THE ENFORCEMENT OF THE RIGHT OF ACCESS TO ADEQUATE HOUSING IN SOUTH AFRICA: A LESSON FOR LESOTHO

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DECLARATION

I, PULE EDWIN SESINYI, declare that the work presented in this thesis is original. There has never been presentation of this work in any other university or institution. Where other people's works have been used, referred or quoted, proper reference has duly been made. Suffice it to declare that the work is solely mine. It is hereby submitted in fulfilment of the requirements for the Degree of Master of Laws.

SIGNATURE:……..

DATE:……..

SUPERVISOR: PROFESSOR CHUKS OKPALUBA

DEDICATION

TO MY BROTHER

PULE EDWARD PULE

Who did not live long enough to ripe the fruits of what he saw

ACKNOWLEDGEMENTS

First and foremost, I faithfully thank God for this magnificent, rich blessing which he has bestowed upon me, and for making the truism of the adage that childhood dreams may come true. If it were not because of His mercy and grace, I would not have been able to achieve my goals, nor overcome the insuperable challenges with which I have been faced throughout this year. With a prayer-filled spirit, when I get tired from writing, the great words of God as they appear in 1 KINGS 19:7 run constantly in the recess of my mind, “Get up and eat, for the journey is too much for you.”

I dedicate this journey through grace to my unselfish supevisor, Professor Okpaluba Chuks who sharpened ambitions to continue with this program. He unendingly kept encouraging me to research and write. He has always been there for me to fill my spirit with words of wisdom in the legal fraternity and academic field. Every time, after our discussion with regard to writing and research, I feel compelled to spend the whole night writing and ignite my mind with fresh and beneficial information. Prof, I am deeply indebted to you.

I am profoundly indebted to Professor Osode C Patrick who facilitated everything for me to be in touch with the University. I do not forget even minute information he would provide to me. Prof, thank you every much. May I not be the last to get such generous help from your hand.

With gratitude, I appreciate the assistance of Mrs Mkiva, the Law Faculty Manager, who has been co-ordinating between me and all stakeholders in this great work.

I wish to extend a note of gratitude to the University of Fort Hare for allowing me pursue this programme. It would have not been possible to carry this cross, but with its fee waiver, I managed to go through.

I could not have completed this task without the love and support of my family and close friends.

Indeed, I believe that confidence thrives on honesty, on honour, on the sacredness of obligations, on faithful protection and on unselfish performance. Without them it cannot live.

ACRONYMS

ANC	African National Congress
BCLR	Butterworths Company Law Reports
BNG	Breaking New Ground
CESCR	Committee on Economic, Social and Cultural Rights
CC	Constitutional Court
ESR Review	Economic and Social Rights Review
ESTA	Extension of Security of Tenure Act 62 of 1997
Harv. C. R.- C.L.L. Rev	Harvard Civil-Rights Liberties Law Review
HSRC	Human Sciences Research Council
HSS	Housing Subsidy Scheme
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
MEC	Member of Executive
NGOs	Non-Governmental Organisations
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998
PULP	Pretoria University Law Press
RHA	The Rental Housing Act 50 of 1999
SACR	South African Criminal Reports
SALJ	South African Law Journal
SAPR/PL	SA Publiekreg/Public Law
SADC	South African Development Community
SHA	The Social Housing Act 16 of 2008

SCA	Supreme court of Appeal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UN	United Nations
UCLA Law Review	University of California, Los Angeles Law Review
UDHR	The Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNCHS	United Nations Commission on Human Settlements
UNCRC	United Nations Convention on the Rights of the Child

ABSTRACT

South Africa is one of the countries with a very horrifying history. However, in the dawn of democratic governance, a worldly admirable constitution was brought into picture. The 1993 and 1996 South African Constitutions entrenched an elaborate Bill of Rights with provisions empowering courts to grant “appropriate relief and to make “just and equitable” orders. Happily, the Bill of Rights included justiciable and enforceable socio-economic rights. Amongst them, there is a right of access to adequate housing, for which this work is about. South Africa is viewed as a country with developed jurisprudence in the enforcement of socio-economic rights, hence it has been used as a lesson for Lesotho.

Lesotho is still drowning in deep blue seas on enforcement of socio-economic rights either because the constitution itself hinders the progress thereon or because the parliament is unwilling to commit execute to the obligations found in the socio-economic rights filed.

This work scrutinizes many jurisdictions and legal systems with a view to draw lively examples that may be followed by Lesotho courts towards enforcing housing rights. Indian and South African jurisprudences epitomize this notion.

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CHAPTER ONE: AN OVERVIEW: FROM ORATORY TO REALITY

1. INTRODUCTION

Since the end of the apartheid regime, South Africa has been viewed as one of the foremost countries in terms of setting standards through infrastructural developments as well as legislative and enforcement through the courts.[1] This is witnessed by the human rights scholars who indicate that such revolution is known for its entrenchment of clear human rights in the constitutions.[2] These rights indicate that the South African Constitution differs from any traditional liberal model in that its provisions are transformative. In *City of Johannesburg v Rand Properties (Pty) Ltd and Others*,[3] Jajbhay J alluded:

> The decision in *Grootboom* 2001 (1) SA 46 (CC) confirms that the Bill of Rights is a transformative document which is aimed at achieving a society where people will be able to live their lives in dignity, free from poverty, disease and hunger. Our Constitution encompasses a transformative provision. As such, the State cannot be a passive bystander in shaping the society in which individuals can fully enjoy their rights. The *Grootboom* judgment confirms that the full transformative power of the rights in the Bill of Rights will only be realised when they are interpreted with reference to the specific social and economic context prevalent in the country as a whole, and the social and economic context within which the applicant now finds itself, in particular.

Sachs J said:

> The substantive approach requires that the test for constitutionality is not whether the measure concerned treats all affected by it in identical fashion. Rather it focuses on whether it serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution but have not already been achieved. It roots itself in a transformative

[1] Most of the cases that were decided after the 1993 South African Constitution came into force indicate the great contribution made by courts. For instance, see *S v Makwanyane and Another* 1995 (3) SA 391 (CC), 1995 (2) SACR 1, 1995 (6) BCLR 665; *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC), 2001 (2) SACR 66, 2001 (7) BCLR 685; *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC); *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC), 2000 (1) SACR 81; 2000 (1) BCLR 86; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC), 1998 (2) SACR 556,1998 (12) BCLR 1517; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39; *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC); *Joseph and Others v City of Johannesburg and Others* 2010 (3) BCLR 212 (CC), 2010 (4) SA 55 (CC).

[2] Both the 1993 and 1996 South African Constitutions are indicative of this fact.

[3] 2007 (1) SA 78 (W). See also Pierre de Vos "Grootboom, the right of access to housing and substantive equality as contextual fairness" (2001) 17 *SAJHR* 258.

> constitutional philosophy which acknowledges that there are patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved. In this respect, the context in which the measure operates, the structures of advantage and disadvantage it deals with, the impact it has on those affected by it and its overall effect in helping to achieve a society based on equality, non-racialism and non-sexism, become the important signifiers.[4]

2. AIMS & SCOPE OF STUDY

Owing to the steady growth of socio-economic guarantees found in national constitutions throughout the world, the question as to whether constitutionally recognized socio-economic rights are judicially enforceable remains an increasingly debated issue worldwide. But this is no longer a controversial issue in South Africa, except that degree of enforceability may be an issue.[5] It therefore means that it is settled that to an extent socio-economic rights are enforceable in South Africa.[6] The Constitutional Court of South Africa has, over the time, decided in a number of significant cases that provide important insights into the judicial enforceability of socio-economic rights.[7] In other words, the judgments of the South African Courts have made it apparent that socio-economic rights are enforceable but have interpreted the provisions on economic rights in a way that limits the separation of power concerns.[8] The Constitution contemplates rather a restrained and focused role for the Courts, namely to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may

[4] *Minister of Finance and Another v Van Heerdan* 2004 (6) SA 121 (CC) para 142. In this case, the court was interpreting section 9(2) of the 1996 South African Constitution in a transformative context.

[5] *Ex Parte Chairperrson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC). Hereinafter referred to as *First Certification case*.

[6] *First Certification case* (note 5) para 78.

[7] These include *First Certification case* (note 5 above); *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) para 8, (hereinafter referred to as *Soobramoney Case*); *Government of the Republic of South Africa and Others v. Grootboom and others* 2001 (1) SA 46 (CC); *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) 2002 (5) SA 703 (CC); *MEC for Health, Kwazulu-Natal v Premier: In re Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 717 (CC); *Khosa and Others v.Minister of Social Development and Others; Mahlaule and Others v. Minister of Social Development and Others* 2004 (6) *SA 505 (CC)*; *Jaftha v. Schoeman & Other* 2005 (1) BCLR 78; 2005 (2) SA 140 (CC); *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae* 2005 (5)SA 3 (CC); *Residents of Joe Slovo Community, Western Cape v. Thubelisha, Minister for Housing, Minister of local Government and Housing, Western Cape, with Centre on Housing Rights rights and Evictions* 2009 BCLR (CC).

[8] This brings up the constitutional supremacy issue highlighted in the order of *Minister of Health and others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) para 99, where it is asserted that "Even simple declaratory orders against Government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find resources to do so."

in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.[9]

The International Covenant on Economic, Social, and Cultural Rights, and many foreign constitutions,[10] including the South African Constitution[11] require governments to affirmatively provide socio-economic necessities.[12] Hence the South African Constitution contains a lengthy list of socio economic rights,[13] with the aim of protecting and assisting those disadvantaged by apartheid and those who are poor and vulnerable. This protection includes the right to 'have access to adequate housing, including if they are unable to support themselves and their dependents, appropriate social assistance.'[14] However, it is the unique structure of the South African Constitution which provides for a judicial enforceability model for socio-economic rights. It promotes judicial protection of socio-economic rights thereby providing new perspectives towards diminishing the gap between theory and practice. This makes South Africa the 'most admirable constitution in the history of the world.[15]

Since 2001, the South African Constitutional Court has handed down a number of decisions that shed light on the constitutional right of access to adequate housing in emergency situations. The groundbreaking cases include *Government of the Republic of South Africa and Others* v. *Grootboom and Others*;[16] *President of the Republic of South Africa and Another v Modderklip Boerdery*,[17] *and Residents of Joe Slovo v Thubelisha Home*.[18] The list is not exhaustive though. The Court explained in *Government of the Republic of South Africa and Others v Grootboom and others*,[19] that the cause of the acute housing shortage lies in apartheid. A central feature of that policy was a system of dispossession without settlement and influx control that sought to limit African occupation of urban areas.

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[9] See *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 33.
[10] E.g. 1990 Namibian Constitution and 1998 Kenyan Constitution.
[11] Constitution of the Republic of South Africa Act 108 of 1996.
[12] The Constitutional Court in a landmark socio-economic right case of *Minister of Health v Treatment Action Campaign* 2002 (BCLR) 1033 (CC) has supported its remedial authority by citing cases from India, Germany, Canada and the United Kingdom.
[13] See Chapter 2, Bill of Rights, of Constitution of the Republic of South Africa Act 108 of 1996.
[14] Sections 27(c) and 28(c) of Constitution of the Republic of South Africa Act 108 of 1996.
[15] CR Sunstein, *Designing Democracy: What Constitutions Do* (Oxford; Oxford University, 2001) 261. Hereinafter referred to as Sunstein, *Designing Democracy*.
[16] 2001 (1) SA 46 (CC).
[17] 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC).
[18] 2009 (9) BCLR 847 (CC), 2010 (3) SA 454 (CC).
[19] 2001 (1) SA 46 (CC) (2000 (11) BCLR 1169) para 6.

In Lesotho, socio-economic rights are termed principles of state policy as enshrined in Chapter II of the Constitution.[20] Section 25 therein states that the principles of state policy shall not be enforceable by any court. However, subject to the limits of the economic capacity and development of Lesotho, it shall guide the authorities and agencies of Lesotho, and other public authorities, in the performance of their functions with a view to achieving progressively, by legislation or otherwise, the full realisation of these principles. But there is no provision referring to the right to housing, shelter and/or even access to clean water. In the absence of any legislative enactment or government policy indicative of the budgetary designations for different social and economic rights, there will still be predicaments for the enforcement agencies of the law as the courts will mostly lack the power to give binding decisions and their orders will usually be worthless, if they order otherwise.

The scope of this dissertation shall address the following questions:

1. To what extent can the judiciary enforce socio-economic rights, especially right of access to adequate housing in Lesotho?

2. How has the recognition of the justiciability of socio-economic rights affected changes in the interpretation and implementation of the right of access to adequate housing in South Africa's transformation?

3. What role does the judiciary play in enforcing the right to housing and does it compromise the relationship between the judiciary, the executive and the legislative bodies of the state?

4. How does international benchmark impact on access to adequate housing?

In answering these questions, differences and or similarities will be assessed in the judicial interpretation and enforcement of the right to have access to adequate housing and principles of International law, and where possible, identify gaps wherein international principles may inform progressive adjudication.

[20] The Constitution of the Kingdom of Lesotho 1993.

3. PROBLEM STATEMENT & CONTEXTUAL BACKGROUND

Principles of international law, founded in extensive human rights instruments such as Article 1 of the United Nations Charter,[21] the preamble of the Universal Declaration[22] and the two International Covenants[23] make it clear, that effective human rights protection at the municipal level is the foundation of justice, peace, social and economic development throughout the world. The United Nations Secretary General, in his millennium report emphasized that "It is now widely accepted that economic success depends in considerable measure on the quality of governance a country enjoys. Good governance comprises the rule of law, effective State institutions, transparency and accountability in the management of public affairs, respect for human rights, and the participation of all citizens in the decisions that affect their lives."[24] Thus emphasizing the need for human rights-based approach within the domestic legal system in ensuring participatory democracy of citizens of all works of life.

The fundamental international instrument pertaining to socio-economic rights enforcement is the International Covenant on Socio Economic Rights that upon, inception and at present, has given rise to the debate as to whether these rights were judicially enforceable. The committee presiding on the covenant heard response to the debate and noted, that "if governments were to assume definite obligations in respect of the observance of such rights, they would have to take legislative and other measures enabling an action to be brought in respect of their non-observance, the courts being empowered to provide redress."[25] State parties to the Covenant hence must abide by the provisions therein in upholding the socio-economic rights of their citizens.

One of the main objectives of the Covenant is to uphold the nature of social rights as universal norms, which is an aspect of human rights. The Covenant attempts to do this in a comprehensive manner striking a reasonable balance between generality and specificity,[26]

[21] The Charter of the United Nations was signed on 26 June 1945.
[22] The Declaration was adopted by the United Nations General Assembly 10 December 1948.
[23] International Covenant on Economic Social and Cultural Rights 1966 and the International Covenant on Civil and Political Rights16 December 1966 (entered into force 23 March 1976).
[24] UN doc. A/54/2000, We the Peoples: the Role of the United Nations in the Twenty-First Century, Report of the Secretary-General, para 84.
[25] UN doc. E/CN.4/SR.248, at 6.
[26] HJ Steiner, and Alston, P. *International Human Rights in Context* (Oxford, Clarendon Press; 1996) 1175-81.

and by means of 'General Comments', that provide an adequate general framework in terms of which specific social rights can be elaborated. A distinctive feature of the International Covenant on Economic Social and Cultural Rights, unlike the International Covenant on Civil and Political Rights on which it is largely modeled, is that its implementation involves a consideration of a government's material resources. That is acknowledged in the stipulation that states are expected to achieve the rights enumerated in the Covenant 'progressively' and to the 'maximum of available resources'. The Committee has tried to address the problem by specifying the 'core obligations' or duties of state parties under the Covenant. Thus in a General Comment it states that a 'minimum of core obligations to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.'[27]

What matters, therefore, is that government takes appropriate steps towards enhancing the realization of economic and social rights (e.g. progressively improving social assistance grant allocation rates). However, decisions about prioritization are not just economic but depend on constitutional and political decisions (e.g. whether to spend less on defence and more on social assistance). Such approach has been demonstrated in the South African context, where the judiciary has based judgments on the reasonableness associated with the affordability of specific policies or state actions,[28] and not premised on the minimum core obligations required under the International Covenant on Economic Social and Cultural Rights. According to Bilchitz [29] lack of judicial reference to the stipulated minimum core obligations could result in an undesirable effect to the judicial enforcement of these rights.

South Africa's Socio-Economic Rights system has been historically deeply disfigured by the deep rooted effects of apartheid labour and welfare policies that were racially biased and premised on only those in the employment sector.[30] When South Africa's first democratically elected Government came into power in 1994, it committed itself to a number of specific goals in the area of social policy. These included amongst others the elimination of poverty and the establishment of a reasonable and widely acceptable, distribution of

[27] Ibid, 285.
[28] See *Soobramoney* C*ase* (note 7 above).
[29] D. Bilchitz, "Giving Socio-Economic Rights Teeth: The Minimum Core and its importance" (2003) 3 *SALJ* 484.
[30] S. Liebenberg & Karrisha Pillay *Socio Economic Rights in South Africa: A Resource Book* (Bellville: Community Law Centre, University of the Western Cape, 2000).

income, and the provision of a reasonable income in old age[31]. The *White Paper on a New Housing Policy and Strategy for South Africa (1994)*[32] as well as Section 26 of the South African Constitution's Bill of Rights, reflect these sentiments, providing that *"everyone has the right to have access to adequate housing."* Whilst section 26(2), requires that State, "*take reasonable legislative and others measures within its available resources, to achieve the progressive realization of this right.*"

It should be noted that the right of access to adequate housing in South Africa deals with two separate societal needs. The first relates to the needs of the poor, excluded largely from the productive capacity and rewards of the formal economy, whilst the second deals with the security needs of the informally employed,[33] and protection of those already having access but deprived of it through execution of judgments. The scope of this dissertation as far as judicial enforcement of right to housing is concerned shall concentrate primarily on all these sectors, which take the form of non-contributory social assistance.[34]

However the ambit of this dissertation does not allow for a complete inquiry into these disparities, and hence will only be touched on where relevant.

The Taylor Committee in its analysis of the current social assistance available affirms that well targeted access barriers especially in regard to the poor remain administrative and institutional, based on capacity constraints of Government itself. The committee's view is therefore that for basic services to make a developmental impact on the poorest, Government needs to take urgent steps to provide the basic means to allow the poor to access these benefits.[35] This discrepancy is evident in the mal-administration of Social Assistance Grants in Kwa-Zulu Natal and the Eastern Cape provincial governments, where social assistance grant applicants took to the judiciary for relief when the designated welfare departments, either 'failed to process their applications or in an attempt to get rid of ghost beneficiaries discontinued payment of grants without notification.'[36] Many class actions were brought to

[31] African National Congress, *"The Reconstruction and Development Programme: A Policy Framework'*, 1994.
[32] White Paper on a New Housing Policy and Strategy for South Africa, GN 1376 in GG16178 of 23 December 1994, *available at* www.gov.za/whitepaper/ (last accessed May 25, 2011).
[33] Taylor Committee,"*Transforming the Present Protecting the Future"*, Report of the Committee of Inquiry into a Comprehensive System for Social Security for South Africa, page 35, Submitted to the Minister of Social Development in March 2000.
[34] Made available through public taxes.
[35] Ibid 55-56 .
[36] I Currie & Johan De Waal *Bill of Rights Handbook* (5th ed.) (Cape Town; Juta & Co Publishers, 2005).

the courts for adjudication within the provinces and shall hence serve as a case study in identifying the role of the judiciary in enforcing constitutionally recognized social and economic rights.

Courts in the provincial divisions stated that once institution of proceedings were launched against government, it took "virtually no time at all for the applicants grant application to be processed." It added that "this leads to the inevitable inference that it was the institution of proceedings which led to the application being processed and that, had it not done so, the administrative sloth and inefficiency which currently bedevils the Department of Welfare of the Eastern Cape would have continued and the application would not have been considered when it was."[37] Another court judgment[38] noted the response of the provincial authorities to the Legal Resource Centre as reflected in the papers as "unfulfilled undertakings, broken promises, missed meetings, administrative buck-passing, manifest lack of capacity and at times gross ineptitude." In addition to this the court established that "the method the province chose to verify and update its pensioner records was not only just undifferentiatingly harsh, but also unlawful."[39]

The Constitution gives the courts wide discretion when granting relief in matters involving the enforcement of constitutional rights. Section 38 of the Constitution states that the court may grant "appropriate relief, including a declaration of rights". Accordingly, in deciding what is 'appropriate' in a given set of circumstances, the main constraints on the power of the court to grant a remedy are the dictates of justice and equity.[40] In the context of socio-economic rights, the effect of the remedial provisions of the Constitution is to confer a wide discretion on the courts to fashion appropriate and innovative remedies to meet the needs of the poor and the desolate. The impact of this wide remedial power is reinforced by the jurisprudence developed by the Constitutional Court,[41] which emphasizes that in order to be 'appropriate,' a remedy must be effective.

[37] *Mahambehlala v MEC for Welfare, Eastern Cape and Another* 2002(1) SA 342 (SE).
[38] *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001(2) SA 609 (E).
[39] *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2000 (2) SA 849 (E).
[40] W Trengove "Judicial remedies for violations of socio-economic rights" (1999) 1 (4) *ESR Review* 13.
[41] See decisions made in landmark socio-economic rights cases such as *Grootboom* and the *TAC cases*.

For the purposes of socio-economic rights litigation, the most important constraint on the discretion of the courts is their inability to step into the domain of the other branches of government because of the doctrine of separation of powers. In deciding constitutional matters, and particularly in matters involving the enforcement of socio-economic rights, judges are required to perform a complex and unenviable balancing function. On one hand, they need to consider their role as protectors of the Constitution, but on the other, they need to be aware of the need to accord an appropriate degree of deference to the legislative and executive arms of government to establish policy and determine budgets and expenditure.[42]

Due to the profuse amount of delays experienced in the processing of social assistance grants under the Social Assistance Act, in the Eastern Cape and Kwazulu Natal provinces the courts became an alternative forum for the processing of social assistance grants when compelling the government to act by way of interdict ordering the appropriate administrator to consider making a decision on the status of the grant application. Courts, as a form of constitutional relief where decisions were not made within a reasonable time limit, approved the grants themselves, and summarily ordered the government to make available back-payment and interest.[43] The Court noted the persistent and huge problem experienced with the administration of social grants in the Eastern Cape Province. The failure in proper administration had led to the situation where the courts had become the primary mechanism for ensuring accountability in the public administration of these grants.

This, in effect, afforded appropriate relief to the aggrieved parties. This approach was criticized in *Jayiya v Member of the Executive Council of Welfare, Eastern Cape,*[44] on the basis that the orders ignored the provisions of the Promotion of Administrative Justice Act,[45] which allows for compensation awards in exceptional circumstances only.[46] However, some issues may be raised as to whether *Jayiya case* pronounces the law to be that individual State officials cannot be sued in the courts in review proceedings for wrongful administrative acts; that appropriate relief under s 38 of the Constitution is excluded by the provisions of PAJA; that back pay and interest cannot be ordered as compensation under PAJA; that there is no binding obligation on the State to comply with money judgments; and that the court may not

[42] K O'Regan "Introducing socio-economic rights" (1999) 1 (4) *ESR Review* 3.
[43] I Currie & Johan De Waal *Bill of Rights Handbook* (5th ed.) (Cape Town: Juta &Co Publishers, 2005).
[44] 2004 (2) SA 611 (SCA).
[45] Promotion of Administrative Justice Act 3 of 2000.
[46] Section 8(1)(c)(ii)(b) of the Promotion of Administrative Justice Act.

take any steps to enforce court orders sounding in money? No rational scholar may think so, but *Jayiya case* appears to be capable of such a reading. In a constitutional democracy, courts have to devise means of protection and enforcing fundamental rights that were not recognized under the common law.[47] In doing so the courts have to keep in mind not only that the today's Executive and administration carries a greater burden than the old to provide for these rights, but that they have had to do this in the context of unifying separate structures of administration as far as the administration of fundamental social rights are concerned.[48]

The courts, in fashioning new remedies and in the enforcement of those remedies, must thus take account of the practical difficulties experienced by the new administration, and must also be extremely wary not to move into areas that, by virtue of the constitutional separation of powers, fall outside their domain. But it should be clear that these difficulties may not serve as an excuse for failing to fashion and enforce new remedies simply because they did not exist under the common law. In these situations the Judge who fails to examine the existing law with a view to ensuring the effective realization of constitutional rights and values that were not recognized before is not, as is often presumed by proponents of this course, merely neutrally and objectively applying the law. That will only ever be true if the existing common law proceeds from a fair and equal baseline, an assumption that will not often be open to the present judiciary in South Africa in cases such as the present, given our unequal past.

Trengrove's description of this considerable power,[49] as "the widest powers to develop and forge new remedies for the protection of constitutional rights and the enforcement of constitutional duties,"[50] quite appropriately describes the orders made by courts in the Eastern Cape and Kwazulu Natal provinces. Hence the courts' tactful use of constitutionally conferred discretionary powers, to override legislative incongruence, saves the day for many a grant applicant that was part of the class actions taken against the respective administrative authorities. The court orders in effect urge the administration to buckle up and structural interdicts which direct violators to take steps to rectify a violation of rights under the court's supervision, provide symptomatic long term solutions. There exists an arena for the judiciary to use this discretionary power to assert fundamental principles of International law

[47] See *Kate v MEC for the department of Welfare, Eastern Cape* 2005 (1) SA 141 (SE) para 16.
[48] See section 27(1)(c) of the 1996 South African Constitution.
[49] As discussed above with reference to the interpretation of section 38 and section 172 of the Constitution.
[50] W Trengove "Judicial remedies for violations of socio-economic rights" (1999) 1 (4) *ESR Review*13.

such as those found in crucial socio-economic rights conventions that the South African government has not ratified[51], into orders of court thereby making them directly enforceable.

From the above averments, the issue of undue delay in processing social assistance grants are due to poor administrative functioning of the welfare departments within the provinces. Although the judiciary may prove to inform and mould certain areas and aspects of right to housing and other socio-economic rights in South Africa, no amount of remedial effect achieved by way of court order shall address the broad underlying issues. It therefore remains an area of dispute that requires a comprehensive role out of systematically engineered and coordinated social assistance systems[52] to effectively combat the problems faced by the allocation of such social assistance grants.

4. SIGNIFICANCE OF THE STUDY

In *Government of the Republic of South Africa and others v Grootboom and others*,[53] the Constitutional Court found that the housing programme was a salutary attempt to meet the housing needs of South Africans.[54] However, the Court found that the housing programme was unreasonable in that it failed to cater for persons in society "who have no roof over their heads, and who are living in intolerable conditions or crisis situations."[55] While much research is undertaken in the housing field, the provision of housing assistance in so-called emergency situations does not receive the attention it deserves.[56] There has not been a comparative study in Lesotho to scrutinise whether pieces of legislation in Lesotho have catered for access to adequate housing. This problematic aspect of housing is highlighted whenever people are evicted – from a variety of situations including backyards, road or rail reserves, under bridges, public property or private property. This research then, focuses on the provision of housing in a wide spectrum.

[51] The International Covenant on Economic Social and Cultural Rights that contain fundamental Standards of core obligations, have not been ratified by the South African Government, hence the non-committal inference.
[52] As recommended by the Taylor Commission.
[53] 2001 (1) SA 46 (CC); 2000 (11) BCLR 883 (CC).
[54] Para 53.
[55] Para 52.
[56] V Wyk "The complexities of providing housing assistance in South Africa" (2007) 1 *TSAR* 35.

The significance of this study is hence premised on the advancement of social and economic rights that ensures the advancement of the interests of the poor, to fully enable the enjoyment of full benefits of democracy to all people. The right of access to adequate housing is but one method of indulging this advancement. However, it is also an area of extreme disparities experienced on the part of government, hence by identifying and challenging the role of the judiciary in the allocation of these grants or entitlements, significant impact can still be made in upholding participatory democracy.

5. CHOICE OF THE LEGAL SYSTEMS

The centre of attraction in this thesis is the scrutiny on the legal framework in South Africa. And such system will be taken as a lesson for Lesotho since South Africa has enormously progressed in advancing human rights, while Lesotho's legal system is lagging far behind human rights and today's demands to provide for the needy. A number of considerations will lead to meticulous considerations and examination of a few jurisdictions. This is influenced by great developments on the subject at hand in such countries,[57] though they may not be regarded as the paradigm of perfectionism in the matter.

These countries are further chosen for comparative study as section 39(2) of the Constitution[58] is directive to the courts to diversify their jurisprudence before embarking to the decisions that may adversely affect the individuals' rights[59]. As O'Regan J put it convincingly in *K v. Minister of Safety and Security*:[60]

> It would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further. It is for this very reason that our Constitution contains an express provision authorizing courts to consider the law of other countries when interpreting the Bill

[57] Countries such as South Africa, Canada India and United Kingdom are well-off because they positively realised socio-economic rights.

[58] Section 39(2) of the 1996 South African Constitution.

[59] Chaskalson CJ in *S v. Makwanyane* 1995 (3) SA 391 paras 37 and 39, expressed that Comparative 'bill of rights' jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw. . . In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.

[60] 2005 (6) SA 419 para 35.

> of Rights. It is clear that in looking to the jurisprudence of other countries, all the dangers of shallow comparativism must be avoided. To forbid any comparative review because of those risks, however, would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions. Our Courts will look at other jurisdictions for enlightenment and assistance in developing our own law. The question of whether we will find assistance will depend on whether the jurisprudence considered is of itself valuable and persuasive. If it is, the Courts and our law will benefit. If it is not, the Courts will say so, and no harm will be done.[61]

In the present work, the jurisdictions to be explored are European Human Rights System, Inter-America Human Rights System, SADC and a few African countries. It therefore goes without saying that South Africa is part and parcel of the list. In some of these countries, the constitutions stipulate that the government shall progressively realize access to adequate housing but the courts have not made any pronouncements on the matter.

