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**SUPERVISOR: LUKE CLEMENTS**

**ENFORCEABILITY OF SOCIO-ECONOMIC RIGHTS**

**Ayşe Çakırca Rutbil-C1152607**

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## Summary

The enforceability of socio-economic rights is still a matter of discussion for legal scholars. Although some scholars argued that social and economic rights cannot be legally enforced, a large amount of case law allows us to assess that socio-economic rights are subject to enforcement in the same manner as civil and political rights. Artificial separations of the two sets of rights do not occur in real cases. As stated by ECHR in *Airey*, there is no water-tight division separating civil and political rights from socio-economic rights. This dissertation shows that claims that social and economic rights are vague, inherently of a positive nature, resource dependent and that courts are not institutionally competent to enforce them have been widely discredited. Whether social rights are enforceable is not the key issue, but rather how they can be consistently adjudicated with measure of integrity, respecting the institutional nature of adjudicatory bodies and the call for justice inherent in human rights.

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**"[W]hen deprived of economic, social and cultural rights, man does not represent the human person whom the**

## Universal Declaration regards as the ideal of the free man."<sup>1</sup>

### I-INTRODUCTION

After the adoption in 1948 of the UDHR<sup>2</sup>, the General Assembly instructed the Commission on Human Rights to commence the drafting of a single covenant on human rights. However, with the onset of the cold war and the rise of new nation states (with their own priorities) it became impossible to incorporate all rights within one document. The western States put emphasis on civil and political rights whereas the focus of the socialist and newly independent States was on economic, social and cultural rights and the right to self determination<sup>3</sup>. The rationale offered for dividing the two groups of rights was that they allegedly belonged to two disparate categories of rights and would require different methods of implementation although the decision to split the covenant was a product of ideological divisions within the UN that also enabled certain states to ratify one covenant and not the other<sup>4</sup>.

Traditional separation of categories of human rights called for a rethinking of the rationale behind the decision of separate covenants for each of the groups of rights in Vienna Declaration in 1993<sup>5</sup>. The indivisibility of human rights is a core concept that no human right can be fully realized without fully realizing all other human rights. Therefore, it has the practical consequence that countries cannot pick and choose among rights. The political aim of the statement about indivisibility in the Vienna Declaration was to defend economic and social rights, to say that countries endorsing civil and political rights are also committed to endorsing economic and social rights<sup>6</sup>.

As noted by the CESCR in its General Comment No. 9 on the Domestic Application of the Covenant<sup>7</sup>:

“The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society”.

While states less favourable to enforceable socio-economic rights such as Australia, the U.S. and the U.K. are now more cautious about insisting in simplistic terms that social and economic rights are not justiciable, they continue to question the value of a complaints and adjudication procedure for many aspects of social and economic rights on the basis of the alleged “vagueness” of those rights and the inappropriateness of interference with governments’ decisions about socio-economic policy<sup>8</sup>.

On the other hand, over the last decade, apex courts in Canada, India, and South Africa which have traditionally been viewed as socio-economic rights friendly have issued judgments fundamentally at variance with the meaningful protection of socio-economic rights. This jurisprudential turn can be understood as part of a de facto harmonisation of constitutional rights protection in the era of neo-liberal globalisation. These national courts, although dealing with

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1G.A. Res. 421E (V), U.N. Doc. A/1775 (Dec. 4, 1950).

2Universal Declaration of Human Rights

3J Rehman, *International Human Rights Law A Practical Approach*(Pearson Education, 2003), 62-63.

4S Koshy, "From Cold War to Trade War: Neocolonialism and Human Rights", *Social Text* 58(1999), Vol. 17, No.1, p. 6.

5Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993, para. 5. The Declaration states that : “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”

6J W Nickel, "Rethinking Indivisibility: Towards A Theory of Supporting Relations Between Human Rights", 30 *Human Rights Quarterly* (2008), 984- 985.

7CESCR, General Comment 9, The Domestic Application of the Covenant (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), para. 10.

8A Nolan, B Porter, M Langford, "The Justiciability of Social and Economic Rights: An Updated Appraisal" CHRGJ Working Paper No. 15, 2007, 2.

idiosyncratic domestic constitutional systems, have nonetheless begun to articulate analogous conceptions of fundamental rights which are atomistic, 'market friendly' and, more broadly, congruent with the narrow neo-liberal conception of rights, and consequently antithetical to the protection of socioeconomic rights<sup>9</sup>. Therefore, the debate over the enforceability of economic, social and cultural rights continues and includes a number of disagreements as to the nature and normative character of the two sets of rights.

The enforceability debates focus on claims that social and economic rights are vague, inherently of a positive nature and resource dependent. Moreover, there are legitimacy-based objections on whether courts are institutionally competent to enforce them<sup>10</sup>.

This dissertation will, as a first step, touch on the debate whether the socio-economic rights should be enforceable by focusing on claims that social and economic rights are vague, inherently of a positive nature, resource dependent and that courts are not institutionally competent to enforce them. Afterwards, it will deal with the issue of content search for adjudicating these rights. Finally, the leading cases from South Africa, the ECHR and Turkey in the area of social and economic rights and the views of legal scholars will be considered.

## II-ENFORCEABILITY DEBATE

### 1. Vagueness

Alston points to the vagueness of socio-economic rights and the resulting lack in the clarity as to their implication as a key problem for the enforceability of such rights<sup>11</sup>. However, as to abstract nature of economic, social and cultural rights, they are phrased no differently than civil and political rights, the right to freedom of speech is no more concrete in expression than right to social security. Many civil and political rights, such as the right to life, the right to liberty and security of the person or the rights to 'human dignity' and 'privacy', are vague and open-textured in their formulation.<sup>12</sup> It is Courts duty giving rights concrete meaning under the individual circumstances and historical developments.<sup>13</sup>

The range of remedies and their availability in various constitutional contexts is not merely a textual matter, but reflects the courts' role in giving meaning to that system of ambiguous, normative

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9 P O'Connell, "The Death of Socio-Economic Rights" *The Modern Law Review* (2011) 74(4) 532-554. O'Connell claimed that Irish Court decisions in *Sinnott v Minister for Education* (Sinnott) and *TD v Minister for Education* cases, the Canadian Court's decisions in *Auton v British Columbia* and *Chaoulli* cases and the South African Court's decisions in *T.M.A. Pai Foundation v State of Karnataka*, *Narmada Valley* and *Tehri Valley* cases reflects their new approach on the socio-economic adjudication.

10A Nolan, B Porter, M Langford, "The Justiciability of Social and Economic Rights: An Updated Appraisal" CHRGJ Working Paper No. 15, 2007, 4. Authors state that: "The justiciability debate, seen from the perspective of those whose rights are at stake, is reminiscent of the children's story called "The Little Engine that Could," in which passengers stranded in a broken down train seek the help of various train engines to get them over a mountain. The first, powerful engine who is asked for assistance responds that it is not its role. "I could, if I would, but I won't." That is the 'legitimacy' concern, that it is not the role of courts to deal with social and economic problems and that to do so would be an inappropriate use of judicial powers. The second engine, lacking in self-confidence, says: "I would, if I could, but I can't." That is the competency concern, that courts lack the institutional capacity to deal with social and economic rights violations. The third engine, the only engine to really consider the plight of the passengers, focuses on the importance of the task and manages to pull the train over the mountain."

11 M F Tinta, "Justiciability of Economic, Social, and Cultural Rights in the Inter American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions" 29 *Human Rights Quarterly* (2007), 433. citing Philip Alston, No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant, in *The Future of Human Rights Protection in a Changing World* 86 (Asbjorn Eide & Jan Helgesen eds., 1991).

12A Nolan, B Porter, M Langford, "The Justiciability of Social and Economic Rights: An Updated Appraisal" CHRGJ Working Paper No. 15, 2007, 9.

13 M Langford, "The Justiciability of Social Rights: From Practice to Theory" in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press 2008), 30.

values<sup>14</sup>. In *Carmichele v Minister of Safety and Security*, the South African Constitutional Court observed<sup>15</sup>:

"Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: 'The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the Legislative, Executive and Judiciary'. The same is true of our Constitution."

The South African Courts has understood its role stating that: "Socio-economic rights cannot be exist only on paper and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights justiciable, but how to enforce them in a given case."<sup>16</sup>

As Liebenberg has pointed out that it is through recourse to the conventions of constitutional interpretation and their application to the facts of different cases that the specific content and scope of a right emerges with greater clarity and the fact that the content of many social and economic rights is less welldefined than civil and political rights is more a reflection of their exclusion from processes of adjudication than of their inherent nature<sup>17</sup>.

## 2.Negative Rights versus Positive Rights

Human rights were frequently allocated between the two categories of negative and positive liberties. The distinction between negative and positive duties mirrors the traditional division between civil and political rights, which restrain the state from intruding; and socio-economic rights, which elicit protection by the state against want or need. According to the proponents of the positive/negative dichotomy economic, social and cultural rights are regarded as positive, resource demanding rights subject to a progressive realization. Civil and political rights are often considered negative, averting rights and since non-interference is considered cost-free<sup>18</sup>.

UN Committee on Economic, Social and Cultural Rights accepted that all rights have a positive as well as a negative component and that they can be better conceptualised as a triad of obligations: to 'respect' which this brings with it the idea of non-interference and states should refrain from interfering with the enjoyment of the right, 'protect' which requires states to have laws and enforcement procedures that prevent rights abuses occurring by third parties or other external factors and 'fulfil' which is concerned with the progressive realisation of the right and requires states to allocate resources and take positive steps to ensure that everyone within the state is able to enjoy the right<sup>19</sup>.

According to Fredman, it is impossible to distinguish between rights on the basis of whether they give rise to positive duties or duties of restraint. Far more useful is to consider each right as giving rise to a cluster of obligations, some of which require the State to abstain from interfering, and others which entail positive action and resource allocation. Debating the legitimacy of social rights through the prism of rights rather than duties is, Fredman demonstrates, a product of intellectual

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14T J Bollyky "R if C > P+B: A Paradigm for Judicial Remedies of Socio-economic Rights Violations" (2002) 18 *SAJHR*, 178.

15*Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para.54

16*Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) para.20

17S Liebenberg, "Social and Economic Rights" in M. Chaskalson et al (eds.), *Constitutional Law of South Africa* (Cape Town; Juta, 1996) 41-11.

18 I E Koch, "The Justiciability of Indivisible Rights", 72 *Nordic Journal of International Law* (2003), 6.

19Committee on Economic, Social and Cultural Rights: Report on the Fifth Session, Supp. No. 3, Gen. Comment No. 3, U.N. Doc. E/1991/23 (1990).

confusion<sup>20</sup>.

On a practical level, the question of whether or not a right is infringed should not depend on whether the situation complained of is seen as state action rather than inaction. Where people with disabilities are barred from benefiting from health services, this will amount to a violation of their right to health care services regardless of whether or not this 'barring' is the result of a facially discriminatory exclusionary policy or, alternatively, of a discriminatory failure to take positive measures to provide access. Whether prisoners are actively abused or, alternatively, not provided with adequate food and clothing ought to be irrelevant to the determination of whether their rights have been violated. Whether a right has been infringed, and whether it is to be protected and enforced by the court, ought to depend on the effect of the impugned law or policy, rather than on whether the measure at issue is categorised as an instance of state action or inaction<sup>21</sup>.

In the Indian Supreme Court case of *Olga Tellis v Bombay Municipal Corporation*<sup>22</sup>, the right to housing was defined in terms of freedom from state interference. Similarly, the South African Court held that the right to housing contains at the very minimum a negative obligation in *Grootboom*<sup>23</sup>, and the Court used the same reasoning in *TAC*<sup>24</sup> stating that there is a negative obligation on the state in relation to the right to health. Thus the courts are capable of implementing economic, social and cultural rights in a negative manner. Conversely, in the *Airey Case*<sup>25</sup>, the state was required to expend money on free legal aid so as to protect the right to fair trial in civil cases. In *Askov*<sup>26</sup>, the Canadian court has confirmed that the right to be tried within a reasonable time can be formulated positively when it held that remedying the problem might require the government to invest in the court structure although it did not specifically order the state to do so. Thus, both sets of rights may be defined in a positive or negative manner<sup>27</sup>.

In *August v Electoral Commission*<sup>28</sup>, the South African Constitutional Court concluded that 'the vote of each and every citizen is a badge of dignity and of personhood'. The Court held that the Commission had failed to fulfil its constitutional obligation and statutory duty 'to take reasonable

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20S Fredman, "Human Rights Transformed: Positive Duties and Positive Rights", *Public Law* (2006), 500.

21A Nolan, B Porter, M Langford, "The Justiciability of Social and Economic Rights: An Updated Appraisal" CHRGI Working Paper No. 15, 2007, 10.

