B. ‘Socio-economic rights in a new constitution: Critical evaluation of recommendations of the South African Law Commission’ (1992) 3 *Tydskrif vir die Suid-Afrikaanse Reg* [*Journal of South African Law*] pp 421 – 436.

²⁹ See Sarkin, J., ‘The political role of the South African Constitutional Court’ (1997) 114 *South African Law Journal* pp 134 – 150 [Hereinafter referred to as Sarkin: 1997], at p 134; and Chaskalson, A., Mohamed, I., Langa, P., Van Heerden, H., & Corbett, M., ‘The legal system in South Africa 1960 – 1994’ *Representations to the Truth and Reconciliation Commission*, published in (1998) 15 *South African Law Journal* pp 21 – 36 [Hereinafter referred to as Chaskalson *et al*: 1998], at p 32. See also Moseneke, D., ‘Transformative adjudication’ paper presented at the *Fourth Bram Fischer Memorial lecture* at Nelson Mandela Civic Theatre, Johannesburg, 25 April 2002, reproduced in (2002) 18 *South African Journal on Human Rights* pp 309 – 319 [Hereinafter referred to as Moseneke: 2002], at p 316; Dugard: 1978, at pp 19 and 35; Klare, K. ‘Legal culture and transformative constitutionalism’ (1998) 14 *South African Journal on Human Rights* pp 147 – 188, at p 151; Gready, P., and Kgalema, L., ‘Magistrates under apartheid: A case study of the politicisation of justice and complicity in human rights abuse’ (2003) 19 *South African Journal on Human Rights* pp 141 – 188; and Chaskalson, A., ‘Law in a changing society’ (1989) 5 *South African Journal on Human Rights* 293 [Hereinafter referred to as Chaskalson: 1989]. For case law in this direction see *Mpangele & Another v. Botha* 1982 (3) SA 638 (C); *In re Dube* 1979 (3) SA 820 (N); and *Sachs v Minister of Justice* 1934 AD 11.

enforcement of socio-economic rights, such a legal background provided very fertile ground for their objections to flourish.

In spite of the adoption of a constitution containing justiciable socio-economic rights, scholars have continued to object to the judicial enforcement of these rights.³⁰ Cottrell and Ghai conclude that:

ESCR require a process of balancing, trade-off and negotiation. If human rights, especially ESCR, are a framework, then there are acute and difficult policy choices to be made within that framework. There are no simple notions of certainty or fixity. If the political process is excluded from the negotiation, and it is left to the judiciary, then respect for human rights will decline. And this is a two-way street: the judiciary does not have to live with the consequences of its decision in the way other branches have to.... If [the judiciary] becomes heavily involved in essentially political decisions, yet is not accountable as political bodies are normally, a sense of irresponsibility can emerge. The primary decision-making framework must be the political process.³¹

This objection has become even more pronounced because of the increasing involvement of the judiciary in ending systemic violations in structural or organisational settings. Such problems have forced courts to make orders that require extensive administrative action to carry out. The courts have also been forced to monitor the implementation of their orders

³⁰ See Lester, L., and O’Cinneide, C., ‘The effective protection of socio-economic rights’ in Cottrell, J., and Ghai, Y., (eds.) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* (2004) INTERIGHTS pp 17 – 22 [Hereinafter referred to as Lester & O’Cinneide: 2004], at p 20.

³¹ Cottrell, J., and Ghai, Y., ‘The role of the courts in the protection of economic, social and cultural rights’ in Cottrell, J., and Ghai, Y., (eds.) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* (2004) INTERIGHTS pp 58 – 89 [Hereinafter referred to as Cottrell & Ghai: 2004], at p 89. Though these authors do not rule out the possibility of the court playing a role in the enforcement of socio-economic rights, they suggest that court enforcement should be the last resort when all else fails. In their view, the mere fact that courts may be enthusiastic to be involved in human rights does not mean that it is right that they should be (at p 88).

in the structural suits.³² This approach has been criticised for allowing the courts to intrude on subject matter that forms the very foundation of the discretionary powers enjoyed by executive and legislative branches of the state.³³ It has been submitted that though court orders may not expressly require that resources be allocated and reprioritised, it is what happens in effect. According to Frug, the court is in fact allocating the budget away from some items to others, probably without even knowing what they are. This is because ‘the court's allocation decision is simply that every element of the court decree takes precedence over every other competing element in the budget, whatever they may be’. He adds that ‘the value of legislative decision-making on budget allocation is undermined, to a greater or lesser degree, depending on the size of the court's demands and the amount of money available’.³⁴

Before responding to these objections, it is important to preface the response with an understanding of the doctrine of separation of powers. This is because some of the controversy appears to emerge from a lack of appreciation of the evolving nature of this doctrine. However, and as is submitted in this chapter, this does not mean that the evolving nature of the doctrine provides the answers to the objection in all its forms. The judiciary must appreciate its institutional constraints and needs to defer to the other organs of the state on certain decisions where it is necessary to do so.³⁵ As regards the political dimension, one needs to understand the

³² Discussed in detail in chapter seven.

³³ Frug, E., ‘The judicial power of the purse’ (1978) *University of Pennsylvania Law Review* pp 715 – 794 [Hereinafter referred to as Frug: 1978], at pp 734 – 735.

³⁴ Frug: 1978, at p 741.

³⁵ It is submitted in chapter seven that where there is failure on the part of the other organs to exercise their discretion to protect the rights, the judiciary may be justified in assuming the functions of these organs. Even then, however, the judicial intrusion should be graduated and should intensify depending on the demands of each case and the attitude and response of the state. See chapter seven at section 7.5.1.

notion of democracy and its influence on the judicial enforcement of socio-economic rights. Democracy does not mean that the wishes of the majority are not subject to any restrictions. This point is discussed later below.³⁶

3.3.2 Evolving nature of the doctrine of separation of powers

As regards the doctrine of separation of powers, traditionally, a formal distinction is made between the legislative, executive and judicial functions of the state. This is what is referred to as the principle of *trias politica*³⁷ which is followed by the principle of separation of personnel. These principles require that the powers of making legislation, administration and adjudication respectively, be vested in three distinct organs of state. Each one of these organs should be staffed by different officials and employees. A person serving in one organ is disqualified from serving in any of the others. The third principle is separation of functions. This principle demands that every organ of state authority be entrusted with its appropriate functions only. The legislature ought only to legislate, the executive to confine its activities to administering the affairs of the state, and the judiciary to the function of adjudication. These three principles together establish the 'pure' as opposed to the 'partial' version of the doctrine.³⁸

The 'partial' version instead emphasises the significance of checks and balances.³⁹ Checks and balances, now a fourth principle, represents the

³⁶ Section 3.3.3.

³⁷ See Vile, M., *Constitutionalism and Separation of Powers* (1967) 1998 edition by Liberty Fund.

³⁸ Barber, N., 'Prelude to the separation of powers' (2001) 60 *Cambridge Law Journal* pp 59 – 88 [Hereinafter referred to as Barber: 2001], at p 60.

³⁹ Barber: 2001, at p 60.

special contribution of the United States of America (USA) to the doctrine.⁴⁰ In the USA, checks and balances allow one organ to intervene in the area of another. Congress's legislative power is subject to executive and judicial checks;⁴¹ the executive and judicial functions are also checked by the other branches. The executive may exercise checks and balances in respect of the legislature through the veto powers of the President;⁴² though vetoed, bills may be presented to Congress again, but they will require a two-thirds majority to become law.⁴³ The judiciary exercises checks and balances in respect of the legislature through the power of procedural and substantive review.⁴⁴ Congress too exercises checks and balances on the executive by approving the appointment of judges of the Supreme Court and ambassadors to take up diplomatic posts. Congress may circumscribe the judiciary by passing legislation that undermines the decisions of the courts.



⁴⁰ Van der Vyver, J., 'The separation of powers' (1993) 8 *SA Public Law* 177 [Hereinafter referred to as Van der Vyver: 1993], at p 178.

⁴¹ Judicial review of legislative and executive action has been described as the most common and dramatic instance of checks and balances. This is because it has allowed courts to exercise very strict control over the other organs by issuing orders which these organs are legally bound to abide by. See Pieterse, M., 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* pp 383 – 418 [Hereinafter referred to as Pieterse: 2004], at p 386.

⁴² The recent veto by President George Bush of a proposed law linking to a timetable the withdraw of troops from Iraq as condition for funding is an example of this. See BBC News 'Bush and democrats locked on Iraq'. Sourced at <<http://news.bbc.co.uk/2/hi/americas/6616361.stm>> (accessed on 3 May 2007).

⁴³ Constitution of the United States of America, Article I section 7.

⁴⁴ Van der Vyver: 1993, at p 180.

During the certification of South Africa's Final Constitution,⁴⁵ the objectors contended that the Draft Constitution had offended the doctrine of separation of powers by allowing members of the executive to be members of the legislature at all three levels of government. It was submitted that by virtue of their positions, members of the executive would be able to exercise powerful influence over the decisions of the legislature.⁴⁶ The objection appears to have been founded on the 'pure' version as opposed to the 'partial' version of the doctrine. Indeed, the CC rejected this objection, holding that there is no universal model and absolute separation of powers.⁴⁷ According to the CC, the principle of checks and balances mandates necessary intrusion of one branch into the terrain of another. This prevents branches of government from usurping power from one another.⁴⁸ The Court went on to hold that the South African model of the doctrine promotes executive accountability because it makes the executive directly answerable to the elected legislature thereby upholding the principle of collective accountability.⁴⁹

⁴⁵ *In re Certification of the Constitution of the Republic of South Africa (First Certification case)* 1996 (10) BCLR 1253 (CC)

⁴⁶ Para 107.

⁴⁷ Para 108. According to Van Bueren, the doctrine only requires that powers be separated. It does not state where the dividing line should be drawn. Van Bueren, G., 'Alleviating poverty through the Constitutional Court' (1999) 15 *South African Journal on Human Rights* pp 52 – 74 [Hereinafter referred to as Van Bueren: 1999], at p 65. Deviation from the doctrine may also be necessary for administrative expediency to allow effective discharge of the functions of administering a state.

⁴⁸ Para 109. In spite of this, in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* 2001 (3) SA 1151 (CC), the CC held that though the separation prescribed by the Constitution is not absolute, and on occasions some overlapping of functions is permissible, action that is inconsistent with the separation demanded is invalid (para 35).

⁴⁹ Para 111. See also Liebenberg, S., 'South Africa's evolving jurisprudence on socio-economic rights' (2002) *Socio-Economic Rights Project, Community Law Centre*,

The CC has, in subsequent cases, followed its ruling in the *First Certification* case and avoided setting down any rigid boundaries between the organs of state. The Court is alive to the fact that the boundaries as traditionally defined by the doctrine are shifting in order to reflect contemporary problems and challenges. The doctrine, as conceptualised by Montesquieu during the 17th century, was merely reflective of the then existing problems.⁵⁰ It cannot, therefore, be used in the same way as it was in the 17th century. In *De Lange v Smuts NO and others*⁵¹ the Court noted that:

[C]ourts will develop a distinctively South Africa model of separation of powers, one that fits the particular system of government provided for in the Constitution and reflects a delicate balancing, informed by South Africa's history and its new dispensation, between the need on the one hand, to control government by separating powers and enforcing checks and balances and, on the other hand, to avoid diffusing powers so completely that the government is unable to take timely measures in the public interest.⁵²

The judiciary is, therefore, justified in holding the other organs accountable to the constitution and ensuring respect for fundamental rights and liberties. This is a function that does not offend the doctrine of separation of powers but upholds the supremacy of the constitution. This does not, however, mean that the court operates without any boundaries as regards the kind of functions it may discharge. The courts must show deference to the legislature and executive where this is required by the circumstances. This is especially so whenever the other organs are institutionally more equipped to undertake certain functions.⁵³ From this,

University of the Western Cape, sourced at http://www.communitylawcentre.org.za/ser/docs_2002/evolving_jurisprudence.pdf (accessed on 11 February 2006), at p 2.

⁵⁰ Pieterse: 2004, at p 387.

⁵¹ 1998 (3) SA 785 (CC).

⁵² Para 60.

⁵³ See generally Ghai & Cottrell: 2004.

it remains clear that the judiciary should not only vindicate the rights but should also be sensitive to the fact that as an institution it has its own weaknesses. These weaknesses should in some circumstances dictate that the judiciary shows due deference to the other branches.⁵⁴ In spite of this, deference should not be adopted as a general rule; the degree of deference should be determinable on a case by case basis.⁵⁵

In socio-economic rights litigation, as is seen in the next chapter, while it is not the function of the courts to set priorities, the courts should be able to enforce the rights as protected.⁵⁶ The courts should also be able to scrutinise government policies and programmes to ensure that they are designed to ultimately lead to the realisation of the rights.⁵⁷ In remedial terms, the courts should not have a problem to implement remedies that are intended to vindicate the rights and should intervene intrusively where it is necessary to do so. The courts should aim at protecting all interests implicated by a case and, using the ethos of distributive justice, should engage in a balancing process which considers the impact of the decision on the state as well as parties and non-parties.⁵⁸

3.3.3 Restrictive understanding of democracy

The aim of this section is to demonstrate that the institutional competence objection in addition to misconceiving the doctrine of separation of powers is also based on a very restrictive understanding of the notion of democracy. In this section I demonstrate that democracy does not mean that the wishes of the majority are beyond reproach. Democracy is not just

⁵⁴ Pieterse: 2004, at p 405.

⁵⁵ See Pieterse: 2005, at p 125.

⁵⁶ See section 4.2 of chapter four.

⁵⁷ See discussion in chapter four, section 4.2.3.

⁵⁸ See chapter five at section 5.2.2.

about the vote but also encompasses such notions as constitutionalism and the rule of law. This is because of the need to protect the rights of minorities and the values they believe in. It is also submitted that both the rule of law and constitutionalism impose many restrictions on the manner in which government, and the majority for that case, conduct their business. It is the responsibility of the courts to enforce these restrictions when an infraction is brought to their attention.

According to Devenish, constitutional democracy is a complex phenomenon of political morality in which the majority, the minority and individuals have rights and obligations.⁵⁹ Constitutional democracy, in as much as it should preserve the wishes of the majority, should also protect minority rights by obligating the majority to respect the values and interests of minorities.⁶⁰ In such a setting, judicial review will protect the interests and rights of the minority by checking those missteps of the majority with the potential of violating minority rights.⁶¹ Minority groups must be protected and afforded the opportunity to enjoy the benefits

⁵⁹ Devenish, G., *A Commentary on the South African Bill of Rights* (1999) Butterworths [Hereinafter referred to as Devenish: 1999], at p 4. See also Kateb, G., 'Remarks on the procedures of constitutional democracy' in Roland, J., and Chapman, J., (eds.) *Constitutionalism : Nomos XX* (1979) New York University Press, at p 148

⁶⁰ See *Larbi-Odam and Others v MEC for Education (North West Province) and Another* 1997 (12) BCLR 1655 (CC), at para 28.

⁶¹ See Hamilton, A., *The Federalist No. 78*, in Rossiter, C., (ed.) *The Federalist Paper* (1961) Penguin Books pp 464 – 472 [Hereinafter referred to as Hamilton: 78]. See also Kentridge, J. & Spitz, D., 'Interpretation' in Chaskalson, M., Kentridge, J., Klaaren, J., Marcus, G., Spitz, D., & Woolman, S., (eds.) *Constitutional law of South Africa* (1995) Juta & Company pp 11-1 to 11-46 [Hereinafter referred to as Kentridge & Spitz: 1995], at p 11-21. This theory finds its source in the famous footnote 4 to the United States case of *United State v Carolene Products Company*, 304 US 144 at 152, 58 SCt 778 (1938). In this footnote, the court said that the appropriateness of statutes that are directed at curtailing the operation of particular religious or national or racial minorities may be questioned by the Court.

provided by the democratic process.⁶² Majoritarian democracy has the danger that once the majority have assumed power, if not checked, they ‘tend to marginalise minorities in such a way that minorities are effectively unable to express their views’.⁶³ In *State v Makwanyane*,⁶⁴ the CC observed that:

The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people in our society. It is only if there is a willingness to protect the worst and weakest among us that all of us can be secure that our rights will be protected.⁶⁵

Furthermore, those who support majoritarian democracy sometimes turn a blind eye to some of its inherent weaknesses. Majoritarian democracy is, for instance, seldom exercised directly but is instead exercised through representatives, with a few individuals chosen to represent the majority.

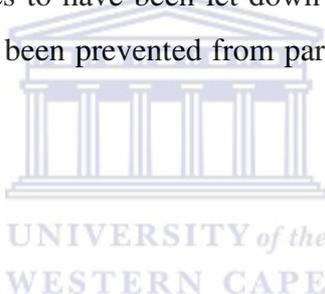
⁶² Davis, D., Chaskalson, M., and De Waal, J., ‘Democracy and Constitutional Interpretation’ in Van Wyk, D., Dugard, D., De Villiers, J., and Davis, D., (eds.) *Rights and Constitutionalism: The new South African Legal Order* (1994) Juta & Company [Hereinafter referred to as Davis *et al*: 1994], at p 2. Van Bueren: 1999, at p 65, is of the view that judicial review of socio-economic rights rather than undermine increases democracy because it increases the participation of the impoverished people in the decision making processes.

⁶³ Bilchitz, D., *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) Oxford University Press [Hereinafter referred to as Bilchitz: 2007], at p 104.

⁶⁴ 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

⁶⁵ Para 88. See also *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC). The CC observed that it might well be that pluralistic society members of large groups can easily rely on the legislative process than those belonging to small groups. The Court went on to hold that the minorities may have to rely on constitutional protection, particularly if they express their beliefs in a way that the majority regard as bizarre or even threatening (para 25).

However, it is not always the case that, in all situations, the representatives will represent and be responsive to the wishes of their constituencies. Instead, their decisions are usually influenced by other factors such as selfishness, political manoeuvring and political party interests in multi-party democracies like South Africa. Indeed, some times elected representatives have much more power than citizens to determine political decisions.⁶⁶ In such situations, both the majority and the minority will be better protected by relying on the courts to force their representatives to account to them.⁶⁷ Unlike the politicians, the judges are insulated from the political pressures and their professional ideals allow them to decide matters in a more dispassionate and impartial manner.⁶⁸ They will, therefore, be able to entertain and consider in a more or less impartial manner the complaints of aggrieved members of society who may consider themselves to have been let down by the political process. Such persons may have been prevented from participating in the political



⁶⁶ Bilchitz: 2007, at p 106.

⁶⁷ Abramovich, V., 'Courses of action in economic, social and cultural rights: Instruments and allies' (2005) 2 *SUR – International Journal on Human Rights* pp 181 – 216 [Hereinafter referred to as Abramovich: 2005], at p 197. South Africa offers a good example of the deficiencies of representative democracy. By the South African system of proportional representation, the voters cast their votes for political parties with the hope that the political parties will represent their wishes. However, the system does not establish clear legal processes through which the voters can hold the political parties to their promises. Instead, the voters will have to wait for another election to remove those parties that did not fulfil their election promises. Many irremediable wrongs may have occurred during this waiting period. This problem is made worse by the fact that the political parties have a highly centralised decision making system. Decisions are taken by the political mantle of the party consisting of the elitist leadership. While decisions may be influenced by such pressure groups as labour unions, these pressure groups are highly patronised by the leadership.

⁶⁸ Chayes: 1976, at pp 1307 – 1308. See also Sachs: 2005, at pp 139 – 140.

process by weaknesses such as lack of political power or economic disadvantage.⁶⁹

It should also be noted that simply because a government has been constituted by the majority does not mean that it exercises its powers without restrictions. A constitution, while giving adequate powers to the elected representatives of the people, should also structure political power in a manner that prevents abuse.⁷⁰ This is the essence of the doctrine of constitutionalism. This doctrine requires that government powers be limited to those set out in the constitution.⁷¹ This limitation takes two

⁶⁹ Davis *et al*: 1994 at p 2.

⁷⁰ Govender, K., 'Assessing the constitutional protection of human rights in South Africa during the first decade of democracy' in Buhlungu, S., Daniel, J., Southall, R., and Lutchman, J., (eds.), *State of the Nation: South Africa 2005-2006* (2005) Human Sciences Research Council (HSCR) pp 93 – 122 [Hereinafter referred to as Govender: 2005], at p 97. Limitation of political powers is made more pertinent by the history of South Africa. South Africa experienced decades of dictatorial and discriminatory rule, which had been sustained, among others, by the constitutional system of parliamentary supremacy. This constitutional system had produced a government that enjoyed a clear majority in the legislature in spite of the fact that it comprised of the minority white group. The constitutional system did not produce any real restrictions of power to forestall abuse. Generally, the judiciary was controlled by the executive and did not have powers to review the activities of the other organs and to test them against established constitutional standards. To turn this page in history, South Africa needed a supreme constitution that effectively provides protection against abuse of power. This is exactly what the 1996 Constitution does. For a detailed discussion of South Africa's constitutional history, see Dugard: 1978; and Hassen, E., *The soul of a nation: constitution-making in South Africa* (1998) Oxford University Press [Hereinafter referred to as Hassen: 1998], at pp 5 – 27.

⁷¹ Currie, I., and De Waal, J., *The new constitutional and administrative law* Volume 1 (2001) Juta & Company [Hereinafter referred to as Currie & De Waal: 2001], at p 10. These authors contrast constitutionalism with arbitrary rule of an aristocracy or dictatorship. Such leadership is not subjected to any rules but is instead directed by the personal whims of the leader. See also Currie & De Waal: 2005, at p 8; and Motlala & Ramaphosa: 2002, at p 176 who define constitutionalism as standing for limited

forms; first, it restricts the range of things which the different organs of government can do, thereby defining their competence. Second, it prescribes the procedures that must be followed in exercising the competences.⁷²

Constitutionalism forestalls abuse of power by guaranteeing fundamental rights and liberties and protecting them in a bill of rights. The bill of rights plays a very important role in promoting constitutionalism by excluding power excesses that would violate the rights and liberties of the individual.⁷³ As noted in chapter two,⁷⁴ Locke contends that the individual finds him/herself party to a social pact, which binds him/her and the state. This pact constitutes framework in terms of which a government is instituted with the duty to protect the natural rights of every individual.⁷⁵

government and seeks to introduce certain substantive and institutional limits to restrict the scope of governmental power.

⁷² Currie & De Waal: 2001, at p 10.

⁷³ See Sachs: 1990, at pp 9 – 10, he gives the example of the *Magna Carter*, the United States *Bill of Rights* and the *French Declaration of the Rights of Man* as having been adopted by the oppressed as a means of controlling the power of the former oppressors and guaranteeing freedom from future oppression. Elsewhere, Sachs has submitted that the very notion of entrenching rights is to provide a basic framework of constitutional regard for every human being and that it is incumbent on the courts to see to it that basic respect for every person is maintained at all times. In Sachs's opinion, this is the reason we have fundamental rights. Sachs, A., 'The judicial enforcement of socio-economic rights: The *Grootboom* case' in Peris, J., and Kristian, S., (eds.) *Democratising development: The politics of socio-economic rights in South Africa* (2005) Martinus Nijhoff Publishers pp 131 – 152 [Hereinafter referred to as Sachs: 2005], at p 139.

⁷⁴ Chapter two, section 2.3.1.

⁷⁵ Locke, J., *Two treatises of government* (1967) Cambridge, at p 135, as referred to by De Villiers, B., 'Social and economic rights' in Van Wyk, D., Dugard, D., De Villiers, J., and Davis, D., (eds.) *Rights and constitutionalism: The new South African legal order* (1994) Juta & Company pp 599 – 628 [Hereinafter referred to as De Villiers: 1994], at p 60. For a discussion on the concept of civil society and control of government as

By this social pact, the government is prohibited from using its powers in a manner that encroaches on the individual rights.⁷⁶ As seen in chapter two,⁷⁷ however, this is a very restrictive understanding of human rights as it conceives them only as negative protections. Human rights embrace both negative and positive freedoms and both civil and political rights and socio-economic rights engender negative and positive obligations. A bill of rights may require the state to fulfil positive aspects of rights and proactively to safeguard the environment in which these rights are enjoyed.⁷⁸ The state may be compelled to pass legislation that elaborates these rights and sets up administrative mechanisms through which they can be implemented and enforced.

The judiciary's role becomes one of upholding the constitution and reminding the other branches of government of the limitations on their powers. This is necessary for the protection of the rights and liberties of individuals.⁷⁹ The judiciary will demand that the other branches justify their policy choices, programmes and legislation,⁸⁰ and where these

conceptualised by Locke, see Curie, M., 'Civil society – conceptual history from Hobbes to Marx' (2001) *International Politics Working Paper*, sourced at <<http://www.aber.ac.uk/interpol/phD/Dorota.pdf>> (accessed on 22 January 2006).

⁷⁶ De Villiers: 1994, at p 601.

⁷⁷ At section 2.3.1.

⁷⁸ According to Devenish: 1999, at p 9, the positive obligations engendered by the South African Bill of Rights are of demonstrable significance for the process of democratic and egalitarian transformation from exclusive white privilege to the economic and social rehabilitation of disadvantaged communities.

⁷⁹ Sullivan, S., 'The role of the independent judiciary' in *Freedom Paper No. 4*, sourced at <<http://usinfo.state.gov/products/pubs/archive/freedom/freedom4.htm>> (accessed on 19 January 2006) [Hereinafter referred to as Sullivan: 2006], at p 2

⁸⁰ Mureinik described the new South African constitutional order as a bridge away from the culture of authority that accompanied the apartheid era to as culture of justification.

cannot be justified, to rule them out of order. Policy and legislation must be justified as ultimately leading to the promotion of the fundamental values, and the realisation of the rights in the Bill of Rights. The judiciary will stand out as the guardian of the constitution and the system of democratic values which involves the protection of the individual and the rights of minority groups.⁸¹ This becomes particularly relevant because of the powerful nature of the state *vis-à-vis* its subjects. Countering this

Mureinik, E., 'A bridge to where? Introduction to the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* pp 31 – 48. In Mureinik's opinion:

[The Constitution] must lead to 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 cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command [at p 31]

Indeed the 1996 Constitution envisions a society based on accountability, responsiveness and openness as one of the fundamental values (section 1). Pieterse has added that this culture of justification should extend to exercise of power in the socio-economic realm, where government power may impact on the enjoyment of several fundamental rights. This would demand that government justifies its choice of policy options and any limitations or negations from socio-economic rights. Pieterse: 2004, at pp 385 and 409 adds that failure of the government to adequately justify a chosen policy as respecting, protecting, promoting and fulfilling socio-economic rights should lead to a finding of unconstitutionality. Similarly, Fredman submits that respect for the democratic process requires greater attention to the duty to account and explain. In Fredman's opinion, the duty to account exposes decisions-makers to justifiable public scrutiny in addition to improving deliberative dimensions of decision-making; it also prevents polarised decision making. Fredman, S., 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 *South African Journal on Human Rights* pp 163 – 190, at p 175.

⁸¹ Devenish: 1999, at p 4. See also Davis, D., Cheadle, H., and Haysom, N., *Fundamental rights in the Constitution: Commentary and cases* (1997) Juta & Company [Hereinafter referred to as Davis *et al*: 1997], at p 3; and Cachalia, A., Cheadle, H., Davis, D., Haysom, N., Maduna., P., and Marcus, G., *Fundamental rights in the New Constitution* (1994) Juta & Company and Centre for Applied Legal Studies. This is what Bilchitz: 2007, at p 105 calls rights based justifications of judicial review which involves the view that there are fundamental rights that must be guaranteed to all individuals in any just society, whether or not the majority agrees or wishes to recognise these rights.

power requires an independent branch with powers to hold the other branches accountable.⁸² The subjects will look to the judiciary to ensure accountability and protection of their interests.⁸³ The judiciary should be able to uphold the constitution and to set aside any law or conduct inconsistent with the constitution.⁸⁴ It is on this basis that Sachs submits that:

The key question, then is not whether unelected judges should ever take positions on controversial political questions. It is to define in a principled way the limited and functionally manageable circumstances in which the judicial responsibility for being the ultimate protector of human dignity compels them to enter what might be politically contested terrain. It is precisely in situations where political leaders may have difficulty withstanding populist pressures, and where human dignity is most at risk, that it becomes an advantage that judges are not accountable. It is at these moments that the judicial function expresses itself in its purest form. The judges, able to rely on the independence guaranteed to them by the

⁸² Cappelletti, M., 'Judicial review of the constitutionality of state action: Its expansion and legitimacy' (1992) 2 *Tydskrif vir die Suid-Afrikaanse Reg* [*Journal of South African Law*] pp 256 – 266 [Hereinafter referred to as Cappelletti: 1992], at p 257. While Locke's theory presupposes existence of a social pact, there is an unbalance of power between the parties to this pact. The government remains far much stronger than its citizens. Though government is bound by the social pact to respect the rights, the subjects by themselves lack the means to enforce this pact. Empowering the subjects to enforce their rights requires the presence of a strong institution like the judiciary, which lies at a horizontal level with the government in the vertical relationship of the subjects and the government. This will enable the citizens to assume a position of derivative horizontality at the level of the state. It should also be noted that even within the horizontal interactions of the subjects themselves, violations of rights do occur. This is because society is not egalitarian; some individuals are more powerful than the others, and the weak need protection by the same institution that protects them against the government.

⁸³ Pieterse: 2004, at p 388. See also Liebenberg, S., 'Needs rights and transformation: Adjudicating social rights' *Center for Human Rights and Global Justice Working Paper No. 8, 2005*, at p 10, sourced at <<http://www.nyuhr.org/docs/wp/Liebenberg%20-%20Needs,%20Rights%20and%20Transformation.pdf>> (accessed on 23 March 2006).

⁸⁴ See *Marbury v Madison* 5 US 137, 2 LED 60 (1803), sourced at <<http://www.lectlaw.com/files/case14.htm>> (accessed on 12 November 2005) [Hereinafter referred to as the *Madison* case].

Constitution, ensure that justice is done to all without fear, favour or prejudice.⁸⁵

It is important to note, however, that for the courts to successfully discharge their functions they also require a great deal of support from the other organs of state. If the executive receives court directions with hostility and unwarranted criticism, the mutual respect between it and the judiciary will be destroyed.⁸⁶ Such hostility makes it hard for the judiciary to effectively and freely discharge its functions. This is because the courts are highly dependent on the executive for survival and enforcement of their orders as they have neither the power of the sword nor the purse. Lack of support or hostility from the executive will erode the legitimacy of the judiciary and deepen the counter-majoritarian dilemma.⁸⁷

The doctrine of constitutionalism is complemented by the long established principle of the rule of law. According to Dicey, the rule of law comprises three fundamental tenets. The regular law of the land is supreme, so that individuals should not be subjected to arbitrary power; state officials are subject to the jurisdiction of the ordinary courts of the land in the same

⁸⁵ Sachs: 2005, at p 139.

⁸⁶ See generally Kanyeihamba, G., 'The culture of constitutionalism and the doctrine of separation of powers' Paper presented at the *Public Lecture on State of Separation of Powers in Uganda*, organised by the Human Rights and Peace Centre, Faculty of Law, Makerere University [Unpublished, on file with author].

⁸⁷ See Corbett, M., 'Human rights: The road ahead' in Forsyth, C., and Schiller, J., (eds.) *Human rights: The Cape Town conference* (1979) Juta & Company pp 1 – 9, at p 6. Corbett cautions that should a court in the pursuit of protecting individual rights overreach itself and go beyond what is considered to be the legitimate limits of its jurisdiction, it will lose popular support and ultimately its legitimacy (at p 7). In Corbett's opinion, 'it is essential that the court maintains a fine balance between, on the one hand, the need to protect constitutional rights and liberties and, on the other hand, the danger of too great an interference in the affairs of the executive and legislative branches of government' (at p 6).

manner as individuals; and the constitution is a result of the ordinary law of the land so that courts should determine the position of the executive and bureaucracy by principles of private law.⁸⁸ In its most elementary form, the rule of law demands that everything that government does must be authorised by the law.

However, over the years, this principle has seen tremendous development. It will not allow government conduct to pass simply because it has been authorised by law if it violates fundamental rights and liberties. Even in those countries without written constitutions like the United Kingdom, the principle of the rule of law has led to the development of certain restrictions to the exercise of public power akin to those imposed by constitutions. In contrast, countries with written constitutions such as South Africa have merely co-opted the principle of the rule of law by applying it simultaneously with the doctrine of constitutionalism.⁸⁹ The principle of rule of law, therefore, strongly compliments the doctrine of constitutionalism to ensure that the exercise of government powers is within legally defined parameters. This is important because it is within these parameters that human rights are protected.

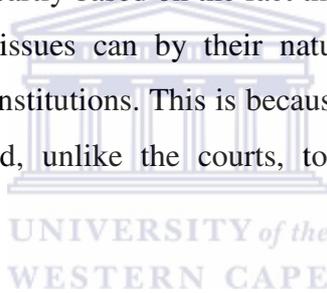
⁸⁸ Dicey, A., *Introduction to the study of the law of the constitution* [1885], (1982) Liberty Fund, at p 1. See also Brewer, R., *Judicial review in comparative law* (1989) Cambridge University Press, at p 90.

⁸⁹ See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (2) SA 374 (CC); *Speaker of the National Assembly v De Lille* 1999 (4) SA 863 (SCA); and *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191.

3.4 TECHNICAL DEFICIENCIES AND INCOMPETENCE OBJECTIONS

3.4.1 Statement of the objection

There is a second kind of objection to the judicial enforcement of socio-economic rights. This objection shifts from questions about the democratic nature of the courts to whether they have technical capacity to perform certain tasks. This dimension of the objection should be distinguished from the one based on democracy as discussed above. The question raised by the technical deficiency objection is very practical; it is not whether the courts should perform certain tasks but whether they can perform those tasks competently.⁹⁰ It should be noted, however, that there is a point where these two objections may intersect; the objection based on democracy is partly based on the fact that questions arising from socio-economic rights issues can by their nature only be decided by democratically elected institutions. This is because, as seen above,⁹¹ these institutions are believed, unlike the courts, to be accountable to the electorate.



On the other hand, while the technical deficiency objection also invokes the questions raised by the nature of socio-economic rights, it is based not on democratic accountability but on the fact that the courts just lack the

⁹⁰ Horowitz: 1977, at p 18. See also Steinberg, C., 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *South African Law Journal* pp 264 – 284 [Hereinafter referred to as Steinberg: 2006], at p 270. Steinberg submits that the primary issue is not whether the judiciary may legitimately engage in evaluations of socio-economic rights as it is already constitutionally obliged to do so. Instead the task is to define the most effective and appropriate role of the judiciary, taking into account both pragmatic and principled considerations, including the inherent limitations of the process of adjudication and the place of other institutions.

⁹¹ Section 3.3.1 above.

technical skills to answer these questions.⁹² The objectors trust that both the legislature and the executive have such skills and in accordance with the principles of separation of functions, should exercise the powers to answer these questions. This is because social justice gives rise to such issues as the prioritisation of objectives, distributing of resources and balancing of opposing interests.⁹³ The courts are considered to be ill-suited to make strategic choices among means and, therefore, lack the necessary technical capacity to determine issues of social justice. Their capacity to determine the scale of preference of needs in the context of scarce resources is doubted. Additionally, realisation of socio-economic rights is believed to require special expertise because of their budgetary implications.⁹⁴

As is subtly expressed by Sachs, the objection is based on the inherent characteristics of the judiciary:

The objection from radical quarters to judges enforcing social and economic rights suggests that we are likely to get it all wrong. They point

⁹² Tushnet, M. 'Enforcing social and economic rights' (unpublished paper on file with author [Hereinafter referred to as Tushnet: 2005], at p 122. See also Tushnet, M., 'Enforcing socio-economic rights: Lessons from South Africa' (2005) 6 *ESR Review* pp 3 – 6; and Tushnet, M, 'Social welfare rights and the forms of judicial review' (2004) 82 *Texas Law Review* pp 1895 – 1919. See also Sunstein, C., 'Against positive rights' (1993) *East Europe Constitutional Review* 35, excerpt in Steiner, H., and Alston, P., *International Human Rights in Context: Law, politics, morals* (2000) Oxford University Press pp 280 – 282, at p 281.

⁹³ Abramovich: 2005, at p 183.

⁹⁴ Pieterse: 2004, at p 394. See also Scott & Macklem: 1992, at p 24. Mureinik: 1992, at p 465, has summarised the essence of this argument as relating to judges' capacity to evaluate budgets. He writes that judges do not have a budget and they are not qualified to evaluate how much it is necessary to spend, nor how much society can afford, nor what its priorities are, or ought to be. In his opinion, answering questions such as these is essential for the decision maker to have both expertise and political accountability and that this is why these tasks are assigned to the legislature and executive.

to the social class from which we judges traditionally have been drawn, and the nature of our legal thinking which tends to look at questions in abstract and in formulaic ways that end up favouring the status quo. But even where our background and modes of thought might predispose us differently, there can be little doubt that it is inappropriate for judges who in general know very little about the practicalities of housing, land and other social realities, to pronounce on these issues. That is what Parliament is there for.⁹⁵

It is for the above reason that some scholars object to remedies that require courts to make decision on issues that require making socio-economic related choices.⁹⁶ This is in addition to a greater involvement in making what appear to be policy choices. It is indeed because of the fear of getting involved in administrative and policy issues that courts are reluctant to retain remedial jurisdiction and continued supervision of their orders.⁹⁷ Courts are more comfortable making final determinations of disputes and to avoid a multiplicity of suits touching on the same subject matter and parties. This is because this would make it inevitable for them to intrude deeply into functions that are considered the preserve of other organs of state.⁹⁸

Arising from the objection as based on technical competence is also the assertion that socio-economic rights disputes have polycentric

⁹⁵ Sachs: 2005, at p 140.

⁹⁶ Cassels, J., 'An inconvenient balance: The injunction as a Charter remedy' in Berryman, J., (ed.) *Remedies, issues and perspectives* (1991) Thomas Professional Publishing pp 272 – 311 [Hereinafter referred to as Cassels: 1991], at p 289.

⁹⁷ See chapter seven, section 7.3.

⁹⁸ The courts fear to lose the support and legitimacy they enjoy from the other organs of state. They fear that should they intrude deeply into the functions of the other organs, these organs may respond by reducing the powers of the judiciary or squeezing their purse. It is, therefore, correct that the issuance by courts of orders whose compliance they cannot secure is a threat to the court's legitimacy. This is because of the fact that the courts have 'the power "neither of the sword nor the purse" which makes it necessary to be sensitive to the maintenance of ... [their] own authority and legitimacy'. Cassels: 1991, at p 289.

repercussions which makes them unfit for judicial adjudication. This objection garners backing from the writings of Lon Fuller,⁹⁹ who sets out to answer two broad questions. The first question is ‘what kinds of social tasks can properly be assigned to courts and other adjudicative agencies?’¹⁰⁰ The second question is what the forms of adjudication are and whether such forms can be deviated from.¹⁰¹ Before answering these questions, Fuller begins by defining adjudication.

In Fuller’s opinion, adjudication means more than settling of disputes or controversies. Instead, ‘adjudication should be viewed as a form of social ordering, as a way in which the relations of men to one another are governed and regulated’.¹⁰² Fuller submits that what distinguishes adjudication from other forms of decision making processes is the form of participation allowed the parties. He views adjudication as guaranteeing the parties a right to formal and institutional participation in the decision making process. This is because the parties are assured the right of audience to present proofs and reasoned arguments.¹⁰³ While Fuller

⁹⁹ Fuller: 1978.

¹⁰⁰ Fuller: 1978, at p 354. Specifically, he asks the question as to what the lines of division that separate social tasks from those that require an exercise of executive power are. Additionally, he asks what assumptions underlie the conviction that certain problems are inherently unsuited for adjudicative disposition and should be left to the legislature.

¹⁰¹ Fuller: 1978, at p 354. Specifically, he asks and answers questions such as what would be the use and dangers of deviating from the ordinary forms of adjudication; are there permissible variations beyond which one would speak of abuse or perversion.

¹⁰² Fuller: 1978, at pp 357 and 380. According to Fuller, even in the absence of formalised doctrines such as *res judicata* or *stare decisis*, an adjudicative determination will always enter in some degree into the litigant’s future relations and into the relations of other parties who see themselves as possible litigants before the same tribunal. Such parties will conduct themselves in a way that avoids such litigation. This is the nature of the social ordering influence that adjudication gives rise to (at p 357).

¹⁰³ Fuller: 1978, at p 365.

acknowledges the fact that other forms of decision making processes may also allow for such participation, this is not guaranteed as a right. The decision maker is not obliged to listen to the parties and may ignore their arguments whether or not they are reasoned.¹⁰⁴ On the other hand, the adjudicator is obliged to listen to the proofs and reasoned arguments of the parties and to take them into account in making his/her decisions. The duty to consider the arguments of the parties places a demand of rationality on the adjudicator, which is not expected of other decision makers.¹⁰⁵

The absence of meaningful participation due to impossibility, in Fuller's opinion, may place some tasks beyond the limits of adjudication. He cites polycentric tasks as an example of tasks in which meaningful participation may be impossible.¹⁰⁶ A polycentric matter is one in respect of which a decision would have unforeseen and wide repercussions affecting a multitude of parties, sometimes not before the court. Fuller contends that the range of people affected by a decision of a court may not be seen easily. As a result, the participation of such people with diverse interests cannot be organised. The adjudicator is inadequately informed and cannot determine the repercussions of the proposed solution.¹⁰⁷ The courts, unlike administrative authorities, may not have in

¹⁰⁴ Fuller: 1978, at p 366. Fuller gives the example of a political speech during an election. There is no affirmative right that the campaigner will have the opportunity to give a reasoned speech. And even when this right is guaranteed, there is no formal assurance that anyone will listen to the speech, let alone act on its reasoned arguments. In Fuller's opinion, a party in the process of bargaining the terms of a contract is in no better position.

¹⁰⁵ Fuller: 1978, at pp 366 – 367.

¹⁰⁶ Fuller: 1978, at p 364.

¹⁰⁷ Fuller: 1978, at p 395. He gives the example of the tasks of players in a football team. Each shift of position by one player has a different repercussion for the other players. He

their possession large amounts of information to guide their decisions.¹⁰⁸ The courts, either due to the limited resources of the parties or as a result of their own rules, may be limited to the information provided in evidence.¹⁰⁹ Such evidence may not adequately reflect the many competing interests implicated by the case. Consequently, many complex policy issues remain unaddressed by the court, resulting in unexpected repercussions making the decision unworkable. In Fuller's opinion, the unworkable decision is either ignored, withdrawn or modified, sometimes repeatedly, making it hard to enforce and observe.¹¹⁰

also compares polycentric tasks to a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will not simply double each of the resulting tensions but will rather create a complicated pattern of tensions. He describes this as a polycentric situation because it is many centred with each crossing of strands being a distinct centre for distributing tensions (at p 394). Currie & De Waal: 2005, at p 569, define polycentric tasks as those matters which entail the co-ordination of mutually interacting variables and a change in one variable will produce changes for other valuables. Allison advises that, to avoid the limits of its own competence, the court, confronted with a significantly polycentric dispute must refrain from two kinds of activism. First, in so far as the court has a choice under existing law, it must avoid choosing a legal solution which necessitates an appreciation of complex repercussions. Secondly, the court must not change the law where an appreciation of repercussions is required for sensible legal development. Allison, J., 'Fuller's analysis of polycentric disputes and the limits of adjudication' (1994) 53 *Cambridge Law Journal* pp 367 – 383, at p 367.

¹⁰⁸ Abramovich: 2005, at p 183.

¹⁰⁹ Pieterse: 2004, at p 393. See also Lenta, P., 'Judicial restraint and overreach' (2004) 20 *South African Journal on Human Rights* pp 544 – 615 [Hereinafter referred to as Lenta: 2004], at p 545. According to Pieterse: 2004, at p 393, one of the reasons why all affected parties cannot be made party to the litigation is because of inadequacies in logistics. This could mean not only logistics available to the parties but also the resources placed at the disposal of the court for that purpose.

¹¹⁰ Fuller: 1978, at p 401.

In *Minister of Health and Others v Treatment Action Campaign*¹¹¹ the CC indicated that it is alive to the problem of polycentric interests implicated by socio-economic rights litigation. It held that courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community.¹¹² As can be deduced from the discussion in chapter four,¹¹³ polycentricism and institutional capacity of the courts is one of the factors that influenced the CC's reluctance to define a minimum core for the right of access to adequate housing.¹¹⁴ In *Government of the Republic of South Africa v Grootboom & Others*,¹¹⁵ the Court said that determination of a minimum core in the context of 'the right to have access to adequate housing' presents difficult questions because the needs are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. According to the Court, it is not possible to determine the minimum threshold without first identifying the needs and opportunities for the enjoyment of such a right. The Court said that these will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. The Court said that, unlike the United Nations Committee on Economic,

¹¹¹ 2002 (5) SA 721 (CC) (*TAC case*).

¹¹² Para 38.

¹¹³ Chapter four at section 4.2.1.2.

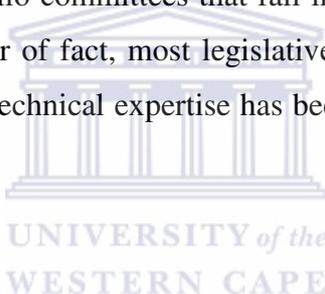
¹¹⁴ See also Steinberg: 2006, at p 271. He submits that definition of a minimum core by the CC would have amounted to involvement in a utilitarian calculus of social and economic advantage of a decision in a context of a myriad of competing claims which are not before the Court.

¹¹⁵ 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC) (*Grootboom case*).

Social and Cultural Rights, it did not have access to the information that would enable it to define the minimum core.¹¹⁶

3.4.2 Responding to the objection

The question that ought to be considered, however, is whether the executive and legislature are institutionally more equipped, in terms of expertise, to make decisions relating to socio-economic rights. In technically specialist areas, the executive is the only branch that can regularly lay claim to expertise necessary to give effect to all the rights.¹¹⁷ The same expertise may be called on by the legislature which, in most cases, considers draft legislation and policy that has gone through the executive and to which expertise has been applied. In addition, legislatures usually harness the expertise of their members by directing them to serve on portfolio committees that fall in their areas of technical expertise.¹¹⁸ As a matter of fact, most legislative decisions take place in these committees after technical expertise has been applied. The same, or



¹¹⁶ Paras 32 – 33.

¹¹⁷ Liebenberg, S., ‘The value of human dignity in interpreting socio-economic rights’ (2005) 21 *South African Journal on Human Rights* pp 1 – 31, at p 22 See also Pieterse: 2004, at p 388. Pieterse is, however, quick to caution that the executive members are usually only indirectly accountable to the citizenry. In his opinion, this is especially so with the members of the bureaucracy who are only tenuously linked to the popular mandate. As a result of this, Pieterse contends that there is a need to develop mechanisms according to which the bureaucracy may be held accountable to the citizenry for its decisions that affect human rights; which can be done through the judiciary (at p 388). See also Sachs: 2005, at p 140.

¹¹⁸ Horowitz: 1977, at pp 28 – 29, contrasts the legislature with the courts and submits that the random assignment of cases to judges makes it hard for expertise to be harnessed and yet no member of the legislature will live in fear that an issue outside his sphere of competence will be thrust upon him or her (at pp 29 – 30).

even a higher degree of specialisation, can be attributed to career administrators in the executive branch of the state.¹¹⁹

It is, therefore, important that in designing remedies for violation of rights, courts should not ignore the special expertise in the hands of the executive or legislative branches of government.¹²⁰ In spite of this, it is also important to note that, sometimes, though the executive and legislature have at their disposal expertise and information, the solutions that they come up with may not be ones tested against real conflicts. The solutions may fail to address some problems that may not have been anticipated when, for instance, legislation was adopted.¹²¹ It is when such problems arise that the courts' expertise kicks in. It is on this basis that it is submitted that in structural reform litigation, the circumstances compelling the courts to intervene do not arise from a desire to take action in conflict with affirmative legislative and executive programmes. Rather,

¹¹⁹ See Horowitz: 1977, at p 30, he submits that although the political appointees may not be as specialised as the career administrators, the difference between them and the judges is that they have information resources close at hand.

¹²⁰ See Bilchitz: 2007, at p 132. It is submitted in chapter seven that the courts should strive as much as possible when they order structural injunctions to harness the knowledge and skills that may be at the disposal of the parties including the state. The initial response should, therefore, be to defer to the parties, especially the defendant, the responsibility of coming up with a remedial plan. In institutional cases, the defendant knows better how the administrative mechanisms of the institution function, this expertise should be exploited. See chapter seven at section 7.6.1

¹²¹ See Scott & Macklem: 1992, at p 37; they submitted that petitions have the effect of drawing attention to personal circumstances that reveal failures and problems unknown to or avoided by those responsible for drafting legislation. According to Scott and Macklem, such failures and problems may not have been predicted by, or may remain hidden from the view of, legislators or bureaucrats who live a more privileged life than those claiming the benefit of constitutionally entrenched social rights, and who are not institutionally required to listen to individual stories to produce a bridge between life experiences. In their opinion, this applies whether the body is the government, a legislative committee, or an international monitoring institution.

the circumstances are created by the deficit brought about by legislative and executive inaction or neglect.¹²² The legislature and executive could have come up with and stuck on solutions that in practice do not realise the rights protected.

In such case, the courts may redirect policy, legislation or conduct in order to align them with the constitution and to solve real life problems.¹²³ When the courts do this, they will not be intruding on the territory of either the legislature or the executive. Instead, the courts will be establishing a dialogue between themselves and the other branches in terms of which each branch is expected to contribute its special skills in solving the problem.¹²⁴ Additionally, there is nothing that stops the courts from availing themselves of technical expertise through expert evidence. The courts could summon witnesses to testify whenever technical questions arise in the course of the proceedings.¹²⁵

¹²² Eisenberg, T., and Yeazell, S., 'The ordinary and the extraordinary in institutional litigation' (1980) 93 *Harvard Law Review* pp 465 – 517 [Hereinafter referred to as Eisenberg & Yeazell: 1980], at pp 495 – 496. Eisenberg and Yeazell submit that there is nothing that suggests that regulating public institutions is a task so clearly and exclusively allocated to the legislative and executive branches that judicial action is unwarranted even in the face of recalcitrance by other government actors. Horowitz: 1977, at p 24, however, submits that there is no institution that can do everything and, that while this may be justification for intervention by the courts into policy matters, there is no guarantee that the judiciary's action will proceed from proper diagnosis or that it will not be deflected in the course of executing the functions.

¹²³ Sturm: 1991 at pp 1387 – 1388.

¹²⁴ Wesson, M., '*Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal on Human Rights* pp 284 – 308, at pp 295 and 307.

¹²⁵ Horowitz: 1977, at pp 24 – 25 and 48, has, however, warned that it has always proved difficult to integrate specialists into the adjudicative process; specialised information is usually provided to judges through the medium of expert witnesses and consultants or

It is also important to note that although the courts may not have access to as many sources of information as other organs do, the litigation process allows for distilled presentation of information in the form of evidence. Sometimes the adversarial nature of litigation compels parties to search and bring before the courts all information relevant to the dispute.¹²⁶ The courts' problem solving procedures also offer a number of advantages not found in the processes of other organs. Within the judicial processes, interested parties are given an opportunity to make submissions in accordance with a settled procedure and the courts are under duty to give reasoned judgements. Scott and Macklem submit that:

A court provides a forum for relating debates over fundamental values to individual concrete cases. It is an opportunity to have personal narratives heard and rights put in living context in a way that is virtually impossible for modern legislatures.¹²⁷

Additionally, the court processes provide for avenues of reviewing decisions if they are contested. This is done through procedures that guarantee parties rights of appeal and review. The political processes may not have the advantage of revisiting decisions as of right. Mistakes and oversights may, therefore, go un-noticed, and when noticed, remedial measures may require involvement in protracted and inaccessible political processes.

The judiciary is also always keen to tap into outside energies and resources in search of appropriate remedies that vindicate the rights. As is seen in chapter seven,¹²⁸ the courts have particularly been most effective in this endeavour through the use of structural remedies that take the

through popularised written versions of the information. In his opinion, the expert witnesses are paid by the respective parties and they are almost invariably partisan.

¹²⁶ Chayes: 1976, at p 1308.

¹²⁷ Scott & Macklem: 1992, at p 38.

¹²⁸ Section 7.3.

courts outside the traditional constraints of adjudication.¹²⁹ The courts have successfully used court appointed experts, commissions of inquiry, public hearings and negotiation committees to find solutions to structural problems.¹³⁰

In spite of some technical deficiencies, therefore, the courts have a number of advantages that enhance their capacity to adjudicate socio-economic rights. It is important that the judicial function should be assessed not in terms of its weaknesses, but in terms of its strengths. It is also important to note that when courts adjudicate socio-economic rights, they are not doing so in competition with the other organs of state. Rather, they are engaging in a dialogue which requires that all the institutions of the state play a role in the constitutional enterprise of actualising the rights. In such a dialogue, it is important that all institutions put to use, in a collaborative manner, their skills and capabilities as regards the enforcement of the rights. The power of the courts of giving the last word on the meaning of the constitution cannot, therefore, be exercised effectively without the co-operation of other branches of the state.¹³¹

The courts may not have the technical expertise to decide socio-economic questions from a political perspective. They do, however, know about human dignity and oppression. The courts know ‘about things that reduce a human being to a status below that which a democratic society would regard as intolerable’.¹³² The judiciary should, however, where necessary, rely on other organs of the state for technical capacity which those organs should provide in good faith with the intention of advancing the rights in

¹²⁹ Chayes: 1976, at p 1309.

¹³⁰ Chapter seven, section 7.3.

¹³¹ Currie, I ‘Judicious avoidance’ (1999) 15 *South African Journal on Human Rights* pp 138 – 165, at p 158.

¹³² Sachs: 2005, at p 140.

the constitution. Such collaborative problem solving processes also have the potential of making it much easier to respond to polycentric tasks.

It is necessary for courts enforcing socio-economic rights to confront the problem of polycentricism. As is contended in chapter six,¹³³ appreciation of the extent of the polycentric nature of a socio-economic rights case will be a factor to consider when designing an ‘appropriate just and equitable relief’. This is important because ‘[t]he harm caused by violating constitutional rights is not merely a harm to an individual applicant, but a harm to society as a whole’.¹³⁴ Constitutional litigation against the state in most cases arises from violations of a structural nature implicating a number of interests. Addressing such structural violations calls for significant structural and institutional changes not only involving, but also affecting persons other than the parties.¹³⁵ As a result of this, the appropriateness of a remedy will be affected unless the court considers all the interests implicated by a case.

Socio-economic rights cases are believed to be polycentric in nature, firstly, because of the conception that they have budgetary consequences.¹³⁶ It is submitted that each decision to allocate a particular sum of money for a specified purpose implies less money for other

¹³³ See chapter six at section 6.3.

¹³⁴ Currie & De Waal: 2005, at p 196.

¹³⁵ Sturm: 1991, at p 1364. Fiss gives the example of a structural decree to reform the practises of a police department as having an effect upon all the individual police officers, present and future. Fiss, O., ‘Foreword: The forms of justice’ (1979) 93 *Harvard Law Review* pp 1 – 58 [Hereinafter referred to as Fiss: 1979], at p 49.

¹³⁶ Budgets, it is believed, are finite in nature and have a multitude of ways in which to be distributed. See Pieterse: 2004, at p 393.

purposes.¹³⁷ According to Davis, a case involving a person's right to a house would not only impact on that person and the state, but also on interests of other citizens. The interests of other citizens would raise questions such as whether the money should be used to build a crèche, a hospital or sporting stadium.¹³⁸

Secondly, it is submitted that socio-economic rights are logically linked to collective rather than individual claims. Yet the courts are ill-suited to adjudicate collective claims because they give rise to a multiplicity of interests.¹³⁹ However, this submission may be challenged on the ground that the problem of polycentricism is alive in all forms of constitutional litigation. As conceded by Fuller, all disputes that come before the courts have either explicit or concealed polycentric effects.¹⁴⁰ This is not limited

¹³⁷ O'Regan, K. 'Introducing socio-economic rights' (1999) 1 *ESR Review* pp 2 – 3 [Hereinafter referred to as O'Regan: 1999], at p 2. Currie & De Waal: 2005, at p 570, give *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) (*Soobramoney* case) as an example of a polycentric case. According to Currie & De Waal, if the CC had decided that Soobramoney was entitled to dialysis treatment, the decision would not only have affected the individual but also the complex web of mutually interacting resource allocations.

¹³⁸ Davis: 1992, at 478.

¹³⁹ See Viljoen, F. 'The justiciability of socio-economic and cultural rights: Experience and problems' [Unpublished paper on file with author] [Hereinafter referred to as Viljoen: 2005], at p 40. For instance, consider a case in which a court orders that the government provides medical treatment to the applicants because they cannot afford it. This case would have an impact on many other patients not before the court but who could also qualify for the treatment because they cannot afford it. However, the medical needs of patients are different. Some may not afford primary care necessary for their needs while others, though economically well placed, may not afford tertiary medical care such as kidney or heart transplants. See Bilchitz, D., 'The right to health care services and the minimum core: Disentangling the principled and pragmatic strands' (2006) 7 *ESR Review* pp 2 – 6.

¹⁴⁰ Fuller: 1978, at p 401. However, he adds that what is required by the adjudicator is to know when the polycentric elements have become so significant and predominant that

to socio-economic rights but extends to civil and political rights as well.¹⁴¹ It is true that a petitioner in a constitutional case, whether involving civil and political rights or socio-economic rights, may be motivated by personal or private interest. In spite of this, the decision of the court usually has a wide impact and may affect so many people.¹⁴²

Examples of civil and political rights disputes will make this clearer. Consider a case in which the issue is the extent to which an attorney's right to privacy may be limited. The case will have repercussions not only for the particular attorney and his clients, but for hundreds, or even thousands, of other attorneys and their clients. This because the case may establish a precedent that binds future disputes. Another example is a case involving the freedom of association or trade union rights; such a case may have multi repercussions for parties other than the litigating union and specific employer. The decision will have implications for all members of the particular union, members of other unions and employers in the same or similar industries. The same could be said of an order in a criminal trial, which may also force the prosecuting authorities to employ and pay more investigators which may lead to budgetary adjustments. This may have multiple repercussions. However, simply because the

the proper limits of adjudication have been reached. Fuller submits that socio-economic rights take the courts to such limit, which requires them to abstain from adjudicating such rights. But this view has been contradicted by Sturm: 1991, at pp 1355 – 1446. According to Sturm Fuller's view of the limits of adjudication renders illegitimate much of what the courts do today; this is because courts are already involved in adjudicating polycentric tasks. Sturm also criticises Fuller's ideas on the ground that his theories are based on traditional private law litigation, whereas new forms of litigation have emerged such as public law litigation on which human rights litigation is based (at pp 1387 – 1388).

¹⁴¹ O'Regan: 1999, at p 2.

¹⁴² Cassels: 1991, at p 302. Cassels also submits that constitutional litigation is not simply a bipolar contest between private interests; instead, it represents itself as a battle for the very meaning of public interest and has the character of a class action (at p 304). See also generally Chayes: 1979.

multitudes of affected persons are not in court will not stop adjudication of the dispute. The mere fact that a court cannot deal with many or all of the aspects of a case does not mean that it deals with none.¹⁴³

Furthermore, it is submitted that policy formulation and legislative processes are not immune from polycentric repercussions.¹⁴⁴ In the first place, one cannot assert, too strongly, that the legislative or executive processes are representative of all the interests particularly on issues of policy formulation and implementation.¹⁴⁵ Those who are not politically organised, and in most cases the impoverished, may find it hard to make their voices heard in the political processes. In addition, usually legislation and policy are designed and adopted in the abstract, and implemented without first having been tested on practical problems. The courts, on the other hand, stand in an advantageous position. While their decisions may have polycentric repercussions, they deal with real problems, sometimes not even contemplated either by the policy makers or by the legislators.¹⁴⁶ Such cases before the courts will alert the

¹⁴³ Pieterse: 2004, at p 394. See also Epstein, A., 'Judicial review: Beckoning on two kinds of error' (1985) 4 *Cato Journal* pp 711 – 718, at p 716. Epstein uses the analogy of an auditor—simply because an auditor cannot correct every abuse in a department's procurement policies does not mean that he should not go after a \$5000 coffee pot. See also Scott, C., and Alston, P., 'Adjudicating constitutional priorities in a transitional context: A comment on *Soobramoney*'s legacy and *Grootboom*'s promise' (2000) 16 *South African Journal on Human Rights* pp 206 – 268 [Hereinafter referred to as Scott & Alston: 2000], at p 242.

¹⁴⁴ According to Fiss: 1979, at p 43, virtually all public norm creation is polycentric because it affects as many people as structural reform litigation and equally impairs the capacity of each affected individual to participate. Additionally, more often than not, there is a myriad of possible remedies that could be formulated.

¹⁴⁵ Chayes: 1976, at p 1311.

¹⁴⁶ Pound, R., *The Formative era of American law* (1939) Little, Brown and Company, at p 45, as quoted by Horowitz: 1977, at p 3. See also Pieterse: 2004, at p 395.

authorities to the widespread nature of socio-economic problems which may either have been ignored or not contemplated.¹⁴⁷

The *Grootboom* case is a good example of a case alerting the authorities to the widespread nature of the problem of accessing adequate housing by many desperate people. The CC indicated that it was aware of the intolerable conditions under which many people are still living and that the respondents were but a fraction of them.¹⁴⁸ The declaration of the CC that the government's housing programme was unreasonable has since inspired litigation and policy revision in the area of housing rights.¹⁴⁹ The CC's ruling that government's housing policy was unreasonable for failure to provide for the needs of those in desperate need prompted government to, for instance, adopt an emergency housing policy.¹⁵⁰ When

¹⁴⁷ Abramovich: 2005, at p 195. See also Viljoen: 2005, at p 41.

¹⁴⁸ Para 2.

¹⁴⁹ See *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC); *Port Elizabeth Municipality v Various Occupiers Case* 2005 (1) SA 217 (CC).; *City of Cape Town v Neville Rudolph and Others* 2003 (11) BCLR 1236 (C); *Jaftha v Schoeman and others*; *Van Rooyen v Stoltz and others* [2003] 3 All SA 690 (C); and *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2006 (6) BCLR 728 (W).

¹⁵⁰ National Department of Housing, *Part 3: National Housing Programme: Housing Assistance in Emergency Circumstances* April 2004; sourced at <http://www.housing.gov.za/Content/legislation_policies/_Emergency%20%20Housing%20Policy.pdf> (accessed on 29 November 2005). The policy acknowledges the fact that it has been adopted as a direct response to the CC's ruling that the existing programme was unreasonable (see at p 5). See also Centre for Study of Social Policy (CSSP)'s report, *New roles for old adversaries: The challenge of using litigation to achieve system reform* (January 1998), available at <http://www.cssp.org/uploadFiles/New_for-old_adversaries.pdf> (accessed on 30 November 2005), [Hereinafter referred to as CSSP: 1998]. This report notes that a judicial decree can spotlight the worst abuses and galvanise public attention thereby producing short-term gains in funding for more services. The report contends further that class action litigation can serve to spark and sustain real institutional change in deeply

such policies are adopted, they will have wide application and benefit all people in situations similar to that of the litigant(s). This, as will be seen in chapter five, is the essence of the notion of distributive justice which is presented as the best response to polycentric tasks in the enforcement of socio-economic rights.¹⁵¹

Fuller's theory is also deficient to the extent that it does not develop a remedial theory. Fuller does not extend his analysis to the determination of the kinds of remedies that may be suitable in what he considers proper forms of adjudication. This omission is, however, deliberate. It naturally arises from the relationship that Fuller and other theorists like him assign to rights and remedies. As is demonstrated in chapter five,¹⁵² a sizeable number of scholars believe that rights and remedies are closely related.¹⁵³ This is because the latter are deduced from the former. In this relationship, since the remedy comes logically from the right, there is no need to develop an independent remedial theory. The purpose of the remedy is one of addressing the right that has been violated.

It is demonstrated in chapter five that this theory uses the notion of corrective justice as its basis. The corrective justice theory emphasises the

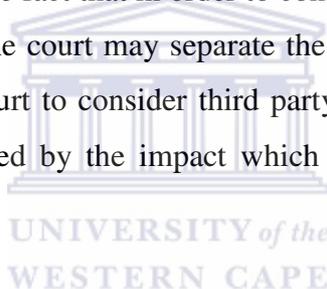
troubled jurisdictions. It can force agencies to acknowledge the magnitude of the problem and pay attention to resolving it (p 3).

¹⁵¹ Section 5.2.2.

¹⁵² At section 5.3.

¹⁵³ See Gewirtz, P., 'Remedies and resistance' (1983) 92 *Yale Law Journal* pp 585 – 680; Cooper-Stephenson, K., 'Principle and pragmatism in the law of remedies' in Berryman, J., (ed.) *Remedies, issues and perspectives* (1991) Thomson Professional Publishing, pp 1 – 48, at p 6; Cassels: 1991, at p 288; and Levinson, D., 'Rights essentialism and remedial equilibration' (1999) *Working paper No. 99-5, Legal Studies Working Paper Series, University of Virginia School of Law*, at p 3, sourced at SSRN: <<http://ssrn.com/abstract=155564>> (accessed on 25 June 2006), also published in (1999) 99(4) *Columbia Law Review* pp 857 – 940.

fact that remedies are granted against a defendant only when liability for violation of a right has been found.¹⁵⁴ While this may be the case in private law litigation, it is not true in public law litigation which implicates interests not necessarily connected to a defendant's wrong. Such litigation also exposes systemic problems not necessarily linked to the wrong but which need to be addressed. Rather than restrict oneself to the interests of the parties and establishment of liability, structural litigation confronts exterior interests and is geared more towards problem solving rather than fault finding. To achieve this, the development of a remedial theory that is not dictated by the rights itself becomes necessary.¹⁵⁵ However, the theoretical considerations that affect both rights and remedies must be kept separate.¹⁵⁶ This, again, is where distributive justice becomes most relevant. This is something that Fuller overlooks; he ignores the fact that in order to consider third party interests implicated by a case, the court may separate the rights from the remedy. This will enable the court to consider third party interests without being unnecessarily constrained by the impact which this would have on the right.



3.4.2.1 New forms of adjudication as a response to polycentric concerns

Though polycentricism does not disqualify socio-economic rights from judicial protection, it presents a problem that needs to be tackled. To resolve polycentric tasks, Fuller proposes a new form of adjudication which he refers to as 'mixed form adjudication'.¹⁵⁷ By 'mixed form

¹⁵⁴ See chapter five, section 5.2.1.

¹⁵⁵ Sturm: 1991, at p 1390. See also Zakrzewski, R., *Remedies reclassified* (2005) Oxford University Press, at p 37.

¹⁵⁶ Wells, M., and Eaton, E., *Constitutional remedies: A reference book for the United States Constitution* (2002) Praeger Publishing, at p xvii.

¹⁵⁷ Fuller: 1978, at 396.

adjudication' Fuller means 'a mixture of adjudication and negotiation'.¹⁵⁸ To drive home his point, Fuller uses the example of a labour dispute arising from an agreement to make salary adjustments with multiple variables which would not only benefit but affect all employees and the employer. To resolve this dispute, Fuller proposes the use of a 'tripartite' arbitration board. Such an arbitration board would be constituted by an impartial chairman who is flanked by two fellow arbitrators. One of the two arbitrators would be selected by the employer and the other by the labour union. The arbitration board would reach its decision unanimously after mutual consultation not only amongst its members but also with the parties.¹⁵⁹

In my opinion, this form of mixed adjudication will enable the arbitration body to be informed of interests that would have not been brought to light had the process not had a tripartite character. This will educate the tribunal on all the repercussions that the decision is likely to have on the parties and all directly implicated interests. In addition, it will produce a result that is acceptable to all the parties.¹⁶⁰ This is because of the degree of participation by the parties that takes place at the remedial stage.

¹⁵⁸ Fuller (as above).

¹⁵⁹ The two arbitrators appointed by the union and the employer respectively will be alive to the interests of the party they present and will bring this experience as dimensions to the decision. However, to counter the problem of extending the failed negotiations into the arbitration process, the objectivity and neutrality of the chairman will become useful. The impact of this process is that it will result in a decision which has taken into account all the interests and is likely to be accepted by all the parties. This will immunise the decision from repercussions that would otherwise have not been foreseen by the arbitrators.

¹⁶⁰ Currie & De Waal : 2005, at p 569, contend that They reckon that the winner-takes-all styles of adjudication may not be suited for the resolution of such matters. This is because the winner-takes-all forms of adjudication are backed by the fact that the courts solve disputes between two parties, each of whom can represent his interests before the court and the task of the court is to weigh up the arguments it has received and decide the matter in favour of one party against another.

Participation will bring to light the obstacles likely to be encountered and, without surprise, clarify the remedial obligations of the parties in a cooperative manner. This makes implementation of the decision easy and forestalls resistance when the time comes to assume the remedial obligations.

Adversarial litigation on the other hand may not provide the opportunity for consideration of all interests implicated by a case. The process of adversarial litigation usually restricts itself to hearing the interests and arguments of the parties before it.¹⁶¹ As a result, the ruling emanating from such ‘winner-takes-all’ litigation will not take into consideration interests and arguments not presented before the court.¹⁶² Difficulties may be experienced in the process of implementing the court’s remedies because of the unforeseen repercussions.

To avoid grappling with the problem of unforeseen repercussions when implementing remedies in socio-economic rights litigation, one would advocate for non-adversarial litigation. However, this is not to suggest that adversarial litigation should not play any role in the adjudication process. Fuller goes to great lengths to demonstrate the advantages of adversarial litigation. In Fuller’s opinion, ‘an adversary presentation seems the only means for combating [the] human tendency to judge too swiftly in terms of the familiar, that which is not yet fully known’.¹⁶³ Fuller is of the view that judicial decision makers are susceptible to making quick conclusions about situations and then later applying these

¹⁶¹ Sturm: 1991, at p 1394. Sturm submits that lawyers’ control over the process in adversarial litigation tends to detract from the client’s sense of autonomy and responsibility. He adds that the ‘win-lose’ character of the adversary process prevents the exchange and integration of multiple perspectives necessary to produce an effective remedy (at 1395).

¹⁶² Currie & De Waal: 2005, at p 569.

¹⁶³ Fuller: 1978, at p 382.

conclusions consistently to seemingly similar situations. He states as follows:

What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is wanting for the case and, without awaiting further proofs, this label is promptly assigned to it. It is a mistake to suppose that this premature cataloguing must necessarily result from impatience, prejudice or mental sloth. Often it proceeds from a very understandable desire to bring the hearing into some order and coherence ... But what starts as a preliminary diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.¹⁶⁴

Fuller contends that the arguments of counsel and the preparations that they put in makes it possible to explore all the peculiarities and nuances of the case. Additionally, the preparation process leads to a preliminary analysis of issues which gives the hearing form and direction.¹⁶⁵ Similarly, Shaibani submits that some forms of litigation, including constitutional law cases, 'are likely to stir emotional and idiosyncratic reactions in the participants'.¹⁶⁶ However, through adversarial litigation the parties will be able to resolve their disputes in an environment where emotions can be controlled, which reduces the chances of undesirable confrontation. The parties will, therefore, be able to express their aggression without physical fights.¹⁶⁷

¹⁶⁴ Fuller: 1978, at 394.

¹⁶⁵ Fuller: 1978, at p 383. He adds that the exchange of written pleadings between the parties will greatly reduce the dispute. In addition, the process gives adjudication integrity by allowing the parties, through their representatives, to present facts and issues through legal proofs and arguments. He contends further that the adjudicator also gains confidence in reaching his decision on the basis of arguments and proofs provided by the parties (pp 383 – 384).

¹⁶⁶ Shaibani, S., 'Psychodynamics of the judicial process' (1999) 1 *Stanford Journal of Legal Studies* pp 1 – 10 [Hereinafter referred to as Shaibani: 1999], at p 2

¹⁶⁷ Shaibani: 1999, at p 3

In spite of its advantages, however, adversarial litigation also has its disadvantages. Adversarial litigation is not only time consuming and expensive but it emphasises the differences between the parties with the effect that conflict is maximised instead of being minimised.¹⁶⁸ Adversarial litigation is also individualistic, in the sense that evidence is gathered to support the respective parties' arguments and interests.¹⁶⁹

It is my submission that a non-adversarial style of litigation would, while maintaining the advantages of adversarial litigation, minimise its disadvantages. Such non-adversarial style would be akin to what Fuller has described above as 'mixed adjudication' combining both adjudication and negotiation. This form of adjudication would be aimed at ensuring maximum participation of all the parties in decision-making, and design and implementation of remedies.¹⁷⁰ Indeed, the use of this form of litigation in socio-economic rights litigation is gaining increasing

¹⁶⁸ Moore, B., 'Community conferencing as transformative problem solving' (2000) 24 *SPIDER NEWS* pp 1 – 4, at p 1.

¹⁶⁹ Brent, K., Marshall, J., Picou, J., and Schlichtman, R., 'Technological disasters, litigation stress and the use of Alternative Dispute Resolution mechanisms' (2002) 26 *Law & Policy* pp 289 – 307 [Hereinafter referred to as Brent *et al*: 2002], at p 290. See also generally Chayes: 1979; and Australian Law Reform Commission (ALRC) Issue paper 22 *Review of the adversarial system of litigation: Rethinking family law proceedings*. The ACLRC takes note of the fact that an adversarial system means that the court has to rely on the parties providing all relevant information. This means that there are many unanswered or unexplored issues and questions because the parties will be selective in the information they present. The ALRC takes the view that a more inquisitorial approach might allow decision makers to satisfy themselves that they have all the relevant information to make decisions (para 5.4).

¹⁷⁰ According to Scott & Alston: 2000, at p 224, it is especially at the level of remedies where the greatest potential lies for forging inter-institutional relations, which will help bring about relief that is both effective and legitimate in the eyes both of litigants and of society at large.

support.¹⁷¹ It has been promoted especially within the context of promotion of institutional dialogue as discussed by Scott.¹⁷² In *Port Elizabeth Municipality v Various Occupiers Case*,¹⁷³ Sachs J, for instance, emphasised the benefits that mediation would bring in constitutional litigation. He said that:

Not only can mediation reduce the expenses of litigation, it can help avoid the exacerbation of tensions that forensic combat produces. By bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give-and-take, mediators can find way around sticking-points in a manner that the adversarial process might not be able to do. Money that otherwise might be spent on unpleasant and polarising litigation can better be used to facilitate an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we live in a shared society.¹⁷⁴

It should also be noted that non-adversarial forms of litigation not only make it possible to tackle polycentric tasks, they reduce the tensions between the court and other organs. The court will not be perceived by the other organs as imposing obligations on them, instead it will be seen as

¹⁷¹ See for example Abramovich: 2005. See also Sabel, F., and Simon, H., 'Destablization rights: How public interest litigation succeeds' (1999) 113 *Harvard Law Review* pp 1 – 83, [Hereinafter referred to as Sable & Simon: 1999]; Scott, C. 'Towards a principled, pragmatic judicial role' (1999) 1 *ESR Review* pp 4 – 6 [Hereinafter referred to as Scott: 1999]; Vikas, J., 'Social change and public interest litigation in India' (2005) *Independent Media Centre, India*, sourced at <<http://www.india.indymedia.org/en/2005/03/210205.shtml>> (accessed on 30 November 2005); Brent *et al*: 2002; Scott & Alston: 2000; Van Bueren: 1999; and Pieterse: 2004, at p 396; Pieterse views adjudication as a manner of building a pragmatic notion of inter-institutional cooperative interaction (at pp 406 and 411 – 2). Sachs: 2005, at p 151, has emphasised the need for dialogue between the different branches of government to be civil in tone and reasonable in substance. In Sachs' view, courts view themselves as being not in a contestentary relationship with government, but in a constitutional conversation.