6. VALUE CONTRIBUTION

This research aims at unearthing ways in which right of access to adequate housing is defectively regulated or not even provided for in Lesotho as opposed to the current situation in the South African jurisprudence. *Residents of Joe Slovo* v. *Thubelisha Home*[62] is the epitome of smartly refined jurisprudence as the court regarded *Grootboom case* as a directive towards proper implementation and/or provision for accessible houses for people. It also points to the shortcomings of ignorantly avoiding to make provisions or policies ready for implementation of the right of access to adequate housing in Lesotho. It is trusted that the research will assist in addressing some of the legal and ethical issues with reference to housing in Lesotho as South Africa is used as a guide.

[61] See also S Choudry, "Globalisation in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" (1999) 74 *Indiana Law Journal* 819; D Visser "Cultural Forces in the Making of Mixed Legal Systems" (2001) 78 *Tulane LR* 41; D Fontana, "Refined Comparativism in Constitutional Law" (2001) 49 *UCLA LR* 539.

[62] 2010 (3) SA 454 (CC). In *Joe Slovo*, the Constitutional Court articulated a specific set of guidelines for the government to follow in respecting the right to housing for a group of informal settlement dwellers. This case marks the first time the Court defined the government's specific responsibilities in ensuring access to housing for the people of South Africa. In the past, the Court never went so far as to order the government to take specific actions.

7. MOTIVATION

The challenges facing this work are to endeavour to deal with comprehensive and detailed right of access to adequate housing in the Republic of South Africa whilst engaging in the proposed legislative reforms in Lesotho. Although the right to housing might have been written about extensively in the international context or in other jurisdictions, the area is still in its infancy in Lesotho. As a consequence, it is crucial to undertake a broad-ranging examination of not only the legal issues involved, but in-depth study of all protective measures is also necessary to guarantee clarification and exposition of the issues surrounding the complex nature of the topic as well.

8. STRUCTURE OF THE STUDY

To effectively answer the proposed guiding questions, a four part approach is adopted to address the issue of constitutional judicial enforceability of rights of access to adequate housing in Lesotho.

Chapter 2 takes a look at the International context of access to housing right, and offers a comparative analysis of judicial enforcement of the right of access to adequate housing at international level and explorative analysis of the international principles upon which the said right is informed and premised.

Chapter 3 sets out the background information surrounding the research study, which shall set forth the jurisprudential history of human rights in the context of access to housing in the South African legal System, both pre and post 1994, hence mapping out the direction taken in effecting transformation in South Africa and to assess how best to proceed in effecting greater transformation in the future.

Chapter 4 assesses the structure of the South African Constitution and pieces of legislation that forge a new housing policy and legislative framework.

Chapter 5 looks at the underpinnings and values of the constitution, translation of socio-economic rights from toothless bulldog to the social realities. This echoes justiciability, accountability and the doctrine of separation of powers while enforcing the right to housing.

Again, the objective is to highlight the key issues surrounding judicial enforcement of the right of access to adequate housing. It specifically analyzes important South African case law concerning socio-economic rights, especially the right of access to adequate housing, thereby adding substance to some of the surrounding debates and from their judgments identify the current trends if any engaged by the constitutional court to overcome these issues. In addition, this work takes an in-depth analysis of the ongoing debates on allocation of land. It also shows the administrative nature of access to adequate housing implementation in respect of the recent controversy caused by the allocation of such right in South Africa. The analysis of cases emerging from this right shall aim to identify the practical and procedural components of housing allocations and the problems experienced.

Chapter 6 deals extensively with Lesotho perspective in the field of housing. It engages into a search of how the wide gap between the rhetoric and the social reality of socio-economic rights in Lesotho can be abrogated by the judicial involvement in and adjudication of, socio-economic rights matters. It therefore begins by traversing the realm of rhetoric: it examines the socio-economic obligations of Lesotho and the normative nature and scope of socio-economic rights. It then identifies and examines critically the legal and ideological obstacles impeding judicial vindication of these rights in Lesotho. It sets out to show against the backdrop of Indian and South African courts' experience and socio-economic jurisprudence, how these rights can be rendered meaningful for the Basotho. In doing so, it tries to map out Lesotho's future socio-economic blueprint, in a quest for social reality of socio-economic rights.

Chapter 7 dwells primarily on the conclusion and recommendations.

CHAPTER TWO: INTERNATIONAL INSTRUMENTS RELATED TO RIGHT OF ACCESS TO HOUSING

> "A right is not what someone gives you; it's what no one can take from you."[63]

> "We proclaim that each person being created in the image and likeness of God possesses an inherent dignity from which stems a basic human right to shelter."[64]

2. INTERNATIONAL BENCHMARK

2.1.1 A BRIEF INTRODUCTION

The concept of human rights as a universal legal obligation of states is of recent origin and its historical antecedents can be traced to the events during and after the Second World War.[65] Socio-economic rights were prominently introduced in the initial international instruments that laid the groundwork for the post-1945 human rights[66] scaffold, in a good number of continental instruments and in many post-colonial constitutions. These international conventions, protocols and covenants have certainly made great strides in terms of influencing human rights awareness and compliance in many countries. The rhetoric of socio-economic rights, evinced by the normative nature and scope of these rights and the obligations assumed by countries in respect of these rights, presents itself, ideally, as a panacea for all socio-economic ills that people face.

The alleviation of poverty, social and economic transformation of the lives of the poor and the marginalised masses of such individuals in different countries hinge, to a great extent,

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[63] Clark R as quoted in W Michael, *Flag burning: Moral panic and the criminalization of protest* (New York: Walter de Gruyter Inc, 2000) 87.

[64] The General Board of the American Baptist Churches Resolution, December 1987.

[65] G Mugwanya, *Human rights in Africa: Enhancing human rights through the African regional Human rights system,* (New York: Transnational Publishers, 2003) 16.

[66] As a matter of precision, L Henki, *Human Rights Today* (Oxford: Clarendon Press, 1979) 1-2, defines 'Human rights' as "claims asserted and recognised as a right, not claims upon love, or grace, or brotherhood, or charity… They are claims under some applicable law. They are rights upon society as represented by the government and its officials. The good society is one in which individual rights flourish and in which their protection and promotion are the fundamental objectives of government."

upon the realisation of socio-economic rights.[67] To be particular, there is wide assertion or recognition of a right to housing in a great many countries, often embodied in constitutional or statutory language. However, the nature of enforcing socio-economic rights in each country are so different as to render this dimension of interest and utility only as a general context, not for any detailed application to the situation that can actually eliminate poverty.

The Universal Declaration on Human Rights[68] and its progeny are worked out in a long way to be directives in promoting socio-economic rights. Exclusively, the right of access to adequate housing is regarded as a universal right, recognized at the international level and in more than one hundred national constitutions throughout the world. It is a right recognized as valid for every individual person. On a previous review of the international housing rights situation, it was noted as follows:

> The right to adequate housing finds legal substance within more than a dozen international human rights texts . . . and has been reaffirmed in numerous international declaratory and policy-oriented instruments. More than fifty national constitutions enshrine various formulations of housing rights and other housing-related state responsibilities . . . and a plethora of domestic laws in nearly all countries have a bearing upon one or more of the core elements of housing rights. Without exception, every government has explicitly recognized that adequate housing is a right under international law. Though on the surface a favourable situation, such legal recognition at the international level has rarely been transformed into effective domestic legislative and policy measures seeking to apply and implement—in good faith—international obligations relevant to housing rights. . . .No government could realistically proclaim that housing rights exist as much in fact as they do in law.[69]

In spite of realisation of this right, the homeless, the inadequately housed, and the evicted are more and more numerous in the cities and the countryside across the planet. More than 4 million persons were evicted from their homes between 2003 and 2006.[70] In today's world,

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[67] B. Molamu "Judicial Independence and Judicial Activism Amidst Socio-economic Challenges" (2003) *Commonwealth Magistrates and Judges Association Report* 42. It was reiterated in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) 2000 (11) BCLR 1169 (hereinafter referred to as *Grootboom Case*) para 23 that "the realisation of socioeconomic rights is also the key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential."

[68] Universal Declaration on Human Rights 1948 (hereinafter referred to as UDHR).

[69] Herman, Marc-Oliver, "Fighting Homelessness: Can International Human Rights Law Make a Difference?" (1994) 2 *Georgetown Journal on Fighting Poverty* 59. See also S Leckie, *Towards an International Convention on Housing Rights: Options at Habitat II*. Issue Papers on World Conferences Number 4. Washington, DC: American Society of International Law, 1994.

[70] In accordance with the NGO Centre on Housing Rights and Evictions (COHRE), more than 4 million persons were victims of evictions between 2003 and 2006 - 2 million in Africa, 2.1 million in Asia and the Pacific

some 100 million persons are homeless and more than a billion are inadequately housed. According to the estimates of the United Nations, 3 billion persons will be living in slums by 2050.[71]

Again, it is of paramount importance to look at housing rights from international human rights law perspective for a variety of reasons. Apart from the fact that South Africa has legal obligation in terms of some human rights treaties and declarations, section 39 of the Constitution provides that the court should take into account international law when interpreting Bill of Rights.[72] In *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*,[73] Mahomed DP stated that International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are relevant in the interpretation of the Constitution itself, on the grounds that the legal draftsmen of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law.[74] It would be worthy to commence this work by making reference to the instruments in a lengthy manner. Thereafter, focus will be reverted to some prominent special rapporteurs and international summits that relate to the topic at hand.

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region, more than 150,000 in the Americas, and 16,000 in Europe. COHRE, *Forced Evictions: Violations of Human Rights*, December 2006: www.cohre.org/store7attachments/GLOBAL%20SURBVEY%202003-2006.pdf (last accessed on the 09 May 2011).

[71] UN-Habitat, *A Safe City is a Just City*. World Habitat Day 2007: http://www.unhabitat.org/categories.asp?catid=534 (last accessed on the 10 May 2011).

[72] The section referred to is to be found in the Final Constitution. It is the replica of section 35(1) of the Interim Constitution of RSA; The Constitutional Court has been guided by international human rights law in the following cases: *S v. Makwanyane* 1995 (3) SA 391 (CC); *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); *S v. Williams & Others* 1995 (3) SA 632 (CC); *Ferreira v Levin NO & Others* 1996 (1) SA 984 (CC); *South African National Force Union v Minister of Defence* 1999 (4) SA 469 (CC); See also R Blake "The World's Law in One Country: The Constitutional Court's use of Public international Law" (1998) 115 *SALJ* 668.

[73] 1996 (4) SA 671 (CC) para 26; such judicial dicta was criticized; See J Dugard, "Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question" (1997) 13 *SAJHR* 258.

[74] Another opinion which advocates for incorporation of international law when interpreting the national constitution can be found in *R v. Secretary of State for the Home Department, Ex Parte Brind and Other* [1991] 1 ALL ER 720; Dugard J, *International Law: A South African Perspective* (Juta & Co.Ltd, Kenwyn, 1994) 339- 346; It was emphasized in *Grootboom Case* para 26 that the relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.

2.1.2 PERTINENT INTERNATIONAL AND REGIONAL TEXTS

2.1.2 (a) THE UNITED NATIONS CHARTER

The international system for the protection and advancement of human rights developed under the auspices of the United Nations is a complex system. Alston[75] notes that the United Nations is 'one part of the broader international human rights regime which, by definition, must also embrace at least: the authentically human rights-conscious UN agencies such as the International Labour Organisation (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO); mechanisms such as the Conference on Security and Co-operation in Europe; and various regional organisations such as the Council of Europe, the Organization of American States and the Organization of African Unity'.

Known to many, the paramountcy of human rights in international law is largely a post-World War II development.[76] This discourse in human rights has transformed international and humanitarian law, and has helped reshape the relations between international organizations, governments and citizens[77] and has become a valuable political and legal tool employed by politicians, social movements and non-governmental organizations (NGOs) to advance their objectives.

The United Nations Charter[78] is striving to employ international machinery for the promotion of the economic and social advancement of all peoples. UNCHS[79] is of the view that adequate shelter and services are a basic human right which places an obligation on governments to ensure their attainment by all people, beginning with direct assistance to the least advantaged through guided programmes of self-help and community action.

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[75] P Alston, 'Appraising the United Nations Human Rights Regime' in Alston, P (ed) *The United Nations and Human Rights A Critical Appraisal* (Clarendon Press: Oxford; 1992).

[76] See J Dugard, *International Law: A South African Perspective* 2nd ed (Juta & Co: Kenwyn; 2000) 234. Hereinafter referred to as *Dugard J, 2000.*

[77] See J Donnelly *Universal Human Rights in Theory and Practice*. (Cornell University Press: New York, 1989) 34.

[78] The Charter of United Nations, 1945 (hereinafter referred to as UN Charter).

[79] United Nations Commission on Human Settlements on its 1995 report "Towards a Housing Rights Strategy: Practical Contributions by UNCHS (Habitat) on Promoting, Ensuring and Protecting the full Realization of the Human Right to Adequate Housing", A/CONF.165/PC.2/11 HS/C/15/2/Add.2.

Governments should endeavour to remove all impediments hindering the attainment of these goals.[80]

2.1.2(b) THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights took the commitment to the protection and promotion of human rights set out in the UN Charter further by enumerating specific rights.[81] The commitment to the protection and advancement of human rights by means of the UDHR is premised on the recognition of the inherent equal dignity of all human beings.[82] The Declaration is set as 'a common standard of achievement for all peoples and all nations'.[83] It includes a short but substantial list of rights that has been further elaborated, with most additions, in a variety of later treaties, most notably 1966 International Human Rights Covenants.[84]

Under the UDHR, the right to housing is identified as an aspect of a more general right to an adequate standard of living. Article 25(1) of the UDHR states:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widow-hood, old age or other lack of livelihood in circumstances beyond his control.

The entitlement to goods that fulfill basic needs, such as food, shelter, and water, in the parlance of international human rights law, fall under the label "economic" or "social" rights.[85]

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[80] The adoption by the Commission on Human Settlements of its resolution 14/6 on the human right to adequate housing represented a significant development, it being the first time the Commission comprehensively addressed the human rights implications of housing within a single resolution. With the adoption of this resolution, the Commission firmly indicated the importance it places on the human right to adequate housing and provided UNCHS (Habitat) with a solid mandate to pursue the promotion and realization of housing rights.

[81] Many of the articles of the Universal Declaration on Human Rights have acquired the status of customary international law. See EF Defeis "Universal Declaration of Human Rights: A Standard for States" (2004) 28 *Seton Hall Legislative Journal* 259 at 264; Dugard, J 2000 (note 74 above) 240.

[82] This idea is echoed in Article 1of the UDHR. See also T Lindholm "Article 1 A New Beginning" in A Eide (ed) *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandinavian University Press, 1992).

[83] See J Dugard, 2000 (note 74 above) 240.

[84] J Donnelly *Universal Human Rights in Theory and Practice*. (Cornell University Press: New York, 1989) 23.

[85] Belani Aarthi, "The South African Constitutional Court's Decision in TAC: A Reasonable choice?" (2004) 7 *Centre for Human Rights and Global Justice* 5 at 19.

2.1.2(c) THE INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS (ICESCR)

The translation of the aspirations set out in the UDHR into enforceable legal rights was seen as imperative in the development of an international human rights law standard.[86] As a matter for agreement, two covenants were drafted thereafter, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In Henkin's[87] view, this division allowed the drafters to recognise the different natures of civil and political rights and socioeconomic rights. The Covenant dealing with civil and political rights focuses on the rights of the individual and while the ICESCR emphasises the obligations of states in relation to the progressive realisation of socio-economic rights. Focus will now be on ICESCR.

ICESCR is particularly the most important enunciation of the international right to adequate housing[88]. This is the main legally significant universal codification in recognizing the right to adequate housing and has been subject to the greatest analysis, application and interpretation of all international legal sources of housing rights. Through their significant humanitarian involvement, many countries have become the signatories to this international document. The right to adequate housing is regarded as a fundamental right upon which other crucial rights depend in terms of this covenant. These dependent rights include health, education, freedom of expression, freedom of association, the right to work, freedom to take part in public decision making as well as many others.[89] The specific obligations of state parties under the ICESCR in relation to the right to adequate housing appear from article 11 (1) which states:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right. . . [90]

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[86] V Pechota 'The Development of the Covenant on Civil and Political Rights' in Henkin, L (ed) *The International Bill of Rights* (Columbia University Press: New York, 1981) 33-35.

[87] Ibid.

[88] The International Covenant on Economic, Social and Cultural rights was adopted in 1966; See Alston "Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly* 332.

[89] M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford University Press: Oxford 1995) 330.

[90] The International Covenant on Civil and Political Rights included a provision for housing too. Article 17 therein states, that "No one shall be subjected to arbitrary or unlawful interference with his [or her] . . . home and that Everyone has the right to the protection of the law against such interference."

In addition, Obligations relating to the specific rights protected under the ICESCR must be read together with article 2(1), which describes, in general terms, the nature of state obligations under the Covenant:

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

The Covenant's compliance is monitored by United Nations Committee on Economic, Social and Cultural rights.[91] The committee's general comments, upon adoption, became the most authoritative legal interpretation of the right to adequate housing under international law to date.[92] General Comments 3, 4 and 7 of the CESCR play a vital role on the interpretation of the right to adequate housing in the Covenant. General Comment No. 3 developed the concept of a minimum core obligation to describe the minimum expected of a State in order to comply with its obligation under the Covenant – i.e. each right has a minimum essential level that must be satisfied by the States Parties.[93]

General Comment No. 4 points the significance of the concept of adequacy in relation to the right to housing as it serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute "adequate housing" for the purposes of the Covenant. While the Committee makes clear that the definition of 'adequate housing' will vary depending on the circumstances in each municipal law, the Comment articulates the key elements that must be present in adequate housing anywhere. These elements are explained in paragraph 8 of General Comment No. 4:[94]

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[91] United Nations Committee on Economic, Social and Cultural Rights (hereinafter referred to as the CESCR) is the supervisory body responsible for monitoring compliance with the ICESCR. For clarity of the committee's functions, see ECOSOC Resolution 1985/17 (UN Doc. E/1985/85, (1985).

[92] UN Doc. E/1992/23-E/C.12/1991/4, annex III. All General Comments and Recommendations are available in UN Doc. HRI/GEN/1 and under OHCHR website.

[93] This can be found in para 10 of General Comment No. 3 (1990); In South Africa, the *Grootboom Case* paras 30 and 31, rejected this approach, for a variety of reasons (e.g. lack of information and the diversity of housing needs and that the general comment does not specify precisely what that minimum core is).

[94] General Comment No. 4 (1991).

a) ***Legal Security of Tenure*** - Security of tenure should be provided and enforced in consultation with the affected groups. This protects people from eviction, harassment and other threats.

b) ***Availability of Services, Materials, Facilities and Infrastructure*** - All people are entitled to i.e facilities that are essential for health, security, comfort and nutrition, which include safe drinking water, energy for cooking, heating, lighting, sanitation facilities, refuse disposal, storage and emergency services.

c) ***Affordability*** - The cost of adequate housing should not compromise the satisfaction of other basic needs.

d) ***Habitability*** - Housing must protect its inhabitants from cold, damp, heat, rain, or other health threats and structural hazards, as well as provide them with adequate space. Here the Committee refers to the World Health Organization's *Health Principles of Housing* (1990).

e) ***Accessibility*** - All people are entitled to adequate housing, and disadvantaged groups in particular must be accorded full and sustainable access to housing, which may mean granting them priority status in housing allocation or land-use planning.

As noted above, the right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants and other applicable international instruments.[95] Reference has already been made in this regard to the concept of human dignity and the principle of non-discrimination. In addition, the full enjoyment of other rights - such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision-making – is indispensable if the right to adequate housing is to be realized and maintained by all groups in society. Similarly, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.[96] This General Comment refers to security against forced evictions as a part of "security of tenure," which is an integral aspect of the right to adequate housing.

[95] This was clearly highlighted in *Grootboom Case.*

[96] General Comment No. 4 (1991), para 9; It is found in ttp://www.unhchr.ch/tbs/doc.nsf/(symbol)/ CESCR Generalcomment+4 (last accessed on the 10 May 2011).

In 1997, the CESCR adopted the General Comment No. 7[97] on the right to adequate housing (forced evictions). In this General Comment, the CESCR first defined the term "forced eviction" and reaffirmed that forced evictions are *prima facie* violations of the right to adequate housing. It expresses that states should be strictly prohibited from intentionally making a person, family or community homeless following an eviction, whether forced or lawful. It also clarifies the obligations of governments with regard to forced evictions[98]. Commission on Human Rights[99] stressed that most countries today are faced with serious housing problems rendering 100 million persons homeless worldwide and over 1 billion people throughout the world inadequately housed.[100] Generally speaking, about 15 million people globally have been forcibly evicted from their homes in the past 10 or more years,[101] 7 million of them during the 1980s in Asia alone.[102]

In resolution 1993/77, the Commission on Human Settlements noted with concern that there were few signs of improvement as the number of people forced to leave their homes every year is growing continuously.[103] As mentioned above, the practice of forced evictions is recognized to constitute a gross violation of human rights, in particular of the right to adequate housing. However, much more far-reaching consequences with wider implications for the enjoyment of human rights of the concerned people are evident following evictions. In such cases, the Committee issues specific recommendations to the States parties on legislative and other measures that are necessary to ensure full compliance with the housing rights norms embodied in the Covenant, and to ensure the realisation of these rights for its citizens to whom the state has a duty to respect, protect and fulfil.

Having considered a number of State Reports relating to forced evictions, the committee decided that the matter was ripe for further elaboration in the form of a General Comment. Two major aspects of the Committee's treatment of State Reports were (1) the fact that during the course of the evictions the families had been forced to live in "deplorable

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[97] General Comment No. 7 (1997).

[98] The use of the term "forced evictions" is, in some respects, problematic. This expression seeks to convey a sense of arbitrariness and of illegality.

[99] E/CN.4/1994/20.

[100] *Official Records of the General Assembly, Forty-third session, Supplement No. 8*, Addendum 1, (A/43/8/Add.1).

[101] Habitat International Coalition, "A Global Survey of Forced Evictions: Violations of Human Rights" (June 1993, February 1992, August 1991, August 1990), Utrecht.

[102] Denis Murphy, "A Decent Place to Live: Urban Poor in Asia", Bangkok, Asian Coalition for Housing Rights, 1990.

[103] Commission on Human Settlements resolution 14/6: "The human right to adequate housing", *adopted* 5 May 1993. See UN Doc. A/48/8.

conditions" and (2) the domestic legal requirements for enforcing an eviction had not been followed.[104] It recognizes that the expropriation of land by the State is a recognized and legally acceptable practice, provided that it is carried out in accordance with the limitations provision of the Covenant, which is Article 4.

2.1.2 (d) DECLARATION ON THE RIGHTS OF THE CHILD

Efforts to formulate provision for a catalogue of children's rights or entitlements at the global level may be traced back to 1924 when the 5th Assembly of the League of Nations[105] adopted the Declaration of the Rights of the Child. This Declaration, also known as Declaration of Geneva, provides the groundwork for the proposition that the welfare of children could best be protected by the protection of their rights.[106] Then followed another document called Declaration on the Rights of the Child.[107]

The Preamble to the 1959 Declaration, which makes a reference to the UN Charter and the Universal Declaration of Human Rights, calls upon governments to implement its provisions through 'legislative and other measures progressively taken'. It also reaffirms the 1924 Declaration's pledge that 'mankind owes to the child the best it has to give' and goes on to place unequivocal duties on local authorities and voluntary organisations to work towards the observance of the rights of children. In accordance with the Declaration, a child is entitled to adequate nutrition, housing, recreation and medical services.[108] Principle 5, 1959 Declaration calls upon states to make special provision for the needs of physically, mentally, and socially handicapped children, as well as those children lacking family support.[109]

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[104] See M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995) 341.

[105] The Declaration of the Rights of the Child, 1924 was adopted by 5th Assembly of the League of Nations (hereinafter referred to as 1924 Declaration). See generally D Hodgson "The historical development and "internationalization" of the children's rights movement" (1992) *Australian Journal of Family Law* 25.

[106] G van Bueren *The international law on the rights of the child* (Amsterdam: Kluwer Law Publishing, 1995) 8.

[107] Declaration on the Rights of the Child, GA Res. 1386 (XIV), 14 UN GAOR Supp (No 16) 19, UN Doc A/4354 (1959), (hereinafter referred to as 1959 Declaration).

[108] 1959 Declaration, principle 4.

[109] 1959 Declaration, principle 6. In the subsequent principles, the 1959 Declaration guarantees the child the right to education, the right to play and recreation, and the right to be protected from neglect and hazardous employment. Crucially, the 1959 Declaration contained a general non-discrimination clause and was the first international instrument to enshrine the principle that children are entitled to "special protection" and that such protection must be implemented by reference to "the best interests of the child," which 'shall be a paramount consideration.

With regard to provision of shelter for children, there are also other international instruments which provided in detail the states' compulsion towards progressively implementing means of accessible housing.[110] It is stated that "The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end special care and protection shall be provided to him and his mother, including adequate pre-natal and post-natal care. The child shall have the right to adequate nutrition, housing, recreation and medical services."[111]

2.1.2 (e) UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (UNCRC)

The UN Convention on the Rights of the Child[112] is a unique document of international law that makes provision for almost every aspect of a child's life.[113] As P. Alston and J. Tobin[114] suggested, the CRC was borne out of calls for a more systematic approach to protecting children's rights. For instance: it is the most comprehensive single treaty in the human rights field and is ratified almost universally; that is by 192 States out of the existing 194. It may rightly be described as forming the core of the international law on the rights of the child.[115] In light of its explanatory and analytical approach, Hammaberg has suggested that CRC may be seen as concerned with the four 'P's:[116] the participation of children in decisions affecting

[110] See Declaration on the Rights of the Child, Proclaimed by United Nations General Assembly resolution 1386(XIV) on 29 November 1959.

[111] Paragraph 4 of Declaration on the Rights of the Child, Proclaimed by United Nations General Assembly Resolution 1386(XIV) on 29 November 1959.

[112] United Nations Convention on the Rights of the Child was adopted in 1989. (hereinafter referred to as the CRC).

[113] Scott Christian, "Intercountry Adoption" (2010) 1 (1) *The University for Peace Law Review* 52 at 57-58, states that "The 1989 Convention on the Rights of the Child is arguable the ultimate expression of children's rights as internationally supported, to date. In the Preamble, the convention talks in very powerful language about the child as a member of the human family entitled to fundamental human rights, and by virtue of immaturity and vulnerability the children are entitled to specific safeguards."

[114] Alston, P. and Tobin, J. *Laying the Foundations for Children's Rights*, UNICEF (2005).

[115] T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (Pretoria University Law Press; Pretoria, 2009) at 15 says that "CRC is a very comprehensive treaty that makes provision for almost every aspect of a child's life." J Fortin *Children's rights and the developing law*, 3rd Edition (Cambridge University Press; Cambridge, 2009) 53 describes it as the touchstone for children's rights throughout the world. Fortin further quoted "Joint Committee on Human Rights" (JCHR) (2008b) A Bill of Rights for the UK? Twenty ninth Report of Session 2007–08, Volume II, HL Paper 165-II, HC 150-II's assertion that "The Convention should function as the source of a set of child-centred considerations to be used as yardsticks by all departments of Government when evaluating legislation and in policy-making, whether in respect of the progressive realisation of economic, social and cultural rights or in relation to guarantees of civil and political rights."

[116] T Hammaberg "The UN Convention on the Rights of the Child-and how to make it work" (1990) 12 *Human Rights Quarterly* 97.

them; the protection of children from all forms of discrimination; the prevention of harm to children; and the provision of assistance for their basic needs.

Article 27(3) of CRC postulates that States Parties in accordance with national conditions and within their means shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in the case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing. This is a clear assertion since the CRC was borne out of calls for a more systematic approach to protecting children's rights. By including children's social and economic rights, the Convention also emphasises that states must not only protect children and safeguard their fundamental freedoms, but also devote resources to ensuring that they realise their potential for maturing into a healthy and happy adulthood. For there to be an enjoyable life, there should be reasonable access to housing. If there is no proper shelter for children, there will be no enjoyment of any other rights.

2.1.2 (f) CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The Convention on the Elimination of All Forms of Discrimination against Women[117] is an international legal instrument against sex discrimination that seeks to make active legal and political instruments work for women and to develop states' accountability for the infringement of the human rights of women.[118] This Convention can be described as an international bill of rights for women and a framework for women's involvement in the advancement of rights. The treaty constitutes a comprehensive attempt at establishing universal standards on the rights of women. It is one of the widely ratified human rights treaties and can be regarded as a milestone on the path to the goal of standard-setting for gender-based equality.

Article 14(2) (h) stipulates that States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men

[117] The Convention on the Elimination of All Forms of Discrimination against Women was adopted on 18 December 1979, and entered into force on 3 September 1981 (hereinafter referred to as CEDAW). See Greenberg "Race, Sex and Religious Discrimination in International Law" in Meron (ed.) *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press1984) 307 and Evatt "Eliminating Discrimination Against Women" (1991) 85 *Melbourne U LR* 435 for much elaboration on this Convention.

[118] Charlotte Bunch "Women's rights as human rights: Toward a re-vision of human rights" (1990) 12 (4) *Human RightsQuarterly* 486.

and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right... to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

2.1.2 (g) CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

The Convention on the Elimination of All Forms of Racial Discrimination[119] has been described as "the most comprehensive and unambiguous codification in treaty form of the idea of equality of races."[120] In Article 5, the Convention enumerates a long list of basic civil, political, economic, social and cultural rights to which this obligation applies.