22*Olga Tellis v. Bombay Municipality Corporation* [1985] 2 Supp SCR 51 (India); (1987) LRC (Const) 351. The case dealt with the rights of slum and pavement dwellers who were homeless persons residing on public property. The Court found that the right to life would include the right to livelihood. If such a right was not recognized then, the Court argued, "the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation." In addition to highlighting the importance of this right, the Court drew attention to the problems of poverty and challenges that squatters face. The right to livelihood was not, however, absolute. No person, it was held, "has the right to make use of a public property for private use... [and] it is erroneous to contend that the pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon." Moreover, Section 314 of the Bombay Municipal Corporation Act, it was held, ought to be interpreted to enable the Commissioner to dispense with the notice requirement in exceptional circumstances, though ordinarily, because all persons have a right to be heard, notice should be served. Even though persons may have no right to reside on public spaces, the serving of notice could, for instance, allow persons to reply and demonstrate that no encroachment had in fact taken place. Most importantly, however, notice should be served because "the trespasser should be asked and given a reasonable opportunity to depart before force is used to expel him." In other words, it would give the squatter sufficient time to find alternate accommodation. Since notice had not been served in this case, the Court held that no eviction should take place till then end of the monsoon season.

23 *Government of South Africa v Grootboom* (2000) 11 B.C.L.R. 1169, para. 34. Actually, in *Grootboom*, the South African Court emphasized that both a negative and positive obligation flowed from the social and economic rights contained in the right to housing under the Constitution which one hand mandated the state and other entities to desist from preventing or impairing the right of access to adequate housing, on the other hand, created a positive duty to ensure that the state would act decisively in order to provide the basic necessities of life for those living in the most extreme conditions of poverty.

24 *Treatment Action Campaign v Minister for Health* (2) 2002 (5) S.A. 721 (CC).

25 *Airey v. Ireland* [1979] 2 E.H.R.R. 305.

26 *Askov v. R.* (1990) 2 S.C.R. 1199.

27 I. Wall, "The Aspirational Nature of Economic, Social and Cultural Rights: An Examination of an Unsound Case, The Logical and Factual Misconception of Rights" [2004] *Cork Online Law Review*, 6.

28 *August v Electoral Commission* 1999 (3) SA 1 (CC).

steps to create the opportunity to enable eligible prisoners to register and vote'. The Court ordered the respondents to 'make all reasonable arrangements necessary to enable the applicants ... to register as voters' and to 'make all reasonable arrangements necessary to enable the applicants and other prisoners ... to vote at the forthcoming general election'.

Recently, the Canadian Supreme Court has pointed out the superficiality of the negative/positive obligation distinction in *Gosselin*<sup>29</sup>, by stating that as a theory of the Charter as a whole, any claim that only negative rights are constitutionally recognised is patently defective. The rights to vote, to trial within a reasonable time, to be presumed innocent, to trial by jury in certain cases, to an interpreter in penal proceedings, and minority language education rights to name but some, all impose positive obligations of performance on the state and are therefore best viewed as positive rights. By finding that state has a positive obligation in certain cases to ensure that its labour legislation is properly inclusive.

As can be seen, socio-economic rights are not only capable of being expressed positively or negatively, but they can also be enforced by the courts despite being framed as a positive right<sup>30</sup>. However, it is accepted that social and economic rights often require relatively greater state action for their realisation than do civil and political rights, this difference separates the two sets of rights more in terms of degree than in kind<sup>31</sup>.

### 3. Separation of Powers and Resource Allocation

The separation of powers doctrine can be defined in the following terms: '... there are three distinct functions of government (legislative, executive and judicial) which should be discharged by three separate agencies (legislature, executive, and judiciary), and that no individual should be a member of more than one of them.'<sup>32</sup> Hence, the separation of powers enables the courts to check the activities of the other branches of state. As the doctrine of separation of powers rests on the assumption that power has a tendency to be abused, therefore, in the words of Montesquieu, 'things must be so arranged that power is checked by power'<sup>33</sup>.

Separation of powers aims at enhancing democracy, increasing accountability and efficiency, and protecting the fundamental rights of citizens against state tyranny. Overall accountability is enhanced by the different branches of government monitoring and counterbalancing the exercise of power by one another. It is generally accepted and constitutionally ordained that the legislature has a primary role to play in giving content to human rights through the development of legal and policy frameworks, given that its members are directly elected by the public, the legislature is also the most directly accountable branch of government<sup>34</sup>.

In most jurisdictions, judges are not elected and are thus neither directly accountable to the citizenry in the same way as the legislature, nor indirectly accountable in the same way as the executive. Indeed, the value of judicial independence necessarily implies a lesser degree of public accountability for the judiciary. The institution of judicial review seems necessarily to imply the sacrifice of a measure of direct or representative democracy. These antidemocratic elements are equally present in civil and socio-economic rights matters. However, because of a perception that socio-economic rights cases have greater implications for state resource procurement and spending, they tend to be emphasised more in relation to these types of cases<sup>35</sup>.

It is argued that for reasons of democratic legitimacy, crucial resource allocation decisions are

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<sup>29</sup>*Gosselin v Québec* (Attorney General) (2002-12-19) SCC.

<sup>30</sup> N Jheelan, "The enforceability of socio-economic rights" E.H.R.L.R. 2007, 2, 149.

<sup>31</sup>A Nolan, B Porter, M Langford, "The Justiciability of Social and Economic Rights: An Updated Appraisal" CHRGI Working Paper No. 15, 2007, 7-8.

<sup>32</sup>E. Barendt, "Separation of Powers and Constitutional Government", Public Law, 592 (1995), 601

<sup>33</sup>T Eckhoff, "Impartiality, Separation of Powers, and Judicial Independence", <<http://www.cenneth.com/sisl/pdf/9-1.pdf>> accessed on 10.01.2013.

<sup>34</sup>N W Barber, "Prelude to the Separation of Powers" (2001) 60 *Cambridge LJ* 59, 71-2.

<sup>35</sup>E Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 *SAJHR*, 465-468.

better left in the hands of the legislature and executive, rather than being determined by an unelected judiciary whose membership is usually comprised of individuals from national socio-economic elites and who also lacks the detailed financial and political expertise that other two branches can bring to bear on questions of resource allocation. Any judiciary supervisory role in this area must be restricted because of constitutional separation of public powers<sup>36</sup>.

It can be argued that it is shortsighted to view direct representative democracy as the only 'true' form of democracy and then to characterise all alternative avenues of human rights protection as undemocratic. Virtually every conception of democracy acknowledges that there must be limits to the power of democratically elected bodies. It is simultaneously naive and contrary to the purpose of human rights protection to assume that abuses of democratic power may adequately be corrected only by a future election, or that the citizenry may not participate in governance in ways other than voting in elections<sup>37</sup>.

In South Africa, during the certification proceedings, it was argued that socio-economic rights should not be justiciable because of their budgetary consequences, and accordingly that to entrench socio-economic rights would involve judicial encroachment on legislative and executive terrain. The Constitutional Court dismissed these objections, recognising that they were based in separation-of-powers concerns and that these were concerns that pertained to rights-based judicial review generally rather than to socio-economic rights specifically. It held that 'it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the Courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers'. The court further pointed out that civil and political rights often have budgetary consequences akin to those of socio-economic rights, and concluded that 'the fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion'<sup>38</sup>. These indications that the Constitutional Court rejected a rigid conceptualisation of separation of powers were affirmed by its holding that the Constitutional Assembly 'was afforded a large degree of latitude in shaping the independence and interdependence of government branches' and opted for a form of separation of powers that reflected the 'historical circumstances of [South Africa's] constitutional development', contained checks and balances, and is concerned with 'both the over-concentration of power and the requirement of an energetic and effective, yet answerable, Executive'. The Court further remarked that the 1996 Constitution does not always maintain a strict separation of powers, and that the independence and impartiality of the judiciary is 'crucial' to and 'an essential part of separation of powers'<sup>39</sup>.

It is possible to argue that fundamental rights violations themselves boil down to a breach of democratic principles, hence justifying judicial intervention or that resort to the judiciary is justified when necessitated by a lack of responsiveness on the part of the 'democratic' branches. It is patent that the institution of judicial review may significantly enhance fundamental aspects of democracy<sup>40</sup>. While the separation of powers doctrine is a significant doctrine, it must be applied consistently with other principles, such as the rule of law and, in the case of constitutional democracies, constitutional supremacy. Under the principle of the rule of law, courts must ensure that all rights are subject to effective remedy and that governments are not exempted from the responsibility to uphold and respect rights. According to the principle of constitutional supremacy, the courts are obliged to ensure that

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36L Lester & C O'Conneide, "The Effective Protection of Socio-Economic Rights" in Y Ghai & J Cottrell (eds) *Economic, Social & Cultural Rights in Practice* (London: Interights 2004), p. 20. Authors argued that the judiciary has an important role to play where there exists a sufficiently gross failure to uphold basic socio-economic rights such as the right to equality where the other two branches have comprehensively failed to fulfil their responsibilities, then the least dangerous branch has a duty to intervene.

37M. Pieterse, "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR*, 391.

38 Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA744 (CC), para 77-8.

39 Ibid para. 112-123.

40M. Pieterse, "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR*, 391-392.

the constitution is upheld, and that other branches of government respect and fulfil their constitutional obligations, including those in relation to social and economic rights<sup>41</sup>.

Although Justice Albie Sachs cautioned against binding the democratic hands of the body politic too strongly<sup>42</sup>, *Olga Tellis* and *Grootboom* show that the courts recognise the limits to which they can go. Indian judges in *Olga Tellis*<sup>43</sup> linked the right to life to the right to livelihood and considered that the government had to comply with the law and serve a notice before removing the pavement dwellers. The court did not overstep the line and recognised that it did not have the power to compel the state to provide housing to everybody. Even though a more robust method of enforcement was adopted in *Grootboom*<sup>44</sup>, the court recognised that resource allocation was a matter for government, and ordered it “to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing”. Again in *State of Himachal Pradesh v Parent of a Student of Medical College, Simla*<sup>45</sup>, the judiciary has shown that it is capable of sanctioning any attempt to judicial dictatorship by reminding that the judiciary could not compel Parliament to legislate. This approach is a far cry away from a situation where judges are holding “ultimate power over the purse”<sup>46</sup>.

On the hand, Wall remarks that there is no strict separation of powers in reality since under a strict separation of powers, most rights cannot be guaranteed as they require judicial examination of legislative spending<sup>47</sup>. Therefore, it is critical to challenge the assumption that the implementation of socio-economic rights should be confined to the realm of social policy and administrative process of governments because these rights do not fit the model of judicial enforcement developed for specific civil and political rights. To leave the matter to the unfettered discretion of governments, however democratic they may be, without any possibility of judicial guidance and supervision, defeats the whole purpose of recognising socio-economic rights as international human rights.<sup>48</sup> Decisions about social and economic programmes or policies may have fiscal consequences in areas that were historically defended as the preserve of elected branches of government, but they are also those in which the most disadvantaged and politically marginalised groups will often have the most at stake in terms of personal security and dignity. Seen in this light, judicial review of government actions by courts to ensure that human rights are not violated would seem to be as legitimate in the socio-economic realm as in other areas of governmental action<sup>49</sup>.

In *TAC*<sup>50</sup>, the South African Court reiterated that the separation of powers underlying the Constitution is not absolute and while the branches of government must respect the respective domains of the other branches, this does not mean that Courts cannot and should not make orders that have an impact on policy<sup>51</sup>. Bilchitz states that the way South African courts have been using

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41 A Nolan, B Porter, M Langford, "The Justiciability of Social and Economic Rights: An Updated Appraisal" CHRGI Working Paper No. 15, 2007, 12.

42 Cited in The Honourable Claire L'Heureux-Dubé, "Canadian Perspective On Economic and Social Rights" in Y Ghai & J Cottrell (eds) *Economic, Social & Cultural Rights in Practice*. (London: Interights 2004), p.49. He stated that "too all that has been said about rights and public health, I would like to add two more rights: the right to government to be stupid and the right to people to be wise. I am cautious about constitutional principles that preempt any government forward planning, for they inhibit democratic governmental experimentation and public innovation. Governments have the right to err."

43 *Olga Tellis v. Bombay Municipality Corporation* [1985] 2 Supp SCR 51 (India); (1987) LRC (Const) 351.

44 *Government of South Africa v Grootboom* (2000) 11 B.C.L.R. 1169.

45 *State of Himachal Pradesh v Parent of a Student of Medical College, Simla* (1985) 3 S.C.C. 169.

46 N Jheelan, "The enforceability of socio-economic rights" *E.H.R.L.R.* 2007, 2, 153.

47 I. Wall, "The Aspirational Nature of Economic, Social and Cultural Rights: An Examination of an Unsound Case, The Logical and Factual Misconception of Rights" [2004] *Cork Online Law Review*, 5.

48 A A An-Na'im, "To Affirm The Full Human Rights Standing of Economic, Social & Cultural Rights" in Y Ghai & J Cottrell (eds) *Economic, Social & Cultural Rights in Practice*. (London: Interights 2004), 7.