¹⁷² Scott: 1999. See also Scott and Alston: 2000, at pp 223 – 224.

¹⁷³ 2005 (1) SA 217 (CC).

¹⁷⁴ Para 42.

facilitating dialogue between the parties. It should be noted, however, that the successful use of this form of litigation is very much dependent on whether the parties are willing to participate in it in good faith. Its success is, therefore, not entirely dependent on the court but also on the attitude of the parties. Dialogue, cooperation and collaboration are voluntary and cannot be imposed upon a person with a negative attitude.

3.4.2.2 Widened 'locus standi' to accommodate polycentric interests

Fuller's theory of polycentricism was conceived with reference to private law litigation and is based on the notion of corrective justice. The notion of corrective justice, as discussed in chapter five,¹⁷⁵ makes a suit individualistic, bipolar in nature and involving very limited interests. Fuller's objection to polycentric litigation has no place in modern public law litigation. This form of litigation has become very complex and often involves a number of interests meriting legal protection. Under a legal duty to protect human rights, modern courts have resorted to distributive justice methods of litigation that deviate substantially from the traditional forms.¹⁷⁶ As seen above,¹⁷⁷ Fuller's main concern with public law litigation is that it does not guarantee participation by all the interests concerned. However, Fuller fails to explore ways to bring on board the participation, as much as is reasonably possible, of all those affected by a case.¹⁷⁸

¹⁷⁵ Section 5.2.1.

¹⁷⁶ See Sturm: 1991, at p 1387 – 1388. Sturm contends that the social realities are that our social existence is now defined by large-scale organisations, particularly government bureaucracies and that to insist on adjudicative methods that ignore these realities is a mistake.

¹⁷⁷ Section 3.4.1.

¹⁷⁸ Sturm: 1991, at p 1391.

In constitutional litigation, a court may confront polycentric challenges by involving a wide range of parties in the resolution of a dispute.¹⁷⁹ In fact, at the disposal of the courts are several procedures that allow judges to invite participation by all persons affected by a case. A judge could order the issuance of third party notices to people he/she thinks may be affected by a decision. In addition to this, the judge may appoint a *guardian ad litem* to represent absentee interests.¹⁸⁰ In modern constitutional states, constitutional litigation is often complemented by provisions widening *locus standi*, which opens up the process of litigation to a greater number of interested parties. This is the spirit of section 38 of the South African Constitution,¹⁸¹ which widens *locus* beyond the confines of the common law.¹⁸² The CC has embraced the spirit of this section fully by allowing access to the courts to a variety of people who in traditional terms would not have had audience.¹⁸³

¹⁷⁹ See Fiss: 1979, at p 40.

¹⁸⁰ Chayes: 1976, at 1312.

¹⁸¹ Section 38 allows the following people to approach the courts in constitutional matters: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members.

¹⁸² The common law is very strict on the question of who may approach the court to enforce a right. It is only those with a direct interest in the case or deriving interest from the parties that may be joined in litigation.

¹⁸³ Chaskalson J in *Ferreira v Levin NO*, (1996) 1 SA 984 (CC), at paragraph 165 held that the Court should rather adopt a broader approach to standing. This would be consistent with the mandate given to the Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of protection to which they are entitled.



The Court has also used section 38 to entrench the use of class actions to pursue claims based on the Constitution. In *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape*,¹⁸⁴ the applicants' disability grants had been suspended without due process of law. They brought an action on their own behalf and on behalf of others in a similar position that numbered over 100,000. Relying on section 38, the Court rejected the objection that the applicants did not have standing. The Court said that the practical difficulties associated with representative and class actions could not justify denial of such action when the Constitution made specific provision for it. According to the Court, a flexible and generous approach was called for to make it easier for disadvantaged and poor people to approach the courts on public issues and to ensure that the public administration adhered to the fundamental constitutional principle of legality in the exercise of public power. This decision was confirmed by the Supreme Court of Appeal in *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others*.¹⁸⁵

Additionally, the Rules of the CC allow any person who is entitled to join the proceedings to apply for leave to intervene at any stage of the proceedings.¹⁸⁶ The Rules also allow for the participation as *amici curiae*: 'any person interested in any matter before the Court'.¹⁸⁷ The involvement

¹⁸⁴ 2001(2) SA 609 (E).

¹⁸⁵ 2001 (10) BCLR 1039 (A)

¹⁸⁶ *Rules of the Constitutional Court*, promulgated under Government Notice R1675 in Government Gazette 25726 of 31 October 2003 [Hereinafter referred to as Rules of Court] , rule 8(1).

¹⁸⁷ Rules of Court, rule 10. This rule has been used mainly by public interest groups, human rights advocates and academic research institutions in order to promote the interests of marginalised groups and to suggest interpretations of the human rights provisions in the Constitution. Examples of such groups in socio-economic rights litigation include the Legal Resource Centre, Treatment Action Campaign and the

of a number of parties in the litigation will bring into perspective interests which the main parties have not considered. This will put the court in a position to make decisions that do not adversely affect such other interests. This does not, however, mean that all interests will be brought to light;¹⁸⁸ rather it plays a very important minimising role and may provoke inquiry into the impact of the decision on interests not directly implicated.

3.5 CONCLUSION

The objections to the judicial enforcement of socio-economic rights based on the institutional competence dimension are more complicated to deal with in comparison to those based on the legitimacy dimension. As is seen in chapter two, it is much easier to prove that by their nature socio-economic rights are no different from civil and political rights. It is, however, not possible to prove with similar ease that the courts are institutionally equipped to adjudicate and answer all questions relating to the realisation of socio-economic rights. This is a more controversial issue because of the kind of questions that it raises. Unlike the legitimacy dimension, which raises legal questions, some of the questions raised by the institutional competence objections are political and practical in nature. The political nature of these questions is premised on the assertion that the judiciary being an unelected body is disqualified from making decisions on such controversial issues as allocation of resources and needs

Community Law Centre at the University of the Western Cape. See Heywood, M., 'Shaping, making and breaking the law in the campaign for National HIV/AIDS Treatment Plan' in Jones, P., and Stokke, K., (eds.) *Democratising development: The politics of socio-economic rights in South Africa* (2005) Nijhoff Law Specials, Vol 64 pp 181 – 212 [Hereinafter referred to as Heywood: 2005].

¹⁸⁸ Though the judge must be certain that the full range of interests is represented he/she should not fail in his/her duty to protect a right simply because every affected individual cannot meaningfully be represented. See Fiss: 1979, at p 40.

prioritisation.¹⁸⁹ Those who pursue this objection are quick to find refuge in the doctrine of separation of powers. They contend that the division of functions between the different organs of state by this doctrine puts socio-economic rights issues beyond the jurisdiction of the courts.

It has, however, been demonstrated in this chapter that the doctrine of separation of powers has gone through an evolution since its inception. The principle of checks and balances has made it possible for organs of state to discharge functions that on their face fall outside the terrain of such organs.¹⁹⁰ The judiciary has particularly been empowered through the doctrine of constitutionalism and the rule of law to check the power excesses of the legislature and the executive.¹⁹¹ This is in addition to protecting the rights of all, including those of minorities.¹⁹² The doctrine of constitutionalism as complemented by the principle of the rule of law from this perspective also helps in understanding the notion of democracy. The objectors have skewed democracy to mean only majoritarian democracy. However, this chapter has demonstrated that democracy means more than majoritarian democracy; it embraces the protection of the values and interests of minorities.¹⁹³ It is incumbent

¹⁸⁹ See chapter four, section 4.2.4 for a detailed discussion of the questions that resource allocation gives rise to and the difficulties that courts confront when faced with such questions.

¹⁹⁰ *First Certification* case, para 108.

¹⁹¹ Currie & De Waal: 2001, at p 10. See also Currie & De Waal: 2005, at 8; Hamilton: 78, at p 467 and *TAC* case, paras 98 – 99.

¹⁹² Bork: 1990, at p 61. Forsyth & Elliot: 2003, at p 294. See also Moseneke: 2002, at p 315.

¹⁹³ See Devenish: 1999, at p 4. See also Whittington, E., 'An "indispensable feature"?' Constitutionalism and judicial review' (2002) 6 *Legislation and Public Policy* pp 21 – 33, at pp 24 – 6; and Davis *et al*: 1994, at p 2.

upon the judiciary to protect these interests against majoritarian infraction.

This chapter has also demonstrated that all rights, including civil and political rights and all cases that come to court have polycentric repercussions.¹⁹⁴ Though it may be conceded that socio-economic rights litigation is far more polycentric, this does not make it any easier for legislative and executive organs to deal with these rights. The executive and legislature usually adopt policy and legislation, respectively, without having tested them against real life problems. These organs may, therefore, not be in any better position to appreciate the polycentric effects of their decisions. In contrast, courts deal with real life problems sometimes not contemplated by either the legislature or the executive. The courts will, therefore, be better placed to appreciate the polycentric effects of their decisions. Additionally, court orders usually have positive polycentric effects. They always highlight the authorities to the presence of widespread problems which may inspire adoption of policy and legislation to tackle the problem.¹⁹⁵ It is also safe to assume that the realisation of constitutional guarantees cannot be expected solely through judicial adjudication. Indeed, 'it is fruitless and even dangerous to look to the courts for the first and last word on any matter concerning the vindication of fundamental societal values'.¹⁹⁶ Realisation of the constitutional guarantees should combine judicial adjudication with efforts within political, economical and social circles.¹⁹⁷

¹⁹⁴ Fuller: 1978, at p 401. See also O'Regan: 1999, at p 2.

¹⁹⁵ Abramovich: 2005, at p 195.

¹⁹⁶ Scott & Macklem: 1992, at pp 6 – 7 and 42.

¹⁹⁷ See Heywood: 2005, at p 186.

Additionally, the institutional based objections expressed against judicial power are at best exaggerated.¹⁹⁸ The judiciary still stands in a very weak position and it is unlikely that it will displace the other branches of government and usurp political power.¹⁹⁹ In fact, the growth of judicial power has been propelled by the failure of the other agencies, and as long as these failures continue, judicial power will continue to blossom. However, it should be noted that the contemporary judiciary has assumed new roles, rather than stand in a position of rivalry with the other branches, the judiciary is a complementary force. It stands out clearly as a partner in the enterprise of realisation of a society in which respect for all human beings and the realisation of social justice is a reality.²⁰⁰ It is on the basis of these roles that the CC has defined the obligations engendered by the socio-economic rights in the South African Constitution as seen in the next chapter.



¹⁹⁸ Pieterse: 2005, at p 132.

¹⁹⁹ Chayes: 1976, at p 1313.

²⁰⁰ Chapters seven will show how judiciaries have played important roles in tackling structural problems and achieving structural changes in society. Judicial decisions have initiated a continuous and tentative process of dialogue between itself and all sectors of society on the structural problems prevalent in many communities. Chayes: 1976, at p 1316. All sectors of South African society should accordingly allow the judiciary to exercise these important roles. It is also true that judicial decisions are not final as they may be overruled by majoritarian forces if the proper procedures are followed. See Fiss: 1979, at p 15.

CHAPTER FOUR

TRANSLATING SOCIO-ECONOMIC RIGHTS FROM ABSTRACT PAPER RIGHTS TO FULLY FLEDGED INDIVIDUAL RIGHTS: AN ASSESSMENT OF THE CURRENT SOUTH AFRICAN APPROACH

4.1 INTRODUCTION

This chapter explores the nature of the obligations engendered by the different categories of socio-economic rights protected by the 1996 South African Constitution and the extent to which they have been implemented. The chapter is premised on the acceptance of the socio-economic rights in the Constitution as justiciable. It is distinguishable from chapter two and three which discuss the objections in support of rejection of socio-economic rights as justiciable rights. The purpose of the current chapter is to discuss the precise nature of the obligations that socio-economic rights give rise to and the manner in which they have been enforced by the courts. This discussion is prerequisite to understanding the nature of the remedies that violation of socio-economic rights should attract. One cannot determine the most appropriate remedy to vindicate a right, which is the secondary theory, without an understanding of the nature of the obligations the right engenders, which is the primary theory.¹ The only

¹ Dinah Shelton refers to rights and remedies as two theories, the primary and secondary respectively. The primary theory addresses the obligations engendered by the rights and the secondary theory address the question of what ought to be done when the rights are violated. Both theories have to be addressed in the litigation process. Shelton, D., *Remedies in international human rights law* (1999) Oxford University Press, at pp 37 – 38. See also Cooper-Stephenson, K., ‘Principle and pragmatism in the law of remedies’ in Berryman, J., (ed.) *Remedies, issues and perspectives* (1991) Thomson Professional Publishing pp 1 – 48 [Hereinafter referred to as Cooper-Stephenson: 1991]. Cooper

reason remedies exist is to give effect to the rights that are protected by the law. Actually, in procedural terms, the remedial process begins only after a finding of liability has been made.² There is, therefore, a need to establish the relationship between the obligations engendered by the rights and the remedial obligations that their violation imposes.³

There is ample evidence to suggest that the drafters of the Constitution were greatly inspired by the International Covenant on Economic, Social and Cultural Rights (the ICESCR),⁴ which explains why most socio-economic rights provisions are drafted along the same lines as those of the ICESCR.⁵ Article 2(1), the linchpin of the ICESCR, obligates states to

contends that rights and remedies are inextricably linked, that determination neither of right nor remedy can be made in isolation of the other (at p 6).

² Sturm, P., 'A normative theory of public law remedies' (1991) 79 *Georgetown Law Journal* pp 1355 – 1446 [Hereinafter referred to as Sturm: 1991], at p 1360.

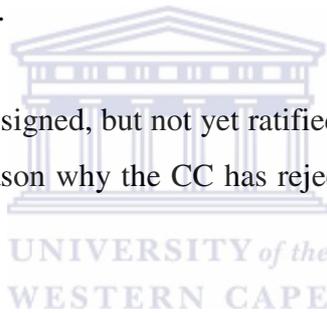
³ Cassels, J., 'An inconvenient balance: The injunction as a Charter remedy' in Berryman, J., (ed.) *Remedies, issues and perspectives* (1991) Thomas Professional Publishing pp 272 – 311 [Hereinafter referred to as Cassels: 1991], at p 291. However, as seen in chapter five (sections 5.2.1 and 5.3), while the theory of corrective justice dictates that remedies flow naturally from rights, this theory is not appropriate for constitutional remedial litigation. In choosing appropriate remedies that address systemic violations, it may be necessary to disengage remedies from the rights. See Berryman, J., *The law of equitable remedies* (2000) Irwin Law, at p 9. Sometimes the choice of a remedy in public law litigation need not be determined by the outcome of the trial on the merits (Sturm: 1991, at p 1364). This, however, does not mean that the nature of the obligations engendered by the rights do not play any role at the remedial level. The remedies should, to the extent possible, be directed at effecting these obligations though some times not with the immediacy that corrective justice demands.

⁴ Adopted and opened for signature, ratification and accession by GA Resolution 2200A (XXI) of 16 December 1966, entered into force 3 January 1976.

⁵ See Constitutional Assembly Constitutional Committee, Draft Bill of Rights, Volume 1, *Explanatory Memoranda of Technical Committee to Theme Committee IV of the Constitutional Assembly* (9 October 1995), [on file with author].

undertake steps to the maximum of their resources, with a view to progressively realising the rights by all appropriate means. Similarly, the Constitution compels the state to take reasonable legislative and other measures, within its available resources, to progressively realise the rights.⁶ The differences between the Constitution and the ICESCR are at best nomenclatural; a closer scrutiny shows that the obligations engendered by the two instruments are similar in many respects. Both are subject to limitations defined by the available resources and the need to realise the rights progressively. ‘By all appropriate means’ as used in the ICESCR could be equated to ‘reasonable legislative and other measures’ used in the Constitution.⁷ In spite of the similarities, the Constitutional Court (CC) has endorsed some and rejected other of the international law constructions of the ICESCR. At best, the Court’s approach can be described as ambivalent.

While South Africa has signed, but not yet ratified, the ICESCR, this does not appear to be the reason why the CC has rejected some aspects of the



⁶ Sections 26(2) and 27(2); the right to further education in 29(1)(b) is also to be realised progressively by the state taking reasonable measures, but no mention is made of acting within available resources.

⁷ The United Nations Committee on Economic, Social and Cultural Rights (the Committee) has said that while countries are free to choose what they consider to be the most appropriate means, it is important that the basis of such means be given. In spite of this, the Committee has said that the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee itself to make. General Comment No. 3, *The nature of States Parties' obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at p 14 (2003), para 10 [Hereinafter referred to as General Comment No. 3]. There is no doubt that an element of the reasonableness of the measures chosen will feature in the determination of appropriateness.

jurisprudence generated by this Covenant.⁸ Instead, the rejection is informed by the CC's normative conception of the nature of the obligations that socio-economic rights engender.⁹ This is in addition to the Court's understanding of its role in enforcing the Bill of Rights against the elected branches of the state.¹⁰ The CC has been caught between the

⁸ In fact the South African courts are compelled by the Constitution to consider international law when interpreting any legislation and to prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law (sections 39(1) and 233). Indeed, the CC has held that both binding and non-binding international law may be used as a tool of interpretation of the Constitution. See *S v Makwanyane* (*Makwanyane* case) 1995 (3) SA 391 (CC), para 35. This means that although South Africa has not ratified the ICESCR, the Covenant may still be used as a tool for interpreting the socio-economic rights provisions in the Constitution. It should be noted, however, that South Africa in support of its membership to the Human Rights Council has pledged to ratify the ICESCR. See Note no. 143/06 made by South Africa to the President of the United Nations General Assembly 2 May 2006 annexed to document detailing the list of candidates for election to the Human Rights Council, UN General Assembly 60th Session: *Election and Appointments. Subsidiary Organs and other elections*, available at <<http://www.un.org/ga/60/elect/hrc/>>

⁹ Pieterse, M., *A benefit-focused analysis of constitutional health rights* Ph.D thesis submitted to the University of Witwatersrand [December 2005] [Hereinafter referred to as Pieterse: 2005], at p 121.

¹⁰ Pieterse, M., 'Possibilities and pitfalls in the domestic enforcement of socio-economic rights: Contemplating the South African experience' (2004) 26 *Human Rights Quarterly* pp 882 – 905 [Hereinafter referred to as Pieterse: 2004a], at p 903. Pieterse submits further that the CC simultaneously affirms its institutional competence to award relief for violations of socio-economic rights and declines to exercise this competence where such exercise requires it to depart from adjudicative practices to which courts are accustomed: 'it simultaneously proclaims the interdependence and indivisibility of human rights and refuses to translate such proclamation into tangible permeation of norms associated with the vindication of social and civil rights respectively'. In his opinion, this is because the Court's jurisprudence is but in its infancy and it is, therefore, perhaps wise for it to approach the relatively novel task of reviewing state compliance with socio-economic duties with tentative pragmatism. According to Davis, the CC is well aware of international jurisprudence and its ambitious reach but is reluctant to cross the judicial boundary which it has established for itself by employing an administrative law model to

need to translate the paper rights into tangible rights, on the one hand and, on the other hand, the need to maintain the separation of powers by deferring to the legislative and executive branches of government.¹¹ This is why it has rejected international human rights law interpretations that would put it in direct confrontation with the other branches of the state.¹²

justify its cautious approach. Davis, D., 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *South African Journal on Human Rights* pp 301 – 327 [Hereinafter referred to as Davis: 2006], at pp 304 and 323.

¹¹ Davis: 2006, at pp 316 – 317, submits that the Court's approach does not reflect ignorance of international jurisprudence nor a lack of cognisance of the implications of sections 26(1) [right of access to adequate housing] and 27(1) [right of access to health care services, sufficient food and water, and social security and social assistance] of the text, but rather the knowledge that the text itself holds out a promise of a kind of society predicated on a very different approach from that which currently prevails in the Ministry of Finance. Davis contends that the government has retreated from its Reconstruction and Development Policy (RDP) promises, which emphasised a more interventionist state, to the Growth and Redistribution Policy (GEAR), which promotes a minimalist state intervention role.

¹² Roux submits, for instance, that the adoption of the minimum core approach would have brought the CC into direct confrontation with the political branches since it would have required the Court to substitute its own views of the needs that ought to be prioritised for that of the legislature and executive. This is why the Court has used South Africa's non-ratification of the ICESCR, which he refers to as a 'discretionary gap', to avoid interpretations that would lead to confrontation. Roux, T., 'Legitimizing transformation: Political resource allocation in the South African Constitutional Court' (2003) 10 *Democratization* pp 92 – 111 [Hereinafter referred to as Roux: 2003], at p 96. See also Brand, D., 'The proceduralisation of South African socio-economic rights jurisprudence, or "what are socio-economic rights for"' in Botha, H., Van der Walt, A., and Van der Walt, J., (eds.) *Rights and democracy in a transformative constitution* (2003) Sun Press Stellenbosch pp 33 – 56 [Hereinafter referred to as Brand: 2003], at p 51. Nevertheless, the CC's confirmation that socio-economic rights are justiciable and the development of its reasonableness review approach as a means of assessing the state's obligations has strengthened the position of the advocates of socio-economic rights in both domestic and international arenas. This approach not only has confirmed that socio-economic rights are capable of constitutional protection but also that they are

Some scholars have described the CC's approach as 'minimalist' in the sense that it only decides what is necessary in a particular case and avoids laying down any abstract rules and theories. This approach is considered ideal in protecting democracy because it leaves contentious issues open for democratic deliberation.¹³ The Court's approach is, therefore, perceived as capable of both respecting the separation of powers and realising the transformative vision of the Constitution.¹⁴

The CC has rejected the notion of minimum core obligations and has instead adopted a reasonableness review approach. This chapter evaluates the CC's approach against the principles of international human rights law, most especially the jurisprudence of the Committee.¹⁵ The CC has been criticised for construing socio-economic rights as abstract rights, whose beneficiaries are only entitled to reasonable programmes instead of

amenable to judicial enforcement. See *In re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) (*First Certification case*).

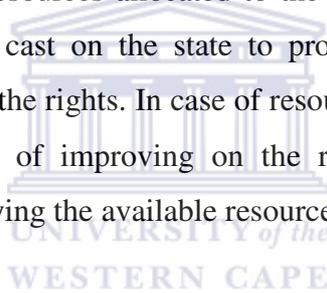
¹³ Steinberg, C., 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *South African Law Journal* pp 264 – 284 [Hereinafter referred to as Steinberg: 2006], at p 269 quoting from Sunstein, C., *One case at a time: Judicial minimalism on the Supreme Court* (1999) President and Fellows of Harvard College, at p 9.

¹⁴ Steinberg: 2006, at p 276.

¹⁵ This is the Committee monitoring the implementation of the ICESCR. While this Committee has greatly contributed to the understanding of the obligations engendered by the rights in the Covenant, its jurisprudence still lacks a judicial component. This is because, as has been mentioned in chapter two (at section 2.2.) the Committee, unlike its counterpart the Human Rights Committee, does not have a mandate to entertain and to consider, in a judicious manner, complaints from victims. Though the process of giving the Committee such a mandate through the adoption of an optional protocol to the ICESCR began way back, it has been riddled with a number of obstacles and has moved at a considerably slow pace. See Chenwi, L., and Mbazira., C., 'The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) *ESR Review* pp 9 – 12.

concrete goods and services. The CC not only has failed to give content to these rights but has also failed to interrogate the effectiveness of the means chosen to realise them. This is in addition to the failure to interrogate the reasonableness of the resources deployed for the purpose of realising the rights and to question whether there are efforts to raise and allocate more resources to the rights.

This chapter demonstrates, however, that the reasonableness review approach could be strengthened to give normative content to the rights. A proportionality test, equivalent to the one used in the general limitations clause inquiry, is proposed. This would enable the court to interrogate the reasonableness of the means chosen on the basis of their ability to realise the right(s) in issue. The chapter also advocates interrogation of the reasonableness of the resources allocated to the realisation of the rights. The burden should be cast on the state to prove that it has allocated reasonable resources to the rights. In case of resource limitations, the state should prove its plans of improving on the resources in addition to proving that it is employing the available resources maximally.



4.2 AN APPRAISAL OF THE CC'S REASONABLENESS REVIEW APPROACH

The CC has held that in socio-economic rights litigation the question should not always be one of whether or not these rights are justiciable but how to enforce them in a given case.¹⁶ The CC has dismissed submissions that socio-economic rights cannot be justiciable because they have budgetary implications. In the CC's opinion, when the courts enforce socio-economic rights, the task conferred upon them is no different from the one conferred on them when they enforce civil and political rights. According to the Court, this is because, just like socio-economic rights, orders to enforce civil and political rights may have budgetary implications.¹⁷ The CC has also said that the inclusion of socio-economic rights in the Constitution does not result in the violation of the doctrine of separation of powers and that, at the very minimum, socio-economic rights can be negatively protected from improper invasion.¹⁸

On the basis of the above, the CC has had no problem enforcing the socio-economic rights in the Constitution. The first case to engage directly with the enforcement of these rights was *Soobramoney v Minister of Health, Kwazulu-Natal*.¹⁹ This case was instituted by a patient who had been denied access to dialysis treatment under a policy that excluded patients of his status because of the limited resources at the disposal of the hospital.²⁰ The Court found that while the state was under a duty to

¹⁶ *Government of the Republic of South Africa v Grootboom & Others*, 2000 (11) BCLR 1169 (CC) 2001 (1) SA 46 (CC) (*Grootboom* case), para 20.

¹⁷ *First Certification* case, para 77.

¹⁸ *First Certification* case, para 78.

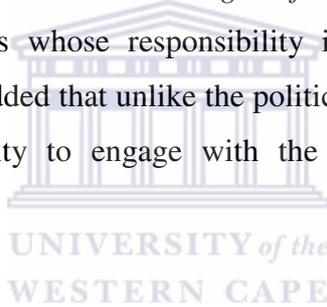
¹⁹ 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) (*Soobramoney* case).

²⁰ Mr. Soobramoney relied on the section 27(3) right not to be denied emergency medical care and the section 11 right to life. The Court found that Mr. Soobramoney could not

provide Mr. Soobramoney with access to health care services, it had been established that it did not have sufficient resources to provide dialysis treatment to all those in need.²¹ The Court emphasised that:

[The] guarantees of the Constitution are not absolute but may be limited in one way or another. In some instances, the Constitution states in so many words that the state must take reasonable legislative and other measures, within its available resources “to achieve the progressive realisation of each of these rights.” In its language, the Constitution accepts that it cannot solve all of our society’s woes overnight, but must go on trying to resolve these problems. One of the limiting factors to the attainment of the Constitution’s guarantees is that of limited or scarce resources. In the present case the limited haemodialysis facilities, inclusive of haemodialysis machines, beds and trained staff constitute the limited or scarce facilities.²²

In the Court’s view, it would only interfere with the decision of the hospital if it was irrational and taken in bad faith: ‘A court will be slow to interfere with *rational decisions taken in good faith* by the political organs and medical authorities whose responsibility it is to deal with such matters’.²³ The Court added that unlike the political organs it did not have the institutional capacity to engage with the agonising problems of making choices.²⁴



base his case on section 27(3) because his case was not an emergency. In the CC’s opinion, an emergency occurs when ‘[a] person suffers a sudden catastrophe which calls for immediate medical attention’ (para 20). Mr. Soobramoney’s case was not an emergency; it was ‘an ongoing state of affairs resulting from a deterioration of ... [his] renal function which is incurable’ (para 21). Having failed to be treated as an emergency under section 27(3), Mr. Soobramoney’s case could be dealt with only in terms of sections 27(1) and (2) of the Constitution.

²¹ See paras 24 – 26.

²² Para 44.

²³ Para 29 [Emphasis mine].

²⁴ Para 58.

The *Soobramoney* case was followed by the *Grootboom* case, a case in which the Court moved away from the rationality test set out in *Soobramoney* to a reasonableness test. This case was instituted under sections 26(1) and 28(1) (c) to enforce everyone's right of access to adequate housing and the children's rights to shelter, basic nutrition and health care respectively. In setting aside the decision of the Cape High Court,²⁵ the CC held that the Constitution requires the state to put in place a comprehensive and workable plan in order to meet its socio-economic rights obligations. The Court held further that this obligation is defined by three key elements that have to be considered separately: (a) 'to take reasonable legislative and other measures'; (b) 'to achieve the progressive realisation' of the right; and (c) to act 'within available resources'.²⁶ A reasonable programme, according to the CC, must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.²⁷ Each sphere of government must accept responsibility for the implementation of particular parts of a comprehensive and well coordinated programme.²⁸

²⁵ See *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C) in which Davis J held that the right in section 26(1) was subject to section 26(2), meaning that all the state could do was to undertake reasonable measures to realise the rights progressively. According to Davis, the state's progressive measures, intended to achieve long term benefits, could not be interfered with by those seeking to jump the queue to get short term benefits. However, as for children's rights in section 28(1)(c), the Judge held that they were not subject to the same limitations as section 26(1); the state was under an immediate obligation to provide shelter for the children. The Court held that because of the right to be cared for by one's parents, every child would be accompanied by his/her parents to the shelter provided by the state. The Judge went on to hold that this did not mean that the parents were the bearers of the right to shelter.

²⁶ Para 38.

²⁷ Para 39.

²⁸ Para 40.

The CC took a deferential approach by holding that the contours of this programme will be left to the state to decide.²⁹ The programme must, however, be balanced and flexible and must make appropriate provision for attention to short, medium and long term needs. ‘A programme that excludes a significant segment of society cannot be said to be reasonable’.³⁰ Those whose needs are the most urgent and whose ability to enjoy all rights is most in peril must not be ignored by measures aimed at achieving realisation of the right.³¹ Later, in *Minister of Health and Others v Treatment Action Campaign*,³² the CC added that for a public programme to meet the constitutional requirements of reasonableness, its contents must be made known appropriately.³³

The CC’s approach has received more criticism than praise. The first major criticism stems from the CC’s rejection of the notion of minimum core obligations as adopted by the Committee.³⁴ The second criticism is

²⁹ Para 41.

³⁰ Para 43.

³¹ Para 44. The CC also held that the programme must be reasonable both in conception and implementation:

[T]he formulation of a programme is only the first stage in meeting the state’s obligations. The programme must also be reasonably implemented. An otherwise reasonable programme but which is not implemented reasonably will not constitute compliance with the state’s obligations’ [para 42].

³² 2002 (5) SA 721 (CC) (*TAC case*).

³³ Para 123. For an illustration of the facts of this case, see chapter two, at section 2.3.4.2.

³⁴ See Bilchitz, D., ‘Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence’ (2003) 19 *South African Journal on Human Rights* pp 1 – 26 [Hereinafter referred to as Bilchitz: 2003a]. See also Bilchitz, D., *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) Oxford University Press [Hereinafter referred to as Bilchitz: 2007], at pp 144 – 148,

based on the failure to give content to the rights in sections 26(1) and 27(1). The court has also failed to interrogate not only the effectiveness of the means chosen by the state to realise the rights but also the sufficiency of resources. This is in addition to the failure to adequately question the appropriateness of budgetary allocations and the development of standards for examining the adequacy of resources allocated to a specific programme. All these criticisms are discussed in the following sub-sections.³⁵

³⁵ Though it is not within the scope of this thesis, it is important to note that the Court has also been criticised for its approach to the children's rights in section 28(1)(c). As can be deduced from the express terms of this section, the rights it proclaims are not subject to the internal limitations as those enlisted in sections 26(2) and 27(2). However, the CC held that the children's socio-economic rights are no different from the rights of everyone else in sections 26 and 27, which are subject to internal limitations. It held further that prioritising children's rights as immediate would produce anomalous results as children would be used as stepping stones for adults who would otherwise not qualify for the rights. According to the CC, at best, section 28(1)(c) only obligates the state to provide immediately for those children who have been removed from the care of their parents. This reading of the CC is problematic; it avoids giving the children's rights any meaningful substantive content. One would endorse the view that section 28(1)(c) is an express manifestation of the minimum core obligations and is intended to ensure that children are provided for without delay. See Liebenberg, S., 'The interpretation of socio-economic rights' in Woolman, S., Roux, T., Klaaren, J., Stein, A., & Chaskalson, M., (eds.) *Constitutional law of South Africa* [2nd Edition, Original Service 12-03] (2005) Juta & Company and Centre for Human Rights, University of Pretoria, pp 33 – 1 to 33 – 64 [Hereinafter referred to as Liebenberg: 2005a], at pp 33-48 – 33-49; Scott, C., and Alston, P., 'Adjudicating constitutional priorities in a transitional context: A comment on *Soobramoney's* legacy and *Grootboom's* promise' (2000) 16 *South African Journal on Human Rights* pp 206 – 268 [Hereinafter referred to as Scott & Alston: 2000], at p 260; Van Bueren, G., 'Alleviating poverty through the Constitutional Court' (1999) 15 *South African Journal on Human Rights* pp 52 – 73, [Hereinafter referred to as Van Bueren: 1999], at pp 57 – 58; De Vos, P., 'The economic and social rights of children in South Africa's transitional Constitution' (1995) 2 *SA Public Law* pp 233 – 259; De Vos, P., 'Pious wishes or directly enforceable rights?: Social and economic rights in South Africa's 1996 Constitution' (1997) *South African Journal on Human Rights* pp 67 – 101 [Hereinafter referred to as De Vos: 1997], at p 88; Bekink, B., and Brand, D., 'Children's constitutional rights' in Davel, J., (ed.) *Introduction to child law in South Africa* (2000)

4.2.1 Rejection of the minimum core approach

4.2.1.1 Description of the minimum core obligations approach

The Committee has construed the provisions of the ICESCR as engendering a minimum core obligation incumbent upon all state parties. The Committee 'is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party'.³⁶ The Committee has given as an example of a *prima facie* violation a state party in which any significant numbers of individuals are deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education.³⁷ The minimum core content of a right is its essential elements, without which the right risks losing its substantive significance as a right.³⁸ It is the level below which standards should not

Juta & Company p 169; and Sloth-Nielsen, J., 'Too little? Too late? The implications of the Grootboom case for state response to child headed households' 2003 (1) *Law, Democracy and Development* pp 113 – 136. Though in the *TAC* case the CC softens its stance by holding that the state bears an obligation to care for children even when they are under the care of their parents, when the parents are unable to care for them, the Court does not go as far as accepting that the children's rights are immediate and a manifestation of the minimum core obligations. See Mbazira, C., and Sloth-Nielsen, J., 'Incy wincey spider went climbing up again.... (Re) assessing children's socio-economic rights and section 28 (1)(c) of the Constitution', paper presented at *Conference on Law and Transformative Justice in Post-Apartheid South Africa*: 04 – 06 October 2006, Hosted by the Nelson R Mandela School of Law, University of Fort Hare.

³⁶ General Comment 3, at para 10.

³⁷ As above.

³⁸ Van Bueren: 1999, at p 58 has submitted that the minimum core provides socio-economic rights with a determinacy and certainty. She submits further that for a right to be justiciable, there must be at least a minimum core of certainty; otherwise, it would be pointless to incorporate socio-economic rights in a justiciable Bill of Rights.

fall.³⁹ The minimum core approach does not require the division of rights according to their priority, rather it requires that each right be realised to the extent that provides for the basic needs of everyone.⁴⁰ The notion emphasises the fact that it is simply unacceptable for any human being to live without sufficient resources to maintain his or her survival.⁴¹ The Committee has thus defined the minimum core obligations that attach to a significant number of rights in the ICESCR.⁴²

³⁹ Russell, S., 'Minimum state obligations: International dimensions' in Brand, D., and Russell, S., (eds.) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) Protea Book House pp 11 – 21 [Hereinafter referred to as Russell: 2002], at p 15. According to Russell, the purpose of the minimum core is not to give the state an escape hatch for avoiding its responsibilities under the ICESCR; instead it is the opposite, it is a way to take into account the fact that many socio-economic rights require resources that are simply not available in poor countries. Even in highly strained circumstances, such state has an irreducible obligation to fulfil what it is assumed to be able to meet. The burden is on the state to prove otherwise (at p 16).

⁴⁰ Craven, M., *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) Oxford University Press [Hereinafter referred to as Craven: 1995], at p 141.

⁴¹ Bilchitz: 2003a, at p 15.

⁴² The Committee has strengthened the application of this notion by elaborating on what it considers to be the minimum core content of several of the rights guaranteed by the ICESCR; see General Comment No. 4, *The right to adequate housing* (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991); General Comment No. 12, *Right to adequate food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999); General Comment No. 13, *The right to education* (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999); General Comment No. 14 *The right to the highest attainable standard of health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000); and General Comment No. 15, *The right to water* (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002) [Hereinafter referred to as General Comment No. 14]; all reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 (2003). In addition to the Committee, the notion of minimum core obligations has received support elsewhere. The Maastricht Guidelines cite as a violation, a state's failure to meet the minimum core

The minimum core obligations approach averts the danger of states relying on the concepts of ‘progressive realisation’ and ‘to the maximum of [their] available resources’ to render the rights in the ICESCR meaningless. While states may take steps only to realise the rights progressively, certain obligations are immediate.⁴³ The notion challenges the conception of socio-economic rights as being programmatic and incapable of enforcement. It translates the rights from abstract entitlements to concrete rights that guarantee concrete individual goods and services. Additionally, the notion of minimum core obligations reduces inequality by playing a redistributive role. It ensures that

obligation as defined by the Committee (para 2); The United Nations Commission on Human Rights has given credence to the minimum core when it says that states are urged to consider benchmarks designed to give effect to the minimum core obligation to ensure respect for minimum levels of living for everyone; U.N. ESCOR, Commission on Human Rights, Res. 1993/14. The Inter-American Commission on Human Rights has said that the most vulnerable members of society should not be denied access to the basic needs for survival. That without satisfaction of these basic needs, an individual's survival is directly threatened, which obviously diminishes the individual's rights to life, personal security, and the right to participate in the political and economic processes. See Inter-American Commission on Human Rights Annual Report, 1993 OEA/Ser.L/V.85, Feb 1994, Chapter IV. See also para 9 of *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, text in Ramcharan, B., (ed.) *Judicial protection of economic, social and cultural rights* (2005) Martinus Nijhoff Publishers pp 553 – 562.

⁴³ Chapman, A., and Russell, S., ‘Introduction’ in Chapman, A., and Russell, S., (eds.) *The core obligations: Building a framework for economic, social and cultural rights* (2002) INTERSENTIA pp 1 – 18 [Hereinafter referred to as Chapman & Russell: 2002], at pp 6 and 16. The notion emphasises that in spite of the fact that the obligations in the ICESCR may be fulfilled progressively; there are those obligations which are immediate. In this respect, the notion compliments articles 2(2) and (3) which put the need to realise the rights without discrimination above the conditions of progressive realisation and available resources. It is not surprising therefore that non-discrimination in extending the rights has been subsumed as one of the elements of the minimum core of every right. It also complements the interpretation of the Committee to the effect that the phrase ‘progressive realisation’ imposes an obligation on states to move as expeditiously and effectively as possible towards full realisation of the rights (General Comment No. 3, para 9).

resources are directed towards those who cannot meet their basic needs using their own means.

Nonetheless, in spite of the overwhelming support that the notion of the minimum core has received, its implementation still poses a number of challenges. For instance, it remains unclear as to whether the minimum standards refer to individual enjoyment of a right or to society-wide levels of enjoyment.⁴⁴ The Committee has said that a state in which ‘a significant number of people is deprived of essential [needs] is, prima facie, failing to discharge its obligations.’⁴⁵ This might be taken to mean that the minimum core does not establish individual rights but looks at society as a whole from a relative perspective.⁴⁶ However, in several of its General Comments, the Committee has indicated that the minimum core refers to individual levels of enjoyment. For instance, in General Comment No. 15, the Committee has said that ‘[t]he water supply for each person must be sufficient and continuous for personal and domestic uses’.⁴⁷ The Committee has also said that ‘water facilities and services have to be accessible to *everyone* without discrimination’.⁴⁸

⁴⁴ Scott: 1998, at p 101.

⁴⁵ General Comment No. 3, para 10.

⁴⁶ Wesson, M., ‘*Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court’ (2004) 20 *South African Journal on Human Rights* pp 284 – 308 [Hereinafter referred to as Wesson: 2004], at p 298.

⁴⁷ Para 12(a).

⁴⁸ Para 12(c) [Emphasis mine]. One of the main reasons why the reasonableness review approach, as stands now, cannot lead to the realisation of the minimum core is because of its failure to focus on the individual. Instead, the reasonableness review approach emphasises society-wide levels of enjoyment by requiring a comprehensive and inclusive programme that takes care of short, medium and long term needs. Although the CC’s approach requires that those in desperate need should be taken care of, it neither guarantees them individual entitlements nor hold that their needs should take priority over all other needs.

Additionally, at the international level, it remains unclear as to whether the minimum core standards are international or state specific.⁴⁹ The socio-economic contexts and needs of countries differ from country to country. Socio-economic variations between countries depend on factors such as economic and social history, the nature of the economic system and the resources at the disposal of a state. These variations will dictate that every country adopts that approach that best realises the socio-economic needs of its people within the prevalent circumstances.⁵⁰ The most viable option, therefore, is to develop state specific standards, the 'relative core minimums', as opposed to 'absolute core minimums'.⁵¹ This is because it would be inappropriate for poor states to be judged by the same standards as their rich counterparts. Yet, on the other hand, it would

⁴⁹ Craven: 1995, at pp 141 – 2.

⁵⁰ Eide, A., 'Realization of social and economic rights and the minimum threshold approach' (1989) 10 *Human Rights Law Journal* pp 35 – 51 at p 46. He submits that because of this, as a minimum, all governments should establish a nation-wide system of identifying local needs and opportunities for the enjoyment of socio-economic rights. In doing this, the focus should be placed on identifying, in particular, the needs of groups which have the greatest difficulties in the enjoyment of these rights. See also Andreassen, B., Skålnes, T., Smith, G., and Stokke, H., 'Assessing human rights performance in developing countries: The case for a minimum threshold approach to economic and social rights' in Andreassen, B., and Eide, A., (eds.) *Human rights in developing countries 1987/88: A Yearbook on human rights in countries receiving Nordic aid* (1988) Chr. Michelsen Institute, Danish Center for Human Rights and Norwegian Institute of Human Rights pp 333 – 355 [Hereinafter referred to Andreassen *et al*: 1988], at pp 335 and 340 – 341.

⁵¹ Scott & Alston: 2000, at p 250. According to Craven: 1995, at p 142, the current practice of the Committee that requires states to establish bench-marks of poverty eradication and to identify disadvantaged sectors of the population suggests that state specific minima are the only viable option.

be inappropriate for the residents of rich countries if their states were judged by the same standards as the poor countries.⁵²

4.2.1.2 *The CC's reluctance to adopt the minimum core approach*

In addition to the reluctance to construct socio-economic rights as conferring individual entitlements, the rejection of the minimum core by the CC has, amongst others, been based on the lack of the institutional capacity to assess what the minimum core would be for each right. According to the Court:

It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right[s]...⁵³

⁵² See Otto, D., and Wiseman, D., 'In search of "Effective Remedies": Applying the International Covenant on Economic, Social and Cultural Rights in Australia' (2001) 7 *Australian Journal of Human Rights* pp 5 – 46 [Hereinafter referred to as Otto & Wiseman: 2000], at p 9. Socio-economic rights obligations can be operationalised by the use of country specific indicators. These indicators could be used to measure the provision of identified minimal needs of the people such as nutrition, housing and health care needs. Andreassen *et al*: 1988, at p 341 have suggested that, by using these indicators, the scope of violation of socio-economic rights would be measured, for instance, by referring to the percentage of the population not assured of the minimal threshold.

⁵³ *Grootboom* case, at para 32. In respect of the right of access to adequate housing, the CC said that the determination of a minimum core for this right presents difficult questions. This is because the needs of people in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are also difficult questions relating to the definition of the minimum core in the context of a right to have access to adequate housing; in particular, whether the minimum core obligation should be defined generally or with regard to specific groups of people.

However, the quotation above suggests that the Court left the possibility of adopting the minimum core approach open.⁵⁴ It seems as if it declined to define it simply because it did not have adequate information to enable it to do so.⁵⁵ This meant that in future, should the CC muster sufficient experience and have adequate information before it, just like the Committee, it would be prepared to define the minimum core.⁵⁶ This notwithstanding, the approach of the CC subsequently pours cold water on this possibility. The Court later held that imposing a minimum core obligation on the state is imposing an impossible duty:

It is impossible to give everyone access even to a “core” service immediately. All that is possible, and all that can be expected of the state, is that it acts reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.⁵⁷

⁵⁴ Bilchitz, D., ‘Giving socio-economic rights teeth: The minimum core and its importance’ (2002) 119 *South African Law Journal* pp 484 – 501 [Hereinafter referred to as Bilchitz: 2002], at p 485.

⁵⁵ See paras 31 – 33. It has been suggested by Chapman & Russell: 2002, at p 18 – 19, that the minimum core obligations approach is woven through the *Grootboom* judgment, both explicitly and implicitly. They base this view on the statement in the judgment to the effect that a society must seek to ensure that the basic necessities of life are provided for all if it is to be a society based on human dignity, freedom and equality (*Grootboom* case, para 44). In my opinion, however, it is clear from the rest of the judgment that, at best, the CC only applied the minimum core obligations approach in a pseudo manner. This is when it emphasised that a reasonable programme must make provision for those in desperate need. While this is an element of the minimum core of the right of access to housing and all other rights as based on non-discrimination, the manner in which it was applied by the CC is incomplete. The court does not define the needs of such desperate people as taking priority over all other needs. Yet the Court does not define, in precise terms, what the needs of the vulnerable are in relation to the right of access to adequate housing.

⁵⁶ See *TAC* case, at para 33.

⁵⁷ *TAC* case, at para 35.

This quotation suggests that the CC considers immediate realisation of the minimum core to be impossible because the state cannot afford it.⁵⁸ It is, however, evident that the Court's conclusion is not based on any evidence adduced by the state to prove that it is impossible on its part to satisfy the minimum core. Contrary to the assertion in the *Grootboom* case that the court cannot define the minimum core without sufficient information before it, the CC in the *TAC* case, without any evidence, closes the possibility of the minimum core by describing it as something that is impossible to realise.

The CC ignores the fact that there is an evidential burden on the state not only to prove that the resources are inadequate but also that it is striving to ensure the widest possible enjoyment of the rights in the circumstances.⁵⁹ The CC ignores the need for this evidential burden and

⁵⁸ During the hearing of the case, one of the judges, Justice Sachs, engaged counsel in questions that sent the message that the minimum core was impossible. Justice Sachs asked counsel whether the minimum core meant that somebody living in the mountains could come to court and say that he wants water from a tap, even if the money spent on this demand would furnish water for 10,000 people on the lower plain. See Sachs, A., 'The judicial enforcement of socio-economic rights: The *Grootboom* case' in Peris, J., and Kristian, S., (eds.) *Democratising development: The politics of socio-economic rights in South Africa* (2005) Martinus Nijhoff Publishers pp 131 – 152 [Hereinafter referred to as Sachs: 2005], at p 150. However, this is a total disregard of the views of the Committee that 'resources play [a role] in assessing whether or not a country has discharged its minimum core obligations and that a state could attribute its failure to discharge the obligation to inadequacy of resources'.

⁵⁹ The Committee has said that the availability of resources plays a role in determining whether a state has violated its minimum core obligations. However, a state must 'demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'. General Comment No. 3, at para 10. The Committee has added that 'even where the available resources are demonstrably inadequate, the obligation remains for the State Party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances'. General Comment No.3, para 11. The Committee goes on to state that, moreover, the obligations to monitor the extent of the realisation, or more especially of the non-realisation, of socio-economic rights and to devise strategies and

makes its own assumptions, unsupported by evidence, that the state does not have the resources to satisfy the minimum core. The state should also have been required to show that every effort is being exhausted towards meeting the basic needs in the circumstances.⁶⁰ This is because the notion of minimum core does not require that minimum levels of goods and services be provided irrespective of circumstances that may make this impossible.⁶¹ Provision of a minimum core, therefore, can be justified only in circumstances where non-provision cannot be ‘justified by the state and where it is appropriate in the circumstances to order that the claimant be provided with the benefit’.⁶² The state could still argue that it does not have the resources to meet the minimum core immediately. This, however, would not mean that the state is completely exculpated; it has to ensure maximum protection of the rights in the circumstances. This point is discussed in more detail later.



programmes for their promotion, are not in any way eliminated as a result of resource constraints (at para 11). See also Liebenberg, S., ‘Violations of socio-economic rights: The role of the South African Human Rights Commission’ in Andrews, P., and Ellman, S., (eds.) *The Post-apartheid Constitutions: Perspectives on South Africa’s basic law* (2001) Witwatersrand University Press and Ohio University Press pp 405 – 443 [Hereinafter referred to as Liebenberg: 2001], at p 419.

⁶⁰ Wesson: 2004, at p 302. According to Pieterse: 2004a, at p 898, the CC’s rejection of the minimum core on the assumption that it would always lead to immediately enforceable entitlements against the state seems to indicate ignorance of the function of the minimum core in international law, which expressly situates the concept within an overarching framework of progressive realisation and indicates that there may be circumstances in which non-compliance with the core obligations may be justified.

⁶¹ Pieterse: 2005, at p 142.

⁶² Pieterse, M., ‘Resuscitating socio-economic rights: Constitutional entitlement to health services’ (2006) 22 *South African Journal on Human Rights* pp 473 – 502 [Hereinafter referred to as Pieterse: 2006], at p 483.

In addition to the problem of resources, one of the reasons why the CC has declined to define the minimum core obligation is because of a conviction that people's needs vary. This links to the problem of polycentricism as discussed in chapter three.⁶³ The Court has, for instance, observed that:

The determination of a minimum core in the context of "the right to have access to adequate housing" presents difficult questions. This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance.⁶⁴

This means that the minimum core is oblivious to context and the diversified needs that context gives rise to. The CC's concerns have been broadened and endorsed by Liebenberg. She submits that the minimum core closes down debate and artificially curtails the evolution of standards of defining social needs as struggles around them unfold.⁶⁵ Liebenberg perceives the minimum core as setting rigid standards as to what the basic needs are; these standards 'would be insensitive to the varying circumstances of differently situated groups in society'.⁶⁶ This is what has motivated Liebenberg to retract her support for the minimum core obligations approach and to give backing to the reasonableness review approach. She submits that the reasonableness review approach is more suited for contextual application because of its flexibility arising from its

⁶³ Section 3.4.1.

⁶⁴ Para 33.

⁶⁵ Liebenberg, S., *Needs rights and transformation: Adjudicating social rights* (2005) Center for Human Rights and Global Justice Working Paper No. 8, at p 27. Sourced at <<http://www.nyuhr.org/docs/wp/Liebenberg%20%20Needs,%20Rights%20and%20Transformation.pdf>> (accessed on 23 March 2006) [Hereinafter referred to as Liebenberg: 2005b]. Also published in (2006) 17 *Stellenbosch Law Review* pp 5 – 36.

⁶⁶ Liebenberg, S., 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* pp 1 – 31 [Hereinafter referred to as Liebenberg: 2005c], at p 24. See also Pieterse: 2006, at p 491.

refusal to impose an absolute standard of performance.⁶⁷ Similar sentiments have been expressed by Steinberg who submits that the minimum core approach would result in actual and perceived restrictions on the legislature. He endorses the reasonableness review approach as being standard based rather than rule based as the minimum core would be. Steinberg submits that the minimum core closes down the space to argue, for example, that to postpone other interests like promoting economic growth and job creation is not the most legitimate interpretation of the Constitution.⁶⁸

However, in my opinion, these concerns about the rigidity of the minimum core approach are taken care of by Liebenberg's suggestions in earlier writings. She has suggested elsewhere that acceptance of the minimum core does not require the court to define, in the abstract, the basket of goods and services that must be provided. Instead, the court could define the general principles underlying the concept of minimum core obligations in relation to socio-economic rights. These principles, so she argues, would then be applied by the courts on a case-by-case basis to define the content of the rights in the circumstances.⁶⁹ The court would

⁶⁷ Liebenberg: 2005c, at p 24. See also Liebenberg, S., 'Enforcing positive socio-economic rights claims: The South African model of reasonableness' in Squires, J., Langford, M., and Thiele, B., (eds.) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) Australian Human Rights Centre and Centre on Housing Rights and Eviction pp 73 – 88 [Hereinafter referred to as Liebenberg: 2005d], at p 81.

⁶⁸ Steinberg: 2006, at pp 273 – 274 and 275.

⁶⁹ Liebenberg, S., 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty' (2002) 6 *Law, Democracy and Development* pp 159 – 191 [Hereinafter referred to as Liebenberg: 2002], at p 175. See also Liebenberg: 2005a, at p 33-31. Liebenberg: 2005a, at p 33-31. Bilchitz: 2002, at p 487, has suggested that the duty of the courts is to identify general principles that specify the obligations of government or individuals which apply beyond the facts of each case. Bilchitz also contends that, in giving content to these socio-economic rights, a court engages in a process of specifying general principles that define the obligations placed upon the state

indicate the general principles of what is required to remedy the breach while leaving a margin of discretion to the state to decide the most appropriate means of fulfilling the minimum core.⁷⁰ Liebenberg has given as an example a community suffering from starvation. It would be for the state to decide whether it fulfils their minimum core by cash grants, food vouchers or direct delivery of foodstuffs.⁷¹ Indeed, ‘the recognition and enforcement of socio-economic entitlements need not take the form of a once-off and comprehensive determination of need, coupled with a rigid insistence on adherence to acontextual standards’.⁷² Actually, ‘[n]othing prohibits courts from incrementally awarding context-sensitive and need-specific, enforceable minimum content to section 27(1)(a) on a case-by-case basis’.⁷³

by the right. One could submit that this would give chance to those with the ‘sharpest elbows’ who make it to the courts to have their minimum core met at the expense of those who cannot access the courts. However, it is submitted in chapter five that this depends on the form of justice that the court adopts. If the court adopts distributive, as opposed to corrective justice, it will be able to address the interests of similarly situated people as the applicants in a specific case (see section 5.2.2 of chapter five).

⁷⁰ Bilchitz: 2002, at p 488 has given as an example the minimum core of the right of access to adequate housing. The court, for instance, would hold that every South African must have access to accommodation that involves, at least, protection from the elements in a sanitary condition with access to basic services, such as toilets and running water. According to Bilchitz, the setting of this general standard, however, still raises significant questions as to the measures that will be adopted in particular cases. In Bilchitz’s view, protection from the elements could involve the provision of tents or the provision of corrugated, galvanized iron such that people build their own shacks; but that whatever method is adopted would be for the legislature and executive to decide. Bilchitz adds that, even with such deference, the reasonableness of particular measures must be assessed against the general principles that the court interprets as defining the content of the right.

⁷¹ Liebenberg: 2002, at p 175.

⁷² Pieterse: 2006, at p 491.

⁷³ As above.

For instance, the courts could define the minimum core of the right to water as, among others, requiring the state '[t]o ensure access to the minimum essential amount of water ... that is sufficient and safe for personal and domestic uses to prevent disease'.⁷⁴ But the courts would not define the exact quantity of water since people differently placed may require different quantities for personal and domestic use and prevention of disease. It would be left to the state to decide what is sufficient in every circumstance. This though does not mean that the state's discretion is without constraint; any quantities chosen must be justified, either by scientific evidence or actual research addressed to a specific context. If the court thinks the quantities inadequate, it could step in and become prescriptive. In being prescriptive, however, the court should still rely on scientific and other evidence which defines the quantities either as adequate or inadequate.

It is submitted here that the deferential nature of this approach gives socio-economic rights content and also allows for contextual application of the minimum core. The contextual application of the minimum core is also enhanced by the discretion given to the state to choose the most appropriate way to realise the rights in every context. Of course, it cannot be ruled out that there could be those cases in which the courts may have to be prescriptive as to the precise means needed to realise a right in the circumstances.⁷⁵ However, the approach also has a potentially negative impact that needs to be guarded against. Definition of the core content of the rights using general principles may deprive the rights of their meaning and portray them as vague in nature. In spite of this, the strength of this

⁷⁴ General Comment No. 15, para 37(a).

⁷⁵ If, for instance, after being given reasonable time and opportunity to exercise its discretion and choose the most appropriate means, the state fails to do so, the court may decide to choose the means and order the state to carry them out. There also may be circumstances in which there is only one way of realising the rights, as was the case in the *TAC* case.

approach lies in the fact that it gives the government leeway in choosing the most appropriate means and allows for their contextual application. This is because it does not present the minimum core as requiring any rigid standards or particular means by which it is to be realised. Yet though broad standards are used here, the rights could still be made meaningful by defining them in an open-ended manner but which takes into account the purpose of each right.⁷⁶ Only when the rights are defined in this manner can one proclaim the existence of general standards upon which the state is evaluated in a variety of contexts.⁷⁷

In addition to the above, the minimum core does not demand that a minimum level of goods and services be provided to everyone immediately. Indeed, the state may not have the resources needed for this to happen. This explains why the CC has found that even when all available resources are deployed, the state cannot afford a minimum core for everyone: 'It is impossible to give everyone access even to a "core"

⁷⁶ This is an exercise which does not require a lot of information on the part of the court. As has been shown in chapter three (section 3.3.2), courts have expertise and experience in interpreting legal texts and subjecting policy, legislation and conduct to defined legal standards. Defining the minimum core would not present tasks different from this. According to Bilchitz: 2002, at p 488, in order to specify the standard that government must meet to comply with its obligations, it is not necessary for the court to have wide sources of information such as that available to the Committee. Such information may be necessary in order to decide on particular actions that the state is required to take in particular circumstances. However, it is not necessary in order for us to understand what the basic needs of people are. In Bilchitz's view, what the Grootboom community wanted was protection from the elements, and an environment that would not be injurious to their health. He adds that very few people would have difficulty in specifying the nature of their most basic needs and the CC overstates the matter when it depicts this as involving enormous complexity.

⁷⁷ Bilchitz, D., 'Health' in Woolman, S., Roux, T., Klaaren, J., Stein, A., & Chaskalson, M., (eds.) *Constitutional law of South Africa*, (2005) [2nd Edition, Original Service: 2005] Juta & Company and Centre for Human Rights, University of Pretoria pp 56A-i — 56A-47 [Hereinafter referred to as Bilchitz: 2005], at p 56A-23.

service immediately'.⁷⁸ As a matter of fact, it would be straining a country's resources for the minimum core to be provided to all. Indeed, the minimum core obligation does not require that minimum levels of threshold be provided to all, including those who do not need it.⁷⁹ Most countries, including South Africa, have a substantial portion of their population living above minimal basic levels of living without direct dependence on the state.⁸⁰ With constrained resources, it would only be reasonable that the state provides the minimum core only to those who need it. All that the state has to do is to ensure minimum basic needs for those unable to provide for themselves without state support. This should be done simultaneously with efforts to enable those that are able to provide for themselves using their means to do so in a sustainable manner

⁷⁸ TAC case, para 35.

⁷⁹ Roux has criticised the *Grootboom* case for not going far enough to constrain the state from spending scarce resources on relatively privileged groups for whom such assistance is an added advantage rather than a need. In Roux's opinion, this is because the interpretation in the case falls short of obliging government to order its spending priorities in a particular way. Rather, the decision is a statement for the proposition that the Constitution requires diversification of social and economic policy to cater for vulnerable groups. Roux, T., 'Understanding *Grootboom* – A response to Cass Sunstein' (2002) *Constitutional Forum* pp 41 – 51 [Hereinafter referred to as Roux: 2002], at p 42.

⁸⁰ Andreassen *et al*: 1988, at p 344. Though he uses it in a different context, Bilchitz: 2002, at p 489, illustrates this point by the example of the right of access to adequate housing in South Africa. He is of the view that the mere fact that people's needs are varied in relation to accessing the minimum core of housing does not affect the obligation of the state. According to Bilchitz, the fact that some people need access to land, some need land and houses, and others need financial assistance is not relevant to the determination of the minimum core. In Bilchitz's opinion, each person is entitled to the same level of provision and the differential needs people have will determine in what way the government, if at all, is required to assist them: for instance, if the minimum core is provision of shelter, those who have land and shelter will have no claim, those with land but with no shelter will have a claim to shelter, and those who have neither land nor shelter will have a claim to both land and shelter.

in the future.⁸¹ This would require the state to identify those persons or categories of persons who are in need of the minimum core. The beginning point is to identify different sectors and groups in society and, thereafter, to identify the most vulnerable who need a minimum threshold in each sector.⁸² The sectors and groups could, for instance, include the rural and urban and the formal and informal. The state would then ensure that a minimum level of goods and services is extended to the vulnerable in each sector or group. On the basis of this approach, one could submit that by holding that a programme that does not include those in desperate need is unreasonable the CC has applied the minimum core.⁸³ The CC has said that:

A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. *Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril*, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, *fail to respond to the needs of those most desperate*, they may not pass the test.⁸⁴ [Emphasis mine]

The problem with the position of the Court is that it still fails to define any substantive entitlements for the vulnerable.⁸⁵ All it emphasises is that

⁸¹ As more and more people cross into the 'able group' so is the reduction in pressure on the resources to provide for those who cannot provide for themselves.

⁸² Anreassen *et al*: 1988, at p 337.

⁸³ Chapman & Russell: 2002, at p 18 – 19.

⁸⁴ Para 44. In the same judgment, the CC said that the minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. According to the Court, it is in this context that the concept of minimum core must be understood in international law (para 31).

⁸⁵ Pieterse: 2006, at p 493.

the programme should be inclusive and not disregard the most vulnerable. However, even when the state does not have the resources to provide the minimum core immediately, it should be able to provide some tangible goods and services to the most vulnerable as an interim measure. The Committee has stated that even where the available resources are demonstrably inadequate the obligation remains for the State Party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances'.⁸⁶ While the reasonableness review approach comes very close to this approach it is deficient to the extent that it does not describe, in terms of content, what would have been due to the vulnerable had resources been adequate. Such description is important as it guides the state on the levels of goods and services that ought to be realised as soon as resources become available. The state must also demonstrate its commitment to maintaining progressive realisation of the rights for all and improving the condition of the vulnerable over time.

4.2.1.3 How to prioritise the needs of the most vulnerable

The issue that one has to confront, however, is whether prioritising the needs of the most vulnerable has a negative effect on the capacity to progressively realise the rights of everyone else. 'Progressive realisation' could mean that the quality of life of all, including those living above the minimum threshold, improves. But this is not what the minimum core approach appears to require; the notion calls on states to accord a high level of priority to the basic needs of all and especially of those who are in dire need.⁸⁷ Progressive improvement for those who already have a

⁸⁶ General Comment No.3, para 11.

⁸⁷ According to Bilchitz: 2003a, at pp 15 – 16, the minimum core is a means of specifying priorities, it involves an injunction that priority must be given to those in a condition where their survival is threatened. He adds that any government programme must consider the needs of people in such a situation and assist them as a matter of priority. Blichitz adds further that the state cannot treat such people as representing one problem to be dealt with amongst others.

minimum level has to wait until everyone has had access to the basic needs.⁸⁸ But this does not mean that the state does not have any obligations towards those living above the minimum level. The state should avoid creating conditions that cripple the ability of those living above minimum levels to meet their needs on their own. The creation of such negative conditions would amount to retrogressive measures which are in themselves *prima facie* violations.⁸⁹

⁸⁸ According to Liebenberg: 2005a, the best approach would be one that in the first place requires the state to ensure that everyone has access to the minimum core and then, in the second place, the state must over time improve the quality of socio-economic rights to which individuals have access. However, Wesson: 2004, at p 303 has expressed doubts about an approach that prioritises minimum core needs by requiring redistribution of resources from 'non core' needs to the 'core needs' and only back to 'non core' needs when the core is met for everyone. In Wesson's opinion, this may be counterproductive. This is because the minimum core would not allow for a multi-layered approach to the realisation of socio-economic rights. She uses the *Grootboom* case to show that the multi-layered approach allows the state to employ a variety of measures to realise the right such as emergency relief, low-cost housing and provision of subsidies. Wesson also uses the example of the right to health to question the wisdom of diverting resources to 'non core' needs, such as care for the chronically ill, to the 'core needs' of the right to health. In Wesson's opinion, this is not a course that society would be prepared to embark on, and she advocates an approach that would prioritise all needs. Wesson views as most promising an approach that only entails limited distribution; certain allocations, but not all, may be compromised to satisfy the core needs. What Wesson does not realise, however, is that the prioritisation submission is not based on the assumption that the state will begin from scratch. Those services that are already being provided, though they do not constitute a minimum core, should continue to be provided. Their reduction would amount to retrogressive measures anyway. What is being advocated is that resources that would have otherwise been expended on improving non-core needs be directed to core needs. And as soon as the core is fully provided, then improvements to all will be made.

⁸⁹ The Committee has said that any deliberate retrogressive measures would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources. General Comment No. 3 (para 3).

The problem with the *Grootboom* case is that while it requires protection of the needs of the most vulnerable, it does not require that such needs should be high on the agenda.⁹⁰ All the CC says is that the needs of such people should not be ignored by measures intended to realise the right. The Court demands that there should be a programme which is inclusive and possibly spreads resources to meet the short, medium and long term needs simultaneously. This approach, therefore, is about inclusiveness without compulsion that the state gives high priority to the needs of the most vulnerable. Indeed, in a recent paper, Liebenberg has described the reasonableness approach as a formalistic and abstract approach which equates the needs of the wealthy with those of the poor by requiring government to be even-handed in attending to both.⁹¹

I am not submitting here that all other forms of expenditure should be suspended until the minimum core of those who are in need of it is met. Instead, I am submitting that more efforts should be directed to meet dire

⁹⁰ See Roux: 2002, at pp 42 and 47. Roux has said that even if the South African government takes the *Grootboom* order seriously, this will only have an impact on the state's budget but will not have an impact on the temporal order in which competing needs are met. In Roux's opinion, it is only the wholesome adoption of paragraph 10 of General Comment No. 3 that would have required the government to devote all available resources to meet the needs of those without any kind of shelter before moving on to improving the life condition of everyone (at p 47). See also Pieterse: 2004a, at p 896. Roux has argued in another paper that had the Court required the government to prioritise the needs of those who need a minimum core over those who do not, it would have put itself in direct confrontation with the political branches whose duty it is to make budgetary allocations. That this is because the Court would have been substituting its views on resource allocation for those of the political branches (Roux: 2003, at pp 97 – 98). But it is submitted in this chapter that the minimum core could still be implemented in a manner that gives appropriate deference to the political branches. As mentioned above (section 4.2.1.2) the Court would have to define the minimum core using broad parameters and leave it to the state to choose the most appropriate means for its realisation.

⁹¹ Liebenberg: 2005b, at 19.

needs and less on needs that may not be necessary for survival. Expenditure on already established non-core needs should be sustained as any withdrawal would amount to retrogressive measures. The state should, however, only enhance the quality of non-core needs only after it has met the core needs. All needs would then be progressively improved.

It also should be noted that the minimum core itself does not remain static; people's needs within every country should be commensurate with the level of resources. As a country's resource levels increase, so does the level of the minimum needs of people. The state should at all times strive to see to it that people's standards of life improve. This will be reflected not only in the quantity but also in the quality of the basic goods and services available for disposal to the people.⁹² However, the state should only strive to improve the quality of life for all after bringing everyone above the minimum levels of life. Failure to do this only entrenches the wide-spread inequalities and social exclusion of the vulnerable. This though, does not mean that the provision of services for those living above the minimum core should be suspended. All it means is that the needs of those living below the minimum core be prioritised by increased expenditure in their favour. It is true that the courts may not have the institutional capacity to ration resources to ensure such prioritisation. However, they have the capacity to evaluate the evidence before them and

⁹² I have, for instance, submitted elsewhere that the people's minimum levels of water supply for domestic use increase as the service gets closer to them. A resident using a yard water tap uses less water as compared to a resident that has multiple taps in the house. It is on this ground that I have criticised the adequacy of the basic water supply that is supplied to all households in the same quantities irrespective of the levels of access. In this regard, the author have suggested that the quantities of basic water should improve as access improves. But this is not to suggest that improvement should be effected before everyone has access to a core. See Mbazira, C., 'Privatisation and the right of access to sufficient water in South Africa: The case of Lukhanji and Amahlati' in De Visser, J., and Mbazira, C., (eds.) *Water delivery: Public or private* (2006) Centre for Environmental Law and Policy pp 57 – 86, at p 67.

to determine whether priority is being accorded to the basic needs of the poor. How best the court can do this is discussed later in this chapter.⁹³

In order to steer the CC towards prioritising basic needs, it has been suggested that sections 26 and 27 should be read as giving rise to two types of duties that are delineated in the first and second subsections of each section. It has been submitted that in the first place, subsection (1) requires the state to ensure that everyone has access to essential levels of goods and services and that, at the second stage, subsection (2) requires the state to improve the quality of the goods and services to which people already have access.⁹⁴ Bilchitz has contended that this approach ‘avoids the creation of two self standing rights, whilst retaining the important idea of progressive realisation and making reference to the purpose behind the protection of human rights’.⁹⁵ This approach realises socio-economic rights and gives them content as individual rights. But situating the minimum core solely in subsection (1) fails to integrate the inadequacy of

⁹³ Section 4.2.4 below.

⁹⁴ Liebenberg: 2005a, at p 33-42. According to Liebenberg, the mere fact that the CC has rejected the notion of a minimum core does not mean that it escapes the interpretative difficulties of clarifying the state’s obligations (at p 33-40). See also Bilchitz: 2003a at p 11; and Van Bueren: 1999, at p 60. Elsewhere, Van Bueren has argued that the minimum core must never be used as a reason for inertia; instead its adoption should be viewed as a springboard for further action by the state. Van Bueren, G., ‘The minimum core obligations of states under article 10(3) of the International Covenant on Economic, Social and Cultural Rights’ in Chapman, A., and Russell, S., (eds.) *The core obligations: Building a framework for economic, social and cultural rights* (2002) INTERSENTIA pp 147 – 160, at p 160.

⁹⁵ Bilchitz: 2003a, at p 12. Bilchitz contends further that sections 26 and 27 protect two kinds of interests which are linked by the notion of progressive realisation. The first is that, at a minimum level, people need to survive and for this they require basic goods and services; the second is the interest that people have in being provided with the conditions that enable them to pursue their own projects and live a good life by their own rights (at pp 10 – 11).

resources as a possible defence for failure to satisfy the minimum core obligations.⁹⁶

As indicated above,⁹⁷ a country can rely on inadequacy of resources to justify its failure to meet the minimum core obligations.⁹⁸ Reading the sections as proposed above suggests that the limitations in subsection (2), including inadequacy of resources, would only apply at the second level of progressive improvements from the minimum core. This means that if resource limitations are to be invoked as a defence, then this has to be derived from the notion of minimum core itself and not subsection (2). However, this is problematic; since inadequacy of resources is expressly integrated in the Constitution, it would only be logical for this defence to derive from subsection (2). One would argue though, that interpreting subsections (1) and (2) holistically would subject the minimum core to the notion of progressive realisation thereby denying it meaning. However, this argument does not stand since the minimum core itself derives from the notion of progressive realisation.⁹⁹ The minimum core approach stresses the point that in spite of the fact that countries may realise the rights progressively, certain obligations have to be met immediately as a matter of priority.¹⁰⁰ It also emphasises the point that if the core content is

⁹⁶ As discussed in the next section, this reading was rejected by the CC in the *TAC* case.

⁹⁷ Section 4.2.1.2.

⁹⁸ See also Pieterse: 2006, at p 480.

⁹⁹ Though not expressly, Bilchitz: 2005, at p 56A-36, appears to have abandoned his initial suggestions that the two subsections be read as giving rise to two different and self-standing obligations. He has submitted that the notion of progressive realisation should be read as involving two components: the first component is a minimum core, to realise, as a matter of priority, the minimally adequate provision required to meet basic needs; the second component is the duty to take steps to improve the adequacy of the provisions of resources over time.

¹⁰⁰ Chapman & Russell: 2002, at p 6.

not provided, irrespective of progressive realisation and acting within available resources, the rights would be rendered useless. On the basis of this, therefore, the minimum core can only be derived from reading subsection (1) together with (2), and not to isolate one from another.¹⁰¹ Subsection (2) should be used as the starting point to justify the minimum core obligation as deriving from the notion of progressive realisation. Subsection (1) would define the minimum core content of the specific rights. A finding that an individual is entitled to a minimum core of goods and services under subsection (1) could still be vitiated under subsection (2). Sub-section (1) would also be used to give normative content to the right.

4.2.2 Giving the rights normative content

Connected to rejection of the minimum core obligations approach is the CC's failure to give content to the socio-economic rights in the Constitution.¹⁰² In all three decisions, *Soobramoney*, *Grootboom* and *TAC*, socio-economic rights have been interpreted in a manner that only entitles the beneficiaries of the rights granted in sections 26 and 27 to reasonable state action undertaken to progressively realise these rights subject to the available resources.¹⁰³ It is clear from subsection (2) of both sections 26 and 27 that what is required of the state is to realise the right mentioned in subsection (1). To this extent, one agrees with the CC's decision in the *TAC* case that the two subsections must be read together. What the CC ignores, however, is the fact that these sections establish a

¹⁰¹ While the Committee has read the minimum core into a number of substantive rights in its General Comments, the notion itself has been derived from article 2(1), which defines the obligations almost in the same manner as sections 26(2) and 27(2) of the South African Constitution. This means that the notion uses article 2 as its basis for spreading out into the other articles of the ICESCR.

¹⁰² See Pieterse: 2005, at pp 96 – 111.

¹⁰³ Brand: 2003, at p 38.

goal as well as the means to achieve that goal.¹⁰⁴ The goal is that the rights in subsection (1) have to be realised but only through the means stated in subsection (2). If we take this further on the basis of what the CC says—*viz* that the two subsections have to be read together—it means that the means have to be understood in the context of the goal. We cannot test the efficacy, or even reasonableness, of the means used in realising the goal unless we know precisely what the goal entails.¹⁰⁵ The CC should have begun by getting to grips with the content of the right; and only then would it have been able to determine whether the measures adopted are reasonable methods of realising the right.¹⁰⁶ The failure of the CC to adopt this approach has serious implications for the efficacy of the remedies the court may have chosen to address a violation.¹⁰⁷ As is seen in chapter five,¹⁰⁸ although rights and remedies can be de-linked, the goals that rights aim to achieve are a factor to consider at the remedial stage in litigation. According to Bilchitz:

¹⁰⁴ Bilchitz: 2007, at p 143.