Article 5(e) (iii) is to the effect that in compliance with the fundamental obligations laid down in Article 2 of this same Convention, States Parties undertake to prohibit and eliminate racial discrimination in all of its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of, *inter alia*, the right to housing. The United Nations Committee on the Elimination of Racial Discrimination, for instance, decided in the case of *L.K. v. The Netherlands*[121] that the complaint alleging non-compliance by the State party of Article 5(e)(iii) of the International Convention on Racial Discrimination – non-discrimination in terms of the right to adequate housing – was valid. Among other grounds, the applicant alleged his right to housing in an environment free of racial discrimination, as enshrined in Article 5(e) (iii), had been violated due to hostile reactions by neighbours to a prospective tenant in an Utrecht neighbourhood, who was of non-Dutch origin.

There are also two international declarations that prevent discrimination in racial dealings, namely: Declaration of Race and Racial Prejudice[122] and Declaration on the Elimination of

[119] Convention on the Elimination of All Forms of Racial Discrimination was adopted on 21 December 1965 and came into force on 4 January 1969 (hereinafter referred to as CERD).
[120] Egan Schwelb, "The International Convention on the Elimination of Racial Discrimination" (1966) 15 *International and Comparative Law Quarterly* 996 at 1057.
[121] *L.K. v. The Netherlands*, Comm. No. 4/1991, opin. 16 March 1993, 42nd session.
[122] Adopted and proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) at its twentieth session, on 27 November 1978.

All Forms of Racial Discrimination.[123] Article 9(2) of the Declaration of Race and Racial Prejudice states:

> Special measures must be taken to ensure equality in dignity and rights for individuals and groups wherever necessary, while ensuring that they are not such as to appear racially discriminatory. In this respect, particular attention should be paid to racial or ethnic groups which are socially or economically disadvantaged, so as to afford them, on a completely equal footing and without discrimination or restriction, the protection of the laws and regulations and the advantages of the social measures in forced, in particular in regard to housing, employment and health; to respect the authenticity of their culture and values; and to facilitate their social and occupational advancement, especially through education.

The Declaration on the Elimination of All Forms of Racial Discrimination reiterates the wording on other treaties in its Article 3(1). It stipulates, "Particular efforts shall be made to prevent discrimination based on race, colour or ethnic origin, especially in the fields of civil rights, access to citizenship, education, religion, employment, occupation and housing."

2.1.2(h) CONVENTION RELATING TO STATUS OF REFUGEES

Article 21 of the Convention Relating to Status of Refugees[124] states with regard to housing that the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

2.1.2(i) OTHER UNITED NATIONS INSTRUMENTS AND RECOMMENDATIONS

International Labour Organisation Convention No. 82 Concerning Social Policy,[125] Article 4 therein states that all possible steps shall be taken by appropriate international, regional, national and territorial measures to promote improvement in such fields as public health, housing, nutrition, education, the welfare of children, the status of women, conditions of employment, the remuneration of wage earners and independent producers, the protection of

[123] Proclaimed by United Nations General Assembly resolution 1904 (XVIII) of 20 November 1963.
[124] It was adopted in 1951 and entered into force on 22 April 1954.
[125] Adopted 11 July 1947.

migrant workers, social security, standards of public services and general production. Where food, housing, clothing and other essential supplies and services form part of remuneration, all practicable steps shall be taken by the competent authority to ensure that they are adequate and their cash value properly assessed.

Similarly, International Labour Organization Recommendation No. 115 Concerning Workers' Housing[126] has a provision that directly deals with housing. Principle 2 of Section II (Objectives of National Housing Policy), paragraph 2, states:

> It should be an objective of national [housing] policy to promote, within the framework of general housing policy, the construction of housing and related community facilities with a view to ensuring that adequate and decent housing accommodation and a suitable living environment are made available to all workers and their families. A degree of priority should be accorded to those whose needs are most urgent.

Furthermore, Section III (Responsibility of Public Authorities), paragraph 8(2)(b) expressed that 'the responsibilities of the central body should include formulating workers' housing programs, such programmes to include measures for slum clearance and the re-housing of occupiers of slum dwellings. Section VI (Housing Standards), paragraph 19 therein indicates that, as a general principle, the competent authority should, in order to ensure structural safety and reasonable levels of decency hygiene and comfort, establish minimum housing standards in the light of local conditions and take appropriate measures to enforce these standards. Again, in 1980, International Labour Organization embarked upon access to housing and came up with a recommendation known as International Labour Organization Recommendation No. 162 Concerning Older Workers (1980). Article 5(g) thereof states:

> Older workers should, without discrimination by reason of their age, enjoy equality of opportunity and treatment with older workers as regards, in particular . . . access to housing, social services and health institutions, in particular when this access is related to occupational activity or employment.

Housing rights have also been extensively recognized in the framework of a wide range of international declarations on related fields, as distinct from human rights law and mechanisms. The unanimously accepted Global Strategy for Shelter to the Year 2000 asserts that – "the right to adequate housing is universally recognized by the community of nations... All nations without exception, have some form of obligation in the shelter sector, as exemplified by their creation of ministries or housing agencies, by their allocation of funds to

[126] Adopted at the forty-fifth session of the ILO Governing Body on 7 June 1961.

the housing sector, and by their policies, programmes and projects... All citizens of all States, poor as they may be, have a right to expect their Governments to be concerned about their shelter needs, and to accept a fundamental obligation to protect and improve houses and neighbourhoods, rather than damage or destroy them."[127]

The Habitat Agenda[128] and Agenda 21[129] are two significant United Nations declarations, which, although they have less legal weight than treaties, still impose certain obligations on the State in terms of the right to adequate housing. The Habitat Agenda provides a strong statement of global support for the implementation of housing rights, with governments recognising that they all have a *"responsibility in the shelter sector"* and that they *"should take appropriate action in order to promote, protect and ensure the full and progressive realization of the right to adequate housing[130]."* With respect to specifics, the Habitat Agenda articulates an inexhaustive list of actions including, *inter alia* –

- adopting legislation prohibiting and guaranteeing protection from discrimination in the housing sector;
- "providing legal security of tenure and equal access to land by all, including women and those living in poverty;"
- creating effective protection from forced eviction;
- adopting "policies aimed at making housing habitable, affordable and accessible;"
- using regulations and market incentives to expand the supply of affordable housing, promoting support services for the homeless and other vulnerable groups;
- mobilizing resources for housing and community development;
- encouraging the private sector to provide affordable rental and owner-occupied housing; and
- monitoring and evaluating "housing conditions, including the extent of homelessness and inadequate housing, and, in consultation with the affected population, formulating and adopting appropriate housing policies and implementing effective strategies and plans to address those problems."

[127] Global Strategy for shelter to the Year 2000, point 13, from United Nations Centre for Human Rights, (http://www.unhchr.ch/housing).

[128] The Habitat Agenda was adopted by the second United Nations Conference on Human Settlements (Habitat II) at Istanbul in 1996. Adopted by 171 countries, including South Africa, it contains over 100 commitments and 600 recommendations on human settlements issues.

[129] Agenda 21, adopted by the UN World Conference on Environment and Development (UNCED), held in Rio de Janeiro in 1992, is another important UN declaration that includes housing-related issues.

[130] Habitat Agenda, para 61.

With regard to Agenda 21, Article 7.9(c)) states: "All countries should, as appropriate, support the shelter efforts of the urban and rural poor, the unemployed and the no-income group by adopting and/or adapting existing codes and regulations, to facilitate their access to land, finance and low-cost building materials and by actively promoting the regularization and upgrading of informal settlements and urban slums as an expedient measure and pragmatic solution to the urban shelter deficit."

Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949)[131] indicates in Article 85 that the Detaining Power is bound to take all necessary and possible measures to ensure that protected persons shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide efficient protection against the rigours of the climate and the effects of the war.[132] Again, Article 134 therein is to the effect that the High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation. This is a concern from International humanitarian law viewpoint, and it must be respected by the states as such[133]. It was profoundly confirmed in *S v Basson*[134] that the rules of humanitarian law constitute an essential ingredient of customary international law and International Court of Justice propounded that such rules are fundamental to the respect of the human person and "elementary considerations of humanity".[135] The rules of humanitarian law are to be observed by all states whether or not they have ratified the Conventions that contain them because they constitute intransgressible principles of international customary law.[136] The ICJ

[131] Adopted 12 August 1949 at the Diplomatic Conference of Geneva, entered into force 21 October 1950.

[132] The same protection can be found in Article 69 of Geneva Protocol 1 Additional to the 1977 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts, which clarifies that "In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship." and Article 17 of Geneva Protocol II Additional to the 1977 Geneva Conventions states that 'The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter . . . safety, and nutrition. . .'

[133] Geneva Conventions recently form part and parcel of the international customary law and bind the signatory and non-signatory states.

[134] *S v Basson* 2005 (1) SA 171 (CC).

[135] In *S v Basson* 2005 (1) SA 171 (CC) para 125, reference is made to Legality of the Threat of or Use of Nuclear Weapons 1996 ICJ Reports 228 para 79.

[136] A number of authors are of this same view. For instance, Dugard J, *International Law: A South African Perspective* (Juta & Co Ltd: Kenwyn, 1994) 339-46; Frankel, *Out of Shadows of the Night: The Struggle for*

has also stressed that the obligation on all governments to respect the Geneva Conventions in all circumstances does not derive from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.[137]

2.1.2(j) THE DECLARATION ON SOCIAL PROGRESS AND DEVELOPMENT

In Declaration on Social Progress and Development[138], Part II, article 10 (f) states:

> Social progress and development shall aim at the continuous raising of the material and spiritual standards of living of all members of society, with respect for and in compliance with human rights and fundamental freedoms, through the attainment of the following main goals: . . .
> (f) The provision for all, particularly persons in low-income groups and large families, of adequate housing and community services.

In 1986, the United Nations General Assembly adopted another Declaration[139] in which its Article 8(1) claimed that "States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia* , equality of opportunity for all in their access to basic resources, . . . housing,. . . Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices."

2.1.2(k) DECLARATION ON THE RIGHTS OF DISABLED PERSONS

Article 9 of Declaration on the Rights of Disabled Persons[140] is to the effect that:

> Disabled persons have the right to live with their families or with foster parents and to participate in all social, creative or recreational activities. No disabled person shall be subjected, as far as his or her residence is concerned, to differential treatment other then that required by his or her condition or by the improvement which he or she may derive therefrom. If the stay of a disabled person in a specialized establishment is indispensable, the environment and living conditions therein shall be as close as possible to those of the normal life of a person of his or her age.

International Human Rights (Celacorte Press: New York, 1989) 103-4; Bernhardt (ed) *Encyclopaedia of Public International Law* (North-Holland, Amsterdam, London, New York,Tokyo, 1992)Vol. 1 at 148; Orentlicher "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" (1991) 100 *Yale LJ* 2537 at 2544; Brownlie, *Principles of Public International Law* (6th ed) (Oxford University Press: Oxford, 2003) 6-12.

[137] *Nicaragua v USA* (1986) ICJ 14 para 220.

[138] Proclaimed by United Nations General Assembly resolution 2542(XXIV) on 11 December 1969.

[139] Declaration on the Right to Development, adopted by United Nations General Assembly resolution 41/128 on 4 December 1986.

[140] Proclaimed by United Nations General Assembly resolution 3447 (XXX) of 9 December 1975.

2.1.2(l) VANCOUVER DECLARATION ON HUMAN SETTLEMENTS

Section III (8) of Vancouver Declaration on Human Settlements[141] stipulates that:

> Adequate shelter and services are a basic human right which places an obligation on governments to ensure their attainment by all people, beginning with direct assistance to the least advantaged through guided programmes of self-help and community action. Governments should endeavour to remove all impediments hindering attainment of these goals. Of special importance is the elimination of social and racial segregation, *inter alia*, through the creation of better balanced communities, which blend different social groups, occupations, housing and amenities.

2.1.2(m) THE SPECIAL RAPPORTEUR ON THE RIGHT TO ADEQUATE HOUSING

According to the United Nations Special Rapporteur[142] on the Right to Adequate Housing, Miloon Kothari, "The human right to adequate housing is the right of every woman, man, youth and child to gain and sustain a secure home and community in which to live in peace and dignity."[143] It continues to express that the realization of the right to adequate housing is intimately linked to the realization of other basic human rights, such as the right to life, the right to protection of one's private life, of one's family and one's home, the right to not be subjected to inhuman or degrading treatment, the right to land, the right to food, the right to water and the right to health. He has also insisted that its realization is tied to respect of the fundamental principles of non-discrimination and gender equality.[144]

In 2006, the Special Rapporteur emphasized a number of obstacles to the realization of adequate housing as a component of the right to an adequate standard of living. Rapporteur stated that these main obstacles in contemporary trends require vital concentration in the following ways:

(a) *Adequate housing and land and property concerns*. Testimonies for country missions to Afghanistan, Brazil, Cambodia or Kenya, and other sources of information have evidently demonstrated that the realization of the right to adequate housing cannot be

[141] Adopted by the United Nations Conference on Human Settlements in 1976.
[142] Special Rapporteur is a title given to individuals working on behalf of the United Nations within the scope of "Special Procedures" mechanisms who bear a specific mandate from the [United Nations Human Rights Council].
[143] Report of the Special Rapporteur on the Right to Adequate Housing to the 57th Commission on Human Rights, E/CN.4/2001/51, § 8, 25 January 2001.
[144] See note 6 thereon.

examined in isolation from land and property considerations. Relevant concerns include: land and property speculation and the unwillingness of States to intervene in the market to ensure that low-income persons can access rental and owner-occupied housing; land occupation/grabbing; land confiscation and expropriation; destruction and deterioration of land; inequality in land ownership; agrarian reform; housing and property restitution in the context of the return of refugees, evicted persons, and internally displaced persons; and the inability of States to control the growth and power of land mafias and cartels,

(b) *Urban and rural*. Urban areas across the world today are scenes of violations of the right to adequate housing, due to the inability and unwillingness of Governments at local, national and international levels to adequately control land and house speculation, to reverse concentration of land and hoarding of property, to promote affordable rental housing and to invest in social housing. This has led to an increase in the number of people who live in slums; and a rise in "urban apartheid", "segregation", and "ghettoization" with physical borders of separation between wealthy and poor urban residents. While recognizing the enormous challenges stemming from rapid urbanization and the need to respond thereto, the Special Rapporteur has, on numerous occasions, emphasized the need to also urgently address the housing rights of rural populations and the distressed reality of inadequate housing and homelessness in rural areas. This includes paying attention to large-scale projects like dams and mining and other extractive industries that promote urban development while resulting in the displacement and loss of homes and livelihoods of large sections of the rural population. Given the grim status of housing rights, it is imperative that States and other involved actors urgently develop policies for both urban and rural areas. Agrarian reform must be given priority in rural development, and planning must address complex trends such as inequality in land ownership, rapid urbanization, growing homelessness, forced evictions, forced migration, land-grabbing, and segregation;

(c) *Natural disasters and humanitarian emergencies*. Tragic events in recent years, such as the earthquake in Bam, Islamic Republic of Iran, in December 2003; the Indian Ocean tsunami in December 2004; the South Asia earthquake in October 2005 that affected areas of Pakistan and India; Hurricane Katrina, which caused flooding along

the Gulf Coast of the United States; and Hurricane Mitch, which devastated parts of Nicaragua, have shown that there is a need to integrate human rights standards into relief and rehabilitation efforts. Concerns raised in recent evaluation studies[145] include discrimination and corruption in distribution of aid, compensation and reconstruction work; and overcrowding, lack of water and sanitation, and violations of the human rights to adequate housing, and privacy and security of the person in temporary and intermediate shelters. Attention should be paid to the elaboration of means by which the international community, including international financial institutions and non-government organizations, can incorporate human rights standards in their policies and practices including the speedy transition from temporary shelter to permanent housing.[146] The serious impacts of disasters and the consequent response mechanisms on women have been referred to at length in the Special Rapporteur's report on women and adequate housing (E/CN.4/2006/118). The Special Rapporteur also welcomes and will contribute to the current initiative of the Special Representative of the Secretary-General to prepare Operational Guidelines on Human Rights Protection in Situations of Natural Disasters.

In 2010, this special Rapporteur on adequate housing has passed its recommendations. The Rapporteur conveyed that states should: (a) Urgently step up their efforts to respect, protect and fulfil the right to adequate housing, in all its dimensions, in both urban and rural contexts; (b) Develop and implement land tenure reform policies and programmes that make suitably located, secure, safe and affordable housing accessible to all; and (c) Recognize and protect a variety of land tenure forms, instead of a predominant or exclusive focus on freehold ownership. The Rapporteur continued that housing and land issues should be addressed in peace agreements and where necessary institutions to deal specifically with property claims should be established.

[145] *Tsunami Response: A Human Rights Assessment*. People's Movement for Human Rights Learning (PDHRE), Habitat International Coalition - Housing and Land Rights Network (HIC-HLRN), and Action Aid International, January 2006.

[146] See *International Human Rights Standards on Post-disaster Resettlement and Rehabilitation*. Habitat International Coalition - Housing and Land Rights Network (HIC-HLRN), People's Movement for Human Rights Learning (PDHRE), and United Nations Special Rapporteur on adequate housing. Bangalore, India: Books for Change, 2006.

2.1.2(n) UN-HABITAT

According to United Nations Commission on Human Settlements (UN-Habitat)[147] and the Global Strategy for Shelter,[148] "'shelter for all' means affordable shelter for all groups in all types of settlements, meeting the basic requirements of affordability, tenurial security, structural stability and infrastructural support, with convenient access to employment and community services and facilities".[149]

2.2 CONTINENTAL BENCHMARKS

There are three main regional arrangements for the protection of human rights in addition to the universal (United Nations) system. The European system was the first to be established in 1950. The Inter-American was established in 1969 while the African system came into being in 1986. The European and the Inter-American systems are innovative institutions and processes; the African system has distinctive norms. The regional systems add in important ways to knowledge derived from the UN and UN-related treaties such as the UDHR, ICCPR and ICESCR about the possible avenues toward the protection and promotion of human rights.

2.2.1 THE AFRICAN CONTINENT

2.2.1 (a) THE AFFICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

Since the initiation of this charter, protection of human rights in Africa as a region has largely been defined through the African Charter on Human and Peoples' Rights.[150] As Umozurike

[147] In 2002 the U.N. Commission on Human Settlements became the Governing Council of the United Nations Human Settlements Program, was renamed "UN-Habitat" and was placed under the authority of the General Assembly. V. General Assembly resolution A/RES/56/206, adopted 21 December 2001.

[148] The Global Strategy for Shelter was officially launched 16 February 1989 in New York at United Nations headquarters, with the purpose of "shelter for all by the year 2000". V. A/RES/43/181 adopted 20 December 1988: http://www.un.org/documents/ga/res/43/a43r181.htm (last accessed on the 13 May 2011).

[149] First report of the Commission on Human Settlements on the implementation of the Global Strategy for Shelter to the year 2000, § 2, A/43/8/Add.1, adopted 6 June 1988.

[150] African Charter on Human and People's Rights was adopted in 1981 and entered into force 21 October 1986 (hereinafter referred to as ACHPR). According to Dan Juma, "Access to the African Court on Human and Peoples' Rights: A Case of the Poacher turned Gamekeeper" (2007) 4 (2) *Essex HRRev.*1, says that the adoption of the African Charter on Human and Peoples' Rights marked a watershed in Africa's history. Over the last two decades following the entry into force of the Charter, significant progress has been registered in the human rights landscape in Africa. The period has witnessed a modest albeit steady development of human rights, reflected in the growth of norms and institutions for human rights protection and promotion.

correctly articulated, although the Charter is different in some ways from those of the other regions, it would be an overstatement to describe these differences as autochthonous.[151] Rather, the differences merely reflect the developments in international human rights law.[152] The Charter has been a factor influencing the development of regional standards on human rights on the continent. Its role as the principal source of legislation on human rights in Africa cannot be denied, though it may not have many visible successes to show. The ACHPR provides in Article 2 that "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind."

The ACHPR, indeed, takes a strikingly different approach to social and economic rights from other international and regional human rights instruments.[153] The preamble of the Charter asserts the indivisibility and interdependence of social and economic rights and civil and political rights in unequivocal terms, stating in particular "that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."[154] What is particularly distinctive about the protection of economic, social and cultural rights under the ACHPR is that the implementation obligation of states parties is not qualified by considerations of "progressive realization" or "available resources,"[155] but arises immediately. In fact, economic, social and cultural rights are subject to fewer "clawback"

On these developments, the establishment of an African Court on Human and Peoples' Rights stands out in particular.

[151] Umozurike U, "The African Charter on Human and Peoples' Rights" (1983) 77 *American Journal of International Law* 911.

[152] Ibid.

[153] For crucial analysis, see C. A. Odinkalu, "Implementing Economic Social and Cultural Rights under the African Charter on Human and Peoples' Rights" in M. Evans and R. Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (2002), (hereinafter referred to as *Evans and R. Murray (eds) 2000)* at 178–218. In the same book, under the topic "The reporting mechanism of the African Charter on Human and Peoples' Rights' by Murray, the author elaborates that "This uniqueness of African Charter is illustrated by, for example, the inclusion of civil and political rights, economic, social and cultural rights and peoples' rights in one document treating them as indivisible; and the drafting of provisions relating to the latter and to duties of the individual in considerable detail. This has led some to claim that it is the most interesting of the regional instruments." See also M. Hansungule, "The African Charter on Human and Peoples' Rights:A Critical Review" (2000) 8 *African Yearbook of International Law* 265; S. C. Agbakwa, "Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights" (2002)5 *Yale Human Rights and Development Law Journal* 177.

[154] As Van Bueren, G. *The International Law on the Rights of the Child*, (Martinus, Nijhoff Publishers, 1995) observes too, the African Charter on the Rights and Welfare of the Child, which protects not only civil and political rights but also economic, social and cultural rights, incorporates the right of individual petition for all children.

[155] See C. A. Odinkalu, "Implementing Economic Social and Cultural Rights under the African Charter on Human and Peoples' Rights" in *Evans and R. Murray (eds) 2000* (note 316 above) 195-197.

provisions or other qualifications than the civil and political rights protected under the African Charter.[156]

This obligation of care for family members is a vital and fundamental value in African social system although under the ACHPR[157] though most social and survival rights are notably not incorporated in therein. Only a few are mentioned. They include article 16, which provides for "the right to enjoy the best attainable state of physical and mental health", article 17(1), which provides for the right to education, and articles 18(1) and (2), which provide for family rights. The absence of rights to food, housing, clothing, medical care and other amenities necessary for an adequate standard of living is out of keeping with other international human rights instruments. Though the African Charter does not specifically provide for the right to shelter, the Commission on Human and Peoples' Rights[158] has endeavoured closing such lacuna. In *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*,[159] for example, the Commission created a right to housing in the African Charter even in the absence of an express guarantee. According to the Commission:

> Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing . . .[160]

The Commission added:

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[156] C. Heyns, 'Civil and Political Rights in the African Charter' in *Evans and R. Murray (eds) The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (2002) 138–142.

[157] It was stated in *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) that the commitment to the advancement and protection of fundamental human rights is also apparent in the ratification of the African Charter on Human and Peoples' Rights and inform the duty which governments owe to their nationals.

[158] The Commission was established in 1987. The African Charter empowers the African Commission to draw inspiration from international law in determining cases brought before it. Article 60 of the Charter provides The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

[159] *Social and Economic Rights Action Centre v Nigeria* Fifteenth Annual Activity Report Annex V Communication 155/96, (SERAC case).

[160] Paras 59 and 64.

> At a very minimum, the right to shelter obliges the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The state's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to him or her in a way he or she finds most appropriate to satisfy individual, family, household or community housing needs. Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and landowners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies. The right to shelter even goes further than a roof over one's head. It extends to embody the individual's right to be left alone and to live in peace -- whether under a roof or not.[161]

In *Purohit and Moore v The Gambia*[162], the Commission held that "millions of people in Africa are not enjoying their socio-economic rights maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of these rights. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into Article 16 the obligation on the part of states party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that such rights are fully realised in all aspects without discrimination of any kind."

2.2.1(b) THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

Article 3 of the African Charter on the Rights and Welfare of the Child provides that children are entitled to enjoy the rights and freedoms recognised and guaranteed in the Charter "irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, . . . birth or other status." The European Court on Human Rights has held that treating extra- marital children differently to those born within a marriage constitutes a suspect

[161] Para 61.
[162] Communication 241/2001.

ground of differentiation in terms of art 14 of the Charter[163]. The United States Supreme Court, too, has held that discriminating on the grounds of "illegitimacy" is "illogical and unjust."[164]

2.2.2 THE EUROPEAN CONTINENT

2.2.2(a) EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The European system provides an illustration of how housing rights can be protected at the regional level. The European Convention for the Protection of Human Rights and Fundamental Freedoms[165] is the first comprehensive treaty in the world for the protection and promotion of human rights. Article 8 therein states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence;
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

2.2.2(b) THE FIRST PROTOCOL TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms[166] on the other hand has a provision which is supplementary to Article 8 of the Convention. Article 1 of the Protocol stipulates:

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[163] *Markxv v Belgium* [1979] EHRR 2 paras 38-39; *Inze v Austria* [1987] EHRR 28 para 41.
[164] *Weber v Aetna Casualty and Surety Co* 406 US 164 (1972) at 175; *Trimble v Gordon* 430 US 762 (1977).
[165] The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in 1950 and came into force in 1953. See Roberts & Merrills, *Human Rights in Europe* (3rd edn) (Manchester: Manchester UP, 1993).
[166] First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms at Paris on the 20th March 1952.

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The provision in the Convention and the one in the Protocol shall be applied together as they are similar in application and implementation in a number of European cases. The European Court of Human Rights[167] has consistently held that in certain circumstances State interference with a person's home violates Article 8 of the European Convention and that forced evictions, arbitrary expropriations and expropriations without compensation all violate Article 1 of Protocol 1 to the European Convention. Article 8 and Article 1 of Protocol 1 jurisprudence from the European Court provides housing rights advocates with legal arguments that can be used within legal regimes that protect civil rights to a greater extent than economic and social rights.[168] Numerous cases under both the European Convention and the First Protocol to the Convention in the present field, have dealt with forced evictions.

The case of *Cyprus v. Turkey*[169] of 1976 treated evictions as a violation of the right to "respect for the home," and thus provided significant protection against violation of internationally recognized housing rights. Notwithstanding the causes why there has been intervention from a State, the case illustrates how standards dealing with protecting persons from interference with their home have been interpreted to protect dwellers from forced evictions. The European Commission held that:

> The evictions of Greek Cypriots from houses, including their own homes, which are imputable to Turkey under the Convention, amount to an interference with rights guaranteed under article 8(1) of the Convention, namely the right of these persons to respect for their home, and/or their right to respect for private life …. The Commission concludes...that...Turkey has committed acts not in conformity with the right to respect for the home guaranteed in Article 8 of the Convention.[170]

This case was appealed and was eventually considered by the European Court in 2001. The Court reiterated the Commission's findings, and held with respect to Article 8 of the European Convention and Article 1 of Protocol 1 to the European Convention –

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[167] The European Court of Human Rights was established on 3 September 1953 in terms of Article 19 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[168] Article 8 is usually categorised as a civil right, and indeed nearly mirrors the language of Article 17 of the ICCPR. As such interpretations are particularly beneficial when dealing with legal regimes that don't provide adequate recognition or protection of economic, social and cultural rights.

[169] *Cyprus v. Turkey*, Applications 6780/74 and 6950/75, Report of the Commission, *European Human Rights Reports*, vol. 4, p. 482.

[170] *European Human Rights Reports*, vol. 4, p. 482, paras 208-210).

> That there has been a continuing violation of Article 8 of the Convention by reason of the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus … [and that there has been a] continuing violation of Article 1 of Protocol No. 1 by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus are being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights.[171]

Housing rights matters were also raised by the European Court in *James and Others v. The United Kingdom*,[172] in the context of the right to undisturbed enjoyment of one's possessions. The Court stated that:

> Modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces. The margin of appreciation is wide enough to cover legislation aimed at securing greater social justice in the sphere of people's homes, even where such legislation interferes with existing contractual relations between private parties and

[171] *Case of Cyprus v Turkey*, Eu. Ct. Hum. Rts., App. No. 00025781/94 (judgement of 10 May 2001), sections III(1) and III(4).