49 A Nolan, B Porter, M Langford, "The Justiciability of Social and Economic Rights: An Updated Appraisal" CHRGI Working Paper No. 15, 2007, 11.

50 *Treatment Action Campaign v Minister for Health* (2) 2002 (5) S.A. 721 (CC).

51 *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC), para 98-106. The Court points out that: "The primary duty of Courts is to the Constitution and the law, 'which they must apply impartially and without fear,

“reasonableness” as a standard of review to protect socio-economic rights shows that they can be judicially enforced whilst respecting the separation of powers by allowing Parliament to make the decision as to which measure best suits the needs of the country<sup>52</sup>.

On the other hand, Pieterse refutes the argument that is related to unaccountability of judiciary, by pointing out that many civil servants are merely indirectly accountable to the people. He further notes that there are mechanisms, such as the public nature of hearings, the duty of judges to give reasons for their decisions, the appointment process of judges, and the doctrine of “binding precedent”, which judges are held to account<sup>53</sup>.

In any country, resources are inevitably limited and since some social and economic rights can be positive in nature, it has been suggested that budgetary constraint can make their enforcement impossible. The situation envisaged here is one where the government does not genuinely have enough resources to guarantee the socio-economic rights in question<sup>54</sup>. However, the scarcity of resources should not be a bar to the enforcement of socio-economic rights since the courts can always give a wide margin of discretion to the government whenever they take decisions that have massive budgetary implications<sup>55</sup>.

Van Bueren accurately points that the enforcement of civil and political rights impacts on the budget in the same way<sup>56</sup>, by mentioning the decisions of Canadian and Venezuelan Courts. The Supreme Court of Canada in *Schachter v Canada*<sup>57</sup> held that any remedy granted by a court will have some budgetary repercussions, whether it be a saving of money or an expenditure of money. Also In *Eldridge v. British Columbia*<sup>58</sup> the Canadian Supreme Court ruled that the right to equality included a duty to provide sign language interpretation in hospitals for patients with hearing impairments. The Venezuelan Supreme Court, rejected the government's plea that it lacked funds. The court noted that the estimated cost of providing sign language interpretation for the whole of British Columbia was only \$150,000 or approximately 0.0025 per cent of the provincial health care budget at the time. The court, however, suspended the effectiveness of the declaration for six months to enable the government to explore its options and formulate an appropriate response. In fashioning its response, the government should ensure, that after the expiration of six months sign language interpreters will be provided where necessary for effective communication in the delivery of medical

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favour or prejudice'. . . Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar as this constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself. There is also no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of State can effect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they effect its policy and has to find the resources to do so. We thus reject the argument that the only power that this Court has in the present case is to issue a declaratory order. Where a breach of any right has taken place, including a socio-economic right, a Court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. South African Courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to the roles of the Legislature and the Executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, Courts may - and, if need be, must - use their wide powers to make orders that affect policy as well as legislation."

52 D. Bilchitz, "Giving Socio-Economic Rights Teeth: The Minimum Core Approach and its Importance" (2002) 119 *South African Law Journal* 496.

53 M. Pieterse, "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR*, 388.

54 N. Jheelan, "The enforceability of socio-economic rights" *E.H.R.L.R.* 2007, 2, 150

55 S. Liebenberg, "The Protection of Economic and Social Rights in Domestic Legal Systems" in A. Eide, C. Krause and A. Rosas, eds, *Economic, Social and Cultural Rights* (2nd edn, Martinus Nijhoff Publishers, The Hague, 2001), 68.

56 G. Van Bueren, "Including the Excluded: The Case for an Economic, Social and Cultural Human Rights Act" [2002] *Public Law* 466.

57 *Schachter v Canada* (1992) 2 S.C.R. 679.

58 *Eldridge v. British Columbia* (Att.-Gen.) [1997] 3 S.C.R. 624.

services.

In *Cruz del Valle Bermudez v. Ministry of Health and Social Assistance*<sup>59</sup> the contentious issue before the Venezuelan Supreme Court of Justice was whether there was a right of those with HIV/AIDS to receive, without charge, the necessary medicines. The Court identified a positive duty of prevention at the core of the right to health and ordered the government to conduct an effective study into the minimum needs of those with HIV/AIDS. The Ministry of Health argued, that because of the budget assigned to it the Ministry would not be able to satisfy the rights of all those ill with HIV/AIDS and could not do so because of the crisis facing the country. This argument was rejected by the Supreme Court, which ruled that those without the economic resources to pay were entitled to the necessary inhibitors.

The judiciary is no longer able to shy away from vindicating socio-economic rights merely because doing so would have political and resource repercussions. Of course, tensions between the possibilities of judicial activism and the need for judicial deference are bound to arise. Such tensions are at the heart of judicial review in any democracy and need to be solved on a case-by-case basis<sup>60</sup>.

#### 4. Judicial competence

Concerns about judicial competence in socio-economic rights matters usually relate either to the limits of judicial skill or the problems posed by polycentricity<sup>61</sup>. Courts are thought to be ill-suited to make polycentric decisions, because of several 'unique' features of the litigation process. Moreover, Courts are regarded as ill-suited to evaluate and choose between various policy options. Further factors complicating the judicial vindication of socio-economic rights include judges' lack of specific specialist expertise in cases where the realisation of a social right involves a specific technical/specialist field and, importantly, the fact that the judiciary is unable to execute its findings itself and is therefore dependent on executive co-operation for its judgments to have any credibility or impact in reality<sup>62</sup>.

It is argued that the Court simply does not or cannot measure the implications of the decisions it makes. Even when a resolution to the problem appears to have been reached through the courts the last order issued usually leaves open the possibility of the future intervention. The number of times some of the cases come back to the Court, for fine-tuning, for further explanation or because there has been no, or no adequate, compliance, indicates not only the difficulty in obtaining compliance but also shortcomings of the judicial decision making process for complex issues of this type. The policies on socio-economic rights involve taking from one group to give another and are therefore infinitely more contentious than civil and political rights policies; the political process is better at coping with this than judicial one<sup>63</sup>.

However, if the courts are considered capable of evaluating and drawing conclusions on the basis of complex technical and medical evidence in, for example, a criminal or tort law context, then there can be no presumption that they are unable to do so in a social and economic rights context. In addition, it is often possible for judges to 'delegate' particular tasks where they deem it appropriate. For instance, in the US, courts have appointed individuals and bodies including special masters, advisory juries, and court-appointed experts to help courts to, *inter alia*, evaluate evidence and resolve

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<sup>59</sup>*Cruz del Valle Bermudez v. Ministry of Health and Social Assistance*, Supreme Court of Justice, No. 916, July 15, 1999.

<sup>60</sup>T J Bollyky 'R if C > P+B: A Paradigm for Judicial Remedies of Socio-economic Rights Violations' (2002) 18 *SAJHR*, 183.

<sup>61</sup>L. Fuller, "The Forms and Limits of Adjudication" (1978) *Harvard Law Review*, Vol 92, 353. The term of polycentricity used by Lon Fuller to describe decisions that affect an unknown but potentially vast number of interested parties and that have many complex and unpredictable social and economic repercussions, which inevitably vary for every subtle difference in the decision.

<sup>62</sup>M. Pieterse, "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR*, 393-394.

<sup>63</sup>J. Cottrell and Y. Ghai, "The Role of the Courts in the Protection of Economic, Social and Cultural Rights" in Y Ghai & J Cottrell (eds) *Economic, Social & Cultural Rights in Practice*. (London: Interights 2004), 84-85.

technical issues<sup>64</sup>. Moreover, if social and economic rights are recognised as central to human rights and democratic accountability, but states have concerns about the competence of courts or other bodies to intervene in this area, they might want to investigate how courts or other bodies can enhance their capacity in this area, or how they can be assisted by other institutional actors in performing their necessary role, rather than suggesting that rights claimants should be left without any hearing or remedy at all<sup>65</sup>.

On the other hand, legislatures are not always more competent at dealing with polycentricity. Division of governmental responsibilities in different ministries, lack of overall accountability or transparency in the budget setting process, failure to consider competing evidence and a tendency to respond to the most vocal or powerful lobby groups may present significant obstacles on the legislative side. In some cases, the judicial process may, in fact, be better suited to the consideration of competing needs or rights of those who do not have access to political decision-making processes. It may bring to light consequences of policies that were not foreseen by the government and may reveal alternative remedial responses that were not considered by the legislature or executive<sup>66</sup>.

Several features of the judiciary make it well-suited to vindicate socio-economic rights. Unlike the legislature and executive, courts are able to provide individualised remedies to aggrieved claimants, and offer a comparatively speedy solution in the face of legislative or executive tardiness. Courts are experts at interpretation and are thus ideally suited to lend content to social rights and the standards of compliance that they impose. The legal process is rational and deliberative and is tailored towards producing fair and well-reasoned results. Judges are educated, experienced and skilled in legal application and interpretation, and have the time and resources to properly deliberate issues before them. Further, 'courts handle real cases and thus can test more effectively the particular implications of abstract principles and discover problems the legislature could not forecast'. However, methods need to be found to ensure that sufficient and factually correct evidence is brought before courts in these matters<sup>67</sup>. With regard to getting sufficient information, some remedies can be adopted such as 'fact-finding' commissions<sup>68</sup>, requiring additional argument on certain issues, making more effective use of expert evidence, or parties making more effective use of available access to information<sup>69</sup>.

Hesitation by the courts to define those rights has contributed to judicial inexperience in that area, and further led to their perception as being imprecise. As Scott and Macklem point out, the ability of courts to relate the expert evidence to the real life circumstances of a rights claimant may provide an important new dimension to information before the court that was not available to the legislature. In this sense, judicial review of decision-making in relation to social and economic rights may enhance the quality of governmental decision-making in this area, in part by bringing forth new information or more 'rights-based' analysis of existing information. Scott and Macklem have observed that courts create their own competence. The courage to be creative depends on a conviction that the values at stake are legitimate concerns for the judiciary<sup>70</sup>.

The Indian experience reflects the Court's own awareness of the limitation and shows a creative response to the institutional competence problem of the courts<sup>71</sup>. In *Kendra v State of Uttar*

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64 A Nolan, B Porter, M Langford, "The Justiciability of Social and Economic Rights: An Updated Appraisal" CHRGI Working Paper No. 15, 2007, p.15.

65 Ibid at 4.

66 Ibid at 17.

67 N W Barber, "Prelude to the Separation of Powers" (2001) 60 *Cambridge LJ* 59, 79.

68 The Indian courts have themselves played an active role in this regard by appointing 'fact-finding' commissions to get sufficient information before them.

69 M. Pieterse, "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR*, 396.

70 C. Scott and P. Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 *University of Pennsylvania Law Review* 1, 35-36.

71 J Cottrell and Y Ghai, "The Role of the Courts in the Protection of Economic, Social and Cultural Rights" in Y Ghai & J Cottrell (eds) *Economic, Social & Cultural Rights in Practice*. (London: Interights 2004), 84. Khosla is argued that the Indian Supreme Court adopted a conditional social rights approach which exhibits a rare private law model of public law adjudication. Rather than focusing on the inherent nature of measures undertaken by the state, the

*Pradesh*<sup>72</sup>, the right to environment was in issue. The court was asked to close down limestone quarries and order a halt to the mining operations because these were having a negative impact on the environment. Before considering the case, it appointed a committee of experts in the field (including environmental scientists and geologists) to investigate, assess and report on the matter, and the court included specific questions, which it considered important in the mandate of the commission. In *Sheela Barse v Union of India*<sup>73</sup>, the treatment of child prisoners was at stake, and the Supreme Court ordered judicial officers to assess and report on the situation in prisons, but more importantly it emphasised that the superintendent of each jail should provide all the assistance the officers may need in their inquiry.

In relation to socio-economic rights, problems of judicial incompetence and polycentricity arise most acutely at the level of remedy<sup>74</sup>. It is argued that no one can fashion a remedy without choosing among the alternatives with socioeconomic rights, it is the manner of enforcement that is complex, and the complexity is one that judges are unqualified to resolve<sup>75</sup>. For proponents of this view, this explains the deferential approach pursued by the South African Constitutional Court thus far in relation to socio-economic rights, one in which the Court has seemingly been content merely to inform government when it has acted unreasonably. More positively, some commentators believe there are immense procedural benefits to subjecting the state to searching judicial scrutiny and pronouncements of unconstitutionality<sup>76</sup>.

However, the benefits of moral condemnation seem rather abstract for those whose rights have been violated, such as the thousands of South Africans living with HIV/AIDS and dying without access to effective treatment. Further, the political consequences that might attach to judicial scrutiny and condemnation are attenuated when those primarily impacted are the poor, disaffected, and powerless who are most vulnerable when the state fails to act in accordance with its duties with respect to socio-economic rights<sup>77</sup>.

In *Fose*<sup>78</sup>, the Constitutional Court wrote that an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal<sup>79</sup>.