¹⁰⁵ Brand: 2003, at p 44. See also Bilchitz: 2003a, at p 8; and Bilchitz, D., 'Placing basic needs at the centre of socio-economic rights jurisprudence' (2003) 4 *ESR Review* pp 2 – 4 [Hereinafter referred to as Bilchitz: 2003b], at p 3.

¹⁰⁶ Bilchitz: 2003a, at p 9; Bilchitz: 2002, at p 496; and Pieterse, M., 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* pp 383 – 418 [Hereinafter referred to as Pieterse: 2004b], at p 407. Pieterse has submitted that where the reasonableness analysis is undertaken separately from an understanding of the content of various socio-economic rights and the obligations they impose, it may fail to develop a sound socio-economic rights jurisprudence (at p 410).

¹⁰⁷ Wells and Eaton have argued that in order to resolve issues related to constitutional remedies, courts need to identify the goals they seek to achieve in this area of law. They add that in this way, a court can evaluate the alternatives by asking which of them will better achieve the policies at stake. Wells, M., and Eaton, E., *Constitutional remedies: A reference book for the United States Constitution* (2002) Praeger Publishing, at p xxv.

¹⁰⁸ Section 5.3.

In order to work out which considerations are relevant to a determination of reasonableness in each context, it is necessary to have a prior understanding of the general obligations government is under by virtue of having to realise the rights in question. The context-bound nature of a determination of reasonableness requires that we have at least some specification of standards we wish to be met such that we can appraise the government's actions in a variety of contexts in terms of their potential to meet these standards. A contextual determination of the reasonableness of the government's conduct thus presupposes ... contextual standards that guide our appraisal of its actions in different contexts.¹⁰⁹

It should be noted further that the failure of the Court to give content to the rights leaves the government without guidance as to what is expected of it in implementing the rights.¹¹⁰ It is not enough for the state to be told that it has to put in place an all inclusive programme, without being told what that programme should set as its goal. It also makes it difficult for the court in its remedial orders to prescribe in precise terms what the government should do to remedy a violation. This lack of precision makes the task of enforcing court orders very difficult, since enforcers cannot point precisely to what needs to be done to remedy the violation. In this regard, Davis has submitted that if the Constitutional Court does not define these rights with any precision, the burden placed upon the executive by the courts is significantly increased.¹¹¹

¹⁰⁹ Bilchitz: 2003a, at p 10 In Bilchitz's opinion, at present, the reasonableness review approach lacks a principled basis upon which decisions on socio-economic rights cases can be based. He submits that this heightens the attack on the legitimacy of the decisions of the Court since it has not set out any principled standards upon which its decisions are based (at p 10). See also Pieterse: 2004b, at p 410. Elsewhere, Bilchitz: 2003b, at p 3, has argued that one of the advantages of an approach that gives content to a right is that it places the interests that are affected under the spotlight and also questions the extent to which government policy detrimentally impacts upon these interests.

¹¹⁰ Iles, K., 'Limiting socio-economic rights: Beyond the internal limitation clauses' (2004) 20 *South African Journal on Human Rights* pp 448 – 465 [Hereinafter referred to as Iles: 2004], at p 454.

¹¹¹ Davis: 2006, at pp 304 – 305.

The CC has emphasised that the rights in the Constitution must be understood in their contextual setting. According to the CC, this requires consideration of chapter two (the Bill of Rights) and the Constitution as a whole.¹¹² In respect of the right of access to adequate housing, the CC has held that section 26 must be understood in its context; the first subsection confers a general right of access to adequate housing and the second subsection establishes and delimits the scope of the positive obligations to realise that right.¹¹³ The CC has also held that subsections (1) and (2) are related and must be read together. It is not very clear what the CC means by the subsections being read together. What is clear from the CC's approach, however, is that it concentrates its interpretation efforts on subsection (2). In this, the Court has not read the two subsections together; it has instead conflated them in such a manner that subsection (1) becomes redundant. In all three cases: *Soobramoney*, *Grootboom* and *TAC*, the CC after casually referring to subsection (1), concentrates its interpretative efforts on subsection (2). This explains why in the *TAC* case, the CC dismissed the submissions of the *amici* to the effect that section 27 should be read as establishing two self standing and independent rights:

[O]ne an obligation to give effect to the [sections] 26(1) and 27(1) rights; the other a limited obligation to do so progressively through "reasonable legislative and other measures, within its available resources". Implicit in that contention is that the content of the right in subsection (1) differs from the content of the obligation in subsection (2).¹¹⁴

¹¹² *Grootboom* case, para 22.

¹¹³ Para 21.

¹¹⁴ Para 29. The *amici* argued that the right to health care in section 27(1)(a) is one of the rights in the Bill of Rights and accordingly attracts the duties imposed on the state by section 7(2) and that there is nothing in section 27(2) to suggest that the duties it imposes replace any of the duties imposed on the state by section 7(2). The *amici* went on to submit that to give meaningful content to the constitutional right of every person to have access to the goods and services described in section 27(1), there must be some concomitant duty on the state to make those goods and services accessible to 'everyone'. According to the *amici*, section 27(2) does not do so because it is a 'macro' duty and not

The CC held that the two subsections cannot be separated from each other; reference to ‘the right’ in subsection (2) is clearly also reference to the subsection (1) right.¹¹⁵ The Court thus concluded that:

[S]ection 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the state to “respect, protect, promote and fulfil” such rights. The rights conferred by sections 26(1) and 27(1) are to have “access” to the services that the state is obliged to provide in terms of sections 26(2) and 27(2).¹¹⁶

The approach of the CC in conflating the two subsections has also rendered section 7(2) redundant. This is in as far as the section obligates the state to respect and protect the rights. Generally, these two obligations are not dependent on resources and, therefore, may not be subjected to progressive realisation.¹¹⁷ Reading the two subsections holistically means that the duties to respect and protect the rights in sections 26(1) and 27(1) are also subject to progressive realisation and available resources. Yet, as long as the content of the rights is not defined, it will be hard to determine whether the means chosen to realise them are effective. Nonetheless, even when the content has been defined, the courts have to develop a sound

one that obliges the state to make the goods and services accessible to every person or any particular person. It accordingly can not be exhaustive of the positive duties imposed on the state. See Submissions of the Community Law Centre and the Institute for Democracy in South Africa (IDASA) in *Minister of Health and Others v Treatment Action Campaign and Others*, sourced at <http://www.communitylawcentre.org.za/ser/docs_2002/TAC_MTCT_Case_Heads_of_Arguments.doc> (accessed on 22 February 2006) [Hereinafter referred to as *TAC amici* submissions], at paras 15 – 27.

¹¹⁵ Para 30.

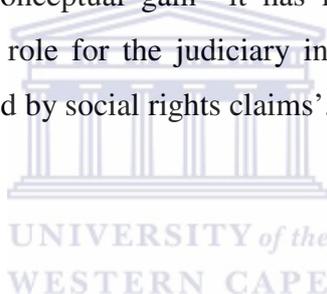
¹¹⁶ Para 39.

¹¹⁷ See chapter two, section 2.3.4.2.

approach for testing effectiveness of the means chosen. Thus far, the reasonableness review approach has failed to do so, as is discussed in the next section.

4.2.3 Interrogating the means and end: A proportionality test

The CC has been criticised for having adopted a weak administrative law approach to interpreting socio-economic rights instead of a full blown proportionality test.¹¹⁸ Some scholars, however, contend that the administrative law approach of the CC is the most appropriate for the enforcement of socio-economic rights. This is because the administrative law approach allows courts to strike a balance between judicial activism and judicial deference. It has thus been submitted that by retreating to the comfort zone of administrative law the Court has ‘made an important conceptual gain—it has mapped out a (what it considers appropriate) role for the judiciary in adjudicating the often polycentric issues raised by social rights claims’.¹¹⁹



¹¹⁸ Bilchitz: 2003b, at p 2; see also Pieterse: 2004a at p 863 and Roux: 2003, at p 97.

¹¹⁹ Pieterse: 2004b, at 893; see also Sunstein, C., *Social and economic rights? Lessons from South Africa* (May 2001), Public Law Working Paper No. 12; University of Chicago Law & Economics, Olin Working Paper No. 124. Sourced at <http://papers.ssrn.com/paper.taf?abstract_id=269657> (accessed on 27 July 2004) [Hereinafter referred to as Sunstein: 2001a]. However, Pieterse: 2004a, at p 896, has endorsed criticism to the effect that the CC’s approach neither serves to prioritise certain forms of social expenditure over others nor to treat the social deprivation of citizens as anything more than ancillary concerns to an inquiry that in essence amounts to an insistence on coherence, flexibility, fairness, inclusiveness, and rationality in social policy formulation and implementation. Pieterse is of the view that the CC’s approach does not offer South Africans any socio-economic entitlements other than those they have always enjoyed under administrative law, which have proved useless in alleviating poverty.

The question, however, is whether the reasonableness review approach is an administrative law approach as has been suggested.¹²⁰ As is demonstrated later,¹²¹ the reasonableness review approach has established standards of scrutiny that are quite different from those established by administrative law.¹²²

According to Fredman, in an administrative law case an agency has a duty of accountability, which means that it must explain why it has adopted a particular allocation of resources and not another.¹²³ In such a case, the duty of the court becomes one of guarding against arbitrariness in resource allocation.¹²⁴ The burden imposed on the state in this case would be one of justification. In the context of sections 26 and 27, the state would have to justify its programmes as reasonable and undertaken ‘within the available resources’. This approach is akin to what was suggested by Mureinik as to how the bill of rights could be reviewed to quell fears that judicial review is countermajoritarian.¹²⁵ Mureinik’s suggested approach was intended to ensure that government decisions are rational, while at the same time restricting the court’s intrusiveness by

¹²⁰ See Sunstein, C., *Designing democracy: What constitutions do* (2001) Oxford University Press pp 224 – 237 [Hereinafter referred to as Sunstein: 2001b]. See also Bilchitz: 2005, at p 56A-11.

¹²¹ Section 4.2.3.1 below.

¹²² See Wesson: 2001, at pp 287 – 297; and Steinberg: 2006, at p 277.

¹²³ Fredman, S., ‘Providing equality: Substantive equality and the positive duty to provide’ (2005) 21 *South African Journal on Human Rights* pp 163 – 190 [Hereinafter referred to as Fredman: 2005], at 176. See also Davis: 2006, at p 304.

¹²⁴ Sunstein: 2001b, at pp 224 – 37.

¹²⁵ Mureinik, E., ‘Beyond a charter of luxuries: Economic rights in the Constitution’ (1992) 8 *South African Journal on Human Rights* pp 464 – 490 [Hereinafter referred to as Mureinik: 1992].

allowing the state a wide margin of discretion. Mureinik suggested that all that the state would have to do was to justify its decisions; such decisions would only be struck down by the court if the state 'could not offer a plausible justification for the programme it has chosen'.¹²⁶ Mureinik contended that 'any decision maker who is aware ... of the risk of being required to justify a decision will always consider it more closely than if there was no risk'.¹²⁷

Mureinik's form of constitutional review fares very well in the *Soobramoney case*. In this case, the CC held that it 'will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters'.¹²⁸ As a result, the Court endorsed as rational a decision that scarce medical resources need not be expended on chronically ill patients at the expense of patients with a hope of recovery. The CC has gone a step further by invoking, not rationality as the basis of justification, but reasonableness. This is a standard expressly proclaimed by the relevant provisions of the Constitution. The problem with the approach of the CC, however, is that it does not require the state to justify its programme as reasonable. Instead, the burden is on whoever is contesting the state's programme to demonstrate its unreasonableness. The question, therefore,

¹²⁶ Mureinik: 1992, at p 471. In a subsequent article Mureinik describes the new constitutional order as a bridge from a culture of authoritarianism, that characterised apartheid, to a culture of justification; a culture in which every exercise of public power is supposed to be justified. Mureinik, E., 'A bridge to where? Introduction to the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* pp 31 – 48, at p 31. See also generally Karl, K., 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal of Human Rights* pp 147 – 188.

¹²⁷ Mureinik: 1992, at p 471. He submits that such decision maker is put under pressure consciously to consider and meet all the objections and thoughtfully to discard all the alternatives to the decision contemplated.

¹²⁸ Para 58.

remains whether the administrative law standard of judicial review takes the same approach.

4.2.3.1 Does the CC's approach use an administrative law standard?

The use of the 'reasonableness' concept in administrative law differs from the way in which it has been used by the CC in socio-economic rights litigation. Most notable is the fact that reasonableness in socio-economic rights litigation considers such values as human dignity, equality and freedom in its assessment. These values do not feature in the administrative law scrutiny.¹²⁹ It cannot be denied though that there are some areas of commonality. The first area of commonality is the principle that the state should be given leeway to choose the most appropriate way of discharging its legal obligations. The second is the contextual definition and application of reasonableness.¹³⁰

The reasonableness test now used in administrative law originates in English common law as first set out in *Associated Provincial Picture Houses, Limited v Wednesbury Corporation*.¹³¹ In this case, it was held that a court is entitled to interfere with the decision of an administrative body only if the decision is so unreasonable that no reasonable body would have taken such a decision.¹³² The Court held further that, even in such case, it is not the duty of the court to decide whether a decision is or is not reasonable. The Court said that this kind of decision is an executive function, which requires that deference be shown to the administrative

¹²⁹ Steinberg: 2006, at p 277. See also *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), at para 29.

¹³⁰ Steinberg: 2006, at p 277.

¹³¹ [1947] 2 All ER 680 (*Wednesbury* case).

¹³² At p 683 E.

authorities. The Court's duty is only to determine whether the decision is of a kind that a reasonable authority could not have taken.¹³³

The *Wednesbury* case principles have become part of South African administrative law and are endorsed by a string of judicial decisions. For instance, in *Union Government v Union Steel Corporation*,¹³⁴ it was held that no judgment has accepted that unreasonableness is a sufficient ground for interference with an administrative decision. Interference is only necessary if the unreasonableness is so gross that something else is inferred from it.¹³⁵ The provisions of the 1996 Constitution have not altered these principles in any fundamental manner. What is new, however, is that the right to just administrative action is no longer merely a common law right.¹³⁶ Instead, it is now a constitutional guarantee that '[e]veryone has the right to administrative action that is lawful, reasonable



¹³³ At p 683, E – G. Of course, one finds it hard to see a clear distinction between determining whether a decision is reasonable, on the one hand, and whether it is a decision that could not have been taken by a reasonable authority on the other hand. Both appear to lead to an inquiry as to whether the decision is reasonable. The principles in the *Wednesbury* case have been followed by English courts in subsequent cases and have informed the approach to judicial review on the ground of unreasonableness; though in some cases, the courts have used irrationality in the place of unreasonableness. However, within English law, these two principles mean the same. See *Wheeler v Leicester City Council* [1985] AC 1054.

¹³⁴ 1928 AD 220.

¹³⁵ At pp 236 – 237. See also *Shidiack v Union Government*, 1912 AD 746, and *National Transport Commission v Chetty's Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A). For a discussion of these cases see Hoexter, C., and Lyster, R., *The new constitutional and administrative law* Vol. 2. (2002) Juta Law [Hereinafter referred to as Hoexter & Lyster: 2002], at pp 171 – 176.

¹³⁶ See *President of the RSA and Others v SARFU and Others* 1999 (10) BCLR 1059 (CC), at para 135.

and procedurally fair'.¹³⁷ This section is implemented by the *Promotion of Administrative Justice Act (PAJA)*,¹³⁸ which retains unreasonableness as a ground of judicial review in the same way as used in the *Wednesbury* case. The Act provides that a court may review administrative action which 'is so unreasonable that no reasonable person could have ... carried out the function [in that manner]'.¹³⁹

'Reasonableness' in socio-economic rights litigation has not been used in the above manner. In socio-economic rights litigation, the court requires that there be a reasonable programme, which must be comprehensive, well coordinated and capable of providing for short, medium and long term needs simultaneously. It must be reasonably conceived as well as implemented and made known appropriately.¹⁴⁰ The CC's finding in the *Grootboom* case that the state's housing programme was unreasonable was not based on any finding that the programme could not have been adopted by any reasonable authority. If this had been the test, the programme would have passed with flying colours.¹⁴¹ Instead, the Court found the housing programme unreasonable because of its failure to make

¹³⁷ Section 33. The CC in *Pharmaceutical Manufacturers of SA; In Re: Ex parte Application of the President of the Republic of South Africa* 2000 (3) BCLR 241 (CC) held that though the common law principles of judicial review in administrative law are still relevant to the development of public law, judicial review is now subject to the prescriptions of the Constitution. The Court said that the principles of common law have been subsumed by the Constitution and are applicable as long as they are consistent with the Constitution (paras 45 and 51).

¹³⁸ Act No. 3 of 2000.

¹³⁹ Section 6(2)(h).

¹⁴⁰ See section 4.2.1 above.

¹⁴¹ Wesson: 2004, at p 291.

provision for short term needs.¹⁴² But this is the farthest that the CC has gone with its reasonableness review approach thus far.

In another twist, the PAJA has introduced, among others, a test of rational connectivity by empowering the courts to review administrative action which is not rationally connected to the purpose for which it was taken.¹⁴³ There is no similar test in the CC's reasonableness review approach. The CC has not enquired whether the means chosen by the government are rationally connected to the purpose of realising the rights. While the reasonableness review approach may result in the court questioning the connection between the policy, which is the means, and the right, which is the goal, the inquiry has not yet been carried out as a prerequisite under the reasonableness review approach.¹⁴⁴ This is because there is no principle that imposes a burden on the state to prove this connection.¹⁴⁵



¹⁴² Para 66.

¹⁴³ Section 6(2)(f)(i).

¹⁴⁴ Brand: 2003, at pp 39 – 40. Roux: 2003, at p 97, submits that the CC's reasonableness review standard is clearly stricter than the rational basis standard applied under section 9(1) of the Constitution. The requirement that a programme be comprehensive, balanced and flexible means that the court must do more than inquire whether the legislation or policy at issue is rationally related to a legitimate government purpose; the court has to assess whether the social programme unreasonably excludes the segment of society to which the claimant belongs. However, Roux's position rests on shaky ground; in the first place there is no evidence in the judgments to suggest that exclusion of certain segments of society may be reasonable in some circumstances. Most importantly, this approach still fails to interrogate the effectiveness of the means chosen to realise the rights. It only supports the *Soobramoney* case rationality test by insisting that a court, in determining whether an action is justified, will have to consider whether the exclusion of a group is justified.

¹⁴⁵ Brand: 2005, at p 45.

The most viable approach would be one that questions the effectiveness of the means chosen by the state. In addition to PAJA, this approach has also been used effectively in the general limitation clause inquiry set out in section 36 of the Constitution.¹⁴⁶ As is demonstrated below,¹⁴⁷ it is for this

¹⁴⁶ Section 36 provides as follows:

36 Limitation of rights

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

The drafters of this section were greatly influenced by the provisions of the *Canadian Charter of Rights and Freedoms*, Schedule B of Constitution Act, 1982 (Charter), and the jurisprudence of the Canadian courts. Section 1 of this Charter provides that: ‘The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. This provision has been dealt with by the Canadian courts in a number of cases. The most prominent of these decisions is the Supreme Court case of *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [Hereinafter referred to as the *Oakes* case]. The Court held that the rights and freedoms guaranteed by the *Charter* are not absolute; they may be limited in circumstances where their exercise would be inimical to the realisation of collective goals of fundamental importance. It was for this reason that section 1 provides criteria to be used in deciding whether a limitation on the rights and freedoms guaranteed by the *Charter* is justified, which imposes a stringent standard of justification (at p 136). The Court went on to hold that the onus of proving that a limitation on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation (at pp 136 – 137). According to the Court, to establish that a limitation is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. Secondly, once a sufficiently significant objective is recognised, then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified, which involves a form of proportionality test. The Court goes on to hold that although the nature of the proportionality test will vary depending on the circumstances, in each case

reason that the section 36(1) approach could play an important role in socio-economic rights litigation. While it is not appropriate to apply section 36 directly when dealing with sections 26 and 27, some of the principles underlying section 36 may be of assistance.¹⁴⁸ The limitations imposed on the socio-economic rights in sections 26(1) and 27(1) are expressly prescribed in sections 26(2) and 27(2).¹⁴⁹ The rights in sections

courts will be required to balance the interests of society with those of individuals and groups. And, there must be a rational connection between the objective and the means chosen and also as little as possible impairment of the right (pp 138 – 139). For the most recent discussion of the manner in which the limitation clause applies, see Iles, K., 'A fresh look at limitations: Unpacking section 36' (2007) 23 *South African Journal on Human Rights* pp 68 – 92 [Hereinafter referred to as Iles: 2007].

¹⁴⁷ Section 4.2.3.2 below.

¹⁴⁸ The manner in which section 36 is crafted and has been applied suggests that it is more suited for negative obligations and is of limited application to positive obligations. By its very nature, the section requires the state to justify restrictions imposed on a particular right. Though violations of socio-economic rights may occur when restrictions are placed on them, enjoyment of these rights in most cases the state's violation would arise from its failure to provide. The other reason why the general limitation clause cannot be applied to all violations of socio-economic rights is because section 36(1) envisages limitations resulting from a law of general application. See Currie, I., & De Waal, J., *The Bill of Rights handbook* (2005) Juta & Company [Hereinafter referred to as Currie & De Waal: 2005], at p 594. While socio-economic rights may be limited by legislation, in some cases, they are limited by policy measures or sheer administrative decisions. Such form of limitation is not excluded by the internal limitation clause. See Liebenberg: 2005c, at p 28. This is an issue which those who advocate the application of section 36(1) to socio-economic rights litigation have ignored in their discussion. See, for instance, Iles: 2004; Pieterse: 2003; and Liebenberg: 2001, at pp 423 – 424.

¹⁴⁹ In *Khosa and Others v Minister of Social Development; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 596 (CC) (*Khosa* case), the CC held that there is a difficulty in applying section 36(1) of the Constitution to the socio-economic rights entrenched in sections 26 and 27 because these sections contain an internal limitation which qualifies the rights. According to the Court, the state's obligation in respect of these rights goes further than to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the

26(1) and 27(1) are expressed as being subject to progressive realisation within the available resources by the state taking reasonable legislative and other measures. It is only appropriate that the sections 26(2) and 27(2) limitations be used instead of the section 36 general limitation clause when adjudicating the sections 26 and 27 rights. What needs to be done, however, is to read a proportionality test into sections 26(2) and 27(2). This is where some principles used under the general limitation clause analysis process may become relevant.

4.2.3.2 Proportionality and rational connectivity

To heighten the level of scrutiny under the general limitation clause, a proportionality test, as inspired by Canadian jurisprudence¹⁵⁰ and as is implicit in section 36(1) has been employed by the CC.¹⁵¹ The proportionality test has been applied in the section 36 enquiry to

rights. The Court was of the view that section 36 can only have relevance if what is 'reasonable' for the purposes of section 36(1) is different from what is 'reasonable' for purposes of sections 26 and 27. (para 83, see also para 105).

¹⁵⁰ See the *Oakes* case as discussed above.

¹⁵¹ In the *Makwanyane* case, the CC held that the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality. The fact that the different rights have different implications for democracy and, in the case of the Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. The Court said that principles can be established, but the application of these principles to particular circumstances can only be done on a case-by-case basis. The Court went on to hold that this is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, according to the Court, the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, and whether the desired ends could reasonably be achieved through other means less damaging to the right (para 104). See also *S v Bhulwana* 1996 (1) SA 388 (CC) (*Bhulwana* case), para 18.

determine whether a limitation is reasonable and justifiable in an open and democratic society. The CC has held that this test requires a weighing up of competing interests in order to determine whether the values intended to be protected by a limitation outweigh the right being limited. According to the Court:

In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds for justification must be.¹⁵²

There is room for application of a similar proportionality test in socio-economic rights litigation. This is especially in those cases where the state has failed to provide socio-economic goods and services on the ground that their provision would affect certain interests. An example of such case is the *Khosa* case. One could, however, submit that the *Khosa* case is not a good example since it was based on a negative violation under section 9 of the Constitution arising from exclusion of the applicants from the social assistance scheme. Nevertheless, the case also invoked positive obligations; the state argued that including the applicants in the social assistance scheme would impose financial burdens on the state and discourage self sufficiency amongst non-citizens.¹⁵³ In effect, the state was arguing that even if there was an obligation to provide for the applicants it just did not have the resources to discharge this obligation. Indeed, enforcing the applicant's rights would not only entail their inclusion in the programme but also a commitment of resources to meet their social assistance needs. The state was also arguing in effect that provision of the benefits requested would have had a negative impact on such interests as the need to promote self-sufficiency of non-citizens.

¹⁵² *Bhulwana* case, para 18.

¹⁵³ Paras, 60 and 63.

The Court held that once those not self-sufficient are granted permanent resident status, then the state has a duty to provide for them. This is irrespective of the financial burden that may be imposed on the state.¹⁵⁴ The application of the proportionality test in this case is seen in the finding that providing social assistance to the applicants outweighed the financial and immigration concerns of the state.¹⁵⁵ The values embedded in the protection of the survival interests of non-citizens were considered by the CC to outweigh the financial and other considerations raised by the state. The Court said that:

The importance of providing access to social assistance to all who live in South Africa and the impact upon life and dignity that a denial of such access far outweighs the financial and immigration considerations on which the State relies. For the same reasons, I am satisfied that the denial of access to social grants to permanent residents who, but for their citizenship, would qualify for such assistance *does not constitute a reasonable legislative measure as contemplated by section 27(2) of the Constitution.*¹⁵⁶ [Emphasis mine]

The CC in this passage appears to suggest that proportionality has a role to play in considering whether or not the measures adopted by the state are reasonable. The Court appears to have been inspired to apply this test because of the direct invocation by the applicants of the right to equality in section 9.¹⁵⁷

¹⁵⁴ Para 68.

¹⁵⁵ Liebenberg: 2005b, at pp 21 – 22.

¹⁵⁶ Para 82.

¹⁵⁷ The proportionality test has featured strongly in the approach that the CC has adopted in considering equality cases. This is most especially at the stage of considering whether discrimination amounts to unfair discrimination. See *Harksen v Lane NO* 1998 (1) SA 300 (CC); para 53. At this stage of the equality inquiry, the court has to consider the impact of the discrimination on the victim. If the discrimination burdens people who have in the past been victims of discrimination, then it will be unfair unless the purpose it intends to achieve outweighs the burdens imposed. This requires a proportionality test which requires, amongst others, an examination of whether there are less burdensome means that could have been adopted. See *President of the Republic of South Africa v*

Another case where the Court has applied the proportionality test is *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Kyalami)*.¹⁵⁸ In this case,¹⁵⁹ the Court applied the proportionality test to uphold the right of access to adequate housing against the right to property. The Court held that although the property interests of the Kyalami residents was a factor to consider, it was not only the only factor, the interests of the flood victims and their constitutional right of access to adequate housing was also a factor.¹⁶⁰ According to the Court:

The fact that property values may be affected by low cost housing development on neighbouring land is a fact that is relevant ... it is only a factor and cannot in the circumstances of the present case stand in the way of the constitutional obligation that government has to address the needs of homeless people.¹⁶¹

The test, as applied above, is very important because it strengthens the remedies granted in socio-economic rights litigation. The *Kyalami* case also shows how the proportionality test can be applied to cases that invoke purely positive obligations. One cannot, therefore, use the *Khosa* case to argue that the test is only applicable to cases invoking negative violations. It should be noted that use of this test is the only way through which the undue burden imposed on litigants in socio-economic rights cases to prove the unreasonableness of the state's measures can be shifted to the state. This test compels the state to put before the courts adequate evidence, which will allow them to make informed decisions. Indeed, as

Hugo 1997 (4) SA 1 (CC); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); and *National Coalition for Gay & Lesbians Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).

¹⁵⁸ 2001 (3) SA 1151 (CC). For a detailed discussion of the facts and issue in this case see chapter two, section 2.3.4.2.II.

¹⁵⁹ For a detailed discussion of the facts and issue in this case see chapter two, section 2.3.4.2.II.

¹⁶⁰ Para 106.

¹⁶¹ Para 107.

will be seen in the next section, the CC in the *Khosa* case held that the state had an evidential burden to put all relevant information before the court. This is especially so in cases where court orders would have budgetary implications. Such evidence may be necessary for the purpose of determining the most appropriate remedy. A finding that the means are not proportionate could be used by the court to determine the degree of intervention required at the remedial stage.

Also part of the section 36 enquiry is a set of factors that have to be considered in determining whether a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. One such factor is whether there is a rational connection between the means chosen to limit the rights and the objective to be served by the limitation.¹⁶² As already stated, a similar test is provided for by PAJA as basis for reviewing administrative action. Another factor is whether there are less restrictive means of realising the rights.¹⁶³ The court must assess the selected means to determine whether they could have been used in a manner that is less restrictive to the right(s) to realise the same object.¹⁶⁴ ‘A court will ... need to know what

¹⁶² Currie & De Waal: 2005, at p 182. See also *Minister of Home Affairs v National Institute for Crime Prevention (Nicro) and Others* 2004 (5) BCLR 445 (CC). Indeed, the rational connection test is being used in enforcing such positive provisions of the Bill of Rights as affirmative action under section 9(2). The CC has held that, amongst others, it has to be proved that the affirmative action is reasonably capable of realising the intended goal of advancing persons disadvantaged by discrimination in the past. See *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC).

¹⁶³ In the *Makwanyane* case, the state argued that the objects to be achieved by the imposition of the death penalty were to prevent and deter commission of violent crime. The CC held that while the death penalty may effectively prevent criminals from committing crime again (since the criminal is dead) the state had not adduced sufficient evidence to prove that the penalty actually deterred commission of crime (para 184). In this latter respect, therefore, there was no relation between the means and the object.

¹⁶⁴ Criticism has been directed at this approach on the ground that it allows courts to strike down legislation under the guise of there being less restrictive means of limitation.

alternative measures for implementing the objective were available to the legislators when they made their decisions'.¹⁶⁵ In doing this the court must not, however, 'second-guess the wisdom of policy choices made by legislators'.¹⁶⁶ Instead, the court must leave a margin of discretion to the state in selecting the most effective means.¹⁶⁷

A similar standard could be employed by the courts in sections 26 and 27 litigation to question the effectiveness of the means chosen to realise the rights. The court would have to enquire whether the means chosen by the state are capable of realising the socio-economic right or rights in issue. This rational connection standard would be applied as part of the reasonableness test. For a programme or policy to be reasonable, the state would have to convince the court that the programme or policy is capable of realising the targeted socio-economic right(s). Where the programme or policy restricts the rights in one way or another, the court would enquire whether there are less restrictive means of achieving the purpose of the programme or policy without restricting enjoyment of the socio-economic right(s).¹⁶⁸ However, the court in this process would be alive to the fact that there are several ways of effectively realising socio-economic rights. Deference would be shown to the state in choosing from amongst

The task of determining the means of restricting rights, so goes the argument, is not one that the courts are qualified to discharge because this is either a legislative or executive function. See Woolman, S., 'Limitation' in Chaskalson, M., Kentridge, J., Klaaren, J., Marcus, G., Spitz, D., & Woolman, S., (eds.) *Constitutional law of South Africa* (1996) Juta & Company [Revised Service 2, 1998] pp 12-i — 12-64 [Hereinafter referred to as Woolman: 1996], at p 12-8.

¹⁶⁵ *Oakes* case, at p 138.

¹⁶⁶ *Makwanyane* case, para 104.

¹⁶⁷ Currie & De Waal: 2005, at p 184.

¹⁶⁸ Liebenberg: 2005c, at p 27.

those means; the state would, therefore, have the discretion to determine what it considers to be the best way of realising the right(s).¹⁶⁹ All that the court would do is to ensure that the means selected by the state are capable of realising the right(s). However, where the means chosen by the state are demonstrably inadequate and incapable of reasonably realising the right(s), then the court should intervene. At this stage, the court should be entitled to be prescriptive by detailing what in its opinion is the best way of realising the right(s).

The above approach would not only allow enquiry into the effectiveness of the means chosen but would also compel the court to give content to the rights. This is because there would be no way the court could assess the effectiveness of the means chosen without an understanding of the goal to be achieved, which is the realisation of the right. This approach would also promote the constitutional values of accountability, responsiveness and openness as it demands for justification from the state. Similar standards of justification could also be used in the available resources inquiry as discussed in the next section. The conclusion of the court after interrogating the effectiveness of the means chosen to realise the rights is relevant at the stage of determining the most appropriate remedy. The court would be able to determine the kind of remedy that effectively compels the state to adopt measures that realise the rights.

¹⁶⁹ This would quell fears that the courts are going to hide under the cloak of choosing the most effective means to carry out functions that are reserved for the executive and legislative organs of the state. See Woolman: 1996, at p 12-8.

4.2.4 Available resources and a justification inquiry

At both the international and South African levels, in realising socio-economic rights, the state can only do as much as its resources permit. While the ICESCR uses the phrase ‘to the maximum of ... [a state’s] available resources’,¹⁷⁰ and the South African Constitution uses the phrase ‘within ... [a state’s] available resources’,¹⁷¹ as already noted,¹⁷² the differences between these two are, at best, nomenclatural. In this section, the phrase ‘within the state’s available resources’ is used because it is the one used in the South African Constitution, but at the same time, reference is made to ‘the maximum of the states’ available resources’, where necessary, to illustrate standards at the international level.

The phrase ‘within available resources’ has mostly been used in a rhetorical manner, without any meaningful attempts to define it and to understand the precise nature of the obligations it imposes.¹⁷³ Unless we

¹⁷⁰ Article 2(1).

¹⁷¹ Sections 26(2) and 27(2).

¹⁷² Section 4.1.

¹⁷³ According to Chapman, we cannot effectively use the standard of progressive realisation as a tool of assessing compliance with the standards established by the ICESCR unless we understand what is meant by the phrase ‘maximum of its available resources’. Chapman, A., ‘A new approach to monitoring the International Covenant on Economic, Social and Cultural Rights’ (1995) 55 *International Commission of Jurists: The Review* pp 23 – 37, at p 26. All that the Committee has said in General Comment No. 3 about the meaning of the phrase ‘the maximum of the available resources’ is that it was ‘intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance’ (para 13). In my opinion, this is very narrow; surely, the drafters must have meant more than this in this phrase. The CESCR, besides elaborating the obligations of international cooperation, does not elucidate on what states have to do within the domestic arena to ensure that sufficient resources are allocated for the purpose of realising the rights. Yet, as argued in chapter two, section 2.3.4.1, the

come to grips with the nature of the obligations that the requirement to act within the available gives rise to, it may be difficult to translate socio-economic rights from mere abstract paper rights to concrete individualised rights.¹⁷⁴ This is because the concept of available resources presents an obstacle to the realisation of these rights. However, the concept also represents the world of scarcity in which we live, which makes it impossible for the state to fully realise all the rights protected. Yet, at the same time, scarcity imposes an obligation on the state to ensure more efficient use of the scarce resources in order to realise the rights to the extent attainable in the circumstances.

Looked at narrowly, the concept of acting ‘within available resources’ is available to the state as a defence to justify its failure to fully realise socio-economic rights or even to provide a minimum level of goods and services. Indeed, in the majority of socio-economic rights cases, the state is always quick to demonstrate that it lacks the resources needed to fully realise the right(s).¹⁷⁵ Nonetheless, the concept also gives rise to a number of positive obligations that can be enforced against the state.¹⁷⁶ In this respect, the concept may be used, for instance, to force the state to

various methods employed by the Committee to determine the appropriateness amounts of resources dedicated to realisation of the rights are flawed in a number of respects.

¹⁷⁴ Robertson, E., ‘Measuring state compliance with the obligation to devote the “maximum available resources” to realizing economic, social and cultural rights’ (1994) 16 *Human Rights Quarterly* pp 693 – 714 [Hereinafter referred to as Robertson: 1994], at p 694.

¹⁷⁵ See, for instance, *Soobramoney*, *Grootboom* and *Khosa* cases.

¹⁷⁶ Liebenberg: 2005a, at p 33-44. According to Moellendorf, the phrase ‘available resources’, however ambiguous, has both narrow and broad senses. It may mean those resources that a ministry or department has been allotted for the protection of a right; but it may also mean any resources that the state can marshal to protect a right. Moellendorf, D., ‘Reasoning about resources: *Soobramoney* and the future of socio-economic rights claims’ (1998) 14 *South African Journal on Human Rights* pp 327 – 333, at p 330.

undertake positive measures to ensure that resources are made available or efficiently employed.¹⁷⁷ This latter dimension begins from the premise that the state does not have sufficient resources to realise the rights. It, however, emphasises the point that the state should not resign itself to fate, but should exhaust all efforts to enhance its resource pool and to employ the resources in the most efficient way. To enforce these obligations, a court would first establish whether, indeed, the state does or does not have all the resources required to fully realise the right(s) in contest.¹⁷⁸ However, where the state contends that it has actually allocated the requisite resources towards the realisation of the right or rights, the role of the court here becomes very difficult. This is because the court would have to determine whether the allocated resources are capable of realising the right(s) and whether they have been employed efficiently. The question at this stage, however, is whether the courts have the skill and tools, let alone the institutional legitimacy, to determine whether the resources are capable of achieving the intended purpose and whether they have been employed efficiently.

Determining whether the state has undertaken reasonable measures to provide sufficient resources to realise the right(s) and whether it has used the available resources effectively involve very difficult questions.¹⁷⁹ The

¹⁷⁷ This meaning can be supported by the views of the Committee to the effect that a state that raises the defence of resources as the reason for not being able to realise the minimum core has a burden to demonstrate that it has used its resources in a manner that ensures maximum realisation of the rights. General Comment No. 3 (paras 10 and 11).

¹⁷⁸ Robertson: 1994 at pp 694 – 695 and 705 – 708, has defined resources to include just more than financial resources. Other elements of resources, in his opinion, include human resources, technological resources, information resources and natural resources. He also contends that resources go beyond those that are controlled by the state. In his opinion, the question becomes one of the extent to which these can be considered resources (at p 695).

¹⁷⁹ In this regard, Alexander Hamilton argued in the *78th Federalist*, Paper that:

Because it will be least in capacity to annoy or injure them.... the judiciary ... has no influence over either the sword or the purse; no direction either

courts may not be institutionally capable of answering these questions. Such questions, for instance, include: is the state's economic strategy the most appropriate to achieve its goal? Should the state engage in mining and not agriculture? Should it increase the levels of taxation and borrow less? Or should it rely more on donor funding? Additional questions include the following: should the state allocate less towards other sectors such as defence and more towards health care, education, food and water? What would the court do if the state contends that resources not being used for education are being used for health care or other purposes such as realising economic growth?¹⁸⁰ It has been submitted that a court cannot weigh the competing demands for government resources to determine how much can be raised for the institutions, nor should it try to force the legislature to raise the necessary money regardless of competing considerations.¹⁸¹

Resolution of the above questions is the biggest hurdle faced by tribunals engaged in the enforcement of socio-economic rights both at the international and domestic levels. No substantial progress has thus far been made to devise standards that can be employed to measure the resources and to determine whether they are appropriate or are being employed effectively.¹⁸²

of the strength or of the wealth of the society; and can take no active resolution whatever.

The Federalist No. 78 (A. Hamilton) (B. Wright ed. 1961), at p 490.

¹⁸⁰ Sunstein: 2001a, at p 14.

¹⁸¹ Frug, E., 'The judicial power of the purse' (1978) *University of Pennsylvania Law Review* pp 715 – 794 [Herein after referred to as Frug: 1978], at pp 787 – 788.

¹⁸² Robertson: 1994, at p 703. See chapter two, section 2.3.4.1.

However, as is demonstrated later in this section, the courts may seek counsel by requiring the state to discharge certain evidential burdens and to justify its use of resources. The courts, then, only would use a standard such as reasonableness to determine whether the state has made out a case to justify its use or non-use of available resources. This approach saves the courts from being entangled in complex budgetary issues and answering the complex resource related questions as outlined above.¹⁸³ The problem with the reasonableness review approach is that there is no principle that establishes a mechanism for determining whether the resources allocated for a particular programme are reasonable in the circumstances. Neither has the CC in its reasonableness review approach come up with any meaningful approach to determining whether reasonable measures are being undertaken to enhance the resources and whether the allocated resources are being used efficiently.¹⁸⁴

Generally, the CC has shown an inclination towards giving deference to the other organs of the state in cases involving allocation of resources. This is because the CC believes that resource allocation involves difficult decisions to be taken at the political level in deciding upon the priorities to be met. In the CC's opinion, a court should not interfere with resources allocation decisions taken in good faith by the political organs whose responsibility it is to deal with such matters.¹⁸⁵ The Court has been quick to assert that the socio-economic rights themselves are limited by lack of

¹⁸³ See Fredman: 2005, at p 176.

¹⁸⁴ According to Bilchitz: 2005, at p 56A-10, the CC's approach to the issue of resources can be summarised as follows: firstly the Court will focus its enquiry upon current allocations of resources within a particular department; secondly, the Court will more readily order allocations within existing budgets rather than require an increased budget in a particular area; and the Court will not readily accept a defence of lack of resources where the exclusion of individuals constitutes unlawful discrimination or a serious invasion of dignity.

¹⁸⁵ *Soobramoney* case, at para 29.

resources and that the obligations imposed by them can only be analysed in the light of the resources allocated to those rights.¹⁸⁶ It is in light of this, and as can be deduced from the Constitution,¹⁸⁷ that the CC is of the view that the reasonableness of the measures undertaken to realise the rights are governed by the available resources.¹⁸⁸ What is evidently lacking, however, is a clear definition of the relationship between resources and the reasonableness test. The Court leaves unanswered the question whether there is need to analyse the reasonableness of the resources allocated to a specific programme and how this would be done. The closest that the CC has come to doing this is in the finding that a reasonable programme must ‘ensure that the appropriate financial and human resources are available’.¹⁸⁹ What it does not do, however, is to set out clear guidelines for determining whether the resources allocated to the programme are themselves reasonable. In those cases where the state has argued that it does not have sufficient resources to realise the rights, the CC has declined to enquire whether there have been attempts on the part of the state to raise more resources.¹⁹⁰ This has the potential of allowing

¹⁸⁶ *Soobramoney* case, at para 11 and *Grootboom* case, at para 46.

¹⁸⁷ Sections 26(2) and 27(2).

¹⁸⁸ *Grootboom* case, at para 46. According to the Court, there could be circumstances in which the state may focus on the broader needs of society instead of the specific needs of particular individuals. Striking a balance between equally valid and competing claims, holds the Court, would not be considered a limitation of rights; instead, it amounts to defining the circumstances in which the rights may most fairly and effectively be enjoyed. See *Soobramoney* case, at paras 31 and 54.

¹⁸⁹ *Grootboom* case, at para 39.

¹⁹⁰ In the *Soobramoney* case, the Court did not question whether there had been any attempts on the part of the provincial authorities to solicit more funding to enhance the health budget. Instead, the Court hastily accepts that the ‘Department of Health in KwaZulu-Natal does not have sufficient funds to cover the cost of the services which are being provided to the public’, para 24. In its opinion, to provide dialysis treatment to all those in need would require a dramatic increase of the health budget ‘to the prejudice of

the state to withdraw from its responsibilities by allocating only minimal resources for the purposes of realising socio-economic rights.¹⁹¹

Requiring the state to demonstrate the steps it has undertaken to provide more resources would not amount to interfering in resource allocation matters. Instead, it would amount to imposing a burden on the state to demonstrate that it is doing whatever is reasonable to improve its resources directed at a specific programme. This is in addition to justifying the manner in which the resources already allocated to the programme are being used. As mentioned above, the concept of acting within the available resources imposes an obligation to take reasonable steps to solicit for more resources where the existing ones are inadequate and using the available resources efficiently. In light of this, it would not be overstepping the boundaries of separation to adopt this approach. All that this approach requires is that an evidential burden be imposed on the state to justify the allocation of resources to a programme or policy.

Furthermore, it is only fair that the burden of proof in relation to resource allocation and use be placed on the state instead of requiring the litigant to prove that the resources are inadequate or have not been employed

other needs which the State has to meet' (para 28). And on this basis, the Court uses section 27(2) to justify the exclusion of the applicant from dialysis treatment. What the Court fails to do is to require the provincial authorities to prove that they are not only aware of their budgetary constraints but that steps were being taken to alleviate them. It, therefore, is not surprising that eight years after the judgment the state has not done much to boost the resources needed to take care of kidney patients at public hospitals. In August 2005, a newspaper report brought to light the acute nature of the problem of scarcity of dialysis machines at public hospitals. It reported that every week, public hospitals send away dozens of patients with kidney failure to die; one public hospital, Baragwanath, had about 150 people on dialysis, while some 5000 patients required it. Keeton, C., 'Kidney patients are sent home to die' *Sunday Times*, 28 August 2005, at p 13.

¹⁹¹ See Pieterse: 2005, at p 91.

properly. The state is in a better position to adduce evidence relating to the available resources and to show how they have been allocated.¹⁹² The court, for instance, should be entitled to presume that any reduction in public spending on a specific right is *prima facie* a violation. The burden then would be on the state to justify such reduction.¹⁹³ As has already been indicated above,¹⁹⁴ this threshold of justification is also necessary in justifying failure to provide a minimum core on the ground of limited resources.¹⁹⁵ The approach is also important because it enforces the value of accountability as a consideration in the application of the reasonableness test. In *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail (Rail Commuters case)*,¹⁹⁶ the CC alluded to

¹⁹² Liebenberg: 2005a, at pp 33-53 — 33-54.

¹⁹³ The Committee has said that any retrogressive measures would need careful consideration and have to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources (General Comment No. 3, para 9). In its concluding observations, after considering Canada's 3rd Periodic Report, the Committee raised concerns about cuts of 10 percent of social assistance rates for single people. The Committee said that these cuts appeared to have a significantly adverse impact on vulnerable groups and could increase homelessness and hunger. See *Concluding Observations adopted by the Committee on Economic, Social and Cultural Rights* at its 57th meeting (nineteenth session) held on 4 December 1998, para 21 in Holmström, L., (ed.) *Concluding Observations of the UN Committee on Economic, Social and Cultural Rights: Eighth to Twenty-seventh sessions (1993-2000)* (2003) Martinus Nijhoff Publishers pp 97 – 107, at p 101. See also Scott: 1998, at p 107.

¹⁹⁴ Section 4.2.1 above.

¹⁹⁵ Section 4.2.1.2 above. Liebenberg: 2005c, at p 18, submits that '[u]rgent needs and severe deprivations demand a strong, immediate response', that '[w]e give expression to the value of human dignity in our constitutional jurisprudence by placing the state under a stringent burden of justification in claims involving a deprivation of basic needs'.

¹⁹⁶ 2005 (4) BCLR 301 (CC).

the importance of accountability in justifying resource allocations. The Court held that:

[A]n organ of State will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resources, whether human or financial, in the context of the overall resourcing of the organ of state will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of activities.¹⁹⁷

As stated by the CC above, the approach I suggest here still leaves room for the state to carry out its resource allocation obligations without interference from the courts. The mandate to determine resources allocation would still vest in the state. All that the courts would demand is justification, which requires a clear indication of the basis upon which particular resources have been allocated and employed.

The problem with the CC's approach in both the *Grootboom* and *TAC* cases, is that it places on the applicant the burden to prove not only the unreasonableness of the measures undertaken, but also whether the state has acted within its available resources. Discharging this burden is 'a matter of great factual and legal complexity which will often be beyond the capacity of indigent and vulnerable groups'.¹⁹⁸ Moreover, this burden is made more onerous by the CC's failure to determine any meaningful standards of measuring the available resources and whether they have been employed effectively. It only would be fair and just if the presumptive standard employed by the CESCRC in applying the minimum

¹⁹⁷ At para 88.

¹⁹⁸ Liebenberg: 2005c, at p 23. Liebenberg: 2005a, at pp 33-53 — 33-54, contends that it would be unreasonable to expect ordinary litigants to identify and to quantify all the resources available to the state for the realisation of a particular socio-economic right.

core obligations approach is employed here.¹⁹⁹ This standard could be extended not only to the examination of the nature of the available resources but also the manner of their employment.²⁰⁰ It would be for the state to prove that it is employing the available resources efficiently. This is in addition to proving that it has undertaken reasonable measures to enhance its resources pool.

Recent jurisprudence from the CC shows a move towards demanding for justification from the state regarding the way resources have been allocated. Although the *Khosa* case is distinguishable from other cases in the sense that it dealt with exclusion from an existing service, the principles it enunciates could still be applied to other socio-economic rights cases not involving such exclusion. In this case, the CC held that in constitutional cases, the burden was on the state to put all the necessary evidence before the Court. Moreover, this was imperative especially in cases in which court orders ‘could have significant budgetary and administrative implications for the state’.²⁰¹ While the Court talks generally about evidence, one could interpret this to mean evidence on resources as well. This means that the state bears the burden of proof whenever it contends that it does not have enough resources or that it has used the available resources effectively. One could stretch this further to mean that the state has a duty to convince the court why only so much has been spent and how providing a service would affect the state’s budget negatively. All the court would do is to assess the evidence of the state and decide whether it was justified in limiting the existing service on the

¹⁹⁹ General Comment No. 3, para 10.

²⁰⁰ This presumption could also be extended to other aspects of the reasonableness review approach as well. *Prima facie* unreasonableness would be established when a litigant proves that he/she lacks access to social goods and services that are required for life sustenance. See Liebenberg: 2005c, at p 23.

²⁰¹ Para 19.

ground of resources. For instance, in the *Khosa* case, the CC said that exclusion of the applicants from the social assistance scheme on the ground of lack of resources is not justified. This is because their inclusion would lead to a very small proportional increment, two percent, in the entire social grants budget.²⁰² The Court based this conclusion on very scanty and speculative evidence adduced by the state on the impact that inclusion of the applicants would have on the budget.²⁰³ The state estimated that extending the benefits to qualifying permanent residents would lead to an increase of between R 240 million and R 672 million in the social assistance budget.²⁰⁴ The CC applied a proportionality test to conclude that the rights of the applicants were very important; such a minimal increment in the budget could not justify their exclusion. The Court also based its decision on the fact that there was anticipated increment of expenditure on social grants by R 18.4 billion over the next three years without making provision for permanent residents.

It is important that the approach in the *Khosa* case be carried to future cases in which resources are implicated. There is no doubt that it is the state that controls all public resources and is in possession of all the information relating to their use. It, therefore, makes sense that the state be required to put information relating to the existing resources and their use before the courts. This makes the work of the courts much easier and,

²⁰² Para 62. A similar decision was made by the Canadian Supreme Court in *Eldridge and Others v. British Columbia (Attorney General) and Others* [1997] 3 SCR 624, 151 D.L.R. (4th) 577. This was a case of unfair discrimination brought by a deaf patient who contended that the failure of the province of British Columbia to provide interpretation services for deaf patients in public hospitals was discriminatory as it denied deaf patients access to health services. The Court rejected the defence of lack of resources because the proportional increment brought about by the provision of sign language interpretation to the entire health budget of the province was negligible, it was only 0.0025 percent.

²⁰³ Para 61.

²⁰⁴ Para 62.

to a large extent, saves them from getting entangled in complex resource issues without adequate information. All that the courts would have to do is demand for justification from the state. In doing this, the courts would be guided by principles such as reasonableness, proportionality and the content of the rights.²⁰⁵ This is in addition to the promotion of the constitutional values of accountability, openness and responsiveness.

4.3 CONCLUSION

In this chapter I have shown that while the reasonableness review approach has the potential to lead to the realisation of socio-economic rights, it has a number of loopholes that have to be plugged. The Court must appreciate the fact that resources play a role in determining whether the minimum core obligation has been discharged and provides the state with a possible defence. This, though, would shift the burden to the state to show that every effort is being made to provide for basic needs in the circumstances. This approach would compel the state to be more responsive to the needs of the poor, by directing resources to those living below the minimum core standard. It is true that the minimum core approach poses a danger of defining socio-economic rights rigidly and a-contextually, which means imposing rigid standards irrespective of the context. Nonetheless, this danger can be obviated by defining the minimum core using broad parameters which are then made applicable on a case-by-case basis. This is in addition to giving a margin of discretion to the state to choose the most effective means of realising the minimum core in each context.

²⁰⁵ This is consistent with the values of accountability, responsiveness and openness, as well as with the spirit of the Constitution as a bridge from a culture of authoritarianism to a culture of justification; a culture in which all exercise of public power has to be justified. See Mureinik: 1994.

The CC's reasonableness review approach has also failed to give content to the rights, most especially as guaranteed by section 26(1) and 27(1). Without any analysis of the content of the rights, the CC rushes to consider the obligation to take reasonable measures to progressively realise the rights within the available resources as stipulated in sections 26(2) and 27(2). This has left the beneficiaries of the rights without any clue as to the nature of the services to which they are entitled. Going by the approach of the CC, all that the claimants can demand from the state is a reasonable programme undertaken within available resources to progressively realise the rights. This poses the danger of the reasonableness review approach degenerating into 'a weak and toothless standard'.²⁰⁶ The CC's approach has also left it without any tools that could be used to interrogate the effectiveness of the means that have been chosen to realise the rights. The means cannot be assessed without an understanding of the goal to be realised, which is the content of the rights. It is only when the Court has given content to the rights that it will then be able to subject the state's measures to a proportionality and rational connection test as suggested in this chapter.²⁰⁷

This chapter has shown how useful a proportionality test, similar to the one applied under the general limitation clause, can be to socio-economic rights litigation. In socio-economic rights litigation, courts would have to weigh up the competing interests as brought to the fore by the state's assertions that providing a particular service would prejudice certain legitimate interests. This is in addition to questioning whether there is a rational connection between the means chosen by the state to realise the rights and the goal to be realised. The courts would also have to be convinced that there are no less damaging means by which the rights could have been limited. This approach imposes a higher burden of justification on the state and puts the government under pressure to adopt

²⁰⁶ Liebenberg, S., 'Making a pro-poor Constitution' newspaper article in *Mail & Guardian* 12 – 18 May 2006, pp 26 – 27.

²⁰⁷ Section 4.2.3.2 above.

the most appropriate means of realising the rights in each case. It is only such an approach that can translate socio-economic rights from mere abstract paper rights to concrete rights capable of improving the conditions of the vulnerable. This approach will compel the courts to reflect on their remedial approach and to grant those remedies that guarantee the concrete nature of the rights. The adoption of this approach does not suggest in any manner that the court is being disrespectful to the elected branches of the state; rather, it reinforces the constitutional values of accountability, responsiveness and openness.

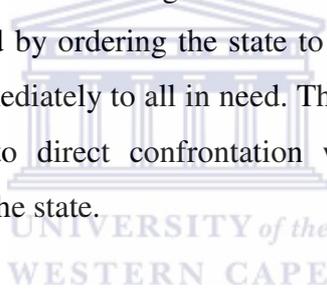
A similar standard of justification would be used to enable the courts to effectively interrogate the reasonableness of the resources allocated to the realisation of socio-economic rights. At the moment, the CC's approach to the issue of resources is still deficient. The Court mostly has deferred to the state to decide the most appropriate way of using resources. However, while courts cannot assume the role of appropriating budgets and resources, they may require the state to justify its budgetary allocations.²⁰⁸ A burden would be imposed on the state to prove not only that its resources are limited but also that the existing resources have been applied appropriately.²⁰⁹ In certain circumstances, the state would have to justify its failure to allocate more resources towards realisation of the rights or its failure to appropriate monies towards a commissioned programme. This approach places the duty of justification on the state and gives the courts an entry point to determine whether the state has indeed justified its actions with regard to resources. If not satisfied, the courts will be able to grant relief which compels the state either to allocate more resources towards realisation of the rights or to use the available resources

²⁰⁸ Fredman: 2005, at p 182, has argued that existence of a right does not mean that courts need to make primary decisions about the allocation of resources; instead, it requires the courts to insist that decision makers take responsibility for the decisions 'by providing open, transparent, and reasonable reasons, based on proper evidence rather than generalisation or assumptions'..

²⁰⁹ See Russell: 2002, at p 16.

more efficiently. The *Khosa* case provides an indication of the CC's preparedness to move in this direction, but it remains to be seen how the Court is going to apply the *Khosa* approach in future cases.

It is only with such an approach that the courts will be able to use their wide constitutional remedial mandate to grant remedies that translate the rights from mere abstract paper to concrete rights. The CC's failure to grant appropriate remedies in socio-economic rights litigations, thus far, is associated with its conception of the socio-economic rights obligations. Most importantly, the Court has been deferential to the executive and legislative branches of the state and has been reluctant to grant remedies that would, in its opinion, lead to overstepping the separation of powers divide. For instance, the Court thought that had it endorsed the minimum core it would have been forced to grant individually focused remedies. This would be achieved by ordering the state to provide socio-economic goods and services immediately to all in need. The Court thought that this would have put it into direct confrontation with the executive and legislative branches of the state.



This chapter has discussed the CC's approach to the primary theory, which is the nature of the obligations engendered by socio-economic rights. It is now safe to move to the secondary theory, which is the nature of the remedies that may be provided by violation of socio-economic rights. The discussion of the approach of the CC in this respect, however, will be guided by two theories: corrective and distributive justice. These two theories of justice have had a very big impact on the nature of judicial remedies in the areas of both public and private law. The theories are discussed in the next chapter.

CHAPTER FIVE

RECONCILING CORRECTIVE AND DISTRIBUTIVE FORMS OF JUSTICE AND THEIR IMPACT ON REMEDY SELECTION

5.1 INTRODUCTION

In chapters three and four I have demonstrated that in construing the obligations engendered by the socio-economic rights in the South African Constitution the CC has, among others, been influenced first by the doctrine of separation of powers. Secondly, the Court has been influenced by concerns regarding its institutional competence to adjudicate social justice matters and to consider issues related to resource allocation. In addition to the above considerations, however, the CC has also implicitly been influenced by the form of justice that it is inclined toward. This has greatly impacted on the kinds of remedies that the CC has granted which, by their nature, have guaranteed socio-economic rights as collective rather than individual rights. This is because the Court is inclined toward distributive justice as opposed to corrective justice.

The Constitution itself is implicitly encrusted with distributive justice. Even where the Constitution guarantees what appear to be individual rights, their enforcement is subject to the values that promote the public good and common interests. Besides, the social and economic context within which the Constitution is enforced dictates that even seemingly individualised socio-economic rights, for instance, be enforced as group rights.

The purpose of this chapter is to set out a theoretical platform for an understanding of how different notions of justice influence the remedies

that courts grant. The two theories of justice to be discussed here derive from the philosophies of corrective and distributive forms of justice. The corrective justice philosophy demands that victims be put in the position they would have been in but for the violation of their rights. On the other hand, the distributive justice philosophy is based on a recognition of the constraints of putting victims in the same position they would have been in had the violation not occurred. The distributive justice philosophy does not focus solely on the interests of the victim. A court basing its decision on distributive justice will decline to put the victim in the position he/she would have been in but for the violation if this would have a negative impact on other legitimate interests.¹

These theories of justice influence a host of other factors such as the relationship attached to rights and remedies, the form and procedures of litigation, and the manner of implementing the remedies. They also influence the liability rules adopted by the courts to determine whether or not there is a wrong and whether the plaintiff has suffered as a result. Additionally, the liability rules are used to identify the wrongdoer and the extent of his/her remedial obligations. All these factors have a bearing on the kinds of remedies that a court may grant. Traditionally, damages and restitution as used—especially in private law, have strong roots in the corrective justice philosophy. The main objective of damages, pecuniary damages in particular, is to restore the position of the victim. The court strives as much as possible to compensate the victim for the harm that was brought upon him/her as a result of the violation. In contrast, injunctive relief has played a dual role by serving the objects of both corrective and distributive forms of justice. It is in the area of using injunctive relief that the distinction between corrective and distributive justice is most visible. On the one hand, courts dispensing distributive justice, unlike those dispensing corrective justice, have embraced the injunction as a tool of

¹ Roach, K., 'The limits of corrective justice and the potential of equity in constitutional remedies' (1991) 33 *Arizona Law Review* pp 859 – 909 [Hereinafter referred to as Roach: 1991], at p 859.

eliminating system violations and have used it without much restraint.² On the other hand, the corrective justice philosophy does not consider the injunction as a remedy of first resort. It is only used where damages are considered inadequate because of the irreparable nature of the harm caused.

In this chapter I will examine the manner in which both corrective and distributive theories of justice have influenced the kinds of remedies that the courts grant in constitutional litigation. The impact of these theories of justice is also felt when one explores the relationship between rights and remedies. This chapter, therefore, discusses this relationship and its impact on the remedy selection process. The chapter sets a theoretical framework for discussion in chapter six of the South African courts' approach to granting remedies. Chapter six analyses the impact that the notions of both corrective and distributive justice have had on the South African Courts. As already mentioned, the CC, for instance, has its inclination toward the distributive justice theory as seen through its definition of an 'appropriate, just and equitable relief'. The Court has chosen to be guided by the ethos of distributive justice and on occasion has treated rights and remedies as two different phenomena.³

² See chapter seven, section 7.3.

³ See Chapter six, section 6.3.

5.2 CORRECTIVE AND DISTRIBUTIVE FORMS OF JUSTICE DISTINGUISHED

In order to understand issues related to constitutional remedies, one needs to understand the goals that the courts seek to achieve when they enforce particular types of remedies.⁴ Amongst other factors, the remedies that a court chooses will be determined by the kind of justice to which the court is inclined, either generally or in a particular case:

[E]xperience teaches that the rules governing the choice of remedy—procedural rules, if you will—cannot and should not be fashioned apart from and independent of one’s belief about the nature and justice of the underlying claim.⁵

It is, therefore, important that one understands the different forms of justice that the courts pursue, as defined either by ethos of corrective justice or those of distributive justice.

5.2.1 The ethos of corrective justice

The traditional conception of litigation as guided by corrective justice reflects the 19th century vision of society, which promoted the individual as an autonomous entity.⁶ The corrective justice theory is also guided by the vision of libertarianism. It is this vision that distinguishes corrective justice from distributive justice. Libertarians are of the view that each person has the right to live his/her life in anyway he/she chooses, so long as the person respects the equal rights of others. The government exists

⁴ Wells, M., and Eaton, T., *Constitutional remedies: A reference book for the United States Constitution* (2002) Praeger Publishing [Hereinafter referred to as Wells & Eaton: 2002], at p xxv.

⁵ Fiss, O., *The Civil rights injunction* (1978) Indiana University Press [Hereinafter referred to as Fiss: 1978], at p 91.

⁶ Chayes, A., ‘The role of the judge in public law litigation’ (1979) 89 *Harvard Law Review* pp 1281 – 1316 [Hereinafter referred to as Chayes: 1979], at p 1285

only to protect people from the use of force by others.⁷ From this perspective, individual freedom cannot be sacrificed for the sake of the common good:

Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices placed on a few are outweighed by the larger sum of advantages enjoyed by many.⁸

In terms of this view, the primary function of the court is resolution of disputes in order to achieve fair results from human interaction and to maintain individual autonomy.⁹ Libertarians define human rights in a negative manner; all that we need are those rights that guarantee non-interference from others in our enterprise of seeking autonomy.¹⁰ In terms of this philosophy, litigation is viewed as a vehicle to restore the autonomy of those whose rights have been interfered with. Libertarianism places much emphasis on the concept of property and the unfairness of the distribution of property gained through individual efforts. It, therefore, rejects the welfare state in favour of a liberal non-intervention state that respects people's property rights.¹¹ The libertarian philosophy is the

⁷ Boaz, D., 'The coming of libertarian age' (1997) 19 *CATO Policy Report*, sourced at <<http://www.heartland.org/pdf/63011a.pdf>> (accessed on 25 June 2006).

⁸ Sandel, M., *Liberalism and the limits of justice* (1998) Cambridge University Press [Hereinafter referred to as Sandel: 1998], at p 16. See also Rawls, J., *A theory of justice* (1999) Oxford University Press, at p 3.

⁹ Chayes: 1979, at p 1285.

¹⁰ Garret, J., *The limits of libertarianism and the promise of a qualified care ethic* (2004), sourced at <<http://www.wku.edu/~jan.garrett/ethics/libcrit.htm>> (accessed on 25 June 2006).

¹¹ See Wellman, C., 'Justice' in Simon L., (ed.) *The Blackwell Guide to social and political philosophy* (2002) Blackwell Publishers Ltd pp 60 – 84 [Hereinafter referred to as Wellman: 2002], at p 70. See also generally Ryan, A., 'Liberalism' in Goodin, E., and

premise of the notion of corrective justice, which is considered to be the most ideal form of justice to pursue the agenda of libertarianism.

The philosophy of corrective justice recognises the fact that stopping legal wrongs completely is impossible. It, however, perceives the law as a tool for restoring those who have been wronged to the position they would have been in but for the wrong.¹² Aristotle defined corrective justice as ‘that which plays a rectifying role in a transaction between man and man’.¹³ Aristotle favoured corrective as opposed to distributive justice; he contended that judges must possess the moral virtue of corrective justice and the intellectual virtue of practical wisdom in order to determine the just result in all cases.¹⁴ Corrective justice has also been described as compensatory justice and associated with three essential features: (1) the parties are treated as equal; (2) there must be damage inflicted by one party on another; and (3) the remedy granted must seek to restore the victim to the condition they were in before the violation.¹⁵ Once a

Pettit, P., (eds.) *A companion to contemporary political philosophy* (1995) Blackwell Publishing Ltd pp 291 – 311.

¹² Roach: 1994, at p 3-17, describes corrective justice as a powerful remedial theory which demands that wrongs be corrected. Though it empowers the courts to correct the wrong, the remedies are also limited to the harm that a wrongdoer has caused (at p 3-18).

¹³ Aristotle, *Nicomachean ethics*, V, 2-5 [Hereinafter referred to as Aristotle: 2-5], as quoted by Modak-Truran, M., ‘Corrective justice and the revival of judicial virtue’ (2000) 12 *Yale Journal of Law & Humanities* pp 249 – 298 [Hereinafter referred to as Modak: 2000], at p 250. Roach, K., *Constitutional remedies in Canada* (1994) Law Book Inc [Hereinafter referred to as Roach: 1994], at pp 3-17 – 3-18. Aristotle distinguished corrective justice from distributive justice when he said that distributive justice is that ‘which is manifested in distributions of honour or money or other things that fall to be divided among those who have a share in the constitution’.

¹⁴ See Modak: 2000, at p 250.

¹⁵ Shelton, D., *Remedies in international human rights law* (1999) Oxford University Press [Hereinafter referred to as Shelton: 1999], at p 38. Shelton contends that in all legal

violation is proven, the judge has to insist on full correction without attempting ‘either to balance the affected interests or changing ... behaviour in the future’;¹⁶ the judge will focus on restoration of the *status quo*.

In modern private law, corrective justice is not only most prominent in tort (delict) law, but obtains also in property and contract law.¹⁷ When parties enter into a contract it is assumed that they begin as equals who assume corresponding rights and duties. Omissions by one party to discharge his/her duties, for example by not paying the price or delivering the goods, destabilises the equality of the parties. It leads to an unjustifiable gain by one party and a corresponding loss to the other party. The effect of such conduct is that it changes the position of both parties, unfairly advantaging one and disadvantaging the other. This is what is meant by destabilisation of the parties’ equality. The purpose of the law in this case becomes one of restoring this equality.¹⁸ The same equality could be assumed with respect to delictual wrongs because of the

systems the principle that a wrongdoer has an obligation to make good the injury caused is prominently enforced, together with the restitution of property wrongly taken (at p 60).

¹⁶ Roach: 1994, at p 3-2. He contends further that if a court focuses on correcting harms caused by a proven violation, it will not have to worry about infringing the role of other branches of government to pursue distributive justice. This means that corrective justice is intrusive in nature as it looks at the outcome of the case and its impact from the perspective of the plaintiff.

¹⁷ See Bridgeman, C., *Strict liability and the fault standard in comparative justice accounts of contract*, Public Law and Legal Theory Working Paper No. 146, Florida State University College of Law, sourced at SSRN: <<http://ssrn.com/abstract=669504>> (accessed on 22 June 2006).

¹⁸ Weinrib, E., ‘Corrective justice in a nutshell’ (2002) 52 *University of Toronto Law Journal*, sourced at <http://www.utpjournals.com/product/utlj/524/524_weinrib.html>, (accessed on 22 June 2006) [Hereinafter referred to as Weinrib: 2002]. See also Modak: 2000, at p 252.

alteration of the victim's position as a consequence of the wrongdoer's conduct. The victim will have to endure physical, emotional, financial or other loss which would not have occurred if the wrong was not committed. According to Aristotle:

Corrective justice is the intermediate between an involuntary gain and loss. According to the corrective justice understanding of legal adjudication, the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it. Therefore, *this kind of injustice being an inequality, the judge tries to equalise it.*¹⁹ [Emphasis mine]

The purpose of the law, from the above perspective, becomes one of looking back to the position of the parties before the wrong was committed and assessing the impact of the wrong on this *status quo*. It is for this reason that corrective justice has been described as backward looking, it tends to focus backwards on the particular events that affected a particular individual.²⁰ Corrective justice is best suited for the rectification of discrete harms suffered by an individual at the hands of a clearly identifiable defendant.²¹ It is not, however, enough that the victim's status has been altered, there must be proof that the alteration has resulted from the defendant's wrong, liability on the part of the defendant must be established. The question posed by corrective justice, therefore, is

¹⁹ Aristotle, as quoted by Modak: 2000, at p 256. According to Aristotle, corrective justice takes the form of an arithmetical progression: If there are two equal parties, A and B and after a transaction, A has injured B to the extent of C, and their relation is $A+C$, $B - C$. To restore the balance, the judge takes C from A and gives it to B, creating a new relationship. $A - C = B - C + C$, an arithmetical mean between gain and loss in which the relative positions of the parties is once again the same.

²⁰ Cooper-Stephenson, K., 'Principle and pragmatism in the law of remedies' in Berryman, J., (ed.) *Remedies, issues and perspectives* (1991) Thomson Professional Publishing Canada pp 1 – 48 [Hereinafter referred to as Cooper-Stephenson: 1991], at p 21.

²¹ Roach: 1994, at p 3-19. See also Roach: 1991, at pp 865, 868 and 872.

whether the plaintiff has suffered an injustice at the hands of the defendant.²²

A judge is required to look only at the distinctive character of the injury rather than at the virtue of the parties and must determine which party inflicted the injury and which party received it.²³ Corrective justice is, therefore, not concerned with the character of the parties. According to Aristotle, an injury is an injury: 'it makes no difference whether a good man has defrauded a bad man or a bad man a good one'.²⁴ As long as fault is established, for instance, it does not matter whether the defendant is a government or a private individual. However, as is submitted later,²⁵ the character of the defendant cannot be ignored and brushed aside as it may determine the potential remedies available.²⁶

The discretionary space of a judge under corrective justice is very limited; the judge has to live up to the demands of causation and restoration.²⁷ In remedial terms, the catalogue of remedies from which the judge can choose is also very limited. He/she is limited to those remedies that, as much as possible, restore victims to their previous position. The court

²² Weinrib, E., 'Restitutionary damages as corrective Justice' (2000) 1 *Theoretical Inquiries in Law* (Online Edition): No. 1, Article 1, at p 3, sourced at <<http://www.bepress.com/til/voll/iss1/art1>> (accessed on 24 June 2006) [Hereinafter referred to as Weinrib 2000].

²³ Modak: 2000, at p 252.

²⁴ Aristotle, as quoted by Modak: 2000, at p 257.

²⁵ Section 5.2.2.1 below.

²⁶ Cooper-Stephenson: 1991, at p 12. Cooper-Stephenson gives the example of an errant quasi-judicial tribunal as requiring an order of hearing or *mandamus* and not an award of damages.

²⁷ Roach: 1991, at p 859.

focuses on establishing liability which must be linked to the wrongful conduct of the defendant as guided by the principles of liability and causation.²⁸ The wrong is an essential element because it is the right infringing wrong which forms the subject of the claim.²⁹ It is unjust for a defendant to be required to remedy that for which fault has not been proven on their part, and yet if fault is proven, it is unjust if the victim is not restored to the position he/she was in before the wrong:

[I]njuries issuing from faultless conduct ought to be viewed more as misfortune than mischief, asserting or implying that it would be *normatively* wrong to hold injurers financially responsible for non-negligent injuries that they inflict. The idea here seems to be that the harms occasioned by blameless human agency are morally equivalent to those caused by natural forces. Responsibility for rectifying injuries that arise out of pure natural misfortune—out of floods, fire, earthquakes and other natural disasters are neither caused nor aggravated by deliberate or careless human actions—does not fall on particular persons, because no particular persons stand in any “normatively important” relationship to the injuries at hand.³⁰

Corrective justice is also not concerned with the impact that its remedies may impose, not only on the defendant, but also on third parties. All that the court focuses on are the interests of the plaintiff. An example of this view can be found in a Canadian case where in ordering compensation against a university, a dissenting judge was not concerned with whether or not the order would negatively impact on the University’s already strapped finances. Justice Wilson in *McKinney v University of Guelph* (*Mckinney* case)³¹ observed that:

²⁸ Roach: 1994, at p 3-17.

²⁹ Shelton: 1999, at p 39.

³⁰ Keating, G., ‘Distributive and corrective justice in tort law of accidents’ (2000) 74 *Southern California Law Review* pp 193 – 226, at p 198. Shelton: 1999, at p 39, submits that, otherwise, a person’s loss due to a falling tree would be legally equivalent to injury resulting from torture and that even rights violating conduct which causes no compensable harm or that brings an economic benefit to the victim would be a cause of complaint.

³¹ (1990), 76 D.L.R. (4th) 545, [1990] 3 S.C.R. 229

I recognize that the enforced retirement of the appellants was not motivated by unconstitutional animus but rather by the severe fiscal restraints under which the universities have been forced to operate. I also appreciate that an award of damages in addition to reinstatement will place an additional monetary burden on these already financially strapped institutions. Impecuniosity and good faith are not, however, a proper basis on which to deny an award of compensatory damages. Such damages are clearly part of the web of remedies that go to make an injured party whole.³²

As is illustrated later,³³ the majority disagreed, taking into consideration the financial impact that compensation would have on the university. According to the majority, in addition to the interests of the aggrieved staff the interest that the public has in the operation of universities had to be considered.

5.2.1.1 Corrective justice and traditional litigation processes

Corrective justice has played a very important role in defining and modelling traditional private law litigation processes. Traditional litigation procedures are primarily aimed at establishing the liability of the defendant, if any. Traditional litigation is also adversarial in nature. In such litigation it is assumed that the judge is an independent and neutral participant with a passive role to play.³⁴ The role of the judge is simply to determine liability, and once this is done, to restore the parties to the position they were in before the wrong leading to liability occurred. The judge is supposed to be independent and impartial, which is the reason why he/she is excluded from any partisan role and reserves judgment until presentation of the facts and arguments.³⁵ A judge cannot answer any

³² See case at <<http://scc.lexum.umontreal.ca/en/1990/1990rcs3-229/1990rcs3-229.html>> (accessed on 18 September 2006).

³³ Section 5.2.2 below.

³⁴ See generally, Sturm, P., 'A normative theory of public law remedies' (1991) 79 *George Town Law Journal* pp 1355 – 1446 [Hereinafter referred to as Sturm: 1991], at p 1360.