[172] Eu. Ct. Hum. Rts., series A, vol. 98 (judgement of 21 February 1986). There have been many cases considered in the housing rights sphere before the European Court on Human Rights. For instance, in *Akdivar and others v Turkey*, Eu. Ct. Hum. Rts., Reports 1996-IV, the issue of the alleged burning of houses by security forces in South- East Turkey was considered by the European Court. Applicants alleged in 1992 that State security forces launched an attack on the village of Kelekçi, burnt nine houses, including their homes, and forced the immediate evacuation of the entire village. The government categorically denied these allegations, contending that the houses had been set on fire by the Kurdistan Worker's Party. The European Court held that with respect to Article 8 of the European Convention and Article 1 of Protocol 1 to the European Convention: "The Court is of the opinion that there can be no doubt that the deliberate burning of the applicants' homes and their contents constitutes at the same time a serious interference with the right to respect for their family lives and homes and with the peaceful enjoyment of possessions. No justification for these interferences having been proffered by the respondent Government – which confined their response to denying involvement of the security forces in the incident, the Court must conclude that there has been a violation of both Article 8 of the Convention and Article 1 of Protocol No. 1. However, in 1998, the court took a different view of the violation of Article 8 of the Convention and Article 1 of Protocol No. 1 in *Mellacher and others v. Austria*, Eu. Ct. Hum. Rts., Series A, No. 169, which dealt with the 'peaceful enjoyment of possessions' in the context of rent control measures. The applicant landlord argued that his rights under Protocol 1 were infringed due to the imposition of rent control measures on property he owned. The Court viewed the matter in the alternative and made the following main findings in their judgement, which are significant in housing rights terms, particularly regarding the rights of tenants: "(a) the disputed reductions [in rent] were neither a formal nor *de facto* expropriation but amounted to a control of the use of the property; (b) the legislature has wide discretion with regard to the implementation of social and economic policies, in particular in the field of housing; (c) the justifications given by the State for the legislation in question cannot be regarded as manifestly unreasonable. They represent the pursuit of a legitimate aim in the general interest; d) in remedial social legislation and in particular in the field of rent control, it must be open to the legislature to take measures affecting the further execution of previously concluded contracts; and e) the measures adopted to control rents did not fall outside the state's margin of appreciation, and although the rent reductions were striking in their amount they did not constitute a disproportionate burden." See also *Papamichalopoulos and others v. Greece*, Eu. Ct. Hum. Rts., A260-B (judgment of 24 June 1993); *Spadea and Scalabrino v. Italy*, Eu. Ct. Hum. Rts., A315-B (judgment of 28 September 1995); *Z. and E. v. Austria*, App. No. 10153/82; *Phocas v. France*, Eu. Ct. Hum. Rts., Reports 1996-II (judgement of 23 April 1996) and *Zubani v. Italy*, Eu. Ct. Hum. Rts., Reports 1996-IV (judgement of 7 August 1996).

confers no direct benefit on the State or the community at large. In principle, therefore, the aim pursued by the leasehold reform legislation is a legitimate one.[173]

2.2.2(c) EUROPEAN SOCIAL CHARTER

The Revised European Social Charter[174], in Article 31, states:

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

(1) to promote access to housing of an adequate standard;

(2) to prevent and reduce homelessness with a view to its gradual elimination; and

(3) to make the price of housing accessible to those without adequate resources.

The revised European Social Charter thereby provides the utmost assurance of housing rights to be found in a regional instrument. The second significant instrument is the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), which is administered by the Council of Europe.

Articles 16 and 31 of the Revised Social Charter guarantee housing rights. These Articles, read together, are to the effect that access to adequate housing must be made equally available to all members of the population. In *European Roma Rights Center (ERRC) v. Greece*,[175] a complaint was made by the European Roma Rights Centre (ERRC), alleging that Roma in Greece were denied an effective right to housing. The Committee held that the implementation of Article 16 with regard to nomadic groups, including itinerant Roma, implies that adequate stopping places should be provided. The Committee stated that, in this respect, Article 16 contains similar obligations to Article 8 of the European Convention of Human Rights. Regarding the allegedly insufficient number of permanent dwellings of an acceptable quality to meet the needs of settled Roma, the Committee found that a significant number of Roma were living in conditions that failed to meet minimum standards. Therefore,

[173] Para 47.

[174] The consolidated European charter was adopted in 1996 and it updated the old 1961 Charter. On elaboration of the 1961 Social Charter, See David Harris, *The European Social Charter* (Charlottesville: University Press of Virginia1984).

[175] *European Roma Rights Centre v Greece* Complaint No. 15/2003.

the situation was in breach of the obligation to promote the right of families to adequate housing laid down in Article 16.

Again, in *European Roma Rights Centre v Bulgaria*,[176] It was held that Bulgaria had violated Article 16 in conjunction with Article E by failing to take positive action to integrate Roma into mainstream society, and failing to take into account the urgency of the housing situation of Roma families in the six years since the Charter had come into effect.

Constitutional Courts in Central and Eastern Europe[177] have reasserted a strict legal status of socio-economic rights (resisting the temptation of considering them as purely 'programmatic'). Nevertheless, the leading authoritative view has been that, even if these constitutional rights cannot be the grounds for an individual claimant, they can be the basis of a constitutional review of legislation[178] conducted by the constitutional court in the process of its abstract review. The main task before the courts has been, however, to establish the status of distinctions between socio-economic rights and 'liberal' rights, despite the absence of any textual constitutional mandate.

Furthermore, Europe needs an extensive strategy based on the fundamental rights to housing in order to take more effective action in solving homelessness, growing at the European scale. Housing should be regarded as a universal human and fundamental right[179]. Housing and a functioning housing market have an increasing significance in promoting economic growth, sustainable development and functioning communities.

2.2.3 THE AMERICAN CONTINENT

Though other regional systems have not explicitly protected housing rights to the same extent as the European system, and thus do not have the same depth of jurisprudence, there are some

[176] (Complaint no. 31/2005)
[177] These encompass countries such as Albania, Poland, Slovenia, Hungary, Poland, and others.
[178] See Wojciech Sadurski, 'Constitutional Socio-Economic Rights: Lessons from Central Europe', *The Foundation for Law, Justice and Society*, The Centre for Socio-Legal Studies, University of Oxford; it can be found in www.fljs.org.
[179] These are among the issues illustrated by "the Housing Rights in Europe expert report", produced by the Ministry of the Environment and published in Helsinki at www.environment.fi.

exceptions.[180] Inter-American Commission on Human Rights and the Inter-American Court on Human Rights have had the opportunity to consider cases that address the right to property, although to date neither has dealt directly with housing rights. For example, the Inter-American Commission indicated in *Carlos Garcia Saccone v. Argentina*,[181] that:

> In the inter-American system, the right to property is a personal right. The Commission is empowered to vindicate the rights of an individual whose property is confiscated … .

The American Declaration on the Rights and Duties of Man and American Convention on Human Rights endeavoured dealing with housing rights though they are not that precise. Much flesh has been added to their meaning by the interpretative entities.

2.2.3(a) THE AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MAN

Many of the rights articulated in the American Declaration[182] have become standard principles within both international human rights legal and normative frameworks. The preamble of the America Declaration closely parallels the language found in Article 1 of the Universal Declaration, and affirms that, "[A]ll men [and women] are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers [and sisters] one to another."

Article IX of the American Declaration on the Rights and Duties of Man states that 'every person has the right to the inviolability of his home.' Furthermore, Article XXIII therein states that 'Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.'

[180] One of the exceptions may be that the courts or commissions in such continents manage to read the housing rights within the meaning of other socio-economic rights.
[181] (Case 11.671, Report Nº 8/98, Inter-Am. C. H. R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 193 (1997).
[182] Adopted by the Ninth International Conference of American States in 1948.

2.2.3 (b) AMERICAN CONVENTION ON HUMAN RIGHTS

Article 11(2) of the American Convention on Human Rights[183] states that 'No one may be the object of arbitrary or abusive interference with his life, his family, his home, or his correspondence, or of unlawful attacks on his *honour* or reputation.

USA Constitution is one of those that make clear reference to civil and political rights, although there is no mention with regard to socio-economic rights. It is therefore said that to appreciate the issues in socio-economic rights in USA, it is of paramount importance to recognise that there are rights not defined or even mentioned in its Constitution[184]. The basis of this argument is that the rights provided for in the US Bill of Rights are not a complete list[185] and that other sources must be employed to determine the full range of rights that individuals have.

2.3 SADC BENCHMARK

2.3.1 SADC Objectives and Structures

Addressing Africa's social development is an urgent priority. Ministries of Social Development, Labour and Social Security, and other related Ministries in each of the African countries are working towards this at the national level. However, the benefits of cooperating at the regional level have been generally overlooked. The SADC countries should address regional policies with regard to social challenges such as Employment and Decent Work, Social Protection, Cross-border Aspects of Health, Higher Education and Regional Research and Housing.

[183] Adopted on the 22 November 1969 and entered into force on 18 July 1978.
[184] See Ginsburg & Lesser "Current Developments in economic and Social rights: A United States Perspective" 1981 *Human Rights Law journal* 241.
[185] This point is even advanced in Dawid Van Wyk, et al, *Rights and Constitutionalism: The New South African Legal Order* (Juta & Co, Ltd, Kenywn, 1994) 612.

2.3.2 Housing Rights Systems in the SADC

In 2005, the SADC Ministerial Meeting[186] emphasized that vast inequalities of housing and housing standards are to be found across the region. The World Summit for Social Development (1995) Programme of Action states that "homelessness and inadequate housing and unsafe environments" are all aspects of poverty which should be eradicated. One of the 'policy statement' was that 'adequate housing is a basic human need and the provision of decent housing is an essential component of social policy directed at eliminating poverty and social exclusion. The SADC countries would work hand in hand to encourage cross border cooperation to share good practice on the provision of adequate housing, to improve access to housing and quality of dwellings, to support cooperation in the area of housing finance for low-income households and share expertise on assessments for housing need drawing.

2.4 COMPARATIVE BENCHMARK- MUNICIPAL LEVELS

2.4 INDIVIDUAL COUNTRIES

3.4.1 GHANA

The 1992 Constitution of Ghana (The Fourth Republic Constitution as it is sometimes referred to) provides for the traditional civil and political (first generation) rights and some economic, social and cultural (second and third generation) rights.[187] These are contained in Chapter 5 entitled 'Fundamental Human Rights and Freedoms'. This constitutional Bill of Rights provides the fundamental legal framework for the protection of human rights in Ghana. Although the Ghanaian Constitution provides for certain socio-economic rights, it does not do so as extensively as the South African Constitution does. The similarity however, is that the socio-economic rights protected are contained within the body of the Bill of Rights and not as policies or principles as in the case of Namibia and Uganda.

[186] SADC Ministerial Meeting was held in Johannesburg, South Africa, 20 June 2005.

[187] For a clear discussion of different generations of rights, refer to KJ Partsch, "Recent Developments in the Field of Peoples' Rights" (1986)7 *HRLJ* 177; Dawid Van Wyk, et al, *Rights and Constitutionalism: The New South African Legal Order*, (Juta & Co, Ltd, Kenywn, 1994); On the same notion Zimbabwe Constitution was made in 1980, preceded by those of Nigeria in 1960, Lesotho and Botswana in 1966, Zambia in 1964 and Swaziland in 1968.

This means that the justiciability of socio-economic rights is more certain in Ghana than in Namibia and Uganda. In the Ghanaian Constitution, there is no specification in relation to housing rights. However, it is fascinating to note that Article 33(5) therein seems to give a blank cheque to the inclusion of other socio-economic rights in the Bill of Rights. It states that:

> The rights, duties, declarations and guarantees relating to fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.

It is vital to point out that, unlike Uganda and Namibia, the enforceability of socio-economic rights in Ghana is not limited to those that are contained in the Bill of Rights. It may in fact extend to those laid out in the Directive Principles of State Policy. This is according to *New Patriotic Party v Attorney General*[188] which held, *inter alia*, that although the Directive Principles of State Policy are not in themselves legally enforceable by the courts, there are exceptions to this principle in that where the Directive Principles are read together with other enforceable parts of the Constitution they then in that sense become enforceable.

2.4.2 NAMIBIA

Namibia is of one of the countries that managed to meticulously enact constitutions containing a Bill of Rights.[189] Chapter 3[190] of the Constitution of the Republic of Namibia is dedicated to the protection of fundamental human rights and freedoms. It also addresses the enforcement and the curtailment in exceptional circumstances of such rights. In addition to a Bill of Rights, the Constitution contains other elements which enhance fundamental rights and freedoms. Imperatively, as is the case in South Africa, the rights in the Namibian Constitution are largely, but not exclusively, derived from the UDHR[191] and other relevant international human rights instruments. In that regard, both traditional civil and political rights and the socio-economic rights are contained in the Namibian Constitution.

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[188] (1996–97) SCGLR 729

[189] Constitution of Namibia Act 1 of 1990.

[190] Articles 5 – 25 of the Namibian Constitution of 1990.

[191] It is clearly highlighted in *Kauesa v Minister of Home Affairs and Others* 1995 (1) SA 51 (NM) that "Article 8 of the Namibian Constitution is based on art 1 of the Universal Declaration of Human Rights of 1948, which in turn was contained in para B5 of the framework for the Namibian Constitution prescribed for the Constituent Assembly and the Constitution for an independent Namibia in the so-called 1982 constitutional principles."

Although some provisions which look like socio-economic rights are incorporated in the Namibian Bill of Rights, these provisions are not justiciable and enforceable before the Namibian courts of law.[192] Different commentators have expressed divergent observations in that regard. Gretchen Carpenter[193] is of the view that the rights enumerated in the [Namibian Bill of Rights] are confined to the so-called first-generation or traditional human rights. The second and third generation rights feature in the Constitution, but only as principles of state policy (in chapter 11) and not as judicially enforceable rights. On the other hand, Gino Naldi indicates that Chapter 3 of the [Namibian] Constitution is not solely concerned with civil and political rights but also seeks to protect certain economic, cultural and social rights, generally referred to as second generation rights in international law, albeit in a somewhat limited and modest fashion.[194]

It is beyond argument that the Namibian Bill of Rights pays very scant attention to socio-economic rights, only confining itself in this regard to a few of them.[195] Frederick Fourie enunciates that "the authors of the constitution chose to handle economic [and social] matters outside the rights context and specifically as policy goals."[196] What has to be regarded as socio-economic rights is treated as policy objectives in Chapter 11 of the Constitution entitled 'Principles of State Policy'[197]. It has evidently been explicated from the above discussion that in assessment, the Constitution of Namibia does not go quite as far as its South African counterpart in protecting socio-economic rights. Finally, it makes no mention in relation to the right of access to housing.

[192] This is where the South African Constitution differs with the Namibian Constitution. All universally accepted fundamental rights (including socio-economic rights) shall be protected and enforceable as per the pronouncement of the court in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic South Africa* 1996 (4) SA 744 (CC) para 78.

[193] See G Carpenter, 'The Namibian Constitution – *ex Afria Aliquid No*vi After All?' in Dawid Hercules van Wyk, Marinus Wiechers and Romaine Hill (eds), *Namibia: Constitutional and International Law Issues* (VerLoren van Themaat Centre for Public Law Studies, University of South Africa, Pretoria 1991) 32.

[194] See GJ Naldi *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights* (Juta & Co Ltd, Ndabeni, South Africa 1995) 96.

[195] It confines itself to children's rights [Article 15] and the rights to education [Article 20].

[196] See F Fourie, "The Namibian Constitution and Economic Rights" (1990) 6 *SAJHR* 363 at 365.

[197] Namibian Constitution simulates 1993 Lesotho's Constitution in that regard.

2.4.3 UGANDA

Uganda's present constitution was enacted in 1995 after decades of military dictatorships and autocratic excesses mainly characterised by gross violations of human rights[198]. Like its predecessors, the 1995 Constitution of the Republic of Uganda was drafted to include a Bill of Rights. This Bill of Rights is contained in Chapter 4 entitled 'Protection of Fundamental and other Human Rights and Freedoms'. As with the Namibian Constitution, the bulk of the rights contained in Chapter 4 of the Ugandan Constitution are mainly civil and political (first generation) rights. These are rights generally included in the UDHR and the International Covenant on Civil and Political Rights (ICCPR). Uganda endorsed the UDHR and is a party to the ICCPR.

With respect to socio-economic rights, Uganda's position is similar to that of Namibia and in contrast to that of South Africa. Just like the Namibian Bill of Rights, Chapter 4 of the Ugandan Constitution pays minimal attention to such rights. In spite of Uganda's obligation to the International Covenant on Economic, Social and Cultural Rights (ICESCR) to which it is a party, the only socio-economic rights provided for under the Ugandan Bill of Rights are: protection from deprivation of property[199], the right to education[200], the right to work and participate in trade union activity[201] and the right to a clean and healthy environment[202]. Other social and economic rights that should ordinarily be included in the Bill of Rights are laid down in the preamble to the Constitution under a section entitled "National Objectives and Directive Principles of State Policy'. This section contains a set of objectives and principles intended to guide all organs of the state and non-state actors 'in applying or interpreting the constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society." Some socio-economic rights are enshrined in the Ugandan Constitution though their enforcement, implementation justiciability is put in great doubt.

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[198] JC Mubangizi, "The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation" (2006) 2 *AJLS* 1; Prior to 1995, Uganda had three constitutions none of which satisfactorily addressed the needs and aspirations of the people in so far as the promotion and protection of human rights were concerned. Interestingly, the 1962 Independence Constitution contained a chapter protecting a number of human rights and freedoms. Due to the political instability pertaining at the time, the 1966 Constitution watered down the Bill of Rights that had originally been included in the 1962 Constitution. This watered-down version was carried over to the 1967 Constitution.

[199] Article 26.

[200] Article 30.

[201] Article 40.

[202] Article 39.

As a result, since the enactment of the 1995 Constitution, very few cases involving socio-economic rights have come before the Ugandan courts, and even then the judgments in some of those cases have left a lot to be desired. In *Byabazaire Grace v Mukwano Industries*[203] for example, the court surprisingly stated that before the totality of the right to a healthy environment could be determined, the National Environment Management Authority had to establish air quality standards. However, in *Joseph Eryau v Environmental Action Network*[204], Justice Ntabgoba declared that smoking in a public place constituted a violation of the rights of non-smokers thereby denying them the right to a clear and healthy environment in terms of Article 39 of the 1995 Constitution. It should, however, be stipulated that Ugandan Constitution too does not entertain the housing rights as incorporated in South African Constitution.

2.5 CONCLUSION

Lack of clarity regarding the normative content of economic, social and cultural rights is often cited as one of the impediments to full implementation of such rights. However, as Leckie notes, in light of 'immense strides' in the past decade in clarifying and elaborating the content of these rights, it is now much more difficult for states to deny that failure to provide for basic human needs is a violation of human rights.[205] Extensive efforts, particularly on the part of the Committee on Social Economic and Cultural Rights and many Declarations, have led to the development of a detailed framework for the application of the right to adequate housing.

Again, although the international community has consistently reiterated the proposition that all human rights are intertwined within a coherent system of law, responses to violations of economic, social and cultural rights, both procedural and substantive, have paled in

[203] Miscellaneous Application No 909 of 2000.
[204] Miscellaneous Application No 39 of 2001; both the Ugandan cases are discussed in JC Bubangizi, "The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation" (2006) 2 *AJLS* 1.
[205] S. Leckie, "Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights" (1998) 20 *Human Rights Quarterly* 81 at 88. Hereinafter referred to as "*Scott Leckie, Violations of Economic, Social and Cultural Rights*".

comparison to the seriousness accorded infringements of civil and political rights.[206] Adequately addressing violations of human rights necessitates an extensive spectrum of responses, both precautionary and corrective in nature. As Scott Leckie[207] alludes, the development of effective early warning systems and emergency response mechanisms designed to prevent pending violations from occurring, expanding public awareness, seeking the issuance of injunctions and

other judicial orders and the amendment of law and policy are several such measures. Philip Alston has postulated:[208]

> Our level of tolerance in response to breaches of economic, social and cultural rights remains far too high. As a result, we accept with resignation or muted expressions of regret, violations of these rights . . . We must cease treating massive denials of economic, social and cultural rights as if they were in some way `natural' or inevitable.

As shown in this chapter, many African constitutions tend to recognise civil and political rights while generally disregarding socio-economic rights[209]. Amongst the above surveyed countries in this study, only South Africa has made the most advanced constitutional provision for socio-economic rights. With respect to mechanisms of implementation and enforcement, South Africa again takes the lead, particularly with regards to the extent of judicial enforcement. The number of decided cases involving socio-economic rights discussed is evident to this.

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[206] A clear dismay and condemnation of gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of human rights that continues to occur in different parts of the world was expressed in The 1993 World Conference on Human Rights.

[207] Scott Leckie, "Violations of Economic, Social and Cultural Rights" at 81.

[208] Philip Alston, `Excerpts from a speech to the plenary of the World Conference on Human Rights', re-printed in *Terra Viva*, 22 June 1993.

[209] See JC Mubangizi, 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' (2006)2 *AJLS* 1 at 18.

CHAPTER THREE: INTRODUCTORY RHETORIC ON SOUTH AFRICAN HISTORY

> *Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.---* **Chief Justice Pius Langa, "Transformative Constitutionalism", A Prestige Lecture delivered at Stellenbosch University on 9 October 2006**

> *The movement from the one side of the bridge to the other will require a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.—* **C Albertyn & B Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 SAJHR 248 at 249.**

3.1 DEVELOPING A BASIS FOR ACCESS TO ADEQUATE HOUSING RIGHTS IN SOUTH AFRICA

3.1.1 NATURE OF THE PROBLEM: A Brief Excursus

Black people, from as long time ago as the genesis of colonial era, have incessantly been the unfortunate victims at the receiving end of untrammeled ramifications of apartheid – the ordering of society under which political, legal, economic and social standards are set by, and fixed in the interests of, the whites, and which is based on white power and black subordination. In this system, blacks have been discriminated against, oppressed, repressed and suppressed. At the sunset of apartheid in 1994, the African National Congress ran a political platform of "housing for all."[210] This was a welcome promise for South Africans

[210] E Wickeri, "Grootboom's legacy: Securing the Right of Access to Adequate Housing in South Africa?" *Centre for Human Rights and Global Justice*, Working paper, Number 5, 2004 at 3.

living in deplorable conditions,[211] with the inclusion of the right of access to adequate housing[212] in the new Constitution, little changed after the ANC's landslide victory. These manifested problems were overcome in a piece-meal trend from the *First Certification Case*[213], *Soobramoney Case*[214], and ultimately *Grootboom case*[215] and *TAC Cases*[216] where socio-economic rights got strong recognition. They are now lately positively enforceable. However, it is worth noting that a plethora of judicial dicta and decisions in the field of human rights still depict a seemingly never-ending clash between different holders of rights. In addition, these rights are at least justiciable to a certain extent.[217]

Apart from that, in order to fill some gaps in the housing policy framework, the South African government identified medium density housing, rental housing, social housing and emergency housing as the key policy priorities from 2000.[218] Emergency, medium density, rental and social housing are part and parcel of addressing inequalities in access to deliver and the legacy of racial segregation. The Emergency Housing Policy Framework was conceptualized as a result of the *Grootboom judgment*[219] and aims to assist groups of people that are deemed to have urgent housing problems, owing to circumstances beyond their control.[220] Again, to actively respond to the inadequacy of the right of access to housing, the

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[211] This assertion was even advanced by the then Chief Justice Chaskalson in *Soobramoney v Minister of Health, KZN* 1998 (1) SA 765 paras 8-9, when he said, "'We live in a society in which there are great disparities in wealth. 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."

[212] See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic South Africa* 1996 (4) SA 744 (CC) paras 76 and 77, (hereinafter referred to as *First Certification Case*).

[213] See *First Certification Case* (note 212 above).

[214] *Soobramoney v. Minister of Health, KZN* 1998 (1) SA 765, (hereinafter referred to as *Soobramoney case*).

[215] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (hereinafter referred to as *Grootboom Case*).

[216] *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) 2002 (5) SA 703 (hereinafter referred to as *Treatment Action Campaign (No.1)*) and *Minister of Health and others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) (hereinafter referred to as *Treatment Action Campaign (No.2)*).

[217] *First Certification Case* (note 212 above) para 78.

[218] The Right of Access to Adequate Housing, 5th Economic & Social Rights Report Series 2000/2003 Financial year, 21 June 2004 by South African Human Rights Commission.

[219] *Grootboom Case* (note 215 above).

[220] Such circumstances are disasters, evictions or threatened evictions, demolitions or imminent displacement or immediate threat to life, health and safety. The State also reported on measures to protect the right to housing in the form of the Prevention of Illegal Eviction from Occupation of Land Act 1998 (as amended) and the commencement of the Home Loan & Mortgage Disclosure Act 63 of 2000.

judgments which are likely to result in inconsistency with section 26 of the Constitution are not executed.[221]

3.1.2 ACCESS TO ADEQUATE HOUSING AS A SUBJECT WITHIN HUMAN RIGHTS

The International Bill of Rights[222] was inspired by a need for solutions to moral and political problems which the world faced at the time.[223] The ravages of the two world wars and the emergence of dictatorships highlighted this need. The world wars left millions dead and more millions destitute, in addition to the massive destruction of property and the subsequent economic depressions. The modern human rights movement emerged as a response to these ravages, humanity could only be preserved if certain of its needs were protected. The first step towards this was recognition of the needs that merit protection.[224] The second step was to accord these needs legitimacy by accepting that it is the responsibility of the state to ensure that they are met. As Pieterse said, "articulating claims to social goods as rights clothes the interests that the claims represent in a measure of political significance" because "rights entail enforceable obligations for those against whom they are claimed and demand justification for their non-fulfilment."[225]

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[221] For instance, *Jaftha v. Schoeman & Other* 2005 (1) BCLR 78; 2005 (2) SA 140 (CC).

[222] J Didcott "Practical workings of a Bill of Rights" in Van der Westhuizen, J., and Viljoen, H., (eds.) *A bill of rights for South Africa* (Durban: Butterworths, 1988), described a bill of rights as follows: "It is a protective device. It can state effectively and quite easily, what may not be done. It cannot stipulate with equal ease or effectiveness, what shall be done. The reason is not only that the courts, its enforcers, lack the expertise and infrastructure to get into the business of legislation and administration. It is also, and more tellingly, that they cannot raise the money. They cannot levy the taxes needed to finance those accomplishments they may like to see…" A Sachs, *Protecting Human Rights in a New South Africa* (New York: Oxford University Press, 1990) 19, expresses that "it is not just individuals who will be looking to the Bill of Rights as a means of enlarging their freedom and improving the quality of their lives, but whole communities, especially those whose rights have been systematically and relentlessly denied by the apartheid system." He opines that the Bill of Rights is a ―truly creative document that requires and facilitates the achievement of the rights so long denied to the great majority of people.

[223] C Matthew *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (Oxford: Oxford University Press, 1998) 11.

[224] The UN Charter and the UHDR are evidence of such recognition. Human rights are recognised as necessary for freedom, justice and peace in the world (UDHR preamble, para 1). The UDHR further proclaims that a common understanding of rights and freedoms is of the greatest importance (para 7). See also Fortman and Goldewijik., *God and the goods: global economy in a civilizational perspective* (World Council of Churches Publications, 1998) at 4 who contend that the human rights 'project' is 'a global effort to bind the execution of power to a set of norms based on a universal belief in human dignity'— geared towards realising 'the global common good' or public interest.

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

Certainly, closer scrutiny reveals that civil and political rights engender positive obligations just like social rights. It is on the basis of this that Sepúlveda submits that all human rights impose a 'continuum' or 'spectrum' of obligations. On the one side of the spectrum is the obligation of non-interference by the state and on the other side is the obligation requiring positive action.[226] Both civil and political rights and socio-economic rights should, therefore, be viewed through this spectrum.

To be specific, the right to adequate housing is also entrenched in a number of international treaties and declarations as a fundamental human right.[227] Though international conversation on human rights legitimately proclaims socio-economic rights such as housing to be equal to, and indivisible from civil and political rights,[228] such as a right to freedom of speech,[229] concentration in municipal law internationally has tended to focus on civil and political

[226] M Sepúlveda, *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) INTERSENTIA; H Shue, "The interdependence of duties" in Alston, P., and Tomaševski, K., (eds.) *The right to food* ((Dordrecht: Martinus Nijhoff Publishers, 1984) 84, she concludes that attempting to classify every right either flatly negative or positive, is an artificial, simplistic and arid exercise.

[227] See e.g, Article 25(1), Universal Declaration on Human Rights, 1948; Article 11(1) of International Covenant on Economic, Social and Cultural Rights, 1966; Article 14(2)(h), International Convention on the Elimination of All Forms of Discrimination Against Women, 1981; Article 5(e)(iii), International Convention on the Elimination of All Forms of Racial Discrimination, 1966; Article 27(3), the Convention on the Rights of Child, 1989; Article 8(1), the European Convention for the Protection of Human Rights and Fundamental Freedom, 1953.

[228] Mokgoro J expressed in *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) that "The socio-economic rights in the Constitution of the Republic of South Africa Act 108 of 1996 are closely related to the founding values of human dignity, equality and freedom. The proposition that rights are interrelated and are equally important has immense human and practical significance in a society founded on these values. When the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights, they have to be taken into account along with the availability of human and financial resources in determining whether the State has complied with the constitutional standard of reasonableness. This is, however, not a closed list and all relevant factors have to be taken into account in this exercise. What is relevant may vary from case to case depending on the particular facts and circumstances. Even where the State may be able to justify not paying benefits to everyone who is entitled to those benefits under certain sections of the Constitution on the grounds that to do so would be unaffordable, the criteria upon which they choose to limit the payment of those benefits must be consistent with the Bill of Rights as a whole."

[229] Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25, June, 1993, para 5 elaborates 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." S, Liebenberg, "Socio-economic rights" in Chaskalson, M. et al, *Constitutional Law of South Africa,* (Cape Town: Juta & Co. Ltd, 1998) para 41.1 elucidates "The principle of interdependency finds expression within human rights discourse both at a normative and an institutional level. It is reflected in the recognition of the equal value of both 'sets' of rights and their close interlinking, as well as the institutional arrangements for enforcement."; See also JC Mubangizi, "The Constitutional Protection of Socio-economic Rights in Selected African Countries: Comparative Evaluation" (2006) 1 *AJLS* 2.

rights.[230] However, the South African Constitutional Court has in many times shown the interdependence of both civil and political rights and socio-economic rights.[231] It therefore means that the rights, despite their classification, may be given the same treatment. Direct infringement of a certain right may directly or indirectly affect the other.

With an inspection to denounce and repudiate the protracted conceptual quagmire in which the integrative human rights approach has for long been entangled in Africa, the African Union (AU)'s First Ministerial Conference on Human Rights in Africa, in 1999[232] and 2003,[233] reinforced the universality, indivisibility, interdependence and interrelatedness of all human rights, and proceeded to direct 'member states and regional institutions to accord the same importance to economic, social and cultural rights, and apply, at all levels, a rights-based approach to policy, programme, planning, implementation and evaluation'.