In *Hoffmann v South African Airways*<sup>80</sup>, the Court held that determination of appropriate relief calls for the balancing of the various interests that may be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that

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conditional social rights approach focuses on their implementation. Moreover, in several cases the Court does not enforce our traditional conception of a social right; the claim involved is more appropriately described as a constitutional tort action. Unlike the South African approach, the Indian conditional social rights approach requires no priority-setting but once priorities are set it plays an important role in their structuring and implementation. Extending the conditional social rights thesis to its logical extreme may lead the state to conclude that it is less likely to win cases if it initiates social service programs and therefore encourage it to do nothing at all. M Khosla, "Making social rights conditional: lessons from India" I.J.C.L. 2010, 8(4), 742-765.

<sup>72</sup> *Kendra v State of Uttar Pradesh* (1986) (Supp.) S.C.C. 517.

<sup>73</sup> *Sheela Barse v Union of India* (1986) 3 S.C.C. 596.

<sup>74</sup> T J Bollyky, "R if C > P +B: A Paradigm for Judicial Remedies of Socio-economic Rights Violations" (2002) 18 SAJHR, 164.

<sup>75</sup> E Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 4 SAJHR, 468.

<sup>76</sup> N Haysom, "Giving Effect to Socio-Economic Rights: The Role of the Judiciary" (1998) 4 ESR Rev., 12.

<sup>77</sup> T J Bollyky, "R if C > P +B: A Paradigm for Judicial Remedies of Socio-economic Rights Violations" (2002) 18 SAJHR, 163.

<sup>78</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC),.

<sup>79</sup> Ibid para. 12-13.

<sup>80</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), para. 45.

can be complied with ; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, 'we must effectively analyse the nature of [the] constitutional infringement, an strike effectively at its source'.

The possibility of obtaining a particular form of judicial redress depends on the extent of the constitutional violation and the degree to which the remedy requires courts to mandate choices regarding policy and budgets. To this extent, the perceived dichotomy between civil and political rights, on the one hand, and socio-economic rights, on the other, is – with respect to judicial redress - both over and under-inclusive. While the balance of these factors will more often exclude certain remedies for violations of socio-economic rights than for civil and political rights, the fact that a right falls within a particular category neither forecloses nor guarantees the possibility of those remedies. The implication of this hypothesis is that violations of socio-economic rights are capable of meaningful redress, but that the courts have not yet been presented with the facts that would permit such remedies<sup>81</sup>.

### **III-Searching a Content for Adjudicating of Socio-Economic Rights**

The UN Committee on Economic, Social and Cultural Rights has released a number of general comments that attempt to give content to the obligations imposed by the Covenant. The Committee has held that socio-economic rights contain a minimum core obligation that must be fulfilled by State Parties. Such an obligation requires every State Party to fulfil certain minimum essential levels of the rights in question and a failure to do so constitutes a prima facie failure to discharge its obligations under the Covenant. In order a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations. Thus for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, of most basic forms of education, is prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'etre*. Moreover, the General Committee claims that the notion of 'progressive realisation' imposes 'an obligation to move as expeditiously and effectively as possible towards' the full realization of the right, and to refrain from deliberately retrogressive measures. The state has a duty to take steps towards the full realization of the right, but is at the same time under an obligation to come up with the essential levels of provision required by the minimum core. These two are fundamentally intertwined in the interpretation given by the Committee<sup>82</sup>.

In *Grootboom*, YacoobJ levelled several criticisms against the approach adopted by the General Committee and concluded that it is not 'necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core content of a right'. He claimed:

"In order to determine what the minimum core of a right is, one must first identify the needs and opportunities for the enjoyment of the right. As a result, three problems arise in attempting to determine the content of a minimum core obligation. Firstly, a court requires sufficient information about these needs and opportunities to determine what the minimum core should be. The Constitutional Court, however, lacked comparable information and so could not determine the minimum core. Secondly, the needs in the context of the right of access to adequate housing are diverse. This makes it difficult to fix upon a precise definition for a minimum core. Finally, difficulties arise as to whether the minimum core should be defined generally or with regard to specific groups of people, and this undermines

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<sup>81</sup>T J Bollyky, "R if C > P +B: A Paradigm for Judicial Remedies of Socio-economic Rights Violations" (2002) 18 *SAJHR*, 164.

<sup>82</sup> Committee on Economic, Social and Cultural Rights: Report on the Fifth Session, Supp. No. 3, Gen. Comment No. 3, U.N. Doc. E/1991/23 (1990), para 9-10.

the very notion that there is one particular minimum core<sup>83</sup>. Instead, the real question in terms of the Constitution is whether the measures taken by the state to realize the right are reasonable<sup>84</sup>. Reasonable measures involve the establishment and implementation by the state of a coherent, well-co-ordinated and comprehensive programme directed towards the progressive realization of the right of access to adequate housing. Moreover, a court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent since a wide range of possible measures could be adopted by the state to meet its obligations<sup>85</sup>. The state had instituted an integrated housing development policy whose 'medium- and long-term objectives cannot be criticised. However, the housing programme lacked any component providing for those in desperate need. The absence of such a component was unreasonable and thus, the housing programme falls short of obligations imposed upon the government to the extent that it fails to recognise that the state must provide for relief for those in desperate need'<sup>86</sup>.

Hoexter argues that the notion of reasonableness refers to that which lies within the 'limits of reason' and allows for a legitimate diversity of views. What is reasonable is not only that which is correct but refers to decisions that lie in between correctness and capriciousness. A reasonable decision is one that is supported by reasons and evidence, that is rationally connected to a purpose, and is objectively capable of furthering that purpose. A reasonable decision generally also reveals proportionality between ends and means, benefits and detriments<sup>87</sup>.

Liebenberg suggests that reasonableness review can contribute to the creation of a participatory, dialogical space for adjudicating social rights. She continues that this can be achieved in three areas of the Court's interpretation of social economic rights. First, and most particularly, claims for basic needs should receive greater protection within the framework of reasonableness review. Second, a court can alter the discourse of rights by emphasizing the judicial role in relieving burdens on poor communities and thus strengthening the constitutional right to dignity. Finally, social rights can contribute to a deconstruction of the range of private law concepts that have been reproduced in the first decade of constitutional democracy; that is, a hierarchical set of legal concepts that support the distribution of resources inherited from apartheid<sup>88</sup>.

However, Dixon disagrees this idea since South Africans could reasonably affirm a variety of perspectives on the ranking of socioeconomic rights claims, depending on whether they gave priority to the relationship between these rights and first-generation rights, such as the rights to life, dignity or equality. If the Court were to define the minimum core in a way that gave clear priority to any one of these different intersectional approaches, it would be embarking on a process of rights definition that ignored the scope of existing disagreements among South Africans while purporting to foreclose future dialogue with the broader culture on this subject. Over time, through actual dialogue, South Africans may come to agree on a set of housing or health care requirements on which to ground individually enforceable rights for all South Africans, regardless of their capacity to pay or the state's budgetary constraints. It may be that, through a process of extensive representative and community dialogue, universal access to certain basic amenities for informal housing or, for that matter, to antiretrovirals will come to be recognized by the broader South African constitutional culture as part of the settled content of the rights of access to housing or health care under sections 26(2) and 27(2). In these circumstances, a dialogic approach would certainly not prevent a court from identifying these claims as ones that, like the international minimum core, are entitled to a heightened degree of respect under sections 26(2) and 27(2). Like the process that has underpinned the definition

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83 *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC), para. 32-33.

84 *Ibid* para. 33.

85 *Ibid* para. 41.

86 *Ibid* para. 64-66.

87 C Hoexter, "The future of judicial review in South African administrative law" (2000) 117 *SALJ*, 509-13.

88S Liebenberg, *Needs, Rights and Transformation: Adjudicating Social Rights in South Africa*, 6 *ECON. & SOC. RTS. REV.*, 6-7 (2005).

of an international minimum core, however, this iterative process of rights definition would be entirely distinct from an approach whereby the Constitutional Court unilaterally and abstractly defined the scope of a minimum core, including the levels of risk, benefit, and cost necessary for a person to claim a minimum core right in accessing specific goods.<sup>89</sup>

After the Constitutional Court's decision, for example, the Cape municipality (one of the respondents in *Grootboom*) announced in 2001 a plan to provide formal public housing to the thousands of people living in informal settlements along the road that connects the center of Cape Town with the airport, but it made no progress in implementing the plan for more than four years. In Gauteng, the local and provincial governments announced a plan in 2001 to provide water, sewerage, and electricity within two years to all of the residents living in the area of Diepsloot, an informal settlement just north of Johannesburg, but by July 2004, little progress had been made in providing water, sewerage, or electricity. Similar forms of compound inertia are also apparent regarding the right of access to health care services, especially in the context of the national government's 2003 plan to extend the rollout of antiretrovirals to all South Africans living with HIV/AIDS<sup>90</sup>.

Sunstein has described the South African Constitutional Court's reasonableness approach as an administrative law model and praised its efficacy in making appropriate demands on government, without displacing democratic judgments about how to set priorities<sup>91</sup>. Therefore, it is argued that the notion of reasonableness is designed to allow scope for the substantive judicial review of decisions by another branch of government whilst retaining a sense that there is a margin of appreciation which the original deciding body has in making a decision. A court will only substitute its decision for that of the body with the initial competence to make it if that decision falls outside the margin of appreciation given to the body<sup>92</sup>.

Pillay asserts that reasonableness standard has not been exploited to its full potential in the judicial review of administrative action or socio-economic rights cases, and should not be abandoned in the attempt to find a workable model for protecting socio-economic rights. A reasonableness model is especially well suited to balancing the protection of rights with respect for democratic priority setting. Administrative justice has always been concerned with protecting individuals from the unfair impact of legislation and administrative decisions on their lives but seeks to balance that with the broader societal interest in government being able to do its job, to set priorities and implement policies, efficiently. A concern with this kind of balancing lies at the heart of socio-economic rights enforcement<sup>93</sup>.

However, Davis finds doubtful whether a court will conceive of reasonableness in any way other than as involving deference to the decisions of a democratically elected legislature and executive. Reasonableness is a standard judges understand within the context of administrative law in which deference to the competence and democratic pedigree of the executive authority or the legislature is well established. By contrast, the possibility, for a new conception of positive rights that imposes correlative obligations on the state may yet prove to be a potentially far more productive route for the development of a transformative jurisprudence. In particular, a jurisprudence of positive rights would force a court to engage in a far more open-textured proportionality analysis when seeking to balance these rights against the claims built up under apartheid as well as arguments that, as a default position, majoritarianism should trump any right asserted by an individual litigant against democratically conceived social policy. In this way, it may be possible for a court to move beyond the traditional approach of judicial deference, which leaves so many vulnerable to the exigencies of

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<sup>89</sup>R Dixon, "Creating dialogue about socioeconomic rights: strong-form versus weak-form judicial review revisited" *I.J.C.L.* 2007, 5(3), 417.

<sup>90</sup> Ibid at 414-415.

<sup>91</sup> C R Sunstein, "Social and Economic Rights: Lessons from South Africa", Public Law and Legal Theory Working Paper No.12, 2001, 14, University of Chicago Law School, available from the Social Science Research Network Electronic Paper Collection at <http://papers.ssrn.com>. accessed on 12.01.2013.

<sup>92</sup>D Bilchitz, "Giving Socio-economic Rights Teeth: The Minimum Core and its Importance" (2002) 119 *SALJ*, 495.

<sup>93</sup> A Pillay, "Courts, variable standards of review and resource allocation: developing a model for the enforcement of social and economic rights" *E.H.R.L.R.* 2007, 6, 619.

the political process<sup>94</sup>.

Bilchitz points that the problem with reasonableness is that it lacks a principled basis upon which to found decisions in socio-economic rights cases. The Court's current approach of stipulating a meaning for the broad and vague concept of reasonableness places no clear restrictions on its role in socio-economic rights cases. A clearer enunciation of the principles upon which such litigation is to take place will offer just such a principled statement of the standards the Court is to use in assessing the state's obligations. This will help provide clear reasons for its involvement in these cases, and a clear statement of the important interests involved which would demarcate the scope of its own decisionmaking powers. Recognizing the role of court in defining general principles allows us to see how such a court can determine the content of a minimum core obligation. An example would be for the court to hold that every person in South Africa must have access to accommodation that involves, at least, protection from the elements in sanitary conditions with access to basic services, such as toilets and running water. He replies to Yacoob J's arguments stating that in order to specify the standard that the government must meet in order to comply with its obligations, it is not necessary for the court to have wide sources of information such as those open to the General Committee. Such information may be necessary in order to decide on particular actions that the state is required to take in particular circumstances. He blames Yacoob J for overstating the matter when depicting the issue as involving enormous complexity. Moreover, he explains that the minimum core is to be specified in relation to the basic needs that shared by human species. Finally, he suggests, the fact that some need access to land, some need land and houses and others need financial assistance, is not relevant to the determination of the minimum core. Each is entitled to the same level of provision; the differential needs people have will determine in what way the government is required by the Constitution, if at all, to assist them<sup>95</sup>.