³⁵ Sturm: 1991, at p 1383.

questions unless they are put to him by the appropriate party, who must also follow the appropriate procedure.³⁶

In traditional litigation, the remedial process begins only after the establishment by the plaintiff of the defendant's liability. It is very important to identify, with precision, not only the victim but also the perpetrator of the wrong. The victim in this form of litigation is identified using very strict rules of standing—the plaintiff must establish his/her standing by proving that he/she had a right whose enjoyment was brought to an end by the actions of the defendant. The plaintiff has to stand not only in the position of a victim but also as a beneficiary of any relief that may be claimed from the court.

Traditionally, the victim of a violation was identified as an individual litigating for him/herself. However, the growing awareness that some transactions could no longer be viewed as bilateral gave birth to the class or representative action.³⁷ A multilateral transaction can lead to multilateral damage, and it may be convenient that the claims of all those who have suffered at the hands of the same defendant or defendants be heard in the same suit. In spite of this, the element of damage and victimhood still has to be established on behalf of each individual plaintiff. The group is just an aggregation of a collection of identifiable individuals who have the same interests and have suffered the same harm,³⁸ sometimes at the hands of the same defendant.

³⁶ Chayes: 1979, at 1283.

³⁷ Chayes: 1979, at p 1291. Chayes also perceives the class suit as a response to the proliferation of more or less well organised groups in society and also as a result of perception of some interests as group interests.

³⁸ The class action has come under increasing scrutiny especially in the United States of America where it has mostly been used. In most cases, it has been used not as a vehicle of justice but as a means of making huge sums in legal fees for lawyers representing a wide range of victims. Class actions have also been criticised in the United States for

The litigation process focuses on the wrong that is alleged to have been committed, and the incidents leading up to the wrong are very important as determinants of liability. Once the wrong has been established, the remedy is deemed to flow naturally and smoothly from this process.³⁹ The remedies that the courts grant after finding of a violation must be connected to the rights and duties of the parties and must be intended to restore those duties and rights. This requires that a close relationship be maintained between rights and remedies; the nature of the remedy is determined by the nature of the liability and the harm done.

This form of litigation, as supported by corrective justice, is not suited to structural or systemic violations arising from organisational behaviour. This is because of the complexities of proving causal responsibility for the harms that are caused by such violations.⁴⁰ Systemic violations are those violations that establish themselves and endure in a sustained manner as part of an institution's behaviour. Most times the violation may not be the product of actions of identifiable officials, instead it may arise from a web of institutional practices entrenched in an *ad hoc* manner as part of the operational system. The violation is but a symptom of a bigger problem requiring a systemic approach to tackle. However, this does not mean

straining judicial resources especially in localised areas where class suits are mostly filed in search of sympathetic juries. These suits also allow cases that raise interstate issues to be conducted outside the jurisdiction of federal courts. It is because of these and other reasons that the United States Congress in 2005 passed the Class Action Fairness Act, an Act which redefines the jurisdiction of the federal and state courts in class actions.

³⁹ Eisenberg, T., and Yeazell, T., 'The ordinary and the extraordinary in institutional litigation' (1980) 93 *Harvard Law Review* pp 465 – 517 [Hereinafter referred to as Eisenberg & Yeazell: 1980], at p 474.

⁴⁰ Roach: 1991, at pp 865. Roach contends that the causal requirement encourages a lack of candour and forces plaintiffs and defendants to make moralistic bluffs that do not capture the complex and ambiguous nature of the structural problem to be remedied (at p 875).

that corrective justice should be discarded completely where violations result from organisational behaviour. It may, for instance, be used to address discrete wrongs suffered by individuals at the hands of state officials. Where a constitutional violation arises from a 'one-shot' wrong and is suffered by an identifiable victim at the hands of an identifiable wrongdoer, corrective justice can be used to correct such harm.⁴¹

It is important to note, however, that corrective justice's insistence on full correction sometimes places unrealistic demands on the courts and fetters their ability to do justice. This is especially so where a number of interests are implicated by a case: '[corrective justice] cannot guide a court's sense of priorities in responding to patterns and practices of violations in institutions or in accommodating social interests in devising remedies'.⁴² With this model of justice there is a fusion of rights and remedies as the purpose of the latter is to realise the former. A remedy is not suited for the right if it cannot restore the position of the victim. On the other hand, distributive justice suggests that, where necessary, rights and remedies can be treated as two separate things. The needs of justice may demand that the remedy adopted should not necessarily be that which leads to the full realisation of the rights. It is this difference between corrective and distributive justice that runs through the debate on the relationship between rights and remedies.

5.2.2 The ethos of distributive justice

Distributive justice is that domain of justice concerned with the distribution of benefits and burdens among members of a given group, who enjoy the relevant benefits and shoulder the relevant burdens.⁴³ The benefits may come to such members either simply by virtue of their

⁴¹ Roach: 1991, at p 870.

⁴² Roach: 1991, at p 861.

⁴³ See Aristotle: 2-5.

membership of the group or as a result of some entitlement.⁴⁴ The concept of distributive justice, unlike corrective justice based on the philosophy of libertarianism, is supported by utilitarianism. The philosophy of utilitarianism is based on the belief in an individual's wellbeing but also lays emphasis on the common good of society and the wellbeing of all its members. An act is just only if it maximises the wellbeing of everyone else.⁴⁵ Utilitarian justice is supported by what John Rawls describes as the idea of social co-operation arising from his conception of justice.⁴⁶ Rawls has described the elements of social co-operation as follows:

A conception of political justice characterizes the fair terms of cooperation. Since the primary subject is the basic structure of society, these fair terms are expressed by principles that specify basic rights and duties within its main institutions to regulate the arrangements of background justice over time, so that the benefits produced by everyone's efforts are fairly distributed and shared from one generation to the next.⁴⁷

From a utilitarian perspective, the law and the courts have very important roles to play in the enterprise of realising social co-operation. In terms of this view, courts have to consider interests other than those of the parties before them. In this context, actions, policies, and institutions are judged in terms of the extent to which they maximise overall happiness and

⁴⁴ Klimchuk, D., 'On the autonomy of corrective justice' (2003) 23 *Oxford Journal of Legal Studies* pp 49 – 64, at p 50.

⁴⁵ See Vallentyne, P., *Distributive Justice* at <[http://www.missouri.edu/~klinechair/online%20papers/distributive%20justice%20\(handbook\).doc](http://www.missouri.edu/~klinechair/online%20papers/distributive%20justice%20(handbook).doc)> (accessed on 24 June 2006) [Hereinafter referred to as Vallentyne: 2006].

⁴⁶ Rawls, J., *Political liberalism* (1993) Columbia University Press [Hereinafter referred to as Rawls: 1993], at p 16. See also Scheffler, S., 'Rawls and utilitarianism' in Freeman, S., (ed.) *The Cambridge companion to Rawls* (2003) Cambridge University Press pp 426 – 459.

⁴⁷ Rawls: 1993, at p 16.

wellbeing.⁴⁸ It is this form of justice that persons such as Jeremy Bentham and John Stuart fought to entrench in England in the 19th century. They viewed the laws that existed then as morally atrocious because they prevented rather than promoted overall happiness.⁴⁹ Utilitarianism also represents itself in the form of what has been described as communitarianism, a concept which challenges libertarianism on the ground that an individual is not an end, but exists together with others with whom he/she pursues a common end.⁵⁰ Communitarians submit that an ideal society is one that defines the individual in terms of what they are and the values that they have.⁵¹

Unlike bilateral corrective justice, distributive justice is, therefore, multilateral. Justice from this perspective is the standard by which conflicting values are reconciled and competing conceptions of good accommodated or resolved.⁵² Though a court case may have only two parties, distributive justice views it as having community wide implications. As a result, the court focuses on what Cooper-Stephenson has described as collateral interests that need secondary consideration.⁵³ This has arisen from the recognition that not all interested persons may be party to a suit, and yet their interests may be affected by the outcome of

⁴⁸ Wellman: 2002], at p 60.

⁴⁹ Wellman: 2002, at p 61.

⁵⁰ See Mulhall, S., and Swift, A., *Liberals & communitarians* (1996) Blackwell Publishers Ltd [Hereinafter referred to as Mulhall & Swift: 1996], at p 10. See also generally Kymlicka, W., 'Community' in Ryan, A., in Goodin, E., and Pettit, P., (eds.) *A companion to contemporary political philosophy* (1995) Blackwell Publishing Ltd pp 366 – 378; and Scanlon, M., *What we owe each other* (2000) Harvard University Press.

⁵¹ Mulhall & Swift: 1996, at p 13.

⁵² Sandel: 1998, at p 16

⁵³ Cooper-Stephenson: 1991, at p 19

that suit.⁵⁴ While corrective justice seeks to explain why ‘*this* defendant is liable to *this* plaintiff’,⁵⁵ distributive justice focuses on the broader societal interests.⁵⁶

Distributive justice is based on an acknowledgement that it is not possible in all cases to put the victim of a wrong in the position they would have been in but for the violation. In the modern context it is not always possible to identify discrete wrongs and the wrongdoer with precision.⁵⁷ Harm may be inflicted on groups of people, and not only an individual victim, and may arise from conduct that cannot be associated, in liability terms, with a specific defendant. Where the state is the obligation bearer

⁵⁴ Cooper-Stephenson: 1991, at p 19, submits that it has also arisen from the increased focus which is being given to the deterrent effect of remedies, which requires consideration of the interests of the future community of persons who will find themselves in a like situation as the plaintiff and defendant.

⁵⁵ Smith, L., ‘Restitution: The heart of corrective justice’ (2001) 79 *Texas Law Review* pp 215 – 275, at p 216.

⁵⁶ It is not true, as is suggested by Horowitz, that all forms of adjudication focus on ascertaining whether one party has a right and another a duty, and it is not true that the question of what alternatives are available for a problem are deterred by this approach. See Horowitz, D., *The courts and social policy* (1977) The Brookings Institution [Hereinafter referred to as Horowitz: 1977], at p 34. While this may be true of traditional litigation based on corrective justice, it is not true of modern litigation based on distributive justice. The question of alternatives is very central to distributive justice as it helps the court find solutions that address, as much as is possible, the interests that need to be balanced. It is also not true, again as suggested by Horowitz (at p 35), that adjudication is piecemeal and that judges are restricted to issues that are presented before them Chapter seven (section 7.3) will show that actually structural litigation has been protracted and has involved judges in issues that were not raised by the parties. Even in the South African context, the courts have rejected proposed out of court settlements for the sake of making judgments that address the wider issues of constitutionality. See chapter six (section 6.2).

⁵⁷ Roach: 1994, at p 3-19.

in this context, it may be necessary for the court to look at the wider obligations of the state and not just liability in the case at hand. Without asking whether or not government is guilty, the court could, in some circumstances, dedicate its efforts to getting solutions that may do away with the harm. In this context, therefore, the liability rules of corrective justice will be of very limited application.

The remedies arising from administration of distributive justice have their roots in the law of equity, whose application began in England as a response to the inadequacies of the common law in remedying certain violations. The common law has historically been a very rigid body of law. It has recognised only specific causes of action through the writ system and granted very rigid remedies to fit the specific writ. What equity has done is to introduce a sense of flexibility into the law and to soften the common law and make it fairer.⁵⁸ It is this form of flexibility that has been embraced by the proponents of distributive justice. Equity has been described as a complex theory and doctrine which requires balancing of the affected interests before intrusive remedies are ordered.⁵⁹ This is in addition to affirming the judge's broad and flexible remedial discretion.⁶⁰ This balancing and wide discretion has allowed courts to award remedies that may be short of full correction. This is because '[t]he disengagement of right and remedy in equity allows judges to provide less than rectification demands'.⁶¹ In addition, equity allows the court to focus

⁵⁸ Berryman, J., *The law of equitable remedies* (2000) Irwin Law [Hereinafter referred to as Berryman: 2000], at p 2.

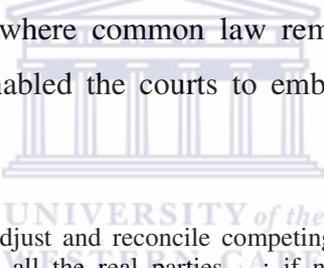
⁵⁹ See Chayes: 1979, at pp 1292 – 1293.

⁶⁰ Roach: 1991, at p 887.

⁶¹ Roach: 1991, at p 860. Roach submits that the flexibility of equity provides judges with an opportunity to address the present needs of plaintiffs and defendants without concentrating on their past rights and wrongs as corrective justice requires. In his opinion, courts have generally been reluctant to use the language of needs to justify 'enriched' remedies, but they have used it to recognise the necessity of granting delayed

not only on the needs of the parties but also to consider third party interests implicated by the case. While equity is not explicitly part of South African law, its principles are implicitly enforced by the courts through such principles as those that require fairness.

Unlike the case with corrective justice, a judge dispensing distributive justice will, therefore, rely on the breadth and flexibility of the equitable remedial powers without careful attention to the demands of causation and restoration.⁶² Rather than be guided by strict rules of procedure, and be bound by the existing causes of action and remedies, distributive justice allows the court very wide discretion to fashion causes of action and remedies as the needs of justice demand. Distributive justice puts equity in its right place by treating it as a primary source of law. Courts, for instance, are not bound by the requirement that equitable remedies will only be available where common law remedies are proven to be inadequate. This has enabled the courts to embrace the full breadth of equity and its benefits:



It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties ...; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.⁶³

and imperfect remedies. Roach submits further that the displacement of the dominance of the corrective theory will encourage courts to develop remedies tied to victims' needs as a counterbalance to the inevitability that remedies cannot fully correct structural wrongs but will often recognise society's needs for delayed or imperfect remedies (at p 864).

⁶² Roach: 1991, at p 859.

⁶³ Murphy J in *Porter v Warner Co.* 328 U.S. 395 (1946), at p 398.

Unlike corrective justice, distributive justice does not emphasise liability but effects of one's activities. Its multilateral nature compels a court to ascertain how its remedial measures, irrespective of whether or not liability has been declared, will impact on the interests of other people. The backward looking nature of corrective justice, geared towards ascertaining liability, may not be suitable to address current legal problems. Legal problems and disputes are no longer bilateral. The world we live in now has complex and interdependent interests, a reality which the courts must acknowledge when they choose remedies.⁶⁴ All the interests implicated by the case must be considered and the impact of the remedy on them assessed.

Due to the need to avoid repetition of the same conduct, distributive justice allows remedies to have a future direction and focuses on the needs of the community as a whole. This should be contrasted with corrective justice, which is backward looking and focuses on the individual claimant in order to address past wrongs. It is true that the process of administering distributive justice may begin with a pronouncement on the legal consequences of past actions. However, unlike the backward looking liability rules of corrective justice, distributive justice will use such past actions as a basis to determine future actions.⁶⁵ In this setting, the role of the remedial stage is not to determine where fault lies. Rather, it is to develop a plan that fairly and effectively realises the rights not only at the time of the case but in future as well.⁶⁶ The court will identify the needs that have to be addressed, and select remedies in response to them. This is important because remedies based

⁶⁴ Roach: 1994, at p 3-19.

⁶⁵ See Chayes: 1979, at p 1294.

⁶⁶ Sturm: 1991, at 1393.

on needs are more directly relevant to the future of those who have been wronged in the past.⁶⁷

The remedy guaranteed will not necessarily be one that flows from the wrong. It must be a remedy that satisfies all the interests concerned. Emphasis is not on correction of the wrong, complete correction may be ignored for the sake of addressing other interests. Both corrective and distributive forms of justice demand that where a state agency is found to have violated constitutional rights, the violation must be stopped. However, where distributive justice differs from corrective justice is that it will insist on full correction of the violation 'absent special circumstances'.⁶⁸ 'Special circumstances' means those circumstances which may impact on the remedy. This may, for instance, include the costs associated with the implementation of the remedy.⁶⁹ Special circumstances also include factors that may affect interests other than those of the parties in the court case. Such other interests have to be balanced against those of the parties. Balancing of these interests may not be possible where a judge insists on full correction of the wrong:

[O]nce a ... violation has been found, remedial options should not be constrained by the corrective requirements of causation and restoration. All of the victim's needs should be considered in the practical balancing of interests that equity demands. Once the constraints of corrective justice are abandoned, I can imagine a justice system in which the needs of the plaintiffs, of affected interests and of society are placed directly on the remedial agenda of courts. Victims will not have to concentrate on tracing the harms which can be attributed to past wrongs, but rather can educate the court about their present needs. Likewise, governmental defendants will not have to channel their energies into claims of innocence and lack of responsibility for harms. They can directly educate courts about the resource constraints they face. For their part, judges could be directly

⁶⁷ Roach: 1991, at p 864.

⁶⁸ Wells & Eaton, at p xxv.

⁶⁹ Wells & Eaton: 2002, at p xxv give the example of an injunction that would be especially disruptive to legitimate state goals as in the case of an employee who is fired and whose reinstatement would produce turmoil in the office. The injunction would be denied in that case.

concerned with the practical prospects for genuine reform and reconciliation. They would not have to pretend that the remedies they order inexorably follow, fit and repair the extent of wrongdoing.⁷⁰

The approach described above requires the court to consider the costs and benefits of a particular remedy. For instance, as seen in chapter six,⁷¹ damages in socio-economic rights litigation deplete the already limited state resources, which may affect the state's capacity to deliver socio-economic goods and services. In the Canadian case of *McKinney*, for example, the majority thought that requiring the university to stick to the statutory state retirement age requirements would adversely affect the University's already strapped finances and would impact on the public interest. Dickson CJ, for the majority, held that:

In assessing whether there has been minimal impairment of a constitutional right, consideration must be given not only to the reconciliation of claims of competing individuals or groups but also to the proper distribution of scarce resources, here access to the valuable research and other facilities of universities. The universities had a reasonable basis for concluding that mandatory retirement impaired the relevant right as little as possible given their pressing and substantial objectives. Against the detriment to those affected must be weighed the benefit of the universities' policies to society.⁷²
[Underline in original]

It should be noted that the various remedies come with a number of costs, not only financial but such other costs as forbearance of benefits, limitation of rights and burdens. Some of these costs are not only relevant at the remedial stage but may even, on occasion, override remedying a violation.⁷³ While a court's approach in granting remedies may be intended to realise full protection of the infringed rights, it may come with unreasonable costs on the part of the defendant. This is in addition to

⁷⁰ Roach: 1991, at p 864.

⁷¹ Section 6.3.2.

⁷² See case at <<http://scc.lexum.umontreal.ca/en/1990/1990rcs3-229/1990rcs3-229.html>> (accessed on 18 September 2006).

⁷³ Shelton: 1999, at p 54. Cooper-Stephenson: 1991, at p 36.

imposing burdens on third parties not before the court. Though the grant of remedies should not be deterred on the ground that they impose burdens on the defendant, these burdens cannot be ignored as they may affect the effectiveness of the remedy itself.⁷⁴ It is sometimes very difficult to design an effective remedy without imposing costs on third parties to the suit who may not even be violators.⁷⁵ The courts should, however, be careful not to impose on such third parties costs which may be viewed as unjust or unduly burdensome.⁷⁶ Such perceptions have the potential of creating resistance which undermines the implementation of the selected remedy. Ignoring the costs on third parties would amount to a

⁷⁴ In the Canadian case of *Lavoie v Nova Scotia (Attorney-General) (Lavoie case)* 47 D.L.R. (4th) 586; 1988 D.L.R. LEXIS 1108 the Court declined to make an order that the defendant establish facilities for francophone students. The Court said that it would not make such order until it was satisfied that the number of enrolled students was sufficient to justify the cost. The Court observed that the defendant's interests in terms of costs had to be considered as well:

To put the defendants by order of this court to the expense of providing a separate facility for say, 200 plus children from Grades P to VIII, and then to find only 50 actually enrolled is an order that I am not prepared to make on the evidence before me (47 D.L.R. (4th) 586, at p 594).

It has been submitted that the burden is on the defendant to persuade the court that the remedy is unreasonable and imposes undue hardship. Roach: 1994, at p 13-50. This does not mean though that the court cannot detect the hardships on its own, and it is even more necessary for the court to do so in respect of third parties who may even not be before the court.

⁷⁵ Shelton: 1999, at p 54.

⁷⁶ In this regard, the courts have been urged to try to limit the consequences of decisions on persons or processes extraneous to the litigation to a minimum. Pieterse, M., 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* pp 383 – 417 [Hereinafter referred to as Pieterse: 2004], at p 412.

failure to acknowledge the polycentric nature of constitutional disputes as discussed in chapter three.⁷⁷

Consideration of the costs of the remedies is the essence of the notion of ‘remedial cost internalisation’. According to this notion, the remedy should limit the autonomy and choices of as few innocent individuals and institutions as possible.⁷⁸ The risk of non-compliance with the remedy should itself be weighed as a cost that needs to be traded off against the effectiveness of the remedy.⁷⁹ A less effective remedy may be selected where a more effective one heightens the risk of non-compliance. Gewirtz, for instance, contends that:

The intellectual and practical problem posed in each situation is whether and how the law should adjust its remedial aspiration in the face of a resistant reality, in particular, under what conditions and premises, if any, public opposition to a legal rule may properly be the basis for limiting judicial remedies for its violation. It may at first seem wholly illegitimate for courts to take account of resistance, since doing so appears to deny the very right that the court has affirmed. But, as I argue in this essay, resistance cannot be ignored. Among the difficulties, indeed, the anguish, necessarily endured by those seeking to produce change in the world is that at times they must cede ground because of opposition. Remedies for violations of constitutional rights are not immune from that reality.⁸⁰

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⁷⁷ At section 3.4.2. See also Cassels, J., ‘An inconvenient balance: The injunction as a Charter remedy’ in Berryman, J., (ed.) *Remedies, issues and perspectives* (1991) Thomson Professional Publishing Canada pp 272 – 311 [Hereinafter referred to as Cassels: 1991], at pp 300 – 303, and also Pieterse: 2004, at p 412.

⁷⁸ Cooper-Stephenson: 1991, at p 36.

⁷⁹ Currie, I., and De Waal, J., *The Bill of Rights handbook* (2005) Juta & Co [Hereinafter referred to as Currie & De Waal: 2005], at p 198. Currie & De Waal contend that it would be unrealistic for a court not to take the possibility of the unsuccessful execution of its order into account when considering the appropriateness of a remedy.

⁸⁰ Gewirtz, P., ‘Remedies and resistance’ (1983) 92 *Yale Law Journal* pp 585 – 680 [Hereinafter referred to as Gewirtz: 1983], at p 588.

The resistance encountered in the implementation of judicial decrees in the United States school desegregation cases supports the above submission.⁸¹ In some cases it was feared that immediate implementation of the court decrees would have exacerbated the resistance.⁸² All that the Court did at the beginning was to demand that the state desegregates the schools with all deliberate speed. It was only after resistance had been overcome that the courts started giving concrete directions, in clear and precise terms, as to what was to be done to rectify the violation.

An effective remedy is, therefore, one that embraces and considers the problems that are likely to be encountered at the implementation stage. The court should look at the end results of its remedy and consider its long term effectiveness. Remedies which, for instance, impose high resource burdens on the state may force the state to adopt long term strategies that will lead to the withdrawal of the challenged social

⁸¹ In the 1950s opposition to racial discrimination in public schools in the United States reached its peak, culminating in a series of judicial decisions from both the state and federal courts. The most significant decision in this direction was the 1955 United States Supreme Court case of *Brown v Board of Education* 349 US 294 (1955) (*Brown* case). In this case, the Supreme Court upheld decisions of several lower courts to the effect that racial discrimination in public education was unconstitutional which had to be remedied. This ruling did not, however, go down well with some sections of American society, resulting in resistance that affected implementation of the court decrees. The resistance manifested itself in the form of violence, flight by white people from public schools, boycotts, hostility and incitement, and foot-dragging by public officials. Gewirtz: 1983, at p 589. In fact, in some cases the Federal government had to enlist the services of the US marshal to ensure that black learners are enrolled in educational institutions. This impacted greatly on the remedies and the means of enforcement chosen by the courts to vindicate the right to equality. Some of the remedies and means of implementation did not present themselves as the most effective available, they seemed minimalist in objective.

⁸² Shelton: 1999, at p 54. See also Davis, D., ‘Adjudicating the socio-economic rights in the South African Constitution: Towards “deference lite”?’ (2006) 22 *South African Journal on Human Rights* pp 301 – 327 [Hereinafter referred to as Davis: 2006], at p 322.

programs.⁸³ A remedy may be ignored simply because it is impossible to carry out, with the resultant effect that the ideal it protects is hypothesised as unrealistic. It is important to note that competing interests that are considered insufficient to override the purposes of the rights at the rights determination stage could be relevant and used at the remedial stage to limit the scope of the remedy. It is, therefore, not correct, as has been contended,⁸⁴ that an effective remedy is one that is capable of having an immediate effect.

In the school desegregation cases, for instance, white resistance could not have been used to limit the right to equality and freedom from discrimination; yet it was considered as limiting the scope of the remedies the courts were willing to grant. This may have, in the short run, appeared to be a limitation of the rights; yet it was calculated to give the courts time to devise means of countering the resistance.⁸⁵ It also served to preserve the legitimacy of the courts and to allow them to assert their remedial powers in a gradual and acceptable manner. The courts were merely taking cognisance of the fact that changing strongly held convictions cannot be done immediately.⁸⁶

⁸³ Cooper-Stephenson: 1991, at p 32.

⁸⁴ See Swart, M., 'Left out in the cold? Grafting constitutional remedies for the poorest of the poor' (2005) 21 *South African Journal on Human Rights* pp 215 – 240 [Hereinafter referred to as Swart: 2005], at p 217.

⁸⁵ Cooper-Stephenson: 1991, at p 38, has submitted that the argument may be made that the highly prized human rights might be reformulated in the face of defendant recalcitrance. He submits that whether a 'rights maximising' approach to remedies, or an 'interest balancing' approach is used, the courts must recognise that resistance can weaken victims' rights and consider strong measures to defeat that resistance. They must sometimes limit remedies in light of resistance because to do so ultimately provides the most effective remedy. It may indeed maximise the plaintiff's rights in the long term to interest-balance in the short term, and a court should be candid when that is done.

5.2.2.1 Focus on character of violator under distributive justice

With distributive justice, the court does not focus solely on the nature of the injury but also on the distinctive character of the parties in the court case. This is in addition to focusing on the character of persons that may not necessarily be parties in the case yet would be affected by its results. Those before the court are, therefore, considered images of sociological entities, which though composed of individuals and must be represented by particular individuals, are not reducible to the people who speak for them.⁸⁷ Focus on the nature of the wrong while ignoring the character of the violator has serious implications, especially where government is implicated as the wrongdoer. The character of the violator is not only relevant to a determination of how to apply the constitution; it may also influence the efficacy or availability of certain remedies.⁸⁸

Though they may inflict the same kind of harm, violations perpetrated by private individuals and those perpetrated by government are generally of a

⁸⁶ Roach: 1991, at p 882. See also Special Project, 'The remedial process in institutional reform litigation' (1978) *Columbia Law Review* pp 784 – 929 [Hereinafter referred to as Special Report: 1978].

⁸⁷ Cooper-Stephenson: 1991, at p 20. Horowitz: 1977, at pp 7 and 9, has condemned this approach as a dubious assumption that the litigants before the court typify a bigger problem. In his opinion, what this signifies is the increasing subordination of the individual case in judicial policy making, which has led to the individual fading away into the background. This has resulted in less care being devoted by the lawyers and the judge to the appropriateness of particular plaintiffs and to the details of the grievance. He describes the new judicial approach as a process that has superimposed itself on the judicial structure that evolved primarily to decide individual cases (at p 23).

⁸⁸ Currie & De Waal: 2005, at p 192. Currie & De Waal argue that the deterrent effect of some remedies may differ considerably depending on whether the violator is a public or private institution. They also argue that when an institution is responsible for the violation, it may be possible to remit a decision for reconsideration; this is not possible where the violator is an individual (at p 197).

differentiated nature.⁸⁹ The reasons that lead to such violations are usually also quite different. So are the benefits that may be obtained by the violator. According to Schucks, in respect of public officials ‘the returns for accepting risk are far more intangible and remote than the potential returns that motivate private risk taking’.⁹⁰ It, therefore, makes sense to identify the violator because the motive of the violator, if deterrence is to be achieved, becomes a relevant consideration. A violator who perceives his/her motive to be legitimate may not be deterred by certain remedies, or may continue the violation if he/she values the benefits of the violation highly. Cooper-Stephenson describes the process of considering the character of the defendant as ‘remedial targeting’, which involves an analysis of the types of official misconduct.⁹¹ The nature of the remedies needed to deter violations by the state may be different from those that deter private violations.⁹² Damages may be effective in respect of private wrongdoers because of the dent they make on private funds. Yet damages against government, paid from public coffers, may be an ineffective deterrence measure.⁹³

⁸⁹ Pilkington has argued that one acting in the name of the government has potential ability to bring about substantially greater harm than the ordinary person. Pilkington, M., ‘Damages as a remedy for infringement of the Canadian Charter of Rights and Freedoms’ (1984) *Canadian Bar Review* pp 517 – 576 [Hereinafter referred to as Pilkington: 1984], at p 536.

⁹⁰ Schuck, P., *Suing government: Citizen remedies for official wrongs* (1983) Yale University Press, at pp 16 – 25 as reviewed by Sunstein, C., (1983) 92 *Yale Law Journal* pp 749 – 761 [Hereinafter referred to as Schuck: 1983 and Sunstein: 1983, respectively], at pp 751 – 752. It is for this reason that Schucks thinks that damages may not be an effective means of deterring public officials from violating rights.

⁹¹ Cooper-Stephenson: 1991, at p 12.

⁹² Shelton: 1991, at p 51.

⁹³ Shelton: 1991, at p 51. Damages are not effective against government because they must be substantial enough for a dent to be felt and to prevent government from purchasing an option to continue violating human rights. Yet substantial damages may

Government is perceived as the guardian of human rights and the protector of all citizens; violations by the same institution go to the very root of protection and need to be dealt with severely.⁹⁴ At the same time one must consider the motives behind violations of human rights. In most cases private wrongdoers are motivated by selfish interests such as accumulation of wealth and amassing power.⁹⁵ In contrast, violations by government may arise out of sheer negligence on the part of public officials, and sometimes in the belief that the public interest is being served.⁹⁶ Violation by government could also result from failure of comprehension, failure of motivation or systemic failure.⁹⁷ Yet remedies that work for a government that is merely inattentive to constitutional standards may not work for a government that is either incompetent, or intransigent. The latter may call for strong remedies, including contempt of court sanctions if necessary.⁹⁸

have an impact on the government's capacity to discharge all its constitutional commitments as they deplete the resources needed for this purpose. See *Fose v Minister of Safety and Security* (Fose case) 1997 (7) BCLR 851 (CC), at para 72. See also chapter six, section 6.3

⁹⁴ Shelton: 1999, at p 50. He submits that the remedies afforded should reflect the breach of trust involved; the more outrageous the wrongdoer's conduct, the more outraged and distressed the victim will be, and the harm that will be suffered.

⁹⁵ This is not to suggest that all private violations are motivated by a desire for wealth and power; some result from sheer negligence, while others may be committed in good faith because of ignorance.

⁹⁶ Again, this is not to suggest that there are no cases where public officials are motivated by personal and selfish interests or even by the need to satisfy political needs.

⁹⁷ These are the reasons that have been identified by Peter Schuck as explaining the motives behind the commission of wrongs by government. See Schuck: 1983 as referred to by Cooper-Stephenson: 1991, at pp 14 – 18.

⁹⁸ Roach, K., and Budlender, G., 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable' (2005) 122 *South African Law Journal* pp 325 – 351 [Hereinafter referred as Roach & Budlender: 2005], at p 345. The identification of the

5.3 RELATIONSHIP BETWEEN RIGHTS AND REMEDIES

The relationship of rights and remedies has been the subject of controversy between scholars for quite some time. While some scholars believe that rights and remedies are interlinked, others insist that the two should be de-linked and considered separately. It is worthwhile exploring this debate because of its impact on the kinds of remedies that a court may grant and its relationship with the ethos of justice. The relationship that different scholars ascribe to rights and remedies has, amongst others, been determined by the notion of justice to which they subscribe. Linkage between rights and remedies makes sense from the perspective of the theory of corrective justice. This is because remedies under this theory of justice are supposed to restore the right in its entirety.

A judge who believes in the linkage between rights and remedies will, therefore, restrict him/herself to those remedies that maximise the right and will not pay attention to considerations not connected to the right, even if these impact on the implementation of the remedy. This is the basis of the theory that the only reason remedies exist is to serve to implement substantive rights, and that the remedy should, as far as possible, serve to vindicate the right in issue.⁹⁹ This approach is in

character of the violator in the case of government defendants is also important because it allows the court to ascertain the specific government entity bearing the remedial obligation. This is particularly relevant within the context of the semi-federal structure of the South African government. The Constitution designates the Republic of South Africa as consisting of the national, provincial and local government spheres which are distinct but also interdependent and interrelated (see sections 40 and 41). Through this structure the Constitution has imposed different socio-economic rights obligations on different levels of government. It is important that any remedy to redress violation of these rights be directed at the level of government that bears the obligation that has been violated. This is not possible where the court ignores the character of the defendant and the nature of the obligations of that defendant.

⁹⁹ Cooper-Stephenson: 1991, at p 5.

accordance with the concept of rights maximisation which requires that the only question that a court asks after finding that there is a violation is one of which remedies will be most effective to the victims.¹⁰⁰ Considerations such as the costs of the remedy, unless they impact on the effectiveness of the remedy, are irrelevant.

Distributive justice on the other hand supports de-linking of right and remedy. This is because this form of justice allows judges when choosing a remedy to take into account factors that may not necessary relate to the nature or objects of the rights. This view is supported by a number of scholars;¹⁰¹ it is contended by some scholars that rights are idealistic and can exist on their own. However, they need to be transformed into reality by the use of remedies. According to Fiss:

Rights and remedies are but two phases of a single social process of trying to give meaning to our public values. Rights operate in the realm of abstraction, remedies in the world of practical reality. A right is a particularized and authoritative declaration of meaning. It can exist without a remedy, the right to racial equality ... can exist even if the court gave no relief (other than the mere declaration). The right would then exist as a standard of criticism, a standard for evaluating present social practices. A remedy, on the other hand, is an effort of the court to give meaning to a public value in practice. A remedy is more specific, more concrete, and more coercive than the mere declaration of right; it constitutes the actualization of the right.¹⁰²

In some cases the considerations bearing on what remedies are available may be different from the principles that determine the existence of

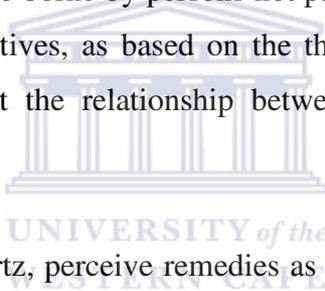
¹⁰⁰ See generally Gewirtz: 1983.

¹⁰¹ See Fiss, O., 'Foreword: The forms of justice' (1979) 93 *Harvard Law Review* pp 1 – 58 [Hereinafter referred to as Fiss: 1979]; Sager, F., 'Fair measure: The legal status of underenforced constitutional norms' (1978) 91 *Harvard Law Review* pp 1212 – 1264 [Hereinafter referred to as Sager: 1978]; Walker, D., *The law of civil remedies in Scotland* (1974) Green & Sons [Hereinafter referred to as Walker: 1974]; and Sturm: 1991.

¹⁰² Fiss: 1979, at p 52.

liability.¹⁰³ Remedies from this perspective are conceptualised as being pragmatic, discretionary and political.¹⁰⁴ This approach to remedies is in accord with the concept of interests balancing which requires that remedial effectiveness for the victims is only one of the considerations; other social interests are also relevant.¹⁰⁵

The theories that de-link right and remedy have been particularly attractive in litigation challenging systemic violations arising from organisational or institutional behaviour. It has been submitted that the character of litigation challenging systemic violations precludes the possibility of deducing the remedy for the violation from the right.¹⁰⁶ This is because in litigation of this nature it may be hard to establish concrete responsibility for a violation. And even more pertinent is the fact that remedial burdens may be borne by persons not party to the litigation. It is from these two perspectives, as based on the theories of corrective and distributive justice, that the relationship between rights and remedies should be discussed.



Scholars, such as Gewirtz, perceive remedies as having an impact on the content of the rights themselves. For this reason, it is submitted that rights and remedies cannot be looked at separately:

There is a permeable wall between rights and remedies. The prospect of actualizing rights through a remedy — the recognition that rights are for actual people in an actual world — makes it inevitable that thoughts of

¹⁰³ Wells & Eaton: 2002, at pp xviii and xx.

¹⁰⁴ Cooper-Stephenson: 1991, at p 5.

¹⁰⁵ Gewirtz: 1983, at p 183, adds that under rights maximising an incompletely effective remedy is acceptable only if a more effective remedy is impossible to achieve. In his opinion, under interest balancing, an imperfect remedy is also permissible when a more effective remedy is deemed too costly to interests other than those of the victims.

¹⁰⁶ See Sturm: 1991, at p 1390.

remedy will affect thoughts of right, that judges' minds will shuttle back and forth between right and remedy.¹⁰⁷

On the basis of the above it has been submitted that rights and remedies are inextricably linked as parts of an integral whole and that determination of neither rights nor remedies can be done in isolation.¹⁰⁸ And that the so-called rights would have no meaning unless the remedial consequences of their non-recognition are incorporated in their definition.¹⁰⁹ Selecting an appropriate remedy is, therefore, considered to be an integral part of defining the right.¹¹⁰ To illustrate this point, Cassels uses the example of the right to property: it would be unrecognisable if it were not for the fact that courts are willing to grant injunctions instead of damages for trespass.¹¹¹ In the same line, it is submitted that historically, the law has moved from remedies to rights, rather than from rights to remedies and that a right is only a right if it has a corresponding remedy.¹¹²

Using a concept called 'remedial equilibration', it has been submitted that 'rights are dependent on remedies, not just for their application to the real world, but for their scope, shape, and very existence'.¹¹³ This is contrasted

¹⁰⁷ Gewirtz: 1983, at pp 678 – 679.

¹⁰⁸ Cooper-Stephenson: 1991, at p 6.

¹⁰⁹ Cooper-Stephenson: 1991, at p 9.

¹¹⁰ Cassels: 1991, at p 288.

¹¹¹ Cassels: 1991, at p 288, contends further that remedial consequences have a habit of flowing backwards to affect the definition of the rights themselves; that the law of negligence would not be as defined as it is today if the only available remedy was an award of damages.

¹¹² Kercher, B., and Noone. M., *Remedies* (1990) The Law Book Company Limited [Hereinafter referred to as Kercher & Noone: 1990], at p 1.

¹¹³ Levinson, D., *Rights essentialism and remedial equilibration* (1999) Working paper No. 99-5, Legal Studies Working Paper Series, University of Virginia School of Law, at

with the concept of ‘rights essentialism’, a way of thinking that assumes that the process of interpreting constitutional rights begins with judicial identification of a constitutional value and then moves into the operational rule, which is the remedy.¹¹⁴ Remedial equilibration requires that rights are often shaped by the nature of the remedies that will follow if the rights are violated.¹¹⁵ In this respect, systemic violation cases have been used to show that, in causal terms, rights essentialism avers that causation runs from rights to remedies, yet these cases show that it is the reverse.¹¹⁶

p 3, sourced at SSRN: <<http://ssrn.com/abstract=155564>> (accessed on 25 June 2006), also published in (1999) 99 *Columbia Law Review* pp 857 – 940 [Hereinafter referred to as Levinson: 1999].

¹¹⁴ Levinson: 1999, at p 2. Levinson contends that constitutional rights do not in fact emerge from abstract interpretations of constitutional texts, structure and history, or from philosophising about constitutional rights. In his opinion, constitutional rights are inevitably shaped by, and incorporate, remedial concerns (at p 16).

¹¹⁵ Levinson: 1999, at p 17. According to Levinson, the cash value of any rights is the function of the remedial consequences attached to its violation. See also Wells & Eaton: 2002, at p xx, where they argue that the courts’ actual practice appears to depart from the view that rights and remedies are different, that whether or not a right exists in a given situation may depend on the remedy sought by whoever is asserting the right.

¹¹⁶ Levinson: 1999, at p 27. This approach, which sees rights and remedies as being inseparable, has been described as a ‘monistic view’. See Berryman: 2000, at p 9. Other scholars who believe in the relationship between rights and remedies include Lawson, H., *Remedies of English law* (1980) Butterworths [Hereinafter referred to as Lawson: 1980]. Lawson’s point of departure is that the phrase *ubi jus remedium* [‘where there is a right there is a remedy’] can be followed in realistic terms by *ubi remedium ibi jus* [‘where there is a remedy there is a right’] (at p 1). He goes on to contend that the rights that are recognised by the law have crystallised around the remedies—‘a remediless right is not regarded by lawyers as a right’ (at pp 1 – 2). Again, here Lawson differs from scholars in his school of thought when he distils his discussion to the relationship, not of rights and remedies, but of wrongs and remedies. It is not very clear why Lawson prefers the term wrong to right.

Criticism is, however, directed to the fact that the functions of idealisation and actualisation are in some cases performed by the same person, the judge. 'Even though the meaning-giving process may require a unity of functions, the risk is always present that the performance of one function may interfere with the other'.¹¹⁷ It is submitted that though judges may use their shrewdness to devise strategies that achieve structural reforms, for instance, their independence is likely to be lost in this process. The need to work through these strategies will force the judge to compromise on some of his/her principles and lead to sacrifice of the people's interests.¹¹⁸ Some scholars, therefore, believe that rights and remedies represent the ideal and the actualised yet judges are not in a position to perform both functions.¹¹⁹ On the basis of this it is contended that the courts lack the legitimacy to make policy decisions that may be necessary in the process of actualisation.¹²⁰

The distinction between rights and remedies has also been supported by the submissions that describe the intellectual fabric of constitutional law. This intellectual fabric is believed to draw a distinction between statements which describe an ideal that is embodied in the constitution, and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues. The defining statement has been described as a 'concept' and the application statement a 'conception':

¹¹⁷ Fiss: 1979, at p 53. He submits also that actualisation of a structural variety creates a network of relationships and outlook which threatens the independence of the judge and the integrity of the judicial process as a whole.

¹¹⁸ Fiss: 1979, at pp 53 – 54.

¹¹⁹ It is, however, demonstrated in chapter seven, section 7.6.3, that judges could still perform this function and maintain their impartiality and independence.

¹²⁰ See Sager: 1978, at p 1213.

The distinction between a conception and its parent concept can explain and justify some norms of apparent “slippage” between a constitutional norm and its enforcement. Thus, for example, it is possible for persons to agree as to the abstract meaning — the concept — of a norm, yet disagree markedly over the conception which ought to be adopted to realize that concept. Likewise, it is possible to remain faithful to an [sic] historical understanding of the concept embodied in a constitutional norm and yet, over time, to revise drastically the conception through which it enjoys enforcement. *But in any of these circumstances, the concept governs the conception, for the very purpose of the conception is the realization or understanding of the concept. From this observation it follows that a valid conception should “exhaust” its parent concept.*¹²¹ [Emphasis mine]

Though situations are envisioned in which people may disagree on the remedies accompanying violations of a right, it is contended that all the remedies will be intended to realise the right, which is the purpose of the remedies. Remedial theory should, therefore, be developed with the right(s) it protects in mind.¹²²

In contrast, judges are urged not attempt to deduce remedies from the nature of the violation, but rather to fashion them to achieve compliance with the constitution in the future.¹²³ Courts can invoke the breadth of

¹²¹ Sager: 1978, at pp 1213 – 1214. One could submit that this explains why people may agree on the need for the protection and advancement of people’s socio-economic wellbeing and yet disagree on whether or not this should be done through justiciable rights enforceable through the judicial process.

¹²² In *Sanderson v Attorney General, Eastern Cape*, 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (EZ) Kriegler J stated that ‘our flexibility in providing remedies may affect our understanding of rights’ (para 27). In their comment on this case, Currie & De Waal: 2005, at p 192 contend that when the courts have wide remedial discretion to fashion an appropriate remedy they will be less likely be deterred from finding a violation than would be the case if their discretion is narrow. While Currie and De Waal immediately suggest that deciding on a remedy requires a much more pragmatic approach than that adopted in any other stages of bill of rights litigation, they mention that many relevant factors at the remedial stage are also relevant at other stages of the litigation.

¹²³ Walker, for instance, argues that:

In modern times more thorough analysis of legal concepts ... justifies distinctions between on the one hand the rights and duties attaching to particular relationships and the consequences of their not being implemented, and on the other between the remedies which the legal system may grant, and the procedural forms and machinery whereby those

their remedial powers to justify ordering remedies that respond to harms and conditions that may not be casually connected to proven violations, and also to balance all interests affected by the remedy.¹²⁴ It has, for instance, been submitted that '[f]actors not considered in determining liability play an important role in formulating the public law injunction'.¹²⁵ It is, therefore, important that:

Both the consequences of the wrongful conduct and the steps necessary to remedy them are mediated through a complex set of formal and informal relationships that may be irrelevant to establishing the legal violation but critical to the development of a remedy adequate to eliminate that violation. The task of correcting the defendants' wrongful conduct raises factual and normative issues that do not arise in the course of determining liability, such as the effectiveness and practicability of various remedial options.¹²⁶

5.3.1 Synchronisation of the rights and remedies debate

While one may be inclined toward the view that rights and remedies are two different notions, it is, in my view, impossible to understand remedies without understanding the constitutional rights themselves.¹²⁷ Though rights and remedies may be kept separate, it is not true that they are governed by fundamentally different considerations. 'Fundamentally different' is too extreme in my opinion. It is submitted that the first

remedies may be sought and, if the court is satisfied, granted. Remedies, in short, can, and should be, studied separately both from the obligations, breaches of which call for remedies, and from the rules of procedure whereby rights and duties are stated and declared, and remedies awarded for infringement of rights and non-implementation of duties.

Walker: 1974, at p 4.

¹²⁴ Roach: 1994, at pp 3-2 — 3-3.

¹²⁵ Roach: 1991, at p 888.

¹²⁶ Sturm: 1991, at p 1364. Sturm submits further that the court cannot simply rely upon the processes used to generate a liability decision to formulate a structural remedy, because the trial on the merits does not provide a sufficient legal or factual basis for adopting a particular remedy.

¹²⁷ Wells & Eaton: 2002, at p xix.

objective of any court adjudicating constitutional rights should be to craft remedies that realise the right in full. However, there could be circumstances where the remedial approach that realises the rights fully adversely affects other legitimate interests, imposes burdens that are impossible to discharge, or undermines the right(s) in the long run. In such circumstances the court is justified to consider the issue of the most appropriate remedy separately from the right in issue.¹²⁸ The court should confront the practicalities on ground and assess their impact on the remedy.¹²⁹ The prevailing circumstances, if not considered, may have the potential of undermining or even making it impossible to implement the selected remedy.¹³⁰ This is very important as it is one of the factors that define what is meant by an ‘appropriate, just and equitable relief’.¹³¹ A

¹²⁸ In *Milliken v Bradley*, 433 US 267 (1977), for instance, the United States Supreme Court observed that the nature of remedies is determined by the nature and scope of the constitutional violation; the remedy must, therefore, be related to the condition alleged to offend the Constitution. According to the Court, the decree must be designed as nearly as possible to restore the victim to the condition they would have occupied in the absence of the wrong. But the courts must take into account the interests of the state and local authorities in managing their own affairs, consistent with the Constitution (at p 281).

¹²⁹ According to Shelton: 1999, at p 53, the question of possible non-compliance is very important; it may be necessary for the ideal to adjust to the reality of popular opposition to the legal rule.

¹³⁰ Cooper-Stephenson: 1991, at pp 2 and 3, has submitted that an analysis of the law of remedies which accommodates the practicalities of implementation contributes to the very understanding of the very nature of law. He contends that the taxonomy of remedies should move from a realistic appraisal of the defendant target of the remedy, through a purposive analysis of the goal of the remedy, to matters of legal principle and procedural regulation, and back to implementation considerations involving a realistic analysis of remedial functioning. Schucks has described as ‘pure rights’ conception an approach that concentrates on the role of the court in identifying individual rights while downplaying their implementation. Schucks describes this approach as unrealistic and naïve. See Sunstein: 1983, at p 754.

¹³¹ In *Modder East Squatters v Modderklip Boerdery; v President of the Republic of South Africa v Modderklip Boerdery* 2004 (8) BCLR 821 (SCA) (*Modderklip* case no. 1), while

remedy that is impossible to implement, however beautifully crafted, does not answer to the needs of an ‘appropriate, just and equitable’ remedy. This though does not mean that the right disappears completely from consideration; instead, the right has to be kept in mind by the court. The remedy and enforcement procedures chosen by the court must be those that lead to the realisation of the right, if not in the short run, at least in the long run.

The process above should not be viewed as a way of limiting a right; rather it is a process of ascertaining the best way of enjoying the right in the prevailing circumstances. This exercise, therefore, differs from the process of limiting rights as envisaged by section 36 of the Constitution.¹³² Limitation of the right once proclaimed, on the one hand, devalues the right to the extent of the limitation. In contrast, interest balancing may be preceded by full recognition of the rights followed by what is seemingly a weak remedy. The weak remedy may be the best way of recognising the right in the circumstances.¹³³ As is submitted above,¹³⁴ the school desegregation cases provide a good example of how weak remedies may actually be intended to protect the rights themselves. However, as already stated,¹³⁵ this is not to suggest that the remedies will

quoting the dicta of Justice Kriegler in the *Fose* case at para 94, Harms JA noted that courts should not be overawed by practical problems, they should attempt to synchronise the real world with the ideal construct of a constitutional world and mould an order that will provide effective relief (at para 42).

¹³² See chapter four, section 4.2.3.2 for a detailed discussion of the section 36 approach.

¹³³ On the meaning of weak remedies and their usefulness, see generally Tushnet, M., ‘Enforcing socio-economic rights: Lessons from South Africa’ (2005) 6 *ESR Review* pp 2 – 6 and Tushnet, M, ‘Social welfare rights and the forms of judicial review’ (2004) 82 *Texas Law Review* pp 1895 – 1919.

¹³⁴ Section 5.2.2.

¹³⁵ Section 5.3 above.

not in any way impact on the nature of the right.¹³⁶ This, though, may be circumstantial and arise on a case-by-case basis. Yet the impact, though negative, is always considered the best way of enjoying the right in the circumstances.

Furthermore, I am of the view that there is no need for the courts to adopt one line of thought, either believing in a causal relationship between rights and remedies or in rights and remedies as two different phenomena. The line that the court follows should be shaped by the circumstances of each case and the demands of justice in that particular case. The court should apply relationship theories, not as two separate concepts from which it must choose one, but as two points at the opposite ends of a sliding scale. The position of the court on this sliding scale should be determined by the demands of every case. Discussion in chapter seven will show that in structural reform litigation, for instance, the demands of justice have always required that the courts incline more to the side of the scale which disentangles rights from remedies. The context within which the constitution is enforced, therefore, matters.¹³⁷

¹³⁶ In this respect, one would agree with Cassels: 1991, at pp 288 and 291 that remedial definition is inextricably interwoven with substantive definition and maintaining flexibility at both levels allows the courts to take a far more subtle approach to its task. Cassels contends that the assumption that interest balancing can be fully accommodated when defining the right, and that once defined the rights must be fully vindicated, is misconceived. In his opinion, this would undermine the need to approach constitutional rights issues with the necessary delicacy and subtlety. One understands Cassels to mean that the process of balancing the interests that delicacy may demand should be continued to the level of selecting an appropriate remedy.

¹³⁷ The CC has adopted a contextual approach to interpretation of the Constitution. The Court has, amongst others, used the historical and textual context to give meaning to the rights in the Bill of Rights. See *Brink v Kitshoff NO* 1996 (2) SA 197 (CC), at para 40; and *S v Makwanyane* 1995 (3) SA (CC), at paras 17 – 18. The content of the rights and the obligations they engender are, among other, dictated by the context leading to the adoption of the Constitution. This is in addition to the socio-economic and political context in which they are enforced. Yet every right has to be read in the context of other

5.4 CONCLUSION

This chapter has laid down the theoretical foundation for understanding how the philosophy of justice to which a court is inclined influences its approach to granting remedies. What is clear from this discussion is that it is important for courts to appreciate that practical considerations play a role in deciding the notion of justice to which a court should incline. The notion of corrective justice is presented as an attractive way of doing justice for the benefit of persons whose rights have been infringed. This is done by putting such persons in the position they would have been in but for the violation. However, restoring the position of the victim may in some cases present practical problems. It may, for instance, impose burdens on third parties to the litigation or impose unfairly high costs on the defendant. This is in addition to having a negative impact on the public interest.

Sticking to corrective justice will also make the realisation of the rights dependant on a person's capacity to access courts and enforce their rights. In other words, justice will be a preserve of those with 'the sharpest elbows'. However, this is problematic, not so many people, because of poverty and ignorance, have the capacity to access courts This is in addition to the potential of opening the floodgates and overburdening the courts arising from the impression that rights can only be realised through judicial processes.

It is at this point that the theory of distributive justice becomes most relevant. The theory of distributive justice may be used to engage a process of interest balancing which requires consideration of interests other than those of the plaintiff. The distributive justice theory is more flexible and bent towards a practical consideration of the impact of the

rights and provisions of the Constitution. See *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), at para 83.

remedy. This theory of justice, as I submit in the next chapter, is relevant to situations that require a re-distribution of resources like is the case for South Africa.¹³⁸ The notion of distributive justice places an individual as part of his community and whose welfare is dependent on the welfare of everybody else. It is important that this situation be reflected in the remedies that courts grant for the infringement of rights.

However, this does not mean that corrective justice is completely irrelevant. In respect of those cases which are discrete and where the victims have suffered at the hands of identifiable government officials, they should be put in the position they would have been in but for the violation. For instance, it is submitted in chapter six that under such circumstances, compensatory damages may become an appropriate remedy.¹³⁹ This should be so especially in those cases which do not give rise to structural problems that require structural reform as is discussed in chapter seven.

It is also important for the courts to consider the remedies differently from the relevant rights by separating the two processes. This is because linking the remedies to rights determination may make it hard for the courts to factor in the interests of third parties, if this is considered to have a negative impact on maximisation of the right. This, however, does not mean that the right is completely irrelevant at the remedy determination stage. It has been submitted in this chapter that a court's first objective should be to maximise the right.¹⁴⁰ This should, however, be done only where the case is of such a nature that maximising the right will not be at the cost of other legitimate interests. In addition to this, it should be clear to the court that the maximisation of the right will not create insurmountable obstacles at the remedy implementation stage.

¹³⁸ Section 6.2.

¹³⁹ See chapter six, at section 5.3.1.

¹⁴⁰ See section section 5.4.2 above.

What remains to be seen is how the South African courts have been influenced by the theories of both corrective and distributive justice. This is what the next chapter sets out to investigate.



CHAPTER SIX

REMEDIES FOR INFRINGEMENTS OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: DISTRIBUTIVE OR CORRECTIVE JUSTICE?

6.1 INTRODUCTION

In this chapter I discuss the impact that the notions of both corrective and distributive forms of justice have had on South Africa's approach to constitutional remedies. The South African courts have sought to focus their remedies beyond the individual litigant and to grant remedies that advance constitutional rights as extending collective/group benefits. Though vindication and compensation of the victim has been acknowledged as a fundamental objective of constitutional litigation, it is not the only objective that is to be achieved. The interest that society has in the protection of the rights in the Constitution, and the protection of the values of an open and democratic society based on equality, freedom and human dignity, too are precepts that the courts wish to advance. The courts have also considered the impact of proposed remedies on the defendant and how the relationship between the defendant and the plaintiff would be affected.

To protect the constitutional values, the courts have, in some cases, awarded plaintiffs relief in circumstances where they may have not deserved it.¹ The CC has in some cases been inclined towards putting

¹ In *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* Case 603/05 [unreported], the High Court showed a determination to protect the rights in the Constitution even if this would benefit litigants that had themselves been found guilty of disregarding the Constitution. Plasket J stated that although the applicants had displayed a lack of respect for, and undermined, the

victims of a constitutional violations in the position they would have been in had the violation not occurred. But in the same cases, the interests of the community and the interests of the defendant too have featured in what the court has called ‘a balancing process’.²

This chapter is divided into two sections; the first section illustrates the Constitution’s inclination towards the notion of distributive justice. Distributive justice is implicit in the provisions of the Constitution that protect what may be construed as rights conferring collective benefits and the protection it accords to collective values upon which South Africa is founded. The second section illustrates the inclination of the South African courts, especially the CC, towards the notion of distributive justice. This is reflected in the CC’s understanding of what it considers to be ‘appropriate, just and equitable relief’. This section discusses the different remedies that the courts have granted so far and illustrates how these have been influenced by the notion of distributive justice. However, the injunction is reserved for detailed consideration in chapter seven. This is due in part to its high potential to promote the notion of distributive justice and also because of the controversies surrounding this remedy. There is, therefore, much to say about the injunction and the structural injunction in particular; the discussion of which may not fit into the current chapter. In fact, chapter seven proposes a set of norms and principles that could be used to determine when the structural injunction constitutes ‘appropriate, just and equitable relief’ in any given context.³

Constitution and its democratic processes and institutions, he considered it necessary, in order to vindicate the Constitution, to grant the bulk of the relief sought (paras 82 and 83).

² *Hoffman v South African Airways* 2000 (11) BCLR 1211 (CC) (*Hoffman case*).

³ See chapter seven, section 7.6.

6.2 THE 1996 CONSTITUTION AND DISTRIBUTIVE JUSTICE

Though the South African Constitution does not, in express terms, prescribe distributive justice, it is implicit in its provisions that this is the ideal form of justice that is envisioned. In terms of social justice, the Constitution is premised on the need to realise an orderly and fair redistribution of resources.⁴ The Constitution in this respect demonstrates a commitment to the establishment of a society based, amongst others, on social justice.⁵ In addition to protecting individual rights, the Constitution guarantees a number of socio-economic rights directly linked to social justice.⁶ While socio-economic rights have elements that are capable of extending individual entitlements they also make provision for elements that can only be enjoyed in a group.⁷ This is especially in respect of the

⁴ See Davis, D., 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *South African Journal on Human Rights* pp 301 – 327 [Hereinafter referred to as Davis: 2006], at p 304.

⁵ Preamble.

⁶ Gloppen, S., *South Africa: The battle over the constitution* (1997) Dartmouth Publishing Company Limited, at p 58. This is the kind of justice that Gloppen interpreted the precursors of the Constitution as having advocated. He came to this conclusion after examining, a number of writings by Albie Sachs, such as Sachs, A., 'Towards constitutional reconstruction of South Africa' (1986) *Lesotho Law Journal*; Sachs, A., 'Post-apartheid South Africa, a constitutional framework' (1989) 6 *World Policy Journal* pp 503 – 529; Sachs, A., *Protecting human rights in a new South Africa* (1990) Oxford University Press; Sachs, A., 'The future constitutional position of white South Africans in a democratic South Africa' (1990) *African Studies Seminar Paper No. 281* ; Sachs, A., *Advancing human rights in South Africa* (1992) Oxford University Press; and Sachs, A., 'Affirmative action and good government' in Hugo, P., (ed.) *Redistribution and affirmative action. Working South Africa on the South African political economy* (1992) Southern Book Publishes.

⁷ Examples include elements of such rights as a clean and healthy environment and also ingredients of such rights as housing and health that can be put in place for the benefit of a number of people or groups of people.

positive elements of these rights which compel government to undertake affirmative action to realise the rights. Obligations of this nature compel government to provide goods and services directed at all members of society or groups of people and not at specific individuals.

It would do little to advance the developmental objectives of the Constitution if the full spectrum of rights of an individual or groups of individuals is met while the rest of the community suffers. It also makes it difficult, if not impossible, to sustain such levels of services for the individual or the community. Consider the right of access to water,⁸ for instance, it requires the government to put in place water services provisions systems that are accessible to everyone.⁹ The right of access to health care services is not different.¹⁰ Hospitals and other health care facilities have to be established for the benefit of all.

It is especially in respect of socio-economic rights that the transformative nature of the Constitution has been underscored. The Constitution is perceived as an instrument to transform South African society, among others, from a society based on socio-economic deprivation to one based on equal distribution of resources.¹¹ The provision of services that were so drastically skewed by the apartheid system is, therefore, considered to be

⁸ Section 27(1) of the Constitution.

⁹ See the Water Services Act, No. 108 of 1997. See also Mbazira, C., 'Privatisation and the right of access to sufficient water in South Africa: The case of Lukhanji and Amahlati' in De Visser, J., and Mbazira, C., (eds.) *Water delivery: Public or private* (2006) Centre for Environmental Law and Policy pp 57 – 85.

¹⁰ Section 27(1) of the Constitution.

¹¹ See generally Klare, K., 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* pp 147 – 188.

central to the transformative project of the Constitution.¹² However, the enforcement of socio-economic rights has generated much controversy arising from arguments about the need to maintain the separation of powers. This is in addition to questioning the institutional competence of the courts to enforce these rights.¹³ However, even when socio-economic rights are accepted as justiciable, there is always the question of whether they should be enforced as conferring individual benefits or as conferring group benefits.¹⁴ In the Constitution itself, most socio-economic rights are crafted as individual rights, thus: ‘everyone has the right to...’¹⁵ and ‘every child has the right to ...’¹⁶ Nonetheless, the question remains whether the prevailing social and economic context allows for the enforcement of these rights as conferring individual benefits on demand in which case corrective justice would be applicable.¹⁷

There is a need, therefore, to understand the existing socio-economic context and its impact on the enforcement of socio-economic rights. It is

¹² Langa, P., ‘Transformative constitutionalism’ (2006) 17 *Stellenbosch Law Review* pp 351 – 360 [Hereinafter referred to as Langa: 2006], at p 352.

¹³ See chapter 3 for a detailed discussion of separation of powers and institutional competence concerns.

¹⁴ Roach, K., ‘Crafting remedies for violations of economic, social and cultural rights’ in Squires, J., Langford, M., and Thiele, B., (eds.) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) Australian Human Rights Centre and Centre on Housing Rights and Eviction pp 111 – 126 [Hereinafter referred to as Roach: 2005], at p 111.

¹⁵ Sections 26(1) and 27(1).

¹⁶ Section 28(1) (c) of the Constitution.

¹⁷ The courts would have to enforce the individual rights by putting victims in the position they would have been in had their individual rights not been violated. See chapter five, section 5.2.1.

only after appreciating the historical, social, political and economic settings that one can appreciate the challenges of enforcing socio-economic as conferring individual rather than collective benefits.¹⁸

According to De Vos:

[I]t is not only the constitutional *text* that forms the context within which the rights in the Bill of Rights must be viewed. In order to trace the direction in which the transformative project is supposed to move it is necessary to come to grips with the larger context within which the text of the Bill of Rights is to be interpreted. Thus, the Constitutional Court has often stated that the historical, social and economic context must be taken into account when interpreting the provisions of the Bill of Rights.¹⁹ [Emphasis in original, footnote omitted].

In South Africa, socio-economic rights assume their importance from a context which is characterised by not only racially institutionalised poverty but also by a commitment to alleviate or eradicate such poverty.²⁰ The majority of South Africans live under extreme poverty as an offshoot of apartheid. It is on the basis of this context that the Constitution 'sets as one of its primary aims the transformation of society into a more just and equitable place'.²¹ One of the obstacles to the realisation of this objective, however, is limited financial resources. The available resources are not adequate to facilitate immediate provision of socio-economic goods and services to everyone on demand as individual rights. Holistic approaches, of providing socio-economic goods and services, that focus beyond the individual are the most practical to implement. This is what the existing

¹⁸ Van der Walt, AJ., 'The State's duty to protect owners v The State's duty to provide housing: Thoughts on the Modderklip case' (2005) 21 *South African Journal on Human Rights* pp 144 – 161 [Hereinafter referred to as Van der Walt: 2005], at p 148.

¹⁹ De Vos, P., '*Grootboom*, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights* pp 258 – 276 [Hereinafter referred to as De Vos: 2001], at p 262.

²⁰ Van der Walt, AJ., 'A South African reading of Frank Michelman's theory of social justice' (2004) 19 *SA Public Law* pp 253 – 307, at p 255.

²¹ De Vos: 2001, at p 260.

social and economic conditions dictate. One, therefore, has to rethink the traditional idea that remedies must be immediate and that the courts can order one shot remedies that achieve corrective justice.²² Remedies of this nature may not be practicable where rights have to be enforced in ways that provide collective benefits. This is particularly so in a context where scarce financial resources dictate how government fulfils its socio-economic rights obligations.

The realisation of socio-economic rights in contexts of scarce resources requires careful redistribution of the resources to benefit all in need of them. It is at this stage that the notion of distributive justice becomes most relevant. The courts have to focus beyond the needs of the individual and to consider the interests of society or groups of people at large. Individual rights, therefore, have to be balanced against collective welfare.²³ It has been submitted, for instance, that it would have been senseless to extend expensive treatment to Mr. Soobramoney ‘at a time when many poor people ... had little or no access to any form of even primary health care services’.²⁴ The CC had to leave it up to the hospital to decide how best to utilise scarce medical resources in a distributive manner without prioritising individual needs at the expense of others who may need such resources.

It is on the basis of this approach that the CC, as seen in chapter four,²⁵ has rejected the submission that the socio-economic rights provisions in the Constitution confer individual entitlements on demand. The Court has rejected the submission that the Constitution be interpreted as establishing

²² Roach: 2005, at p 111.

²³ Motala, Z., and Ramaphosa, C., *Constitutional Law: Analysis and cases* (2002) Oxford University Press, at p 34.

²⁴ De Vos: 2001, at pp 259 – 260.

²⁵ See section 4.2.2.

a minimum core which entitles every individual to a minimum level of goods and services on demand.²⁶ The Court has also rejected the submission that section 28 of the Constitution guarantees every child access to basic nutrition, shelter, and health services irrespective of available resources. Instead, the CC has chosen to locate the claims of all individuals, adults and children, within the broader dimension of society's needs. As seen in chapter four, the CC has held that all that the state is obligated to do is to put in place a reasonable programme, reasonably implemented to achieve the progressive realisation of socio-economic rights, subject to the available resources.²⁷ The programme must be inclusive of the needs of all people and must address short, medium and long term needs.

The Constitution is also encrusted with what are considered to be the values upon which democratic South Africa is based.²⁸ Indeed, the courts are constitutionally obliged to promote these values whenever interpreting the Bill of Rights.²⁹ Though some of the values may be used to promote individual welfare, the CC has used the concept of values to advance the common good of society. Even when protecting individual rights the CC

²⁶ See *Government of the Republic of South Africa v Grootboom & Others* (Grootboom case) 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC), at para 32. See also *Minister of Health and Others v. Treatment Action Campaign* 2002 (5) SA 721 (CC). See chapter four at section 4.2.2.2 for a detailed discussion of these cases.

²⁷ See section 4.2. of chapter four.

²⁸ Section 1. The values include human dignity, the achievement of equality and advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the Constitution; and universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

²⁹ Section 39(1)(a).

has on some occasions used values that promote general welfare to justify such individualised protection.³⁰

The Constitution itself, however, does not describe in an exhaustive manner the values upon which it is based. This has forced the courts on some occasions to look outside the Constitution for the values that should guide constitutional interpretation.³¹ To effectively use these external values not necessarily found in the Constitution, the CC has freed itself from textualism as the only method of constitutional interpretation. The Court has used such other methods as purposive interpretation³² to give effect the values underlying the Constitution.³³ In the *Makwanyane* case, for instance, the CC used this method of interpretation to read into the Constitution the value of *ubuntu*, a concept encrusted with notions of distributive justice.³⁴



³⁰ An example of this, and as discussed later, is use of the concept of *ubuntu* to advance the individual's right to life. The individual has, therefore, been placed as part of society and cannot be singled out for protection irrespective of the needs of others. See *S v Makwanyane* 1995 (3) SA 391 (CC) [Hereinafter referred to as *Makwanyane* case].

³¹ See Kroeze, I., 'Doing things with values: The role of constitutional values in constitutional interpretation' (2001) 11 *Stellenbosch Law Review* pp 265 – 276, at pp 267 – 268.

³² Also referred to as 'value oriented' or 'teleological' interpretation; see De Waal, J., and Erasmus, G., 'The constitutional jurisprudence of South African courts on the application, interpretation and limitation of fundamental rights during the transition' (1996) 7 *Stellenbosch Law Review* pp 179 – 209, at p 181 ft 8.

³³ *Makwanyane* case, at para 9. See also *S v Zuma*, 1995 (4) BCLR 401 (CC), at para 15.

³⁴ See generally Kroeze, I., 'Doing things with values II: The case of *ubuntu*' (2002) 13 *Stellenbosch Law Review* pp 252 – 264 [Hereinafter referred to as Kroeze: 2002].

It has been submitted that although *ubuntu* is not mentioned in the Constitution it coincides with some of the values expressly mentioned.³⁵ The CC has indeed found no problem using *ubuntu* to promote distributive justice.³⁶ As will be seen later, the Court has used the value of *ubuntu* as the basis for setting aside an order of excessive damages against the defendant in a case of defamation.³⁷ The Court has held that *ubuntu* requires that in cases of defamation the remedy granted should aim to restore a harmonious human and social relationship: ‘Historically ... [*ubuntu*] was foundational to the spirit of reconciliation and bridge-building that enabled our deeply traumatised society to overcome and transcend the division of the past’.³⁸ According to the Court, today *ubuntu* represents the element of human solidarity that binds together liberty and equality and creates an affirmative and mutually supportive triad of central constitutional values.³⁹

³⁵ Kroeze: 2002, at p 256.

³⁶ *Makwanyane* case, at para 224, the CC described *ubuntu* as follows:

It is a culture which places some emphasis on communality and on interdependence of members of a community. It recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of the community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all. See also para 263.

³⁷ In *Dikoko v Mokhatla* 2007(1) BCLR 1 (CC) (*Mokhatla* case). This case arose from a purely private law delictual claim in defamation. R 110 000 had been awarded by the High Court as compensation for the defendant’s defamatory statement. The defendant’s appeal to the SCA was dismissed, which prompted him to approach the CC. On appeal the defendant contested, amongst others, the quantum of damages as excessively disproportionate or unreasonable (para 24). The CC, however, widened this issue; it questioned whether an award of damages was the most appropriate remedy to vindicate the constitutional right to human dignity.

³⁸ At para 113 [footnote omitted].

³⁹ As above.

Promotion of the constitutional values has, therefore, been central in the transformative enterprise of the CC. In constitutional litigation, protection has been accorded to individual needs only if they do not negatively impact on collective interests. This is reflected not only in interpreting the substantive content of the rights but also in determining the kinds of remedies that their violation demands. This approach has made inclination toward the notion of distributive justice inevitable in the conception of an ‘appropriate, just and equitable’ remedy as discussed in the next section.

6.3 ‘APPROPRIATE, JUST AND EQUITABLE RELIEF’

Other than merely enforce the values that promote commonality, the CC’s resort to the ethos of distributive justice is reflected in its approach to granting remedies for infringement of constitutional rights. The Constitution gives courts very wide remedial powers to ‘grant appropriate relief, including a declaration of rights’⁴⁰ and to make ‘any order that is just and equitable’.⁴¹ The test for the effectiveness of the courts’ remedies, therefore, is whether the remedy is ‘appropriate, just and equitable’. It is important to note, however, that a court’s definition of what is an ‘appropriate, just and equitable’ remedy will be determined, among others, by the notion of justice favoured by the court. In this respect, the phrase ‘appropriate, just and equitable’ remedy could assume two meanings: It could refer to a remedy that is required by an individual whose rights have been violated in order to put him/her in the position he/she would have been in but for the violation. It could also mean a remedy that focuses on all interests implicated by the case and balances these interests against those of the individual plaintiff in the case.⁴²

⁴⁰ Section 38 of the Constitution.

⁴¹ Section 172(1)(b) of the Constitution.

⁴² Roach, K., *Constitutional remedies in Canada* (1994) Law Book Inc [Hereinafter referred to as Roach: 1994], at p 3-4.

As seen in chapter five,⁴³ because of the bipolar nature of the theory of corrective justice, the burdens imposed by a remedy on third parties are not a factor to consider when choosing remedies.⁴⁴ In contrast, distributive justice pays attention to the interests of not only the parties but also of third parties. The remedy should also be intended not only for the benefit of the plaintiff but for other similarly situated persons. This is in addition to protecting the interests of society at large.

It is on the basis of the above that the CC has taken cognisance of the fact that when constitutional rights are violated, though the victim may be an individual, society as a whole is injured.⁴⁵ If any remedies are to be obtained for such violation, they should be aimed at vindicating not only the victim but also advancing the interests of society as a whole.⁴⁶ Even where an individual victim is clearly identifiable, any subsequent remedy is likely to have an impact on other persons and on society at large.⁴⁷ It is

⁴³ Section 5.2.1 above.

⁴⁴ Roach: 1994, at p 3-21.

⁴⁵ In the *Hoffman* case the CC observed that:

Fairness requires a consideration of the interests of all those who might be affected by the order. In the context of employment, this will require a consideration not only of the interests of the prospective employee but also the interests of the employer. In other cases, the interests of the community may have to be taken into consideration. [Footnote omitted]

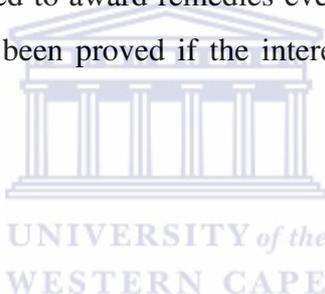
At para 43

⁴⁶ Roach: 1994, at p 3-30.

⁴⁷ Shelton, D., *Remedies in international human rights law* (1999) Oxford University Press

[Hereinafter referred to as Shelton: 1999], at p 52. Shelton submits that actions against the state test the reasonableness of the state's activity in its context, the need to protect society, and the fairness of allowing the victim's damage not to go without redress. See also Cassels: 1991, at p 290.

for this reason that the notion of distributive justice requires that courts be considerate not only to the interests of the parties but also the interests of society at large.⁴⁸ It is on the basis of this that the CC has adopted an approach that spreads the benefits of constitutional litigation beyond the parties in a particular case. This explains why, for instance, the CC has on some occasions rejected proposed out of court settlements between the parties if it would result in a benefit of a constitutional right only to the parties.⁴⁹ The Court has held that an offer to settle a dispute made by the litigant to the other, even if accepted, cannot cure the ensuing legal uncertainty as it would settle the dispute only between litigants. According to the Court, this would not resolve the unconstitutionality of the impugned provisions and the interests that they have on the broader group of persons who may qualify for a similar benefit.⁵⁰ The Court has also on occasion declined to award remedies even where a violation of a constitutional right has been proved if the interests of good governance require this.⁵¹



⁴⁸ Currie, I., and De Waal, J., *The new constitutional and administrative law* Volume 1 (2001) Juta & Company [Hereinafter referred to as Currie & De Waal: 2001], at p 195.