To illustrate the concept further, the Constitutional Court's explicit endorsement of the concept of the interrelationship and interdependence of all the rights in the Bill of Rights underscores this point.[234] Social rights have an important role to play in securing civil and political participation while civil and political rights in turn can help facilitate greater equity in resource distribution.[235]

3.2 HISTORICAL CONTEXT OF THE SOUTH AFRICAN ACCESS TO HOUSING SYSTEM

3.2.1 INHERITED INADEQUACIES OF THE APARTHEID REGIME

[230] Lesotho's Constitution is the epitome of such a situation in which much focus is on the civil and political rights. See chapters II and III thereof.

[231] See C Scott "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Convention on Human Rights" (1989) 2 *Osgoode Hall LJ* 769 at 786; S Liebenberg, "The Interpretation of Socio-Economic Rights" in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds), *Constitutional Law of South Africa* (2nd Edition, OS, 2005) 33-1; *Grootboom Case* para 24.

[232] The First OAU Ministerial Conference on Human Rights, meeting from 12 to 16 April 1999 in Grand Bay, Mauritius.

[233] the AU Ministerial Conference on Human Rights in Africa, May 2003 in Kigali, Rwanda.

[234] See *Khosa v Minister of Social Development; Mahlaule v Min of Social Development* 2004 (6) BCLR 569 (CC) paras 49 and 52; *TAC* para78; *Grootboom Case* paras 23 and 44.

[235] See the statement by A Sachs "Social and Economic Rights: Can they be Justiciable?" (2000) 53 *Southern Methodist University Law Review* 1389, when he said: "We do not want bread without freedom, nor do we want freedom without bread; we want bread and we want freedom."

It is an extremely impenetrable task to appreciate the housing rights in the Constitution and/ or court proceedings dealing with housing rights devoid of reference to the effects of previous apartheid legislation on housing and the issues the housing right seeks to address[236]. This piece, for that reason, portrays the legislation directly affecting housing and its impact. However, it should be noted at this point that South Africa's history of housing cannot be described in any clear picture without recourse to both the peculiar racial and economic ideologies underpinning previous housing legislation, especially as it related to labour and influx control.

When the African National Congress took office in 1994, it inherited a country that had developed unequally over almost three hundred and fifty years of white minority rule. Severe unequal distribution of land and resources together with ownership were vehemently direct consequences of apartheid policies that authorised forced and brutal removal from land, extrajudicial evictions and the demolition of homes[237]. By then, black South Africans were required to live only in officially mandated settlements that were run-down, cramped, and without utilities.

Discrimination was rampant under colonial South Africa, but after the founding of the Union of South Africa in 1910, some damaging and long-lasting pieces of legislation were enacted, institutionalizing segregation and the unequal division of social property and resources between white and non-white South Africans. National planning was characterized by overlapping colour-controlling laws and regulations. The Natives' Land Act[238] and the Native

[236] E Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31, eloquently accentuated that the need to understand the past as a mechanism to deal with the future: "What is the point of our Bill of Rights? The Bill is Chapter 3 of the interim constitution, which declares itself to be aspiring to be 'a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.' 'If this bridge is successfully to span the open sewer of violent and contentious transition, those who are entrusted with its upkeep will need to understand very clearly what it is a bridge from and what a bridge to.'"

[237] K Robinson "False Hope or a Realizable right? The implementation of the right to Shelter under the African National Congress' Proposed Bill of Rights for South Africa" (1993) 28 *Harv. C. R.-C.L.L. Rev.* 505.

[238] Act No. 27 of 1913. The Act included two very crucial provisions: first, section 1(1) prohibited Africans from buying land in freehold outside of designated "scheduled areas", which included the reserves, locations and many farms owned by individuals or groups of Africans at that time. The Act also prohibited whites from buying land in the reserves. The scheduled areas equalled about ten million morgen (just over seven per cent of the area of South Africa). Secondly, the Act included provisions (especially sections 6 and 7) which were an attempt by members of Parliament to restrict the opportunity for squatters and sharecroppers to continue to remain on white-owned farms in this capacity, especially in the Orange Free State.

Trust & Land Act[239] created "reserves" for black South Africans, formulating the separation of black and white. The fundamental demand behind the Land Acts was expressed by a then Member of Parliament who stated simply that the black African had to be told 'that it was a white man's country, that he was not going to be allowed to buy land there, and that if he wanted to be there he must be in service.'[240] As Jaichand[241] elaborates, the Acts scheduled 34 750 miles of land for the exclusive use of Black South Africans. This constituted 7% of all land in South Africa.

Whilst the Land Acts dealt with land distribution, no central state policy dealing with housing was in place until 1920. Hendler, Mabin and Parnell remark that housing for the poor during this time remained the voluntary responsibility of local authorities[242]. In 1919, the Public Health Act[243] was passed. From housing right perspective, the Act was more about public health control than a gauge to deal with housing shortages. Despite that fact, it was the first Act to contain a chapter dealing with factors associated with what is at the moment termed the 'housing right' in the rainbow nation. The chapter, entitled '*Sanitation and Housing*' fixed upon local authorities the duty of maintaining the areas under their jurisdiction in a clean and sanitary condition, and of preventing dangers to health from unsuitable dwellings. At this early stage then, local government was responsible for aspects of housing.

Just the following year, the first Housing Act[244] was enacted. The Act blotched the beginning of financial assistance by the state in the field of housing. Though no subsidies were recognized in the Act, grants were catered for and made available to local government to put in action all approved housing schemes for specific race groups.[245] The principle guiding the state's policy at this early stage was that provision for housing was a function of local government, and the grants stipulated in the Act were purely there to lend a hand to the local

[239] Act No. 18 of 1936.
[240] See M Chanock *The Making of South African Legal Culture, 1902-1936: Fear, Favour and Prejudice* (Cambridge: Cambridge University Press, 2001) 365.
[241] See V Jaichand *Restitution of Land Rights: A Workbook*, (Johannesburg: Lex Patria Publishers, 1997). Hereinafter referred to as V Jaichand, , *Restitution of Land Rights: A Workbook.*
[242] P Hendler, A Mabin and S Parnell "Rethinking Housing Questions" (1986) 3 *S Afr. Rev.* 195 at 196. hereinafter referred to as *Hendler, Mabin and Parnell 1986*.
[243] Act 36 of 1919.
[244] Act 35 of 1920.
[245] Upon analysis of this Act, Hendler, Mabin and Parnell 1986 (note 242 above) indicate that 'working-people were residentially segregated by the state through its control of housing funds' even *before* more specific racist legislation.

government in its duties. As time went on, the Black (Urban Areas) Act[246] was enacted and made provision for the granting of leasehold in respect of sites in black villages and locations only to 'qualified persons.' The Act sought to confine the entry and duration in the 'white' cities by black South Africans.

The Act also allowed local authorities to deport black South Africans from the area if they were 'habitually unemployed' or did not 'possess the means of honest livelihood' or led an 'idle, dissolute or disorderly life.' The Act was amended in 1930, 1937 and 1945 to tighten influx control measures further. These added restrictions dealt with the right of African women to enter an urban area and reducing the days allowed to black South Africans to seek employment. The 1945 amendment further restricted a black South African from claiming permanent residence in an urban area. Section 10 of the Consolidation Act[247] stated that no black South African could be in a place outside his reserve for more than 72 hours unless he had resided there continuously since birth, had lawfully resided there for fifteen years, or had worked there for the same employer for ten years.[248]

On implementation of housing policy, local government frequently and dismally failed to make use of the grants available in terms of the Housing Act, preferring to set aside plots where blacks could erect their own houses on a monthly tenancy.[249] Given the enormous housing shortages during this time, the government tried to encourage local authorities to access loan facilities by amending the Housing Act in 1944[250] and introduced the Housing (Emergency Powers) Act.[251] The 1944 Housing Act had provision for a National Housing and Planning Commission (NHPC) and brought in a newfangled financial basis for housing loans to local authorities while section 2(1)(p) of the Housing (Emergency Powers) Act gave supremacy to the newly-constituted NHPC to carry out a housing scheme where local authorities were unable or unwilling to do so. As a consequence of these Acts, the quantity of

[246] Act 21 of 1923.
[247] Act 25 of 1945.
[248] See D Gelderblom and P Kok, *Urbanisation: South Africa's Challenge* (HSRC: Pretoria, 1994).
[249] Morris P, *A History of Black Housing in South Africa* (South Africa Foundation: Johannesburg, 1981) 26 is of the view that local authorities were "afraid to risk the experiment of establishing a permanent native community or relaxing the very strict regulations applicable to locations"(hereinafter referred to as Morris P); Pienaar J M, "The housing crisis in South Africa: Will the plethora of policies and legislation have a positive effect?" (2002) 17 *SAPR/PL* 336 at 338 states that housing 'was completely halted' during World War II which resulted in the proliferation of various squatter movements due to acute overcrowding where blacks were forced to crowd into any available accommodation.
[250] Housing Amendment Act 49 of 1944.
[251] Act 45 of 1945.

loan funds granted to local authorities increased by a small amount. However, the NHPC failed to use the powers granted to it by the Housing (Emergency Powers) Act and around 1949, the housing problem was 'far from solution'.[252]

Contradiction inherent in the legislative enactments made it impossible for the local authorities to deliver, focus being on housing shortages and the Stallardist doctrine upon which the legislation was planed. In effect, this contradistinction made local authorities tentatively to acknowledge responsibility for their black population in terms of housing. The housing problem was also inextricably linked to the wage structure for black labourers which was too low to afford adequate housing and which, in turn, increased local authorities' financial responsibilities for these obvious "temporary sojourners:"

> Housing is obviously enough the lynchpin of the urban Native problem. The local authorities are required to provide accommodation for the Natives resident in their area, and this housing is by implication supposed to conform to certain standards of decency. But as the vast majority of Africans do not earn a wage sufficient to ensure reasonable standards of living, the great majority cannot pay an economic rent. Furthermore, as the economic and social structure in the Union pegs Africans to the unskilled occupations and maintains the present wide gulf between skilled and unskilled wage levels, there is no reason to expect the earning powers of the bulk of the African urban workers to reach a stage in the immediate future which will enable them to bear the costs of economic rentals without having to sacrifice expenditure on items such as food.[253]

African workers' housing had to be subsidised, and recognition of this necessity was afforded by the facilities afforded by the central government for loans on which it was prepared to incur a heavier loss than the local authority. But the use of such facilities presupposed an ability on the part of the local authority to bear a loss. In the case of some smaller municipalities there was apparently no ability to bear any loss. The larger municipalities were now seriously concerned as to the magnitude of the loss they would be called upon to bear if they were indeed to fulfil their housing obligations to Africans.[254]

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[252] See Hellman E *Handbook on Race Relations in South Africa* (Oxford University Press: London, 1949). Hereinafter referred to as Hellman, E *Handbook on Race Relations in South Africa*.

[253] Hellman, E *Handbook on Race Relations in South Africa* (note 252 above) 248- 249.

[254] Ibid. This extract is cited in jam-packed here because Hellman managed to capture the spherical natural history of the obstacle presented. Based on this argument, she comes to the conclusion that housing subsidies were in fact camouflaged subsidies to employers of Native labour "…because if wages had reached an adequate level there would be no need to subsidise housing." In *Port Elizabeth Mumicipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 8- 10, Sach J attempted to conceptualise the problems relating to the above quotation which have bred as a result of Prevention of Illegal Squatting Act 52 of 1951.

Though biased rules and regulations affecting land and housing issues were enacted earlier than National Party's government, the system of unequal division of property and resources became official policy when the National Party came into power in 1948 – a policy called 'separate development'.[255] The parliamentary agenda which was pursued thereafter has been branded as "more thoroughgoing, more grotesque perhaps, than anything the country or the world had yet seen."[256] In a report commissioned[257] in 1948 to embark upon the 'native problems', the decision was reached that the relocation of blacks to the city was a natural economic phenomenon and although it could not be reversed, it could be controlled and regulated.[258] This policy was expanded in the 1950s primarily through the Group Areas Act[259] whereby black South Africans were divided into racial enclaves along ethnic and linguistic lines.[260] The Group Areas Act had the effect of setting aside only thirteen percent of the land for black Africans who made up eighty-two percent of the population[261].

With a view of prohibiting the rise in a huge number of squatters, the then government enacted the Prevention of Illegal Squatting Act[262] in 1951 which focused on the criminalisation of squatting, the eviction of those persons and the establishment of emergency camps[263]. In a short period of time, two legislative enactments were passed. These were the Black Building Workers Act[264] and the Black Services Levy Act.[265] The basis for these Acts

[255] V Jaichand *Restitution of Land Rights: A Workbook* (Johannesberg: Lex Patria Publisher, 1997) 6 indicated that "apartheid was the basis of Prime Minister Malan's election manifesto in 1948 and entailed a system of separating the race groups to safeguard the racial privileges of the whites." Plasket, C *Baxter's Administrative Law* 2008, quotes Roux's observation that "racial laws and segregation there had always been, but after 1948 racism became a political creed or ideology transcending all other creeds and providing the motive for a sustained program of legislation by the party in power."

[256] What distinguishes the apartheid legislation is that the previous *ad hoc* segregationist measures were amended, supplemented and combined within a political ideology that has been pursued with a single-mindedness of purpose.

[257] The Native Law Commission Report 1948.

[258] J M Pienaar, "The housing crisis in South Africa: Will the plethora of policies and legislation have a positive effect?" (2002) 17 *SAPR/PL* 336 at 338. Hereinafter referred to as J M Pienaar (2002).

[259] Initially passed in 1950 as Act No. 41 of 1950, later consolidated by Act No. 36 of 1966. It complemented the Native Trust and Land Act of 1936 and Black Land Act of 1913.

[260] The National Party's homelands policy was aimed at bifurcating South Africans along lines of exaggerated ethnic difference. Four quasi-independent 'homelands' and seven 'self-governing territories' scattered in a crescent stretched from South Africa's northern borders and along its eastern and southern seaboards. The Bantustans gave the apartheid state somewhere in which it could 'repatriate' Africans who were in surplus to the labour needs of 'white' cities and farming areas and, as a result, fell foul of its tightened influx controls.

[261] P Rutsch, "Group Areas" (1990)1 *South African Human Rights Yearbook* 139; Black South Africans not living on reserved land were forcibly and unceremoniously removed from their homes.

[262] Act 51 of 1952 (hereinafter referred to as PISA).

[263] This statute bred cases such as *R v Phiri* 1954 (4) SA 708 (T); *Lolwana v Port Elizabeth Divisional Council* 956 (1) SA 379 (E); R *v Press* 1956 (3) SA 89 (T) and *R v Zulu* 1959 (1) SA 263 (A).

[264] Act 27 of 1951.

was to promote the site-and-service and home-ownership schemes. While these schemes endeavoured to initiate access to a housing market, one of the main aims of the government was to decrease its overall expenditure on 'temporary urban blacks.' In any event, most municipal housing proved to be too expensive for the ordinary black South African.

Towards the sunset of 1950s the ruling party began taking positive moves in providing accommodation for black South Africans working in adjacent 'white' areas as a matter of policy.[266] The prominence on this homeland ideology saw Parliament pass the Promotion of Bantu Self-Government Act[267] in 1959, with the Transkei becoming the first of the homelands to be granted self-government. At that time, the government committed itself to spend much on physical development and housing together with resettling large numbers of black South Africans from 'white' areas in homeland towns.[268] Due to such consequence, the endorsement of leasehold rights and the proviso of family housing in South Africa's urban areas, introduced earlier were in effect reversed, the powers to evict were tremendously exacerbated, influx regulations were constricted and prospect to acquire permanent residence restricted.[269]

In 1967, a General Circular[270] was passed and it required local authorities to obtain consent from the Department of Bantu Administration and Development before commencing any new black housing schemes. The Department of Bantu Administration and Development in turn, only granted such approval if it considered such developments (especially family housing) essential, and that accommodation could not be provided in the adjacent homeland.[271] To mirror on these circumstances in 1979, the Riekert Commission commented:

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[265] Act 64 of 1952.

[266] P Smit, J J Olivier and J J Booysen, , "Urbanisation in the homelands" in Smith (ed*) Living Under Apartheid* (London: George, Allen and Unwin, 1982) 96; Bekker, S and Humphries, R *From Control to Confusion: The changing role of Administration Boards in South Africa, 1971-1983* (Shuter & Shooter: Pietermaritzburg, 1985) 6.

[267] Act 46 of 1959.

[268] See Smit, Olivier, and Booysen (note 113) 96. *Report of the Commission of Inquiry into Legislation Affecting the Utilisation of Manpower,* (Pretoria; Government Printer, 1979) para 4.387, recorded that the change of policy was clearly reflected in the allocation of funds for black housing in white areas in the annual budget of the Minister of Finance from 1968: 'Whereas the allocation to the Department of Community Development of funds for black housing – from which the boards obtain their allocation – declined since 1968, the allocations to the Development Trust and to the governments of black states rose sharply so that the total funds for black housing for the country as a whole also rose fairly sharply,' (hereinafter referred to as Riekert Commission report).

[269] J M Pienaar (2002) (note 258 above) at 339.

[270] General Circular 27 of 1967.

[271] See Lemon A, *Apartheid: a geography of separation* (Farnborough: Saxon House, 1976) 82.

> The official [housing] policy from 1968 was, in regard to black workers in white areas, to provide family housing in the black states as far as possible rather than in the black residential areas surrounding the white cities and towns where they worked.[272]

In 1971, the Administration of Bantu Affairs Act[273] was passed and thereby transferred the administration of urban black areas from white local government and placed control over Administration Boards established in terms of the Act. These boards were composed of white South Africans who captured the significant areas of black labour and housing, and also took over the administration of black urban areas.[274] In so doing, housing and other specified 'black affairs' was removed from the jurisdiction of white local government to a centralised body acting under the National Department of Bantu Affairs.[275] In spite of the fact that central government policy on the road to late 1970s had been to depress housing for blacks in urban areas, the Riekert Commission found that urbanisation was inevitable, and the best way of dealing with such urbanisation was to accept it and control it.[276] One perceived method of controlling urbanisation (as well as placating heightening political unrest and boycotts) was the introduction of black local government. Dr Riekert[277] advanced the justification for his novel proposed structure in his later publication:

> These local authorities will serve to defuse pent-up frustrations and grievances against the administration in Pretoria. Local authorities will affect the daily existence of these black people more directly and intimately than the more removed activities of central government. In the war in which South Africa is involved and the total onslaught against the country, defusion of this kind has become an urgent necessity which cannot be postponed any longer.[278]

Learning from this passage, an effort to rectify injustices perpetually executed under the umbrella of discriminatory laws against Black people was made. The government also introduced black local government as an attempt to recompense in some measure for the barring of the black population from the tri-cameral system introduced by the 1983

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[272] The Riekert Commission Report 1979 para 4.387. It must be highlighted that the Riekert Commission's terms of reference were to inquire into, report on and make recommendations in connection with certain legislation, including the Bantu (Urban Areas) Consolidation Act 25 of 1945, the Administration of Bantu Affairs Act 45 of 1971, the Community Councils Act 125 of 1977, as well as various provincial ordinances and local authority by-laws.

[273] Act 45 of 1971.

[274] The Local Government for Coloureds and Indians, Ordinance 6 of 1963 made provision for separate local government bodies for both the coloured and Indian population; See further J De Beer and L Lourens, *Local Government: The Road to Democracy* (Cape Town: Educum Publishers, 1995) 30.

[275] See Riekert Commission report 1979 at 147.

[276] See Riekert Commission report 1979 para 4.204 (d) - (f).

[277] Then Chief Director of the Western Transvaal Administration Board.

[278] Riekert Commission report 156.

Constitution[279]. Nonetheless, the attempt by government to 'compensate' and to 'defuse' the situation was all in vain. Although greater powers being given to these authorities, local government had no power over housing and labour – two major sources of dissatisfaction. In particular, housing for black South Africans remained in the hands of the Administration Boards. Black authorities[280] had no powers in terms of the Housing Act to raise loans for housing schemes.

Black local government suffered from the same deficiencies as those institutions before them, namely, inequality, illegitimacy and lack of financial support. An obvious peculiarity could be drawn between the well-serviced and financially-able local authorities in the white areas, and the underdeveloped, under-serviced and financially-deficient 'non-white' areas.[281] The frustrations and grievances of the black population escalated into protests and violence in many areas, often in the form of physical attacks on black councillors.[282] Due to violence and irresistible urbanisation of cities by black South Africans, Abolition of Influx Control Act[283] was later passed, still with some movement restrictions on the Blacks into White townships.

This forced removal policy was disbanded[284] in 1986 in favour of 'orderly urbanisation'[285] allowing some freedom of movement within urban areas to all South Africans. The novel policy still required blacks to live only in mandated settlements on the outskirts of cities that had little or no access to utilities. Despite the increased access to urban land for black South Africans, the government did not institute any policy to encourage the development of homes for blacks who began to return to cities. The official housing policy of the government was

[279] South African Constitution Act 110 of 1983. This Constitution provided for limited power sharing with coloureds and Indians. The government sought to achieve this by classifying matters to be dealt with by Parliament and the state departments in two groups. Firstly, *General affairs* (which included black municipal affairs) to be legislated upon in unison by the three houses of Parliament and administered by the state department and other public institutions entrusted to ministers who were members of the cabinet. Secondly, *Own affairs* of coloureds, Indians and whites to be legislated upon by each of the relevant Houses of Parliament (House of Representatives, House of Delegates, and House of Assembly, respectively) and administered by state departments, which constituted the administration of the Houses – one administration for each House. See J J Cloete N *South African Municipal Government and Administration* ((Pretoria: JL van Schaik Publishers, 1997) for brilliant elaboration on this point.

[280] Set up in terms of the Administration of Bantu Affairs Act 45 of 1971 and the Black Local Authorities Act 102 of 1982.

[281] See *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC).

[282] See Pieterse E 'Metropolitan Governance under Construction' *Dark Roast Occasional Paper Series* 7 (2002) *Isandla Institute* 16.

[283] Act No. 68 of 1986.

[284] Some Laws were repealed by the Abolition of Influx Control Act No. 68 of 1986.

[285] Catherine O'Regan, "Land & Housing in the urban Areas" (1991) 2 *South African Human Rights Yearbook* 119.

limited to facilitating private sector involvement in the market, and to providing homes to the destitute.[286]

The effect of these policies was a veritable housing catastrophe by the 1980s. An inspection conducted from 1989 to 1990 put the housing scarcity figure at between two million and 3.4 million units; ninety percent was borne by the black South Africans.[287] Facing burgeoning informal settlements and increased unrest over housing and land in urban areas, the government once more altered its policy by repealing the Land Act and Group Areas Act, and passed new statutes to lessen the control over some aspects of settlement-establishment and to appease disgruntled groups.[288] It is fair to comment that the result of this morass of legislation and policies was a housing crisis during the 1980s which threatened the very edifice of apartheid.

The struggle for land and housing continued both in and outside of urban areas.[289] The pronouncement by the government that through change in policy, no land restitution would be feasible, was met by public outcry and in many cases communities decided to move back onto their homes in protest. Those communities were met varyingly with violence, negotiation and litigation between the communities and local government.[290] Community organisations encouraged boycotting rental and utilities payments in protest over poor access to land and lack of services, actions that contributed to the ANC's strategy to make South Africa ungovernable.[291] As early as 1955, the ANC proclaimed a need to recognize housing

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[286] Ibid.

[287] K Robinson "False Hope or a Realizable right? The implementation of the right to Shelter under the African National Congress' Proposed Bill of Rights for South Africa" (1993) 28 *Harv. C. R.- C.L.L. Rev*. 505.

[288] The new Acts were the Abolition of Racially Based Land Measures Act No. 108 of 1991, the Upgrading of Land Tenure Rights Act No. 112 of 1991; and the Less Formal Township Establishment Act No. 113 of 1991.

[289] Kriegler J observed in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 122 that "The apartheid city, although fragmented along racial lines, integrated an urban economic logic that systematically favoured white urban areas at the cost of black urban and peri-urban areas. The results are tragic and absurd: sprawling black townships with hardly a tree in sight, flanked by vanguards of informal settlements and guarded by towering floodlights, out of stone-throw reach. Even if only a short distance away, nestled amid trees and water and birds and tarred roads and paved sidewalks and streetlit suburbs and parks, and running water, and convenient electrical amenities . . . we find white suburbia. How did it happen? Quite simply: '. . . in reality the economic relationship between the white and black halves of the city was similar to a colonial relationship of exploitation and unequal exchange.'"

[290] In *Administrator, Cape v Ntswaqela & Others* 1990 (1)SA 405 (A), following removal from privately owned land by the police, informal settlers applied for and received a spoliation. See also *Luvwalala v Port Nolloth Municipality* 1991 (3) SA 98 (C).

[291] Ashwin Desal, *We are the poors: Community struggles in post-apartheid South Africa* (New York: Monthly Review Press, 2002).

rights.[292] The wording of the provision in the Freedom Charter on housing informs the desperate need in which the majority of South Africans lived and was expressed as thus:

> There *shall* be Houses, Security and Comfort!
>
> All people shall have the right to live where they choose, be decently housed, and to bring up their families in comfort and security;
>
> Unused housing space to be made available to the people;
>
> Rent and prices shall be lowered . . .
>
> Slums shall be demolished . . .
>
> Fenced locations and ghettos shall be abolished, and laws which break up families shall be repealed.

An analogous stipulation was adopted in the ANC's Draft Bill of Rights in 1990, accentuating the dismantling of apartheid institutions such as housing hostels associated with the migrant labour system, and also demanding the provision of services to all homes, and the outlawing of extrajudicial evictions.[293] In 1992, a National Housing Forum was established just as a 'think tank' for all main stakeholders to develop a housing strategy and policy for South Africa. Of provisional exercise, the Housing Arrangements Act[294] was passed with an intention to ensure that housing provision could proceed while a detailed future housing policy was being developed.

This Act made provision for the establishment of a National Housing Board to advise government on issues of national policy. The Act provided for the amalgamation and joint operation of housing funds and certain housing institutions of old own affairs administrations by April 1994.[295] Though this temporary task was put in action, there was still a momentous degree of overlap and duplication within the housing sector. It was abundantly clear that new legislation was needed to rationalize existing housing legislation. This then set the background to the first era of the Government of National Unity on 1994. At this point, it was the time for ANC to prove itself for the promises it has been making to the marginalised people. It therefore revised its policy to set the basis firstly for socio-economic rights.

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[292] See African National Congress, The Freedom Charter, *adopted* Congress of the People (26 June 1955), *at* www.anc.org.za/ancdocs/history/charter.html (last accessed 05th May 2011).

[293] African National Congress, Draft of Bill of Rights, *has been* reprinted *in* (1991) 2 *South African Human Rights Yearbook* 401 at 409.

[294] Act 155 of 1993.

[295] This Act was numerously amended since 1993 to 1996 so as to extend its application to the entire national territory and to all South Africans without distinction on the basis of race. See Housing Amendment Act 101 of 1993, General Law Second Amendment Act 108 of 1993, Housing Matters Amendment Act 191 1993, Housing Second Amendment Act 33 of 1994, Housing Amendment Act 6 of 1996.

3.2.2 POSITION SINCE 1994 AND THE WAY FORWARD – FROM ANGUISH TO EMPATHY

The ANC thus succeeded to the urban landscape that apartheid had created, and despite the removal of legal hindrances to land tenure and ownership for South Africans of all ethnicities, cities and towns remained racially segregated in apartheid structure. In 1994, eighteen percent of South Africans were living is squatter settlements, backyard shacks or in overcrowded conditions with no formal rights to their homes.[296] It was estimated that in one year, the housing backlog would attain one and half million units, increasing at an annual rate of one hundred and seventy eight thousand units[297]. The State approximated two hundred thousand households would have to be housed annually for the backlog to be eliminated over a period of ten years.[298] After 1994 elections, the new Minister of Housing announced;

> It is our task to give millions of South Africans an essential piece of dignity in their lives, the dignity that comes from having a solid roof over your head, running water and other services in an established community.[299]

As Elisabeth Wickeri[300] observed, "It was acutely recognized not only that the lack of adequate housing and basic services in urban townships and rural settlements had reached crisis proportions, but also that the crisis was directly attributable to apartheid policies." The pressure on the government to deliver their specific promises,[301] and differentiate itself from pre-1994 ruling political party, was so enormous. In 1994, a White Paper on Housing[302] announced that 'the time for delivery of housing has arrived'.[303]

The structures set up by the apartheid policy left an urban landscape of black townships and settlements on the peripheries of cities alongside so-called coloured and Indian areas which served as a 'buffer' for wealthier white areas. In *Fedsure Life Assurance Ltd v Greater*

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[296] Urban Sector Network & Development works, Scoping Study: Urban Land Issues, Final Report, 2003, Available at www.sarpn.org.za/documements.

[297] New Housing and Policy Strategy for South Africa: White paper, December 1994, available at www.gov.za/whitepaper.

[298] Ibid.

[299] Tammy Cohen, "Land and Housing", (1995) 6 *South African Human Rights Yearbook* 131.

[300] See Elisabeth Wickeri, "Grootboom's legacy: Securing the Right of Access to Adequate Housing in South Africa?" *Centre for Human Rights and Global Justice* Working Paper No. 5, 2004.

[301] ANC, on campaigning, proclaimed a need to recognize housing rights – There shall be Houses, Security and Comfort.

[302] The New Housing and Policy Strategy for South Africa: White Paper, GN 1376 in GG 16178, 23 December 1994 (hereinafter referred to as Housing White Paper).

[303] Ibid, para 1.