Similarly, Pieterse argues that given the relatively abstract and open-ended nature of the reasonableness inquiry, doubts may nevertheless be expressed about its suitability in developing a socio-economic rights jurisprudence resonating with international law and with the transformative aims of the constitutional order. This is so especially where a reasonableness analysis is undertaken separately from an understanding of the content of various socio-economic rights and the obligations they impose<sup>96</sup>. According to Pieterse, the Constitutional Court has shown little vigour in carrying out the interpretative function in relation to socio-economic rights since the Court has elaborated on the textual, social and historical context of the interpretation exercise in relation to socioeconomic rights and has contemplated the meaning of several words and phrases in the relevant sections of the Constitution. However, he notes that the Court has largely failed to relate these explicitly either to tangible socio-economic needs. Neither has it related its understanding of socio-economic rights to specific benchmarks, timeframes or minimum standards from which either the extent of citizens' socio-economic entitlements or of the state's socio-economic obligations may be derived. Instead, the Court has spent most of its energy devising and applying the abstract compliance measuring standard of reasonableness. The failure to link this standard explicitly to a more detailed elaboration on the content of individual rights and obligations is lamentable, because it removes the compliance-measuring standard from its context and fails to acknowledge the explicit prioritisation of socioeconomic interests abundantly evident from a purposive reading of the constitutional text. As such, the Court's approach has rightly been criticised for failing to place the needs of citizens at the centre of its inquiry<sup>97</sup>.

Court-mandated policy shifts with respect to socio-economic rights might be significantly more frequent if there was a predetermined minimum level of shelter or minimum standard of accessible clean water. The absence of a predetermined minimum standard reduces the likelihood of obtaining redress by increasing the perceived complexity of the budgetary and policy implications of

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<sup>94</sup>D M Davis, "Socioeconomic rights: do they deliver the goods?" *I.J.C.L.* 2008, 6(3/4), 707.

<sup>95</sup>D Bilchitz, "Giving Socio-economic Rights Teeth: The Minimum Core and its Importance" (2002) 119 *SALJ*, 496-499.

<sup>96</sup>M Pieterse, "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR*, 410.

<sup>97</sup>*Ibid* at 407.

remedying violations of those rights<sup>98</sup>.

The comments of Lord Hoffman in *Matthews v Ministry of Defence* are noteworthy<sup>99</sup>:

“Human rights are the rights essential to the life and dignity of the individual in a democratic society. The exact limits of such rights are debateable and, although there is not much trace of economic rights in the 50-year old Convention, I think it is well arguable that human rights include a right to a minimum standard of living, without which many of the other rights would be a mockery.”

## IV-CASE-LAW

### 1.South African Court

South Africa Constitution includes a range of socioeconomic rights such as the right to have access to adequate housing, health care services(including reproductive health care), sufficient food and water, social security including, if they are unable to support themselves and their dependants, appropriate social assistance. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of these rights. The South African Courts has understood its role stating that: “Socio-economic rights cannot be exist only on paper and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights justiciable, but how to enforce them in a given case.”<sup>100</sup>

The first case brought on the basis of one of the socio-economic rights in the Constitution was *Soobramoney*<sup>101</sup>. Justice Arthur Chaskalson, on behalf of a unanimous court, wrote:

"We are living in a society in which there are great disparities involved. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring...What is apparent from these provisions is that the obligations imposed on the State in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources...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 "<sup>102</sup>.

Although the case has been criticised for a number of reasons, the most worrying aspect of the Court's reasoning was its adoption of an extremely low threshold for determining whether the policy was reasonable<sup>103</sup>. In this case, when *assessing the claim, the Constitutional Court deferred to both the hospital's guidelines for rationing treatment and the provincial authorities' allocations for*

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<sup>98</sup>T J Bollyky, "R if C > P+B: A Paradigm for Judicial Remedies of Socio-economic Rights Violations" (2002) 18 *SAJHR*, 184.

<sup>99</sup>*Matthews v Ministry of Defence* [2003] UKHL 4, para. 26.

<sup>100</sup>*Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) para.20

<sup>101</sup>*Soobramoney v Minister of Health* 1998 (1) SA 765 (CC). Mr Soobramoney suffered from chronic renal failure and required renal dialysis. Due to a lack of resources and facilities, the relevant hospital's policy was that patients with acute renal failure, which could be remedied by renal dialysis, would automatically be given treatment. Other patients had to show they were eligible for a kidney transplant. Mr Soobramoney did not fall into either of these categories. The Court rejected his argument that the dialysis amounted to emergency medical treatment and found the policy to be reasonable.

<sup>102</sup> *Ibid* para. 8-11-29.

<sup>103</sup> A Pillay, "Courts, variable standards of review and resource allocation: developing a model for the enforcement of social and economic rights" *E.H.R.L.R.* 2007, 6, 623.

*the general health budget*<sup>104</sup>. The Court signalled its unease with its new role of watchdog over the progressive realisation of socio-economic rights, by stating that it would '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'<sup>105</sup>.

In *Grootboom*<sup>106</sup>, the Constitutional Court considering the scope of the right to housing of the South African Constitution found that the government's housing policy was not reasonable because it did not make provision for temporary relief for those in desperate need. On the standard of reasonableness, the Constitutional Court stated:

"A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met. In order for a policy to be reasonable, it could not ignore a significant segment of the population; it had to be coherent, set out clear tasks for the different spheres of government and make sure that the required resources, financial and human, are available. Also, reasonableness was a requirement both of the policy's design and its implementation"<sup>107</sup>.

The court not only explicitly reaffirmed the justiciability of socio-economic rights, but also indicated a willingness to vindicate their 'positive' aspects through inquiring into the reasonableness of a provincial housing plan and ultimately declaring that the plan fell short of the state's obligations imposed by the right of access to adequate housing under the Constitution<sup>108</sup>. The decision was seen to provide important evidence as to the possibility of judicial enforcement of socioeconomic or second-generation rights in a way that was both appropriately transformative and yet sensitive to concerns about judicial competence and responsiveness in this area. In the years following *Grootboom*, however, it has become apparent that the Court's decision in fact did little to change the status quo in South Africa with regard to a right to basic shelter<sup>109</sup>.

Similarly, in *Grootboom*, the judicial stance was deferential. Refusing to articulate any self-standing dimension, or "minimum core," of the right to access housing, the Constitutional Court inquired only into the "reasonableness" of government policy. As a result, the Court offered only declaratory relief, preferring to defer, in its remedial stance, to the Department of Housing's consideration of how best to meet the needs of vulnerable communities living in intolerable conditions or crisis situation<sup>110</sup>.

The problem with deference is the danger of judicial abdication that it presents. Particularly

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104 K Young, "A typology of economic and social rights adjudication: exploring the catalytic function of judicial review" *I.J.C.L.* 2010, 8(3), 392-394.

105 M. Pieterse, "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR*, 401.

106 *Government of the Republic of South Africa v. Grootboom*, 2000 (11) BCLR 1169. After a series of events, the respondents, without alternate options, occupied a sports field where they lived under plastic sheets. This form of housing was unsustainable, and they eventually alleged a violation of their constitutional rights.

107 *Ibid* para. 39-45.

108 M. Pieterse, "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR*, 402.

109 R Dixon, "Creating dialogue about socioeconomic rights: strong-form versus weak-form judicial review revisited" *I.J.C.L.* 2007, 5(3), 392.

110 K Young, "A typology of economic and social rights adjudication: exploring the catalytic function of judicial review" *I.J.C.L.* 2010, 8(3), 394. According to Young, many of the South African Constitutional Court's earliest cases on economic and social rights have been characterized as deferential. Deferential review is a model which belongs to the tradition of defending judicial review in democratic terms. In exercising deferential review, courts give credence to the democratic authority and epistemic superiority of, and textual conferral of tasks to, the legislative and executive branches. While democratic authority is the best rationale for deference to the legislature, as the most electorally accountable and representative branch, epistemic authority is more fittingly assigned to the executive, as the branch equipped with the most technical resources and information. On these grounds, a deferential court is slow to override or second-guess legislation or policy. In the most traditional formulation of deferential review, the Court intervenes only when it detects a clear legislative mistake--one "so clear that it is not open to rational question."

in light of the positive obligations that flow from economic and social rights and in the face of an intransigent or incompetent government actor, the subtle reciprocity that is expected to flow from deference may not ensure that rights are sufficiently protected by the elected branches<sup>111</sup>. The problem of judicial abdication is highlighted by the concrete lack of redress experienced by the claimants in the *Soobramoney* and *Grootboom* cases. Justice Albie Sachs suggested, with respect to *Soobramoney*, that the public was angry with the Court--they felt it should have done something, anything, to save a life<sup>112</sup>. Similarly, the apparent inattention of the Constitutional Court to the direct plight of the claimants in *Grootboom* registered dramatically when, eight years after the judgment, Irene Grootboom passed away, still without a home<sup>113</sup>.

According to Blichitz, the court's failure to include a minimum core obligation in *Grootboom* had a negative effect on the practical outcome of the case. The first important point to recognize about the decision is its lack of specificity. It gives the state little guidance as to what it is required to do in particular to meet basic needs. Since the reasonableness standard is slippery, it can provide the grounds for state delay, obfuscation and much else. Moreover, the court imposes no time limit on the state's actions in regard to the development of a programme to meet short-term needs. Finally, there is a real question about the introduction of supervisory mechanisms for the enforcement of socio-economic rights<sup>114</sup>.

In *TAC115*, the Court evaluated each of the government's reasons for not widening the provision of the drug against a standard of reasonableness and, in rejecting them, employed various aspects of reasonableness. These ranged from a simple lack of evidence supporting the claims to a lack of proportionality between means and end. Most importantly, in response to government's argument that wider provision of nevirapine would result in people developing a resistance to it, the Court stated:

“Although resistant strains of HIV might exist after a single dose of nevirapine, this mutation is likely to be transient. At most there is a possibility of such resistance persisting, and although this possibility cannot be excluded, its weight is small in comparison with the potential benefit of providing a single tablet of nevirapine to the mother and a few drops to her baby at the time of birth. The prospects of the child surviving if infected are so slim and the nature of the suffering so grave that the risk of some resistance manifesting at some time in the future is well worth running.”<sup>116</sup>

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111 C Scott, P Alston, "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise", 16 *SAJHR* (2000), 250.

112 A Sachs, "Social and Economic Rights: Can They be Made Justiciable?", 53 *SMU L. Rev.* (2000), 1386.

113 K Young, "A typology of economic and social rights adjudication: exploring the catalytic function of judicial review" *I.J.C.L.* 2010, 8(3), 395.

114 D Blichitz, "Giving Socio-economic Rights Teeth: The Minimum Core and its Importance" (2002) 119 *SALJ* 484, 500-501. He suggested that imposing a minimum core obligation would have had the benefit that the state would have been provided with a more definite standard against which to judge its behaviour. Had it recognized a minimum core obligation, and the urgency of the interest protected by such an obligation, it seems to me more likely that it would have been inclined to impose a time limit upon the government in developing and putting into practice the requirements of the minimum core obligation. Although the court refers to the fact that the Human Rights Commission will monitor and report on the compliance of the state with its obligations, the court itself should have retained a residual supervisory role in this regard. It could have done so through crafting its order so as to allow the Human Rights Commission, or an alternative body with locus standi, to approach it speedily in respect of the required governmental action under the Constitution recognition of the peremptory force of a minimum core obligation may well have made the court more willing to adopt a residual supervisory role.

115 *Minister of Health v Treatment Action Campaign (No.2)* 2002 (10) BCLR 1033 (CC). The was dealing with access to the one-off provision of the anti-retroviral drug nevirapine to prevent mother-to-child transmission of HIV. Access to the drug had been limited to certain research and training sites. At all other public hospitals and clinics, Nevirapine could not be administered. the state argued, to provide counseling to mothers during the administration of the drug and there were financial constraints in this regard. Counseling was crucial because HIV could be transmitted through breastfeeding, thereby counteracting the effect of the drug. Moreover, the state contended that it was uncertain about the drug's safety; wide availability could only be ensured after the drug's performance at the limited sites had been evaluated.

116 *Minister of Health v Treatment Action Campaign (No.2)* 2002 (10) BCLR 1033 (CC) para. 59-64.

The Constitutional Court's decision in the *TAC* case brought an end to a highly criticized aspect of the South African government's policy on HIV/AIDS and set in motion many other changes to the government's general stance toward the disease. Yet, the remedies were not immediately effective. The success of the remedies was in large part due to the activities of the social movement that brought the case rather than merely the interbranch conversation that was created by the Constitutional Court<sup>117</sup>. The *TAC* litigant worked to bring about the cultural transformation and institutional reforms required to secure the right to health care in this context; this strategy was also indispensable to the success of the court order, as well as interdependent with the judicial stance adopted by the Court<sup>118</sup>.

It is suggested that the analysis in both *Grootboom* and *TAC* indicates that the Court has not completely turned its back on the idea of minimum core obligations but views them as relevant to a consideration of what is reasonable in the circumstances<sup>119</sup>.