⁴⁹ See *Khosa and Others v Minister of Social Development; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 596 (CC) (*Khosa* case). For a detailed discussion of this case, see chapter four at section 4.2.3.2. During the course of hearing this case the respondents indicated their willingness to enter into a settlement that would have extended the definition of 'South African' citizen to accommodate the specific applicants and thereby extend social benefits to them only which would have extinguished the case. This settlement would have had little impact on others similarly situated.

⁵⁰ *Khosa* case, at para 35.

⁵¹ See *East Zulu Motors (Pty) v Empangeni/Ngwlezane Transitional Local Council and Others* 1998 (2) SA 61 (CC); 1998 (2) BCLR 1 (CC); and *Steyn v The State* 2001 (1) BCLR 52 (CC); 2001 (1) SA 1146 (CC).

To consider the interests of all those who may be affected by the outcome of the case requires a balancing of all the affected interests. The CC has observed that the balancing process must be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter violations; and third, to make an order that can be complied with. This is in addition to ensuring fairness to all those who might be affected by the relief.⁵² Accordingly, successful litigants should obtain the relief they seek only when the interests of good government do not demand otherwise. The position of the CC, therefore, is that litigants before the court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants.⁵³ This is important because despite the fact that South Africa has an advanced constitutional system courts are still not easily accessible to all.⁵⁴ Any remedies granted in constitutional litigation should, therefore, extend the constitutional benefits to those without easy access to courts.

As noted above,⁵⁵ in the *Mokhatla* case, for instance, the CC held that the principal objective of culture and the law is ‘restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms’.⁵⁶ The Court held that instead of

⁵² *Hoffman* case, at para 45.

⁵³ *S v Bhulwana* 1995 (12) BCLR 1579 (CC), at para 32. Cited with approval in *Minister of Home Affairs v National Institute for Crime Prevention (Nicro) and others* 2004(5) BCLR 445 (CC), at para 74.

⁵⁴ Dugard, J., ‘Court of first instance? Towards a pro-poor jurisdiction for the South African Constitutional Court’ (2006) 22 *South African Journal on Human Rights* pp 261 – 282, at p 266.

⁵⁵ Section 6.2.

⁵⁶ Para 68. The judge does not elucidate on what she means by ‘community norms’, but, in the context of her judgment, one could conclude that these are the values that we share as a society. This would mean that their infraction affects all members of society who

awarding damages that merely put a hole in the defendant's pocket, the law of defamation should strive to re-establish harmony between the parties.⁵⁷ This is because an award of excessive damages would have implications on free expression, which is the lifeblood of a democratic society.⁵⁸ What this means is that vindicating the plaintiff's injury by awarding excessive damages would be foregone for the sake of maintaining society's right to freedom of expression. The Court in the *Mokhatla* case suggested that consideration should also be given to the impact the remedy has on the defendant. According to the Court, if the plaintiff's rights can be vindicated and restoration achieved using remedies less burdensome to the defendant, this approach should be adopted.⁵⁹

The CC's approach is in accord with the notion of cost internalisation which, as discussed in chapter five,⁶⁰ requires the court to consider the costs which any remedy it may grant will have on the defendant. Prohibitive costs increase the risk of non-compliance with the remedy. The CC has pushed this further by considering the effect of the cost not only from the perspective of non-compliance but also from the perspective of the benefit that society may derive. This explains why the Court has been reluctant to award damages if these would, for instance, have a negative impact on freedom of expression. As is discussed later,⁶¹

share in the maintenance of these norms. This, as seen in chapter five (section 5.2.2), is part of the essence of the ethos of distributive justice.

⁵⁷ As above.

⁵⁸ See paras 54 and 92.

⁵⁹ Paras 64, 67, 112 and 113.

⁶⁰ Section 5.2.

⁶¹ Section 6.3.1 below.

the Court has indeed doubted the appropriateness of damages as a public law remedy and as the most appropriate method to enforce constitutional rights.⁶²

In the context of socio-economic rights litigation, one cannot use only the situation of the litigants to judge whether the remedy of the court is an ‘appropriate, just and equitable’ remedy as is suggested by some authors.⁶³ Instead, one should assess the overall impact of the remedy on the state’s policy or policies touching on the right in issue. One should ask, for instance, whether the state has overhauled its policy to reflect the elements of a reasonable policy as defined by the CC. Taking the example of the case of *Government of the Republic of South Africa v Grootboom & Others*⁶⁴ (*Grootboom* case); the judgment may not have resulted in tangible goods and services for the Grootboom community. Generally, however, the decision has forced government to shift its housing programme to have regard to the needs of people in intolerable conditions and those threatened with eviction.⁶⁵ The government has adopted an emergency housing policy to cater for people who may find themselves in

⁶² See generally *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* 2005 (4) BCLR 301 (CC) [Hereinafter referred to as *Rail Commuters* case].

⁶³ See Swart, M., ‘Left out in the cold? Grafting constitutional remedies for the poorest of the poor’ (2005) 21 *South African Journal on Human Rights* pp 215 – 240 [Hereinafter referred to as Swart: 2005], at p 216.

⁶⁴ 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC) (*Grootboom* case). This case is discussed in detail in chapter four at section 4.2.

⁶⁵ Budlender, G., ‘Justiciability of socio-economic rights: Some South African experiences’ in Ghai, Y., and Cottrell, J., (eds.) *Economic, social and cultural rights* (2004) INTERIGHTS pp 33 – 41 [Hereinafter referred to as Budlender: 2004], at p 41.

situations similar to that of the Grootboom community.⁶⁶ Whether such policy is being implemented, though relevant, is another issue.

There are, however, cases in which a remedy though directed at the individual has the potential to advance the interests of society as a whole. This is especially so where the remedy has the potential to play an effective deterrent role and to benefit similarly situated people. In the *Hoffman* case, though the remedy appeared to be directed at the individual victim, the CC was convinced that it would benefit similarly situated people.⁶⁷ In this case, the Court considered reinstatement to be the most appropriate relief in the case of a prospective employee who had been denied employment on the basis of unconstitutional grounds.⁶⁸ The CC held that:

⁶⁶ National Department of Housing, *Part 3: National Housing Programme: Housing Assistance in Emergency Circumstances* April 2, available at <http://www.housing.gov.za/Content/legislation_policies/Emergency%20%20Housing%20Policy.pdf> (accessed on 12 April 2006).

⁶⁷ Mr. Hoffman had successfully applied for a job with South African Airways (SAA) as a cabin attendant. He had passed all the pre-employment tests save for the medical test, which revealed that he was HIV positive. On this ground he was rejected by SAA, which argued that he posed a health risk since he would not respond to the yellow fever vaccination. SAA also argued that his life span was limited which made it worthless to spend so much on his training. SAA contended further that it is the practice of airlines to reject HIV positive people as cabin attendants and that if SAA did not do so, they would be prejudiced in the context of business competition as it would scare away clients. The CC rejected all these arguments. It emphasised the vulnerability of HIV positive people and earmarked them as a disadvantaged group that should be protected by the equality clause (para 28). It rejected the submission based on the practice of other airlines as a disguise for prejudice against HIV positive persons (para 34). The CC accepted the medical evidence to suggest that some HIV positive persons would respond to the yellow fever vaccine and are fit to work as cabin attendants. It stated that though some HIV positive people would not respond to the vaccination and would be unfit for cabin work, this was no justification for discrimination against all HIV positive people (para 30).

⁶⁸ At para 50.

[Instatement] is an expression of the general rule that where a wrong has been committed, the aggrieved person should, as a general matter, and as far as is possible, be placed in the same position the person would have been but for the wrong suffered.⁶⁹

However, the Court was quick to add that the remedy would have wider application beyond the individual victim and would only be granted where practicable.⁷⁰ It observed that instatement would serve a general deterrent role as it strikes effectively at unfair discrimination. This is because ‘[i]t sends a message that under our Constitution discrimination will not be tolerated and thus ensures future compliance’.⁷¹ It could, for example, be argued that large corporations may have been willing to pay extensive financial compensation in lieu of employing HIV/AIDS positive persons.

The approach in the *Hoffman* case shows that courts should not be dismissive of an individualised remedy in its entirety if there is evidence that it would have wide implications by, for instance, promoting deterrence. This is because deterrence forestalls future violation of the rights which benefits society as a whole. However, this does not mean that the court should completely disregard the impact that individual remedies, such as damages, may have on other legitimate interests.

6.3.1 Purpose of damages—distributive or corrective justice?

The awarding of damages is the oldest kind of remedy recognised and enforced by the common law to redress legal wrongs. Their award, especially as compensatory damages, has for a long time been used to promote the notion of corrective justice. Compensatory damages serve the objectives of corrective justice by making the victim of a violation ‘whole’ again. This is by putting the victim, as much is possible, in the

⁶⁹ At para 50.

⁷⁰ At para 53.

⁷¹ Para 52.

position that he/she would have been in but for the violation.⁷² Compensatory damages may be awarded either as ‘pecuniary’ or ‘non-pecuniary’.⁷³ The award of pecuniary damages purports to represent what the plaintiff has suffered directly in monetary terms as a result of the wrong. The plaintiff could have expended quantified monies on medical fees, on replacement of lost property or lost wages resulting from physical incapacity, for instance, because of a tortuous injury.

Non-pecuniary damages do not make up for the money that has been lost by the plaintiff. Instead, they compensate him/her for the pain and suffering caused by the harm.⁷⁴ Such pain and suffering may not always be easily reduced to loss of monetary value; it may include anxiety, depression, embarrassment and humiliation. Non-pecuniary damages are very important because in some cases the pecuniary damage suffered may either be nominal or non-existent.⁷⁵ Some forms of injuries, especially in the human rights arena, are hard to assess in monetary terms. It may be hard for someone to express, in monetary terms, for instance, the injury suffered by a gag that violates his/her freedom of speech if what he/she was going to say is not part of his trade and would not have generated money. The same may be said in respect of violation of one’s freedom of association and freedom to vote or exercise of religion. However,

⁷² Wells, M., and Eaton, T., *Constitutional remedies: A reference book for the United States Constitution* (2002) Praeger Publishing [Hereinafter referred to as Wells & Eaton: 2002], at p 170. In this respect the awarding of damages presents itself as backward looking. It focuses on past events, mainly the harm that has been suffered and the extent of the defendant’s contribution in liability terms.

⁷³ Wells & Eaton: 2002, at p 172.

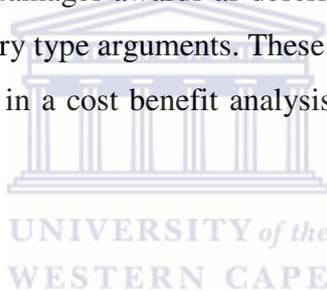
⁷⁴ See McGregor, H., *Mayne and McGregor on damages* (1961) The Common Law Library No. 9 Sweet & Maxwell Limited [Hereinafter referred to as McGregor: 1961], at p 6.

⁷⁵ Shelton: 1999, at p 73.

although the violation of these rights may not result in monetary loss, it may be so egregious so as to warrant the payment of non-pecuniary damages.⁷⁶

The award of non-pecuniary damages serves not only to vindicate the rights of the individual but also to deter future infringements. In this respect, one could submit that such an award serves the notion of distributive justice. It protects not only the victim in a particular court case but other persons that would have, in future, become victims of the conduct of the defendant. Such an award sends out a message to persons planning to engage in conduct similar to that of the defendant that they will suffer the same loss as the defendant.

The deterrent effect of damages awards as described above is founded on law and economics theory type arguments. These arguments postulate that individuals will engage in a cost benefit analysis before undertaking any activity:



⁷⁶ See, for instance, the Sri Lanka case of *Deshapriya and Another v Municipal Council, Nuwara Elye and Others* [1996] 1 CHR 115 sourced from the University of Minnesota Human Rights Library, at <http://www1.umn.edu/humanrts/research/srilanka/caselaw/Speech/Deshapriya_v_Municipal_Council_Nuwara_Eliya.htm> (accessed on 3 August 2006). The Sri Lanka Supreme Court, after finding a violation of the right of free speech, awarded substantial non-pecuniary damages even if no substantial monetary loss had been suffered. The Court justified this award on the ground that it would not be right to assess compensation at a few thousand rupees, simply because the newspaper was sold for seven rupees a copy; that this would only be the pecuniary loss caused by the violation of the petitioners' rights of property under ordinary law. The Court said that it was concerned with a fundamental right, which not only transcends property rights but which is guaranteed by the Constitution; and with an infringement which darkens the climate of freedom in which the peaceful clash of ideas and the exchange of information must take place in a democratic society. 'Compensation must therefore be measured by the yardstick of liberty, and not weighed in the scales of commerce' (at p 371).

The reasoning begins with a hypothetical world in which there are no penalties for committing wrongs. Given a choice between acting as one pleases and doing what is required by some legal norm, many people will do as they please, including committing constitutional violations. In order to counter this tendency to pursue our own preferences rather than to obey the law, it is necessary to attach sanctions to the breach of legal norms, including violations of constitutional rights. If actors know that doing as they please without regard for others will have bad consequences for their own welfare, through litigation that will extract money from their bank accounts, then they will be dissuaded from illegal conduct. A premise of this reasoning is that people are generally rational; they will prefer a state of affairs in which they are better off to one in which they are worse off. Thus, they will prefer to obey the law and keep their money rather than violate the law and hand it over to the victim of the wrong.⁷⁷

This economic theory argument is based on three assumptions: (1) that conditions of scarcity preclude the fulfilment of every human desire; (2) that in a condition of scarcity most individuals behave rationally most of the time in pursuit of their desires; and (3) that individuals are the best judges of their own preference.⁷⁸ On the basis of these assumptions, it is believed that individuals will only engage in certain activities where the benefit to be obtained exceeds the costs that may be incurred if caught.⁷⁹ The law, therefore, best stops wrongful conduct by imposing costs by way of damages as a consequence of engaging in prohibited activities. In this respect, the amount of damages need not be compensatory as this would denote some direct relationship between the damages paid and the victim's loss and its magnitude. Instead, damages are set at an appropriate level to deter future infringement;⁸⁰ as submitted above, if damages are minimal and 'affordable' to certain actors, it may fall within their accepted cost-benefit analysis.

⁷⁷ Wells & Eaton: 2002, at p 176.

⁷⁸ Shelton: 1999, at p 41.

⁷⁹ Polinsky, M., and Shavell, S., *The economic theory of public enforcement of law* John M. Olin Program in Law and Economics, Working Paper 159 (1998), sourced at <http://papers.ssrn.com/paper.taf?abstract_id=93709> (accessed on 28 July 2006), at p 4. See also Shelton: 1999, at p 41.

⁸⁰ Shelton: 1999, at p 41.

6.3.1.1 *Weaknesses with the deterrence (distributive) effect of damages*

There are, however, a number of weaknesses in the deterrence effect as based on the concept of law and economics. First, sometimes damages are not calculated on the basis of the gains that the violator may derive from the infringements. This is because in some cases it may be impossible to express the gains in monetary terms. This makes it hard to calculate, with precision, the amount of damages that outweigh the benefits to be derived from the violation. The damages awarded may, therefore, be less than what would lead to deterrence or may be overly excessive. In the same line, when government infringes rights, for instance, it may not view the benefits of such infringement in monetary terms. Yet the political gains derived may in the government's opinion outweigh any damages likely to arise from a finding of a violation. The government may, therefore, be prepared to embark on such conduct irrespective of the possibility of damages being awarded against it. Any damages awarded, irrespective of the amount, may, therefore, not deter government as government would be prepared to pay its way out.

Secondly, there is always no guarantee that the award of damages against the defendant will deter other potential defendants.⁸¹ Persons engaging, or intending to engage, in similar conduct may be much wealthier or deriving much more in terms of gains than the defendant. They may, therefore, not suffer as a result of an award of damages if caught. This is in addition to the conviction on the part such other violators that they will never be caught or dragged to court. Indeed, the greatest deterrent is the likelihood that offenders will be apprehended, convicted and punished.⁸² If the offenders do not anticipate being caught and convicted, they will not be deterred by damages awarded against

⁸¹ Park, J., 'The constitutional tort action as individual remedy' (2003) 38 *Harvard Civil Rights-Civil Liberties Review* pp 393 – 453 [Hereinafter referred to as Park: 2003], at p 400.

⁸² Per Chaskalson CJ in the *Makwanyane* case, at para 122.

defendants who have been caught and convicted. Additionally, amongst others, whether or not the possibility of being dragged to court is high is also dependent on the character and status of the victims of the violation. Poor, uneducated and vulnerable victims may not have the capacity to sue the wrongdoers for damages. Persons violating the rights of such victims will, therefore, continue to do so with impunity as they will not anticipate any conviction or apprehension at the very least.

Another weakness of awarding damages is that it offers only general deterrence because it leaves it to the government (defendant) to determine how to eradicate the violation. General deterrent remedies of this nature are appropriate when society is not concerned with the exact steps government will take to comply with its obligations.⁸³ However, where the public is concerned with the exact steps that have to be undertaken to implement and realise the rights, damages will be of limited use. The public may be interested in seeing the government adopt practical steps and measures, in affirmative terms, to end the violation. It could sometimes be through such measures where real assurance that the violation will not re-occur is obtained. Also, an award of compensatory damages, consistent with the principles of corrective justice, is directed at past events. The award does not address the threat of existing and ongoing violations posed, for instance, by a delinquent state institution.⁸⁴

An award of compensatory damages may also be limited as relief for the violation of socio-economic rights. This is because of the diffuse and amorphous nature of socio-economic rights claims.⁸⁵ Socio-economic rights litigation seldom involves individualised claims. Instead, it is

⁸³ Roach: 1994, at p 3-29.

⁸⁴ Trengove, W., 'Judicial Remedies for violations of socio-economic rights' (1999) 1 *ESR Review* pp 8 – 10 [Hereinafter referred to as Trengove: 1999], at p 8.

⁸⁵ Trengove: 1999, at p 9.

always undertaken in the interest of communities and groups of people. This applies to litigation arising either from negative but most especially positive violations. The litigants usually take action to enforce a benefit that is not directed at them alone but at a multitude of people. In this kind of litigation, it may be impossible to identify all the individual victims and to determine the harm that they have suffered as a result of the positive infringement of a right.⁸⁶ The case of *Modderklip Boerdery (Pty) Ltd v President of the RSA and Others (Modderklip case)*,⁸⁷ discussed in detail below, is an example of a case where it was impossible to identify all the victims because of the transient nature of the population.⁸⁸

⁸⁶ Trengove: 1999, at p 6, gives the example of violation of the right to education resulting from discrimination perpetrated over a long period of time. He contends that it is hard to determine how such victims would be compensated; it is even harder where the victims have received some form of inferior education. Trengove submits that identification of such victims would be a logistical nightmare which would devour valuable resources in a hopelessly, yet inadequate, attempt to determine who should get what. It is for this reason that socio-economic rights litigation has mainly been pursued under the banner of public interest litigation. In the case of *People's Union for Democratic Rights and Others v Union of India and Others* (1982) 3 SCC 235, the Indian Supreme Court underscored the special character of public interest litigation brought for the benefit of the poor. Bhagwati J observed that:

[P]ublic interest litigation which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief. Public interests litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed or unredressed. [At p 240]

⁸⁷ 2004 (8) BCLR 821 (SCA).

⁸⁸ As will be seen later (section 6.3.1.2 below), when the case was first instituted in the High Court, the estimated number of occupants of the land in issue was about 18,000 but by the time the case got the CC the figure had arisen to over 45,000.

However, there could be cases where only an individual or few individuals are targeted by the violation. This is common in respect of negative infringements that interfere with the enjoyment of an individual right. In such case, although a number of individuals may be involved, it may not be a problem to litigate as an individual. Nonetheless, a violation could be of a negative nature yet involving a multitude of people. Consider a case, for instance, where a municipality, without due process, disconnects water from a multitude of residents.⁸⁹ The same practical problems of determining who suffered what damage may arise as is the case with positive violations.

It is for the above weaknesses, among others, that courts have doubts about the appropriateness of damages in constitutional litigation. This doubt is reflected in the approach of the CC towards award of damages as discussed below.

6.3.1.2 The approach of the South African courts

It is my opinion that the position adopted by the South African courts as regards the award of damages in constitutional litigation is similar in many respects to the US and Canadian courts' approach. In all these jurisdictions constitutional damages have been awarded only where damages for injury cannot be obtained under delictual or other law. Though the courts have not rejected the award of punitive damages, the cases show that there is often a reluctance to award them. The US Supreme Court has, for instance, rejected submissions that damages can be paid for the violation of a constitutional right for its abstract value without proof of actual physical injury or loss. However, the Court has left open the possibility of awarding punitive damages if it is necessary to deter and punish malicious violation of rights.⁹⁰

⁸⁹ See, for instance, *Residents of Bon Vista v Southern Metropolitan Council* 2002 (6) BCLR 625 (W)

⁹⁰ In *Carey v Phipus* (*Carey case*) 435 US 247 (1978), the Court held that:

The US Supreme Court has placed much weight on the principles of tort (delict) law governing the awarding of damages, which it has recognised as applicable in constitutional litigation.⁹¹ Emphasis has been placed on the common law principle that ‘a person should be compensated fairly for the injuries caused by the violation of his legal rights’.⁹² The Court has added, however, that the common law rules may not provide a complete solution to damages for a deprivation of constitutional rights. Where the interests protected by the constitutional rights are not protected by the common law, there will be a need to adapt the common law in order to provide fair compensation.⁹³

[I]t remains true ... that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations [at p 266].

The *Carey* case was followed by another case, *Memphis Community School District V Stachura* 477 US 299 (1986), where the Supreme Court held that there is no room for non-compensatory damages measured by the jury’s perception of the abstract importance of a constitutional right.

⁹¹ *Carey* case, at p 255.

⁹² *Carey* case, at p 255.

⁹³ This approach was applied in the case of *Bivens v Six unknown Federal Narcotics Agents* 430 U.S. 388 (1971), a case arising from false arrest and imprisonment. The majority of the Court held that although the Constitution did not provide for the enforcement of constitutional rights by an award of damages, there was nothing precluding the courts from vindicating the rights with such awards. It has been submitted that if *Bivens* had not been permitted to sue in damages he would have had no means of redressing the violation of his rights. An injunction would have been useless to him because he had been arrested and then released, and yet no recurrence of the conduct had been anticipated. Pilkington, M., ‘Damages as a remedy for infringement of the Canadian Charter of Rights and Freedoms’ (1984) *Canadian Bar Review* pp 517 – 576 [Hereinafter referred to as Pilkington: 1984], at p 525. The Court has also held that in the absence of such alternative relief the court would exclude the claim only if there are special factors counseling hesitation in the absence of affirmative action by Congress. See *Carlson v Green* 447 U.S. 14 (1980).

The Canadian courts' approach has not been much different from the one adopted in the US. In fact the Canadian approach has very much been influenced by the US approach. The Canadian courts have embraced damages for compensatory purposes and have declined to award them as a means of vindicating constitutional rights and deterring future violations.⁹⁴ The Canadian Supreme Court has declined to award punitive damages because it considers such damages to be a fine accomplished without procedural protections as those available in criminal law. Instead, the fine is imposed on a balance of probabilities and does not follow the standard of proof beyond reasonable doubt.⁹⁵

In South Africa, the CC has acknowledged the fact that damages may be an appropriate remedy in some circumstances:

[T]here is no reason in principle why "appropriate relief" should not include an award of damages, where such an award is necessary to protect and enforce Chapter 3 rights [of the Interim Constitution]. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed, at least for loss occasioned by the breach of a right vested in the claimant by the Supreme law. When it would be appropriate to do so, and what the measure of damages should be, will depend on the circumstances of each case and the particular right which has been infringed. [Footnotes omitted]

⁹⁴ Roach: 1994, at p 11-3.

⁹⁵ *Vorvis v ICBC* (1989) 58 DLR (4th) 193 (SCC) (*Vorvis case*), at p 205 – 206.

⁹⁶ *Fose v Minister of Safety*, 1997 (7) BCLR 851 (CC) (*Fose case*), at para 60. In the *Fose case* the plaintiff claimed damages arising from a series of assaults alleged to have been perpetrated by members of the South African Police Services (SAPS) on the plaintiff while in detention (para 11). In addition to compensatory damages, the plaintiff claimed punitive damages. He contended that torture was a wide-spread and persistent infringement by members of the SAPS (para 12). The CC, however, rejected the claim of punitive damages. It approved submissions that although punitive damages may lead to systemic change, the process might be a slow one and requiring a substantial number of such awards before change is induced. Yet, such change could be achieved using such equitable relief as the injunction, which is far cheaper and faster (para 65(d)).

However, like the US and Canadian courts, the CC has rejected an award of damages as appropriate in a case of an infringement of the Constitution that does not cause loss.⁹⁷ The Court is only prepared to use damages for compensatory purposes where loss is proved. It is on the basis of this that the Court has declined to award punitive damages as a response to infringements of constitutional rights. Accordingly, the Court has held that compensatory damages, once proved, would serve a vindictive role without the need for further damages in the form of punitive constitutional damages.⁹⁸ The Court is of the view that the award of damages should not serve to punish but to compensate for the damage caused.⁹⁹ Like the Canadian Supreme Court in the *Vorvis* case, the CC has alluded to a historical anomaly that has allowed punitive damages, equitable to fines in criminal law, to be awarded against a person without the safeguards afforded by the criminal law. '[I]t becomes even more unacceptable in a country ... in which extensive criminal procedural rights are entrenched'.¹⁰⁰

The CC is also of the view that there is no real evidence that awarding punitive damages will serve as a significant deterrent against individual or systemic repetition of infringements.¹⁰¹ According to the CC, an award of punitive damages, if it is to have a deterrent effect on the government, should be substantial. The problem, in the CC's opinion, is that this will bring a windfall to a single plaintiff and yet similarly situated victims would not be entitled to similar awards.¹⁰² In addition, substantial awards

⁹⁷ *Fose* case, at para 67.

⁹⁸ *Fose* case, at para 67.

⁹⁹ *Mokhatla* case, at para 78.

¹⁰⁰ Para 70.

¹⁰¹ *Fose* case, at para 71.

¹⁰² *Fose* case, para 71.

made against government will significantly impact on the revenue of government and would arguably impinge on the executive's ability to function effectively. Though the Court has acknowledged the fact that punitive damages may lead to systemic change, it is of the view that the process might be a slow one and requiring a substantial number of such awards before change is induced. Yet, such change could be achieved using equitable relief which is far cheaper and faster.¹⁰³

In addition to the above, the Court considers damages as having a retrospective effect because they seek to remedy loss caused rather than prevent loss in the future. 'Moreover, the use of private law remedies to claim damages to vindicate public law rights may place heavy financial burdens on the State'.¹⁰⁴ Furthermore, the CC has held that the award of damages to vindicate human rights violations would amount to measuring something intrinsic to human beings as if these were market-place commodities.¹⁰⁵ The Court has, therefore, concluded that constitutional damages will be awarded only where no relief can be obtained in litigation other than constitutional litigation. This is the basis upon which the Court declined to award damages in the *Fose* case. The applicant had already secured compensatory damages under delictual law.

The Supreme Court of Appeal (the SCA) has adopted the same approach as can be seen, for instance, in *Jayiya v MEC for Welfare, Eastern Cape*.¹⁰⁶ In this case, the SCA declined to uphold an order that

¹⁰³ *Fose* case, at para 65(d).

¹⁰⁴ *Rail Commuters'* case, at para 80. The Court observed further that although there could be circumstances when delictual relief may be appropriate for constitutional violations, the fact that public law remedies may be as effective and appropriate should not be overlooked (at para 81).

¹⁰⁵ *Mokhatla* case, at para 109.

¹⁰⁶ 2004(2) SA 611, [2003] 2 All SA 223 (SCA).

‘constitutional damages’ be paid arising from the State’s failure to approve the applicant’s social assistance grant in time. The High Court had awarded compensatory damages including back pay and interest to be paid to the plaintiff in a lump sum. The SCA, relying on the *Fose* case, held that constitutional damages could only have been awarded if there was no provision for either statutory or common law remedies.¹⁰⁷ The case was brought under the Promotion of Administrative Justice Act (PAJA)¹⁰⁸ which made provision for a statutory remedy. According to the SCA: ‘Where the lawgiver has legislated statutory mechanisms for securing constitutional rights, and provided, of course, that they are constitutionally unobjectionable, they must be used’.¹⁰⁹ An award of damages would, therefore, have been construed as disregarding the express intent of the legislature as reflected in PAJA. Since no constitutional challenge had been mounted challenging the remedies provided by PAJA there was no reason to disregard this Act.

The *Modderklip* case is a good example of a case where an award of damages was appropriate because compensatory relief could not be obtained elsewhere other than in the constitutional case. The facts leading to this case are as follows: During the 1990s, some 400 persons who had been evicted by the Ekurhuleni Metropolitan Municipality from Chris Hani Township moved onto a portion of farmland belonging to Modderklip and erected about 50 shacks. By October 2000 there were about 4 000 residential units inhabited by some 18 000 persons. On 18 October 2000 Modderklip launched an application for the eviction of the occupiers under the Prevention of Illegal Eviction and Unlawful

¹⁰⁷ Para 9.

¹⁰⁸ Act No. 3 of 2000.

¹⁰⁹ Para 9.

Occupation of Land Act (PIE).¹¹⁰ The application succeeded and the High Court issued an eviction order on 12 April 2001. A writ of execution was issued and the sheriff requested to execute. The sheriff, however, responded by insisting on a deposit of R1,8m in order to cover the estimated costs of a security firm which she intended to engage to assist her in evicting the occupiers and demolishing their shacks. This amount by far exceeded the value of the part of the property occupied.

The landowner was unwilling and unable to spend this kind of money on executing its judgment and lodged an application against the state to force the sheriff to carry out the eviction order. Modderklip's case against the state was that failure on the part of the state to carry out the eviction order undermined its right to property as guaranteed by section 25 of the Constitution. The occupants, who had by this time swelled to 40,000, also resisted the eviction and argued that they could not be evicted from Modderklip's property without provision of alternative accommodation. It was contended on their behalf that this would undermine their right of access to adequate housing as guaranteed by section 26(1) of the Constitution.

The *Modderklip* case is very significant from the perspective of the notion of distributive justice. Other than merely protect Modderklip's individual right to property, the Court was called upon to consider the impact of an eviction order on the occupants' right of access to adequate housing. The case also indicates that in certain circumstances the award of individualised compensatory damages may produce a distributive effect. The SCA found in favour of both Modderklip and the occupants. The Court ruled that the occupiers could not be evicted without alternative accommodation as this would undermine their right of access to adequate housing. Yet there was need to protect Modderklip's right to property and to compensate it for the loss suffered by past and future use of the property. This loss was deemed to arise from the state's failure to provide

¹¹⁰ Act 19 of 1998

housing to the occupiers. The Court held that this was a burden that could not be placed on Modderklip because it is a constitutional obligation which falls squarely on the shoulders of the state and not on private persons.

The SCA ruled, a ruling that was upheld by the CC,¹¹¹ that the only appropriate relief in the circumstances was constitutional damages to Modderklip:

Ordering the State to pay damages to Modderklip has the advantage that the Gabon occupiers can remain where they are while Modderklip will be recompensed for that which it has lost and the State has gained by not having to provide alternative land [immediately].¹¹²

The distributive effect of this order does not lie in the monetary benefits deriving from the award of damages as these went to Modderklip. Instead, the distributive effect lies in the fact that the award produced a benefit for persons other than Modderklip. The award made it possible for Modderklip's right to property to be protected and also averted a danger of violation of the occupier's right of access to housing. At the same time, the award was in the interest of the government. Government was saved the burden of having to provide 40 000 people with immediate alternative accommodation. Indeed, the SCA described its order as an aversion of a social problem: 'the immediate social problem is solved while the medium and long-term problems can be solved as and when the State can afford'.¹¹³

The outcome of this case was a win-win solution for all the parties involved. The Court managed to balance the competing proprietary rights of a landowner and the socio-economic rights of unlawful occupiers in the

¹¹¹ At para 20.

¹¹² 2004 (8) BCLR 821 (SCA), at p 839.

¹¹³ 2004 (8) BCLR 821 (SCA), at p 839.

context of evictions.¹¹⁴ The order in this case has been described as reflecting a quintessentially post -1994 perspective on eviction: ‘the applicant is entitled to implementation of his eviction order, but for it to be carried out provision has to be made for the future accommodation of the unlawful occupiers’.¹¹⁵ The case is important also because it shows how determination of the most appropriate remedy is highly dependent on the context and circumstances of a particular case. Where rights of a number of people, including applicants and respondents, have been violated, practical considerations may dictate a win-win situation for all the parties involved. This requires the court to be very creative and to develop existing public and private law remedies to protect the infringed rights.

6.3.1.3 Exhausting the full potential of damages

As seen above,¹¹⁶ the CC has been cognisant of the fact that damages awards may deplete the already strapped state resources. In socio-economic rights terms, for instance, damages may be fatal because they direct monies that would have been used for the common good into the pockets of the very few who make it to court. Rather than place money in the pockets of individuals, it may be wise to adopt remedies with broader social benefits, such as injunctions.¹¹⁷ I do subscribe to the submission that when funds are limited it may make more sense to require that any available money be used directly to improve the conditions which caused the problems and which may potentially continue to give rise to future

¹¹⁴ Christmas, A., ‘Property rights of landowners vs socio-economic rights of occupiers’ (2004) 5 *ESR Review* pp 11 – 13, at p 13.

¹¹⁵ Van der Walt: 2005, at p 150.

¹¹⁶ Section 6.3.1.2.

¹¹⁷ Shelton: 1999, at p 79.

wrongs. This approach is preferable to repaying a particular victim who has had the resources and power to bring and win a law suit:

In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are “multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform”, it seems to me to be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are readily compensated for the injuries done to them with no real assurance that such payment will have any deterrent or preventive effect. It would seem that funds of this nature could be better employed in structural and systemic ways to eliminate or substantially reduce the cause of the infringement.¹¹⁸
[Footnote omitted]

It could be argued that the award of substantial punitive damages against government may induce change. Nonetheless, it is also true that other remedies such as injunctions may lead to such change without substantial cost on the part of the state.¹¹⁹ This does not mean, though, that the award of damages should be ruled out completely as means of redressing systemic violations. The award of damages could still be used in creative ways that eliminate systemic violations and lead to structural reforms.

There is, therefore, a need for the CC to be more creative and to explore the full potential of damages to advance the notion of distributive justice. In socio-economic rights litigation it may be possible for damages awards to be channelled to causes that advance the realisation of these rights without necessarily putting money in the pockets of individuals.¹²⁰ The

¹¹⁸ *Fose* case, at para 72. See also Cooper-Stephenson, K., ‘Principle and pragmatism in the law of remedies’ in Berryman, J., (ed.) *Remedies, issues and perspectives* (1991) Thomson Professional Publishing pp 1 – 48 [Hereinafter referred to as Cooper-Stephenson: 1991], at p 32.

¹¹⁹ Whitman, C., ‘Constitutional torts’ (1980) 79 *Michigan Law Review* pp 5 – 71 [Hereinafter referred to as Whitman: 1980], at p 50, as quoted by Pilkington: 1984, at p 539. See also *Rail Commuters* case, at para 81.

¹²⁰ See Trengrove: 1999.

Court has been urged to explore the possibility of awarding what has been described as preventive damages in order to counter widespread and persistent violations.¹²¹ Preventive damages are damages awards that should go not to the individual victim but to bodies carrying out activities designed to deter future infringements of specific rights. The award should be accompanied by directions to such bodies to use the damages in stepping up their activities in the affected area.¹²²

Such damages, it is contended, 'would not be determined or calculated by the extent of the infringement or suffering of the victim but by the cost of deterrence'.¹²³ This would require evidence on the likely contribution of the award in ending the infringement. This could be based on the nature of the identified organisation and the intended outcomes of its activities. This is in addition to the funding needs of such an organisation. There should be proof that the organisation is engaged in activities aimed at ending the violation. This is in addition to evidence that the funds arising from the damages award will be used for activities that advance the object of ending the violation. The organisation receiving the award may be required by the court to report on how the monies are being used in preventing future infringements.¹²⁴

¹²¹ Varney, H., 'Forging new tools: A note on *Fose v Minister of Safety and Security* CCT 14/96' (1998) 14 *South African Journal on Human Rights* pp 336 – 349 [Hereinafter referred to as Varney: 1998], at p 343.

¹²² Varney: 1998, at p 343. Varney has submitted that such awards would be appropriate in cases where independent bodies have joined the complaint as *amici curiae* and where they set out the details of the proposed relief. However, in my opinion, the organisation to which the award is made need not have been *amicus curiae* in the case. It could be one that is suggested either by the parties or appointed by the court, and one which has agreed to use the award.

¹²³ Varney: 1998, at p 343.

¹²⁴ Varney: 1998, at p 344.

In socio-economic rights litigation, preventive damages would serve a good purpose when directed at causes that advance provision of the denied goods and services to society as a whole, without targeting specific individuals. Consider, for instance, a case of violation of the right of access to adequate housing. Substantial preventive damages could be directed towards organisations that assist homeless people to get access to housing, or those that provide humanitarian assistance to the victims of disaster. This is in addition to organisations that engage in advocacy and research activities aimed at promoting the rights. In awarding such damages, however, care should be taken to ensure that it does not interfere with the budgetary plans of government and which may lead to delay in delivering socio-economic services. However, where the damages are well directed and properly applied, they will go a long way in enhancing the delivery of socio-economic goods and services.

6.3.2 Declarations

6.3.2.1 Nature and purpose of declarations

A declaratory order is a legal statement of the legal relationship between the parties.¹²⁵ It is primarily used to declare whether or not a particular decision or conduct is a nullity.¹²⁶ This is in addition to determining the scope of public powers and the obligations and the ambit of the rights protected by the law. The Constitution explicitly mandates courts to issue orders of declarations of rights;¹²⁷ it allows persons listed as having *locus*

¹²⁵ Aldous, G., and Alder, J., *Application for judicial review: Law and practice of the Crown Office* (1993) Butterworths [Hereinafter referred to as Aldous & Alder: 1993], at p 66.

¹²⁶ Lewis, C., *Judicial remedies in public law* (1992) Sweet & Maxwell [Hereinafter referred to as Lewis: 1992], at p 174.

¹²⁷ Section 38.

to seek declarations of rights from the courts.¹²⁸ The courts are also obliged to declare as invalid any law or conduct that is inconsistent with the Constitution.¹²⁹ Declaratory orders are traceable as a common law remedy predating the Constitution; they serve the role of clarifying legal and constitutional obligations. Such clarification helps to enforce the constitution and the values upon which the Constitution is based.¹³⁰

A declaratory order is the most commonly and widely used non-intrusive remedy used by the courts to pronounce on legal rights and their infringement. The non-intrusive nature of a declaratory order arises from the fact that it does not give directions as to how a violation should be remedied. It leaves it to the state to determine how, and when to remedy the violation.¹³¹ This flexibility contributes to an appropriate institutional division of labour between the courts and government.¹³² By making declaratory orders, courts signal respect and show due deference to the executive and legislative branches of the state. In the *Rail Commuters* case the CC observed that:

It should be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the executive and the

¹²⁸ Section 38 of the Constitution provides that the following persons may approach the courts alleging the violation of their rights: (a) anyone acting in their own interests; (b) anyone acting on behalf of another person (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interests; and (e) an association acting in the interests of its members.

¹²⁹ Section 172(1) (a) of the Constitution.

¹³⁰ *Rail Commuters* case, at para 107.

¹³¹ Shelton: 1999], at p 55.

¹³² Roach: 1994, at p 12-2.

legislature, the decision as to how best the law, once stated, should be observed.¹³³

In this respect, declaratory orders can be very effective especially in those cases where there are several ways available to the state for remedying the violation. The court thus saves itself from the agonising task of having to assess the pros and cons of each option, and passes this task on to the state. This is a task which may require consideration of political factors which are often beyond the easy comprehension of the court.

Declaratory orders provide the government with adequate guidance about the standards that ought to be maintained to comply with the constitution. They are, therefore, very useful in those cases where the violation of rights arises from mere inattentiveness to the constitutional standards, sometimes on the pretext of (or actual) lack of clarity. Such clarity of the legal standards will expose any violation that may have occurred thereby compelling government to fix it.¹³⁴ Declarations have also proved very effective in cases where a violation has not yet occurred but there is a threat of it occurring. This is especially so in cases where the threat of infringement arises from uncertainty about the law.¹³⁵ The litigant need not prove that a right has been violated, and there is no need to prove that actual harm has been suffered as a consequence.¹³⁶ All that a litigant has to prove is that his fear is not hypothetical but is based on a reasonable apprehension of harm. It is also not necessary to demonstrate who exactly would suffer as a result of the violation: 'As long as there is reason to

¹³³ At para 107.

¹³⁴ See Roach, K., and Budlender, G., 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable' (2005) 122 *South African Law Journal* pp 325 – 351 [Hereinafter referred to as Roach & Budlender: 2005], at p 346.

¹³⁵ It may not be an effective remedy where the violation has already taken place and injury suffered.

¹³⁶ Roach: 1994, at 12-5.

believe that the declaration could prevent future ... violation, the court should consider issuing declaratory relief'.¹³⁷

It is important to note, however, that while declaratory relief should not be prescriptive as regards the options that are available to the state in remedying the violation, it should be crafted in a manner that clarifies all the legal uncertainties. Where the obligation to remedy the violation falls on more than one person, it is important that what has to be done by every person to remedy the violation be detailed in clear and certain terms. This is very important in contexts such as those where there are, for instance, several spheres of government that bear obligations similar to the ones under contestation. For example, in the South African context, the obligations to implement socio-economic rights are spread between national, provincial government and local spheres of government.¹³⁸

¹³⁷ Roach: 1994, at p 12-8. A declaration is also appropriate to past violations where there is no longer a feasible remedy available. In *President of RSA v Hugo* 1998(2) SA 363 (CC), 1997 (6) BCLR 708 (CC) Kriegler, J dissented from the majority's conclusion that the pardon of convicted mothers and not fathers did not amount to unfair discrimination. The only remedy he considered appropriate was a declaration. There would indeed have been no other remedy because the pardon could not be reversed. Neither could the president be ordered to release fathers too, as this is a discretionary remedy. See Currie & De Waal 2005, at pp 214 – 215. However, such a declaration becomes most relevant in those cases where, though the violation has occurred, there is a likelihood of it occurring and victimising other people. Roach: 1994, at p 12-11 uses the Canadian case of *Howard v Stony Mountain* [1984] 2 FC 642 (CA) to back this submission. In this case, a declaration that inmates were entitled to legal representation during disciplinary hearings was made. This was despite the fact that the prisoner had already been convicted of a disciplinary offence and had served his sentence. The declaration was deemed useful to prevent disputes in the future. Applying this to Kriegler's decision, it could be submitted that unless the President was given guidance, it was likely that he would exercise his powers of pardon in a discriminatory manner in future, to the prejudice of certain sections of society.

¹³⁸ See schedules 4 and 5 of the Constitution.

The failure to declare, in clear terms, the obligations of the different levels of government is one of the weaknesses cited in the declaratory order emanating from the *Grootboom* case. This failure is perceived as one of the reasons why the order has not effectively been implemented as regards the Grootboom community.¹³⁹ Pillay contends that:

Despite a clear allocation of roles in the Housing Act, the lack of specificity in the *Grootboom* order with regard to the allocation of responsibilities between the three spheres of government has been blamed for the discord and uncertainty among them with regard to their obligations under the Grootboom judgement.¹⁴⁰

However, one could argue that it was not necessary for the CC to be specific as regards the Grootboom community. The order applicable to the Grootboom community, as suggested by Pillay, had been made as an interlocutory one arising out of the settlements between the parties.¹⁴¹ The final declaratory order was not intended by the Court to address the plight of the Grootboom community. Instead, the order was intended to have a distributive effect by addressing the general obligation of the state to ensure access to adequate housing under section 26(1) and (2). This is in addition to pronouncing on the duty to realise the children's rights in section 28. Since the Housing Act clearly set out the obligations of the different levels of government, it was not necessary for the CC to pronounce on them as they were not in dispute. The different levels of government should, therefore, not have allowed themselves to be confused by the general order as regards the Grootboom community. They were all bound by the terms of the interlocutory order, and only bound by the general order as regards their obligations towards all South

¹³⁹ See generally Pillay, K., 'Implementation of Grootboom: Implications for the enforcement of socio-economic rights' (2002) 2 *Law, Democracy and Development* pp 225 – 277 [Hereinafter referred to as Pillay: 2002].

¹⁴⁰ Pillay: 2002, at p 267.

¹⁴¹ Pillay: 2002, at pp 264 – 265.

Africans. Yet the obligations of each sphere of government as regards the right of access to adequate housing are clearly detailed in the National Housing Act.¹⁴²

6.3.2.2 Declaratory orders and the theory of distributive justice

It should be noted that there are several ways through which declaratory orders promote the theory of distributive justice. It is true that a declaration will not be granted in respect of academic or hypothetical issues or where it would not serve any practical purpose.¹⁴³ However, unlike other forms of relief, such as damages awards, there is no need for injury to be proved before a declaratory order issues. This is distinguishable from the theory of corrective justice which, as discussed in chapter five,¹⁴⁴ puts much stress on the existence of an injury and liability in respect of such injury. Indeed, the applicant of a declaratory order need not even prove that he/she has a cause of action or that there is a dispute. In South Africa, for instance, section 19(1)(a)(i) of the *Supreme Courts Act*¹⁴⁵ provides that a court may, at its discretion, and at the instance of any interested person, enquire into and determine any existing, future or contingent right or obligation. This is notwithstanding that such person cannot claim any relief consequential upon the determination.

The importance of the above from the perspective of distributive justice is two-fold. First, it enables persons other than the victim of an actual or threatened violation to apply for relief in court. Such applicants may, in some cases, be persons that are acting in the public interest as contemplated by section 38(d) of the Constitution. Indeed, it is on the

¹⁴² Act No. 107 of 1997. See sections 9 and 10.

¹⁴³ Aldous & Alder: 1993, at p 68. See also *Gibb v Nedcor Limited* [1997] 12 BLLR 1580 (LC).

¹⁴⁴ See Chapter five, section 5.2.1

¹⁴⁵ Act 59 of 1959.

basis of section 19 of the *Supreme Courts Act* that the courts have taken cognisance of the fact it is not necessary to have an interest in the outcome of a case challenging infringement of constitutional rights. The section has been construed as being very flexible in nature as regards the principles of *locus standi*.¹⁴⁶ Even where the applicant has lost interest in the outcome of the case during the course of the proceedings the CC has proceeded and made a declaration for the benefit of persons other than the applicant. The *Grootboom* case, as discussed above,¹⁴⁷ is an example of such a scenario. The CC proceeded and made a declaratory order in respect of the government's housing programme. This was regardless of the fact that the parties had settled their dispute through a settlement leading to an interlocutory order.

Secondly, allowing persons that would not claim any relief consequential upon the determination makes it possible to obtain relief in respect of future or threatened infringement of rights. This is in circumstances where no remedy would be obtainable under the corrective justice theory. There is in fact no need on the part of the applicant to prove that there is an actual dispute.¹⁴⁸ This is a course that the corrective justice theory would not condone; as indicated in chapter five,¹⁴⁹ due to its backward-looking

¹⁴⁶ See *TAU v Minister of Agriculture & Land Affairs & others* [2003] JOL 10697 (LCC), at para 7. See also *Ferreira v Levin NO*, (1996) 1 SA 984 (CC).

¹⁴⁷ Section 6.3.2.1 above.

¹⁴⁸ In *Ex Parte Nell 1963 (1) SA 754 (A)* the Appellate Division held that an existing dispute was not a prerequisite for the exercise by the Court of its discretion to make a declaratory order:

The need for such an order can pre-eminently arise where the person concerned wished to arrange his affairs in a manner which could affect other interested parties and where an uncertain legal position could be contested by one or all of them. It is more practical, and the interests of all are better served, if the legal question can be laid before a court even without there being an already existing dispute. (759G–H in translation)

¹⁴⁹ Section 5.2.1.

nature, corrective justice deals with past events and from which actual injury has arisen. Declaratory orders also embrace the remedial flexibility which the notion of distributive justice demands. They allow the courts, in their own words, to identify and particularise what may be objectionable in legal terms and the measures that ought to be taken to remedy the infringement. Ancillary to this is the fact that given their flexibility, declaratory orders are not closed as regards the situations in which they may issue.¹⁵⁰ They are a remedy that is open to court in all situations and is not constrained by the principles of the substantive law in issue.

The above, though, does not mean that declaratory relief provides the redress necessary for all violations in all contexts. The biggest shortcoming of declaratory orders is the enforcement problems associated with them. It has been submitted that, in practice, there is no difference today between declaratory judgments and injunctions because they are both effective.¹⁵¹ However, this is not true because failure to comply with an injunctive order will attract penalties, including orders of contempt of court. In contrast, a failure to comply with a declaratory order does not attract such a penalty. Indeed, declaratory orders have been defined as a non-constitutive remedy: 'it records only existing legal rights and cannot change the legal position in any way'.¹⁵² The courts have in fact held that no execution can issue as arising from a declaratory order.¹⁵³ Though, as

¹⁵⁰ Lewis: 1992, at p 177.

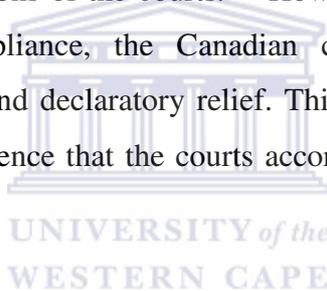
¹⁵¹ See Wells & Eaton: 2002, at p 186.

¹⁵² Aldous & Alder: 1993, at p 66. However, it is important to note that this may not be true in respect of the declaration of invalidity provided for under section 172(1)(a) which must be granted whenever legislation or conduct is found to be inconsistent with the Constitution. The effect of this declaration, unlike its common law counterpart under consideration, is that it nullifies conduct or legislation.

¹⁵³ See *Burman and Others v Davis* (1920) 41 NPD 273.

suggested by Wells and Eaton,¹⁵⁴ the holder of a declaratory order could still go back to court and seek injunctive relief, what will be enforced then is the injunctive order and not the declaration. What this brings to light, therefore, is that where there is evidence that a government will not comply, in good faith, with a declaratory order, the court would be well advised to issue a mandatory injunction instead of a declaratory order.¹⁵⁵

Hence, declaratory orders are only successful against states that are committed to the rule of law,¹⁵⁶ and, therefore, responsive to the decisions of the courts. It is because of such responsiveness that declaratory judgments have found favour with the European Court of Human Rights,¹⁵⁷ and with Canadian courts. In Canada a constitutional convention has developed by which the government has responded positively to the directions of the courts.¹⁵⁸ However, even in cases with evidence of non-compliance, the Canadian courts have been very reluctant to move beyond declaratory relief. This is because of the high degree of judicial deference that the courts accord to the other organs of



¹⁵⁴ Wells & Eaton: 2002, at p 186.

¹⁵⁵ Roach: 1994, at p 3-24 and 12-5.

¹⁵⁶ Shelton: 1999, at p 199. See also Roach: 2005, at p 113.

¹⁵⁷ Shelton: 1999, at p 201. There is evidence that in the overwhelming majority of cases, states have reported to the Council of Ministers of the European Union on positive steps they have taken to remedy the violations highlighted in the declaratory judgments.

¹⁵⁸ Roach: 1994, at p 3-38 and 12-2. See also Borchard, E., *Declaratory judgements* (1941) Banks-Baldwin Law Publishing Co, at p 876. This is in contrast with the United States where preference for declaratory relief broke down because of the resistance exhibited by some states especially in the school desegregation cases but also in many civil rights cases. The courts were left with no option but to use the injunction and to invoke contempt of court citations in order to induce change. See Roach: 1994, at p 12-1.

state owing to separation of powers concerns. In *Mahe v Alberta*,¹⁵⁹ for instance, the Canadian Supreme Court observed that:

Once the Court has declared what is required in Edmonton, then the government can and must do whatever is necessary to ensure that these appellants, and other parents in their situation, receive what they are due under s. 23. Section 23 of the *Charter* imposes on provincial legislatures the positive obligation of enacting precise legislative schemes providing for minority language instruction and educational facilities where numbers warrant. To date, the legislature of Alberta has failed to discharge that obligation. It must delay no longer in putting into place the appropriate minority language education scheme.¹⁶⁰

Thus in cases where it is clear that the state would not comply with the court orders in good faith; the Canadian courts have combined declaratory with mandatory relief. An example of such case is *Marchand v Simcoe County Board of Education*.¹⁶¹ Convinced that the defendant board continued to demonstrate a negative attitude towards the plaintiff's minority language rights,¹⁶² the Court concluded that it was appropriate and just in the circumstances that 'there be a declaration ... coupled with a mandatory injunction to implement the constitutional rights'.¹⁶³

In the South African context, the government's response to court orders in some cases brings it very close to fitting the description of a recalcitrant government.¹⁶⁴ The recent decision regarding the rights of prisoners to

¹⁵⁹ (1985), 22 D.L.R. (4th) 24, 39 Alta. L.R. (2d) 215 (Q.B.)

¹⁶⁰ [1990] 1 SCR 342.

¹⁶¹ (1989) 55 O.R (2d) 638 (*Marchand* case).

¹⁶² At p 660.

¹⁶³ At p 662.

¹⁶⁴ See *South Africa justice sector and the rule of law*, Report by AfriMAP and Open Society Foundation for South Africa, sourced at <http://www.soros.org/resources/articles_publications/publications/sajustice_20060223/afrimapreport_20060223.pdf> (accessed on 18 October 2006). This report discusses a

access antiretroviral drugs presents clear evidence of such recalcitrance.¹⁶⁵ While publicly proclaiming its willingness to abide by court orders,¹⁶⁶ there was evidence of foot dragging on the part of government in this case. This is irrespective of the fact that the courts applied the most intrusive relief in the form of the structural interdict. This means that declaratory orders alone in this case would have gone unnoticed. The government was keen to exploit procedural, yet untenable legal technicalities, to delay the implementation of the orders of courts by filing appeals in a serial manner.

6.4 CONCLUSION

Inclination by the South African courts toward the notion of distributive justice is an indication of the context in which the courts enforce human rights. Constitutional provisions, including those on socio-economic rights, cannot be construed outside the social, economic and political context in which the Constitution operates. The current South African context characterised by high levels of poverty and constrained state resources makes it impossible to grant everyone individual socio-economic goods and services on demand. There are wide societal interests that have to be considered which may dictate the negation of the individual interests of the litigant. This is where distributive justice becomes very useful in the remedial approach of the courts.

number of cases where government has, in a recalcitrant manner, declined to implement court orders (at pp 29 – 31).

¹⁶⁵ *EN and Others v Government of RSA and Others* 2007 (1) BCLR 84 (D) (*Westville* case) See chapter seven at section 7.4 for a detailed discussion of this case.

¹⁶⁶ See, for instance, Stolley, G., 'Prisons dept reveals plan for Aids drugs' *Mail & Guardian online*, 11 September 2006.

Criticisms of the failure of the remedies of the CC to extend individualised entitlements in socio-economic rights litigation could wrongly be based on the perception of the corrective role of remedies. At a seminar held at the end of May in 2006¹⁶⁷ a participant questioned the usefulness of the *Grootboom* case if the plight of the people of the Grootboom community has not changed positively. This criticism, and others of a similar nature,¹⁶⁸ stress the corrective role of litigation and negate its distributive justice effect. The Grootboom community may not have obtained the individual goods and services they demanded, yet the judgment has played a very important distributive role. Indeed, the CC observed that the case was a reminder of the intolerable conditions under which many people are living and that the respondents were but a fraction of them.¹⁶⁹ What this called for was a judgment that would benefit similarly situated people. This explains why the order was generally worded; it was addressed for the benefit of ‘people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations’.¹⁷⁰ There is agreement by many scholars in the area of socio-economic rights that the *Grootboom* case has helped to positively influence policy and legislation to realise socio-economic rights.¹⁷¹

¹⁶⁷ *Strengthening strategies for promoting socio-economic rights in South Africa*, held in Cape Town 29 – 30 May 2006, organised by the Community Law Centre, University of the Western Cape and the Norwegian Centre for Human Rights, University of Oslo.

¹⁶⁸ See also Cohen, M., *How supervisory jurisdiction can save socio-economic rights in South Africa*, LLM dissertation [unpublished] University of Cape Town, February 2005 [on file with author], at p 20; and generally Swart: 2005.

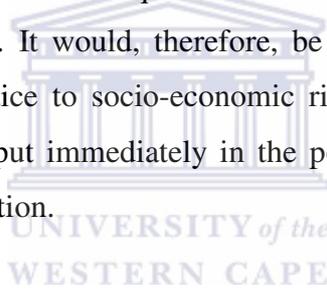
¹⁶⁹ Para 2.

¹⁷⁰ Para 99(2)(b).

¹⁷¹ See Liebenberg, S., ‘South Africa’s evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty’ (2002) 2 *Law, Democracy and Development*, pp 159 – 191, at pp 177 – 180. See also Pillay: 2002, at pp 256 – 257; and Budlender: 2004, at p 41.

The *TAC* case is not much different. In this case, government was ordered to remove the restrictions that prevented Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that were not research and training sites.¹⁷² The CC observed, however, that the judgment did not mean that everyone could immediately claim access to nevirapine treatment. All that the government had to do was to make every effort as soon as was reasonably possible to make the treatment available.¹⁷³

As mentioned in chapter two,¹⁷⁴ while civil and political rights too have resource implications, socio-economic rights require far more resources. It has been submitted that even the economically resource endowed nations are yet to realise all these rights. This is partly because of the immense amounts of resources required to match the dynamic standards of human development. It would, therefore, be unrealistic to apply the ethos of corrective justice to socio-economic rights by demanding that successful litigants be put immediately in the position they would have been in but for the violation.



In South Africa, inclination towards the theory of distributive justice is also reflected in the CC's reluctance to award constitutional damages. Though damages present themselves as an attractive remedy to vindicate constitutional violations they suffer from a number of defects. Damages paid to an individual will deprive the state of resources that would have been used to provide services for the general good of society as a whole. Consider a case where damages are paid to an individual after a finding that his housing rights have been violated. An award of compensatory damages would demand that a enough be made available to build a house for that individual and punitive damages would take large amounts from

¹⁷² Para 135(3)(a).

¹⁷³ Para 125.

¹⁷⁴ At section 2.3.1.1.

the state in order to deter future violations of the same kind. These funds may be taken from an already existing general housing budget thereby creating a deficit. This deficit, if substantial, will cripple the housing programme and delay the provision of housing to all members of society in need of it.¹⁷⁵

Declaratory relief very well presents itself as appropriate in some circumstances and may promote distributive justice. Its strength lies in its deferential nature, which gives the state latitude to choose what it considers to be the most appropriate way of undoing a constitutional violation. This is very important in those cases where there are various equally effective ways of undoing a violation.¹⁷⁶ The court would very well save itself from the tantalising task of having to make choice, which may some times require extra-legal considerations. However, as this chapter has demonstrated, the declaration is only effective if the government is committed to the rule of law and accords court orders the respect they deserve. The South African government is yet to prove itself as matching such a description. Recalcitrance towards court orders has been detected in a number of cases, which makes the declaration an inappropriate remedy in those cases. One should, therefore, explore the appropriateness of such other remedies as the injunction/interdict as discussed in the next section.

¹⁷⁵ According to Pilkington: 1984, at p 540, rather than award damages in class actions, in which damages may be hard to assess for every individual, a court might think it appropriate to direct the expenditure of public funds to restructuring the institution so that future infringements will be avoided.

¹⁷⁶ See *Eldridge* case, at para 96.

CHAPTER SEVEN

THE STRUCTURAL INJUNCTION: NATURE, ROLE APPROPRIATENESS AND THE SOUTH AFRICAN APPROACH

7.1 INTRODUCTION

The purpose of this chapter is to discuss the injunction and particularly the structural injunction especially as used in socio-economic rights litigation against government.¹ This form of relief has been reserved for detailed consideration in this chapter because it is a true reflection of the judicial flexibility required by the notion of distributive justice. This is in addition to the controversies that it has generated. The structural injunction has been used by the courts in a manner that goes against traditional perceptions of the role of the courts as envisioned under the theory of corrective justice. It has enabled judges to discard their position as mere umpires and to assume positions which make them active participants in the dispute. The courts have made not only extensive judicial decrees but have also overseen their implementation. This has generated much controversy and objection to the structural injunction as an appropriate relief. This is because it forces courts to do things that they are ordinarily not expected to do.

This chapter delineates the circumstances under which grant of a structural injunction may be considered appropriate. The approach of the

¹ The chapter does not discuss structural injunctions that may be granted in such other forms of litigation as bankruptcy, receivership, estates and trusts. It should also be noted that in South African legal jargon the term 'interdict' is used in the place of 'injunction'; the terms 'injunction/structural injunction' and 'interdict/structural interdict' are in this chapter, therefore, used to mean one and the same thing.

South African courts towards this form of relief, especially in socio-economic rights litigation, is discussed. The approaches of the High Court,² on one hand, and the CC on the other have differed markedly. The High Court has readily availed itself of this remedy while the CC has emphasised the need to defer to the executive and legislative branches and not to get embroiled in what it considers to be policy issues.³ In spite of this, the CC has used the structural injunction in a number of cases. What is clear, however, is that all these cases deal with the enforcement of civil and political rights. The reluctance to use the structural injunction by the CC in socio-economic rights cases reflects the cautiousness with which the Court has enforced these rights. As a result, the CC's approach to the structural injunction is ambivalent and lacks clear norms and principles.

This chapter gives an exposition of some of the norms and principles that could guide the courts in deciding whether or not a structural injunction is appropriate in a specific case dealing with socio-economic rights. The norms and principles also help to guide the courts on how they should proceed should they deem a structural injunction appropriate. The structural injunction should be used as of last resort, and when used, should be used with flexibility and in a graduated manner which also ensures participation of all the affected stakeholders. In addition, reasoned decision making should be preserved, and remediation and protection of

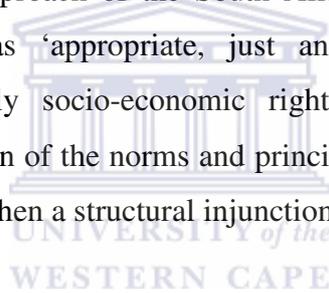
² In this chapter I use the term High Court to describe all the provincial divisions of the High Court as I deem all these divisions to be part of a single level within the judicial hierarchy.

³ Davis, D., 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *South African Journal on Human Rights* pp 301 – 327 [Hereinafter referred to as Davis: 2006], at p 304. As submitted in chapter three (section 3.1), the CC has avoided approaches that would put it in direct confrontation with the executive and legislative branches of state as regards matters considered to be within the domain of these branches. See also Roux, T., 'Legitimizing transformation: Political resource allocation in the South African Constitutional Court' (2003) 10 *Democratization* pp 92 – 111, at p 96.

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the substantive norms should be promoted as much as possible. Furthermore, courts should ensure that they maintain their independence and impartiality.

The chapter is divided into four sections; the first section prefaces discussion of the structural injunction with discussion of the general injunction as a remedy in constitutional litigation. This section discusses the different types of injunctions and their relevance to socio-economic rights litigation. This section is followed by discussion of the nature of the structural injunction and the different forms it could take. The third section discusses the arguments that have been advanced both to support and oppose the structural injunction. The opposition is based both on separation of powers and corrective justice type arguments. The fourth section discusses the approach of the South African courts in using the structural injunction as ‘appropriate, just and equitable relief’ for violations of especially socio-economic rights. The last section is dedicated to a discussion of the norms and principles that could guide the courts in determining when a structural injunction is appropriate.



7.2 THE INJUNCTION AS A CONSTITUTIONAL REMEDY

The injunction is an order of the court requiring the person to whom it is directed to do or to refrain from doing a particular thing.⁴ The injunction can be used both as relief for those whose rights have been violated and as a remedy to deter violations of a similar nature in future. The injunction was initially developed exclusively as a remedy to protect private property. Later, however, it evolved into an instrument for the protection of commercial interests other than property.⁵ These interests, for instance, included confidential business information, technology and production techniques, copy rights and patents. The injunction now finds its way in all kinds of litigation and has found scope for application in such fields as labour and industrial relations, protection of privacy, intellectual property, electronic data and protection of human rights, among others.

Historically, the injunction has been used as a remedy of last resort, used only when other remedies are considered inadequate. In procedural terms, this means that the plaintiff would be granted an injunction only if there is no other common law remedy capable of adequately repairing the injury.⁶ It should be noted, however, that there are not many remedies that provide an alternative to the injunction other than damages. Remedies such as

⁴ See Jones, T., and Buckle., H., *The civil practice of the magistrates' courts in South Africa* vol I (1988 – 1991) Juta & Co [Hereinafter referred to as Jones & Buckle: 1988 – 1991], at p 87; and Berryman. J., *The law of equitable remedies* (2000) Irwin Law [Hereinafter referred to as Berryman: 2000], at p 12.

⁵ Cassels, J., 'An inconvenient balance: The injunction as a Charter remedy' in Berryman, J., (ed.) *Remedies, issues and perspectives* (1991) Thomas Professional Publishing pp 272 – 311 [Hereinafter referred to as Cassels: 1991], at p 272.

⁶ Fiss, O., *The Civil rights injunction* (1978) Indiana University Press [Hereinafter referred to as Fiss: 1978], at p 38.

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restitution and rectification still harbour some elements of injunctive relief and derive from equity, the same source for the injunction.⁷

In South Africa, the injunction or interdict finds its source principally in the Roman-Dutch law. Nonetheless, the law on interdicts has also been influenced to a great extent by English law and particularly by the English law principles of equity.⁸ The conditions for the grant of an interdict in South Africa were made clear in *Setlogelo v Setlogelo*:⁹ there must be a clear right,¹⁰ injury actually committed or apprehended, and the absence

⁷ The only problem, as seen in chapter six (section 6.3.1), is that the appropriateness of damages in some cases is doubtful. This raises questions about the appropriateness of placing the injunction at the bottom of the remedy hierarchy as has been the common law practice. It also explains why public law has embraced the injunction as a tool of first resort where appropriate. See Cooper-Stephenson, K., 'Principle and pragmatism in the law of remedies' in Berryman, J., (ed.) *Remedies, issues and perspectives* (1991) Thomson Professional Publishing pp 1 – 48 [Hereinafter referred to as Cooper: 1991], at p 22. In the United States, for instance, this transplant can be traced to the 1894 *Debs* case arising from disruption of rail services by striking workers demanding better working conditions. The Supreme Court parted with the tradition that the injunction was only available as a measure of last resort. The Court issued an injunction preventing the leaders of the strike from 'compelling or inducing by threats, intimidation, persuasion, force or violence, railway employees to refuse or fail to perform duties'. This was motivated both by the need to protect the commercial interests of the rail operator and the need to make public transport available. An award of damages would not have protected these interests. It would have protected the interests of the rail operator but not the public interest of having public transport.

⁸ Prest, B., *The law and practice of interdicts* (1996) Juta & Co [Hereinafter referred to as Prest: 1996], at pp 9 and 28. See also *Struben & ors v Cape Town District Waterworks Co* (1892) 9 SC 68 as discussed by Prest at p 30.

⁹ 1914 AD 221 (*Setlogelo* case), an excerpt of decision is in Van der Walt, A., *Law of property casebook for students* (2002) Juta & Co, pp 257 – 258.

¹⁰ See *Nienaber v Stuckey* 1946 AD 1049 and *Bankorp Trust Bpk v Pienaar* 1993 (4) SA 215 (N). It has been submitted by Prest: 1996, at p 43 that the existence of a right is a matter of substantive law and that whether that right is clearly established is a

of similar protection by any other ordinary remedy.¹¹ Additionally, it has also been held that the grant or refusal of an interdict is a matter within the discretion of the court and depends on the facts of each case and the right being enforced.¹² The other requirement is that the applicant for an injunction must have *locus standi* in accordance with the civil procedure law.¹³ But this rule does not appear to have application in respect of enforcement of the rights in the Bill of Rights. As mentioned in chapter six,¹⁴ *locus standi*, as regards Bill of Rights litigation is governed by section 38 of the Constitution. This section gives *locus* to persons who would not otherwise have had it under civil procedure law.¹⁵ Just like with the declaratory order, this enables persons other than the direct victims of an infringement of a right to seek relief in the form of an injunction. In fact, the first socio-economic rights case in which the CC issued a mandatory injunction was brought to the Court by persons who were

matter of evidence. This requires proof by the plaintiff, on a balance of probability, of the right which he seeks to protect.

¹¹ *Setlogelo* case 1914 AD 221, at p 227. See *Fourie v Uys* 1957 (2) SA 125 (C) where it was held that a court will not grant an interdict when an applicant can obtain adequate redress by an award of damages (at p 128). See also *SAPU & another v National Commissioner, SAPS & another* [2005] JOL 16030 (LC). The basis for the requirement that the interdict will be granted only if there is no other remedy is that the interdict is a very drastic remedy which ought to be granted only in deserving cases. See Prest: 1996, at p 45.

¹² See *Candid Electronics (PTY) LTD v Merchandise Buying Syndicate (PTY) LTD* 1992 (2) SA 459 (C) (*Candid* case).

¹³ Harms, L., 'Interdicts' in Joubert, W., and Faris, J., (eds.) *The law of South Africa* (1998) Butterworths pp 285 – 306 [Hereinafter referred to as Harms: 1998], at p 287.

¹⁴ Section 6.3.2.

¹⁵ See *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape* 2001(2) SA 609 (E). See also *Ferreira v Levin NO* (1996) 1 SA 984 (CC).

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themselves not direct victims of the infringement of the right of access to health care services.¹⁶

The power of the courts to follow up injunctive orders with contempt of court sanctions has enhanced the power of the injunction as a deterrent remedy.¹⁷ Failure to comply with an injunction could attract sanctions ranging from mere warnings to orders that the defendant be imprisoned until he/she assures the judge of his or her intention to comply.¹⁸ Indeed, contempt of court, even arising from a civil case, is treated as a criminal offence.¹⁹ This is what makes injunctive relief far more powerful than declaratory relief as contempt sanctions cannot issue in respect of the latter.²⁰

¹⁶ See *Minister of Health and Others v Treatment Action Campaign* 2002 (5) SA 721 (CC).

¹⁷ See *Kate v MEC Department of Welfare, Eastern Cape* [2005] 1 All SA 745; *Mahambehelala v MEC Department of Welfare, Eastern Cape* 2002 (1) SA 342 (SE); and *Mbanga v MEC for Welfare, Eastern Cape* 2002 (1) SA 359.

¹⁸ Fiss: 1978, at p 76. Fiss has elevated the injunction above criminal rules as a deterrent on the basis of what he calls its individuated nature. He contends that while a criminal liability rule is directed to the general public, the injunction is directed at a specific person. The individuated nature of the injunction also contributes to the higher degree of its specificity and proper specification of the intended beneficiaries. This makes compliance much easier in comparison to a criminal liability rule (at p 12). He also submits that the injunction puts to rest fears of potential victims in comparison to compensatory relief. While a potential victim will know that he will get compensation once a wrong is committed on him/her, he/she still lives with the fear that the compensation may not be adequate. Fiss adds that yet, the guarantee of compensation does not still allay the fear of being a victim. Injunctions allay these fears because one will know that the possibility of being a victim has been allayed.

¹⁹ *S v Beyers* 1968 3 SA 70 (A).

²⁰ See chapter six, section 6.3.2.

7.2.1 Types of injunctions and appropriateness in socio-economic rights litigation

There are two broad types of injunctions: prohibitory injunctions on one hand, and mandatory (sometimes called reparative) injunctions on the other. Both the prohibitory and mandatory injunction can be issued either as perpetual or as interim injunctions (interlocutory).²¹ The perpetual injunction is the final order of the court and is deemed to signal the final determination of the issues in the case. In contrast, the interim injunction is issued to protect the interests of the applicant by maintaining the *status quo* pending the final determination of the case. The distinction between the perpetual and the interim injunction is very important because the prerequisites for issuing the two differ.²² The requirements enumerated above apply to the perpetual injunction.²³

7.2.1.1 Prohibitory injunctions

A prohibitory injunction is negative in form—it prohibits the person(s) to whom it is directed doing something proclaimed as a violation.²⁴ Its role is, therefore, to proscribe what may be considered unlawful conduct. In socio-economic rights cases, the prohibitory injunction is most appropriate as a remedy for infringements of the negative obligations that these rights give rise to. It could be obtained to stop either the government, or any other person, from taking away the existing socio-

²¹ See *Jordan v Penmill Investments* CC 1991(2) SA 430 (E), at p 436D.

²² Jones & Buckle: 1988 – 1991, at p 89.

²³ The interim injunction will be discussed in detail in this section because of its importance in protecting human rights.

²⁴ The prohibitory injunction has been granted in a variety of contexts and for a variety of reasons to prohibit the commission of a delict, to restrain interference with a property owner's right of enjoyment, to restrain the breach of a statutory provision, to restrain the infringement of a copy right, to restrain the passing on of trade secrets and to restrain acts of family violence, amongst others. See Jones & Buckle: 1988 – 1991, at p 91.

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economic rights vested in the applicants and similarly situated people. The prohibitive injunction is also very effective in preventing future infringements where the plaintiff shows a likelihood of violating protected rights. In this case, it becomes a preventative injunction. For this type of injunction to be granted, the plaintiff must show a reasonable apprehension of injury. This is apprehension a reasonable man might entertain on being faced with the facts. The test is objective and the applicant need not prove on a balance of probability that injury will follow.²⁵ However, the apprehension must be induced by some action of the respondent or authorised to be performed by his/her agent or servant.²⁶

The distinction between the prohibitory and mandatory injunction appears to be of no practical value. In fact the prerequisite for the issuance of the two are the same. However, the importance of the distinction lies in the manner of enforcement of each of them.²⁷ This is because the prohibitory injunction does not require the state to undertake any positive action, it involves less costs to the defendant, few problems with supervision and is easier to formulate.²⁸ All the court has to do is to pronounce that government should not engage in certain activities. For this reason, the prohibitory injunction is considered to be less intrusive in separation of powers terms.

²⁵ Harms: 1998, at p 289. This should be distinguished with the approach of the Canadian courts which requires the plaintiff to prove that there is a *strong probability*, upon the facts, that *grave damage* will accrue from the violation. See *Operation Dismantle Inc. v Canada* [1985] 1 S.C.R. 441. However, 'strong probability' and 'grave damage' appear to put the requirements at an unreasonably high level. It should be enough that the contemplated harm amounts to violation of the constitution and is based on reasonable apprehension.

²⁶ Jones & Buckle: 1988 – 1991, at p 94.

²⁷ Harms: 1998, at p 286.

²⁸ Berryman: 2000, at p 40.

7.2.1.2 *Mandatory injunctions*

A mandatory injunction is expressed in positive terms; it requires the person to whom it is directed to undertake positive steps to remedy a wrongful state of affairs for which he/she is responsible. It could also require such person to do something which he/she ought to do if the complainant is to enjoy his/her rights.²⁹ The mandatory injunction is appropriate as a means of enforcing both the negative and positive obligations engendered by socio-economic rights. But what has made the mandatory injunction most suited for the enforcement of socio-economic rights is its potential to enforce positive obligations. This is because in the majority of socio-economic rights cases the emphasis is always more on ensuring compliance with the obligations in the future than on repairing past wrongs.³⁰ In such cases what are needed are those remedies that have an affirmative element and which can be used to demand positive provision of socio-economic goods and services.