Johannesburg Transitional Metropolitan Council,[304] Kriegler J captures the tragic and absurd results of such structures:

> Sprawling black townships with hardly a tree in sight, flanked by vanguards of informal settlements and guarded by towering floodlights, out of stonethrow reach. Even if only a short distance away, nestled amid trees and water and birds and tarred roads and paved sidewalks and streetlit suburbs and parks, and running water, and convenient electrical amenities … we find white suburbia.

The essentiality of overhauling the housing predicaments in South Africa was so acute that the right of access to adequate housing was constitutionalised in 1996.[305] Such recognition and welcoming remark was vehemently approved by the Constitutional Court in *The First Certification Case*[306] whereby all socio-economic rights were introduced into the Constitution and regarded justiciable before the Courts of law. The Court stated:

> These rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [constitutional text] will give rise to similar budgetary implications without compromising their justiciability. 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.[307]

It is worth mentioning that the right to housing is one of those rights which struggled for recognition and enforcement in the above-mentioned case. Kriegler J agitatingly addressed in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*[308] that the court is basically concerned with the vast conurbation that developed in the economic heartland of the country. More specifically it is concerned with

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[304] 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) para 122.

[305] Section 26 of the 1996 Constitution of the Republic of South Africa; This Constitution attracted attention of many academic scholars as it provides the most arguably sophisticated and comprehensive system for the protection of socio-economic rights of all the constitutions in the world today. Scott, C & Alston, P. in "Adjudicating Constitutional Priorities in a Transitional Context: A comment on Soobramoney's Legacy & Grootboom's Promise" (2000) 16 *SAJHR* 206 pointed out that "South Africa is increasingly at the centre of the transitional exchange of ideas and experiences about the rule of law and human rights, and as such, human rights scholars around the world can ill-afford not to pay attention to developments there."

[306] 1996 (4) SA 744 (CC).

[307] *First Certification Case* (note 212 above) para78; This was further enhanced in *Grootboom Case* (note 215 above) by same court as well as in *Jooste v Botha* 2000 (2) SA 199 (T) that Section 28(1)(b) of the 1996 Constitution sets out vertical socio-economic rights against the State. It is not necessary to decide to what extent they are justiciable in that context, but the fact remains that they are. It is also stated that the courts should crucially be careful and cautious when faced with socio-economic rights. It was emphasized in *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 35, that "an intermediate level of scrutiny is applied to classifications concerning gender or socio-economic rights. The other level of scrutiny requires merely that a classification be shown to have a rational relationship to the legislative purpose."

[308] 1999 (1) SA 374 (CC).

the consequences, primarily socio-economic but ultimately political, of the vastly inferior living conditions imposed on the majority of residents, merely by reason of their skin colour. Such was undoubtedly complimented by Yacoob J in *Government of the Republic of South Africa and Others v. Grootboom and Others*:[309]

> Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in chap 2[310]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.

It was therefore inspirationally affirmed in *Grootboom case*[311] that while the justiciability of socio-economic rights has been the subject of considerable jurisprudential quagmires and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the "*First Certification judgment*." Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Final Constitution requires the State "to respect, protect, promote and fulfill the rights in the Bill of Rights"[312] and the courts are constitutionally bound to ensure that they are protected and fulfilled. To add on, section 8(1) therein also places emphasis on the duty that is imposed on the state and all its organs to meet the requirements of section 7(2) and to refrain from performing any act that will infringe the above-mentioned rights.[313] The multilayered structure imposes on the state the obligations to respect, protect, promote and fulfil the protected socio-economic rights.[314] The question is therefore no longer whether socio-economic rights are justiciable under the Constitution, but how to enforce them in a given case.[315]

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[309] 2001 (1) SA 46 (CC) para 23.
[310] Reference is made to Chapter 2 of Constitution of Republic of South Africa, 1996.
[311] 2001 (1) SA 46 (CC).
[312] See *S v Williams and Others* 1995 (3) SA 632 (CC) (1995 (2) SACR 251; 1995 (7) BCLR 861) at 648H; and BP *Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W).
[313] Sec 8(1) reads: 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of State'.
[314] See A Eide,"Universalisation of human rights versus globalisation of economic power" in Coomans, F., Westendorp, I., and Willems, J., (eds.), *Rendering justice to the vulnerable: Liber amicorum in honour of Theo van Boven* (Hague: Kluwer Law International, 2000) 99.
[315] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC), para 20. Hereinafter referred to as *Treatment Action Campaign No. 2*.

The right of access to adequate housing cannot be seen in isolation too. There is a close relationship between it and the other socio-economic rights.[316] As such, it is evidently reflected that the State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Though such rights were already included in the Constitution, the government was still slow on its delivery of housing not only due to poor resources, but because of lack of legitimate structural plans, slow release of land for development, and bureaucratic red tape.[317]

As a result of such ramifications, the community living in Wallacedene, an informal settlement in Western Cape, challenged the state's failure to fulfill its constitutional obligations under sections 26 and 28(1)(C) of the 1996 Constitution.[318] The constitutionalisation of the right of access to adequate housing came as a powerful rhetoric of "rights" usually available in courts only to those claiming civil and political rights.[319] It has, however, lately been released as a right that can oust execution of court orders, or invalidate the statutes that are inconsistent with section 26 of the Constitution. The case of *Jaftha v. Schoeman & Other*[320] epitomizes that effect. In that *locus classicus* case, the Court order was never executed and Section 66(1)(a) of the Magistrates' Courts Act[321] was declared unconstitutional and invalid[322] as it violated the provisions of Section 26 of the Constitution.

The Constitutional Court has had to consider claims for enforcement of socio-economic rights on several occasions.[323] On each occasion, it was recognised that the State is under a constitutional duty to comply with the positive obligations imposed on it by Sections 26, 27 and 28 of the Constitution.[324] There has also been a vast jurisprudence in regard to the right of access to adequate housing in different courts in recent times.[325]

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[316] It has been an emphasis amongst the scholars and the courts that socio-economic rights must all be read together in the setting of the Constitution as a whole.

[317] D Schnell, "Land and Housing", (1996)7 *South Africa Human Rights Yearbook* 154 at 157- 158.

[318] See *Grootboom case*.

[319] Elisabeth, Wickeri, "Grootboom's legacy: Securing the Right of Access to Adequate Housing in South Africa?" *Centre for Human Rights and Global Justice* Working paper, Number 5, 2004.

[320] 2005 (1) BCLR 78; 2005 (2) SA 140 (CC) (hereinafter referred to as *Jaftha v. Schoeman*).

[321] Act No. 32 of 1944.

[322] *Jaftha v. Schoeman* (note 319 above) para 49 at 160B-C.

[323] *First Certification Case* (note 212 above); *Soobramoney v Minister of Health, KZN* 1998 (1) SA 765; *Grootboom Case* (note 215 above); *Treatment Action Campaign (No 2)* (note 314 above); *Jaftha v. Schoeman* (note 319) and other latest cases.

[324] It must be stressed, however, that the obligations are subject to the qualifications expressed in sections 26(2) and 27(2).

[325] *Agrico Masjinerie (Edms) Bpk v Swiers*, 2007 (10) BCLR 1111 (SCA); *City of Johannesburg v Rand Properties (Pty) Ltd and Others*, 2007 (6) BCLR (SCA); *Barnett and Others v Min of Land Affairs and*

3.3 THE CONCEPT OF ACCESS TO ADEQUATE HOUSING

3.3.1 DEFINITION OF ACCESS TO HOUSING

Right to housing may be viewed at two levels, the first being the international right to adequate housing, as stipulated in international legal instruments, and secondly, the South African right of access to adequate housing, as expressed in court rulings and interpretation of court rulings and recommendations made by institutions such as South African Human Rights Commission.

It would be imperative to have a glance at international human rights law for several reasons. Besides the reason that South Africa has legal obligations in terms of some human rights treaties and declarations, section 39(1)(b)[326] expressly indicates that the courts are obliged to consider international law as a tool for interpretation of the Bill of Rights and the need for courts to be guided by international human rights law in their interpretation of the Bill of Rights is buttressed by section 232,[327] which requires the courts, on interpreting pieces of legislation, to deem customary international law as forming part of the law of the land, unless inconsistency is proved.[328]

It is even confirmed in *S v. Makwanyane*[329] that customary international law and the ratification and accession to international agreements are dealt with in section 231[330] of the Constitution, which sets the requirements for such law to be binding within South Africa. In the context of section 35(1),[331] public international law would include non-binding as well as binding law.[332] They may both be used under the section as tools of interpretation.

Others,2007 (11) BCLR (SCA); *Lingwood and Another v The Unlawful Occupiers of R/E of Erf 9 Highlands*, 2008 (3) BCLR (W); *ABSA Bank Ltd v Xonti and Another*, 2006 (5) SA 289 (C); *Standard Bank of SA Ltd v Snyders and Eight Similar Cases*, 2005 (5) SA 610 (C)*; Standard Bank of SA Ltd v Saunderson and Others* 2006 (9) BCLR 1022 (CC).

[326] Section 39 (1)(b) of the 1996 Constitution.

[327] Section 232 of the 1996 RSA Constitution.

[328] Chaskalson, M. et al. *Constitutional Law of South Africa* (Juta & Co. Ltd; Cape Town, 1998).

[329] 1995 (3) SA 391 (CC) para 35.

[330] Section 231 of the Interim Constitution.

[331] Section 35(1) of the 1993 Interim Constitution.

[332] J Dugard, in Dawid van Wyk, et al (eds), *Rights and Constitutionalism: The New South African Legal Order* (Juta & Co. Ltd, Cape Town, 1994) 192-5, advocates that section 35 of the Interim Constitution requires regard to be had to 'all the sources of international law recognised by Article 38(1) of the Statute of International Court of Justice'.

International agreements and customary international law accordingly provide a framework within which chapter 3 can be evaluated and understood, and for that purpose, decisions of tribunals and bodies dealing with comparable instruments, such as the United Nations Committee on Human Rights,[333] the Inter-American Commission on Human Rights,[334] the Inter-American Court of Human Rights,[335] the European Commission on Human Rights,[336] and the European Court of Human Rights[337] and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of Bill of Rights.[338]

In spite of a comprehensive definition of the right of access to housing, it is yet not only a multifaceted wording but a sentence[339] that needs a critical interpretative breakdown as well. It may, however, be seen as an entitlement of individuals which should progressively be realised by the state, taking into account its financial muscles. The precise formulation of these rights determines the duties they impose and entitlements they create. The international law views it from the angle of minimum core[340], reasonable measures on the state's exercise of its functions or duties, and the progressive realization of the right in issue.[341] *Government*

[333] Established under Article 28 of the International Covenant on Civil and Political Rights of 1966.
[334] Established in terms of Article 33 of the American Convention on Human Rights, 1969.
[335] Established in terms of the same American Convention on Human Rights, 1969.
[336] Established in terms of Article 19 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.
[337] Ibid.
[338] The same view was reiterated in *Grootboom Case* (note 215 above) para 26.
[339] The sentence reads thus, "everyone has a right of access to adequate housing", this is per section 26(1) of the 1996 Constitution.
[340] The concept of minimum core obligation was developed by the United Nations Committee on Economic, Social and Cultural Rights to describe the minimum expected of a State in order to comply with its obligation under the Covenant. It is the floor beneath which the conduct of the State must not drop if there is to be compliance with the obligation. Each right has a "minimum essential level" that must be satisfied by the State parties. In *Grootboom's case* (note 215 above) para 33, the court explained that "The determination of a minimum core in the context of 'the right to have access to adequate housing' presents difficult questions. This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people."
[341] The extent and content of the obligation consist in what must be achieved, that is, 'the progressive realisation of this right'. The term 'progressive realisation' shows that it was contemplated that the right could not be realised immediately. It was stipulated in *Grootboom's case* that "the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the State must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses."

of the Republic of South Africa and Others v. *Grootboom and Others*,[342] the court highlighted that:

> In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the program. The program must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise.[343]

The court went on to give guidance with regard those who are poverty-stricken. It elaborated that:

> Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.[344]

On the other hand, constitutional socio-economic rights can be put as blueprints for state's manifold activities that proactively guide and shape legislative action, policy formulation and executive and administrative decision-making. Again, such rights are indirectly protected through other constitutional rights. Any number of non-rights related constitutional provisions that seemingly have nothing whatsoever to do with socio-economic rights can be used to protect and advance the right to housing. it is a well-known fact that adequate housing is essential for human survival and dignity.[345] This right is defined[346] as being comprised of a variety of specific concerns and entitlements. Such entitlements include:[347] first, the legal security of tenure which guarantees legal protection against forced evictions, harassment, and

[342] 2001 (1) SA 46 (CC).
[343] paras 43 and 44
[344] Para 44.
[345] C Sidoti "Housing as a Human Right", a Conference paper, available online (http://www.hreoc.gov.au.pdf/human-rights/housing.pdf) accessed on 23/9/2006.
[346] CESCR General Comment No.4 (1991) para 7.
[347] *Ibid* para 8.

other threats.[348] Second, availability of services, materials and infrastructure must be available.[349]

Third, personal and household costs associated with housing should be at a level that is attainable and affordable. Housing subsidies should be available for those who are unable to obtain affordable housing, and tenants should be protected from unreasonable rent levels or rent increases. Fourth, adequate housing must be accessible to those entitled to it.[350] Five, it must be a habitable housing.[351] Lastly, it must be in a location which allows access to employment options, health care services, schools, child care centres, and other facilities.

3.3.2 DEBATES WITHIN THE ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS ON THIER INCORPORATION INTO THE CONSTITUTION

South African scholars featured a now-celebrated debate about the jurisprudence and practicality of entrenching socio-economic rights in the Constitution and on the possible forms such constitutionalisation could take.[352] The participants specifically embarked upon the extent to which the courts, in a moderate democracy, could legitimately and credibly pronounce on the constitutional validity of socio-economic legislation and policy,[353] and the extent to which such pronouncements could aid or frustrate much needed socio-economic

[348] CESCR General Comment No.7 (1997). The different kinds of tenure include rental accommodation, owner-occupation, cooperative housing, lease, emergency housing and informal settlements, including occupation of land or property. Tenure security is also defined as, "...(i) protection against eviction; (ii) the possibility of selling, and transferring rights through inheritance; (iii) the possibility... (of having a)... mortgage, and access to credit under certain conditions"— (FIG/UNCHS:1998:18).

[349] The beneficiaries of this right should have sustainable access to natural and common resources, clean drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, food storage facilities, refusal disposal site, drainage and emergency services.

[350] Disadvantaged groups – the elderly, children, physically disabled, mentally ill, victims of natural disasters, etc – must be accorded full and sustainable access to adequate housing resources.

[351] It means that it must provide adequate space, be physically safe, offer protection from cold, damp, rain, heat, wind or other threats to health for all occupants, and guarantee the physical safety of occupants.

[352] See N Haysom, "Constitutionalism, Majoritarian Democracy and Socio-economic Rights" (1992) 8 *SAJHR* 451; D M Davis, "The Case Against the Inclusion of Socio-economic Demands in a Bill of Rights except as Directive Principle" (1992) 8 *SAJHR* 475; S Liebenberg, *The Constitution of South Africa from a Gender Perspective* (David Philip Publishers, Cape Town, 1995) 79; De Villers and Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (Cape Town: Juta & Co., 1994).

[353] M Pieterse, "Coming to terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR* 383.

reform. These scholarly works have also considered and critiqued the Constitutional Court's reasonableness review approach in enforcing these rights.[354]

Some of the scholars who might have had differing reasons to the judicial adjudication of socio-economic rights lately surreptitiously tend to agree with a fact that the courts are in a right position to dwell upon matters pertaining to socio-economic right. To echo some of the arguments advanced, one of them is the disquiet about judicial competence in socio-economic rights matters usually relate either to the limits of judicial skill or the problems posed by polycentricity.[355]

Given the finite nature of budgets and the fact that there are a multitude of seemingly valid ways in which to distribute them, decisions concerning the realisation of socio-economic rights are, due to their society-wide impact and almost inevitable budgetary implications, typically regarded as 'preponderantly polycentric'.[356] O'Regan J has pointed out that determining a dispute with budgetary implications is a classic polycentric problem: "Each decision to allocate a sum of money to a particular function implies less money for other functions. Any change in the allocation will have a major or minor impact on all the other

[354] See D Bilchitz, "Health" in Woolman, S., Roux, T., Klaaren, J., Stein, A., & Chaskalson, M., (eds.) *Constitutional law of South Africa* (Pretoria: Juta & Co, 2005) 56A-I —56A-47; D Brand and S Russell (eds.) *Exploring the core content of socio economic rights: South African and International perspectives* (Brand: Protea Book House, 2005); Cass R, Sunstein, *Designing Democracy: What Constitutions Do* (Oxford; Oxford University, 2001); K Govender, "Assessing the constitutional protection of human rights in South Africa during the first decade of democracy" in Buhlungu, S., Daniel, J, Southall, R, & Lutchman, J, (eds.) *State of the Nation: South Africa 2005-2006* (2005) Human Sciences Research Council (HSCR) 93; Peris, J., and Kristian, S., (eds) *Democratising development: The politics of socio-economic rights in South Africa* (Leiden: Martinus Nijhoff Publishers, 2005) ; Liebenberg, S, "The Interpretation of Socio-Economic Rights" in Woolman, S., Roux, et al, (eds.) *Constitutional law of South Africa*, (2nd ed) (Pretoria: Juta & Co, 2005) 33 – 1 to 33 – 64; De Vos, P, "The economic and social rights of children in South Africa's transitional Constitution" (1995) 2 *SAPL* 67; Gabriel, A, "Socio-Economic rights in the Bill of Rights: Comparative lessons from India" (1997) 1 *The Human Rights and Constitutional Law Journal of Southern Africa* 9; M Heywood, "Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign's case against the Minister of Health" (2003) 19 *SAJHR* 278; Liebenberg, S, "South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?" (2002) 6 (2) *Law, Democracy and Development* 159; S Liebenberg, "The right to Social Assistance: The implications of *Grootboom* for policy reform in South Africa" (2001) 17 *SAJHR* 232 and S Liebenberg, "The value of human dignity in interpreting socio-economic rights" (2005) 21 *SAJHR* 1.

[355] C Scott and P Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 *University of Penns.LR* 1 at 24. Lon Fuller used the term "polycentricity" 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.--- Lon Fuller 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353 at 395. See also K O'Regan "Introducing Socio-economic Rights" (1999) 1 (4) *ESR Review* 3.

[356] See M Pieterse, "Coming to terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR* 383 at 393.

decisions relating to the budget."[357] Social and economic rights adjudication may also involve complex policy choices with far-reaching social and economic ramifications. Lastly, it is said that Courts are thought to be ill-suited to make polycentric decisions, because of several 'unique' features of the litigation process – "certain kinds of human relations are not appropriate raw material for a process of decision that is institutionally committed to acting on the basis of reasoned argument."[358]

However, countering the above-stated criticism on the court, it has never been uttered by any Justice of any court that the court will embark upon the budgetary processes to cater for socio-economic rights. The Courts are always of the concrete idea that where there has already been pronouncement on the budget by the executive, and there is delay in fulfilment of certain rights, theirs is only to direct the relevant arm of government to acts towards fulfilment within a specified period. A good example may be found in *Mahambehlala v MEC for Welfare, Eastern Cape and Another*.[359] Leach J opined:

> I am accordingly of the view that the second respondent's failure to approve the applicant's application for a social grant by 7 June 2000 and the five month delay until it was approved on 9 November 2000 resulted in an unlawful and unreasonable infringement of the applicant's fundamental right to just administrative action as set out in s 33(1) of the Constitution. The conclusion leads one to s 38 of the Constitution, which provides that "anyone acting in their own interest" (which would clearly include the applicant) . . . has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

As a failure on the part of a functionary to perform an administrative action is as irregular and unlawful as an administrative decision not properly taken, the person aggrieved thereby would at common law be entitled to succeed in what has become known as a common-law review. It has long been said by Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town Council* that:[360]

> Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court, which has jurisdiction

[357] K O'Regan, "Introducing Social and economic Rights" (1999) 1 (4) *ESR Rev.* 3.
[358] L Fuller 'The Forms and Limits of Adjudication' (1978) 92 *Harvard LR* 353 at 371.
[359] 2002(1) SA 342 (SE).
[360] 1903 TS 111 at 115.

> to entertain all civil causes and proceedings arising . . . in such a cause as falls within the ordinary jurisdiction of the Court.

In terms of our present constitutional order, the common-law principles which provided the grounds for judicial review of public powers have been subsumed under the Constitution from which they gain their force relevant to judicial review. In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*,[361] Chaskalson P (as he then was) stated:

> What would have been *ultra vires* under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of s 24 of the interim Constitution. What is "lawful administrative action", "procedurally fair administrative action" and administrative action "justifiable in relation to the reasons given for it" cannot mean one thing under the Constitution and another thing under the common law.[362]

Due to this involvement of courts in the enforcement of socio-economic rights, there has been dawn of realisation in access to adequate housing in South Africa.

3.4 HOUSING WITHIN THE REALM OF TRANSFORMATIVE CONSTITUTIONALISM

The Courts in South Africa view the Constitution as transformative.[363] Chaskalson CJ had indicated that a "commitment ... to transform our society...lies at the heart of the new constitutional order."[364] Ngcobo J in *Director of Public Prosecutions, Transvaal v. Minster*

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[361] 2000 (2) SA 674 (CC).

[362] Para 50.

[363] In *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) para 262, the Court stressed that "what the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting ... future." In the same vein, in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) para 157, it was highlighted that "the Constitution 'is a document that seeks to transform the status quo ante into a new order."

[364] *Soobramoney Case* para 8. See *The Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) para 21, where the Court stated: "The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance." See also *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) paras 39 and 40 and *City of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3)

for Justice and Constitutional Development[365] lamented too that "the constitutional democracy seeks to transform our legal system."

Brand Danie[366] postulates that the South African Constitution differs from a traditional liberal model in that it is transformative, as it does not simply places limits on the exercise of collective power but requires collective power to be used to advance ideals of freedom, equality, dignity and social justice as well.[367] Socio-economic rights, interpreted within this context, constitute a commitment to transform our society so that increasing numbers of people have access to better social services.[368] In *Rates Action Group v City of Cape Town,*[369] Budlender AJ pronounced too that:

> Ours is a transformative constitution. Justice Scalia of the US Supreme Court has said that "the whole purpose of a constitution, old or new . . . is to impede change or pejoratively put "to obstruct modernity" ... Whatever the position may be in the USA or other countries, that is not the purpose of our Constitution. Our Constitution provides a mandate, a framework and to some extent a blueprint for the transformation of our society from its racist and unequal past to a society in which all can live with dignity.

The crucial question to be asked is: what is meant by transformative constitutionalism? As articulated by some writers, there is no single accepted definition of this concept.[370] It is conceivably in keeping with the spirit of transformation that there is no single stable understanding of transformative constitutionalism.[371] In *Bato Star (Pty) Ltd v Minister of Environmental Affairs,*[372] O'Regan, after careful analysis, explained that "transformation can be achieved in a myriad of ways ... as no one simple formula for transformation" can be

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BCLR 257 (CC) para 73; *Holomisa v Khumalo* 2002 (3) SA 38 (T) para 55 and *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C) para 100.

365 [2009] ZACC 8, para 2.

366 D Brand,"Introduction to socio-economic rights in South Africa" in Brand D and H, Christof, *Socio-Economic Rights in South Africa* (Pretoria: PULP, 2005) 1.

367 Emphasis added.

368 Sandra Liebenberg, "Needs, rights and transformation: adjudicating social rights" (2006) 17 (1) *Stel. LR* 5 similarly submitted that "The commitment to social justice is central to the transformative goals and processes of our Constitution, and must infuse the interpretation of the Bill of Rights."

369 2004 (12) BCLR 1328 (C) para 100. See also *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2006 (6) BCLR 728 (W) paras 51-52.

370 As aluded to by D Moseneke "The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication" (2002)18 *SAJHR* 309 at 315, "the meaning of transformation in juridicial terms is as highly contested as it is difficult to formulate." As R Cotterrell, *The Sociology of Law: An Introduction* (London: Butterworths, 1992) 47 puts it: "It is clearly essential to try to pinpoint what is meant by social change in the relevant literature but this is not easy since the concept is often used in extremely loose fashion in discussions of law as though it were self-explanatory."

371 P Langa, "Transformative Constitutionalism" (2006) 17 *Stel. LR* 351.

372 2004 (7) BCLR 678 (CC) para 35.

prescribed. Langa CJ (as he then was), avers that there must, however, be agreement at any rate on some basis for an understanding of transformative constitutionalism.[373] It would be advocated that the Epilogue, also known as the postamble, to the Interim Constitution provides that basis. The Epilogue[374] describes the Constitution as providing:

> A historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.[375]

Transformative laws aim to create a more egalitarian society where socio-economic disparities between different communities are eradicated or at least somewhat levelled. In the shorter term such laws would aim at the proportional representation across income, wealth and resource categories of the various social groupings, and in the longer term they would aim at the realization of a society where all residents will lead dignified lives, free from

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[373] P Langa, "Transformative Constitutionalism" (2006) 17 (3) *Stel. LR* 351 at 352.

[374] Constitution of the Republic of South Africa Act 200 of 1993.

[375] For K Klare, "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 146 at 157 "transformative constitutionalism entails a long term project of constitutional enactment, interpretation, and enforcement committed … to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction." C Albertyn & B Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 *SAJHR* 248 at 249, point out that the movement from the one side of this bridge to the other will require a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships." Pieterse "What do We Mean When We Talk about Transformative Constitutionalism?" 2005 *SAPL* 155 at 159 also seems to think that: "Constitutional transformation in South Africa includes the dismantling of the formal structures of apartheid, the explicit targeting and ultimate eradication of the (public and private) social structures that cause and reinforce inequality, the redistribution of social capital along egalitarian lines, an explicit engagement with social vulnerability in all legislative, executive and judicial action and the empowerment of the poor and otherwise historically marginalised sectors of society…". Dror, "Law and Social Change" 1958 *Tul L Rev* 788 states that "social change" refers to changes in social structure or *culture*. LM Friedman & J Ladinsky "Social Change and the Law of Industrial Accidents" (1967) *Col LR* 50 takes 'social change' and 'transformation' as synonyms, probably Mistakenly, as 'any non-repetitive alteration in the established modes of behaviour in society'. See also BA Hocking "Where are We After 10 Years of Discrimination Law?" (1995) 15 *Proctor* 19 at 21; S Liebenberg "The New Equality Legislation: Can it Advance Socio-Economic Rights?" (2000) 2 *ESR Rev.*2; R Teitel "Transitional Jurisprudence: The Role of Law in Political Transformation" (1997) 106 *Yale LJ* 2009; AJ van der Walt "Modernity, Normality, and Meaning: The Struggle Between Progress and Stability and the Politics of Interpretation" (2000) 11 *Stel. LR* 21; A van der Walt "Tentative urgency: sensitivity for the paradoxes of stability and change in the social transformation decisions of the Constitutional Court" (2001) 16 *SAPL* 1; H Botha "Metaphoric reasoning and transformative constitutionalism" (2003) *TSAR* 20; AJ van der Walt "Transformative constitutionalism and the development of South African property law" 2005 *TSAR* 55-689; H Botha, D Davis, J Froneman, J van der Walt and K van Marle in H Botha, AJ van der Walt & JWG van der Walt (eds) *Rights and democracy in a transformative constitution* (Stellenbosch: SUN Press, 2003); H Botha "Metaphoric reasoning and transformative constitutionalism" 2002 *TSAR* 612.

hunger and want.[376] This is a superb ambition for a Constitution: to heal the wounds of the past and guide the nation to a better future. The South African Constitutions[377] intend a not fully defined but nonetheless unmistakable departure from liberalism … toward an 'empowered' model of democracy. There is a clear support for this assertion from Mahomed DP's judgment in *S v Makwanyane*[378] that characterises the interim Constitution as signalling a

> Decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos.

As Langa P thought, transformation then is a social and an economic revolution.[379] South Africa at present has to contend with imbalanced and deficient access to housing, food, water, healthcare and electricity. As propounded by Chief Justice Chaskalson in *Soobramoney*,[380] 'for as long as these conditions continue to exist that aspiration [that is, of substantive equality] will have a hollow ring.' The provision of services to all and the levelling of the economic playing fields that were so drastically skewed by the apartheid system must be absolutely central to any concept of transformative constitutionalism.[381] Transformation in this sense does not only involve the fulfilment of socio-economic rights, but also the provision of greater access to education and opportunities through various mechanisms, including affirmative action measures.[382] On this concept, *First Certification Case* was an eye-opener for transformation of socio-economic rights. *Soobramoney Case* came as an illusion and many scholars might have thought that a positive inroad into the socio-economic rights was hard to reach however, the judiciary sorted out the wheat from the chaff in the

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[376] See Anton K, "The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Court-Driven or Legislature-Driven Societal Transformation?" (2008) 19 (1) *Stel. LR* 122. The author goes further that "such laws aim to change the 'hearts and Minds' of the broader South African community so that racism, sexism, homophobia, xenophobia and the like become anathema."

[377] Both the Interim 1993 and Final 1996 Constitutions.

[378] 1995 (3) SA 391 (CC) para 262.

[379] P Langa, "Transformative Constitutionalism" (2006) 17 (3) *Stel. LR* 351 at 352.

[380] *Soobramoney case* para 8.

[381] *City of Johannesburg v. Rand Properties (Pty) Ltd* 2006 (6) BCLR 728 (W) paras 51-52.