According to Davis, the Court's early socioeconomic jurisprudence has developed a minimalist framework within which to apply these rights, and it has done so by allowing the state to base a complete defense on grounds of limited availability of resources, save in respect of the development of programs that deal with the poorest in the community. features<sup>120</sup>. Firstly, although the Court developed a concept of reasonableness from international jurisprudence, particularly the interpretation of the General Comment 31<sup>21</sup>, a significant difference exists between the two approaches. General Comment 3 clearly imposes on the state the obligation to implement elements of the right immediately<sup>122</sup>. The concept of reasonableness adopted by the Court in *Grootboom* provides far less clarity about the core content of the right<sup>123</sup>. Secondly, there is an expectation that the structure of the provision requires, at the very least, a two-stage enquiry. The first step would involve an initial determination of the core meaning of the right, and the second would entail assessing the extent to which the government has taken reasonable measures to achieve the progressive realization of that core content--as contained in the text and gleaned from the first stage of the enquiry. In neither *Grootboom* nor *TAC* was any significant attempt made to give specific meaning to the rights set out in the Constitution. Thirdly, the Court emphasized on the availability of resources<sup>124</sup>. Finally,

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<sup>117</sup> In the *Treatment Action Campaign* case, the Court developed a conversational review in which all three branches assume a shared interpretive role over the right at issue. By offering an engaged scrutiny of government action that invites a response and an order which opens the way for a range of options, the obligations that flow from economic and social rights are negotiated between courts and the elected branches over time. See K Young, *I.J.C.L.* 2010, 8(3), 397-398.

<sup>118</sup> K Young, "A typology of economic and social rights adjudication: exploring the catalytic function of judicial review" *I.J.C.L.* 2010, 8(3), 398.

<sup>119</sup> A Pillay, "Courts, variable standards of review and resource allocation: developing a model for the enforcement of social and economic rights" *E.H.R.L.R.* 2007, 6, 625.

<sup>120</sup> D M Davis, "Socioeconomic rights: do they deliver the goods?" *I.J.C.L.* 2008, 6(3/4), 701-702.

<sup>121</sup> In Comment Three, the UN committee held:

"[T]he fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving \*I.J.C.L. 699 the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal."

<sup>122</sup> Even when the available resources are demonstrably inadequate, the obligation remains for a state party to strive to ensure the widest possible enjoyment of the relative rights under the prevailing circumstances.

<sup>123</sup> In *Grootboom*:

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 a 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.

<sup>124</sup> In *Soobramoney*, Justice Chaskalson observed that "the obligations imposed on the State by ss 26 & 27 are dependent upon the resources available for such purposes and that the corresponding rights themselves are limited by reason of

the Court's cautious approach regarding the nature of an order granted to a successful applicant requires critical analysis. In the lower court, in both *Grootboom* and *TAC*, the relief granted included a form of supervisory jurisdiction. In both cases, the Court refused to follow this precedent<sup>125</sup>.

In *Khosa*<sup>126</sup>, the Court refused to exercise mere rationality review, noting that the search for reasonableness demanded more of the government than the search for rationality and nonarbitrariness; the latter standard, the Court conceded, would have been met by the legislation. Instead, the Court's test for "reasonableness" is substantively based--and grounded in the Constitution's guarantees. These relate to the values of dignity, equality, and freedom--and to the prohibition on unfair discrimination under the Constitution<sup>127</sup>. The Court accepted that the concern that non-citizens may become a financial burden on the country is a legitimate one and there are compelling reasons why social benefits should not be made available to all who are in South Africa irrespective of their immigration status. However, the Court found that the cost thereof would not place an additional burden on the state and, indeed, would constitute only a small proportion of the total cost of the social security budget when proceeding to examine the evidence placed before the Court regarding the financial implications of the decision to extend social benefits to permanent residents<sup>128</sup>.

*Khosa* suggested a new direction in judicial scrutiny of government's social policy and the imposition of financial obligations based on a reading of the equality guarantee, and, hence, it represented a significant break from the administrative law model employed in the cases dealing directly with socioeconomic rights<sup>129</sup>.

In *Rail Commuters Action Group and Others v Transnet Limited t-a Metrorail and Others*<sup>130</sup>, the Court interpreted the relevant legislation in light of the values that animate the constitutional rights of dignity, life, and freedom and security of the person and, accordingly, found that the rail corporation was constitutionally obliged to take affirmative steps to ensure the safety of their commuters. This was the first judgment where the Court made reference to the rights of dignity, life, and freedom and security of the person to impose a positive obligation upon the rail company. The Court thereby affirmed the concept of the positive right of an individual litigant to claim improved public resources<sup>131</sup>. *Khosa* and *Metrorail* cases appear to indicate that the role of courts to take seriously the adverse effects of policy on the poor is less dependent on boldly conceived clauses in a constitutional text and more upon broader jurisprudential considerations that can destabilize existing legal concepts<sup>132</sup>.

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the lack of resources."<sup>38</sup> In *Grootboom*, although the unevenness of the judgment makes it more difficult to draw a definitive conclusion about the Court's approach to resources, Justice Yacoob said "s 26 does not expect more of the State than is achievable within its available resources."

<sup>125</sup> In its reasoning in *TAC*, it said that there was no reason to believe that the government could not execute the Court order. Ironically, the evidence strongly suggests the need for some form of supervisory jurisdiction of the sort the Court rejected. Research conducted in the aftermath of the *Grootboom* judgment revealed that more than two years after the order was granted, there has not been full implementation by any of the relevant government agencies.

<sup>126</sup> *Khosa v. Minister of Social Development* 2004 (6) SA 505 (CC). This case concerns an application for an order confirming the constitutional invalidity of certain provisions which disqualify persons who are not South African citizens from receiving certain welfare grants. The applicants in this matter are indigent Mozambican citizens living in South Africa as permanent residents and if they had been South African citizens, all of them would have qualified to receive welfare grants in terms of the Act. The Constitutional Court held that the exclusion of permanent residents from social benefits was contrary to the right of everyone to social security and to equality.

<sup>127</sup> *Ibid* para. 67-84.

<sup>128</sup> *Ibid* para. 58-62.

<sup>129</sup> D M Davis, "Socioeconomic rights: do they deliver the goods?" *I.J.C.L.* 2008, 6(3/4), 708.

<sup>130</sup> *Rail Commuters Action Group and Others v Transnet Limited t-a Metrorail and Others* 2005 (2) SA 359 (CC). The case concerned applicants who have either suffered assaults or injuries while travelling on trains or are relatives of people injured or killed on trains, sought to hold certain organs of state responsible for the safety and security of rail commuters.

<sup>131</sup> *Ibid* para. 83

<sup>132</sup> D M Davis, "Socioeconomic rights: do they deliver the goods?" *I.J.C.L.* 2008, 6(3/4), 708.

The South African Constitutional Court in *Port Elizabeth Municipality*<sup>133</sup> affirmed the need for special judicial control of the process of eviction, concluding that while there is no constitutional requirement that the state provide housing to any evicted household, a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.

In *Occupiers of 51 Olivia Rd Berea Township and 197 Main Street Johannesburg v. City of Johannesburg and 3 others*<sup>134</sup>, the Court grounded the constitutionally mandated process of engagement in the concept of reasonableness developed in *Grootboom*. The city was thus obliged, and had failed, to engage with the applicants with a view to a determination of the following issues: (a) what the consequences of the eviction might be; (b) whether the city could help in alleviating those dire consequences; (c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period; (d) whether the city has any obligations to the occupiers in the prevailing circumstances; and (e) when and how the city could or would fulfill these obligations. The concept of engagement, as developed by the Court, may be exquisitely vague in its attempt to strike a balance between property rights and the rights of the homeless, but it represents a further development of the principles of accountability and participation that can be employed by the homeless against the hitherto absolute power of property<sup>135</sup>.

In *Bon Vista Mansions*<sup>136</sup>, the High Court of South Africa found a violation of the constitutional right to water on the basis that the Applicants had existing access to water before the Council disconnected the supply. The act of disconnecting the supply was *prima facie* in breach of the Council's constitutional duty to respect the right of access to water, in that it deprived the Applicants of existing access. An interim injunction was issued ordering the local authority to restore the water supply to the residents.

The applicants in the *Mazibuko case*<sup>137</sup> sought to challenge the decision of Johannesburg Water Ltd to install pre-paid water meters in the poor township of Phiri. The two main aspects of the applicants' challenge was that the installation of the pre-paid water meters was, for a variety of reasons, unlawful and secondly that the company's Free Basic Water Policy which provided 6 kilolitres of water per month for free to all account holders was in breach of Section 27 of the Constitution as it provided an insufficient amount of water. The Constitutional Court found against the applicants on all grounds. The Court held that the 'City is not under a constitutional obligation to provide any particular amount of free water to citizens per month. It is under a duty to take reasonable measures progressively to realise the achievement of the right', and that the installation of pre-paid water metres was not unreasonable.

Davis argues that the record of socioeconomic jurisprudence in South Africa documents one important means to achieve the implementation of the critical principles of transparency, accountability, and participation. Rights that impact so directly on distributional decisions can, if the South African experience is a guide, constrain the tendency toward capture of state decisions by a centralized and unaccountable administration. In this way a justificatory culture can be preserved and promoted, itself essential to the democratic success of the developmental state. However, the South African experience cautions us that political organization remains the primary means for securing different forms of distributional decisions for the vulnerable within society. It also confirms that, even when armed with progressive texts, judges retreat into models of adjudication that are based on earlier

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<sup>133</sup> *Port Elizabeth Municipality v. Various Occupiers (1)* 2005 SA 217 (CC) paras 18, 28.

<sup>134</sup> *Occupiers of 51 Olivia Rd Berea Township and 197 Main Street Johannesburg v. City of Johannesburg and 3 others* 2008 ZACC (1). The case was concerning to more than four hundred occupiers of buildings in the inner city of Johannesburg challenged their eviction by the city, which was based on a finding that the buildings they occupied were unsafe and unhealthy.

<sup>135</sup> *Ibid* para. 13.

<sup>136</sup> *Residents of Bon Vista Mansions v SMLC* 2001 (High Court) App No.12312 (South Africa).

<sup>137</sup> *Mazibuko v City of Johannesburg* [2009] ZACC 28 (8 October 2009).

traditions of legal practice and that reduce the potential promise of the text<sup>138</sup>.

## 2.ECHR

It has been a long time since the European Court of Human Rights for the first time recognized that the fulfilment of a duty under the Convention sometimes requires positive action. In *McCann* case<sup>139</sup>, it is suggested that a positive obligation, undertaken by state under Article 2 for protection of the right to life, procedurally requires an effective implementation of the law that composes of taking appropriate measures to prevent arbitrary use of force, investigating all suspicious deaths efficiently and prosecuting alleged offenders. Therefore, States cannot fulfill their obligations imposed by the European Convention on Human Rights by just remaining passive<sup>140</sup>.

In the landmark case of *Airey*<sup>141</sup>, when interpreting the right to a fair trial in civil lawsuits as a right encompassing the fight to legal aid for people of modest means even though the provision literally only concerns criminal charges, the Court stated:

"...it [the Convention] is designed to safeguard the individual in a real and practical way, as regards those areas with which it deals. Whilst the Convention sets out what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention."

According to Clements and Simmons, in analysing the extent to which the European Convention has been interpreted to require States protect socio-economic rights, it is possible to discern two general and overlapping categories, such as gross socio-economic deficits directly or indirectly attributable to State action and gross socio-economic destitution for which the State has no direct or obviously indirect responsibility. Where a complaint discloses severe and straight-forward socio-economic deprivation that is directly or indirectly attributable to State action or inaction and which has had or threatens gross consequences for the victim, then the Court is prepared to examine the State's responsibility-primarily in terms of its obligation under Article 3 and 8. Where the complaint is suffering from or threatened with severe socio-economic deprivation for which there is no direct or obvious indirect state responsibility. In such cases the State's responsibility under the Convention is generally engaged by reference to its obligations under Article 1 in combination with Article 3 and 8.<sup>142</sup>

In *D v UK*<sup>143</sup>, the Court held that in view of these exceptional circumstances and bearing in

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138 D M Davis, "Socioeconomic rights: do they deliver the goods?" *I.J.C.L.* 2008, 6(3/4), 710-711. He continues that a jurisprudence that holds a democratically elected government to the distributional consequences of a social democratic constitution is in its infancy in South Africa and may yet fail to thrive or even survive. To convince lawyers that law is deeply imbricated with the political and economic processes of society is a very difficult task and not one that has yet succeeded with any clear conviction in South Africa. But the enterprise holds democratic promise in that, the powerless have been able to compel transparency and accountability. That gain should not be discounted

139 *McCann and others v UK*, Judgment of September 27, 1995, Series A, No: 324, (1996) 21 E.H.R.R. In this case, the Court held that it confines itself, like the Commission, that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alia, agents of the State.