The mandatory injunction could also pass as a corrective remedy when it is aimed at correcting past wrongs, thereby becoming a reparative injunction which compels the defendant to repair a wrong.³¹ Such compulsion is also deterrent as it becomes clear to the defendant that if he/she engages in wrongful conduct in the future, he/she will be compelled to undo the wrong. So are other potential defendants who,

²⁹ Jones & Buckle: 1988 – 1991, at p 90. See also *Sikuza v Minister of Water Affairs and Agriculture and another* [2001] JOL 8486 (Tk), at p 2.

³⁰ Roach, K., 'Crafting remedies for violations of economic, social and cultural rights' in Squires, J., Langford, M., and Thiele, B., (eds.) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) Australian Human Rights Centre and Centre on Housing Rights and Evictions pp 111 – 126 [Hereinafter referred to as Roach: 2005], at p 111. See also chapter two, section 2.3.1.1.

³¹ Roach, K., *Constitutional remedies in Canada* (1994) Law Book Inc [Hereinafter referred to as Roach: 1994], at p 13-20.

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though not party to the suit, will be deterred once they become aware of the courts' powers of compulsion.³²

It would not be appropriate to award a mandatory injunction where there is evidence that the state will respond positively, in good faith, to the orders of the court. In such cases, as seen in chapter six,³³ a declaratory judgment would suffice.³⁴ But where there is evidence of likely non-compliance it would be appropriate for the court to make a mandatory injunction. This could be in a case where a government official, for instance, states on public television that the government is not prepared to abide by any order against it in a pending case compelling government to provide Nevirapine.³⁵

³² See Fiss: 1978, at p 33.

³³ Section 6.2.2.

³⁴ This is because the mandatory injunction is said to be more intrusive as it compels the state to act and involves displacement of the state's judgment for that of the court. It should, therefore, be avoided if this is possible. See Cooper-Stephenson: 1991, at p 35. In the Canadian case of *Société des Acadiens v Association of Parents*, [1986] 1 S.C.R. 549 (*Société des Acadiens* case); (1984), 8 D.L.R. (4th) 238; (1983), 48 N.B.R. (2d) 361, with evidence that the state was likely to comply with the court orders in good faith, the Supreme Court of Canada was reluctant to award a mandatory injunction. The Court held that considering the impression given off by the character of the defendant throughout the trial, and in light of all the testimony, the court was convinced that it was not necessary to order a mandatory injunction: 'Put simply, the court is confident that this decision will be respected by the defendant' (1983), 48 N.B.R (2d), at p 409). In spite of this, however, the Court deemed it necessary to retain jurisdiction over the case and remain open to the parties. This proved very useful at a future stage because the state did not honour its promise to implement the order in good faith, which compelled the Court to deploy the mandatory injunction at a latter stage.

³⁵ This was the situation in the *TAC* case where the minister of health stated, on public television, that the government would not abide by the judgment of the Court. See Bilchitz, D., 'Towards a reasonable approach to the minimum core: Laying the foundations for a future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* pp 1 – 26 [Hereinafter referred to as Bilchitz: 2003], at pp 23 –

The CC has asserted its powers to grant mandatory injunctions as part of ‘appropriate, just and equitable relief’. The Court has rejected submissions that the only order it could make against the government in constitutional litigation was a declaratory order. It had been submitted that the Court was prevented by the doctrine of separation of powers from granting a mandatory injunction as this would amount to requiring the executive to pursue a particular policy.³⁶ According to the CC, there is no distinction between a mandatory order and a declaratory order because they both affect state policy and may have budgetary implications. This is because the government is constitutionally bound to give effect to both mandatory and declaratory orders.³⁷

I do endorse the holding that government is constitutionally bound to carry out declaratory orders in the same way as mandatory orders. In my opinion, however, the distinction between declaratory and mandatory order becomes clear when government disregards its constitutional obligations. As mentioned in chapter six,³⁸ declaratory orders once

24. Though at the end of the case evidence had emerged that the government was prepared to abide by the judgment of the court, the commitment was too fluid to merit a declaratory order alone. The CC, therefore, made a mandatory order, compelling the government to remove, without delay, the restrictions that prevented nevirapine from being made available at public hospitals and clinics that had not been designated research and training sites. Indeed, subsequent events proved the usefulness of the mandatory injunction as some provinces had to be threatened with contempt of court order citations to extract an undertaking from them to abide by the order. See *TAC v MEC for Health, Mpumalanga and Minister of Health*, TPD, Case No: 35272/02 [unreported] (*TAC Mpumalanga case*). See also Heywood, M., ‘Contempt or compliance? The *TAC* case after the Constitutional Court judgment’ (2003) 4 *ESR Review* pp 7 – 10 [Hereinafter referred to as Heywood: 2003].

³⁶ *TAC case*, at paras 97 – 98.

³⁷ *TAC case*, at para 99.

³⁸ Section 6.3.2.

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disobeyed cannot be enforced in the same way as the injunction. The injunction can be followed by contempt of court proceedings to secure compliance from the state. This explains why it was easy for those dissatisfied with implementation of the *TAC* case order in some provinces to secure compliance.³⁹ This should be contrasted with the position of those dissatisfied with the implementation of the judgment in *Government of the Republic of South Africa v Grootboom & Others*⁴⁰ (*Grootboom* case) whose only access to the Court is through fresh litigation.⁴¹ It, therefore, remains that the power of a mandatory order cannot be compared to that of a declaratory order.

7.2.1.3 Interim injunctions

The injunction has gained prominence as an interim remedy because of the impossibility of using the traditional public law remedies as a means of interim relief. In this respect, the interim injunction, granted on an interim basis, becomes handy. The interim injunction can be granted at any time of the proceedings if the circumstances warrant. It can even be granted without notice to the defendant.⁴² The interim injunction, just as other interlocutory remedies, provides one possible way to combine individual and distributive or systemic relief.⁴³ The interim injunction can be used to accord individual protection to litigants in the case while

³⁹ See *TAC Mpumalanga* case and Heywood: 2003.

⁴⁰ 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC)

⁴¹ See Bilchitz, D., *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) Oxford University Press [Hereinafter referred to as Bilchitz: 2007], at p 150.

⁴² Berryman: 2000, at p 13. He also associates the popularity of the interim injunction to the ability to get a preliminary trial of the disputed merits, which may assist in reaching a settlement before the case goes to trial.

⁴³ Roach: 2005, at 121.

seeking a remedy that may have a distributive effect as the final order of the case. However, this can only be done with respect to protection against negative and not positive violations. It is easily available in those cases where the applicants, for instance, require that government be restrained from taking away an existing right until a final decision is made. An example is an order sought in an eviction case to maintain the *status quo* and prevent irreparable harm that would result from the eviction. This though does not mean that there could be no circumstances under which an interim order can be made to compel affirmative action such as the interim provision of services.

For an interim injunction to be granted in South Africa a litigant must prove the following:

- (a) that the right which is the subject matter of the main action and which he/she seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;
- (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he/[she] ultimately succeeds in establishing his/[her] rights;
- (c) that the balance of convenience favours the granting of interim relief; and
- (d) that the applicant has no other satisfactory remedy.⁴⁴

The right that the applicant for an interim injunction seeks to enforce need not be shown on a balance of probabilities.⁴⁵ All that a court has to do is to consider the facts as set out by the applicant together with any facts set out by the respondent. If with regard to the inherent probabilities the

⁴⁴ See *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267A-F. See also *The National Gambling Board v Premier of Kwazulu-Natal and Others* 2002 (2) SA 715 (CC).

⁴⁵ Prest: 1996, at p 52.

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applicant would obtain final relief then a *prima facie* case would have been proved.⁴⁶

Proving whether the balance of convenience is in the applicant's favour requires the court to weigh the applicant's interests against those of the defendant. The court must weigh the prejudice that the applicant will suffer if the interim injunction is not granted against the prejudice to the respondent if it is. If there is greater possible prejudice to the respondent the injunction will be refused.⁴⁷ However, one of the factors to consider in the balancing process is the prospects of success in the main action. '[T]he stronger the prospects of success, the less the need for the balance of convenience to favour the applicant; the weaker the prospects of success, the greater the balance of convenience to favour him[her]'.⁴⁸ As with irreparable harm, third party interests too may have to be weighed in the balance of convenience. The court should focus beyond the interests of the parties in order to be able to consider not only the polycentric case but also the interest that society as a whole may have in the case as discussed in chapter three.⁴⁹

Traditionally, irreparable harm has been considered as harm that cannot be repaired with an award of damages. But as submitted in chapter six,⁵⁰ the inherent nature of human rights and the intrinsic values they protect

⁴⁶ Joubert & Faris: 1998, at p 292. This is 'based on the unreliability of making determinations on conflicting ... evidence of substantive claims without the benefit of detailed argument and in a climate of judicial haste'. Berryman: 2000, at pp 22 and 49.

⁴⁷ Prest: 1996, at p 72. See also *Eriksen Motors (Welkom) Ltd v Protea Motors & Another* 1973 (3) SA 685 (A).

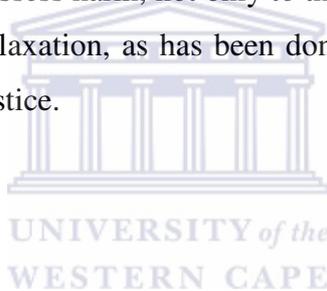
⁴⁸ Jones & Buckle: 1988 – 1991, at p 98.

⁴⁹ See section 3.4.1.

⁵⁰ Section 6.3.1.

cannot be compensated for with damages.⁵¹ Indeed, it has been held that if the applicant can establish a clear right, there is no need to prove that irreparable harm would result if the interim injunction is not granted.⁵² It is only when the right is open to some doubts that irreparable harm would have to be proved.⁵³ This is positive in the sense that it makes the interim injunction readily available in human rights litigation.

It is indeed important that the requirements for the grant of an interim injunction be relaxed in human rights litigants in order to give these rights their full effect. In socio-economic rights litigation, for instance, it may be necessary to apply the balance of convenience in a way that is different from other forms of litigations. Due to the polycentric nature of socio-economic rights litigation⁵⁴ and the need to engage in interest balancing,⁵⁵ it may be necessary to assess harm, not only to the petitioners but on third parties as well. Such relaxation, as has been done, is consistent with the theory of distributive justice.



⁵¹ Damages may not be equated to human dignity, to a lost opportunity to worship one's God, or to a missed opportunity to vote. See *Dikoko v Mokhatla 2007(1) BCLR 1 (CC)* (*Mokhatla case*), at para 109. On this basis, one could submit that the requirement of proving that irreparable harm would be suffered where human rights are involved is not necessary.

⁵² *Setlogelo case*, at p 227. This is where South African law differs from English law, under English law irreparable harm would have to be proved irrespective of the nature of the right. See *American Cyanamid v Ethicon* [1975] 2 WLR 316 (*American Cyanamid case*).

⁵³ *Setlogelo case*, at p 227.

⁵⁴ Chapter three, section 3.4.

⁵⁵ Chapter five, sections 5.2.2 and 5.3. See also chapter six, section 6.3.

7.3 NATURE, FUNCTIONS AND MODELS OF THE STRUCTURAL INJUNCTION

The structural injunction is a complicated form of injunction. It involves continued participation of the court in the implementation of its orders. The functions of the structural injunction are various and determined by the circumstances and demands of each case. Unlike other forms of injunctions or remedies, such as damages, the purpose of a structural injunction is not deterrence or compensation as such. In broad terms, its purpose is the elimination of systemic violations existing especially in institutional or organisational settings.⁵⁶ Rather than compensate for past wrongs it seeks to adjust future behaviour and is deliberately fashioned rather than logically deduced from the nature of the legal harm suffered.⁵⁷ Its most prominent feature is that it provides for a complex, on-going regime of performance and is not a one-shot and one-way approach of providing judicial remedies.⁵⁸ Its on-going nature is facilitated by the court's retention of jurisdiction, and sometimes by the court's active participation in the implementation of the decree.

The structural injunction is a response to the inadequacy of the traditional remedies in responding to systemic violations of a complex organisational nature.⁵⁹ The traditional remedies may not be effective to eliminate

⁵⁶ See Liebenberg, S., 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* pp 1 – 31 [Hereinafter referred to as Liebenberg: 2005], at p 30.

⁵⁷ See the discussion in chapter five (section 5.3) regarding the relationship between rights and remedies.

⁵⁸ Chayes, A., 'The role of the judge in public law litigation' (1979) 89 *Harvard Law Review* pp 1281 – 1316 [Hereinafter referred to as Chayes: 1979], at p 1298.

⁵⁹ Sturm, S., 'A normative theory of public law remedies' (1991) 79 *Georgetown Law Journal* pp 1355 – 1446 [Hereinafter referred to as Sturm: 1991], at p 1357.

systemic violations because these may require negotiation, dialogue, *ex parte* communications and broad participation of parties not liable for the violation.⁶⁰ The structural injunction has also been inspired by a recognition that some constitutional values cannot be fully secured without effecting changes in the structures of complex organisations especially in government bureaucracy settings.⁶¹

In a setting of systemic violations, what would be most appropriate are those remedies that aim at achieving structural reforms and tackling the systemic problems at their root rather than redressing their impact. This may require development of on-going measures designed to eliminate the identified mischief,⁶² and to promote participation of not only the parties but also third parties in the remedy selection process. Dealing with systemic violations in institutional settings also requires a continued establishment of facts and the continual interplay between such facts and the legal consequences.⁶³ This is important because in such cases the problems could have their roots in the structural characteristics of the institution itself.⁶⁴ Facts that enhance the court's understanding of the nature of the institution, therefore, become relevant at all stages of the

⁶⁰ Sturm: 1991, at p 1357.

⁶¹ Fiss, O., 'Foreword: The forms of justice' (1979) 93 *Harvard Law Review* pp 1 – 58 [Hereinafter referred to as Fiss: 1979], at p 2.

⁶² Chayes: 1979, at p 1297. See also Special Project, 'The remedial process in institutional reform litigation' (1978) *Columbia Law Review* pp 784 – 929 [Hereinafter referred to as Special Project: 1978], at p 812.

⁶³ Chayes: 1979, at 1297.

⁶⁴ Note, 'Implementation problems of institutional reform litigation' (1998) 91 *Harvard Law Review* pp 428 – 463 [Hereinafter referred to as Note: 1998], at p 433.

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case.⁶⁵ The cases may also require frequent re-determination of liability and reformulation of relief.⁶⁶

It is because of these factors that the structural injunction has become a preferred remedy in what have been described as structural or institutional suits.⁶⁷ These suits challenge large scale government deficiencies, sometimes arising out of organisational or administrative failure. The causes of the failure are various: failure to use (or misuse of) discretion, negligence, failure to comprehend the law, administrative red tape, and deliberate disregard of rights. Usually these suits are preceded by political pressure and instituted only when this is unsuccessful. However, even when they are filed, political pressure may continue to be exerted on the government.⁶⁸ The suits are usually multi-partied, with large numbers of plaintiffs, who may act in a representative capacity for known and unknown victims. The suits could also have *amici* and interveners, and may be instituted against a multitude of government departments and institutions.

The facts in institutional or structural litigation are often complex, and much of the judge's efforts are dedicated to finding an amicable solution

⁶⁵ It has been submitted that understanding the institution will permit the policy maker, whether administrative or judicial, to anticipate obstacles to implementation and develop strategies of surmounting the obstacles. Note: 1998, at p 435.

⁶⁶ Special Project: 1978, at p 790. In fact, the Special Project has described the resulting decree as resembling a legislative or executive act (at p 791).

⁶⁷ See Fletcher, W., 'The discretionary constitution: Institutional remedies and judicial legitimacy' (1982) *Yale Law Journal* pp 635 – 697 [Hereinafter referred to as Fletcher: 1982], at p 637. See also Eisenberg, T., and Yeazell, S., 'The ordinary and the extraordinary in institutional litigation' (1980) *Harvard Law Review* pp 465 – 517 [Hereinafter referred to as Eisenberg & Yeazell: 1980].

⁶⁸ Fletcher: 1982, at 637.

acceptable to all the parties and which will lead to structural reforms. Usually the remedial decree is perceived as the key to the success or failure of the litigation.⁶⁹ The most common practice is for the court to push the parties to agree on a plan and to register that plan as a decree contained in a mandatory injunction. However, even after this is done the court does not let go— it retains jurisdiction over the case and, if need be, may supervise the implementation of the remedial plan.⁷⁰

The structural injunction as a remedy in constitutional litigation is traced back to the US school desegregation cases. The leading case in this respect is *Brown v Board of Education*.⁷¹ This case was propelled by the need to realise transformation of the dual school system, based on race, into a unitary non-racial school system. This required a great deal of organisational reforms to transform the entrenched racial segregation which had survived for hundreds of years. The courts were required to transform this entrenched *status quo* and to reconstruct the social reality in a very radical manner.⁷² There was just too much on the sleeves of the

⁶⁹ Fletcher: 1982, at pp 637 – 638.

⁷⁰ Contrary to general perception, although there is no denying that their application in the realm of public law has been more controversial, structural injunctions are not exclusive to public law but have been applied in private law as well. In the realm of private law, courts have, for a very long time, undertaken managerial roles resulting either from judicial initiatives or from statutory powers. Courts have through receivers managed bankrupt or insolvent companies and supervised the administration of trusts, estates and wills. See Berryman: 2000, at p 110. See also Eisenberg & Yeazell: 1980, at p 474: they submit that the view that the traditional lawsuit ends almost amicably at a stage well before the administration of the remedy is artificial. They contend that in this ‘old’ litigation, as in the public litigation that has engendered so much outcry, administering remedies often creates resistance and the courts must expend a great deal of energy and devise ingenious procedures to overcome such resistance (at p 481). See also Roach: 1994, at p 13-3.

⁷¹ 349 US 294 (the *Brown* case).

⁷² Fiss: 1979, at pp 2 – 3.

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judges: what was required included establishing new procedures for student assignments, new criteria for construction of schools, revision of transport routes, re-assignment of faculty, curricular modifications, reallocation of resources and above all, establishing equity in the school system. The question is whether this would have been achieved through the conventional one-stance traditional litigation and remedial procedures. The answer is a definite no; it required protracted and unusual methods of litigation and remediation.⁷³

It is in this context that the Supreme Court made its orders in *Brown* and similar cases. The Supreme Court recognised the fact that the school authorities were better placed to solve the problem of segregation. It noted, however, that there was need for the courts, especially the local courts, to consider whether the actions of the school authorities constituted good faith implementation of court orders. The Supreme Court advised that in discharging their roles the local courts had to be guided by the principles of equity 'characterized by a practical flexibility in shaping the remedies and facility for adjusting and reconciling public and private needs'.⁷⁴ The Court required that the defendants make 'a prompt and reasonable start toward full compliance' with the ruling of court.⁷⁵ During what the court termed as a period of transition, the courts were advised to retain jurisdiction over the cases. This was to enable the courts to monitor the implementation of their decrees and to intervene or issue further orders if necessary. Indeed, this is what happened. Most

⁷³ Fiss: 1979, at p 3, has submitted that 'desegregation required a revision of familiar conceptions about party structure, new norms governing judicial behavior, and new ways of looking at the relationship between rights and remedies'.

⁷⁴ 347 U.S. 483, at p 496.

⁷⁵ 347 U.S. 483, at p 497.

school authorities did not implement the decrees, which forced the courts to intervene more intrusively and to give specific directions.

7.3.1 The unusual features of the structural injunction

7.3.1.1. Flexibility and gradualism

The structural injunction is very flexible; its form at the beginning of the case may differ from its form when the case is concluded. Though this fluidity may present some problems of implementation, it is the kind of flexibility that contributes to the strengths of this kind of relief. It allows for the revisiting of the remedy without having to institute fresh litigation, and also for accommodation of changed circumstances.⁷⁶

The non-specificity of a structural injunction at the stage when it is first decreed is not by default but by design. The essence of a generally stated structural injunction is to give latitude to the executive, or some times the legislative branch of government, to choose the most appropriate remedy for the violation. Specificity should come as a matter of last resort. The remedy may be crafted in a very broad manner by merely requiring that a wrong be corrected. With time, however, the terms of the order may become more specific by detailing what ought to be done and within what time. This point is reverted to later.⁷⁷ Unlike the other types of injunctions which are usually backed by contempt of court sanctions, recalcitrance in the case of a structural injunction is in most cases followed by supplementary decrees:⁷⁸

⁷⁶ Revisiting of the remedy in this way may arise because of factors that were not anticipated when the remedy was designed. This is in addition to changes in the degree of recalcitrance and willingness on the part of the defendant to abide by the orders of court which may motivate the court to loosen some of the tough conditions in the decree.

⁷⁷ See section 7.6.1 below.

⁷⁸ This is not to suggest that there can be no stages at which contempt of court order sanctions become appropriate.

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The usual scenario in the structural context is for the judge to issue a decree (perhaps embodying a plan formulated by the defendant), to be confronted with disobedience, and then not to inflict contempt but to grant a motion for supplemental relief. Then the cycle repeats itself. In each cycle of the supplemental relief process the remedial obligation is defined with greater and greater specificity. Ultimately, after many cycles of supplemental decrees, the ordinary contempt sanctions may become realistically available, but the point to emphasize is that it is *only* then—only at the end of a series—that the threat of contempt becomes credible.⁷⁹ [Emphasis in original]

The factors propelling such specificity are discussed later in this chapter,⁸⁰ but it is mainly the inadequacy of the steps taken by the defendant, or even the degree of recalcitrance exhibited. Breaking down this recalcitrance may require many cycles of clarification of the obligations of the defendant. According to Fiss:

The gradualism of the structural sanctioning system might be attributable to political considerations (such as a desire to “go slow” so as to build wide popular support for the remedial enterprise). In a similar vein, it might be said that it reflects an ambivalence toward the underlying decree. I suspect, however, that the gradualism has deeper roots—uncertainties in the goal to be achieved (e.g., what is a “unitary non-racial” school system) or shortcomings in our knowledge and ability to restructure ongoing institutions—and thus is less tractable. The gradualism stems from the very nature of the remedial enterprise.⁸¹

Gradualism also helps the court juggle around a number of options in its search for the most effective way of remedying the violation. It is not until the court has decided on what it considers the most appropriate

⁷⁹ Fiss: 1978, at p 36. Fiss attributes this to the fact that the purpose of a structural injunction is to serve a preventive role to deter future wrongs and is not a coercive act issuing a command. Instead, it is a declaration that the court will manage or direct the reconstruction of an institution in order to bring it into conformity with the constitution. He submits that this role requires the court to induce collaboration, and to give authoritative directives as a last resort (at p 37).

⁸⁰ See section 7.6.1 below.

⁸¹ Fiss: 1978, at p 36.

means of remedying the violation that it concretises the decree.⁸² I discuss this point in detail below.⁸³

7.3.1.2 Retention of jurisdiction and its purpose

The most peculiar feature of the structural injunction is the court's retention of jurisdiction over the case even after judgment has been passed. The courts have disregarded the traditional *functus officio* doctrine, which requires that once a court has made a final determination of a matter, its jurisdiction over the case ceases and the case is closed.⁸⁴ Though the case can be reopened, conventional legal procedures put in place stringent legal requirements that have to be satisfied before this is done.

Retention of jurisdiction by the court helps a party who thinks that the decree is not being complied with to bring this to the attention of the court. It also helps the persons to whom the order is directed, in certain circumstances, to seek clarity from the court as regards what the order entails. Courts have also retained jurisdiction to enable them participate sporadically in the administration of the institutions whose reform they seek to achieve.⁸⁵ In such case, the retention will be accompanied by a stipulation of supervisory powers, thereby establishing supervisory jurisdiction on the part of the court. Supervisory jurisdiction is particularly necessary where a mandatory order has been issued in terms that are so general that it is not possible to define with precision what is

⁸² Cooper-Stephenson: 1991, at p 36. See also Fiss: 1978, at p 36.

⁸³ Section 7.6.1.

⁸⁴ For a detailed discussion of the *functus officio* doctrine see Pretorius, M., 'The origins of the *functus officio* doctrine, with specific reference to its application in administrative law' (2005) 122 *South African Law Journal* pp 832 – 864. See also Special Project: 1978, at p 816.

⁸⁵ Note: 1998, at p 428.

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required of the defendant.⁸⁶ The continued participation in the case by the court will enable it to make its order more precise as new facts and circumstances present themselves.

Retention of jurisdiction also affords the successful litigant with an opportunity to be heard after the defendant has formulated his response to the court's directions. In the case of government as the defendant, the successful litigant is given a second chance to be heard by a government whose initial failure could have been the cause of the litigation.⁸⁷ The government would be compelled, this time round, to engage with the plaintiffs in meaningful dialogue because of the knowledge that the doors of the court are open to the plaintiffs. This is in addition to the reluctance to endure another wave of embarrassment arising from litigation and

⁸⁶ Roach, K., and Budlender, G., 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable' (2005) 122 *South African Law Journal* pp 325 – 351 [Hereinafter referred to as Roach & Budlender: 2005], at p 334. General orders may be made, either because of the nature of the duty, like the duty to act reasonably, or because the court is anxious to leave government with as much latitude as possible on how to comply. This may be based on the conviction that the government will comply with the order and carry it out in good faith. The retention of jurisdiction in this case helps the court to keep a watchful eye over the defendant, which is motivated by the fact that at this stage compliance is dependant on the defendant's good faith. An example of this can be seen in the Canadian *Société des Acadiens* case. In this case, the Court made a general declaration and initially declined to assume a supervisory role because it was convinced that the defendant would comply in good faith. However, because of the general nature of the order, the Court decided to retain jurisdiction. As it turned out, the defendants were in fact the first to make use of this jurisdiction when they sought clarity on the nature of their obligations. A few months down the road the order was transformed into a mandatory order because of evidence of non-compliance on the part of the defendants. If jurisdiction had not been retained, the plaintiffs would have had to commence fresh and possibly unwinding proceedings to secure compliance with the court order.

⁸⁷ Davis, D., 'Socio-economic rights in South Africa: The record of the Constitutional Court after ten years' (2004) 5 *ESR Review* pp 3 – 7 [Hereinafter referred to as Davis: 2004], at p 6.

which is easy to trigger. This is very crucial for poor litigants who may not have the resources to institute another suit in case of non-compliance by the defendant.⁸⁸

Additionally, retention of jurisdiction enables the courts to work out a negotiated compromise between the parties in order to secure full implementation of the order. The period of retention may be used as a delaying tactic to allow parties a cooling off period before compromise is reached. This is one of the reasons why a court may be prepared to delay full implementation of its orders and to rely on negotiations between the affected parties in order to win their support and acceptance of the remedy.⁸⁹ The court may also use the delay to assess the circumstances on the ground and to determine whether there are obstacles that may hamper effective implementation of the decree. Once any obstacles are identified, the court will be in a better position to devise what it considers to be the best means to confront them. This form of delay also allows the courts to assess the practicalities of the decree and the perspectives of the affected parties.⁹⁰ This is important because it avoids imposing undue remedial burdens on the parties and sometimes on third parties. This is more effectively achieved if the parties themselves are allowed to devise the remedy and to present it for the court's approval.⁹¹ I discuss this point in detail in the next section.

⁸⁸ Swart, M., 'Left out in the cold? Grafting constitutional remedies for the poorest of the poor' (2005) 21 *South African Journal on Human Rights* pp 215 – 240 [Hereinafter referred to as Swart: 2005], at p 228.

⁸⁹ Roach: 1994, at p 3-3.

⁹⁰ Roach, K., 'The limits of corrective justice and the potential of equity in constitutional remedies' (1991) 33 *Arizona Law Review* pp 859 – 909 [Hereinafter referred as Roach: 1991], at p 893.

⁹¹ Roach: 1994, at p 13-50.

7.3.2 Models of structural injunctions

Courts have adopted different models of the structural injunction, not only in different cases but at different levels of the same case. The most commonly used models include: the bargaining model, the legislative or administrative hearing model, the expert remedial formulation model, report back to court model and the consensual remedial formulation model.⁹² Each of these models is discussed in the sub-sections that follow.

7.3.2.1 Bargaining model

The bargaining model involves making remedial decisions through negotiation by the parties involved in the case, plaintiff(s) and defendant(s) or applicant(s) and respondent(s). The biggest advantage of this model is that it produces a remedy that is acceptable to all the parties, thereby easing implementation.⁹³ The negotiation process will also bring to the fore facts and issues which may have been ignored by the court yet are relevant to having an effective remedy. Such facts and issues will emerge from the perspectives of all the parties. This is very important in as much as it allows parties to bring to light factors they think would affect the implementation of the remedy.⁹⁴

The negotiation process also accords legitimacy to the remedy since the remedy becomes 'self-imposed', as opposed to one that is 'court-

⁹² See Sturm: 1991, at pp 1368 – 1375.

⁹³ Special Project: 1978, at p 810.

⁹⁴ The best example of the bargaining model is the US case of *Liddle v Board of Education of the City of St. Louis* 491 F. Supp. 351 (E.D.Mo.1980). In this case, after failure to extract from the defendants a voluntary school desegregation plan, a district court appointed a third party to oversee the remedial process. The third party, designated as a court master, met with the attorneys of all the parties, both individually and in groups, and shuttled back and forth between them with proposals and counter-proposals. Later the master arranged for direct negotiations between the attorneys. The negotiations were also supervised by *amicus curiae* until agreement was reached.

imposed' and may be viewed by some of the parties as illegitimate. This is in addition to reducing the burden on the court to resolve some issues, as the parties may come to agreement on them. The parties then may only litigate on those issues where a deadlock has been reached. Nonetheless, when disagreement arises, the threat of a court imposed remedy may still force the parties to break the deadlock by coming to an agreement.⁹⁵ Regarding the doctrine of separation of powers, the 'self-imposed' remedy will shield the court from accusations of interfering in the affairs of other organs of state. In case of failure to abide by the remedy, the court will be able to enforce it without fears arising from any separation of powers concerns. This is because the court's involvement will be viewed as justified and, therefore, legitimate.

The process also saves time; it brings to a quick end the protracted court processes of resolving legal issues, sometimes only achieved after countless adjournments. The parties will be able to commit their time to the process, if the case means a lot to them. Even if it means a lot to only one party, he/she will mount pressure that agreement be reached. The other party will be forced to submit to the negotiations because of the fear that failure to reach agreement may provoke a court selected remedy which may not be as favourable.⁹⁶ The bargaining model is also appropriate in cases involving governmental action. This is because such action is always, in large part, the product of bargaining and manoeuvring among public officials and departments or levels of government, each of which will have different goals and motives.⁹⁷

⁹⁵ Special Project: 1978, at p 811.

⁹⁶ Chayes: 1979, at p 1299.

⁹⁷ Note: 1998, at p 434.

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The model has been criticised as encouraging perpetuation of the case and indefinite involvement of the court. This is in addition to sacrificing reasoned decision making on the part of the court. According to Fiss,⁹⁸

The drive for settlement knows no bounds and can result in a consent decree even in ... [structural litigation], that is, even when a court finds itself embroiled in a continuing struggle between the parties or must reform a bureaucratic organization. The parties may be ignorant of the difficulties ahead or optimistic about the future, or they may simply believe that they can get more favorable terms through a bargained-for agreement. Soon, however, the inevitable happens: One party returns to court and asks the judge to modify the decree, either to make it more effective or less stringent. But the judge is at a loss: He has no basis for assessing the request. He cannot, to use Cardozo's somewhat melodramatic formula, easily decide whether the "dangers, once substantial, have become attenuated to a shadow," because, by definition, he never knew the dangers.⁹⁹ [Footnotes excluded]

It should be noted, however, that Fiss's criticism, is based on erroneous assumptions. The first assumption is motivated by the purpose of his article, *viz.*, to criticise models of litigation that encourage alternative dispute resolution in the place of court determinations. Structural litigation does not, however, fall in this class of litigation. Structural litigation is conducted with clear appreciation of the fact that the litigation implicates interests beyond the interests of parties. This, too, is a fact that Fiss ignores: he trivialises litigation by reducing its social function 'to one of resolving private disputes'.¹⁰⁰ Fiss also ignores the fact that structural litigation is always opened up to persons not originally parties to the litigation and allows them to bring to the fore their interests. The judge remains conscious of these interests and reserves the right to reject settlements that sideline them. Fiss also does not understand that the continued involvement of the judge in the litigation is motivated by the

⁹⁸ Fiss, O., 'Against settlement' (1984) 93 *Yale Law Journal* pp 1073 – 1090 [Hereinafter referred to as Fiss: 1984].

⁹⁹ Fiss: 1984, at p 1083.

¹⁰⁰ Fiss: 1984, at p 1085.

desire to stop a systemic violation rather than the protection of the interests of the parties.

Furthermore, Fiss assumes that the adversarial litigation process is the only possible method of preserving a reasoned decision making process.¹⁰¹ Reasoned decision making could still be preserved in non-adversarial litigation; the judge could begin by laying down the normative standards implicated by the case. Later, at the remedial stage, the judge could then test the remedies agreed upon against these normative standards.¹⁰²

The above though does not mean that the model is without deficiencies, it may, for instance compromise the norm of participation.¹⁰³ This is because there is always no guarantee that the full range of people and organisations with a stake in the case will be included in the negotiations.¹⁰⁴ As I submit later,¹⁰⁵ it is important that the norm of

¹⁰¹ Sturm: 1991, at p 1400 – 1401. However, Sturm also concedes that sometimes deferring remedial selection to the parties may compromise the court's impartiality, which may in turn undermine the court's legitimacy. The court may fail to bring to bear perspectives other than those of the parties (at p 1412).

¹⁰² Sturm: 1991, at p 1401 – 1402, has submitted, and rightly so, that reasoned decision-making need not proceed through traditional adjudication based solely on legal norms. He submits that other decision making methodologies, such as structured negotiation, may be better suited to generating reasoned public remedial decision making when legal norms alone provide an insufficient basis for choosing among possible remedies. In Sturm's opinion, the court's discretion can be effectively structured through the development of norms of public remedial processes that can be articulated by the trial judge and reviewed by appellate courts. Moreover, the court's interpretive role may be preserved by a model of remedial decision-making premised on the view of the court as the enforcer of a deliberative process.

¹⁰³ Discussed in section 7.6.2 below.

¹⁰⁴ Sturm: 1991, at p 1414.

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participation be promoted by ensuring that all affected parties participate in the remedy selection process. Also, remedies obtained from the negotiations by the parties should be subjected to scrutiny by the court to ensure that they do not negatively impact on third party interests.¹⁰⁶ In fact, the court is not entirely relieved from the responsibility of fashioning a remedy.¹⁰⁷ If the parties fail to agree, or if the agreement reached fails to conform to the requirements of the substantive law in issue or accommodate third party interests, the judge may intervene and fashion the remedy.¹⁰⁸

7.3.2.2 Legislative/ administrative hearing model

The legislative/administrative hearing model resembles a legislative committee process providing for public hearings and direct informal participation by interested parties.¹⁰⁹ This model allows persons not

¹⁰⁵ Section 7.5.2 below.

¹⁰⁶ The court's function when presented with a negotiated remedy is to consider its terms carefully, without assuming that the involvement of all the parties ensured a fair and adequate result. A court should only adopt a proposed consent decree if it is reasonable. This is because the parties may not have adequately represented all interests affected by the remedy. The court must, therefore, avoid a decree which unnecessarily injures interests of non-participants. See Special Project: 1978, at p 812.

¹⁰⁷ Chayes: 1979, at pp 1299 – 1300.

¹⁰⁸ Sturm: 1991, at p 1415, submits that the bargaining model fails to provide for mechanisms for fostering the accountability of the participants in the negotiation process to those they represent. He contends that where lawyers are involved, the bargaining closely follows an adversarial model of presentation. Sturm also submits that usually the bargaining model tends to lay emphasis on reaching agreement and proceeds according to an adversary structure which narrows the terms of the discussion and inhibits meaningful exchange (at p 1416). The lawyers control the agenda and the process of negotiation. It is, therefore, important for the court to ensure the participation of those affected and accountability to them through, for example, the legislative and hearing model.

¹⁰⁹ Sturm: 1991, at p 1370.

originally party to the litigation, but who may be interested in the case, to participate in the formulation of the remedy. It is an effective model in responding to polycentric interests that may be implicated by the case.

An example of a case where this model was used is the US case of *Pennsylvania Association for Retarded Children v Pennsylvania*.¹¹⁰ In this case, in addition to conducting extensive informal public hearings, the Judge established an advisory committee composed of representatives of the various groups and organisations with a stake in the case. The mandate of the committee was to advise on an appropriate remedy,¹¹¹ which was deemed necessary because of the multitude of people interested in the outcome of the case. Their participation made it possible for the different views and divergences to be brought to the fore. However, as discussed below,¹¹² participation should not be inflated to such an extent that the process becomes muddled making it hard for the Committee to make a decision.

The openness of the process allows for a better understanding of the polycentric interests implicated by the case. The informal nature of the process also makes accessibility much easier especially for the weak and vulnerable. Such persons may not have the resources to initiate and sustain litigation.

7.3.2.3 *Expert remedial formulation model*

The expert remedial formulation model involves the appointment of either an individual expert or a panel of experts with a mandate to develop a remedial plan. Sometimes these experts are designated as court officials

¹¹⁰ 334 F.Supp. 1257 (E.D. Pa. 1971) (*PARC* case).

¹¹¹ See Sturm: 1991, at p 1370.

¹¹² Section 7.6.2.

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and have judicial powers.¹¹³ The court appointed experts in structural litigation differ from those in other forms of litigation. Experts in other forms of litigation are always restricted to fact finding mandates. In contrast, the experts in structural litigation are usually mandated to design and propose a remedial plan.¹¹⁴ The expert could even be designated as an administrator with a mandate to take over and manage the institution for the purposes of effecting reforms. The expert model is particularly relevant in those cases where specialised and technical skill is required to formulate an appropriate remedy. This could be in those cases where there is, for instance, a need to appreciate some social information facts before formulating the decree.¹¹⁵ The court may not have the expertise and skill to ascertain the social facts. This does not, however, mean that the parties are left out of the remedy finding process. In spite of their skills, the experts may be obliged to consult with the parties in formulating the remedial plans.¹¹⁶ This, like the legislative hearing model, is intended to ensure that polycentric interests are considered and that the remedy is acceptable not only to the parties but to other members of the community who may play a role in its implementation.¹¹⁷

¹¹³ A variety of terms have been used to refer to these experts and panels of experts. These include: receiver, monitor, human rights committee, administrator, advisory committee, ombudsman, committee, audit and review Committee, to mention but a few. See Special Project: 1978, at p 826.

¹¹⁴ See Special Project: 1991, at p 805.

¹¹⁵ See Special Project: 1991, at p 795.

¹¹⁶ An example of this is found in *Hart v Community School Board* 383 F.Supp. 699 (E.D.N.Y. 1974). In this case, the order of reference required the expert to solicit views not only from the parties but also from community groups within the district.

¹¹⁷ Sturm: 1991, at p 1419 – 1420, contends that the expert model also encourages reasoned decision making and fosters the impartiality and independence of the court.

However, this model also has its disadvantages; first, it may detract from the need for participation of all stakeholders in the case. The expert, and not the stakeholders, gets the benefit of integrating the range of information and perspectives on the remedy. The parties' limited involvement may make it difficult for the expert to justify particular remedial decisions. This is because in the course of developing specific approaches to realising the underlying legal principles, the expert must in some situations pursue goals and norms that are not dictated by those underlying principles. These choices can be justified only by the expert's view of the wisdom of those norms; and those who must live with the remedy may have a different perspective on the norms and how they should be implemented. In some cases there may be a reasoned basis for striking a particular balance among competing norms and applications in a particular context.

Achieving and justifying this balance, however, requires a participatory process of exploring the interests of, and the factual bases and reasoned justifications offered by, the various participants.¹¹⁸ In my opinion, however, whether participation is fostered also depends on the expert's mandate and how he/she carries it out. The court may foster participation by making consultation part of the expert's mandate. The court may also leave its doors open to the stakeholders to express their dissatisfaction with the way the expert is conducting him/herself.¹¹⁹ The parties may also be afforded the opportunity to contradict the proposals of the expert or to present alternative plans. Additionally, the court may not be bound by the recommendations of the expert and may disregard them if found to be erroneous.

¹¹⁸ See Special Project: 1991, at p 807.

¹¹⁹ This, though, should not be done in such a way that it undermines the expert's authority and leads to entertainment of frivolous complaints.

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7.3.2.4 Report back to court model

This is the most commonly used model implemented by requiring the defendant to report back to the court with a plan on how he/she intends to remedy the violation. Usually a fixed date is set for the filing of the plan and the other party is given an opportunity to comment on the plan. It is only when the court is satisfied with the plan that it will concretise the plan as part of its decree.

This model has a number of advantages. First, it allows the court to defer to the government (defendant) on the most effective way of eliminating the violation. This promotes the doctrine of separation of powers and shields the court from accusations that it has usurped functions reserved for the other organs of state. The model also enables the court to harness the expertise that may be in the hands of the defendant. This is especially relevant in the case of government because of the quality of expertise that may be at its disposal through its bureaucracy and public service. Secondly, it allows for a self imposed remedy from the defendant which makes implementation of the remedy much simpler. It is highly unlikely that the defendant will propose a plan that it cannot carry out. In the case of government, such plan will be calculated very well to cater for government's budgetary and related needs. However, the process may not be left entirely to the defendant as both the court and the opposite party are afforded an opportunity to scrutinise the plan. In fact the court should reserve the right to reject the plan if considered inadequate.

Another advantage of this model is that it allows the parties a cooling off period and, therefore, allows for the resolution of the disputes in a dispassionate manner. The parties may be compelled to work together in devising a plan and may be engaged in negotiations in this regard. This will lead to the same advantages of those of the bargaining model discussed above.¹²⁰

¹²⁰ Section 7.3.2.1 above.

One disadvantage with this model is that it may lead to protracted litigation especially where the defendant is not willing to participate in the process in good faith. Nonetheless, the protracted litigation may in some cases be necessary to enable the court and the parties find the most appropriate way of stopping the violation. It may also be the only process through which long-term and enduring solutions are found.

7.3.2.5 Consensual remedial formulation model

The consensual remedial formulation model also tries to secure the consensus of the parties and third parties in the formulation of the remedy.¹²¹ This model allows parties to exchange views and raise contests in a less formal manner. It also fosters a good working relationship between the parties and participation may be open to a variety of stakeholders. However, there is also a danger that has to be guarded against: the process should not be open to selected participants. This is important because of the negative impact that negotiated remedies sometimes bear. The most overt negative impact is the exclusion of persons who, though not parties to the suit, may be affected by its outcome.¹²² At the same time, it should not be opened unnecessarily to such an extent that reaching agreement becomes impossible because of

¹²¹ An independent third party could be appointed to assist the parties to reach consensual agreement on the remedy. An example of this is *United States v Michigan* 471 F.Supp. 192 (W.D. Mich. 1979), where a third party was appointed to assist the parties to come to an agreement on the allocation of fishing waters between tribes.

¹²² See generally Schwarzschild, M., 'Public law by private bargain: Title VII consent decrees and the fairness of negotiated institutional reform' (1984) *Duke Law Journal* pp 887 – 935. While Schwarzschild appreciates the advantages of negotiated decrees in structural reform litigation, he warns against their potential negative impact. On a positive note, however, he submits that they save the court's time and secure the co-operation of the parties in the remedial exercise. On the negative side they may exclude third party interests and may also dis-empower the court. The court will be denied the opportunity of deciding the case after a full hearing.

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the wide range of interests. The process should be directed by a third party who is able to co-ordinate and ensure the participation of all stakeholders. The consensual remedial formulation model is in many respects similar to the bargaining model. The difference is that the consensual formulation model is less formalised and is readily opened to third party participants. The consensual public dispute resolution usually requires the assistance of a third party who acts as the keeper of the process and assumes responsibility for convening the deliberations, assisting groups in choosing spokespeople, helping to establish ground rules and an agenda and identifying and obtaining expert assistance. This is in addition to facilitating fact finding, co-ordinating subcommittees, facilitating the process of collaboration, assuring meaningful participation, preparing detailed minutes of the sessions, and helping to build consensus.¹²³

7.4 ARGUMENTS FOR AND AGAINST THE STRUCTURAL INJUNCTION



Objection to the structural injunction has been based on two broad arguments: separation of powers and institutional competence type arguments and arguments based on the notion of corrective justice. Although chapter three extensively discusses the separation of powers and institutional dimension objections to socio-economic rights, it is worth discussing them here again in the context of the structural injunction. This is because the dimension of the objections as regards the structural injunction is very specific and a discussion of the structural injunction without the separation of powers based objection would be incomplete.

¹²³ Sturm: 1991, at p 1423.

7.4.1 Separation of powers type arguments

As discussed in chapters three and four,¹²⁴ making budgetary allocations and making policy related choices are considered an exclusive domain of the legislative and executive branches of the state and not the courts. This is because the process of making budgetary allocations and policy choices gives rise to very difficult questions relating to the making of expenditure, policy and prioritisation. These questions are considered to be appropriately answered not in judicial but policy making processes. It is on this basis that structural litigation has been perceived as inappropriately moving the courts ‘from the byways onto the highways of policy-making.’¹²⁵ Although all forms of constitutional litigation may

¹²⁴ Section 3.2.1 of chapter three and section 4.2.4 of chapter four.

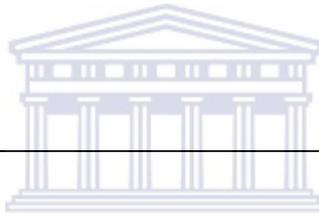
¹²⁵ Horowitz, D., *The courts and social policy* (1977) The Brookings Institution [Hereinafter referred to as Horowitz: 1977], at p 9. Referencing Alexander Bickel [Bickel, A., *The least dangerous branch: The Supreme Court at the bar of politics* (1962) Bobbs-Merill, Indianapolis], Horowitz submits that this has led to judges viewing themselves as roving commissions and as problem solvers charged with the duty to act when majoritarian institutions fail:

What this means is that there is somewhat less institutional differentiation today than two decades ago. There is now more overlap between the courts and Congress in formulating policy and between the courts and the executive in both formulating and carrying out programs. That is, the types of decisions being made by the various institutions— their scope and level of generality—seem to be converging somewhat, though the processes by which the decisions are made and the outcomes of those processes may be quite different—as different as the groups who manoeuvre to place an issue before one set of decisionmakers rather than another, or who, defeated in one forum, turn hopefully to the next, believe them to be. Thus, to say that there is convergence in the business of courts and other institutions is not tantamount to saying that it makes no difference who decides a question. On the contrary, it matters a good deal, for the institutions are differently composed and organized. The real possibility of overlapping responsibilities but opposite outcomes makes the policy process a more complex and drawn-out affair than it once was. [at p 20].

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carry budgetary consequences, budget related questions in socio-economic rights litigation requiring the structural injunction are always more pronounced.¹²⁶ Litigation of this nature usually takes the form of restructuring large organisations to provide services that have in the past been neglected and which impact on a number of people. This may call for a great deal of money and other resources to be provided by the government. This is in addition to involving the courts in what may appear to be administrative and policy making matters. According to Frug:

The orders in the institution cases, of course, do not deal directly with either the raising or the allocation of money. They simply require a specified level of services, leaving to the legislature the necessary revenue raising and allocation decisions that result from the order. But although the court does not specify the source of the money needed to comply with its order, it still is engaging in budget allocation.¹²⁷

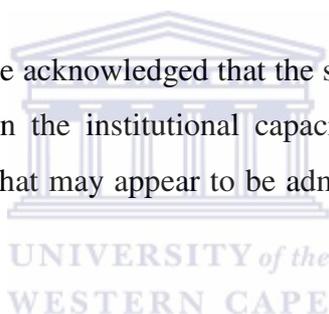


¹²⁶ Horowitz: 1977, at p 7. The structural injunction is also sometimes perceived as engaging what are considered to be purely political questions. It should be noted that court involvement in certain decision making processes has been rejected on the ground that certain decisions give rise to political questions and are reserved for political branches. See US case of *Gilligan v Morgan*, 413 U.S. 1 (1973).

¹²⁷ Frug, G., 'The judicial power of the purse' (1978) *University of Pennsylvania Law Review* pp 715 – 794 [Hereinafter referred to as Frug: 1978], at pp 739 – 740. Nagel gives examples of United States cases in which government expenditure has been increased dramatically as a result of structural injunctions. In one mental institution case the operating and capital expenses increased by US \$ 29 million in one year. Nagel, R., 'Controlling the structural injunction' (1984) 7 *Harvard Journal of Law and Public Policy* pp 395 – 411 [Hereinafter referred to as Nagel: 1984], at p 397. In this regards, Horowitz: 1977, at p 6, gives the example of a case which led to an increment of the state's annual expenditure on mental institutions from US\$ 14 million when the suit was filed to US\$ 58 after the decree was made.

However, as discussed in chapter three,¹²⁸ courts possess characteristics that make them well suited to perform some tasks where there is evidence of either failure or neglect on the part of the other organs of state. These characteristics include: insulation from narrow political pressures, the ability to gather information within their non-bureaucratic structures and the willingness to encourage participation of affected interests.¹²⁹ It is, therefore, important that competence of the courts in eliminating systemic violations be analysed not only in terms of institutional inappropriateness but also in terms of their advantages.¹³⁰ The courts should, therefore, be mandated to use their special characteristics and intervene by way of a structural injunction where other organs have failed or neglected their duties.¹³¹ This point is canvassed later in discussing the norms and principles of the structural injunction.¹³²

Nonetheless, it should be acknowledged that the structural injunction may raise issues touching on the institutional capacity of the courts as the judges may carry out what may appear to be administrative functions for



¹²⁸ Section 3.3.2.

¹²⁹ Sturm: 1991, at p 1408.

¹³⁰ Note: 1998, at p 437. This is not to suggest that the institutional competence and separation of powers concerns are totally irrelevant. The courts have to be cautious and to refrain from overrunning the executive and legislative branches of the state unless this is absolutely necessary. It is submitted later in this chapter (section 7.6.1 below) that judicial supervision should only be justified when the political bodies that should exercise the necessary discretion are seriously and chronically in default.

¹³¹ Rycroft, A., 'Judicial innovation and the delinquent state: A note on the *State and Mfezeko Zuba and 23 Similar cases*' (2004) 20 *South African Journal on Human Rights* pp 321 – 330 [Hereinafter referred to as Rycroft: 2004], at p 325. See also Davis: 2004.

¹³² Section 7.5 below.

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which they are ill-suited.¹³³ This is one of the factors that force courts to prefer procedures that provide final determinations to disputes. This is in contrast to those procedures that call for a multiplicity of actions and on-going judicial supervision.¹³⁴ The courts do not want to be entangled in the day-to-day running of government.¹³⁵ Fiss has submitted that such entanglement may compromise the judge's independence and may act as an entry point for the judge into the world of politics.¹³⁶

In my opinion, however, the relevant issue is whether or not such entry is justified in the circumstances of a particular case and whether respect for other organs of state could still be maintained. Respect for the executive and legislative branches of the state could still be realised by crafting the structural injunction with a degree of deference to the other organs. This is especially at the initial stages of the remedial process.¹³⁷ The court may have to begin by acknowledging the competence and expertise at the

¹³³ Sunstein, C., 'Suing government: Citizen remedies for official wrongs. By Peter Schuck' Book review (1983) 92 *Yale Law Journal* pp 749 – 761 [Hereinafter referred to as Sunstein: 1983], at p 753. See also Special Project: 1978, at p 813.

¹³⁴ Cassels: 1991, at p 289. Horowitz: 1977, at p 19, attributes the institutional challenges faced by the courts to the shift from the traditional nature of judicial review which merely required forbidding of state action by the judiciary saying no to other branches. The approach has been changed to one of requiring affirmative action on the part of other branches, which may constrain the resources of the judiciary to manage the task of commanding.

¹³⁵ Currie, I., & De Waal, J., *The Bill of Rights handbook* (2005) Juta & Company [Hereinafter referred to as Currie & De Waal: 2005], at pp 218 – 219. Currie and De Waal have suggested that it is, therefore, important that the terms of the order be devised in a flexible manner that does not result in supervision becoming too intrusive and result in a blurring of the distinction between executive and judicial functions (at p 219).

¹³⁶ Fiss: 1979, at p 46.

¹³⁷ Cooper-Stephenson: 1991, at p 34.

disposal of the state. The court should seek to harness this expertise by requiring the government to come up with a plan detailing how it intends to remedy the proclaimed violation. This approach, if successful, will heighten the chances of the remedy being implemented as it may do away with resistance from the other organs. This is because of the involvement of those responsible for its implementation in its formulation. Though the court may choose to be intrusive, it could still, in the formulation of the remedy, involve the state institution which is at fault. The court could, for instance, appoint an expert who is mandated to assist the parties to themselves find a solution to the problem. A more intrusive approach would require the expert to find a solution, with or without the contribution of the parties. An even more intrusive approach would force the court itself to come up with a solution and to ask the government, for instance, to implement its order within a stated time and to report on the same. However, as is noted below,¹³⁸ the court should gravitate towards such intrusiveness only when it is absolutely necessary to do so.¹³⁹ The circumstances that determine the level of intervention are detailed under the discussion of norms and principles below.¹⁴⁰

In conclusion, therefore, the separation of powers objection is not totally unfounded. Courts should not use the structural injunction to assume functions of other organs of state as of first resort. I submit in this chapter that using the structural injunction should be a matter of last resort and

¹³⁸ Section 7.6.

¹³⁹ Horowitz: 1977, at p 24 concedes that where there is reticence on the part of other branches as regards policy decision making, however imperfect a judicial remedy is, it may be the best available due to the absence of performance by other branches. Horowitz could be read as suggesting that in a situation of a recalcitrant government, the courts have to use all kinds of creative means to protect the values and rights guaranteed by the constitution. The structural injunction is an example of such creative remedies used to achieve compliance with court orders.

¹⁴⁰ Section 7.6.1.

only where there is evidence of failure on the part of government to exercise its discretion.¹⁴¹ It is this degree of failure and extent of government recalcitrance that should dictate the level of judicial intrusion.

7.4.2 Corrective justice type arguments

As seen in chapter five,¹⁴² the theory of corrective justice requires that victims of violations be put in the position they were in before the violation occurred. It is on the basis of this principle that the structural injunction has been condemned for its failure to put victims in the position they would have been but for the violations. Nagel, for instance, refers to the United States school desegregation cases and submits that these cases did not benefit the students who had been illegally segregated and who instituted the actions.¹⁴³ The decrees were instead directed at making structural reforms that would only bring about change in the long run.

The structural injunction also contravenes the notion of corrective justice by adopting unconventional mechanisms of adjudication. As seen above,¹⁴⁴ for instance, the structural injunction may force judges to ignore the principle of *functus officio* by allowing courts to retain jurisdiction. It is, for example, on the basis of the *functus officio* principle that an appellate court in Canada set aside a decision by a lower court to retain supervisory jurisdiction in *Doucet-Boudreau v Nova Scotia*.¹⁴⁵ The Nova

¹⁴¹ See section 7.6.1.

¹⁴² Section 5.2.1.

¹⁴³ Nagel: 1984, at p 402.

¹⁴⁴ Section 7.3.1.

¹⁴⁵ [2003] 3 S.C.R. 3 (*Doucet-Boudreau* case). For a detailed discussion of this case see McAllister, D., 'Doucet-Boudreau and the development of effective section 24(1) remedies: Confrontation or cooperation?' (2004) *National Journal of Constitutional Law* pp 153 – 173. The main issue in this case was whether a trial judge had powers, after

Scotia Court of Appeal found the retention of supervisory jurisdiction to be out of order; it held that the principles of *functus officio* ought to be preserved even in Charter rights litigation. But as will be seen later, the Supreme Court of Canada set aside this holding and approved the approach of the trial judge.

Additionally, the structural injunction goes against the theory of corrective justice by allowing judges to abandon their role as independent umpires who act only on evidence and proof presented to them in an adversarial manner. In structural litigation challenging systemic violations and requiring a structural injunction, judges are sometimes forced to intervene proactively by, for instance, seeking evidence themselves without waiting for presentations from the parties. The judges may also be actively involved in the implementation of their orders and may assume administrative roles.

It is important to note, however, that corrective justice is inappropriate to cases challenging systemic violations in an institutional or organisational setting.¹⁴⁶ This is because of the multitude of interests that these cases implicate beyond the interests of the individual plaintiffs and defendants. If these interests are to be considered, in most cases, full correction of the wrong becomes impossible and the plaintiff's interests may have to be sacrificed partially because of the need to protect other equally legitimate interests.¹⁴⁷ Because of the structural nature of such a suit, the court is

making a mandatory order, to retain jurisdiction in order to hear reports from the defendants regarding the progress in the implementation of his order. The trial judge had adopted this approach and presided over several reporting sessions for a period of about nine months. The judge required affidavits to be filed prior to every reporting session detailing the measures adopted. The respondents were on every such occasion afforded chance to adduce rebuttal evidence ([2003] 3 S.C.R. 3, at para 8).

¹⁴⁶ See generally Chayes: 1979.

¹⁴⁷ See Roach: 1991, at p 877. The remedies also ignore the causal link that is alleged to exist between rights and remedies. This is because full remediation of all the interests

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required to adopt orders that not only reflect the interests of the parties but also public policy and treat fairly interests not adequately represented.

Traditional procedures of litigation may not be able to provide social information or legislative facts which may be necessary in designing an appropriate remedy. The use of such information is necessary because of the frequent legislative nature of the order. Without such information, the court may not understand the nature of the remedial problem. The court cannot rely on the parties, as is the case in the adversarial procedure, to produce all the legislative facts required.¹⁴⁸ In this setting, therefore, corrective justice principles 'offer unstable foundation for structural remedies because of their limitation as principles best suited for rectification of discrete wrongs committed by one individual against another'.¹⁴⁹ In structural settings, the finding of an appropriate remedy

cannot be achieved if the remedies are pegged to the establishment of liability. See Roach: 1991, at p 874.

¹⁴⁸ Special Project: 1978, at pp 792 – 793.

¹⁴⁹ Roach: 1991, at pp 874 – 875. He submits that corrective justice's presumption of causation encourages an absolutist approach to remedial decision making by ignoring the socio-economic background of the violation, the involvement of other parties and interests, and the possibility that intervening forces will work against the court's remedy. In his opinion, causation discourages open balancing of interests or addressing intervening factors that can threaten a remedial ambition (at p 875). Fiss: 1979, at p 18 – 32, follows the same line of thought and identifies a number of distinctions between the structural suit and the traditional suit. These distinctions, although this is not mentioned by Fiss, are structured along the lines of the notions of corrective and distributive justice. Fiss describes the traditional suit as challenging a legal wrong as opposed to a structural suit which opposes a social condition that threatens the constitutional values. While the victim of a traditional suit is deemed to speak for him/herself, the victim of a structural suit is not an individual but a group of people. The suit could have been triggered by an individual but it remains representative of a group interest. The same may be said to apply to the defendant who may be perceived as the wrongdoer. Fiss submits that in structural suits the defendant may not even be a wrongdoer, and yet has other interested parties behind him who may not be defendants.

may require the courts to depart from the traditional process of litigation built around individualised litigation which seeks to enforce corrective justice. The evidence on the court record at what would ordinarily be the conclusion of traditional litigation may, for instance, be inadequate for choosing an appropriate remedy. It may be necessary for the court to retain its jurisdiction in order to adjust its remedies in response to the factual discoveries that may emerge later. The court may also have to involve parties who were not part of the original litigation in its factual inquiries.¹⁵⁰ The traditional adversarial presentation of proof and evidence may also prove inadequate because of the need for information on facts that do not necessarily inform the disputes between the parties.

Additionally, such common law principles as *functus officio*, if considered, may impair the capacity of the courts to administer justice in a more flexible manner. The courts will be barred from retaining jurisdiction to ensure that the remedial orders are implemented to their final end. In the Canadian *Doucet-Boudreau* case, for instance, the majority in the Supreme Court held that some of the common law principles such as *functus officio*, as found outside Charter jurisprudence, are overly vague and inapplicable to orders made under section 24(1) of the Charter.¹⁵¹ They held that there was need for creative remedies in enforcing Charter rights to meet the challenges and circumstances presented by the cases under the Charter. The majority held that tradition and history should not present themselves as barriers to this enterprise; the judicial approach must be flexible and responsive to the needs of a given case.¹⁵² The circumstances of the case, according to the majority, disclosed delay on the part of the defendants, yet the protected rights were

¹⁵⁰ Sturm: 1991, at p 1367.

¹⁵¹ [2003] 3 S.C.R. 3, at para 54.

¹⁵² [2003] 3 S.C.R. 3, at para 59.

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imperilled.¹⁵³ The traditional procedures of litigation would have but furthered these delays. The order of the trial judge was found to have been flexible and sufficient to address unforeseen difficulties.¹⁵⁴

It, therefore, remains true that the structural injunction has a very important role to play in uprooting systemic violations especially in institutional or organisational settings. What remains to be explored is whether (and how) the South African courts have made use of this very important remedy. The next section will show the circumstances under which the South Africa courts have deemed the structural injunction appropriate.

7.5 SOUTH AFRICA: WHICH WAY?

The South African experience shows a willingness and frequent use of the structural interdict in the High Court but reluctance on the part of the CC to use this form of relief. In spite of this, the CC has acknowledged that it is within its powers to grant structural remedies including the structural interdict. In this section I contrast the approaches of these two courts and the reasons for this.

7.5.1 The approach of the High Court

The High Court has rejected the view that a declaratory order would be the only sufficient remedy for the government to implement orders from the courts. The Court considers a declaratory order without injunctive relief to lack practical content.¹⁵⁵ Most importantly, however, the High

¹⁵³ [2003] 3 S.C.R. 3, at para 60.

¹⁵⁴ [2003] 3 S.C.R. 3, at para 68.

¹⁵⁵ See *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C) (*Grootboom Oostenberg* case). In this case the High Court found that the state was obliged by section 28(1)(c) of the Constitution to provide shelter for children. The Court

Court considers the structural injunction to be of practical importance both to the applicants and the government. This is especially in those cases where there is insufficient information before the court to determine the most appropriate relief that would redress the violation. The practical advantages arise particularly from the court's retention of jurisdiction over the case; the applicants, on one hand, would not be bothered by filing new papers when more information emerges. On the other hand, it would be fair to the respondent government which may need more time to come up with solutions:

In fairness to the respondents, who now know where their duty lies, they should be given an opportunity of proposing a practical solution. In fairness to the applicants, now that they know where their rights lie, respondents should be directed to make such proposals within a reasonable time. The applicants should furthermore have the opportunity of commenting on the proposal, and the respondents should be allowed to respond to such comment.¹⁵⁶

The High Court has also underlined the structural injunction as an appropriate response to systemic violations. The Court has observed that other remedies, 'such as declarator, the prohibitory interdict, mandamus, and awards of damages', are inappropriate to remedy 'systemic failures or the inadequate compliance with constitutional obligations, particularly when one is dealing with ... rights of a programmatic nature'.¹⁵⁷

ordered the state to provide the children with shelter until such time as their parents are able to shelter them. The government was also ordered to report to the Court, under oath, within a period of three months from the date of the order on how it was planning to eradicate the violation. The applicants were also given a right to deliver a commentary on the government report within a period of one month after the state report.

¹⁵⁶ *Grootbom Oostenberg* case 2000 (3) BCLR 277 (C), at p 292. One of the issues that the Court thought needed clarification was the question of on which sphere of government would the remedial obligations in the case lie, the Oostenberg Municipality or the Cape Metropolitan Council. The judge hoped that this would be clarified in the plan to be filed (at p 293).

¹⁵⁷ *S v Zuba and 23 similar cases* 2004 (4) BCLR 410 (E) (*Zuba* case), at para 36. This case arose from the absence of juvenile reform schools in the Eastern Cape. It had been

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Additionally, the High Court has been motivated to grant structural injunctions by the need to protect and promote the doctrine of separation of powers. The structural injunction has enabled the Court to give latitude to the executive branch of government by deferring to it on the most appropriate solutions to address unconstitutional conditions. In this respect '[t]he structural injunction is not intended to substitute the judiciary for the administration, but to relieve the judge from framing relief in a way that would constitute democracy by judicial decree.'¹⁵⁸ This, as seen above, is what the Court has described as the opportunity given to the respondent to propose a practical solution. According to Budlender, 'structural interdicts can be deeply democratising. They create spaces for dialogue between the court, the government and civil society actors. In this way, they strengthen and deepen accountability and participation – the key elements of democracy'.¹⁵⁹ Rather than violate the doctrine of separation of powers, the High Court, therefore, views the structural injunction as a means of preserving the doctrine. The latitude given to the government to fashion the remedy indicates that the High Court is not prepared to assume functions that are preserved for the executive organ of the state. The executive branch is, therefore, required to execute self imposed rather than judicially imposed remedies.

established in evidence that the provincial government had just embarked on what was to be a long planning process of establishing a reform school in the province. After reviewing the problems as regards the establishment and maintenance of reform schools in the province, the Court ordered the Department of Education to file a report disclosing its short, medium and long term plans for the incarceration of juvenile offenders. It was also ordered that a task team, to work on the establishment of a reform school, be identified, and its reports be submitted on a regular basis to the inspecting judge as regards progress until the school is established.

¹⁵⁸ Davis: 2004, at p 6.

¹⁵⁹ Budlender, G., 'The role of the courts in achieving the transformative potential of socio-economic rights' (2007) 8 *ESR Review* pp 9 – 11 [Hereinafter referred to as Budlender: 2007], at p 11.

It appears, however, that the main reason the Court has resorted to the structural injunction is to counter recalcitrance by government towards court orders.¹⁶⁰ This is in addition to ‘the dilatory and lackadaisical approach taken’ by the state in some cases.¹⁶¹ The recent case of *EN and Others v Government of RSA and Others*¹⁶² is evidence of this. The degree of recalcitrance exhibited by the government in this case makes it worthwhile discussing the case in detail. The case was commenced by the AIDS Law Project (ALP), the Treatment Action Campaign (TAC) and 15 HIV/AIDS positive prisoners from the Westville correctional facility in Kwazulu-Natal. The applicants sought orders to compel the government

¹⁶⁰ In *City of Cape Town v Rudolph and Others* 2003 (11) BCLR 1236 (C) (*Rudolph* case), for instance, the Court justified the structural injunction by the circumstances of the case, in particular the attitude of denial expressed by government. The government had deliberately failed to recognise the plight of the respondents, thereby ignoring the *Grootboom* judgment to the effect that those in desperate need should not be ignored (at p 1279). In this case, on the basis of the *Grootboom* case, the Court had found that Cape Town’s housing programme was unreasonable in as much as it failed to make provision for short term needs—the needs of those in desperate or crisis like situations.

¹⁶¹ *Centre for Child Law and Others v MEC for Education and Others*, Case No. 19559/06 [Unreported] (the *Luckhoff* case), High Court Transvaal Provincial Division, at p 11, lines 7 – 9 of the unreported judgment. In this case the respondents contested the conditions under which children placed at JW Luckhoff High School under section 15(1)(d) of the Child Care Act of 1983 lived. The physical conditions in the hostels were pathetic: there were poor sleeping facilities, the hostels did not have access control systems, and psychological support and therapeutic services were absent. The applicants contended that these features, among others, amounted to an infringement of the children’s socio-economic rights under section 28. The children had been removed from the care of their parents or families which imposed a direct duty on the state to provide for their socio-economic needs. Murphy J agreed with the applicants that the school needed a quality assurance programme, immediate provision of sleeping bags for the children, and putting in place of a plan for construction of a perimeter wall and access control system.

¹⁶² 2007 (1) BCLR 84 (D) (*Westville* case). For a discussion of this case see Muntingh, L., and Mbazira, C., ‘Prisoners’ right of access to anti-retroviral treatment’ (2006) 7 *ESR Review* pp 14 – 16.

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to remove all obstacles preventing the 15 and other similarly placed prisoners from accessing anti-retroviral treatment (ARV treatment). They also sought an order that the government provides the 15 and other similarly situated prisoners with ARV treatment in accordance with the existing government Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment (Operational Plan).¹⁶³ The applicants argued that the Operational Plan had not been implemented with reasonable speed and urgency.

The Court found implementation of the Operational Plan to be unreasonable and inflexible in its disregard of the needs of prisoners. The respondents were ordered to remove the obstacles that prevented prisoners from accessing ARVs under the Operational Plan.¹⁶⁴ The Court found the respondents to have acted with dilatoriness and a lack of commitment on their part.¹⁶⁵ Even when some agreements had been reached between the parties outside court, these agreements had not been honoured by the respondents who instead chose to engage in adversarial litigation. This behaviour motivated the judge to retain jurisdiction and to order that the respondents file a plan within two weeks on how they intended to implement the court order.¹⁶⁶

Rather than implement the court order in good faith, the respondents instead pursued a technicality-based appeal arising from the judge's rejection of a recusal request on the ground that one of the counsel for the applicants was his daughter. They also failed to file the plan on the due

¹⁶³ Available at <<http://www.info.gov.za/otherdocs/2003/aidsoperationalplan.pdf>> (accessed on 10 March 2007).

¹⁶⁴ See para 35.

¹⁶⁵ See para 24, the judge found 'a singular lack of commitment to appreciate the seriousness and urgency of the situation'.

¹⁶⁶ See paras 32 – 33.

date and instead sought to set aside an interim order made for the implementation of the orders of the Court pending the appeal. This application to stay the order came before Nicholson J¹⁶⁷ who found that irreparable harm would be suffered by the prisoners if the interim order were set aside. The harm that the prisoners would suffer was not comparable to the inconvenience likely to be suffered by the state.¹⁶⁸ Nicholson castigated the state for creating a constitutional crisis:

If the government of the Republic of South Africa has given such an instruction [to disobey the Court order] then we face a grave constitutional crisis involving a threat to the doctrine of separation of powers. Should that continue the members of the judiciary will have to consider whether their oath of office requires them to continue on the bench.¹⁶⁹

This case demonstrates how government recalcitrance can break down dialogue in a constitutional dialogue, and the struggles by the judiciary to restore this dialogue. The case also shows the minimal appreciation, if not misunderstanding, on the part of the executive of their constitutional obligations, and the role of the judiciary in reasserting these obligations through means such as the structural injunction. Rather than lead to a break down of the relationship between the judiciary and the executive, the structural injunction should be viewed as promoting a dynamic dialogue between these two branches. This is dialogue on the intricacies of implementing court orders and actualising constitutional rights.¹⁷⁰ It is clear from this case that, rather than be deferential, in some cases where there is evidence of recalcitrance from the start, use of a structural injunction as a remedy of first resort may be justified. The South African

¹⁶⁷ Also recorded as *EN and Others v Government of RSA and Others* Case No. 4576/06 [Unreported].

¹⁶⁸ Para 42 of Nicholson's ruling.

¹⁶⁹ Para 32 of Nicholson's judgment.

¹⁷⁰ See Pieterse, M., 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* pp 383 – 417, at p 414.

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government has in the past exhibited inconsistency and incoherence towards the HIV/AIDS problem.¹⁷¹ This leaves the courts with no option but to demand, on those occasions when cases are filed, concrete plans detailing the intended response to the problem. The persistence of the court in this case forced the government to give in and file a plan as earlier directed.¹⁷²

7.5.1.1 Analysis of the High Court approach

Although the High Court has readily availed itself of the structural injunction and used it consistently, it has not devised clear principles that could determine when such remedy is appropriate. While the Court has deemed the remedy appropriate whenever there is recalcitrance on the part of government, this does not detail all the relevant principles needed to determine appropriateness and use of the structural injunction. In addition to clear principles that may be used to determine when the remedy is appropriate, there should also be principles on how the remedy should be applied. The High Court has, for instance, not determined the level of recalcitrance that would justify use of the remedy, let alone the causes of such recalcitrance. It is this lack of clear principles in respect of application of the structural injunction that has motivated me to craft a set of norms and principles applicable to this remedy. These norms and principles are detailed in section 7.6 of this chapter.

One should, however, underline some of the important principles that may be deduced from the High Court's approach. These principles, though not exhaustive, are relevant in designing more comprehensive norms and principles as I do later. First, the High Court has made it clear that the court should retain jurisdiction were the evidence before it is inadequate for the purpose of determining the most appropriate relief. In such case,

¹⁷¹ See 'Aids criticism: Manto hits back' *Mail & Guardian online* 11 September 2006.

¹⁷² See Stolley, G., 'Prisons dept reveals plan for Aids drugs' *Mail & Guardian online* 11 September 2006. See also Bilchitz: 2003, at p 24.

the parties should be saved the trouble of having to institute fresh litigation when new evidence or facts come to the fore. Secondly, the structural injunction should be used as a means of paying due deference to the other branches of the state. This is especially so where the court is not clear on the most appropriate way of remedying the violation. The executive and legislative branches should be given the latitude to devise what they consider the best means of remedying the violation. The means should, however, be subject to scrutiny by the court and the opposite party. Lastly, the structural injunction should be resorted to in the face of government recalcitrance. Where there is evidence that the government will not comply, in good faith, with the orders of the court the structural injunction is appropriate.

7.5.2 The approach of the CC

The CC has emphatically asserted its powers to grant all forms of relief including a structural injunction and to exercise supervisory jurisdiction if need be. According to the Court, '[t]he power to grant mandatory relief includes the power where it is appropriate to exercise some form of supervisory jurisdiction to ensure that the order is implemented'.¹⁷³ The CC also views the structural injunction as a practical remedy which would eradicate conduct giving rise to violation of constitutional rights.¹⁷⁴ Like the High Court, the CC has deemed the structural injunction appropriate in those cases where the information before the Court is inadequate for the purposes of making a final order. This is in addition to the lack of expertise on the part of the Court to make appropriate arrangements for the eradication of the violation.¹⁷⁵ The Court has thus allowed those with

¹⁷³ *TAC case*, para 104.

¹⁷⁴ See *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC), at para 96.

¹⁷⁵ *August and Anor v Electoral Commission* 1999 (4) BCLR 363 (August case), at para 39.

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information and expertise the time to devise and submit to the Court plans on how they intend to eradicate the violation.

Again, like the High Courts, the CC has used the structural injunction in those cases where there is evidence of lackadaisical conduct on the part of the government. In *Sibiya and Others v DPP*,¹⁷⁶ for instance, the Court was concerned that the process of substitution of death sentences in accordance with the *Makwanyane* case¹⁷⁷ had taken far too long.¹⁷⁸ The Court, therefore, deemed the structural injunction appropriate in the circumstances. Government was ordered to take immediate steps to ensure that all sentences of death imposed before 5 June 1995 are set aside and replaced by an appropriate alternative sentence. The government was also required to report to the Court not later than 15 August 2005 on all the steps taken to comply with the order above.