[382] In *Van Rooyen and Others v S and Others* 2002 (8) BCLR 810 (CC) para 50, Chaskalson CJ said that "transformation involves not only changes in the legal order, but also changes in the composition of the institutions of society, which prior to 1994 were largely under the control of whites and, in particular, white men." According to E Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 at 32, "the true shift from apartheid to post-apartheid South Africa is a move from 'a culture of authority' to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command. The new order must be a community built on persuasion, not coercion." see *Minister of Finance and Another v Van Heerden* 2004 (11) BCLR 1125 (CC) para 142.

subsequent *Grootboom's case*. The Constitutional Court explicitly stated that 'the cause of the acute housing shortage lies in apartheid.'[383] There are other recent cases in which *Grootboom* was treated as a directive in their interpretations and in reaching their decisions. It is now a settled principle, taking into cognizance the precedents ushered in to transform this field, "accessible housing".

To recapitulate, the enactment of the 1996 Constitution, the transformative hopes it disseminates and the view that its normative framework is explicitly post-liberal[384] occasions an opportunity for a re-evaluation of and a challenge to the individualist understanding of achievement of what it portrays about socio-economic rights. This challenge also faces its concomitant commitments and, as we shall see, the tangled web it weaves in order to sustain the false consciousness on which its legitimacy turns,[385] in the view of others.

3.5 CONCLUDING REMARKS

It would be wise to let the statement echoed in *Soobramoney Case* and later in *City of Johannesburg v Rand Properties (Pty) Ltd and Others*,[386] to ring a bell at all times when rights such as right of access to housing are in dispute. Jajbhay J in *City of Johannesburg v Rand Properties (Pty) Ltd and Others*,[387] highlighted:

> There are vast social and economic inequalities between different groups that leave many people extremely vulnerable and even desperate, far removed from the ideal of a life lived in dignity and respect. This approach acknowledges that people cannot live with a semblance of human dignity and cannot fulfil their full potential as human beings where structural inequality prevails and where the State fails to take steps to address such structural inequality and its causes.

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[383] *Grootboom Case* (note 215 above) para 6.

[384] H Botha "Democracy and rights: Constitutional interpretation in a postrealist world" 2000 (63) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 561. Botha notes three reasons why the Constitution requires more than a classical liberal interpretation. First, he points out that the Constitution contains a commitment to an open, value-orientated, participatory democracy. This is a commitment that cannot be reconciled with the reduced concept of democracy which pervades liberal theory. Secondly, Botha argues that the Constitution does not support a liberal conception of rights as boundaries between the individual and the collective; the rights in the Bill of Rights have a contingent and non-absolute meaning and to that extent they do not operate as a shield against government intervention or as trumps over collective interests. Thirdly, the Constitution is structured such that it requires a far more activist stance of the judiciary than what would be acceptable under a liberal interpretation (574-576).

[385] AJ Barnard-Naude, "'Oh, what a tangled web we weave ...' hegemony, freedom of contract, good faith and transformation - towards a politics of friendship in the politics of contract" (2008) 1 *Constitutional Court Review* 155 at 156.

[386] 2007 (1) SA 78 (W).

[387] Para 51.

The right of access to housing, and other socio-economic rights, are now treated on the same level with the fundamental human rights as all the rights are found to be interdependent[388] and that there cannot be a smooth exercise of civil and political rights without proper realisation of socio-economic rights.

[388] See *Khosa and Others v. Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC).

CHAPTER FOUR: FORGING A NEW HOUSING POLICY THROUGH SOUTH AFRICAN LEGISLATIVE FRAMEWORK – FROM THE TWILIGHT OF APARTHEID TO THE BLISS OF DEMOCRACY

> "For it is through collective action that injustices can be meaningfully addressed and true democracy can triumph over the diluted forms that it may pass for these days."[389]

4.1 INTRODUCTION

The housing crisis was a disaster foretold. Prior to 1994, the South African political landscape was littered with numerous Acts based on ethnic and discriminatory grounds regulating housing. At the dawn of the 1990s, the main regulatory Act was the Housing Act 1997.[390] In addition, there were quite a few racial Acts, namely the Community Development Act 1966,[391] Development and Housing Act 1985,[392] Housing Act (House of Representatives) 1987,[393] Development Act (House of Representatives) 1987,[394] and Housing Development Act (House of Delegates) 1987.[395] These were mainly designed to foster the spatial apartheid policy of the previous regime.[396] These different pieces of legislation were unashamedly discriminatory and cumbersome.[397] This situation inevitably made the new ANC government to begin to level the playing field. Firstly, there was a need for a new set of wheels in the form of legislation and even policies to address the disparities already

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[389] Lance C Buhl, *Renewing Struggles for Social Justice: A Primer for Transformative Leaders* (2nd ed) (Duke University, Duke; 2008) at 4.

[390] No. 107 of 1997.

[391] No. 3 of 1966.

[392] No. 103 of 1985.

[393] No. 2 of 1987.

[394] No. 3 of 1987.

[395] No. 4 of 1987.

[396] See *Former Highlands Residents: Naidoo v Department of Land Affairs* 2000 (2) SA 365 (LCC) and *Minister of Land Affairs and Another v Slamdien and Others* [1999] 1 All SA 608 (LCC) for elaborative discussion of these Acts. K Robinson, "False Hope or a Realisable Right? The Implementation of the right to shelter under the African National Congress's Proposed Bill of Rights for South Africa" (1993) 28 *Harvard Civil Rights-Civil Liberties Law Review* 505 at 509 articulated, "The housing crisis that the government faced was not only about homelessness *per se*, but rather about the varying degrees of squalor and overcrowding that millions of South Africans were forced to endure in informal settlements."

[397] M J Termine, "Promoting residential integration through the fair Housing Act: Are *qui tam* actions a viable method of enforcing 'Affirmatively furthering fair housing' violations?" (2010) 79 *Fordham LR* 1367 at 1374 and 1377, suggested that "When residential segregation is viewed as a late-blooming offshoot of the institution of slavery, the artificial and insidious nature of racial isolation shines through and that . . . by the time Congress and the courts prohibited discriminatory individual and institutional action in the housing markets, segregation's internal staying power had taken hold."

perpetuated.[398] As part of their policy-document, ANC government indeed started enacting fair housing legislation which, to a large extent, sought to remove the walls of discrimination which enclosed the oppressed, suppressed and subordinated groups and to foster truly integrated and balanced living patterns within the South African society.[399]

In essence, the South African housing policy was compellably based on neo-liberal policy principles, with a once-off housing subsidy as a central component of the policy.[400] To add on, South African founding documents established a general framework for effective governance of a nation destined to grow and change. They bravely fix the basic structure of government and some of its important procedures while expressing government's commitment to certain core values: liberty, equality, and democracy.[401] When it comes to housing, it has inexorably been interpreted to be an integral part of these fundamental rights.[402] In this chapter, focus will be on analytical theory of the milestones travelled by South Africa in eliminating the bitter fruits of the apartheid regime.

4.2 A NEW HOUSING POLICY AND STRATEGY FOR SOUTH AFRICA

The first policy document that detailed realisation and implementation of right of access to housing in South Africa is *White Paper on a New Housing Policy and Strategy for South*

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[398] As R Keightley, "When a home becomes a castle: A constitutional defence against common-law eviction proceedings: Ross v South Peninsula Municipality" (2000) 117 *SALJ* 26, notes that "Since 1994, government policy on land-related matters has focused to a great extent on improving security of tenure for various occupiers of land"; according to R Keightley, "The impact of the Extension of Security of Tenure Act on an owner's right to vindicate immovable property" (1999)15 *SAJHR* 277, "One of the major thrusts by government since 1994 election has been in the sphere of land reform. The land reform programme developed by the Department of Land Affairs comprises three distinguishable, yet interlocking components, namely land restitution, land redistribution and land tenure reform."

[399] The regulatory nature of these Acts is that they try to address a longstanding predicament through central government agencies, as well as local governments and public housing authorities with a view to overcome the housing and to defeat the racial discrimination and segregation still pervaded by apartheid laws.

[400] See L Marais and S Krige, "Who received what, where in the Free State? an assessment of post-apartheid housing delivery and policy 1994 – 1998" in *Development Southern Africa*, (Routledge; 2000) 603–619.

[401] See particularly the Interim and the Final Constitutions. Yacoob J introduced Court's unanimous decision in *Government of the Republic of South Africa and Others v Grootboom and others* 2001 (1) SA 46 (CC) para 1 with the following observation: "The people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The preamble to our Constitution records this commitment."

[402] Thornberry *Minorities and Human Rights Law, Report No 73* (London The Minority Rights Group, 1991) at 6 enunciated that Taking economic, social and cultural rights seriously implies at the same time a commitment to social integration ... and equality. These rights include a major concern with the protection of vulnerable groups..

Africa.[403] With a clear view for transforming the mess of the past, the law on the transitional bridge ought certainly to gradually differ from stage to stage.[404] It therefore means that the political and social upheaval forced the law-makers to adopt a policy that would be seen as a basis for housing just before its formal constitutionalisation.[405] Robinson indicated that:

> The constitutional dispensation that came into effect in South Africa on the 27th April 1994 was designed to innovate social, political and legal structures that would be radically different from those of the country's past history. The Constitution not only recognises the injustices of the past, but also depicts the new South Africa as an open and democratic society based on human dignity, equality and freedom.

The White Paper came as government's commitment to ascertain a practicable socially and economically integrated communities, situated in areas that permit expedient access to economic opportunities as well as educational, health and communal amenities.[406] The White paper's preamble reads as follow:

> Housing the Nation...is one of the greatest challenges facing the Government of National Unity. The extent of the challenge derives not only from the enormous size of the housing backlog and the desperation and impatience of the homeless, but stems also from the extremely complicated bureaucratic, administrative, financial and institutional framework inherited from the previous government.

The White Paper further stressed that all South Africa's people "will have access to a permanent residential structure with secure tenure ensuring privacy and providing adequate protection against the elements; potable water; and sanitary facilities including waste disposal, and domestic electricity supply." The White Paper recognises (a) Housing as a basic human right and the role of the Government to take steps and create conditions that will lead to an effective right to housing for all[407];

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[403] White Paper on a New Housing Policy and Strategy for South Africa, GN 1376 in GG16178 of 23 December 1994 [hereinafter Housing White Paper], *available at* www.gov.za/whitepaper/ (last accessed 25 May 2011).

[404] The way JA Robinson, "Children's rights in the South African Constitution" (2003) 6 (1) *PER/PELJ* 22/112 (hereinafter referred to as *Robinson JA, 2003*) says that "the transformation effected by the constitutional dispensation was radical. In fact, eminent scholars from the United States convey that South Africa is increasingly establishing itself at the centre of a transnational exchange of ideas about the rule of law and human rights, and that human rights scholars around the world can ill afford not to pay attention to the developments in the country." see also Scott & Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise' in (2000) 16 *SAJHR* 211.

[405] Robinson JA "Children's rights in the South African Constitution" (2003) 6 (1) *PER/PELJ* 22/112.

[406] Para 4.2.

[407] Para 4.4.2.

(b) The duty of the Government to stop taking any steps that encourage or cause homelessness[408]; (c) The responsibility of the Government to ensure conditions suitable for the delivery of housing[409]; (d) The importance of involving communities in the housing development process;[410] (e) The right of individuals to freedom of choice in satisfying their housing needs;[411] and (f) The principle of non-discrimination in the delivery of housing.[412] Fascinatingly, the White Paper cautions that "the absence of legitimate, functional and viable local authority structures will jeopardise both the pace and quality of implementation of housing programmes."[413]

4.3 HOUSING ACT 107 OF 1997

The Housing Act 1997 came out of the White paper. This Act sets out the framework for housing delivery in South Africa. It repeals all previous discriminatory laws[414] on housing, dissolves all apartheid housing structures and creates a new non-racial system for implementing housing rights in South Africa.[415] This Act promulgates and lengthens the provisions set out in the White Paper. It does not only define the roles of national, provincial and local government on housing but commits local government to take reasonable steps to ensure that all people in its area have access to adequate housing progressively as well. Its point of departure is by laying down the basis for housing in the form of general principles.[416] It breaks the ice by prioritising the needs of the poor,[417] mandating consultation with

[408] Para 4.4.2.
[409] In para 4.4.3, it is clarified that "It is the responsibility of the State to ensure conditions conducive to the delivery of housing."
[410] Para 4.5.1.
[411] Para 5.3.5.
[412] Para 5.7.1.5.
[413] Para 5.2.3. this paragraph makes it clear that "The physical processes of planning and housing is very much a local community matter and that it is the local governments' obligations to make sure that they promote and facilitate the provision of housing to all segments of the population in areas under their jurisdiction."
[414] This Housing Act in section 20 repeals a plethora of unjust pieces of legislation such as Housing Act 4 of 1966, Housing Amendment Act 47 of 1967, Housing Amendment Act 80 of 1968, Housing Amendment Act 65 of 1969, Housing Amendment Act 73 of 1970, Housing Amendment Act 19 of 1971, Housing Amendment Act 40 of 1975, Housing Amendment Act 124 of 1977, Housing Amendment Act 21 of 1978, Slums Act 76 of 1979, Housing Amendment Act 109 of 1979, Housing Amendment Act 11 of 1980, Housing Amendment Act 28 of 1982, Housing Amendment Act 63 of 1983, Housing Amendment Act 72 of 1984, Development and Housing Act 103 of 1985, Housing Amendment Act 49 of 1986, Abolition of Influx Control Act 68 of 1986, Housing Act (House of Representatives) 2 of 1987, Development Act (House of Representatives) 3 of 1987, Housing Development Act (House of Delegates) 4 of 1987, Housing Amendment Act 97 of 1987 and others.
[415] The Housing Act provided that racial discrimination in the housing markets must be eradicated in a number of successive phases. See section 2 (1)(d)(iv) and (x).
[416] See section 2 of Housing Act 107 of 1997 (hereinafter referred to as Housing Act).
[417] Section 2(1)(a) of Housing Act.

individuals and communities affected by housing development[418] and ensuring proper regulation for affordable and sustainable housing development through the principles of co-operative government.[419] It further directs the national government, acting through the Minister in consultation with every MEC and the national organisation representing municipalities as contemplated in section 163 *(a)* of the Constitution, to establish and facilitate a sustainable national housing development process.[420]

Section 2(h) (i) has reiterated the wording of Section 7(2) of the Constitution[421] in that all levels of government are mandated to respect, protect, promote and fulfil the rights in chapter 2 of the Constitution,[422] though its main focal point is on the responsibility to be carried by individual spheres of government in the provision of housing.

Furthermore, section 4 of the Housing Act directs that the Minister should publish a 'National Housing Code' which must contain national housing policy.[423] As the Housing Act gives direction in the general sense, the National Housing Code[424] establishes the national housing programmes, including the Housing Subsidy Scheme (HSS), management of the Discount Benefit Scheme and the regulation of Hostel Redevelopment Programme. According to the Code:

> In each of these documents, the environment within which a house is situated is recognised as being equally as important as the house itself in satisfying the needs and requirements of the occupants. Ultimately, the housing process must make a positive contribution to a non-racial, non-sexist, democratic and integrated society...The goal within both urban and rural areas is to improve the quality of living of all South Africans. The emphasis of our efforts must be on the poor and those who have been previously disadvantaged. To meet this goal in a manner that is viable and sustainable, we understand that we need to undertake a range of interventions.

The Code additionally states that government's housing target is:

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[418] Section 2(1)(b) of Housing Act.
[419] Section 2(1)(c) of Housing Act.
[420] Section 3(1) of Housing Act.
[421] 1996 South African Constitution.
[422] The main task of a constitution in any given democratic country is to protect certain basic rights that are regarded as being indispensable to the maintenance of our humanity. In the same vain, section 7(2) of the Constitution states that the state 'must respect, protect, promote and fulfil the rights in the Bills of Rights. This section is amplified by section 8(1) therein in the following words, "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of State". These sections, read together, mandate the state to take reasonable measures, not only through legislation but executive as well, in protecting citizens and also refraining from violating people's rights.
[423] See section 4(1) read with 4(2)(a) of Housing Act.
[424] The National Housing Code published in 2000 (accessed on 8 July 2011 in http://www.housing.gov.za/).

> Subject to fiscal affordability, to increase housing delivery on a sustainable basis to a peak level of 350 000 units per annum until the housing backlog is overcome. It is expected that this process may take several years. Realisation of the goal relies on government ensuring that its implementation systems in all three spheres of government can accommodate the budget allocation and delivery programme.

There is also another document which is very relevant in the housing sphere known as "Breaking New Ground (BNG): A Comprehensive Plan for the Development of Sustainable Human Settlements."[425] BNG makes provision for a new National Housing Code, which is intended to align and cohere with the BNG so that its goals and aims can be implemented. According to Chief Justice Ngcobo in *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes, Minister for Housing and Minister of Local Government and Housing, Western Cape*,[426] "The Housing Act, the Housing Code, the Breaking New Ground *(*BNG) policy . . . constitute 'reasonable legislative and other measures within [the government's] available resources, to achieve the progressive realisation of [the right of access to adequate housing]' as contemplated in section 26(2) of the Constitution."[427]

The Department of Human Settlements[428] has recognized the need for a paradigm shift and its BNG policy epitomises a somewhat more progressive and holistic approach. The BNG strategy acknowledged the modification in the nature of the housing demand, the drop in average household size, the increasing average annual population growth, significant regional differences, increasing urbanisation, skewed growth of the residential property market, growth in unemployment and a growing housing backlog despite substantial delivery over the previous decade.[429] The Revised Code is also meant to accommodate changes since 2000 and to alter the National Housing Programmes into acceptable provisions and guiding principles.

In terms of the revised National Housing Code, it is basically intended to accomplish the underlying policy principles, guidelines and norms and standards which apply to

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[425] Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements (August 2004) www.capegateway.gov.za/Text/2007/10/bng.pdf (last accessed on the 18th July 2011), (hereinafter referred to as BNG).

[426] 2010 (3) SA 454 (CC) para 229.

[427] In para 228, Ngcobo CJ describes how the government initiated the BNG policy "whose primary objective is to eradicate informal settlements over time, through in-situ upgrading of informal settlements and the relocation of households where development is not possible or desirable."

[428] This department was, in the past, called the National Department of Housing and changed its name in May 2009.

[429] It recognised that the lack of affordable, well-located land for low-cost housing had led to development on the periphery of existing urban areas, achieving limited integration.

Government's various housing assistance programmes introduced since 1994 and updated. It also reiterates the government's vision for housing development, as outlined in the White Paper and BNG. It explicates that:

> Government's housing development mandate emanates from the Constitution. It is therefore Government's duty to work progressively towards ensuring all South Africans can access secure tenure, housing, basic services, materials, facilities and infrastructure. Government will have to apply measures of a legislative, administrative, financial, educational and social nature to fulfil its housing obligations.[430]

The Code is aimed to be adjusted on a yearly basis in order to ensure that it keeps abreast of legislative or policy changes. The Code itself is all-embracing and addresses an assortment of housing programmes mentioned in the BNG and attempts to eliminate old programmes too.

Section 9(1)(a)(i) of the Housing Act thereunto states that, "Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis." Furthermore, section 10 permits a municipality to administer any national housing programme in respect of its area of jurisdiction, upon application to the MEC.

Some Acts are only relevant in part as they relate and control occupation of land on which there may be buildings to live in. Land use in South Africa is therefore currently regulated by various separate, yet interrelated acts including, *inter alia*: The Less Formal Township Establishment Act,[431] The Land Reform (Labour Tenants) Act,[432] Land Survey Act,[433] the Physical Planning Act,[434] The Interim Protection of Informal Land Rights Act,[435] the Local

[430] Department of Housing, "The National Housing Code" (2007), at 7. In terms of informal settlements, the revised Code states that "Government plans to upgrade informal settlements on a progressive basis in a phased approach. A new tailor-made programme was introduced in 2004 providing for a phased development approach that is flexible, needs-orientated, that will optimally utilise existing land and infrastructure, and will facilitate community participation in all aspects of their redevelopment."

[431] The Less Formal Township Establishment Act 113 of 1991 provides for shortened procedures for the development of land and establishments of townships and less formal forms of residential settlement, as well as the use of land by tribal communities for communal forms of residential settlement.

[432] The Land Reform (Labour Tenants) Act 3 of 1996 aims to protect persons who reside on agricultural land and who instead of wages obtain a right to use land for faming purposes. Only the Land Claims Court may grant an order of eviction in respect of such persons.

[433] No. 8 of 1997.

[434] No. 125 of 1991.

[435] No. 31 of 1996.

Government Transition Act,[436] the Local Government Municipal Structures Act,[437] the Communal Property Associations Act,[438] and the Restitution of Land Rights Act,[439] the Extension of Security of Tenure Act,[440] the Prevention of Illegal Eviction from Unlawful Occupation of Land Act.[441] Only those that form pillars in the realisation of access to adequate housing will be discussed in this context.

4.4 THE INTERIM PROTECTION OF INFORMAL LAND RIGHTS ACT NO. 31 OF 1996

The Interim Protection of Informal Land Rights Act[442] provides for the temporary protection of certain rights to, and interests in, land which are not otherwise adequately protected by law and provides for matters connected therewith. In *Ndlovu v Ngcobo; Bekker and Another v Jika*,[443] Olivier JA recognised that the Interim Protection of Informal Land Rights Act 31 of 1996 is meant to protect (lawful) occupiers of (rural and urban) land in terms of informal land rights. In *City of Cape Town v. Rudolph and Others*,[444] Selikowitz J stated that The Interim Protection of Informal Land Rights Act 31 of 1996, has as its aim 'to provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law, and to provide for matters connected therewith'. The Act prohibits the denial of an informal right to land for a period which will lapse when the Minister so determines. An informal right is defined to include an unlawful occupier who has had beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997. It was emphasised that the Act is intended to apply to the use and occupation of and access to land where there is a degree of continuity or permanence.

[436] No. 209 of 1993.
[437] No. 117 of 1998.
[438] No. 28 of 1996.
[439] No. 22 of 1994.
[440] No. 62 of 1997.
[441] No. 19 of 1998.
[442] The Interim Protection of Informal Land Rights Act NO. 31 of 1996 commenced on 26 June 1996.
[443] 2003 (1) SA 113 (SCA), 2002 (4) All SA 384 (SCA).
[444] 2004 (5) SA 39 (C).

4.5 EXTENSION OF SECURITY OF TENURE ACT 62 OF 1997 [ESTA]

The Extension of Security of Tenure Act[445] recognises that many South Africans living on farms do not have secure tenure due to the discriminatory apartheid land laws. It further acknowledges that the insecure tenure arrangements make many occupiers vulnerable to unfair evictions, which 'leads to great hardship, conflict and social instability. The ESTA provides for measures with State assistance to facilitate long-term security of land tenure. For instance, Moloto AJ clarified in *Nkuzi Development Association v Government of the Republic of South Africa and Another*,[446] that "Having regard to the provisions of s 25(6) of the Constitution of the Republic of South Africa Act 108 of 1996, persons who have a right to security of tenure in terms of the Extension of Security of Tenure Act 62 of 1997 and the Land Reform (Labour Tenants) Act 3 of 1996, and whose security of tenure is threatened or has been infringed, have a right to legal representation or legal aid at State expense if substantial injustice would otherwise result, and if they cannot reasonably afford the cost thereof from their own resources. The State is under a duty to provide such legal representation or legal aid through mechanisms selected by it."

It aims to regulate the conditions of residence on certain land, to regulate the conditions on, and circumstances under, which the right of persons to reside on land may be terminated, to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land, and to provide for matters connected therewith.[447] Maya JA in *Lebowa Platinum Mines Ltd v Viljoen*,[448] stated that the main purpose of the Act 'is to regulate the eviction process of vulnerable occupiers of land' and that the Act 'generally seeks to protect a designated class of poor tenants occupying rural and peri-urban land . . . with the express or tacit consent of the owner against unfair eviction from such land'.[449] Further explanation appears in *Randfontein Municipality v Grobler and others*[450] where Tshiqi AJA emphasised:

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[445] The Extension of Security of Tenure Act 62 of 1997 commenced on 28 November 1997.
[446] 2002 (2) SA 733 (LCC).
[447] In *Skhosana and Others v Roos t/a Roos SE Oord and Others* 2000 (4) SA 561 (LCC) para 23, the court said that ESTA is a statute which provides a specific class of people, called 'occupiers', with a range of special defences against common law claims for eviction. ESTA also prescribes an elaborate procedure which a land owner must follow before an eviction order can be granted. See also *Bergboerdery v Makgoro* 2000 (4) SA 575 (LCC) and *Agrico Masjinerie (EDMS) BPK v Swiers* 2007 (5) SA 305 (SCA).
[448] 2009 (3) SA 511 (SCA) para 9.
[449] See also *Kiepersol Poultry Farm v Phasiya* 2010 (3) SA 152 (SCA), [2010] 1 All SA 408 (SCA); *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA) para 21, the Court highlighted that the Land Reform (Labour

> The Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 were adopted with the objective of giving effect to the values enshrined in sections 26 and 27 of the Constitution. The common objective of both statutes is to regulate the conditions and circumstances under which occupiers of land may be evicted. The main distinction is that broadly speaking ESTA applies to rural land outside townships and protects the rights of occupation of persons occupying such land with consent after 4 February 1997, whilst PIE is designed to regulate eviction of occupiers who lack the requisite consent to occupy. Occupiers protected under ESTA are specifically excluded from the definition of 'unlawful occupier' in PIE.

Under this Act, the eviction procedures consist of two stages, namely the termination of the existing right to reside on the premises and the actual eviction process, which requires the owner to approach the court for an eviction order.[451] Both stages require specific circumstances to be taken into consideration, before the court may mull over an eviction application. An eviction application may only be instituted, after the occupier's existing rights to occupy the land has lawfully been terminated in accordance with ESTA. ESTA spells out four requirements before an eviction order is to be granted.[452] As shown by

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Tenants) Act regulates the eviction of labour tenants; See Van der Walt "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A critical evaluation of Recent Case Law" (2002)118 *SA Journal on Human Rights* 372; Van der Walt "Exclusivity of ownership, security of tenure, and eviction orders: a model to evaluate South African land-reform legislation" 2002 *TSAR* 254; Keightley R, "The impact of the Extension of Security of Tenure Act on an owner's right to vindicate immovable property" (1999) 15 *SAJHR* 277; Keightley R, "When a home becomes a castle: A constitutional defence against common law eviction proceedings: Ross v South Peninsula Municipality" (2000)117 *SALJ* 26.

[450] [2010] 2 All SA 40 (SCA).

[451] See sections 8, 10 and 11 of ESTA. In *Khumalo v Potgieter* 2001 (3) SA 63 (SCA) para 6, Olivier JA held that "the appellant's right of residence could only be terminated in terms of section 8 of the Act, which required that the termination be lawful, just and equitable, having regard to certain stated factors. The appellant could only therefore be evicted in terms of an order of court issued under the Act."

[452] Section 9(2) of ESTA lists such conditions as follows: A court may make an order for the eviction of an occupier if—*(a)* the occupier's right of residence has been terminated in terms of section 8; *(b)* the occupier has not vacated the land within the period of notice given by the owner or person in charge; *(c)* the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and *(d)* the owner or person in charge has, after the termination of the right of residence, given— (i) the occupier; (ii) the municipality in whose area of jurisdiction the land in question is situated; and (iii) the head of the relevant provincial office of the Department of Land Affairs, for information purposes, not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Land Affairs not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with.

Keightley,[453] the intention of the legislature in enacting the Extension of Security of Tenure Act was to amend the law on eviction and such is expressed in section 9(1) of the Act.[454]

This precision of the parliamentary intent, which is deceptively easy, truly belies an intricacy that only becomes noticeable when the provisions of the Act are suitably implemented. In addition, the importance of section 9, read with other provisions of the Act, cannot be exaggerated as it permits the court to consider a range of state of affairs, which might not be considered relevant within the substantive provisions of sections 10 and 11 and it may also consider circumstances not provided by the latter provisions in order to avoid the eviction leading to greater hardship. Sections 10 and 11 lay down some prerequisites to be met before an eviction application is granted[455] and they distinguish between occupiers who lawfully occupied the land before 4 February 1994[456] and occupiers who lawfully occupied the land after 4 February 1994.[457]

In conclusion, the Act endeavours to balance the rights and interests of both the landowners and those of the occupiers, enhancing doing away with arbitrary common-law principles of eviction. In *Diedericks v Univeg Operations South Africa (Pty) Ltd t/a Heldervue Estates*,[458] the Land Claims Court highlighted that through enactment of the ESTA and other legislation, including the Prevention of the Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998, and the Housing Act 107 of 1997, parliament sought to limit homelessness and thus "respected, protected, promoted and fulfilled" the right of access to housing. These enactments considered together with the Bill of Rights and Court interpretations show a significant shift in the relationship between any land occupier (lawful or unlawful) and

[453] R Keightley, "The impact of the Extension of Security of Tenure Act on an owner's right to indicate immovable property" (1999) 15 *SAJHR* 277.

[454] Section 9(1) reads as follows: Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.

[455] In *Albertyn and Another v Bhekaphezulu and Others* 1999 (2) SA 538 (LCC) at 539F--G/H and 539I/J, Moloto J held that "A court, in an application for an eviction order in terms of s 11 of the Extension of Security of Tenure Act 62 of 1997, is enjoined by s 11(3) to have regard to certain very specific factors in deciding whether it is just and equitable to grant an eviction order in terms of the section against persons who became occupiers after 4 February 1997. These factors are '(a) the period that the occupier has resided on the land in question; (b) the fairness of the terms of any agreement between the parties; (c) whether suitable alternative accommodation is available to the occupier; (d) the reason for the proposed eviction; (e) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land'. The provisions of s 11(3) are peremptory."

[456] See Van der Walt "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A critical evaluation of Recent Case Law" (2002)118 *SAJHR* 372 at 278.

[457] Ibid.