140 A R Mowbray, "The Creativity of the European Court of Human Rights", 5: 1 *Human Rights Law Review* (2005), 78

141 *Airey v Ireland* (1979) 2 E.H.R.R. 305.

142 L Clements & A Simmons, 'European Court of Human Rights: Sympathetic Unease' Theory' in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press 2008), at 410-412.

143 *D v United Kingdom* (1997) 24 E.H.R.R. 423. The applicant, originally from St Kitts (in the Caribbean), was arrested

mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3. As a result, the Court has held that deporting individuals back to jurisdictions in which they would run a real risk of being subject to degrading treatment will constitute a breach of Art.3, with state responsibility engaged as a result of the decision to make use of deportation powers.

In *A v UK*<sup>144</sup>, the Court stated that children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity. In the Court's view, the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3. In the circumstances of the present case, the failure to provide adequate protection constitutes a violation of Article 3 of the Convention.

In *Price v. UK*<sup>145</sup>, the Court considered that the threshold depended —on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim, and after a thorough review it concluded that to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3.

In *Z v United Kingdom*<sup>146</sup>, state responsibility was engaged by the failure of local authorities to take reasonable preventative measures to protect children against abuse. In the case, the state authorities knew or should have been aware of the problem. In addition, the victim was in a special relationship of dependency upon the state because as a child within a particularly vulnerable class of person that the state authorities should have identified as being in need of special care.

In *Hadareni*<sup>147</sup>, the Court held that the police were complicit in the atrocity and tried to cover up the incident. The Government's responsibility was engaged regarding the applicants' subsequent living conditions. The Romanian authorities had repeatedly failed to put a stop to the breaches of applicants' rights, which constituted a serious continuing violation of Article 8. Moreover, the Court also found a violation of Article 3 since the living conditions of applicants for ten years had had a detrimental effect on their health and well-being.

The case law has established that there appears to be no Convention requirement on states to provide a particular type or level of health care. Nevertheless, the Court has tentatively recognised that acts and omissions by state authorities which expose impoverished individuals to threats to their life may in certain circumstances engage state responsibility under Art.2148.

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for cocaine possession upon his arrival in the United Kingdom and was sentenced to six years' imprisonment. It was discovered that he suffered from AIDS. Before his release, an order was made for his deportation to St Kitts. He claimed that his deportation would reduce his life expectancy as no treatment of the kind he had been receiving in the United Kingdom was available in St Kitts.

144 *A v UK* (1999) 27 E.H.R.R. 611. The applicant was then nine years old who was found by the consultant paediatrician and examined by him to have been beaten with a garden cane which had been applied with considerable force on more than one occasion. The Court stated that under English law it is a defence to a charge of assault on a child that the treatment in question amounted to "reasonable chastisement". The burden of proof is on the prosecution to establish beyond reasonable doubt that the assault went beyond the limits of lawful punishment. In the present case, despite the fact that the applicant had been subjected to treatment of sufficient severity to fall within the scope of Article 3, the jury acquitted his stepfather, who had administered the treatment.

145 *Price v. UK* (2001) 34 E.H.R.R. 1285. The case concerned a Thalidomide impaired applicant who in the course of debt recovery proceedings refused to answer questions put to her and was committed to prison for seven days for contempt of court. She alleged that she suffered degrading treatment as a result of the prison's inadequate facilities, but the UK Government argued that any discomfort she experienced had not reached the minimum level of severity required by Article 3. The Court noted that where treatment humiliates or debases an individual showing lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading (para. 52).

146 *Z v UK* (2001) 34 E.H.R.R. 97.

147 *Moldovan and others v Romania* (2005) application no: 64320/01. The applicants had to leave their village and live in dire conditions for over ten years in hen houses and pig sties in the cold in grossly overcrowded conditions.

148 C O'Connell, "A modest proposal: destitution, state responsibility and the European Convention on Human Rights" *E.H.R.L.R.* 2008, 5, 590.

In *Pentiacova v Moldova*<sup>149</sup>, the Court justified its reluctance to interpret the Convention as requiring the provision of certain forms of free health care. It accepted that national authorities were often in a better position to assess health care priorities and to decide how to allocate limited state resources; expressed concern about requiring all ratifying states to provide a certain form of health treatment, irrespective of their varying social and economic situations; and recognised that requiring the funding of one particular type of treatment could draw funds away from other areas of vital public expenditure. The Court also observed that the Convention could not be used to meet every need or plug every gap in state health care or social security systems.

In *Öneryildiz v Turkey*<sup>150</sup>, where the failure of administrative authorities to take action to protect slum-dwellers living on a rubbish dump against the threat of a methane gas explosion, the European Court found a violation of the right to life of the applicant's nine relatives, who died when the explosion eventually occurred. State responsibility was engaged by the failure to eliminate the methane gas threat to the slum-dwellers when the state should have been aware of its existence. The threat to life in *Öneryildiz* did not directly stem from the destitute status of the slum-dwellers, but more indirectly from their residence in a hazardous area. Nevertheless, it would involve no great conceptual leap to suggest that state responsibility may be engaged where state action or inaction exposes the destitute to specific and distinct threats to their life where the nature and existence of that distinct threat should have been known to the authorities and reasonable remedial action could have been taken to avoid it.

The Art.8 case law requires states to refrain from interfering in an unjustifiable manner with these rights: in addition, states may have positive obligations that arise out of the concept of respect for private, home and family life. Therefore, the possibility must exist that state interference or a failure to discharge positive obligations which generates or contributes to the creation of conditions of extreme poverty may infringe the rights recognised in Art.8(1): if this occurs, then a state will have to justify its (in)action on the basis that it is a proportionate interference with privacy and family rights and is directed towards achieving a legitimate aim, as required by Art.8(2)<sup>151</sup>.

In *Connors v. UK*<sup>152</sup>, the Court found violation for the distress caused by the eviction carried out by a local housing authority without adequate justification or procedural safeguards. In *Connors v UK*, the applicant and his family lived on a local authority caravan site for thirteen years. The local authority took summary proceedings to evict the applicant and his family. The following the eviction he and his family were required to move on repeatedly. Partly at least due to the stress and uncertainty, the applicant's wife chose to move into a house with the younger children and they were separated in 2001.

In *Marckx v Belgium*<sup>153</sup>, the decision in *Marckx* established that there should be no

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149 *Pentiacova v Moldova* (2005) 40 E.H.R.R. SE23.

150 *Öneryildiz v Turkey* [2004] 39 E.H.R.R. 12.

151 C O'Conneide, "A modest proposal: destitution, state responsibility and the European Convention on Human Rights" *E.H.R.L.R.* 2008, 5, 590.

152 *Connors v United Kingdom*, 27 May 2004 (App No 66746/01). The Court stated that:

"The Court is not persuaded that the necessity for a statutory scheme which permitted the summary eviction of the applicant and his family has been sufficiently demonstrated by the Government. The power to evict without the burden of giving reasons liable to be examined as to their merits by an independent tribunal has not been convincingly shown to respond to any specific goal or to provide any specific benefit to members of the gypsy community. The references to "flexibility" or "administrative burden" have not been supported by any concrete indications of the difficulties that the regime is thereby intended to avoid. It would rather appear that the situation in England as it has developed, for which the authorities must take some responsibility, places considerable obstacles in the way of gypsies pursuing an actively nomadic lifestyle while at the same time excluding from procedural protection those who decide to take up a more settled lifestyle. The Court finds that the eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a "pressing social need" or proportionate to the legitimate aim being pursued. There has, accordingly, been a violation of Article 8 of the Convention."

153 *Marckx v Belgium* (1979) 2 E.H.R.R.330. The case concerned the legal relationship between an unmarried mother and her "illegitimate" child under Belgian law was considered unsatisfactory compared with the situation of a

distinction drawn between 'legitimate' and 'illegitimate' family. Importantly, the Court in *Marckx* clearly accepted that civil rights may entail positive obligations for the state. In *Marckx* it was held that article 8 concerning respect for family life, involves negative and positive obligations which imply the existence of domestic legal safeguards rendering a child's integration into his family possible from the moment of birth.

In *Botta v. Italy*<sup>154</sup>, the Court noted that while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference. In addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. Having determined that a failure to remove barriers could, in certain situations, place a State in breach of its Article 8 responsibilities, the Court decided that the extent of this obligation depended upon whether a direct and immediate link could be established between the measures sought by an applicant and the latter's private and/or family life. The Court held that the right asserted by Mr Botta, namely the right to gain access to the beach and the sea at a place distant from his normal place of residence during his holidays, concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life.

In *Lopez Ostra v Spain*<sup>155</sup>, the European Court held that the Spanish government breached article 8 of the Convention because it failed to take steps to protect the applicant and her family from the environmental problems caused by the facility. Severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. Environmental problems may violate the right to privacy and personal security even where they do not violate the right to health.

The European Court of Human Rights has been willing to go beyond the wording of the ECHR and read social elements into the civil rights provisions of the Convention even though several of the decisions have implications of a more general character. One can say that the decisions illustrate that the notion of the indivisibility of human rights has a legal relevance<sup>156</sup>. However, the ECHR in common with all other courts, is hesitant when asked to determine socio-economic questions since they are frequently controversial, politically challenged and above all are generally very difficult<sup>157</sup>. Therefore, the modest and limited nature of the protection offered against destitution by the current state of the ECHR case law should not be confused with the development of a full-blown socio-economic rights jurisprudence<sup>158</sup>.

Although the Court has frequently emphasised that the Convention is essentially directed at the protection of civil and political rights, the case law of the Court is best understood as involving an "integrated" approach containing a distinct "social dimension", which reflected the "permeable" nature of the distinction between civil and political and socio-economic rights. Incorporating a "social dimension" into the interpretation of the Convention is essential to maintain a coherent and responsive

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"legitimate" child.

<sup>154</sup> *Botta v. Italy* (1998) 26 E.H.R.R. 241. A physically disabled applicant, sought to take it further, by complaining that physical barriers stopped him gaining access to Italian beaches and as a consequence this amounted to a violation of his rights under Article 8, since it rendered him —unable to enjoy a normal social life which would enable him to participate in the life of the community.

<sup>155</sup> *Lopez Ostra v. Spain*, Judgment of December 9, 1994, Case No. 41/1993/436/515. the applicants were nationals and residents of Spain who complained that a waste treatment facility was sitting a few meters from their home.

<sup>156</sup> I E Koch, "The Justiciability of Indivisible Rights", 72 *Nordic Journal of International Law* (2003), 25.

<sup>157</sup> L Clements & A Simmons, "European Court of Human Rights: Sympathetic Unease" Theory' in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press 2008), 426.

<sup>158</sup> C O'Connell, "A modest proposal: destitution, state responsibility and the European Convention on Human Rights" *E.H.R.L.R.* 2008, 5, 604.

human rights jurisprudence<sup>159</sup>. In this regards following comment takes an important place:

"It will take a long time for economic, social, and cultural rights to obtain the same status and impact as civil and political rights. States will continue to fear the financial commitments of guaranteeing such rights. A conceptual clarification of the separate economic, social, and cultural rights may nevertheless contribute to their recognition and implementation. In addition, this clarification reveals that economic, social, and cultural rights, equal to civil and political rights, may require state abstention, a commitment that requires no financial resources on the part of states. Simultaneously, the fact that civil and political rights may embrace positive obligations underlines the interdependence and interrelatedness of both sets of rights. If positive obligations are derived from civil and political rights, why not recognize similar obligations with regard to economic, social, and cultural rights?"<sup>160</sup>.

### 3. Turkey

Article 5 of Turkish Constitution requires that fundamental aims and duties of the state are as follows; to ensure welfare and peace of individuals and society, to abolish political, economic and social barriers that pressure fundamental rights and freedoms of individuals in a way which incompatible with justice and the understanding of social state governed by the rule of law; to prepare the necessary conditions for the development of persons' material and spiritual existence. However, Article 65 of the Constitution lays down; "The State shall fulfil its duties as laid down in the Constitution in the social and economic fields within the capacity of its financial resources, taking into consideration the priorities appropriate with the aims of these duties." Therefore, article 65 adopts a principle that could be used as an justification not to enforce socio-economic rights.

The Constitutional Court, in its decisions, has always questioned whether or not financial resources of state are adequate. This is because of the fact that courts evaluate "the adequacy of financial resources of the state" is inevitably *ultra vires* and "expediency review" rather than using judicial power. This limited supervision of the Constitutional Court has led that two principles come out; "State has a wide margin of appreciation while fulfilling its social duties." and "If once state has decided to fulfil a duty in a particular way, it cannot make it again in a way violating equality."<sup>161</sup>

Regarding Turkish legal order, one can argue that, in the context of judicial protection, the Constitutional Court which could be considered the highest court of Turkey behaves irresolutely in the protection of social and economic rights; reads and implements the Constitution from the perspective of the protection and sustainability of institutional and economic welfare of state rather than from the perspective of the protection of rights. The Constitutional Court should handle fundamental principles, such as justice, equality and non-discrimination including the equality of

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<sup>159</sup> Ibid at 586.