The *Sibiya* case is important in a number of respects. First, it shows the extent to which the CC is prepared to go to ensure compliance with its orders in the face of lackadaisical conduct. It is evidence of the fact that where the government fails to act in a timely manner in the face of a structural injunction the Court is prepared to continue to engage the government until full compliance is obtained. This is because, as argued above,¹⁷⁹ in some cases it is only after several rounds of engagement that government may fully comply. In this case, instead of filing the report before the 15 August 2005, the government on 12 August 2005 filed an

¹⁷⁶ 2005 (8) BCLR 812 (CC) (*Sibiya* case).

¹⁷⁷ *S v Makwanyane* 1995 (3) SA 391 (CC), a case where the death penalty was found to violate the rights to life and human dignity.

¹⁷⁸ *Sibiya* case, para 60.

¹⁷⁹ Section 7.3.1.1.

application for extension of the time of filing the report.¹⁸⁰ The CC allowed the application and extended the time to 15 September 2005. Thereafter, however, even with the defects detected in the report filed on 15 September 2005, the CC still granted the government more time to rectify the defects and file another report by 7 November 2005. But the November report was also not impressive to the extent that the sentences of some 28 people had not been substituted. A further extension was given to the government to file an additional report by 15 February 2006. Yet the February report still had names of persons whose sentences had not been substituted which attracted a further extension to 15 May 2006. The May report was also not fully compliant as the sentence of one person had not been substituted. This led to a further extension of up to 1 September 2006. But before 1 September 2006 the government reported that all sentences had been substituted.

This case shows how a structural injunction can lead to rounds of engagement between the court and the government. This is because, as mentioned above,¹⁸¹ full compliance may be achieved only after a series of engagements. The court and interested parties must, therefore, be patient and be prepared to engage the government on more than one occasion. The case is also important because at the end the CC made some observations that could inform the procedures that ought to be followed when courts deem supervisory jurisdiction appropriate. These procedures are also relevant in developing a comprehensive set of norms and principles for the structural injunction. The Court observed that the supervisory process in the case had shown the following:

- (a) Successful supervision requires that detailed information be placed at the disposal of a court;

¹⁸⁰ See *Sibiya and Others v DPP, Johannesburg High Court and Others* 2006 (2) BCLR 293 (CC) (*Sibiya case 2*).

¹⁸¹ Section 7.3.1.1.

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- (b) Supervision entails a careful analysis and evaluation of the details provided;
- (c) Supervision cannot succeed without the full co-operation of others in the process; and
- (d) Courts should exercise flexibility in the supervisory process.¹⁸²

7.5.2.1 The CC and structural injunctions in socio-economic rights cases

The willingness on the part of the CC to exercise supervisory jurisdiction contrasts in civil and political rights cases and socio-economic rights cases. The CC has been very reluctant to use this form of relief to enforce socio-economic rights. This reluctance has been inspired by what the CC considers to be a need to maintain the divide between itself and the other branches of the state as dictated by the doctrine of separation of powers. For the sake of maintaining the boundaries of separation of powers, the CC has conceptualised the structural injunction as a remedy that should be used as a last resort. The Court has also been sceptical about the structural interdict in socio-economic rights cases because of its reluctance to be involved in protracted litigation and implementation of its orders. The Court does not want to be dragged into long and unending battles for socio-economic rights. According to one commentator, the CC would like to be ‘a “one-stop shop” in resolving these cases – they do not want to look at a case again once they have decided on it’.¹⁸³

¹⁸² See *Sibiya and Others v DPP, Johannesburg High Court and Others* [2006] ZACC 22, at para 22.

¹⁸³ Khoza, S., ‘The importance of a dialogue on strategies to promote socio-economic rights in South Africa’ (2006) 7 *ESR Review* pp 6 – 9, at p 9. However, unlike the approach of the minority in the Canadian case of *Doucet-Boudreau*, the CC has not radically rejected the structural injunction on the basis of such principles as *functus officio*. Instead, it has left its use open as a remedy that could be granted in ‘deserving cases’.

According to Davis, '[t]he less the burden on the Constitutional Court to exercise supervision over the executive, the more comfortable it feels'.¹⁸⁴ There is an indication that the remedy has been reserved for those cases where there is recalcitrance on the part of government to implement the directions of the Court. However, the CC has been ambivalent in determining existence of such recalcitrance in socio-economic rights cases. Some members of the Court hold the view that if the political will is lacking, there is no guarantee that even structural injunctions will be effective. According to the former Chief Justice, Arthur Chaskalson:

If there is not the political will, supervisory orders are not likely to be effective and may drag courts into long drawn battles that could more appropriately and more effectively be fought on the political terrain. Those battles should be fought first, and if successful, the results are likely to be more effective than attempts to secure compliance through court supervision. A structural interdict may be necessary in a particular case to ensure that relief granted is effective relief; for instance if there is deliberate failure to heed a declaratory order or other relief granted by a court. *But it should be a last resort and not a routine response to claims for the enforcement of socio-economic rights.*¹⁸⁵ [Emphasis mine]

This appears to be the basis upon which the CC rejected and set aside structural interdicts granted by the High Court in the *Grootboom* and *TAC* cases. The Court also declined to comment on the structural injunction that had been granted by the High Court in *Modderklip Boerdery (Pty) Ltd and Others v President of RSA and Another (Modderklip case)*.¹⁸⁶

The CC's reluctance to use the structural injunction in socio-economic rights cases has generated condemnation and castigation of the Court as

¹⁸⁴ Davis: 2006, at p 304.

¹⁸⁵ Former Chief Justice Arthur Chaskalson's speech 'Implementing socio-economic rights: The role of the courts' delivered as guest speaker at the 3rd *Dullah Omar Memorial Lecture* organised by the Community Law Centre and the Faculty of Law at the University of the Western Cape, 13 June 2006, at p 31. See also Bilchitz: 2007, at p 165.

¹⁸⁶ 2005 (8) BCLR 786 (CC).

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undermining the socio-economic rights in the Constitution.¹⁸⁷ This is because it has left court orders powerless in the face of government recalcitrance. According to Davis:

[T]he Court's ... refusal to grant structural relief that would empower courts to supervise the implementation of their own orders has produced unfortunate results. Litigants have won cases and government has done little to produce the tangible benefits that these litigants were entitled to expect from their success. The Court, in effect, has surrendered its powers to sanction government inertia and, as a direct result, litigants have not obtained the shelter or drugs that even a cursory reading of the judgments promised.¹⁸⁸

It has also been submitted that exercising supervisory jurisdiction in socio-economic rights cases would have saved the time and expenses that parties would have to endure to challenge state action through filing fresh suits.¹⁸⁹

¹⁸⁷ See Bilchitz, D., 'Health' in Woolman, S., Roux, T., Klaaren, J., Stein, A., & Chaskalson, M., (eds.) *Constitutional law of South Africa* (1996) Juta & Company and Centre for Human Rights, University of Pretoria [2nd Edition, Original Service 2005] pp 56A-i —56A-47, at p 56A-24. See also Heywood, M., 'Preventing mother-to-child HIV Transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign case against the Minister of Health' (2003) 19 *South African Journal on Human Rights* pp 278 – 315 [Hereinafter referred to as by Heywood: 2003b], at p 312; Swart: 2005; and Bilchitz: 2007, at p 151.

¹⁸⁸ Davis: 2004, at p 6. Davis also submits that:

The reluctance of the Court to exercise any form of tangible control over the process of implementation has already had negative consequences for successful litigants. The order in the *Grootboom* case, for example, did not contain any time frames within which the State had to act. The result is that, more than three years later, there has been little visible change in housing policy to cater for people who find themselves in desperate and crisis situations. [at p 5]

¹⁸⁹ Bilchitz, D., 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 118 *South African Law Journal* pp 484 – 510, at p 510.

The CC's reluctance to exercise supervisory jurisdiction in socio-economic rights cases, just like its rejection of the minimum core obligations approach, appears to be rooted in the need to preserve the boundaries of the separation of powers. The Court has been particularly cautious to defer to the executive branch as regards issues of budgetary allocation.¹⁹⁰ On those occasions when it has risen to the occasion to interpret the rights, it has also been keen to push the cases out of its doors as soon as possible. This would not be possible if jurisdiction were retained as the Court would have to engage in budgetary issues in the course of its supervision. This could be one of the factors that explain the ambivalent approach of the CC, which also explains its differentiated approach as regards civil and political rights litigation when compared to socio-economic rights litigation. For instance, while affirming its powers to make a structural injunction in the *TAC* case the Court cautioned that due regard must be paid to the roles of the legislature and the executive in a democracy.¹⁹¹

In order to show what it deems due deference to the other branches of state, the CC has, even in the face of government recalcitrance, struggled to convince itself that government would comply with its orders in good faith. In the *TAC* case, for instance, the Court declined to grant the structural injunction because in its opinion 'the government has always respected and executed orders of this Court' and that there was 'no reason to believe that it will not do so'.¹⁹² This conclusion appears to have been motivated by evidence that emerged during the hearing that the government had 'made substantial additional funds available for the treatment of HIV, including the reduction of mother to child

¹⁹⁰ See Chapter four at section 4.2.4. See also generally Davis: 2006.

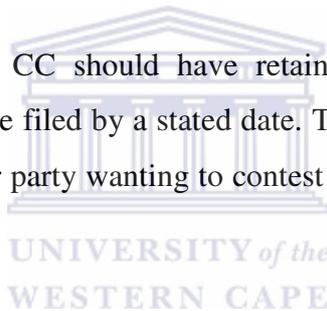
¹⁹¹ Para 137.

¹⁹² Para 129.

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transmission'.¹⁹³ However, this evidence blinded the CC to the high degree of recalcitrance demonstrated by the state during the hearing of the case, particularly the declaration by the Minister of Health that the government would not respect the judgment of the Court.¹⁹⁴ Recalcitrance in addition to the seriousness of the matter in issue, saving innocent babies from a deadly disease, was justification for the issuance of a structural injunction.¹⁹⁵ This matter was especially serious because of the lackadaisical approach of the government in tackling the problem of HIV/AIDS. As already observed above,¹⁹⁶ the policy of the government in relation to HIV has been notable for its very slow progress in coming to terms with the health crisis facing the country. There had indeed been a tremendous amount of bungling and a high degree of reluctance expressed to provide nevirapine.¹⁹⁷

At the very least, the CC should have retained jurisdiction, without requiring that a report be filed by a stated date. The Court could have left itself open to whichever party wanting to contest the manner in which the



¹⁹³ Para 120, the evidence indicated an increment in the HIV treatment budget from R350 million to R1 billion which would increase to R1,8 billion the following year.

¹⁹⁴ See Bilchitz: 2003, at pp 23 – 24.

¹⁹⁵ Geoff Budlender has submitted that one of the indications of whether a structural injunction is appropriate is the risk of severe consequences, such as loss of life, even in the case of good faith failure on the part of government to comply with its obligations. Budlender, G., 'Justiciability of socio-economic rights: Some South African experiences' in Ghai, Y., and Cottrell, J., (eds.) *Economic, social and cultural rights* (2004) Interights pp 33 – 41 [Hereinafter referred to as Budlender: 2004], at p 358. See also Bilchitz, D., 'Placing basic needs at the centre of socio-economic rights jurisprudence' (2003) 4 *ESR Review* pp 2 – 4 , at p 4.

¹⁹⁶ Section 7.5.1.

¹⁹⁷ Bilchitz: 2003, at pp 23 – 24.

order was being implemented.¹⁹⁸ The mere fact that the Court retained jurisdiction over the case could have propelled the government to act more cautiously because of the knowledge that any deleteriousness would easily be brought to the attention of the Court and might also spark media frenzy.¹⁹⁹

The Court would have only graduated into more specific and detailed directions on the basis of the evidence brought to it by those who would have come back to it, and by the attitude of the government. Though this may have exposed the CC to protracted litigation, a thing that the Court wanted to avoid, it would have been beneficial in many respects. It would have demonstrated that in cases dealing with serious matters and where recalcitrance is detected, the CC would engage with a case until its orders are implemented. The retention of jurisdiction would have further enabled the CC to continue to engage in dialogue with the state as regards the mechanisms of policy implementation.²⁰⁰ There is no better way than this approach in which the court could have engaged the government in a constitutional dialogue. Indeed, the courts can only engage in dialogue between themselves and the other organs of state in litigation before them. Once the litigation is closed the dialogue is also automatically closed. Dialogue between the government and the courts is justified, among others, by the fact that not so many cases have been filed before the CC since the Constitution was adopted. It is, therefore, important that the Court takes full advantage of those cases before it to engage in full dialogue with the other organs of state. This can only be done effectively

¹⁹⁸ Unlike the declaration in the *Grootboom* case, this would not have caused any confusion, as the order made in this case was a clear mandatory direction as to what had to be done.

¹⁹⁹ See section 7.3.2.1 above for discussion of the impact of retention of jurisdiction on the defendant.

²⁰⁰ Davis: 2006, at p 312.

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if supervisory jurisdiction is retained. Another opportunity to engage in such dialogue may arise only after a considerably long time. It is, for instance, almost eight years since the *TAC* case was heard. Yet, in spite of the contentions surrounding the problem of HIV/AIDS, the Court has not had another opportunity to engage in dialogue on this problem.

In my opinion, the CC's ambivalence has arisen partly because of absence of clear norms and principles governing the issuance of the structural injunction. However, the *Sibiya* case shows that the Court is willing to be guided by some norms and principles on how to exercise supervisory jurisdiction. The principles in this case, however, need to be developed and applied consistently and in a broader manner. This is in addition to the fact the principles thus far address only one aspect of the structural injunction: the supervision process. There is need for a comprehensive list of norms and principles that address not only the supervision process but also the process of determining when the relief is appropriate. The principles deduced from the *Sibiya* case could be developed together with those deduced from the approach of the High Court into a comprehensive list of structural relief norms and principles. This is what the next section sets out to do.

7.6 NORMS AND PRINCIPLES FOR THE STRUCTURAL INJUNCTION

It is important that the structural remedial process adheres to certain norms and principles if it is going to achieve its purpose and meet some of the criticisms that have been directed at it. These norms should, by their nature, be capable of application in a number of contexts. The norms include: utilisation of the structural injunction in a graduated manner as a remedy of last resort; participation of all stakeholders; impartiality and independence; reasoned decision making; remediation which complies with the substantive norms;²⁰¹ and flexibility.

Roach and Budlender should be commended for defining some of the principles that could guide the courts in determining when a structural interdict is an appropriate remedy.²⁰² They argue that the remedy should be granted where there is evidence to believe that the government may not comply promptly. The same applies to those cases where the violation arises from 'neglect, inadequate budgets and inadequate training of public officials'.²⁰³ This is in addition to those cases where the consequences of 'even a good-faith failure to comply with a court order are so serious that the court should be at pains to ensure effective compliance'.²⁰⁴ The other circumstance Roach and Budlender reckon a structural interdict appropriate is where there is evidence of government's incompetence or lack of capacity to provide for the rights: '[t]he greater the degree of the government's incompetence or lack of capacity to provide for the rights, the stronger the case for supervisory jurisdiction including requirements

²⁰¹ Sturm: 1991.

²⁰² Roach & Budlender: 2005.

²⁰³ Roach & Budlender: 2005, at p 349.

²⁰⁴ Roach & Budlender: 2005, at p 333.

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that government submit a plan and progress reports for the court's approval'.²⁰⁵ While I find Roach and Budlender's article very useful in defining principles guiding the grant of a structural interdict I find it incomprehensive in this regard. There are a host of other norms and principles that could guide the court in using the structural interdict as discussed below.

7.6.1 Utilisation as a remedy of last resort in a graduated manner

Execution by the courts of administrative functions deemed to be the preserve of the executive organ of the state amounts to substitution of executive with judicial discretion. Fletcher has submitted that such substitution becomes legitimate only when the political bodies that should exercise that discretion are 'seriously and chronically in default'. He contends that as long as those political bodies remain in default, judicial discretion may be a necessary and legitimate substitute for political discretion.²⁰⁶ On a similar note, Eisenberg and Yeazell submit that courts usually intervene in institutional cases not so much to take affirmative action in conflict with the other branches of government. In their opinion, such intervention is justified by the need to fill a vacuum which the other branches have created due to inaction or neglect.²⁰⁷

The above is the determinant of whether or not the court should intervene in what may be considered administrative or policy matters. Greater judicial intrusion is, therefore, only warranted if there is a failure by the

²⁰⁵ Roach & Budlender: 2005, at p 349.

²⁰⁶ Fletcher: 1982, at p 637.

²⁰⁷ Eisenberg & Yeazell: 1980, at pp 495 – 496. See also Horowitz: 1977, at pp 2 and 24, who submits that one reason for judicial involvement in social policy matters has arisen from the reticence of other policymakers. In his opinion, sometimes, though a judicial decision on these issues may be imperfect, it may be the best that is available.

other organs.²⁰⁸ This notwithstanding, the courts should ascertain in the first place whether there is still any chance of using the executive or legislative discretion to eliminate the constitutional violation and to fill the vacuum. If this is still possible, intervention by substitution of discretion will not be justified. The court's initial response should be aimed at procuring the government to exercise its discretion in a manner that eliminates the violation. The government should be given an opportunity to demonstrate the plans it intends to follow to eliminate the violation. The court could also require the parties to negotiate a plan and report back to it. It is only when all these attempts fail that the court should intervene by taking administrative decisions.²⁰⁹

The courts should, therefore, exercise what has been described as 'remedial absentation'.²¹⁰ A court exercising remedial absentation merely retains jurisdiction to stop the infringement while allowing the state to formulate a remedial plan indicating how it intends to end the infringement. At this stage, the court should only order the defendant to produce a plan for judicial evaluation. The order may be accompanied by guidelines suggested by the court. This is important because a defendant making a good faith attempt may need guidance, but also a recalcitrant defendant will produce an inadequate plan unless closely instructed.²¹¹ As mentioned above,²¹² this approach is important because it limits judicial

²⁰⁸ Special Project: 1978, at p 823.

²⁰⁹ The United States experience shows reluctance on the part of the courts to devise the remedial plans themselves. Instead, the parties were themselves required to do so. The courts only imposed plans where the parties had failed to come to an agreement. See Chayes: 1979.

²¹⁰ Special Project: 1978, at p 796.

²¹¹ Special Project: 1978, at p 798.

²¹² Section 7.3.2.4.

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involvement in what may be viewed as policy matters. Additionally, it allows the court to harvest the special expertise of the defendant and to secure co-operation in this regard. Remedial absentation should be contrasted with judicially imposed remedies, which are formulated without the benefit of the expertise or skills of the parties and may be considered to be intrusive.²¹³

It should be noted, however, that there could be circumstances where a judicially imposed remedy is needed. This occurs in those cases where it is necessary to immediately alleviate an intolerable condition or where the case implicates non-systemic aspects susceptible to immediate relief. Even then, the court may be forced to combine judicial imposition with remedial absentation. The *Westville* case is an example of this: the Court ordered that the applicants be provided with ARVs immediately in addition to the state filing a plan on how it intended to comply with the Court's order. Immediate relief was provided to the applicants and a long term remedy was sought for similarly situated people. This was made possible for the benefits to be provided even when an appeal had been lodged.

²¹³ Special Project: 1978, at pp 800. Roach & Budlender: 2005, at p 346, suggest that in some cases it may be appropriate for the court to require the government to report to the public on the steps it plans to take to comply with the Constitution. In their opinion, such reporting would make it possible for civil society and political organisation to monitor compliance. This is a softer remedy in comparison to requiring the government to report to the court. In such circumstances, the court cannot be accused of being undemocratic and breaching the doctrine of separation of powers. Roach and Budlender contend that a court that requires an elected government to communicate with its citizens about important matters of governance and steps taken to comply with constitutional rights cannot reasonably be criticised for being undemocratic or infringing the separation of powers. This is because reporting to the public is simply a reasonable and democratic means of ensuring proper compliance with the Constitution.

7.6.2 Participation

Whatever the form taken by structural litigation, the court must ensure that those affected by the litigation participate in the remedy formulation process. Such participation has many advantages especially as regards the implementation of the remedy and attendance to polycentric interests implicated by the case. Abram Chayes has submitted that:

Public law litigation, because of its widespread impact, seems to call for adequate representation in the proceedings of the range of interests that will be affected by them. At the stage of relief in particular, if the decree is to be quasinegotiated and party participation is to be relied upon to ensure its viability, representation at the bargaining table assumes very great importance, not only from the point of view of the affected interests but from that of the system itself.²¹⁴

The participation should focus on individuals, groups or organisations whose interest may be affected by the case.²¹⁵ In the context of government as the defendant, it may be necessary to ascertain the interests of other spheres or departments of government. In the semi-federal nature of South Africa, national, provincial and local government interests may be invoked in the case. The case may also implicate constitutional competences of these spheres of government as regards the provision of social goods and services.²¹⁶ Ignoring these interests and competences may affect the efficacy of the remedy obtained and may lead to imposition of remedial burdens that fall outside a government sphere's

²¹⁴ Chayes: 1979, at p 1310. According to Horowitz: 1977, at p 23, the fact that there are fewer participants in the adjudicative process than in the legislative process makes it easier for judges than for legislators to cut through the problem to a resolution. In his opinion, it is precisely this ability to simplify the issues and to exclude interested participants that may put the judges in danger of fostering reductionist solutions.

²¹⁵ Sturm: 1991, at p 1410.

²¹⁶ See Schedules 4 and 5 of the Constitution for the competences of the different levels of government. See also Mbazira, C., *Realising socio-economic rights in the South African Constitution: The obligations of local government. A guide for municipalities* (2006) Community Law Centre.

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constitutional mandates. Involvement of a wide range of stakeholders is also necessary in securing collaboration between the different spheres or departments of government and the different stakeholders in the remedial process. It is also important to note that government programs often consist of partially co-ordinated outputs of a number of departments and organs of state.²¹⁷ In addition to the state actors there could be non-state actors such as trade unions and organised groups that influence the direction of the government programme.²¹⁸ It is prudent that these actors be consulted if practicable.

Sturm has suggested that the forms of interaction used in the decision making process should promote involvement, co-operation and consensus. He suggests further that the process should also mitigate the unequal power, resources, and sophistication of participants.²¹⁹ This is important because it establishes equality of participation in the process and encourages parties to bring to the fore their interests without fear. It is particularly important with regard to socio-economic rights because of the

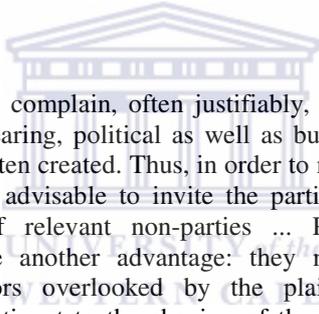
²¹⁷ Collaboration of all the state participants is also very important because of the weak position of the court. There is no doubt that the courts rely on the other branches of government for the preservation of their powers. Frug: 1978, at p 792, has submitted that if the courts invite confrontation, they will face a practical impediment to effectuating their orders. Only the legislature can provide the necessary money, and only the executive can administer the spending of that money. The courts cannot imprison the legislature for contempt unless it raises or reallocates the necessary money, nor jail an executive official to ensure implementation of a government program. Courts ultimately lack the power to force state governments to act. According to Frug, the courts may not be willing to do what no responsible government official would do because this will injure their legitimacy. They cannot, for instance, close the institutions or let the prisoners and the mentally incapacitated go free. Engagement of these institutions and other stakeholders may be the only way that will help the court maintain its legitimacy.

²¹⁸ Note: 1998, at p 433.

²¹⁹ Sturm: 1991, at p 1410.

imbalance of power which usually exists between poor and marginalised communities and powerful government or other artificial entities.

It is also vital that institutional reform includes identification of the various groups and entities whose co-operation is necessary. This is in addition to ascertainment of the needs and interests of those groups and entities, and assessment of the likely impact of any proposed reforms on their interests.²²⁰ The involvement of a wide variety of participants increases the number of alternative remedial proposals before the court.²²¹ Participation will also allow all the stakeholders to be educated on the nature of the case, the remedial plan, and its likely impact. If crucial stakeholders misunderstand the remedy, implementation may be grounded simply because they do not know both what to do and the objectives to be realised:²²²



When those excluded complain, often justifiably, that their position has not received a fair hearing, political as well as bureaucratic obstacles to implementation are often created. Thus, in order to minimize opposition to implementation, it is advisable to invite the participation at the decree formulation stage of relevant non-parties ... Participation by such nonparties may have another advantage: they may raise policy and implementation factors overlooked by the plaintiffs and defendant administrators yet pertinent to the shaping of the decree. The court can employ various procedural devices to promote this expanded participation, such as inviting groups whose interests may be affected by the decree to file amicus briefs or, if necessary, to intervene at the remedial stage.²²³

²²⁰ Note: 1998, at p 433.

²²¹ Special Project: 1978, at p 804.

²²² According to Note: 1998, at p 440, in the United States case of *Mills v Board of Education* 343 F. Supp. 866 (DC 1972) teachers and school principals who did not participate in the decree formulation process substantially delayed implementation of due process standards relating to student discipline in part because they misunderstood and exaggerated what the new rules required.

²²³ Note: 1998, at p 440.

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However, the remedial process should not be diluted by participation to the extent that effective remediation and reasoned decision making are lost. As discussed below,²²⁴ reasoned decision making is another norm that has to be promoted by structural litigation.²²⁵ So too is effective remediation. The consensual remedial model, as discussed above,²²⁶ appears to be the most suitable for realising the norm of participation. This model may, however, sacrifice reasoned decision making and effective remediation. Nonetheless, this depends on how the process is conducted and the oversight role played by the court. The court could direct the parties on agreements that are based on reason and may reject those that do not realise effective remediation. Participation should also not be allowed to unnecessarily slow down the remedial process.²²⁷

7.6.3 Impartiality and judicial independence

Impartiality and judicial independence is a norm to be preserved in all forms of judicial process. The need for impartiality accords legitimacy to the judicial process and plays a very important role in producing remedies that are acceptable not only to the parties but to the public at large. However, the need for impartiality and independence in structural litigation is not only relevant but also complex. This is because of the active role played by the judge, not only in formulating the remedy but also in its implementation. Impartiality and judicial independence are also heightened by the administrative nature of the tasks that the judge has to discharge and his continued involvement in the reformation process. This

²²⁴ Section 7.6.4.

²²⁵ Sturm: 1991, at 1418.

²²⁶ Section 7.3.2.3.

²²⁷ Special Project: 1978, at p 812 submits that rather than slow down the process, participation produces the opposite result. This is because of the fact that it produces an acceptable remedy which makes implementation much easier.

is because such participation may threaten the judge's independence and impartiality. Fiss has thus warned that:

To some extent this threat is tied to a peculiar characteristic of the structural remedy, it places the judge in an architectural relationship with the newly reconstituted state bureaucracy. A judge deeply involved in the reconstruction of a school system or prison is likely to lose much of his distance from the organization. He is likely to identify with the organization he is reconstructing, and this process of identification is likely to deepen as the enterprise of organizational reform moves through several cycles of supplemental relief, drawn out over a number of years. There is, however, a deeper and more pervasive threat to judicial independence, one that turns not on the peculiar reconstructive character of the structural remedy, but on the desire of the judge represented by the very attempt to give a remedy, any remedy, the desire to be efficacious.²²⁸

However, Fiss's statement should be qualified. It is only true in those cases where the same judge has been involved with an institution for a considerably long time and has discharged functions that place him/her in an administrative position in that institution. Yet the judge could still use his/her judicial training to distance him/herself from the institution. This may not be easy though; the judge must strive to ensure that his/her decisions are fair, unbiased and supported by facts that are related to the legal problem in issue.²²⁹ Judicial independence would also allow the judge to make judicial orders, without interference, on the basis of legal standards and norms. It, therefore, remains the duty of the court not only to assert its independence but to avoid being unnecessarily involved in tasks that would undermine this independence. Where remedial decisions can be made by a political organ, this should be considered as a measure of first resort, and judicial usurpation of the process as a matter of last resort. This is not to ignore the fact that in some cases it may be plainly clear that the political processes have failed and court assumption of the task is the only reasonable thing to do. Even then, the political process

²²⁸ Fiss: 1979, at p 53.

²²⁹ Sturm: 1991, at p 1410.

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should be given a second chance though under the supervision of the court.²³⁰

The expert model serves the norm of judicial impartiality and independence.²³¹ So does the consensual remedial formulation model.²³² The expert model enables the court to maintain a disinterested posture with respect to the remedy ultimately proposed. Fiss contends that the expert is used as an intermediate structure that stands between the judge and the institution on one hand, and on the other hand between the judge and the body politic.²³³ Nevertheless, it is not necessary for the court to give itself a posture of complete disinterest considering the fact that it is the bearer of the ultimate obligation to devise an effective remedy. Even when it delegates the obligation to an expert, the expert, is for all intents and purposes, deemed to be a representative of the court.²³⁴ The court must ensure that the remedy, whether devised by the expert or by the

²³⁰ It is also important that the court guards against losing its impartiality when it defers remedial selection to the parties. Sturm: 1991, at p 1412, has submitted that deference to the defendants does not afford all relevant participants an opportunity to participate in the development of the remedy. Sturm argues that this may create the appearance of favouring the interests of the defendant over the interests of those entitled to the remedy. It is, therefore, important that all the affected parties be involved in the remedial decision making process through participation as discussed above (section 7.6.2). If the defendant has been ordered to produce a remedial plan, all affected parties should be accorded sufficient opportunity to comment on the plan, or even to contest it in court.

²³¹ Section 7.3.2.3.

²³² See section 7.3.2.5 above.

²³³ Fiss: 1978, at p 56.

²³⁴ Fiss: 1978, at p 56, warns that if the expert is not treated as being a representative of the court, the very reason why the remedial process was entrusted to a judge in the first place be defeated. In his opinion, the expert would in effect now become an administrative agency, created not by the legislature or the executive, but by the judge.

court itself, enforces the substantive legal norms. And also, as seen above,²³⁵ the expert model inherently exposes the expert to perceptions of partiality on his/her part, especially where participation is not guaranteed to its fullest. According to Nagel:

Judges have appointed masters, monitors, and receivers to help design injunctions and to oversee their implementation. These appointees are not judges and therefore neither their training nor role necessarily assures the habits and capacities required for the kind of disciplined impartiality we expect of judges. Judges have appointed individuals whose associational ties (for example, mental health reform organizations) would suggest bias; in fact, judges have appointed members of the plaintiff class to supervise defendants' efforts at compliance.²³⁶

Nagel contends further that judges cannot be counted on to correct any bias in the formulation of the decree because the facts in the expert's report are traditionally only alterable if clearly erroneous.²³⁷ In my opinion, however, the possibility of bias can be overcome if the judge keeps a close eye on the expert and requires periodic updates. The courts should also take care not to appoint experts that are close to the interests of one of the parties. In some cases, it may serve the interests of justice if more than one expert is appointed; a panel of experts as opposed to an individual expert is less likely to be biased. But this does not mean that all cases merit the appointment of a panel. The magnitude of the task to be accomplished should also be a factor to consider in deciding whether or not a panel as opposed to an individual expert should be appointed.

²³⁵ At section 7.3.

²³⁶ Nagel: 1984, at pp 403 – 404.

²³⁷ Nagel: 1984, at p 404.

7.6.4 Reasoned decision making

One of the criticisms levied against structural litigation is that it sacrifices reasoned decision making and exalts remedies reached by consent.²³⁸ There is, therefore, a need for structural remedies to be based on reasoned decision making. Structural litigation should be conducted with open awareness of the fact that the litigation implicates interests beyond those of the parties. The court should determine whether the case negatively impacts on interests other than those of the parties. In addition to this, however, the court should support its decisions with legal norms and standards in the form of normative standards established, for instance, in the Bill of Rights.²³⁹ This is where reasoned decision making becomes relevant as reflected in the way the judge interprets and applies the normative standards in issue.

The judge has to justify his/her decision as based on the law. This forestalls accusation that the judge has applied his/her own value judgement to decide the case. Reasoned decision making in structural litigation terms, therefore, gives legitimacy to judicial intervention as being based on legal norms and the need to solve systemic problems. When remedies are based on reasoned decision making, they accord legitimacy to the process, which translates into acceptance of the directions issued by the court.

The expert remedial formulation model²⁴⁰ is more capable of realising reasoned decision making in comparison to the bargaining and legislative

²³⁸ Fiss: 1984, at p 1083. See also Horowitz: 1977, at p 22.

²³⁹ However, this does not mean that the court cannot disgorge the remedy from the normative standards if the demands of the case so require. I have submitted in chapter five that while the court should design its remedies to maximise the right in issue, this does not mean that it cannot separate right and remedy if this is what is appropriate (section 5.3.2).

²⁴⁰ See section 7.3.2.3 above.

hearing models.²⁴¹ Usually, the court appointed experts come with technical expertise and a capacity to gather and assess large quantities of information.²⁴² In spite of this, whether a case requires an expert model of remediation should depend on the circumstances of each case. If a case has many technical aspects which need to be assessed before an effective remedy is crafted, it will definitely need expert help. But if a case merely requires ascertainment of some factual aspects, the hearing model and not the expert model may be the most appropriate. Reasoned decision making should, therefore, not be exalted blindly by appointing an expert without first considering the circumstances of the case.

Finally, it should be noted that reasoned decision making also promotes the principle that aims at ensuring that remediation complies with the substantive norm as discussed in the next sub-section. The substantive norm is the law that protects the right(s) in issue.

7.6.5 Remedy that complies with substantive norms

The reason why people litigate is to enforce their rights. The remedies must, therefore, as much as possible, be intended to realise the rights. However, as mentioned in chapter five,²⁴³ in certain cases the interests of justice may require that the remedy granted is not one that is necessarily capable of realising the right in full.²⁴⁴ This does not mean, however, that the court should completely abandon the need to develop the substantive rights as protected.²⁴⁵

²⁴¹ See sections 7.3.2.1 and 7.3.2.2 above.

²⁴² Sturm: 1991, at p 1420.

²⁴³ Section 5.2.2.

²⁴⁴ See also chapter at six section 6.2.1.

²⁴⁵ See chapter five, section 5.3.1.

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It is advisable that the court begins by detailing the normative standards implicated by the right. In the context of socio-economic rights, this approach would help to give content to the rights. This is important because, as I have submitted in chapter four,²⁴⁶ the CC is yet to give substantive content to the socio-economic rights in the Constitution. Giving substantive content to the rights will help the court and the parties to understand what they are working towards. The remedies will also be structured with these objectives in mind. The normative content also provides a basis upon which the efficacy of the remedies selected can be criticised and evaluated. The court will also use these normative standards to ensure that its model of supervision is the most effective in terms of realising the objectives of the substantive norms.

7.6.6 Flexibility, monitoring and supervision

In litigation challenging systemic violations the court usually may embark on a remedial process without full knowledge of the requisite facts, interests and obstacles that may impact on the implementation of its decree.²⁴⁷ The necessarily speculative nature of this enterprise, therefore, means that no single order can be regarded as final. Additionally, implementation of the remedy may continue for a long time.²⁴⁸ According to Fiss:

The judge must search for the "best" remedy, but since his judgment must incorporate such open-ended considerations as effectiveness and fairness, and since the threat and constitutional value that occasions the intervention can never be defined with great precision, the particular choice of remedy can never be defended with any certitude. It must always be open to revision, even without the strong showing traditionally required for modification of a decree, namely, that the first choice is causing grievous

²⁴⁶ At section 4.2.2.

²⁴⁷ See section 7.3.1.1.

²⁴⁸ Special Project: 1978], at p 789.

hardship. A revision is justified if the remedy is not working effectively or is unnecessarily burdensome.²⁴⁹

It is, therefore, important that the court proceeds with flexibility and crafts its decree in a manner that allows easy adjustment should the need to do so arise.²⁵⁰ The need to revise the order is also made inevitable because of the detailed nature of structural orders and sometimes because of the lack of judicial expertise in drafting some of them, since some are drafted by experts with no judicial background.²⁵¹

The court may also have to closely monitor the implementation of its decree and obtain information that may be needed to make adjustments in the remedial standards should the need to do so arise.²⁵² This can only be achieved if the court retains jurisdiction and assumes an active oversight role.²⁵³ The court should, however, be careful not to interfere with the implementation process if it is not necessary to do so. Though the parties should be relied on for information and the need for adjustments, the court should be careful not to be distracted by parties who may be interested in protecting their interests at the expense of other equally important

²⁴⁹ Fiss: 1979, at p 49, also notes that it is this that explains the fact that specificity usually comes at a late stage of the remedial process. The judge will begin with very broad remediation and gradually move to specifics. See section 7.3.1.1 above.

²⁵⁰ See *Doucet-Boudreau* case, at para 68. In the *TAC* case, the CC observed that a factor that needs to be kept in mind is that policy is and should be flexible and that court orders concerning policy choices made by the executive should not be formulated in ways that preclude the executive from making such legitimate choices (at para 114).

²⁵¹ Most structural orders arise from negotiated settlements and the court may not be able to anticipate the impact of every aspect of the orders. It is, therefore, fair that the judge oversees implementation of the decree to be able to make adjustments should the need to do so arise.

²⁵² Note: 1998, at p 440.

²⁵³ See Special Project: 1978, at p 817.

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interests. Plaintiffs may underplay the degree of compliance, while the defendants may exaggerate it. All this may distract the remedial process.

The need to adjust the order may also arise, for instance, when it transpires during the implementation period that the defendant cannot successfully implement the decree without the co-operation of persons or departments not party to the original suit.²⁵⁴ Other participants whose co-operation is needed may include, for instance, different spheres of government. In such event, notice should be served on the third party participants, with a view of determining whether they are opposed to the order and the likely impact that it may have on their activities. In other cases it may be merely necessary to widen the geographical scope of the order. Yet in some adjustments of the order may be motivated by changed legal standards, especially following decisions of higher courts or even legislative enactments.



7.7 CONCLUSION

There is no doubt that the structural injunction is the most creative of the remedies that have been designed in constitutional litigation. The structural injunction is especially useful as a response to violations that arise from structural settings and are caused by systemic problems.²⁵⁵ The structural injunction is inspired by the ethos of distributive justice and seeks to adjust future behaviour and to tackle systemic violation at their root. The most prominent feature of this form of relief is the court's retention of jurisdiction and the provision of a complex regime of ongoing supervision of compliance with the court's order.²⁵⁶ In spite of this, the

²⁵⁴ Special Project: 1978, 818.

²⁵⁵ Liebenberg: 2005, at p 30.

²⁵⁶ Chayes: 1979, at p 1298. See also Special Project: 1978, at p 812; Note: 1998, at p 433; and section 7.3.1.2 above.

structural injunction has not been without controversy. The biggest controversy arises from criticism that it amounts to a breach of the doctrine of separation of powers, because it allows courts to interfere in policy matters and to make decisions that have direct budgetary allocation implications.²⁵⁷ However, it has been demonstrated that the judiciary has characteristics that may make it well suited for the task of enforcing constitutional standards, including such means as the structural injunction.²⁵⁸ These include insulation from political pressures, capacity to gather information through non-bureaucratic processes and willingness to engage all affected parties.²⁵⁹

In spite of this, I have submitted in this chapter²⁶⁰ that while separation of powers and institutional competence concerns do not vitiate the legality of the structural injunction they are a cause of concern and should not be ignored completely. The courts should, where appropriate, defer to the executive and legislative branches of government. They should only intervene by way of a structural injunction where the other branches are ‘seriously and chronically in default’ as regards the exercise of their discretion.²⁶¹ Even then, intervention should be graduated,²⁶² choosing first to merely retain jurisdiction and allow the state to tackle the

²⁵⁷ Horowitz: 1977, at pp 9 and 20. See also Frug: 1978, at pp 739 – 740.

²⁵⁸ See section 7.4.1.

²⁵⁹ See Sturm: 1991, at p 1408; Chayes: 1979, at pp 1308 – 1309; and Note: 1998, at p 437.

²⁶⁰ See section 7.4.1 above.

²⁶¹ Fletcher: 1982, at p 637. See also Eisenberg & Yeazell: 1980, at pp 495 – 496.

²⁶² See Fiss: 1978, at p 35 – 36; and Cooper: 1991, at p 36. See also sections 7.3.1.1 and 7.6.1. above.

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constitutional violation. This could be followed by a requirement to submit a report to the court and to the opposite party detailing the plan to eradicate the violation. Where necessary, the court may more intrusively devise the plan and supervise its implementation. It has been cautioned though that there could be cases that are of a very serious nature that a high degree of intervention is immediately necessary.²⁶³

In all these processes the court should ensure that all persons whose interests may be affected by the litigation process participate in the remedial formulation process to the extent that this is necessary and practicable.²⁶⁴ The courts could use various models of the structural injunction including the expert model and the legislative hearing model to realise this. The remedy should be flexible and the court should be prepared, if need be, to adjust it at any time.²⁶⁵ The adjustments also allow the judge to find what is considered to be the most appropriate means of responding to the constitutional violation. This is because usually the structural injunction may begin as experimentation of several remedies, and perfection may only come after a number of adjustments.²⁶⁶

Sometimes the main issue is not when a violation is going to be uprooted. Rather the issue is what steps are being undertaken to begin the uprooting process. In such a context, it is the direction and rate of change that may be important and not the final outcomes, as these may still be too far away.²⁶⁷ Sometimes reform may be slow and almost viewed as amounting

²⁶³ The *Westville* case has been given as an example. In spite of this, one sees that the graduated response is still applied to a certain extent.

²⁶⁴ See Chayes: 1979, at p 1310; and Sturm: 1991, at p 1410.

²⁶⁵ See *Doucet-Boudreau* case, at para 68.

²⁶⁶ See Fiss: 1979, at p 49.

²⁶⁷ Frug: 1978, at p 790.

to failure, but this may be necessary to accommodate the unforeseen obstacles. A slow but steady process of uprooting the violation is far better than short run artificial measures that may not overcome all the obstacles ahead. In this regard a structural interdict is ‘a process for setting ambitious but achievable targets and monitoring the achievement of those targets’.²⁶⁸ Artificial or ‘quick fix’ like measures, though dramatic, may stall or disappear in the long run. It is important that the court takes its time to study all the obstacles so that it is able fashion long term solutions to them. It is because of this that the US Supreme Court in the *Brown* case, for instance, initially merely ordered that the states act with all deliberate speed, and, as seen above,²⁶⁹ advised the local courts to act with flexibility in their remedial exercise. This provided both the state and the courts with time to study the obstacles and to find solutions to them. It also illustrates the concern of a court to provide space for public authorities to implement a far reaching and contentious order in a gradual way.²⁷⁰

Finally, it is important that the court does not act in a way that would threaten its impartiality and independence, and reasoned decision-making must be promoted as much as possible. This is important to enable the courts to weaken criticism that the structural injunction compromises the impartiality and independence of the judge because of his/her direct involvement in the administration of the institution that needs to be reformed.²⁷¹ The court may need to maintain reasoned decision making

²⁶⁸ Budlender: 2007, at p 11.

²⁶⁹ See section 7.3.

²⁷⁰ Davis: 2006, at p 322. Davis has likened this approach to the reasonableness review approach in *Grootboom* and *TAC* cases which appears to accord deference to the executive. However, the distinction, he submits, is that the South African socio-economic rights cases were not as controversial as the *Brown* case.

²⁷¹ Fiss: 1979, at p 53.

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by basing its decisions on legal principles and established facts.²⁷² Reliance on established legal substantive norms will also help to advance the normative content of the rights that are being assessed.



²⁷² Sturm: 1991, at p 1411.

CHAPTER EIGHT

CONCLUSIONS AND RECOMMENDATIONS

8.1 INTRODUCTION

Although the South African Constitution protects socio-economic rights as justiciable, their enforcement is still controversial. This is evident in defining the nature of the obligations these rights engender, and in finding and implementing relief to remedy their violation. I have demonstrated in this thesis the sources of some of these controversies, which include the normative (real and perceived) nature of socio-economic rights.¹ In addition, there is the separation of powers based concern.² Normatively, the realisation of socio-economic rights requires far more resources and yet, procedurally, the courts may not have the institutional capacity to deal with some of the issues to which the enforcement of these rights gives rise.³ These factors explain not only the approach of the South African courts in interpreting the obligations engendered by these rights, but also in determining the remedies that follow their violation. However, other than the nature of the rights, the approach of the courts, and particularly the CC, also has been influenced by the notion of justice to which the courts are inclined.⁴ The CC has inclined more towards the theory of distributive justice as opposed to corrective justice.⁵

¹ Chapter two.

² Chapter three.

³ See also chapter four, section 4.2.4 and chapter seven, section 7.4.1.

⁴ Chapter five.

⁵ Chapter six.

The purpose of this chapter is to draw conclusions emerging from the discussions of the factors as identified above. It also makes recommendations on how best the socio-economic rights in the Constitution can be enforced, and appropriate remedies found for their violation. The chapter is divided into three sections. The first section draws conclusions on the way the normative nature of the rights has influenced the remedies for their violation. The second section draws conclusions on the impact of separation of powers based concerns and how these could be overcome. The last section discusses the influence of the theories of justice in defining ‘appropriate, just and equitable relief’.

8.2 INFLUENCE OF THE NORMATIVE NATURE OF THE RIGHTS ON REMEDIES

The difficulties that courts face in devising remedies for socio-economic rights violations should be studied in relation to the normative nature of these rights. Some scholars, as seen in chapter five,⁶ submit that rights and remedies must be kept separate, as the considerations in determining the nature of the two differ. In my opinion, however, rights and remedies are not two fundamentally different notions that have to be determined independently of each other. In developing appropriate, equitable and just remedies, the rights intended to be protected must constantly be had in mind.⁷ It is, therefore, not possible to study or critique remedies for socio-

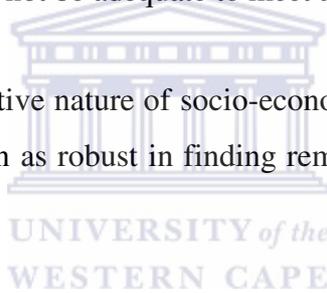
⁶ Section 5.3. See also See Fiss, O., ‘Foreword: The forms of justice’ (1979) 93 *Harvard Law Review* pp 1 – 58; Sager, F., ‘Fair measure: The legal status of underenforced constitutional norms’ (1978) 91 *Harvard Law Review* pp 1212 – 1264; and Walker, D., *The law of civil remedies in Scotland* (1974) Green & Sons.

⁷ See chapter five, section 5.3.1.

economic rights violations without understanding the normative nature of these rights and the obligations they engender.⁸

There is no doubt that, just like civil and political rights, socio-economic rights are justiciable. Both categories of rights engender both positive and negative obligations and have budgetary implications.⁹ In spite of this, as seen in chapter two,¹⁰ it cannot be denied that the enforcement of socio-economic rights poses more difficulties in comparison to the enforcement of civil and political rights.¹¹ This is especially so as regards the enforcement of the positive obligations that socio-economic rights engender. These positive obligations call for substantial resources to realise, and give rise to separation of powers based concerns. Additionally, socio-economic needs also require to be prioritised since the available resources may not be adequate to meet all the needs.¹²

The fundamentally positive nature of socio-economic rights explains why the courts have not been as robust in finding remedies for these rights as



⁸ See chapter four, section 4.1.

⁹ Chapter two, section 2.3.

¹⁰ Section 2.3.1.1.

¹¹ See also Coomans, F., 'Some introductory remarks on the justiciability of economic and social rights in a comparative constitutional context' in Coomans, F., (ed.) *Justiciability of economic and social rights: Experiences from domestic systems* (2006) INTERSENTIA pp 1 – 15, at p 2.

¹² Sachs, A., 'The judicial enforcement of socio-economic rights: The *Grootboom* case' in Peris, J., and Kristian, S., (eds.) *Democratising development: The politics of socio-economic rights in South Africa* (2005) Martinus Nijhoff Publishers pp 131 – 152 [Hereinafter referred to as Sachs], at p 144.

they have been with regard to civil and political rights.¹³ Civil and political rights are believed to require less positive action than socio-economic rights.¹⁴ Expressed in terms of a sliding scale reflecting positive and negative dimensions, one would conclude that both categories of rights fit on this scale. The difference, however, is that socio-economic rights slide more towards the positive dimension side of the scale. In contrast, civil and political rights slide more towards the negative side.¹⁵

It should be noted that courts are more comfortable enjoining states by prohibiting certain conduct than by requiring that positive action be taken.¹⁶ Enforcing negative obligations is believed to result in less interference in the spheres of the other organs of state,¹⁷ and the questions raised when enforcing negative obligations are not as complicated as those raised in the case of positive obligations. The budgetary

¹³ See De Vos, P., 'Pious wishes or directly enforceable rights?: Social and economic rights in South Africa's 1996 Constitution' (1997) *South African Journal on Human Rights* pp 67 – 101, at p 71.

¹⁴ See Abramovich, V., 'Courses of action in economic, social and cultural rights: Instruments and allies' (2005) 2 *SUR – International Journal on Human Rights* pp 181 – 216 [Hereinafter referred to as Abramovich: 2005], at p 183.

¹⁵ See Sepúlveda, M., *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) INTERSENTIA, at p 125; see also Abramovich: 2005, at pp 186 – 187.

¹⁶ Berryman, J., *The law of equitable remedies* (2000) Irwin Law [Hereinafter referred to as Berryman: 2000], at p 40. See also Cooper-Stephenson, K., 'Principle and pragmatism in the law of remedies' in Berryman, J., *Remedies, issues and perspectives* (1991) Thomson Professional Publishing Canada pp 1 – 48, at p 35; and Horowitz, D., *The courts and social policy* (1977) The Brookings Institution, at p 19. See also chapter seven, section 7.2.1.

¹⁷ Brand, D., 'Introduction to socio-economic rights in the South African Constitution' in Brand, D., and Heyns, C., (eds.) *Socio-economic rights in South Africa* (2005) Pretoria University Law Press pp 1 – 56, at p 26.

implications of enforcing positive obligations are, for instance, far more severe than those of enforcing negative obligations.¹⁸ This explains why the courts have readily used prohibitive remedies, such as the prohibitory injunction, and been reluctant to use such positive remedies as the mandatory or structural injunctions.¹⁹

However, in some contexts the enforcement of negative obligations in socio-economic rights terms may be as complicated as enforcing positive obligations.²⁰ It is also true that enforcing negative obligations may require substantial resources. A prohibitory injunction, for instance, proscribing an eviction without alternative accommodation, may require government to spend money on providing alternative accommodation. This is in addition to paying compensation for the continued use of private land from which an eviction cannot occur without alternative accommodation.²¹ Another example relates to the enforcement of the section 9 negative right not to be unfairly discriminated against. In some cases a finding that the applicants have been unfairly excluded from socio-economic benefits must be followed by provision of such benefits to them. This may require an enhancement of the resources committed to

¹⁸ Lenta, P., 'Judicial restraint and overreach' (2004) 20 *South Africa Journal on Human Rights* pp 544 – 615, at p 567. See also Wells, M., and Eaton, T., *Constitutional remedies: A reference book for the United States Constitution* (2002), Praeger Publishing, at p xxv.

¹⁹ See chapter seven, at section 7.2.1.

²⁰ See chapter two, at section 2.3.3.

²¹ See *Modder East Squatters v Moddeklip Boerdery v President of Republic of South Africa v Modderklip Boerdery* 2004 (8) BCLR 821 (SCA); and *Modderklip Boerdery (Pty) Ltd and Others v President of RSA and Another* 2005 (8) BCLR 786 (CC). For detailed discussion of this case see chapter six at section 6.3.1.2.

the programme under which the benefits are provided.²² Nonetheless, it cannot be denied that in enforcing negative obligations the budgetary consequences are more occasional than when enforcing positive obligations. It is this that has made litigation invoking positive obligations more controversial when compared to enforcement of negative obligations. Enforcing positive obligations is also perceived as giving the courts leeway to interfere with functions reserved for the executive and legislative branches of state, as discussed below.²³

Socio-economic rights also continue to be perceived as vague and devoid of any normative content.²⁴ In normative terms, socio-economic rights have not been as developed as civil and political rights. Socio-economic rights have been neglected and have not been the subject of as much judicial interpretation as civil and political rights.²⁵ This has left the normative content of socio-economic rights relatively undeveloped. However, continued recognition of socio-economic rights as justiciable is likely to lead to increased clarification of the nature of the obligations they engender.²⁶ The rights have been recognised as justiciable not only at

²² See *Khosa and Others v Minister of Social Development; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 596 (CC) (*Khosa* case). For a detailed discussion of this case see chapter four at section 4.2.4.

²³ Section 8.3.

²⁴ See Munoz, C., 'Stand up for your rights' *The Economist* 22 March 2007. See also Neier, A., 'Social and economic rights: A critique' (2006) 13 *Human Rights Brief* pp 1 – 3.

²⁵ See chapter two, section 2.3.4.1.

²⁶ See Alston, P., 'No right to complain about being poor: the need for an optional protocol to the economic rights Covenant' in Eide, A., & Helgesen, J., (eds.) *The future of human rights protection in a changing world: fifty years since the four freedoms address: Essays in honour of Torkel Opsahl* (1991) Norwegian University Press pp 79 – 100

the international and regional levels, but also in several domestic jurisdictions.²⁷ It is important, however, that courts involved in socio-economic rights litigation should not be complacent but should rather strive to develop the normative content of these rights. This is why I have suggested that courts should observe the norm of reasoned decision making whenever they deem the structural interdict to be the most appropriate remedy.²⁸ In addition, it is necessary to ensure that the remedy complies with the substantive norm in issue.²⁹ In developing the normative content of the rights courts should use international jurisprudence, particularly the General Comments of the UN Committee on Economic, Social and Cultural Rights (Committee), as the starting point.³⁰ The duties on the state to respect, protect, promote and fulfil the rights provide a viable mechanism for the clarification of the obligations engendered by the rights.³¹ Yet this mechanism applies to both civil and political rights and socio-economics and blurs the distinction between them.

Thus far, the CC has not adequately developed the substantive content of the rights protected in the Constitution.³² The Court has not only rejected the notion of minimum core, but has also failed to describe the components of the various socio-economic rights. Furthermore, the Court has failed to develop a proper approach to determining the effectiveness

²⁷ See generally Coomans, F., (ed.) *Justiciability of economic and social rights: Experiences from domestic systems* (2006) Intersentia.

²⁸ Chapter seven, at section 7.6.4.

²⁹ See chapter seven, at section 7.6.4.

³⁰ See chapter four, at section 4.2.1 for examples of these General Comments.

³¹ See chapter two, section 2.3.4.2.

³² See chapter four, at section 4.2.2.

of the means chosen by the state to realise the rights.³³ Many commentators have approved the CC's rejection of the minimum core approach and its resort to the reasonableness review approach as the most appropriate to enforce socio-economic rights contextually.³⁴ What the CC and these commentators have failed to appreciate, however, is the fact that the minimum core approach is not necessarily inflexible. As a result, both the CC and the commentators have closed down space for pragmatic approaches that could be used in defining the minimum core of the socio-economic rights in the Constitution.³⁵

The flexibility of the notion of minimum core is reflected in the manner in which it has been constructed by the Committee. The Committee has recognised the fact that in some situations it may not be possible to provide everyone with a minimum level of goods and services. The Committee is of the view that a state can justify its failure to provide a minimum core, for instance, on the ground of inadequate resources: '[A]ny assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within

³³ See chapter four, at section 4.2.3.

³⁴ See Liebenberg, S., 'Enforcing positive socio-economic rights claims: The South African model of reasonableness' in Squires, J., Langford, M., and Thiele, B., (eds.) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) Australian Human Rights Centre and Centre on Housing Rights and Eviction pp 73 – 88; Liebenberg, S., 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* pp 1 – 31 [Hereinafter referred to as Liebenberg: 2005c], at p 24; Pieterse, M., 'Resuscitating socio-economic rights: Constitutional entitlement to health services' (2006) 22 *South African Journal on Human Rights* pp 473 – 502, at 491; and Steinberg, C., 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *South Africa Law Journal* pp 264 – 284, at pp 273 – 274 and 275.

³⁵ For examples of how the minimum core can be defined pragmatically see Bilchitz, D., 'The right to health care services and the minimum core: Disentangling the principled and pragmatic strands' (2006) 7 *ESR Review* pp 2 – 6.

the country concerned'.³⁶ A very important qualification of this, however, is the requirement that the state 'demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.³⁷ This is important because, unlike the reasonableness review approach, it casts the burden on the state to prove that it is doing whatever is reasonable to ensure maximum enjoyment of the rights. Nonetheless, the government need not prove that a minimum core is being provided; rather it has to show that a reasonable level of goods and services is being provided as is permitted by the available resources. This, however, does not mean that the court is absolved from any form of responsibility. It has to interrogate the state in order to determine whether the available resources have been applied appropriately. This is something which the CC has ignored in its reasonableness review approach; under the CC's approach the burden to prove unreasonableness is cast on the applicant who may not be in possession of adequate government information necessary for this purpose.

The CC has also not developed a clear practice of interrogating the reasonableness of budgetary allocations. The CC has been circumspect in scrutinising budgetary allocations made by the executive and legislative branches of the state;³⁸ it has chosen, in some cases, to completely defer

³⁶ Committee on Economic, Social and Cultural Rights, General Comment 3, *The nature of States parties' obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003), at para 10.

³⁷ As above. The Committee has also said that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances (para 11).

³⁸ Brand, D., 'Socio-economic rights and courts in South Africa: Justiciability on a sliding scale' in Coomans, F., (ed.) *Justiciability of economic and social rights:*

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to the executive and legislative organs of state on issues of budgetary allocations.³⁹ It should be noted, however, that there is hope as there is evidence that the Court is moving in the direction of requiring the government to justify its budgetary allocations as reasonable. The *Khosa* case⁴⁰ is evidence of this. However, this case could be distinguished from other cases because it dealt with exclusion from a service, and therefore invoked a negative duty. This notwithstanding, the principles it enunciates as regards the burden on the state to justify its budgetary allocations could be extended to cases dealing with purely positive obligations.⁴¹ The CC's emphasis in this judgement that it is the responsibility of the government to put all evidence relating to the resource implications of a case cannot be overlooked. Indeed, rather than hurriedly reject the minimum core this approach could have been used by the CC to require the government to adduce evidence that it cannot afford a minimum core.⁴² Even where there is evidence that the resources are inadequate, it would have to be demonstrated that government is working towards achieving a minimum core as soon as resources become available.

The reasonableness review approach is also inadequate, to the extent that it does not interrogate the means chosen by the state to determine whether they are capable of realising the rights.⁴³ It is indeed doubtful whether the

Experiences from domestic systems (2006) INTERSENTIA pp 207 – 236 [Hereinafter referred to as Brand: 2006], at p 223.

³⁹ See *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC), discussed in detail in chapter four at section 4.2.1.

⁴⁰ For a detailed discussion of this case see chapter four, at section 4.2.5. See also *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* 2005 (4) BCLR 301 (CC), at para 88.

⁴¹ See chapter four, section 4.2.4.

⁴² See chapter four, section 4.2.1.2.

⁴³ See chapter four, section 4.2.4.

reasonableness review approach can be described as ‘a means-end-test’, as has been suggested by some authors.⁴⁴ The approach does not require a court to question whether state action is rationally connected to the purpose for which it was taken. The government is not required to demonstrate that its programme, policy or legislation is capable of realising the targeted right(s).⁴⁵ It is because of this shortcoming that I have suggested the use of a rational connection test similar in some respects to the one used in the section 36 general limitations inquiry.⁴⁶ The burden would be cast on the government to prove not only that the intended measures would realise the rights, but also that they are the least restrictive. Measures not reasonably capable of realising the rights, or which are not the least restrictive, would be condemned by the court. To avoid separation of powers based criticisms, however, the court would not immediately substitute its own measures for the government’s condemned measures. Instead, the court would defer to the government on the most appropriate means, while giving guidance on the basic contents of any selected measures.

The need to prove a rational connection between the measures and the rights is also important, because it would force the courts to give content to the rights. This is because the rights represent the goal to be attained; unless the goal (which is realisation of the right) is defined with precision, it may not be possible to assess the means selected for this.⁴⁷

⁴⁴ See Brand: 2006, at p 221. See also Brand, D., ‘The proceduralisation of South African socio-economic rights jurisprudence, or “what are socio-economic rights for”’ in Botha, H., Van der Walt, A., and Van der Walt, J., (eds.) *Rights and democracy in a transformative Constitution* (2003) Sun Press Stellenbosch pp 33 – 56

⁴⁵ See chapter four, section 4.2.3.1.

⁴⁶ See chapter four, section 4.2.3.2.

⁴⁷ See chapter four, section 4.2.2.

8.3 OVERCOMING SEPARATION OF POWERS BASED OBJECTIONS

Other than the normative nature of the rights, as discussed above, the CC's approach in adjudicating socio-economic rights could be explained by the need to maintain the doctrine of separation of powers. The Court has avoided constructions that would lead to confrontation with other organs of state. This includes constructions that would, for instance, impose what may be perceived by the government to be unreasonable resource burdens.

Objection to judicial enforcement of socio-economic rights on the basis of the separation of powers has assumed two dimensions. First, it is contended that socio-economic rights litigation allows an undemocratic judiciary to make judgments on matters that require democratic deliberation.⁴⁸ Secondly, the judiciary is institutionally deficient, and is not able to deal with some of the issues to which the enforcement of socio-economic rights gives rise. This includes issues such as making budgetary and policy choices.⁴⁹ It has also been contended that the courts are ill-suited to adjudicate socio-economic rights because litigation of these rights is polycentric.⁵⁰

While the CC has rejected the separation of powers doctrine as a reason for keeping courts away from socio-economic rights, it has not escaped from the influence of this doctrine. The need on the part of the Court to uphold the doctrine of separation of powers is reflected in the way it has construed the obligations engendered by socio-economic rights. The CC

⁴⁸ See section 3.3.1 of chapter three.

⁴⁹ Section 3.4.1 of chapter three.

⁵⁰ See Chapter three, section 3.4.1.

has been very careful not to construe the rights in ways that would result in courts assuming what appear to be legislative or executive functions.⁵¹ The courts have respected the fact that functions such as making budgetary and policy related choices are reserved for the legislative and executive organs of state: '[A court may] disagree with the allocation of resources ... and one may justifiably debate priorities but ... [the CC] has not sanctioned the reallocation of public funds by courts'.⁵² The doctrine of separation of powers and awareness of the courts' institutional limitations has also influenced the approach of the courts in dealing with remedies for violation of socio-economic rights. The courts have been very careful not to grant remedies that their institutional capacity does not allow them to grant or enforce. This partly explains why the CC has been very reluctant to use the structural interdict as a readily available remedy.⁵³

The separation of powers concerns cannot be dismissed simply on the basis that the courts are mandated by the principles of checks and balances and the doctrine of constitutionalism to enforce the rights.⁵⁴ There is no doubt that the judiciary may have some features that make it qualified to adjudicate socio-economic rights.⁵⁵ This notwithstanding, the judiciary is also constrained in a number of respects; the courts are technically handicapped and may have to rely on the judgment of other

⁵¹ See *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC), at para 181.

⁵² *The City of Johannesburg v Rand Properties (PTY) LTD and Others* Case No. 253/06 (Supreme Court of Appeal) [Unreported], at para 45.

⁵³ See chapter seven, section 7.5.2.

⁵⁴ See chapter three, section 3.3.1.

⁵⁵ See chapter three, section 3.4.2. See also chapter seven, section 7.4.1.

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organs of state.⁵⁶ This is especially so in dealing with, for instance, budgetary issues or policy questions that need technical skills or democratic deliberation. Budgetary considerations may give rise to questions that are hard for the judiciary to answer because some of them may relate to priority setting.⁵⁷ The courts may have to defer these questions to the executive and legislative organs of state. This, though, does not mean that judicial deference should be adopted as a general rule.⁵⁸ It is something that the court ought to have in mind and apply on a case-by-case basis depending on the demands of every case. In essence the issue relates to the necessity of maintaining a fine balance between, on the one hand, the need to protect rights and, on the other hand, the danger of too great an interference in the affairs of the executive and legislative branches of government.⁵⁹ The question then becomes one of determining the stage at which judicial intervention would be justified.

There is no doubt that some functions are preserved for the executive and legislative branches of government. However, when these branches ignore their constitutional obligations the judiciary is empowered to step in and enforce them.⁶⁰ This interference is mandated by the Constitution.⁶¹ Most importantly, however, the extent of what may appear to be interference should be determined by the degree of failure or neglect on the part of the executive and legislative organs to discharge their constitutional

⁵⁶ See Steinberg: 2006, at p 270. See also chapter three, section 3.3.1.

⁵⁷ See chapter four, section 4.2.4.

⁵⁸ Chapter three, sections 3.3.2 and 3.3.2.

⁵⁹ Corbett, M., 'Human rights: The road ahead' in Forsyth, C, and Schiller, J., (eds.) *Human rights: The Cape Town conference* (1979) Juta & Company pp 1 – 9, at p 6.

⁶⁰ See chapter three, section 3.3.3, and chapter seven, section 7.4.1.

⁶¹ See chapter three, at section 3.2.3.

obligations.⁶² In remedial terms, the level of intrusiveness in response to failure or neglect should be determined by the level of recalcitrance exhibited by the government. Where there is evidence that the government will not respect the court order, the court is justified to issue highly intrusive remedies such as mandatory or structural interdicts.⁶³ This, though, should come as a last resort after all efforts have been exhausted to secure the co-operation of government in implementing the court orders. The courts should, for instance, acknowledge and make use of the expertise at the disposal of the executive and legislative organs of state before displacing these organs.⁶⁴ This notwithstanding, there could be cases in which intervention as a matter of first resort is justified. This could be in those cases where there is no chance of procuring co-operation, or where the seriousness of the matter at stake demands immediate intervention.

It should also be noted that it is not prudent for the courts to overlook the fact that socio-economic rights litigation is essentially polycentric. The courts may not be able to appreciate and attend to all the polycentric interests implicated by a case. In spite of this, the courts should strive as much as possible to appreciate and attend to these interests. It is for this reason that I have suggested that, when using the structural interdict, courts should try, as much as possible, to secure the participation of persons who may be affected by the outcome of a case.⁶⁵ The courts should also ensure that the remedies they grant bring benefits to a wide section of people in need of such benefits and not just to the litigants in

⁶² See chapter seven, at section 7.6.1. See also Fletcher, W., 'The Discretionary Constitution: Institutional remedies and judicial legitimacy' (1982) *Yale Law Journal* pp 635 – 697.

⁶³ See chapter seven, at sections 7.2 and 7.5.

⁶⁴ See chapter seven, at section 7.4.2.

⁶⁵ Chapter seven, at section 7.6.2.

court. It is only possible for a court to do this if it inclines more towards the notion of distributive justice and less towards the notion of corrective justice, as discussed below.

8.4 APPROPRIATE, JUST AND EQUITABLE REMEDIES: ROLE OF DISTRIBUTIVE FORMS OF JUSTICE

The notions of corrective and distributive justice provide an important theoretical framework that could be used to assess the kinds of remedies granted by the courts. The remedies that are granted by a court inclined towards the notion of corrective justice will differ from those granted by a court inclined towards distributive justice.⁶⁶ However, the appropriateness of each of these remedies will depend on the perspective from which one assesses them. To those who view socio-economic rights, for instance, as establishing individual entitlements, corrective justice based remedies will be the most appropriate. In contrast, those who view these rights as establishing collective entitlements will consider distributive justice based remedies as the most appropriate. The question that ought to be answered before one examines the remedies granted in respect of socio-economic rights, however, is whether it is ideal to enforce these rights, either as individual or collective rights.

I have demonstrated in this thesis that socio-economic rights cannot be enforced outside the social and economic context in which they are protected.⁶⁷ The majority of South Africans are poor and in dire need of socio-economic goods and services; but, as observed in chapter two,⁶⁸

⁶⁶ See chapter five.

⁶⁷ See chapter six, at section 6.2. See also De Vos, P., 'Grootboom, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights* pp 258 – 276, at p 262.

⁶⁸ Section 2.3.1.1.

these goods and services require a great deal of resources to realise. Yet the state may not have all the resources required to provide every individual with the goods and services he/she needs even at a very basic level. This is something that the Constitution acknowledges by requiring the progressive realisation of socio-economic rights within the available resources.⁶⁹ In this context, it is only reasonable that the rights be enforced as collective rather than as individual ones, because this is what the socio-economic context dictates. The realisation of collective rights requires careful redistribution of resources in order to benefit all in need of them. Redistribution of this nature is most appropriately realised through litigation that is guided by the ethos of distributive justice.

It is on the basis of the above that the appropriateness of remedies for socio-economic rights violations should be assessed. The success or failure of a remedy should not be assessed solely on the basis of its impact on the litigants such as the Grootboom community. This is so because it is important that in dealing with socio-economic claims the courts should consider the interests of persons other than the litigant(s). It is also important for the courts to appreciate the fact that providing for the socio-economic needs of an individual or groups of individuals may have repercussions for similarly situated persons.⁷⁰ The remedies that the courts grant therefore should be aimed at maximising the socio-economic benefits implicated by the case for the benefit of all similarly situated persons. In this context it may be impossible to put the victims of a violation in the position they would have been in but for the violation as demanded by those who support corrective justice.⁷¹

⁶⁹ Sections 26(2) and 27(1).

⁷⁰ See Sachs: 2005, at p 144.

⁷¹ See chapter five, section 5.2.2.

The *Grootboom* case has been used by many commentators to demonstrate the weaknesses of the remedies granted by the CC in socio-economic rights litigation.⁷² It has been argued that the situation of the Grootboom community has not changed dramatically even with judgment in their favour. However, this case could also be used to demonstrate the distributive benefits that socio-economic rights litigation can bring about. The case has set standards to be used to assess the reasonableness of government conduct, and has resulted in programmes and policies that advance the socio-economic rights of all in need as presented by the context.⁷³ Although the case has not resulted in a dramatic improvement of the conditions of the Grootboom community, it has resulted in benefits for a wide range of poor and vulnerable people.

However, the fact that the socio-economic context dictates that socio-economic rights can only be realised as collective rights should not be interpreted to mean that the rights cannot result in individual entitlements. The ultimate outcome of any programme for the realisation of these rights should aim at maximisation of individual wellbeing, if not in the short run at least in the long run. The socio-economic context as characterised, amongst others, by inadequacy of resources should not be viewed as a permanent and unalterable state of affairs. As seen in chapter four,⁷⁴ it is incumbent upon the government to put in place measures that enable it to enhance the level of resources at its disposal. This means that the rights may be enforced as individual entitlements as soon as resources needed

⁷² See Swart, M., 'Left out in the cold? Grafting constitutional remedies for the poorest of the poor' (2005) 21 *South African Journal on Human Rights* pp 215 – 240; Pillay, K., 'Implementation of Grootboom: Implications for the enforcement of socio-economic rights' (2002) 2 *Law, Democracy and Development* pp 225 – 277; and Davis, D., 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *South African Journal on Human Rights* pp 301 – 327.

⁷³ See chapter six, at section 6.3.

⁷⁴ Section 4.2.4.

for this purpose become available. Ancillary to this is the fact that while the non-provision of a minimum core may be justified in the present context on the basis of limited resources, this does not mean that the concept be discarded completely. It should be incumbent upon the government to provide everyone with a minimum level of goods and services as soon as resources for this purpose become available.

8.5 CONCLUDING REMARKS

While a lot has been written on the subject of the judicial enforcement of socio-economic rights in South Africa, no research has focused on a comprehensive examination of the subject of remedies as this study has done. This study has engaged the description and analysis of the factors that courts consider, or should consider, when deciding to grant certain remedies. This analysis is intended to give a proper foundation for any critique of the appropriateness of judicial remedies in constitutional litigation generally and socio-economic rights litigation in particular. It is contended that while socio-economic rights are as justiciable as civil and political rights, they have characteristics that make their enforcement much more controversial. Generally, they require far more affirmative action and resources, and the remedies resulting from violation of these rights are distributive in nature. It is upon this basis that the theoretical foundations of judicial remedies have been discussed.

Great emphasis has been laid on the effect of the form of justice that the courts choose to pursue. The study has shown that the nature and objectives of remedies arising from corrective justice are quite different from those that arise from distributive justice. It has been demonstrated that any critique of judicial remedies without an understanding of the form of justice that one considers ideal is a parochial and arid exercise. It is on this basis that the appropriateness of the different remedies available in constitutional litigation, such as declarations, damages and injunctions, has been analysed.

Conclusions & recommendations

This thesis has also been able to examine in detail the most controversial of the remedies, the structural injunction; as a result thereof, the study has formulated guiding norms and principles that may be used by the courts when considering this form of relief. These norms and principles should not only guide the courts in deciding whether the structural injunction is appropriate, but also indicate its use in a particular case. It should be used as of necessity, and, when used, it should be flexible and graduated. This is in addition to ensuring the widest participation of all stakeholders, ensuring reasoned decision-making, developing the substantive norms, and maintaining independence and impartiality.