<sup>160</sup> B Toebes , 'Towards an Improved Understanding of the International Human Right to Health', Human Rights Quarterley (1999) 21, 679.

<sup>161</sup> B Algan, (2007), Ekonomik, Sosyal ve Kültürel Hakların Korunması (Protection of Socio-economic and Cultural Rights), 1. Baskı, Ankara, Seçkin Yayıncılık, s. 442-446, B Tanör, N Yüzbaşıoğlu, (2001), 1982 Anayasasına Göre Türk Anayasa Hukuku (Turkish Constitutional Law Under 1982 Constitution), YKY, İstanbul, 2. bası, 178. AYM, 11.12.1964 , E. 1963/138, K. 1964/71, <http://www.anayasa.gov.tr/eskisite/KARARLAR/IPTALITIRAZ/K1964/K1964-71.HTM>, (erişim tarihi: 15 Ocak 2013). In the case which concerned the right to have social security, the Court stated that "... In accordance with Article 48 of the Constitution, social security is a right for everyone as well. The constitution maker, under this article, has demanded to ensure all citizens benefit from the right of social security, however, in Article 65, regarding its materialization may take time and depends on some conditions, it has laid down that state should fulfil the duty of reaching to economic and social aims prescribed in this part of the Constitution to the extent of economic development of state and the adequacy of financial resources. Therefore, on the basis of this article, in the field of social security, the law maker is authorized not to grant certain rights or to grant them partially. However, when it grants a right considering that economic development and financial resources are adequate for this right, everyone must be covered. In terms of personal circumstances, such as committing certain crimes, cannot make a distinction between the interested parties and it cannot take certain rights back from certain persons after they are granted. This kind of distinction or retrieval is against to both the justification of Article 48 and the meaning of the word of "everyone" in this article. Moreover, this understanding leads that the law maker is able to make same thing for all kind of social and economic rights and, therefore, this has a detrimental effect not only on social security but also on whole social order regulated by the Constitution..."

opportunity, in a way comprising disadvantaged persons in society that should be protected first and foremost. It also should interpret fundamental rights such as education, health and social security from this perspective. However, it is not a mistake to argue that the Constitutional Court has not leaved the tendency to protect the state in cases on relationships between state, individuals and society yet.<sup>162</sup>

The Constitutional Court, in the judgement of a case which was filed to argue that it is violation of right to health to claim price for health services, decided that as follows; the fact that the Ministry of Health determines the prices of health services provided by public institutions and hospitals and, if necessary, approves price tariffs of private hospitals and, thus, the demand for the participation of citizens to public expenses cannot be considered as “the sale of these services”; state must fulfil its obligations according to its financial resources, however its financial resources are not sufficient to provide health services free of charge and, moreover, the Constitutions does not impose this obligation; state has the authority to check prices of services provided by private hospitals and to regulate this field, because of the fact that private hospitals cannot determine their prices arbitrarily.<sup>163</sup>

On the other hand, the Constitutional Court decided that state cannot make a regulation which violates “right to life” by emphasizing the fact that there is a very strong relation between the health supports provided in the context of right to social security and right to “life, the protection spiritual and physical existence” prescribed in Article 17 of the Constitution. It concluded that the limitations in Article 65 cannot be basis to limit the duration of health support<sup>164</sup>.

According to case-law of Turkish Council the State<sup>165</sup>, the right to health which is one of the most important rights guaranteed by the Constitution should not had been damaged by a public authority on the basis of economic difficulties this authority has<sup>166</sup>. Therefore, the judgement emphasized that the essence of right to health must be read as is including “health supports” and financial difficulties cannot be excuse not to protect the essence of a right. The Council of State, in a judgement in which the scope of right to health was determined according to contemporary human rights understandings stated that it is impossible to interpret the Article 65 of the Constitution in a way that leads to prevent relevant persons to reach to health services by determining prices under the minimum price level or in a way that leads them have an excessive financial burden<sup>167</sup>.

In regard to the right to education, the Constitutional Court stated that the Constitution

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162 Y Aliefendioğlu, (2005), “İnsan Hakları Uluslararası Sözleşmelerinin İç Hukukta Doğrudan Uygulanması (Direct Application of International Human Rights Agreements in the Domestic Legal System)”, *Türkiye Barolar Birliği*, Ankara, s.136, M Turhan, (2007), “Anayasanın Hak Temelli Yorumu ve Anayasa Yargısı(Interpretation of the Constitution Grounds of Rights and Constitutional Law)”, *Ankara Üniversitesi SBF Dergisi*, 62-3, 392.

163 AYM, 19.4.1988, E:1987/16, K:1988/8, AMKD S:24, 99-115.

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AYM,17.1.1991,E.1990/27,K.1991/2,<http://www.anayasa.gov.tr/eskisite/KARARLAR/IPTALITIRAZ/E1990/K1991/02.htm> , (accessed at 15 January 2013). The notes that :“Article 65 of the Constitution requires that, while fulfilling its duties in social and economic field, state should consider as follows; a) the protection of economic stability, b) the adequacy of financial resources. The Social Insurance Institution which is one of the national public social security institutions provide social security for workers by using financial resources deducted from employees and employers. Also, the Institution can take support from public budget in case of emergency which prevent it from functioning properly according to 9th paragraph of Article 19 of Law No. 4792. In this regard, it can be argued that state is responsible for ensuring the Institution has a strong financial structure. State must behave according to the principles above while fulfilling this responsibility. There is no relationship between the restriction in Article 65 of the Constitution and the impugned expression of “... up to 18 months” in Article 34 of Law No. 506. While Article 60 of the Constitution gives “the right to social security” to individuals and in second paragraph imposes the duty of taking necessary measurements, Article 65 lay downs some restrictions for this duty. Nevertheless, this right in Article 60 has a very relationship with “the right to life, the protection of material and spiritual existence” regulated in Article 17. Therefore, state cannot make a regulation which ends “right to life” while fulfilling its responsibilities in the field of social and economic. Therefore, the restrictions in Article 65 cannot be applied for the cases on the impugned expression of “... up to 18 months” in Article 34 of Law No. 506.

165 Turkish Council the State works as a highest Court on the Administrative Courts.

166 İDDK(The Plenary Session of Administrative Chambers of The Turkish Coucil of The State), 17.01.1997, E.1995/816, K.1997/1

167 The Council of State (of Turkey), 2nd Chamber, E.2007/2534

attaches special importance to educational services compared to other public services; that private educational institutions are allowed to carry out education and training services as long as their services are not conflicting with public interests, that, therefore, private educational institutions carrying out education and training services which are public services cannot be exempt from obligations arising from these services; that the later judgement is the requirement of the understanding of social state and justice; that educational services are fully open to private enterprise, however, activities cannot be considered an unlimited service. The Constitutional Court concluded that the restrictions which are put on activities of private educational institutions are constitutional<sup>168</sup>.

## V. CONCLUSION

The reality of international law has shown that artificial separations of the two sets of rights do not occur in real cases. Just as a human being exists in reality as a "whole," rights are intertwined and interwoven, existing as a living organism. Enforceability is no longer a matter of perfectly dissecting and distinguishing the inseparable: "here is the right to life and here the right to health" or "here is freedom from torture" and here "the right not to be starved." Human rights are indeed indivisible<sup>169</sup>.

The U.N. Committee on Economic, Social and Cultural Rights (CESCR) has made it clear that, regardless of whether or not domestic courts in a particular legal system are able to enforce all, or only some aspects of social and economic rights, these rights must still be enforceable and be subject to effective remedies. There must be somewhere to go to be heard and there must be an effective remedy provided if a right has been violated. As emphasised by the Committee, this is fundamental to the relationship between human rights and the rule of law<sup>170</sup>.

We are at a significant advantage in considering the validity of concerns about the enforceability of economic and social rights in comparison to commentators in earlier years. There is now a large amount of case law that allows us to assess whether, in fact, courts have been able to deal with some of the problems considered above, and what strategies have been developed to address them. First, social and economic rights have been litigated directly before courts, resulting in judgments and orders being made expressly on the basis of such rights. Second, as stated above, many civil and political rights have social and economic aspects or implications and the acknowledged interrelationship and indivisibility of both kinds of rights have led to elements of social and economic rights being protected by means of provisions relating to civil and political rights. In some instances, economic and social rights have been derived from such rights. Third, some rights, which may be classified as either civil and political or social and economic in nature, for example, trade union rights and equality rights, may be employed by litigants and courts in order to give effect to social and economic interests. The argument that economic and social rights lack the qualities of enforceability cannot, therefore, be sustained in the face of any reasonable survey of jurisprudence at the national and international level. The same is true in relation to the contention that only 'some' aspects of economic, social rights are, or might be, inherently justiciable. In a surprising number of cases from a variety of legal systems, courts have demonstrated that they are capable of identifying the relevant legal standards to apply in cases concerning alleged violations of economic and social rights, while at the same time respecting their limits in relation to the distinctive role and competencies of

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<sup>168</sup> AYM, 12.4.1990, E.1990/4, K.1990/6, AYMKD S:26, 124-135. The case was about a regulation made by Ministry of Education increasing the percentage of students free of charge to 10 %, it was laid down that the Constitution has a principle which requires that state will provide scholarships and other means to support economically deprived students with the aim of allowing them to continue their education; that it was state's task to support these students and state should carry out this task using its own resources, therefore, it was contrary to the Constitution to force private educational institutions to accept more students free of charge.

<sup>169</sup> M F Tinta, 'Justiciability of Economic, Social, and Cultural Rights in the Inter American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions' 29 Human Rights Quarterly (2007), 435.

<sup>170</sup> CESCR General Comment No. 9, The Domestic Application of the Covenant, (Nineteenth Session, 1998), U.N. Doc. E/C.12/1998/24 (1998), para 2-3.

governments<sup>171</sup>.

Courts have ordered the providing water, sanitation and drainage system<sup>172</sup>, the halting of forced evictions<sup>173</sup>, the provision of medical treatments<sup>174</sup>, the enrolment of poor children and minorities in schools<sup>175</sup>, the reinstatement of social security benefits<sup>176</sup> and the development and improvement of State programmes to address endemic diseases and starvation<sup>177</sup>. This burgeoning case law provides an opportunity and potential for future development and application of law for socio-economic rights<sup>178</sup>.

As seen above, Courts play an important role in mainstreaming socio-economic rights by elaborating the contents of rights, indicating the responsibilities of the state, identifying ways in which the rights have been violated by the state, suggesting the frameworks within which policy has to be made, highlighting the priority of human rights<sup>179</sup>. Adjudicating socio-economic rights cases will never be a simple calculation of “factors in favour of greater scrutiny” against “factors against greater scrutiny”. The factors themselves may be differentially weighted, both within each individual jurisdiction and in comparison with other jurisdictions. They could intersect and interact in complex ways in a single case. But continued engagement with them holds the promise of providing clearer, more coherent guidelines for future cases. The cases discussed here and many others in various jurisdictions place beyond doubt the fact that courts have a key role to play in enforcing socio-economic rights<sup>180</sup>.

As a result, Pieterse accurately states that whether we like it or not, socio-economic rights are as justiciable as civil and political rights<sup>181</sup>. The crucial issue is not whether social rights are justiciable, but rather how they can be consistently adjudicated with measure of integrity, respecting the institutional nature of adjudicatory bodies and the call for justice inherent in human rights<sup>182</sup>.

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171 A Nolan, B Porter, M Langford, "The Justiciability of Social and Economic Rights: An Updated Appraisal" CHRGI Working Paper No. 15, 2007, 18-20.

172 *Municipal Council Ratlam v Vardhichand and ors.* AIR 1980 SC 1622.

173 *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 S.C.C.

174 *Paschim Banga Khet Mazdoor Samity v. State of W. B.* (1996) 4 S.C.C. 37.

175 Int-Am. Ct H. R., *Caso de las NiZas Yean y Bosico v. Reptblica Dominicana* (8 Sept. 2005).

176 *Five Pensioners v. Peru*, Inter-Am C.H.R., Series C No. 98 (28 Feb. 2003).

177 Inter-Am. Ct. H.R., *The Mayagna (Sumo) Indigenous Community of Awas Tingni*, Judgment of Aug. 31, 2001 (Ser. C) No. 79.

178 M Langford, "The Justiciability of Social Rights: From Practice to Theory" in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press 2008), 3-4.

179 J Cottrell and Y Ghai, "The Role of the Courts in the Protection of Economic, Social and Cultural Rights" in Y Ghai & J Cottrell (eds) *Economic, Social & Cultural Rights in Practice*. (London: Interights 2004), 86.

180 A Pillay, "Courts, variable standards of review and resource allocation: developing a model for the enforcement of social and economic rights" *E.H.R.L.R.* 2007, 6, 636.

181 M. Pieterse, "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR*, 404.

182 M Langford, "The Justiciability of Social Rights: From Practice to Theory" in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press 2008), 43.

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