BIBLIOGRAPHY

1. Books

Aldous, G., and Alder, J., *Application for judicial review: Law and practice of the Crown Office* (1993) Butterworths

Alston, P., and Tomasevski, K., (eds.) *Right to Food* (1984) Martinus Nijhoff

Andreassen, B., and Eide, A., (eds.) *Human rights in developing countries 1987/88: A Yearbook on human rights in countries receiving Nordic aid* (1988) Chr. Michelsen Institute, Danish Center for Human Rights and Norwegian Institute of Human Rights

Andrews, P., and Ellman, S., (eds.) *The Post-apartheid Constitutions: Perspectives on South Africa's basic law* (2001) Witwatersrand University Press and Ohio University Press – Athens, pp 405 – 443

Arambulo, K., *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and procedural aspects* (1999) INTERSENTIA

Aristotle, *Nicomachean ethics*, V, 2-5

Barnett, H., *Constitutional & administrative law* (2004) Cavendish Publishing

Bas de Gaay, F., & Goldewijk, B.K., *God and the goods: global economy in a civilizational perspective* (1998) World Council of Churches Publications

Berger, R., *Government by judiciary: The transformation of the Fourteenth Amendment* (1977) Cambridge University Press

Berryman, J., *Remedies: Issues and perspectives* (1991) Thomas Professional Publishing

Berryman, J., *The law of equitable remedies* (2000) Irwin Law

Bickel, A., *The least dangerous branch: The Supreme Court at the bar of politics* (1962) Bobbs-Merill

Bilchitz, D., *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) Oxford University Press

Borchard, E., *Declaratory judgements* (1941) Banks-Baldwin Law Publishing Co

Bork, R., *The tempting of America: The political seduction of Law* (1990) The Free Press

Bibliography

- Mahoney, K.E., and Mahoney, P., (eds.) *Human Rights in the twentieth century* (1993) Martinus Nijhoff
- Brand, D., and Russell, S., (eds.) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) Protea Book House
- Brand, D., and Heyns, C., (eds.) *Socio-economic rights in South Africa* (2005) Pretoria University Law Press
- Botha, H., Van der Walt, A., and Van der Walt, J., (eds.) *Rights and Democracy in a Transformative Constitution* (2003) Sun Press Stellenbosch
- Brewer, A.R., *Judicial review in comparative law* (1989) Cambridge University Press
- Buhlungu, S., Daniel, J., Southall, R., and Lutchman, J., (eds.) *State of the Nation: South Africa 2005-2006* (2005) Human Sciences Research Council
- Burrows, A., *Remedies for torts and breaches of contract* (1994) Butterworths
- Cachalia, A., Cheadle, H., Davis, D., Haysom, N., Maduna., P., and Marcus, G., *Fundamental rights in the New Constitution* (1994) Juta & Company and Centre for Applied Legal Studies
- Chapman, A and Russell, S., (eds.) *The core obligations: Building a framework for economic, social and cultural rights* (2002) Intersentia Antwerp
- Chaskalson, M., Kentridge, J., Klaaren, J., Marcus, G., Spitz, D. & Woolman, S., (eds) *Constitutional law of South Africa* (1995) Juta & Company
- Coomans, F., (ed.) *Justiciability of economic and social rights: Experiences from domestic systems* (2006) INTERSENTIA
- Corder, H., *Judges at work: The role and attitudes of the South African Appellate Judiciary 1910 – 1950* (1984) Juta & Company
- Cottrell, J., and Ghai, Y., (eds.) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* (2004) INTERRIGHTS
- Cranston, M., *What are human rights* (1973) Bodley Head
- Craven, M., *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) Oxford University Press
- Currie, I., and De Waal, J., *The new constitutional and administrative law* Volume 1 (2001) Juta & Company
- Currie, I., & De Waal, J., *The Bill of Rights handbook* (2005) Juta & Company

Bibliography

- Davel, J., (ed.) *Introduction to child law in South Africa* (2000) Juta & Company p 169
- Davis, D., Halton, C., & Haysom, N., *Fundamental rights in the Constitution: Commentary and case* (1997) Juta & Company
- Devenish, G., *A Commentary on the South African Bill of Rights* (1999) Butterworths Durban
- De Villiers, B., (ed.) *Birth of a Constitution* (1994) Juta & Company
- De Visser, J., and Mbazira, C., (eds.) *Water delivery: Public or private* (2006) Centre for Environmental Law and Policy
- De Wet, E., *The constitutional enforceability of economic and social rights: The meaning of the Germany constitutional model for South Africa* (1996) Butterworths Publishers
- Dicey, A.V., *Introduction to the study of the law of the constitution* [1885], (1982) Liberty Fund
- Dlamin, C., *Human rights in Africa: Which way South Africa* (1995) Butterworths
- Dugard, J., *Human Rights and the South African legal order* (1978) Princeton University Press
- Dworkin, R., *Life's dominion* (1993) Harper Collins *the*
- Eide, A., Krause, C., and Rosas, A., (eds.) *Economic, social and cultural rights: A textbook* (2001) Kluwer Law International
- Eide, A., (ed.) *Food as a Human Right* (1984) United Nations University
- Ely, J., *Democracy and distrust* (1980) Harvard University Press
- Ewing, K., & Gearty, C., *Democracy or a Bill of Rights* (1991)
- Fiss, O., *The Civil rights injunction* (1978) Indiana University Press
- Fox, W., *Understanding administrative law* (1986) Mathews Bender & Company
- Freeman, S., (ed.) *The Cambridge companion to Rawls* (2003) Cambridge University Press
- Glennon, M., J., *A constitutional law anthology* (1992) Anderson Publishing Company
- Goodin, E., and Pettit, P., (eds.) *A companion to contemporary political philosophy* (1995) Blackwell Publishing Ltd

Bibliography

- Halpern, C., and Lamb, C., (eds) *Supreme Court activism and restraint* (1982) D.C. Heath and Company
- Hassen, E., *The soul of a nation: constitution-making in South Africa* (1998) Oxford University Press
- Hirschl, R., *Towards juristocracy: The origins and consequences of the new constitutionalism* (2004) Harvard University Press
- Hoexter, C., and Lyster, R., *The new constitutional and administrative law* Vol. 2. (2002) Juta Law
- Holmström, L., (ed.) *Concluding Observations of the UN Committee on Economic, Social and Cultural Rights: Eighth to Twenty-seventh sessions (1993-2000)* (2003) Martinus Nijhoff Publishers
- Horowitz, D., *The courts and social policy* (1977) The Brookings Institution
- Jones, T., and Buckle., H., *The civil practice of the magistrates' courts in South Africa vol. I* (1988 – 1991) Juta & Co
- Joubert, W., and Faris, J., (eds.) *The law of South Africa* (1998) Butterworths
- Karin, A., & Mihyo, P., (eds.) *Responding to the human rights deficit, essays in honour of Bas de Gaay Fortman* (2003) Kluwer Law International
- Kercher, B., and Noone. M., *Remedies* (1990) The Law Book Company Limited
- Klug, H., *Constituting democracy: Law, globalism, and South Africa's political reconstruction* (2000) Cambridge University Press
- Lawson, F., *Remedies of English Law* (1972) Butterworth & Co
- Lewis, C., *Judicial remedies in public law* (1992) Sweet & Maxwell
- Locke, J., *The Second Treatise of Civil Government* (1690)
- Locke, J., *Two treaties of government* (1967)
- Macpherson, B., *The political theory of possessive individualism: Hobbes to Locke* (1967) Oxford University Press
- Mahoney, E., and Mahoney, P., (eds.) *Human Rights in the twentieth century* (1993) Martinus Nijhoff
- Malloy, P., *Law and economics: A comparative approach to theory and practice* (1990) West/Thomson/Foundation Press

Bibliography

Mbazira, C., *Realising socio-economic rights in the South African Constitution: The obligations of local government, a guide for municipalities* (2006) Community Law Centre, University of the Western Cape

McGregor, H., *Mayne and McGregor on damages* (1961) The Common Law Library No. 9 Sweet & Maxwell Limited

Montesquieu, *L'Esprit des Loix* (1955)

Motala, Z., and Ramaphosa, C., *Constitutional Law: Analysis and cases* (2002) Oxford University Press

Mulhall, S., and Swift, A., *Liberals & communitarians* (1996) Blackwell Publishers Ltd

Paterson, T., *Eckard's principles of civil procedure in the magistrates' courts* (2001) Juta Law

Peris, J., and Kristian, S., (eds.) *Democratising development: The politics of socio-economic rights in South Africa* (2005) Martinus Nijhoff Publishers

Plattner, M., (ed.) *Human rights in our time: Essays in memory of Victor Baras* (1984) West View Press

Pomeroy, J., *Remedies and rights by civil action* (1876) Little, Brown and Co

Pound, R., *The Formative era of American law* (1939) Little, Brown and Company

Prest, B., *The law and practice of interdicts* (1996) Juta & Co

Rawls, J., *Political liberalism* (1993) Columbia University Press

Rawls, J., *A theory of justice* (1999) Oxford University Press

Roach, K., *Constitutional remedies in Canada* (1994) Law Book Inc

Roland, J., and Chapman, J., (eds.) *Constitutionalism: Nomos XX* (1979) New York University Press

Rossiter, C., (ed.) *The Federalist Paper* (1961) Penguin Books

Russel, P., and O'Brien, M., *Judicial independence in the age of democracy: Critical perspectives from around the world* (2001) University Press of Virginia

Sachs, A., *Protecting human rights in a new South Africa* (1990) Oxford University Press

Sandel, M., *Liberalism and the limits of justice* (1998) Cambridge University Press

Scanlon, M., *What we owe each other* (2000) Harvard University Press

Bibliography

Schuck. P., *Suing government: Citizen remedies for official wrongs* (1983) Yale University Press

Sepúlveda, M., *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) INTERSENTIA

Shelton, D., *Remedies in international human rights law* (1999) Oxford University Press

Shue, S., *Basic rights: subsistence, affluence, and U.S. foreign policy* (1980) Princeton University Press

Simon L., (ed.) *The Blackwell Guide to social and political philosophy* (2002) Blackwell Publishers Ltd

Smith, A., *The Russian Revolution: A very short introduction* (2002) Oxford University Press

Steiner, H., & Alston, P., *International human rights in context: Law, politics, morals* (2000) Oxford University Press

Steytler, N., (ed.) *The Freedom Charter and beyond: Founding the principles for a democratic South African legal order* (1991) Community Law Centre, University of the Western Cape

Sunstein, C., *Designing democracy: What constitutions do* (2001) Oxford University Press

Sunstein, C., *One case at a time: Judicial minimalism on the Supreme Court* (1999) President and Fellows of Harvard College

Squires, J., Langford, M., and Thiele, B., *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) Australian Human Rights Centre and Centre on Housing Rights and Evictions

Treitel, G., *Remedies for breach of contract: A comparative account* (1989) Oxford University Press

Van der Walt, A., *Law of property casebook for students* (2002) Juta & Co

Van der Westhuizen, J., & Viljoen, H., (eds.) *A bill of rights for South Africa* (1988) Butterworths

Van Wyk, D., Dugard, D., De Villiers, J., and Davis, D. (eds.) *Rights and Constitutionalism: The new South African legal order* (1994) Juta & Company

Vile, M., *Constitutionalism and Separation of Powers* [1967], (1998) Liberty Fund

Walker, D., *The law of civil remedies in Scotland* (1974) Green & Sons

Wells, M., and Eaton, T., *Constitutional remedies: A reference book for the United States Constitution* (2002) Praeger Publishing

Zakrzewski, R., *Remedies reclassified* (2005) Oxford University Press

2. CHAPTERS IN BOOKS

Alston, P., 'No right to complain about being poor: The need for an optional protocol to the economic rights Covenant, in Eide, A., & Helgesen, J., (eds.) *The future of human rights protection in a changing world: fifty years since the four freedoms address: Essays in honour of Torkel Opsahl* (1991) Norwegian University Press pp 79 – 100

Andreassen, B., Skålnes, T., Smith, G., and Stokke, H., 'Assessing human rights performance in developing countries: The case for a minimum threshold approach to economic and social rights' in Andreassen, B. and Eide, A., (eds.) *Human rights in developing countries 1987/88: A Yearbook on human rights in countries receiving Nordic aid* (1988) Chr. Michelsen Institute, Danish Center for Human Rights and Norwegian Institute of Human Rights pp 333 – 355

Bekink, B., and Brand, D., 'Children's constitutional rights' in Davel, J., (ed.) *Introduction to child law in South Africa* (2000) Juta & Company p 169

Bilchitz, D., 'Health' in Woolman, S., Roux, T., Klaaren, J., Stein, A., & Chaskalson, M., (eds.) *Constitutional law of South Africa* (1996) Juta & Company and Centre for Human Rights, University of Pretoria [2nd Edition, Original Service 2005], pp 56A-i —56A-47

Bogart W., A., "'And the courts which govern their lives": The judges and legitimacy' in Berryman, J., *Remedies: Issues and perspective* (1991) Thomas Professional Publishing Canada pp 49 – 67

Bossuyt, M., 'International human rights systems: Strengths and weaknesses' in Mahoney, K.E., and Mahoney, P., (eds.) *Human Rights in the twentieth century* (1993) Martinus Nijhoff pp 47 – 55

Brand, D., 'Socio-economic rights and courts in South Africa: Justiciability on a sliding scale' in Coomans, F., (ed.) *Justiciability of economic and social rights: Experiences from domestic systems* (2006) INTERSENTIA pp 207 – 236

Brand, D., 'Introduction to socio-economic rights in the South African Constitution' in Brand, D., and Heyns, C., (eds.) *Socio-economic rights in South Africa* (2005) Pretoria University Law Press pp 1 – 56

Brand, D., 'The proceduralisation of South African socio-economic rights jurisprudence, or "what are socio-economic rights for"' in Botha, H., Van der Walt,

Bibliography

A., and Van der Walt, J., (eds.) *Rights and democracy in a transformative constitution* (2003) Sun Press Stellenbosch pp 33 – 56

Budlender, G., 'Justiciability of socio-economic rights: Some South African experiences' in Ghai, Y., and Cottrell, J., (eds.) *Economic, social and cultural rights* (2004) Interights pp 33 – 41

Cassels, J., 'An inconvenient balance: The injunction as a Charter remedy' in Berryman, J., (ed.) *Remedies, issues and perspectives* (1991) Thomas Professional Publishing pp 272 – 311

Chapman, A., and Russell, S., 'Introduction' in Chapman, A and Russell, S., (eds.) *The core obligations: Building a framework for economic, social and cultural rights* (2002) INTERSENTIA pp 1 – 18

Coomans, F., 'In search of the content of the right to education' in Chapman, A and Russell, S., (eds.) *The core obligations: Building a framework for economic, social and cultural rights* (2002) INTERSENTIA pp 217 – 246

Cooper-Stephenson, K., 'Principle and pragmatism in the law of remedies' in Berryman, J., (ed.) *Remedies, issues and perspectives* (1991) Thomson Professional Publishing pp 1 – 48

Corbett, M., 'Human rights: The road ahead' in Forsyth, C, and Schiller, J., (eds.) *Human rights: The Cape Town conference* (1979) Juta & Company pp 1 – 9

Corder, H., 'Seeking social justice: Judicial independence and responsiveness in a changing South Africa' in Russel., P., and O'Brien, M., *Judicial independence in the age of democracy: Critical perspectives from around the world* (2001) University Press of Virginia pp 194 – 206

Cottrell, J., and Ghai, Y., 'The role of the courts in the protection of economic, social and cultural rights' in Cottrell, J., and Ghai, Y., (eds.) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* (2004) INTERRIGHTS pp 58 – 89

Cranston, M., 'Human rights real and supposed' in Raphael D, (ed.) *Political theory and rights of man* (1967) Macmillan

Craven, M., 'The International Covenant on Economic, Social and Cultural Rights' in Hanski, R., & Suksi, M., (eds.) *An Introduction to the international protection of human rights: A textbook* (1997) Institute of Human Rights , Åbo Akademi University pp 101 – 123

Currie, I., 'The Constitutional Court's jurisdictional jurisprudence' in *The Constitutional Court of South Africa: First ten years* (2004) South African Constitutional Court

Davis, D., Chaskalson, M., & De Waal, J. 'Democracy and constitutional interpretation' in Van Wyk, D., Dugard, D., De Villiers, J., and Davis, D. (eds.)

Bibliography

Rights and constitutionalism: The new South African Legal Order (1994) Juta & Company

De Villiers, B., 'Social and economic rights' in Van Wyk, D., Dugard, J., De Villiers B and Davis D (eds.) *Rights and constitutionalism: The new South African legal order* (1995) Juta & Company pp 599 – 628

De Villiers, D., 'The constitutional principles: Content and significance' in De Villiers (ed.) *Birth of a Constitution* (1994) Juta Law pp 37 – 49

Didcott, M., 'Practical workings of a bill of rights' in Van der Westhuizen, J., & Viljoen H (eds.) *A bill of rights for South Africa* (1988) Butterworths

Eide, A., 'Economic, social and cultural rights as human rights' in Eide, A., Krause, C. and Rosas, A., (eds.) *Economic, social and cultural rights: A textbook* (2001) Kluwer Law International

Eide, A., 'Universalisation of human rights versus globalisation of economic power' in Coomans, F., Westendorp, I. and Willems, J. (eds.) *Rendering justice to the vulnerable: liber amicorum in honour of Theo van Boven* (2000) Kluwer Law International pp 99 – 120

Fairley, S., 'Private law remedial principles and the Charter: Can the old dog wag the new tail' in Berryman, J., (ed.) *Remedies, issues and perspectives* (1991) Thomson Professional Publishing pp 313 – 333

Govender, K., 'Assessing the constitutional protection of human rights in South Africa during the first decade of democracy' in Buhlungu, S., Daniel, J., Southall, R., & Lutchman, J., (eds.) *State of the Nation: South Africa 2005-2006* (2005) Human Sciences Research Council pp 93 – 122

Gutmann, A., 'The Rule of rights or the right to rule?' in Pennock, J. & Chapman, W. (eds.) *Justification: Nomos XXVIII* (1986) New York University Press p 15

Harms, L., 'Interdicts' in Joubert, W., and Faris, J., (eds.) *The law of South Africa* (1998) Butterworths pp 285 – 306

Heywood, M., 'Shaping, making and breaking the law in the campaign for a National HIV/AIDS Plan' in Peris, J., and Kristian, S., (eds.) *Democratising development: The politics of socio-economic rights in South Africa* (2005) Martinus Nijhoff Publishers pp 181 – 212

Jeffery, H., 'The new politics of economic and social rights' in Karin, A. & Mihyo, P. (eds) *Responding to the human rights deficit, essays in honour of Bas de Gaay Fortman* (2003) Kluwer Law International pp 61 – 72

Kateb, G., 'Remarks on the procedures of constitutional democracy' in Roland, J., and Chapman, J., (eds.) *Constitutionalism : Nomos XX* (1979) New York University Press

Bibliography

Kentridge, J., & Spitz, D., 'Interpretation' in Chaskalson, M., Kentridge, J., Klaaren, J., Marcus, G., Spitz, D., & Woolman, S., (eds.) *Constitutional law of South Africa* (1996) Juta & Company pp 11-i —11-46, at 11-18

Kryzstof, D., 'The UN Charter and the Universal Declaration of Human Rights' in Hanski, R., & Suksi, M., (eds.) *An Introduction to the international protection of human rights: A textbook* (1997) Institute of Human Rights Åbo Akademi University pp 65 – 78

Kymlicka, W., 'Community' in Goodin, E., and Pettit, P., (eds.) *A companion to contemporary political philosophy* (1995) Blackwell Publishing Ltd pp 366 – 378

Liebenberg, S., 'Enforcing positive socio-economic rights claims: The South African model of reasonableness' in Squires, J., Langford, M., and Thiele, B., *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) Australian Human Rights Centre and Centre on Housing Rights and Eviction pp 73 – 88

Liebenberg, S., 'The interpretation of socio-economic rights' in Woolman, S., Roux, T., Klaaren, J., Stein, A., & Chaskalson, M., (eds.) *Constitutional law of South Africa* [2nd Edition, Original Service 12-03] (2005) Juta & Company and Centre for Human Rights, University of Pretoria pp 33 – 1 to 33 – 64

Liebenberg, S., 'Violations of socio-economic rights: The role of the South African Human Rights Commission' in Andrews, P., and Ellman, S., (eds.) *The Post-apartheid Constitutions: Perspectives on South Africa's basic law* (2001) Witwatersrand University Press and Ohio University Press pp 405 – 443

Liebenberg, S., 'Socio-economic rights' in Chaskalson, M., Kentridge J., Klaaren J., Marcus G, Spitz D and Woolman S (eds.) *Constitutional law of South Africa* (1996) Juta & Company pp 41-1 — 41-56

Lester, L., and O'Conneide, C. 'The effective protection of socio-economic rights' in Cottrell, J., and Ghai, Y., (eds.) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* (2004) INTERIGHTS pp 17 – 22

Mandisa, M., 'The Treatment Action Campaign and the history of rights-based, patient-driven HIV/AIDS activism in South Africa' in Peris, J., and Kristian, S. (eds.) *Democratising development: The politics of socio-economic rights in South Africa* (2005) Martinus Nijhoff Publishers pp 213 – 243

Mbazira, C., 'Privatisation and the right of access to sufficient water in South Africa: The case of Lukhanji and Amahlati' in De Visser, J., and Mbazira, C., (eds.) *Water delivery: Public or private* (2006) Centre for Environmental Law and Policy pp 57 – 85

Opschoor, H., 'Economic, social and cultural rights from an economist's perspective' in Karin, A., & Mihyo, P., (eds.) *Responding to the human rights deficit, essays in honour of Bas de Gaay Fortman* (2003) Kluwer Law International pp 73 – 89

Bibliography

Orwin, C., and Pangle, T., 'The philosophical foundation of human rights' in Plattner, F., (ed.), *Human Rights on our time – Essays in memory of Victor Baras* (1984) Westview Press pp 1-22

Piechowiak, M., 'What are human rights? The concept of human rights and their extra-legal justification' in Hanski, R., & Suksi, M., (eds.) *An Introduction to the international protection of human rights: A textbook* (1997) Institute of Human Rights, Åbo Akademi University pp 3 – 24

Raes, K., 'The Philosophical basis of economic, social and cultural rights' in Van der Auweret, P., De Pelsmaeker, T., Sarkin, J. & Vande Lanotte, J. (eds.) *Social, economic and cultural rights: An appraisal of current European and international developments* (2002) MAKLU pp 43 – 53

Roach, K., 'Crafting remedies for violations of economic, social and cultural rights' in Squires, J., Langford, M., and Thiele, B., *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) Australian Human Rights Centre and Centre on Housing Rights and Eviction pp 111 – 126

Russell, S., 'Minimum state obligations: International dimensions' in Brand, D., and Russell, S., (eds.) *Exploring the core content of socio-economic rights: South African and international perspective* (2002) Protea Book House pp 11 – 21

Ryan, A., 'Liberalism' in Goodin, E., and Pettit, P., (eds.) *A companion to contemporary political philosophy* (1995) Blackwell Publishing Ltd pp 291 – 311

Sachs, A., 'The judicial enforcement of socio-economic rights: The *Grootboom* case' in Peris, J., and Kristian, S., (eds.) *Democratising development: The politics of socio-economic rights in South Africa* (2005) Martinus Nijhoff Publishers pp 131 – 152

Scheffler, S., 'Rawls and utilitarianism' in Freeman, S., (ed.) *The Cambridge companion to Rawls* (2003) Cambridge University Press pp 426 – 459

Simon, L., 'Social policy and political philosophy – sorting out issues in Simon L., (ed.) *The Blackwell Guide to social and political philosophy* (2002) Blackwell Publishers pp 1 – 13

Van Bueren, G., 'The minimum core obligations of states under article 10(3) of the International Covenant on Economic, Social and Cultural Rights' in Chapman, A and Russell, S., (eds.) *The core obligations: Building a framework for economic, social and cultural rights* (2002) INTERSENTIA pp 147 – 160

Wellman, C., 'Justice' in Simon L., (ed.) *The Blackwell Guide to social and political philosophy* (2002) Blackwell Publishers pp 60 – 84

Woolman, S., 'Application' in Woolman, S., Roux, T., Klaaren, J., Stein, A., & Chaskalson, M., (eds.) *Constitutional law of South Africa* (2005) Juta & Company and Centre for Human Rights, University of Pretoria pp 31-1 — 31-158

Woolman, S., 'Limitation' in Chaskalson, M., Kentridge, J., Klaaren, J., Marcus, G., Spitz, D., & Woolman, S., (eds.) *Constitutional law of South Africa* (1996) Juta & Company [Revised Service 2, 1998] pp 12-i — 12-64

3. ARTICLES IN JOURNALS AND PERIODICALS

Abramovich, V., 'Courses of action in economic, social and cultural rights: Instruments and allies' (2005) 2 *SUR – International Journal on Human Rights* pp 181 – 216

Allison, J., 'Fuller's analysis of polycentric disputes and the limits of adjudication' (1994) 53 *Cambridge Law Journal* pp 367 – 383

Alston, P., and Quinn, G., 'The nature and scope of States Parties obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 8 *Human Rights Quarterly* pp 156–229

Baerhr, P., 'Controversies in the current human rights debate' (2000) 2 *Human Rights Law Review* pp 7 – 72

Barber, N., 'Prelude to the separation of powers' (2001) 60 *Cambridge Law Journal* pp 59 – 88

Berger, R., 'Constitutional interpretation and activist fantasies' (1993) 82 *Kentucky Law Journal* 1

Bilchitz, D., 'Placing basic needs at the centre of socio-economic rights jurisprudence' (2003) 4 *ESR Review* pp 2 – 4

Bilchitz, D., 'The right to health care services and the minimum core: Disentangling the principled and pragmatic strands' (2006) 7 *ESR Review* pp 2 – 6

Bilchitz, D., 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 118 *South African Law Journal* pp 484 – 501

Bilchitz, D., 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* pp 1 – 26

Bilchitz, D., 'Placing basic needs at the centre of socio-economic rights jurisprudence' (2003) 4 *ESR Review* pp 2 – 4

Bossuyt, M., 'La distinction juridique entre les droits civil et politiques et les droit économiques, sociaux et culturels' [The legal distinction between civil and political rights and economic, social and cultural rights]: *Revue des Droits de l'Homme* [*Human Rights Journal* (1975) 8] pp 783 – 820

Bibliography

Brent, K., Marshall, J., Picou, J., & Schlichtman, R., 'Technological disasters, litigation stress and the use of Alternative Dispute Resolution mechanisms' (2002) 26 *Law & Policy* pp 289 – 307

Bork, R., 'Neutral principles and some first amendment problems' (1971) 47 *Indiana Law Review* pp 1 – 35

Budlender, G., 'Access to courts' (2004) 121 *South African Law Journal* pp 339 – 358

Budlender, G., 'The role of the courts in achieving the transformative potential of socio-economic rights' (2007) 8 *ESR Review* 9 – 11

Cappelletti, M., 'Judicial review of the constitutionality of state action: Its expansion and legitimacy' (1992) 2 *Tydskrif vir die Suid-Afrikaanse [Journal of South African Law]* pp 256 – 266

Capelletti, M., 'The future of legal education: A comparative perspective' (1992) 8 *South African Journal on Human Rights* p 1

Carr, L., 'Wyatt v Stickney: A landmark decision' (2004) *Alabama Disabilities Advocacy Newsletter*

Cassels, J., 'Judicial activism and public interest litigation in India: Attempting the impossible' (1989) *The American Journal of Comparative Law* pp 495 – 519

Chapman, A., 'A new approach to monitoring the International Covenant on Economic, Social and Cultural Rights' (1995) *International Commission of Jurists: The Review* No. 55 pp 23 – 37

Chaskalson, A., Mohamed, I., Langa, P., Van Heerden, H. & Coebett, M. 'The legal system in South Africa 1960 – 1994' *Representations to the Truth and Reconciliation Commission* (1998) 15 *South Law Journal* pp 21 – 36

Chaskalson, A., 'Law in a changing society' (1989) 5 *South African Journal on Human Rights* p 293

Chayes, A., 'The role of the judge in public law litigation' (1979) 89 *Harvard Law Review* pp 1281 – 1316

Chenwi, L., and Mbazira, C., 'The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) *ESR Review* pp 9 – 12.

Christmas, A., 'Property rights of landowners vs socio-economic rights of occupiers' (2004) 5 *ESR Review* pp 11 – 13

Corbett, M., 'Representations to the Truth and Reconciliation commission' (1998) 115 *South African Law Journal* pp 17 – 21

Bibliography

Cowling, G., 'Judges and the protection of human rights in South Africa: Articulating the inarticulate premise' (1987) *South African Journal on Human Rights* pp 177 – 201

Currie, I 'Judicious avoidance' in (1999) 15 *South African Journal on Human Rights* pp 138 – 165

Davis, D., 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *South African Journal on Human Rights* pp 301 – 327

Davis, D., 'The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles' (1992) 8 *South African Journal on Human Rights* pp 475 – 490

Davis, D., 'Democracy: Its influence upon the process of constitutional interpretation' (1994) 10 *South African Journal on Human Rights* pp 103 – 121

Davis, D., 'Democracy and integrity: Making sense of the Constitution' (1998) 14 *South African Journal on Human Rights* pp 127 – 145

Davis, D., 'Socio-economic rights in South Africa: The record of the Constitutional Court after ten years' (2004) 5 *ESR Review* pp 3 – 7

Dennis, J., & Stewart, P., 'Justiciability of Economic, Social and Cultural Rights: Should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health?' (2004) 98 *American Journal of International Law* pp 462 – 515

De Villiers, B., 'Socio-economic rights in a new constitution: Critical evaluation of recommendations of the South African Law Commission' (1992) 3 *Tydskrif vir die Suid-Afrikaanse Reg* [*Journal of South African Law*] pp 421 – 436

De Visser, J., 'A perspective on local government's role in realising the right to housing and the answer of the *Grootboom* judgment' (2003) 7 *Law, Democracy and Development* pp 201 – 215

De Vos, P., '*Grootboom*, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights* pp 258 – 276

De Vos, P., 'Pious wishes or directly enforceable rights?: Social and economic rights in South Africa's 1996 Constitution' (1997) *South African Journal on Human Rights* pp 67 – 101

De Vos, P., 'The economic and social rights of children in South Africa's transitional Constitution' (1995) 2 *SA Public Law* pp 233 – 259

De Waal, J., and Erasmus, G., 'The constitutional jurisprudence of South African courts on the application, interpretation and limitation of fundamental rights during the transition' (1996) 7 *Stellenbosch Law Review* pp 179 – 209

Bibliography

Dlamin, C., 'The South African Law Commission's Working paper on group and human rights: Towards a bill of rights for South Africa' (1990) *S A Public Law* 96

Donald, L., 'Thinking about constitutionalism at the start of the twenty-first century' (2000) 30 *The Journal of Federalism* pp 115 – 135

Donnelly, J., 'The relative universality of human rights' (2007) 29 *Human Rights Quarterly* pp 281 – 306

Dugard, J., 'Court of first instance? Towards a pro-poor jurisdiction for the South African Constitutional Court' in (2006) 22 *South African Journal on Human Rights* pp 261 – 282

Eide, A., 'Realization of social and economic rights and the minimum threshold approach' (1989) 10 *Human Rights Law Journal* pp 35 – 51

Epstein, A., 'Judicial review: Beckoning on two kinds of error' (1985) 4 *Cato Journal* pp 711 – 718

Eisenberg, T., and Yeazell, S., 'The ordinary and the extraordinary in institutional litigation' (1980) 93 *Harvard Law Review* pp 465 – 517

Fagan, A., 'In defence of the obvious – ordinary meaning and the identification of constitutional rules' (1995) 11 *South African Journal on Human Rights* pp 545 – 570

Fiss, O., 'Foreword: The forms of justice' (1979) 93 *Harvard Law Review* pp 1 – 58

Fiss, O., 'Against settlement' (1984) 93 *Yale Law Journal* pp 1073 – 1090

Fletcher, W., 'The Discretionary Constitution: Institutional remedies and judicial legitimacy' (1982) *Yale Law Journal* pp 635 – 697

Forsyth, C., 'Interpreting a bill of rights: The task of a reformed judiciary' (1991) 7 *South African Journal on Human Rights* pp 1 – 23

Forsyth, C., & Elliot, M., 'The legitimacy of judicial review' (2003) *Public Law* pp 286 – 307

Fredman, S., 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 *South African Journal on Human Rights* pp 163 – 190

Freedman, M., 'Human rights and welfare: A communitarian view' (1990) *Ethics* pp 489-502

Fuller, L., 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* pp 353 – 409

Frug, E., 'The judicial power of the purse' (1978) *University of Pennsylvania Law Review* pp 715 – 794

Bibliography

- Gabriel, A., 'Socio-economic rights in the Bill of Rights: Comparative lessons from India' (1997) 1 *The Human Rights and Constitutional Law Journal of Southern Africa* pp 9 – 14
- Gewirtz, P., 'Remedies and resistance' (1983) 92 *Yale Law Journal* pp 585 – 680
- Gleick, P., 'The human right to water' (1998) 1 *Water Policy* pp 487 – 503
- Gready, P., & Kgalema, L., 'Magistrates under apartheid: A case study of the politicisation of justice and complicity in human rights abuse' (2003) 19 *South African Journal on Human Rights* pp 141 – 188
- Haysom, N., 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 8 *South African Journal on Human Rights* pp 451 – 63
- Henrard, K., 'Post apartheid South Africa's democratic transformation process: Redress of the past, reconciliation and 'unity in diversity' (2002) 3 *The Global Review of Ethno politics* pp 18 – 38
- Heywood, M., 'Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign's case against the Minister of Health' (2003) 19 *South African Journal on Human Rights* pp 278 – 315
- Heywood, M., 'Contempt or compliance? The TAC case after the Constitutional Court judgment' (2003) 4(1) *ESR Review* pp 7 – 10
- Hunt, P., 'Reclaiming economic, social and cultural Rights' (1993) 1 *Waikato LR* 141
- Iles, K., 'Limiting socio-economic rights: Beyond the internal limitation clauses' (2004) 20 *South African Journal on Human Rights* pp 448 – 465
- Iles, K., 'A fresh look at limitations: Unpacking section 36' (2007) 23 *South African Journal on Human Rights* pp 68 – 92
- Karl, K., 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal of Human Rights* pp 147 – 188
- Kenneth, R., 'Defending economic, social and cultural rights: Practical issues faced by an international human rights organisation' (2004) 26 *Human Rights Quarterly* pp 63 – 73
- Keating, G., 'Distributive and corrective justice in tort law of accidents' (2000) 74 *Southern California Law Review* pp 193 – 226
- Khoza, S., 'The importance of a dialogue on strategies to promote socio-economic rights in South Africa' (2006) 7 *ESR Review* pp 6 – 9

Bibliography

Klaaren, J., 'The structure of government in the 1996 South African Constitution: Putting democracy back into human rights' (1997) 13 *South African Journal on Human Rights* pp 3 – 27

Klimchuk, D., 'On the autonomy of corrective justice' (2003) 23 *Oxford Journal of Legal Studies* pp 49 – 64

Klug, H., 'Introducing the devil: An institutional analysis of the power of constitutional review' (1997) 13 *South African Journal on Human Rights* pp 185 – 207

Kroeze, I., 'Doing things with values II: The case of *ubuntu*' (2002) 13 *Stellenbosch Law Review* pp 252 – 264

Kroeze, I., 'Doing things with values: The role of constitutional values in constitutional interpretation' (2001) 11 *Stellenbosch Law Review* pp 265 – 276

Langa, P., 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* pp 351 – 360

Lenta, P., 'Judicial restraint and overreach' (2004) 20 *South African Journal on Human Rights* pp 544 – 615

Labuschagne, P., 'The doctrine of separation of powers and its application in South Africa' (2004) 23 *Politica* pp 84 – 102

Levinson, D., 'Rights essentialism and remedial equilibration' (1999) 99 *Columbia Law Review* pp 857 – 940

Levinson, D., 'Making Government Pay: Markets, politics, and the allocation of constitutional costs' (2000) 67 *University of Chicago Law Review* pp 345 – 420

Liebenberg, S., 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?' (2002) 6 *Law Democracy and Development* pp 159 - 191

Liebenberg, S., 'The right to Social Assistance: The implications of *Grootboom* for policy reform in South Africa' (2001) 17 *South African Journal on Human Rights* pp 232 – 257

Liebenberg, S., 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* pp 1 – 31

Mbazira, C., 'Translating socioeconomic rights from abstract paper rights to fully fledged individual rights: Lessons from South Africa' (2006) 12 *East African Journal of Peace and Human Rights* pp 183 – 231

McAllister, D., 'Doucet-Boudreau and the development of effective section 24(1) remedies: Confrontation or cooperation?' (2004) 16 *National Journal of Constitutional Law* pp 153 – 173

Bibliography

- Mizikenge, D., 'Minister of Health and Others v. Treatment Action Campaign: Its implications for the combat of HIV/AIDS and the protection of economic, social and cultural rights' (2003) 19 *East African Journal of Peace and Human Rights* pp 174 – 193
- Modak-Truran, M., 'Corrective justice and the revival of judicial virtue' (2000) 12 *Yale Journal of Law & Humanities* pp 249 – 298
- Moellendorf, D., 'Reasoning about resources: *Soobramoney* and the future of socio-economic rights claims' (1998) 14 *South African Journal on Human Rights* pp 327 – 333
- Moore, B., 'Community conferencing as transformative problem solving' (2000) 24 *SPIDER NEWS* pp 1 – 4
- Moseneke, D., 'Transformative adjudication' (2002) 18 *South African Journal on Human Rights* pp 309 – 319
- Motala, Z., 'Towards an appropriate understanding of the separation of powers, and accountability of the executive and the public service under the new South African order' (1995) 112 *South African Law Journal* 503
- Mureinik, E., 'Beyond a charter of luxuries: Economic rights in the constitution' (1992) 8 *South African Journal on Human Rights* pp 464 – 475
- Mureinik, E., 'A bridge to where? Introduction to the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* pp 31 – 48
- Muntingh, L., and Mbazira, C., 'Prisoners' right of access to anti-retroviral treatment' (2006) 7 *ESR Review* pp 14 – 16
- Nagel, R., 'Controlling the structural injunction' (1984) 7 *Harvard Journal of Law and Public Policy* pp 395 – 411
- Neier, A., 'Social and economic rights: A critique' (2006) 13 *Human Rights Brief* pp 1 – 3
- Note, 'Implementation problems of institutional reform litigation' (1998) 91 *Harvard Law Review* pp 428 – 463
- O'Regan, K., 'Introducing socio-economic rights' (1999) 1 *ESR Review* pp 2 – 3
- Park, J., 'The constitutional tort action as individual remedy' (2003) 38 *Harvard Civil Rights-Civil Liberties Review* pp 393 – 453
- Peces-Barba, G., 'Reflections on economic, social and cultural rights' (1981) 2 *Human Rights Law Journal* pp 281 – 294

Bibliography

- Peiris, G., 'Public interest litigation in the Indian sub-continent: Current dimensions' (1991) 40 *International and Comparative Law Journal* pp 66 – 90
- Pieterse, M., 'Towards a useful role for section 36 in social rights cases? Residents of Bon Vista Mansions v Southern Metropolitan Council' (2003) 120 *South African Law Journal* pp 41 – 48
- Pieterse, M., 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* pp 383 – 418
- Pieterse, M., 'Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience' (2004) 26 *Human Rights Quarterly* pp 882 – 905
- Pieterse, M., 'Resuscitating socio-economic rights: Constitutional entitlement to health services' (2006) 22 *South African Journal on Human Rights* pp 473 – 502
- Pillay, D., 'Law's republic, democracy and the South African Constitution' (2002) 17 *South African Public Law* pp 319 – 335
- Pillay, K., 'Implementation of Grootboom: Implications for the enforcement of socio-economic rights' (2002) 2 *Law, Democracy and Development* pp 225 – 277
- Pilkington, M., 'Damages as a remedy for infringement of the Canadian Charter of Rights and Freedoms' (1984) *Canadian Bar Review* pp 517 – 576
- Powell, F., 'The original understanding of original intent' (1985) 98 *Harvard Law Review* p 885
- Pretorius, M., 'The origins of the functus officio doctrine, with specific reference to its application in administrative law' (2005) 122 *South African Law Journal* pp 832 – 864
- Rehnquist, W., 'The notion of a living constitution' (1976) *Texas Law Review* pp 693 – 706
- Roach, K., 'The limits of corrective justice and the potential of equity in constitutional remedies' (1991) 33 *Arizona Law Review* pp 859 – 909
- Roach, K., and Budlender, G., 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable' (2005) 122 *The South African Law Journal* pp 325 – 351
- Robertson, E., 'Measuring state compliance with the obligation to devote the "maximum available resources" to realizing economic, social and cultural rights' (1994) 16 *Human Rights Quarterly* pp 693 – 714
- Roux, T., 'Understanding *Grootboom* - A response to Cass R. Sunstein' (2002) 12 *Constitutional Forum* pp 41 – 51

Bibliography

- Roux, T., 'Legitimizing transformation: Political resource allocation in the South African Constitutional Court' (2003) 10 *Democratization* pp 92 – 111
- Rycroft, A., 'Judicial innovation and the delinquent state: A note on the State and Mfezeko Zuba and 23 Similar cases' (2004) 20 *South African Journal on Human Rights* pp 321 – 330
- Sabel, F., & Simon, H., 'Destablization rights: How public interest litigation succeeds' in (1999) 113 *Harvard Law Review* pp 1 – 83
- Sachs, A., 'A Bill of Rights for South Africa: Areas of agreement and disagreement' (1989) 21 *Columbia Human Rights Law Review* pp 13 – 44
- Sager, F., 'Fair measure: The legal status of underenforced constitutional norms' (1978) 91 *Harvard Law Review* 1212 – 1264
- Sandalow, T., 'Constitutional interpretation' (1981) 79 *Michigan Law Review* pp 1033 – 1072
- Sarkin, J., 'The political role of the South African Constitutional Court' (1997) 114 *South African Law Journal* pp 134 – 150
- Schauer, F., 'Neutrality and judicial review' (2003) 22 *Law & Philosophy* pp 217 – 240
- Schauer, F., 'The calculus of distrust' (1991) 77 *Virginia Law Review* pp 653 – 67
- Schroeder, H., 'Corrective justice, liability for risk, and tort law' (1990) 38 *UCLA Law Review* pp 143 – 161
- Schwarzschild, M., 'Public law by private bargain: Title VII consent decrees and the fairness of negotiated institutional reform' (1984) *Duke Law Journal* pp 887 – 935
- Scott, C., 'Towards a principled, pragmatic judicial role' (1999) 1 *ESR Review* pp 4 – 6
- Scott, L., 'Another step towards indivisibility: Identifying the key features of violations of economic, social and cultural Rights' (1998) 20 *Human Rights Quarterly* pp 81-124
- Scott, C., 'Reaching beyond (without abandoning) the category of "economic, social and cultural rights"' (1999) 21 *Human Rights Quarterly* pp 633 – 690
- Scott, C., and Alston, P., 'Adjudicating constitutional priorities in a transitional context: A comment on Soobramoney's legacy and Grootboom's promise' (2000) 16 *South African Journal on Human Rights* pp 206 – 268
- Scott, C., and Macklem, P., 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* pp 1 – 148

Bibliography

Shaibani, S., 'Psychodynamics of the judicial process' (1999) 1 *Stanford Journal of Legal Studies* pp 1 – 10

Shane, P., 'Rights, remedies and restraint' (1988) 64 *Chicago-Kent Law Review* pp 531 – 571

Sloth-Nielsen, J., 'Too little? Too late? The implications of the *Grootboom* case for state response to child headed households' 2003 (1) *Law, Democracy and Development* pp 113 – 136

Smith, L., 'Restitution: The heart of corrective justice' (2001) 79 *Texas Law Review* pp 215 – 275

Special Project, 'The remedial process in institutional reform litigation' (1978) *Columbia Law Review* pp 784 – 929

Steinberg, C., 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *South African Law Journal* pp 264 – 284

Sturm, S., 'A normative theory of public law remedies' (1991) 79 *Georgetown Law Journal* pp 1355 – 1446

Sunstein, C., 'Against positive rights' (1993) *East Europe Constitutional Review* 35, excerpt in Steiner, H. & Alston, P. *International Human Rights in Context: Law, Politics, Morals* (2000) Oxford University Press pp 280 – 282

Sunstein, C., 'Suing government: Citizen remedies for official wrongs. By Peter Schuck' Book review (1983) 92 *Yale Law Journal* pp 749 – 761

Swart, M., 'Left out in the cold? Grafting constitutional remedies for the poorest of the poor' (2005) 21 *South African Journal on Human Rights* pp 215 – 240

Trengrove, W., 'Judicial Remedies for violations of socio-economic rights' (1999) 1 *ESR Review* pp 8 – 10

Troper, M., 'The logic of justification of judicial review' (2003) 1 *International Journal of Constitutional Law* pp 99 – 121

Tushnet, M., 'Judicial review' (2003) 20 *Harvard Journal on Legislation* pp 453 – 492

Tushnet, M., 'Enforcing socio-economic rights: Lessons from South Africa' (2005) 6 *ESR Review* pp 2 – 6

Tushnet, M., 'Social welfare rights and the forms of judicial review' (2004) 82 *Texas Law Review* pp 1895 – 1919

Tushnet, M., 'Democracy versus judicial review' (2005) *Dissent Magazine* pp 1 – 5

Bibliography

Van Bueren, G., 'Alleviating poverty through the constitutional court' (1999) 15 *South African Journal on Human Rights* pp 52 – 74

Van der Vyver, J.D., 'The separation of powers' (1993) 8 *SA Public Law* p 177

Van der Walt, A.J., 'The State's duty to protect owners v The State's duty to provide housing: Thoughts on the Modderklip case' (2005) 21 *South African Journal on Human Rights* pp 144 – 161

Van de Walt, A.J., 'A South African reading of Frank Michelman's theory of social justice' (2004) 19 *SA Public Law* pp 253 – 307

Varney, H., 'Forging new tools: A note on *Fose v Minister of Safety and Security* CCT 14/96' (1998) 14 *South African Journal on Human Rights* pp 336 – 349

Weinrib, E., 'Corrective justice in a nutshell' (2002) 52 *University of Toronto Law Journal*, available on line at http://www.utpjournals.com/product/utlj/524/524_weinrib.html, (accessed on 22 June 2006).

Weinrib, W., 'Restitutionary Damages as Corrective Justice', in 1, *Theoretical Inquiries in Law (Online Edition)*: (2000) 1 *Article 1*, at p 3, available at <http://www.bepress.com/til/voll/iss1/art1> (accessed on 24 June 2006)

Wesson, M., '*Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal on Human Rights* pp 284 – 308

Whitman, C., 'Constitutional torts' (1980) 79 *Michigan Law Review* pp 5 – 71

Whittington, E., 'An "indispensable feature"? Constitutionalism and judicial review' (2002) 6 *Legislation and Public Policy* pp 21 – 33

Yigen, K., 'Enforcing social justice: Economic, and social rights in South Africa' (2002) 4 *International Journal of Human Rights* pp 13 – 29

4. CONFERENCES, SEMINARS, WORKSHOPS, SHORT COURSES AND GUEST RESEARCH PROGRAMMES ATTENDED

Intensive Course on the Justiciability of economic, social and cultural rights, organised by the Institute for Human Rights, Åbo Akademi University – November/December 2004 at Åbo Akademi University, Turku

Out-sourcing/ Privatisation of Basic Services at the Local Government Level in SA: Democracy, Human Rights Norms and Good Governance Principles, organised by the Community Law Centre, University of the Western Cape 22 October 2004

Water Delivery in South Africa and the Netherlands: Public or Private? Organised by the Community Law Centre, University of the Western Cape together with the Institution of Constitutional and Administrative Law, Utrecht University – March 2005, Utrecht University

The Judiciary in a changing terrain, Organised by the Institute for Democracy in South Africa (IDAASA), 11th – 12th October 2005 Cape Town

The Research Unit for Legal and Constitutional Interpretation (RULCI) Colloquium on Constitutional Interpretation and Theory, Faculty of Law, University of Cape Town 20th – 21st October 2005

Strengthening strategies for promoting socio-economic rights in South Africa, held in Cape 29 – 30 May 2006, organised by the Community Law Centre, University of the Western Cape and the Norwegian Centre for Human Rights, University of Oslo

Summer School, *Peace and Development in Africa*, Institute of Development and Development Policy, University of Bochum, Germany, 25 September – 1st October 2005

Moving rights to realities: Realising socio-economic rights, Organised by Basic Rights Campaign in conjunction with the Kenya National Commission on Human Rights, 26th – 29th June 2005, Mombasa, Kenya

Summer School DAAD High Education Forum; *Capacity Building and Development for Communities in Sub-Saharan Africa*, Centre for Development Research, ZEF, University of Bonn, Germany, 2nd – 7th October 2005

35th and 38th Sessions of the African Commission on Human and Peoples' Rights held in Banjul, The Gambia in April/May 2004 and November/December 2005 respectively

Constitutional Law of South Africa public lecture series, Organised by the Center for Human Rights, University of Pretoria, 28 – 30 March 2006

Delivering Municipal Services: Socio-Economic Rights and Outsourcing Options, organised by the Community Law Centre, University of the Western Cape, 11 November 2005

Bibliography

3rd *Dullah Omar Memorial Lecture* organised by the Community Law Centre and the Faculty of Law at the University of the Western Cape, 13 June 2006 [attended by the author], Chief Justice Arthur Chaskalson delivered speech as guest speaker titled 'Implementing socio-economic rights: The role of the courts'

Guest research, Norwegian Centre for Human Rights, 9 October – 3 November 2006

5. REPORTS AND POLICY DOCUMENTS

African National Congress, *The bill of rights for a democratic South Africa*, 1988. Sourced at <<http://www.anc.org.za/ancdocs/policy/constprn.htm>> (accessed on 18 May 2005)

African National Congress, *Constitutional Principles for a Democratic South Africa* 1991, sourced at <<http://www.anc.org.za/ancdocs/policy/constprn.htm>> (accessed 18 May 2005)

Constitutional Assembly, Constitutional Committee, Draft Bill of Rights, Volume 1, *Explanatory Memoranda of Technical Committee to Theme Committee IV of the Constitutional Assembly* (9 October 1995), [on file with author]

National Department of Housing, *Part 3: National Housing Programme: Housing Assistance in Emergency Circumstances* April 2004; available at <http://www.housing.gov.za/Content/legislation_policies/_Emergency%20%20Housing%20Policy.pdf> (accessed on 29 November 2005)

South African Law Commission *Interim Report on Group and Human Rights Project* 58, August 1991

South African Law Commission *Final Report on Group and Human Rights Project* 58, October 1994

The Freedom Charter, adopted by the Congress of the People at Kliptown on 26 June 1955. Sourced at <<http://www.anc.org.za/ancdocs/history/charter.html>> accessed on 17 May 2005

6. INTERNET SOURCES

- BBC News 'Bush and democrats locked on Iraq'. Sourced at <<http://news.bbc.co.uk/2/hi/americas/6616361.stm>> (accessed on 3 May 2007).
- Bhagwati, P., 'The role of the judiciary in the democratic process: Balancing activism and judicial restraint' paper presented at the *Fifth Judicial Colloquium on The Domestic Application of International Human Rights Norms, Oxford, 21-23 September 1992, Commonwealth Secretariat*, sourced at <http://www.humanrightsinitiative.org/jc/papers/jc_2004/supplementary_papers/bhagwati.pdf> accessed on 5 December 2005
- Boaz, D., 'The coming of libertarian age' in (1997) 19 *CATO Policy Report* available at <<http://www.heartland.org/pdf/63011a.pdf>> (accessed on 25 June 2006)
- Bridgeman, C., 'Strict liability and the fault standard in comparative justice accounts of contract' *Public Law and Legal Theory, Working paper No. 146*, Florida State University College of Law available at SSRN: <<http://ssrn.com/abstract=669504>> (accessed on 22 June 2006)
- Center for Study of Social Policy (CSSP)'s report on *New roles for old adversaries: The challenge of using litigation to achieve system reform* January 1998, available at <http://www.cssp.org/uploadFiles/New_for-old_adversaries.pdf> (accessed on 30 November 2005)
- Curie, M., 'Civil society – conceptual history from Hobbes to Marx' (2001) Working Paper *International Politics*, sourced at <<http://www.aber.ac.uk/interpol/phD/Dorota.pdf>> (accessed on 22 January 2006).
- Garret, B., Structural reform prosecution University of Virginia Law School, Public law and legal theory working paper series No. 50 (2006), sourced at <<http://law.bepress.com/cg/viewcontent.cg?article=uvalwpa>>(accessed on 25 October 2006)
- International Labour Organisation
<<http://www.ilo.org/public/english/about/history.htm>> (accessed on 27 April 2005)
- Legal history and philosophy *Legal maxims and other quotes from Lord Coke*
<<http://www.commonlaw.com/index.html>> (accessed on 22 June 2006)
- Levinson, D., 'Rights essentialism and remedial equilibration' (1999) Working paper No. 99-5 *Legal Studies Working Paper Series*, University of Virginia School of Law, at p 3, available at SSRN: <<http://ssrn.com/abstract=155564>> (accessed on 25 June 2006)
- Liebenberg, S., 'South Africa's evolving jurisprudence on socio-economic rights' (2002) Socio-Economic Rights Project, Community Law Centre, University of the Western Cape, sourced at

Bibliography

<http://www.communitylawcentre.org.za/ser/docs_2002/evolving_jurisprudence.pdf> (accessed on 11 February 2006)

Liebenberg, S., 'Needs rights and transformation: Adjudicating social rights' *Center for Human Rights and Global Justice Working Paper No. 8, 2005*, sourced at <<http://www.nyuhr.org/docs/wp/Liebenberg%20%20Needs,%20Rights%20and%20Transformation.pdf>> (accessed on 23 March 2006)

Muralidhar, S., *Implementation of court orders in the area of social and economic rights: An overview of the experience of the Indian judiciary*, available at <http://www.humanrightsinitiative.org/jc/papers/j_2004/supplementary_papers/muralidhar.pdf> (accessed on 20 June 2006)

Polinsky, M., and Shavell, S., 'The economic theory of public enforcement of law' *John M. Olin Program in Law and Economics, Working Paper 159* (1998), sourced at <http://papers.ssrn.com/paper.taf?abstract_id=93709> (accessed on 28 July 2006)

Otto, D., and Wiseman, D., (2001) 'In search of "effective remedies": Applying the International Covenant on Economic, Social and Cultural Rights to Australia' Faculty of Law, the University of Melbourne, Public Law and Legal Theory Working Paper No.15, sourced at <http://papers.ssrn.com/paper.taf?abstract_id=270908> (accessed on 10 April 2006)

Robertson, B., 'Economic, social and cultural rights: Time for a reappraisal' *New Zealand Business Roundtable* September 1997 First published in 1997 by New Zealand Business Roundtable, Wellington, New Zealand, sourced at <<http://www.nzbr.org.nz/documents/publications/publications-1997/nzbr-rights.doc.htm>> (accessed on 23 January 2005).

Smith, L., *Restitution: The heart of corrective justice* available at <<http://www.utexas.edu/law/conferences/restitution/smith.pdf>> (accessed on 24 June 2006)

South Africa justice sector and the rule of law, Report by AfriMAP and Open Society Foundation for South Africa, sourced at <http://www.soros.org/resources/articles_publications/publications/sajustice_20060223/afriMAPreport_20060223.pdf> (accessed on 18 October 2006)

Submissions of the Community Law Centre and IDASA in *Minister of Health and Others v Treatment Action Campaign and Others*, sourced at <http://www.communitylawcentre.org.za/ser/docs_2002/TAC_MTCT_Case_Heads_of_Arguments.doc> (accessed on 22 February 2006)

Sullivan, S., 'The role of the independent judiciary' in *Freedom Paper No. 4*, sourced at <<http://usinfo.state.gov/products/pubs/archive/freedom/freedom4.htm>> (accessed on 19 January 2006)

Bibliography

Sundram, C., 'Wyatt v. Stickney –A Long Odyssey reaches an end' available at <http://www.aamr.org/Reading_Room/pdf/wyatt.shtml> (accessed on 6 September 2006)

Sunstein, C., 'Social and economic rights? Lessons from South Africa' *John M. Olivin Law and Economic Working Paper No. 124, Public Law and Legal Theory Working Paper No 12*, (Preliminary draft) sourced at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=269657> (accessed on 20 May 2005)

The Founder's Constitution, document, Volume 4 Document 4 available at <http://press-pubs.uchicago.edu/founders/documents/amendV_due_process4.html> (accessed on 22 June 2006)

Vallentyne, P., *Distributive Justice* at < [http://www.missouri.edu/~klinechair/online%20papers/distributive%20justice%20\(handbook\).doc](http://www.missouri.edu/~klinechair/online%20papers/distributive%20justice%20(handbook).doc)> (accessed on 24 June 2006)

Vikas, J., 'Social change and public interest litigation in India' (2005), Independent Media Center, India, available at <<http://www.india.indymedia.org/en/2005/03/210205.shtml>> (accessed on 30 November 2005)

Zulman, R., 'South African judges and human rights' paper presented to the *Supreme Court History Society* in the Banco Court, Supreme Court, Queensland, Australia on 4 July 2001 sourced at <<http://www.courts.qld.gov.au/publications/articles/speeches/2001/Zelman040701.pdf>> (accessed on 8 February 2006).

7. UNPUBLISHED PAPERS

Australian Law Reform Commission (ALRC) Issues paper 22 *Review of the adversarial system of litigation: Rethinking family law proceedings*

Chirwa, D., *Towards binding economic, social and cultural rights obligations of non-state actors in international and domestic law: A critical survey of emerging norms* (2005) [LLD, University of the Western Cape]

Cohen. M., *How supervisory jurisdiction can save socio-economic rights in South Africa*, LLM dissertation [unpublished] University of Cape Town, February 2005 [on file with author]

Kanyehamba, G., 'The culture of constitutionalism and the doctrine of separation of powers' Paper presented at the *Public Lecture on State of Separation of Powers in Uganda*, organised by the Human Rights and Peace Centre, Faculty of Law, Makerere University [Unpublished, on file with author]

Bibliography

Langa, P., 'The role of the court in the protection of human rights' paper delivered at a seminar titled *Democracy and Human Rights : A Southern African Perspective* organised by the Human Sciences Research Council (HSRC) in conjunction with the Foundation for Human Rights (FHR) as part of the launch of the *Human Rights Lecture Series*, 7 September 2005 [on file with author]

Mbazira, C., and Sloth-Nielsen, J., 'Incy Wincey spider went climbing up again.... (Re) assessing children's socio-economic rights and section 28 (1) (c) of the Constitution', paper presented at *Conference on Law and Transformative Justice in Post-Apartheid South Africa*: 04 – 06 October 2006, Hosted by the Nelson R Mandela School of Law, University of Fort Hare

Pieterse, M., *A benefit-focused analysis of constitutional health rights* PhD thesis submitted to the University of Witwatersrand [December 2005]

Sunstein, Cass R., 'Social and Economic Rights? Lessons from South Africa' (May 2001). *Public Law Working Paper No. 12; University of Chicago Law & Economics, Olin Working Paper No. 124.* Sourced at <http://papers.ssrn.com/paper.taf?abstract_id=269657> (accessed on 27 July 2004)

Trengrove, W., *What is the government spurs court orders?* Paper delivered at A focus on the Last Ten years of South Africa's Democracy Conference in Durban (22 – 25 Jan 2004)

Tushnet, M., *Enforcing Social and Economic Rights* [Unpublished paper on files with author, a summarised version of this paper has been published under the title 'Enforcing socio-economic rights: Lessons from South Africa' in (2005) 6 *ESR Review* pp 2 – 6

Viljoen, F., 'The justiciability of socio-economic and cultural rights: Experience and problems' [Unpublished paper on file with author]

8. NEWSPAPER ARTICLES

Keeton, C., 'Kidney patients are sent home to die' *Sunday Times*, 28 August 2005, at p 13

Liebenberg, S., 'Making a pro-poor Constitution' *Mail & Guardian* 12 – 18 May 2006, pp 26 – 27

Munoz, C., 'Stand up for your rights' *The Economist* 22 March 2007

Nashira, D 'Apology gets teen off murder rap', *Sunday Times*, 6 August 2006

Stolley, G., 'Aids death toll climbs at Durban prison' *Mail & Guardian online*, 11 September 2006

Bibliography

Stolley, G., 'Prisons dept reveals plan for Aids drugs' *Mail & Guardian online*, 11 September 2006

'Aids criticism: Manto hits back' *Mail & Guardian online* 11 September 2006

9. LEGISLATION

Abolition of Civil Imprisonment Act, No. 2 of 1977

South African Union Act, 31 May 1910

Supreme Courts Act No. 59 of 1959

South African Republic Constitution, Act No. 32 of 1961

Republic of South Africa Constitution, Act No. 110 of 1983

Constitution of Canada, Constitution Act, 1982

Social Assistance Act, No. 59 of 1992

Interim Constitution of the Republic of South Africa, Act No. 200 of 1993

Constitutional of the Republic of South Africa, No. 108 of 1996

National Housing Act, No. 107 of 1997

Promotion of Administrative Justice Act, No. 3 of 2000

State Liability Act of 1957, No. 20 of 1957

Rules of the Constitutional Court, promulgated under Government Notice R1675 in Government Gazette 25726 of 31 October 2003, rule 8(1).

10. CASE-LAW

African Commission on Human and Peoples' Rights

The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, Communication No. 155/96 of the African Commission on Human and Peoples' Rights *Fifteenth Annual Report of the African Commission on Human and Peoples' Rights, 2001 – 2002* pp 47 – 73

Purohit and Moore v The Gambia, Communication No. 24/2001, *Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, 2002 – 2003*, at pp 62 – 74

Rakesh Chantl v State of Bihar [1986] (Supp.) S.C.C. 576

Canada

Doucet-Boudreau v Nova Scotia [2003] 3 S.C.R 3

Eldridge and Others v. British Columbia and Others (Attorney General) [1997] 3 SCR 624, 151 D.L.R. (4th) 577

Gould v Attorney General of Canada, [1984] 2 S.C.R. 124

Howard v. Stony Mountain [1984] 2 FC 642 (CA)

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

Lavoie v Nova Scotia (Attorney General) 47 D.L.R. (4th) 586; 1988 D.L.R. LEXIS 1108

Mahe v Alberta (1985), 22 D.L.R. (4th) 24, 39 Alta. L.R. (2d) 215 (Q.B.)

Marchand v Simcoe (1986), 55 O.R (2d) 638

McKinney v. University of Guelph (1990), 76 D.L.R. (4th) 545, [1990] 3 S.C.R. 229
Operation Dismantle Inc. v Canada [1985] 1 S.C.R. 441

R v Big M Drug Mart Ltd, 1985 18 DLR (4th) 321 [Canada]

R v Oakes, [1986] 1 SCR 103, 26 DLR (4th) 200 [Canada]

Saskatchewan Human Rights Commission v. Kodellas (1989), 60 DLR (4th)

Société des Acadiens v Association of Parents [1986] 1 S.C.R. 549; (1984), 8 D.L.R. (4th) 238; (1983), 48 N.B.R. (2d) 361

Vorvis v ICBC (1989) 58 DLR (4th) 193 (SCC)

India

Metha v Union of India, (1989) 2 S.C.C. 179

Paschim Banga Khet Mazdoor Samity v State of West Bengal [1996] ICHRL 31 (6 May 1996) [Supreme Court of Indian]

People's Union for Democratic Rights and Others v Union of India and Others (1982) 3 SCC 235

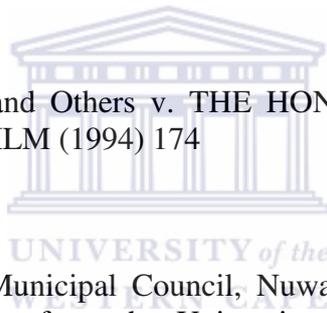
Vellore Citizens Welfare Forum v Union of India WP 914/1991, available at <http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep3237.html> (accessed on 12 September 2006)

Namibia

Ex parte Attorney General, Namibia: In Re Corporal Punishment by Organs of State 1991 (3) SA 76 (NmSC)

Philippines

JUAN ANTONIO OPOSA and Others v. THE HONOURABLE FULGENCIO S. FACTORAN and another 33 ILM (1994) 174



Sri Lanka

Deshapriya and Another v Municipal Council, Nuwara Elye and Others [1996] 1 CHRD 115, accessed on line from the University of Minnesota Human Rights Library, at <http://www1.umn.edu/humanrts/research/srilanka/caselaw/Speech/Deshapriya_v_Municipal_Council_Nuwara_Eliya.htm> (accessed on 3 August 2006)

South Africa

August and Another v The Electoral Commission and Others 1999 (3) SA 1 (CC)

Bankorp Trust Bpk v Pienaar 1993 (4) SA 215 (N)

Brink v Kitshoff NO 1996 (2) SA 197 (CC)

Brown v Leyds N.O. (1897) 4 Off. Rep. 112

Burman and Others v Davis (1920) 41 NPD 273

Bushbuck Ridge Border Committee and Another v Government of the Northern Province and Others 1999 (2) BCLR 193 (T)

Bibliography

Cabinet for the Territory of South West Africa v Chikane and Another 1989 (1) SA 349 (A)

Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 369 (A)

Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)

Centre for Child Law and Others v MEC for Education and Others Case No. 19559/06 [Unreported]

Christian Education South Africa v Minister of Education, 2000 (4) SA 757 (CC)

Candid Electronics (PTY) LTD v Merchandise Buying Syndicate (PTY) LTD 1992 (2) SA 459 (C)

City Council of Pretoria v Walker 1998 (3) BCLR 257 (CC)

City of Cape Town v Neville Rudolph and Others 2003 (11) BCLR 1236 (C)

Cape Town Municipality v Abdulla 1974 4 SA 428 (C)

City of Johannesburg v Rand Properties (Pty) Ltd and Others 2006 (6) BCLR 728 (W)

Daniels v Campbell NO 2004 (5) SA 331 (CC)

Dikoko v Mokhatla 2007(1) BCLR 1 (CC)

De Lange v Smuts NO and Others 1998 (3) SA 785 (CC)

De Lille v Speaker of the National Assembly 1998 (3) SA 430 (C)

Doctors for Life International v The Speaker of Parliament and Others, CCT 12/5 [Unreported]

Du Plessis v De Klerk 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC)

Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as amicus curiae) 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC)

East Zulu Motors (Pty) v Empangeni/Ngwlezane Transitional Local Council and Others 1998 (2) SA 61 (CC); 1998 (2) BCLR 1 (CC)

EN and Others v Government of RSA and Others 2007 (1) BCLR 84 (D)

Executive Council, Western Cape Legislature and Others v President of the RSA and Others 1995 (10) BCLR 1289 (CC)

Fraser v Children's Court, Pretoria North 1997 (2) SA 261 (CC)

Bibliography

Fedsures Life Assurance and Others v. Greater Johannesburg Transitional Metropolitan Council and others, 1998 (2) SA 1115 (SCA)

Ferreira v Levin NO, (1996) 1 SA 984 (CC)

Fose v Minister of Safety and Security 1997 (7) BCLR 851 (CC)

Fourie v Uys 1957 (2) SA 125 (C)

Gibb v Nedcor Limited [1997] 12 BLLR 1580 (LC)

Government of the Republic of South Africa v Grootboom & Others 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC)

Government of the Republic of Bophuthatswana and Others v Segale 1990 (1) SA 434 (BA)

Grootboom v Oostenberg Municipality and Others 2000 (3) BCLR 277 (c)

Harris v Minister of Interior 1952 (2) S.A. 423 (A.D)

Hoffman v South African Airways 2001 (1) SA 1 (CC)

In re Certification of the Constitution of the Republic of South Africa (First Certification case) 1996 (10) BCLR 1253 (CC)

In re Dube 1979 (3) SA 820 (N)

Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 294

Jayiya v MEC for Welfare, Eastern Cape 2004(2) SA 611, [2003] 2 All SA 223 (SCA)

Jaftha v Schoeman and others; Van Rooyen v Stoltz and Others [2003] 3 All SA 690 (C)

Jooste v Score Supermarkets Trading (Pty) Ltd 1999 (2) SA 1 (CC)

Jordan v Penmill Investments CC 1991(2) SA 430 (E)

Khosa and Others v Minister of Social Development; Mahlaule and Another v Minister of Social Development and Others 2004 (6) BCLR 596 (CC)

Larbi-Odam and Others v MEC for Education (North West Province) and Another 1997 (12) BCLR 1655 (CC)

L F Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C)

Minister of Finance v Van Heerden 2004 (11) BCLR 1125 (CC)

Bibliography

- Minister of Health and Others v. Treatment Action Campaign 2002 (5) SA 721 (CC)
- Minister of Home Affairs v Fisher, (1980) AC 319, (1979) 3 All ER 21, (1979) 2 WLR 889
- Minister of Home Affairs v National Institute of Crime Prevention (Nicro) and Others 2004(5) BCLR 445 (CC)
- Minister of Interior and Another v Harris and Others 1952 (4) SA 769 (A)
- Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another 2001 (3) SA 1151 (CC)
- Modder East Squatters v Moddeklip Boerdery; v President of Republic of South Africa v Modderklip Boerdery 2004 (8) BCLR 821 (SCA)
- Modderklip Boerdery (Pty) Ltd and Others v President of RSA and Another 2005 (8) BCLR 786 (CC)
- Mohamed and another v President of the Republic of South Africa and Others, 2001(3) SA 893
- Mpangele & Another v. Both 1982(3) SA 638 (CC)
- National Coalition for Gay & Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)
- National Transport Commission v Chetty's Motor Transport (Pty) Ltd 1972 (3) SA 726 (A)
- New National Party v Government of the Republic of South Africa 1999 (3) SA 191
- Nienaber v Stuckey 1946 AD 1049
- Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape 2001(2) SA 609 (E)
- NK v Minister of Safety and Security [2005] JOL 14864 (CC)
- Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others 2001 (10) BCLR 1039 (A)
- Pharmaceutical Manufacturers of SA; In Re: Ex parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC)
- Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others Case 603/05 [unreported]

Bibliography

- Port Elizabeth Municipality v Various Occupiers Case 2005 (1) SA 217 (CC)
- President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC)
- Pretoria City Council v Walker 1998 (2) SA 363
- President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others 2005 (8) BCLR 786 (CC)
- Prince v President of the Law Society of the Cape of Good Hope, 2002 (3) BCLR 231 (2002 (2) SA 794) (CC)
- R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd [1999] 2 AC 418 [United Kingdom]
- Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail 2005 (4) BCLR 301 (CC)
- Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd t/a Weider Health & Fitness Centre [1996] 4 All SA 29 (C)
- Residents of Bon Vista v Southern Metropolitan Council 2002 (6) BCLR 625 (W)
- Rudolph and Another v. Commission for Inland Revenue and others, 1996 (2) SA 886 (A)
- S v Beyers 1968 3 SA 70 (A)
- S v Bhulwana 1996 (1) SA 388 (CC)
- S v Makwanyane 1995 (3) SA 391 (CC)
- S v Marwane 1982 (3) SA 717 (A)
- S v Joyce Maluleke and Others Pretoria High Court 83/04, 13 June 2006 [Unreported]
- S v Thebus 2003 (6) SA 505 (CC)
- S v Z and 23 similar cases 2004 (4) BCLR 410 (E)
- S v Zuma, 1995 (4) BCLR 401 (CC)
- Sachs v Minister of Justice 1934 AD 11
- SAPU & another v National Commissioner, SAPS & another [2005] JOL 16030 (LC)
- Shidiack v Union Government 1912 AD 746
- Sibiya and Others v DPP, Johannesburg High Court and Others, 2006 (2) BCLR 293 (CC)

Bibliography

- Sibiya and Others v DPP, Johannesburg High Court and Others [2006] ZACC 22
- Sikuza v Minister of Water Affairs and Agriculture and another [2001] JOL 8486 (Tk)
- Soobramoney v Minister of Health (KwaZulu-Natal) 1998 (1) SA 765 (CC)
- Speaker of the National Assembly v De Lille 1999 (4) SA 863 (SCA)
- Setlogelo v Setlogelo 1914 AD 221
- Steyn v The State 2001 (1) BCLR 52 (CC); 2001 (1) SA 1146 (CC)
- Struben & ors v Cape Town District Waterworks Co (1892) 9 SC 68
- TAC v MEC for Health, Mpumalanga and Minister of Health, TPD, Case No: 35272/02 [unreported]
- TAU v Minister of Agriculture & Land Affairs & others [2003] JOL 10697 (LCC)
- The City of Johannesburg v Rand Properties (PTY) LTD and Others Case No. 253/06 (Supreme Court of Appeal) [Unreported]
- The National Gambling Board v Premier of Kwazulu-Natal and Others 2002 (2) SA 715 (CC)
- The State v Gibson (1898) 15 Cape Law Journal
- Union Government v Union Steel Corporation, 1928 AD 220
- United Democratic Movement v The President of the Republic of South Africa and others, 2002 (11) BCLR 1179 (CC) para 11
- Van Rooyen and Others v S and Others 2002 (8) BCLR 810 (CC)
- Walker v Pretoria City Council 1998 (3) BCLR 257 (1998 (2) SA 363) (CC)
- United Kingdom**
- American Cyanamid v Ethicon [1975] 2 WLR 316
- Associated Provincial Picture Houses, Limited v Wednesbury [1947] 2 All ER 680; [1948] 1 KB 223
- Wheeler v Leicester City Council [1985] AC 1054 [United Kingdom]

Bibliography

United States of America

- Bivens v Six unknown Federal Narcotics Agents 430 U.S. 388 (1971)
- Brown v Board of Education 349 US 294 (1955)
- Carey v Phiphus, 435 US 247
- Carlson v Green 447 U.S. 14 (1980)
- Davis v Passman 44 U.S 228 (1979)
- Gilligan v. Morgan, 413 U.S. 1 (1973)
- Green v School Board of New Kent County, 391 US 430 (1968)
- Harlow v. Fitzgerald United States of America 457 US 800 (1982)
- Hart v Community School Board 383 F.Supp 699 (E.D.N.Y. 1974)
- Liddle v Board of Education of the City of St. Louis 491 F. Supp. 351 (E.D.Mo.1980)
- Marbury v Madison 5 US 137, 2 LED 60 (1803)
- Memphis Community School District V Stachura, 477 US 299 (1986)
- Milliken v Bradley, 433 US 267 (1977)
- Mills v Board of Education 343 F. Supp. 866 (DC 1972)
- Newport v Facts Concerts Inc 453 US 241
- Pennsylvania Association for Retarded Children v. Pennsylvania 334 F Supp. 1257 (E.D. Pa. 1971)
- Porter v Warner Co. 328 U.S. 395 (1946)
- Swann v Charlotte-Mecklenburg Board of Education F. Supp. 1358 (W.D.N.C)
- United States v Caroline Products 304 US 144; 58 S. Ct. 778
- Wyatt v Stickney 325 F. Supp 781 (M.D. Ala 1971), 334 F. Supp. 1341 (M.D. Ala 1971), 344 F. Supp. 373 (M.D. Ala 1972)

11. INTERNATIONAL TREATIES AND DOCUMENTS

European Convention on the Protection of Human Rights and Freedoms, adopted on 4 November 1950, Rome

Human Rights Committee, General Comment No. 03: *Implementation at the national level (Art. 2)*, 29 July 1981 in *Compilation of general comments and general recommendations adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.7. 12 May 2004

International Covenant on Economic, Social and Cultural Rights, adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York, came into force on 3 January 1976

International Covenant on Civil and Political Rights, adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York, came into force on 23 March 1976

Optional Protocol to the International Covenant on Civil and Political Rights adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York, came into force on 23 March 1976.

Report of the independent expert on the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, Commission on Human Rights Fifty-eighth session, E/CN.4/2002/57, 12 February 2002

Report of Open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc E/CN.4/2004/44, dated 15 March 2004

Committee on Economic, Social and Cultural Rights, General Comment 3, *The nature of States parties' obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003)

Committee on Economic, Social and Cultural Rights General Comment 4 *The right to adequate housing* (article 11 (1)) Sixth session, 1991) U.N. Doc E/1992/23 reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003)

Committee on Economic, Social and Cultural Rights, General Comment 9, *The domestic application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 54 (2003)

Bibliography

Committee on Economic, Social and Cultural Rights, General Comment 12, *The right to adequate food* [article 11] (Twentieth session, 1999), U.N. Doc. E/C.12/1998/5 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 54 (2003)

Committee on Economic, Social and Cultural Rights, General Comment 14, *The right to the highest attainable standard of health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003)

Committee on Economic, Social and Cultural Rights, General Comment 15, *The right to water* (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 105 (2003)

Concluding Observations adopted by the Committee on Economic, Social and Cultural Rights at its 57th meeting (nineteenth session) held on 4 December 1998

Inter-American Commission on Human Rights Annual Report, 1993 OEA/Ser.L/V.85, Feb 1994

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, adopted by a group of experts at Maastricht, 22 – 26 January 1997, text in Ramcharan, B., (ed.) *Judicial protection of economic, social and cultural rights* (2005) Martinus Nijhoff Publishers pp 553 – 562.

Note no. 143/06 made by South Africa to the President of the United Nations General Assembly 2 May 2006 annexed to document detailing the list of candidates for election to the Human Rights Council, UN General Assembly 60th Session: *Election and Appointments. Subsidiary Organs and other elections*, available at <<http://www.un.org/ga/60/elect/hrc/>>