[458] (LCC18/2011) [2011] ZALCC 11 para 6.

owner, and between them and the public authority from the pre-constitutional days to one where these respective parties can rely on their new constitutional and statutory rights and obligations.[459]

Again, *Karabo and Others v Kok and Others*,[460] the landowner had sought an eviction order against the applicants on the basis of the common-law right of vindication. The applicants were subsequently evicted and the magistrate granted such under common-law and there was no reference to the Act. The applicants subsequently sought an order of restoration from the Land Claims Court, asserting their rights under the Act. The Court held, *inter alia*, that: the intention of the Act was to change the law relating to eviction; the Act applied to the law in question; the papers in eviction proceedings should contain essential realistic allegations to comply with the Act; the provisions of the Act had not been complied with and therefore that the applicants had been evicted contrary to the provisions of the Act. Finally that the order of eviction should not have been made.[461]

ESTA provides extensive factors to be considered before an eviction is granted and these factors are more prescriptive than the provisions of PIE. The Land Claims Court (LCC) has extensively emphasised the importance of compliance with the formal provisions of ESTA, as security of tenure can only be achieved if all the requirements in ESTA have been met.[462] The consequences of this legalistic approach to ESTA can undermine the achievements and objects of ESTA as it is unclear whether this approach supports the 'reading-in' of additional factors not supported by the text of ESTA.

[459] AJ van der Walt, *Constitutional Property Clauses: A Comparative Analysis* (Juta: Kenwyn, 1999) 11 said that "to move away from a static, typically private-law conceptualist view of the constitution as a guarantee of the *status quo* to a dynamic, typically public-law view of the constitution and as an instrument for social change and transformation under the auspices of entrenched constitutional values."

[460] 1998 (4) SA 1014 (LCC).

[461] See also the following cases for a major development on the application of the Act: *Rerief v Dladla* LCC 20 April 1999, (unreported).

[462] *Karabo v Kok* 1998 (4) SA 1014 (LCC) at 1019B. see also *Dlamini v Mthembu* 1999 (3) SA 1010 (LCC) at 1032I.

4.6 THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT NO. 19 OF 1998 [PIE]

The main objective of The Prevention of Illegal Eviction From and Unlawful Occupation of Land Act[463] is "to provide for the prohibition of unlawful eviction; to provide for procedures for the eviction of unlawful occupiers; and to repeal the Prevention of Illegal Squatting Act, 1951,[464] and other obsolete laws; and to provide for matters incidental thereto."[465] In its preamble, PIE, among others, provides that it is promulgated in recognition of particularly Section 26 (3) of the Constitution and that it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognizing the right of land owners to apply to a court for an eviction order in appropriate circumstances.[466]

PIE was adopted with the manifest objective of overcoming the arbitrary and unprocedural evictions[467] and ensuring that evictions in future took place in a manner consistent with the values of the new constitutional dispensation.[468] Its provisions have to be interpreted against

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[463] The Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, Act 19 of 1998 commenced on 5 June 1998. This Act applies to all instances of illegal occupation, which included tenant and landlord situations. See *Ndlovu v Ngcobo and Bekker v Jiga* 2002 (4) All SA 384 (SCA). This decision has overturned the view held in *Absa Bank v Amod* (1999) 2 All SA 423 (W); *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C); *Betta Eiendomme v Ekple–Epoh* 2000(4) SA 468(W), *Ellis v Viljoen* 2001 (5) BCLR 487 (C) and *Brizley v Drotsky* 2001 4 All SA 573 (SE) that "PIE is only applicable where vacant land has been unlawfully occupied."

[464] In the pre-democratic era the response of the law to a situation like the present would have been simple and drastic. In terms of the Prevention of Illegal Squatting Act 52 of 1951 (PISA), the only question for decision would have been whether the occupation of the land was unlawful. Once it was determined that the occupiers had no permission to be on the land, they not only faced summary eviction, they were liable for criminal prosecution. See O'Regan "No More Forced Removals? An Historical Analysis of the Prevention of Illegal Squatting Act" (1989) 5 *SAJHR* 361.

[465] As Hlophe DJP pointed out in *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2000 (2) SA 67 (C) para 8 that "The PIE has been described as 'a great step forward in the fight for the rights of occupiers of land in general and tenants in particular' because the common law was cruel to occupiers and tenants who faced eviction." See also Ranjit Purshotam "Equity for Tenants" (1999) *De Rebus* 27.

[466] In *Ndlovu, Ngcobo, Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 3, Harms JA observed that "PIE has its roots, *inter alia*, in s 26(3) of the Bill of Rights, which provides that 'no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances."

[467] PISA, repealed by PIE, was an integral part of a cluster of statutes that gave a legal/administrative imprimatur to the usurpation and forced removal of black people from land and compelled them to live in racially designated locations. See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 11, it was said that "The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was adopted with the manifest objective of . . . ensuring that evictions, in future, took place in a manner consistent with the values of the new constitutional dispensation. Its provisions have to be interpreted against this background" while in *Andrew Machele and Others v William Marofane Mailula and Others* 2010 (2) SA 257 (CC), 2009 (8) BCLR 767 (CC) para 16, Skweyiya J propounded that "PIE is of great importance given that there are still millions of people in our country without shelter or adequate housing and who are vulnerable to arbitrary evictions."

[468] Pienaar and Muller "The impact of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 0f 1998 on homelessness and unlawful occupation within the present statutory Framework" (1999) 3 *Stel.*

this background. The PIE created a new perspective on the age-old conflict of interests between the traditional rights of a landowner and the statutory protection of the unlawful occupier. PIE is premised on the recognition that the right of access to adequate housing will not be realised for all immediately, or even in the medium term. Unlawful occupiers are however entitled to be treated with dignity and respect in the interim. This articulation was expressed in *Port Elizabeth Municipality v Various Occupiers*[469] as follows:

> The overall objective of facilitating the displacement and relocation of poor and landless black people [under the Prevention of Illegal Squatting Act] was replaced by an acknowledgement of the necessitous quest for homes for victims of past racist policies. While awaiting access to new housing development programmes, such homeless people had to be treated with dignity and respect. Thus the former depersonalised processes that took no account of the life circumstances of those being expelled were replaced by humanised procedures that focused on fairness to all. People once regarded as anonymous squatters now became entitled to dignified and individualised treatment with special consideration for the most vulnerable.[470]

In terms of sections 4 and 6, PIE distinguishes between the eviction of unlawful occupiers at the instance of a private individual and the State. In eviction proceedings at the instance of private individuals, PIE specifies different circumstances to be considered where the unlawful occupiers have dwelled on the property for less than six months and where unlawful occupiers have resided on the property for more than six months. Factors that the court should take into account at times of eviction include whether the occupant is in occupation of the land and has erected structures without consent and whether it is in the public interest[471] to grant the order.[472] The court must also consider the availability of suitable alternative accommodation, regardless of the period of occupation of the unlawful occupier.

Furthermore, in urgent eviction proceedings, different factors should be taken into cognisance by the courts before the eviction is granted.[473] The court should satisfy itself that there will be real and imminent danger of substantial injury or damage to the property or any person if the

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LR 379, opined that "PIE was enacted with the aim to prohibit illegal evictions and to provide for procedures for the eviction of unlawful occupiers so as to avoid vulnerable persons being left destitute after an eviction."

469 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC), (hereinafter referred to as *PE Municipality*).

470 Ibid, paras 11–12.

471 The term 'public interest' has also been defined in section 6(2) of PIE and includes circumstances, which relate to the interest and safety of those occupying the land and the general public.

472 Section 6.

473 Section 5.

occupier is not evicted, and that there is no other effective remedy.[474] The court is also required to weigh up the hardships of the owner and that of the occupier before an eviction is granted and such order may only be granted if the owner's hardship exceeds that of the occupier.[475] Though the Act prescribes that the court has to grant an eviction order if it is satisfied that all the requirements of the Act have been met and that a valid defence has not been raised by the occupier, the court order has to contain details regarding a 'just and equitable date' relating to when the eviction should occur.[476] When determining this date, the court must have regard to all relevant factors including the period of occupation.[477]

4.7 HOUSING CONSUMER PROTECTION MEASURES ACT, 95 OF 1998

The object of the Housing Consumer Protection Measures Act[478] is to make provision for the protection of housing consumers and to provide for the establishment and functions of the National Home Builders Registration Council and to provide for matters connected therewith.[479] The Act regulates the conduct of "home builders" and excludes contractors of industrial and commercial properties. However, the Act does not cover renovations of existing homes.

In terms of section 3 of the Act, the Council is mandated to (a) represent the interests of housing consumers by providing warranty protection against defects in new homes; (b) Improve the structural quality of houses built; (c) Promote housing consumer rights and give housing consumer information; (d) improve structural quality in the interests of housing consumers and the home building industry; (e) communicate with and to assist home builders to register in terms of this Act; (f) assist home builders, through training and inspection, to achieve and to maintain satisfactory technical standards of home building; and basically (h) provide protection to housing consumers in respect of the failure of home builders to comply with their obligations in terms of this Act. In *Leas: Maurice t/a Build 4 You v Van Kerckhoven: Roeland Van Kerchoven: Tina*,[480] Claassen J alluded to the fact that "on a

[474] Section 5 (1)(a) and (c).
[475] Section 5(1)(b).
[476] See Badenhorst PJ, Pienaar JM and Mostert H *Silberberg & Schoeman's The Law of Property*, (4ed) (Durban: Lexis Nexis Butterworths; 2003).
[477] Section 4(9).
[478] Housing Consumer Protection Measures Act 95 of 1998 came into force on 4 June 1999.
[479] See preamble of the Housing Consumer Protection Measures Act 95 of 1998,
[480] Case No.: 28811/2007.

conspectus of the provisions of the Housing Consumer Protection Measures Act 95 of 1998, it is clear that the Act purports to regulate the building industry in such a way that protection is afforded to housing consumers who are in the process of acquiring or have acquired a home. . . This interpretation is supported by the fact that section 3(a) objectifies the duties of the Council to 'new homes' only."

4.8 THE RENTAL HOUSING ACT 50 OF 1999 (RHA)

The Rental Housing Act[481] was introduced as a legal instrument to standardize the relationship of tenant and landlord within the burgeoning democratisation of the legal system.[482] The RHA was promulgated with the roles vested in the Member of the Executive for Housing (MEC) in each of the nine provincial governments to give effect to the RHA through the establishment of the Rental Housing Tribunal (RHT).[483] In *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd*,[484] the appellants contended that the termination of the leases for the rental houses they were staying on was contrary to public policy because it constituted an unfair practice in contravention of the Rental Housing Act 50 of 1999 and the relevant regulations promulgated under that Act. The Supreme Court of Appeal dismissed the application, stating that the termination of their leases does not constitute contravention of the statutory provisions applicants relied on.

The responsibility of the Rental Housing Tribunal is vested with the mechanism for dispute resolution with the least amount of inconvenience and cost to the disputants.[485] A speedy process of justice to resolving disputes that would otherwise remain in the clogged legal system for longer period of time, underlined the need for refitting tenant-landlord legislation, especially the Rent Control Act 86 of 1976.[486]

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[481] Rental Housing Act 50 of 1999. It was published on 15th December 1999 and became law on 1st August 2000. RHA repealed the Rent Control Act 80 of 1976.

[482] See Mohamed, S.I, *Tenant and Landlord in South Africa: a guide to the rights,duties and responsibilities of tenant and landlord of residential dwellings with a copy of a standard lease agreement, specimen letters and reference to the Rental Housing Act 50 OF 1999*. Durban: Organisation of Civic Rights, 2003.

[483] See section 7 of RHA.

[484] 2011 (5) SA 19.

[485] See section 8 of RHA.

[486] The Rent Control Act 86 of 1976 was ingrained in the colonial period and blemished by the apartheid apparatus; the rent boards were gender insensible in its composition and operated for "white" and later "Indian" tenants and landlords only with its powers limited to a small number of dwellings in urban areas.

To a large extent, RHA incorporates agitations and suggestions that includes overloading,[487] security deposits, provision for subsidy for tenants who are unable to afford the rentals during their tenancy,[488] arbitrary eviction,[489] exorbitant rentals,[490] discrimination[491] and invasion of privacy[492] by unscrupulous landlords, unacceptable living conditions, illegal lockouts,[493] recognition of tenants' committees and the right to bring under review proceedings of the RHT before the High court,[494] non-payment of rentals and nuisance committed by tenants.[495] Lastly, RHA allows a local authority to establish a Rental Housing Information Office to advise tenants and landlords on their housing rights and duties[496] and that a tenant or landlord can make a complaint to the Rental Housing Tribunal about an unfair rental housing practice.

RHA was amended in 2007, hence enactment of The Rental Housing (Amendment) Act.[497] The aim of the amendment is to make further provision for rulings by RHT to expand the provisions pertaining to leases and to extend the period allowed for the filling of vacancies in rental housing tribunals.

4.9 THE HOME LOAN AND MORTGAGE DISCLOSURE ACT 63 OF 2000

The Home Loan and Mortgage Disclosure Act[498] aims to promote fair lending practices among financial institutions that provide home loans.[499] To achieve this aim, the Act calls for the disclosure of certain information by financial institutions that provide home loans.[500] For

[487] See 13(4)(c)(i) of RHA.
[488] See section 3(1) of RHA.
[489] See preamble and section 15 of RHA.
[490] See section 13(4)(c)(iii) of RHA.
[491] Section 2(1)(a) of RHA states that "Government must promote a stable and growing market that progressively meets the latent demand for affordable rental housing among persons historically disadvantaged by unfair discrimination and poor persons, by the introduction of incentives, mechanisms and other measures that (i) improve conditions in the rental housing market; (ii) encourage investment in urban and rural areas that are in need of revitalisation and resuscitation; and (iii) correct distorted patterns of residential settlement by initiating, promoting and facilitating new development in or the redevelopment of affected areas."
[492] See section 4(2) and (3) of RHA.
[493] Sections 4(5)(d)(ii), 13(4)(c) and 15 of RHA.
[494] Section 17 of RHA stipulates that "without prejudice to the constitutional right of any person to gain access to a court of law, the proceedings of a Tribunal may be brought under review before the High Court within its area of jurisdiction."
[495] See section 15 of RHA.
[496] See section 14 of RHA.
[497] Act 43 of 2007.
[498] The Home Loan and Mortgage Disclosure Act 63 of 2000 was approved at the end of 2000, and came into operation during 2003.
[499] See preamble of the Home Loan and Mortgage Disclosure.
[500] Ibid.

instance, they should disclose: (a) The total number of applications for home loans; (b) The number and amount in Rand of applications granted; (c) The number and amount in Rand of unsuccessful applications; (d) The reasons for rejections.[501]

4.10 THE SOCIAL HOUSING ACT 16 OF 2008 [SHA]

The Social Housing Act[502] aims to ascertain and promote a sustainable social housing environment. It defines the functions of the national, provincial and local spheres of government in respect of social housing. SHA establishes the Social Housing Regulatory Authority (SHRA) and mandates the SHRA to regulate all social housing institutions obtaining or having obtained public funds and it allows for the undertaking of approved projects by other delivery agents with the benefit of public money.

The social housing sector has gained much growth, and has been the recipient of significant funding from government. It is, however, characterised by a patchwork of policies, findings and institutions that neither supports the growth of the sector nor allows for proper regulation and monitoring of funding and policy. That being the case, the Department of Human Settlements has taken steps to lend a hand in the governance and regulatory processes through the promulgation of the SHA and the establishment of the SHRA, all framed by the approved Social Housing Policy. The objectives of the SHA are to establish and consolidate general definitions and principles, which can then be recognised as the authoritative guidelines for the sector as a whole.

The Act also provides for the recognition and accreditation of social housing institutions. In providing for specific functions and responsibilities for the three tiers of government, the Act requires the national Government to, among others things, create the kind of legislative, regulatory, financial and policy frameworks that will enable the sector to grow. Provincial governments are given responsibilities to, among other things, approve, allocate and administer capital grants, as well as to administer the social housing programme and, for this purpose, approve any projects in respect
thereof.

[501] See section 3(1) of Home Loan and Mortgage Disclosure.
[502] Act No. 16 of 2008.

Local governments are required to ensure access to land, municipal infrastructure and services for approved projects in designated restructuring zones. Local governments are furthermore responsible to initiate the identification of these restructuring zones. The Act's major purpose is the establishment of the SHRA, the body that in accordance with the Public Finance Management Act, 1999 (Act 1 of 1999), will, *inter alia*, be responsible for accrediting social housing institutions, administer and disburse capital and institutional grants as well as conduct compliance monitoring to norms and standards through regular inspections. It will have powers to intervene in the affairs of social housing institutions, to resolve maladministration issues and take remedial steps where necessary.

4.11 THE CONSTITUTION

The South African Final Constitution[503] is premised upon the need to establish social justice, and a number of its provisions allow for corrective action to address existing inequalities and injustices through affirmative action processes. Socio-economic upliftment is a fundamental constitutional goal, and despite a heated debate during the drafting stages of the two constitutions,[504] special provisions were included in the Constitution to promote and guarantee social and economic rights. Further, controversies[505] about the wisdom of

[503] Constitution of the Republic of South Africa Act 108 of 1996, superseded the Constitution of the Republic of South Africa Act 200 of 1993, known as "the Interim Constitution." The 1996 Constitution is generally labelled as the "Final Constitution." This constitution cannot be `final', inflexible and so cast in stone as to resist any change. The 1996 Constitution is definitely not the end of the history of constitutional law in South Africa. It has been amended several times. Amendments include the Constitution of the Republic of South Africa Amendment Act 35 of 1997; the Constitution of the Republic of South Africa Amendment Act 65 of 1998; the Constitution of the Republic of South Africa Second Amendment Act. 87 of 1998; the Constitution of the Republic of South Africa Second Amendment Act 2 of 1999; the Constitution of the Republic of South Africa Amendment Act 34 of 2001; and the Constitution of the Republic of South Africa Second Amendment Act 61 of 2001. These amendments and those still to come, make it clear that the 1996 Constitution was not, and could hardly be, the `final' Constitution of the Republic.

[504] For theory generated, see N Haysom "Constitutionalism, Majoritarian Democracy and Socio-economic Rights" (1992) 8 *SAJHR* 451; E Mureinik "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 *SAJHR* 464; DM Davis "The Case Against the Inclusion of Socio-economic Demands in a Bill of Rights except as Directive Principles" (1992) 8 *SAJHR* 475 and M Pieterse "Coming to terms with judicial enforcement of socio-economic rights" 2004) 20 *SAJHR* 383.

[505] For entrenchment debates, see De Vos "Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution" (1997) 13 *SAJHR* 67; Corder *et al A charter for social justice: A contribution to the South African Bill of Rights debate* (1992); De Vos "The economic and social rights of children and South Africa's Constitution" (1995) 10 *SAPR/SAPL* 233; Liebenberg "The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa" (1995) 11 *SAJHR* 359-378; De Wet "Can the social state principle in Germany guide state action in South Africa in the field of social and economic rights?" (1995) 11 *SAJHR* 30; Davis "The case against the inclusion of socio-economic demands in a bill of rights except as directive principles" (1992) 8 *SAJHR* 475; De Villiers "Socio-economic rights in a new constitution: Critical evaluation of the recommendations of the South African Law Commission" 1992 *TSAR* 421; De Villiers "The socio-economic consequences of directive principles of state policy: Limitations on fundamental rights" (1992) 8 *SAJHR* 188; Haysom

constitutionalising social and economic rights gave way to concerns about the practical enforcement of those rights,[506] a shift of emphasis that generally heralded a simultaneous loss of interest in theoretical subject unrelated to the separation of powers and the countermajoritarian dilemma.

Sections 26(2), s7(2) and s8(1) in the Bill of Rights all recognise the "state" as the responsible agent for realising the right to have access to adequate housing either in:

(a) taking reasonable legislative and other measures within its available resources to achieve progressive realisation of this right;

(b) respecting, protecting, promoting and fulfilling the rights in the Bill of Rights;[507] or

(c) by being compelled to act in compliance with the Bill of Rights.[508]

These sections, read together, mandate the state to take reasonable measures, not only through legislation but executive as well, in protecting citizens and also refraining from

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"Constitutionalism, majoritarian democracy and socio-economic rights" (1992) 8 *SAJHR* 451-463; Mureinik "Beyond a charter of luxuries: Economic rights in the Constitution" (1992) 8 *SAJHR* 464.

[506] Pieterse "Beyond the welfare state: Globalisation of neo-liberal culture and the Constitutional protection of social and economic rights in South Africa" (2002) 14 *Stel. LR* 3.

[507] As Scott, L, "Another step towards indivisibility: Identifying the key features of violations of economic, social and cultural rights' (1998) 20 *Human Rights Quarterly* 81 has indicated, "This typology of obligation has also made it possible to establish accountability and to identify violations of socio-economic rights"; According to Shue, H., *Basic rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press, 1980), this typology defines human rights obligations at three levels: the primary level, duty to respect; the secondary level, duty to protect; and the tertiary level, duties to promote and fulfil. In South Africa the duty to respect has been broadened. In the case of *Grootboom case*, para 34, the Court held that "at the very least there is 'a negative obligation placed upon the state and all other entities and persons to desist from *preventing or impairing* the right of access to adequate housing.'" With regard to a duty to respect, *Residents of Bon Vista v Southern Metropolitan Council* 2002 (6) BCLR 625 (W) is an obvious example. In this case, the Court held that the disconnection of the applicants' water by the Council without justification amounted to violation of the duty to respect the right of access to sufficient water. Going for a right to protect, the case of *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* 2001 (3) SA 1151 (CC) presents a very wonderful example of how robustly the state may protect socio-economic rights. In this case, residents of Alexandra Township had had their homes destroyed by flooding following heavy rains. The government had spontaneously moved them to a safe piece of land where they stayed in tents and later huts constructed to accommodate them. However, the conditions at this site were not favourable; there was poor sanitation and overcrowding amongst others. In order to ameliorate the condition of the victims, government decided to set up a Camp in another location with better houses and sanitation facilities. This move was, however, resisted by a group of residents adjoining the prison farm on which the camp was to be established. The residents argued that the process of establishing the camp had not followed the processes prescribed by town planning and environmental protection laws, and that they had not been given a hearing to air their objections. The Court held that in a case like this, where conflicting interests have to be reconciled and choices made, proportionality, which is inherent in the Bill of Rights, is relevant to determining what fairness requires. In the present circumstances, the Court weighed up the right of the flood victims to adequate housing against the residents' rights to property and a clean and healthy environment. In this case, both the government and the Court discharged their constitutional duty to protect the right of access to adequate housing.

[508] Section 2 of the 1996 RSA Constitution states that the obligations imposed by it must be fulfilled.

violating people's housing rights. Though there might be no exact stipulation as to whom the duty of fulfilling access to adequate housing may be placed, section 239 defines "organs of state" as including the national, provincial and local spheres of government. Suffice it therefore to mention that every sphere of government is duty-bound to exercise its responsibility for realising the right to have access to adequate housing. The duties imposed on these spheres of government may differ and it may seem that local government has very limited duties or responsibility to implement in complying with section 26, although it should be taken into account that the Constitution imposes some duties on it by way of the following provisions,

- The principles of co-operative governance;
- Local government's developmental mandate; and
- The provisions setting out local government housing duties in supporting housing legislation and policy.

a) The principles of co-operative government

According to the 1996 Constitution, the government is constituted in three spheres, namely the national, provincial and local government,[509] liaising with one another towards achieving the governmental objectives at a given time.[510] In this new constitutional framework, all spheres of the government are obliged to observe the principle of co-operative government.[511] As required by the Constitution, co-operative government is foundational to South Africa's constitutional endeavour.[512]

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[509] See section 40(1) of the 1996 South African Constitution.

[510] However, they still have time to exercise their independence in their respective functional spheres as explained in different pieces of legislation. For instance, in *Ex Parte President of the RSA: In re Constitutionality of the Liquor Bill*, 2000 (1) BCLR 1,2000 (1) SA 732, The concurrent and exclusive powers of each of the three spheres have been tested before the Constitutional Court, which has defended exclusive powers (for instance, of the provinces, in terms of section 6).

[511] Co-operative government requires a system of co-operation and constructive intergovernmental relations within the separate spheres and across the whole government at large. As Gideon Pimstone, *Constitutional Law of South Africa*,2nd ed. (Cape Town: Juta & Co., 2008) puts it, "provincial responsibilities towards the local sphere, as a function of participation in a co-operative system government, are briefly introduced in section 10N. The provision calls on the MEC to promote and support local government development so as to enable municipalities to exercise powers and perform duties in the management of their affairs, and to provide information in this regard to the Minister." The principle of co-operative government is regarded as having great values and influence within modern democratic government that the constitutional drafters had to ensure the inclusion of such principles within the supreme law of the Republic. The South African Courts have had occasions to adjudicate on the principle of co-operative government. To mention but a few, in *Van Wyk v Uys NO* 2002 (5) SA 92 (c) at 99, it was stipulated that section 41 of the Constitution enjoins the central, provincial and local tiers of government to foster the principle of co-operative government, to assist and support each other, to consult on matters of common interest and to co-ordinate their actions. This is the

Though housing only seems to form an ingredient in the national and provincial spheres' list for contemporaneous implementation as a matter of necessity, the Court held in *Grootboom Case*[513] that the duty to provide housing fell on all three spheres of government – national, provincial and local. In an endeavour to define the responsibilities of the various spheres of government, the Constitutional Court reasoned that in view of the principles of co-operative government set out in Chapter 3 of the Constitution, policies and actions of all three spheres must be co-ordinated to give effect to section 26.[514] The Constitutional Court elaborated that:

> All levels of government must ensure that the housing programme is reasonable and appropriately implemented. … Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.[515]

The Constitutional Court continued by outlining broadly the responsibilities of each sphere of government. It clarified that the national sphere is ultimately responsible for the provision of finances; the provincial government is responsible for the implementation of a housing programme and local government needs to play a supportive role. Suffice it to emphasise therefore that recent jurisprudence in the higher Courts interpret government's role in housing against a background of co-operative government.[516]

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background against which schedule 1 to the Local Government: Municipalities Systems Act 32 of 2000 has to be interpreted. In *MEC of Health v TAC* 2002 (5) SA 717 (CC) para 9, it was emphasised that the Constitutional Court will, in rare situations, grant direct access to the Constitutional Court to state organs which have not duly executed their mandate to the co-operative government. By the same token, the failure to perform those obligations is relevant when deciding whether or not it is in the interest of justice to grant a state organ leave to appeal directly to the court; *Uthukela and Others v President of the Republic of South Africa and Others* 2003 (1) SA 678 (CC), where the dispute was over whether the national government was obliged to provide district municipalities directly with an equitable share of national revenue. Three IFP-controlled district municipalities –*Amajuba*, *Uthukela* and *Zululand*– claimed that "many district projects that relied on the equitable share to function had ceased to operate or had run into large deficits", and as many as "seventeen projects concerned with the provision of essential services of water and sanitation had been ceased [sic] due to the lack of finances." The Constitutional Court focused on whether the parties to the dispute had exhausted the demands of cooperative government in Chapter 3 of the Constitution. Section 41(3) in particular demands government organs to only resort to the courts as a last resort. No evidence came forth of any attempts to resolve the dispute through any meaningful negotiation or arbitration before resorting to the courts. Thus a unanimous Court declined to confirm the ruling, and then sent back for the parties to resolve themselves. In the implementation of this principle, see also *National Gambling Board v Premier, KZN* 2002 (2) SA 715 (CC); *Hardy Ventures CC v Tshwane Metropolitan Municipality* 2004 (1) SA 199 (T).

[512] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic South Africa* 1996 (4) SA 744 (CC) paras 287, 290, 469 and 470.

[513] Para 40.

[514] Para 39.

[515] Para 82.

[516] The principle of co-operative government has also been echoed in section 3 of the Municipal Systems Act 32 of 2000.

(b) Local government's developmental mandate

Local government law has experienced vivid modification since the first of a suite of local government laws was passed to kick-start a new local government structure in 1998.[517] As enunciated in the Constitution, municipalities must provide democratic and accountable government for local communities, promote socio-economic development and undertake developmentally-oriented planning.[518] The concept of "developmental local government"[519] is closely linked to the realisation of socio-economic rights in the Constitution, as this is a sphere where clear decentralisation[520] of power and delivery of services to the poverty-stricken are seen.[521] The Constitution too does not thereby leave behind this notion. It has expressed its developmental objectives of local government in a number of sections, namely sections 152, 153 and 156. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council,*[522] the Court held that even under the Interim Constitution, local government no longer exercised powers delegated to it by the national or provincial governments, but received its powers from the Constitution.

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[517] See *Local Government: Municipal Demarcation Act* 27 of 1998; the *Local Government: Municipal Structures Act* 117 of 1998; the *Local Government: Municipal Systems* Act 32 of 2000; the *Local Government: Municipal Electoral Act* 27 of 2000; the *Local Government: Municipal Finance Management Act* 56 of 2003 and the *Local Government: Municipal Property Rates Act* 6 of 2004.

[518] See J van Wyk, "The role of local government in evictions" (2011) 14 (3) *PER* 50.

[519] In terms of the White Paper on Local Government, 1998, the notion of developmental local government is comprised of four basic characteristics: (1) Maximising economic growth and social development: local government is instructed to exercise its powers and functions in a way that has a maximum impact on economic growth and social development of communities; (2) Integrating and coordinating: local government integrates and coordinates developmental activities of other state and non-state agents in the municipal area; (3) Democratic development: public participation: local government becomes the vehicle through which citizens work to achieve their vision of the kind of place in which they wish to live; and (4) Leading and learning: municipalities must build social capital, stimulate the finding of local solutions for increased sustainability and stimulate local political leadership.

[520] Decentralization is the devolution of resources, tasks and decision-making power to democratically elected lower echelons of the governance structure in order to promote local democracy and good governance with the ultimate objective of improving the quality of life of the people. The paramount reasons for decentralisation (a) is the need to enhance local governance processes, improve the delivery of services to the local population and in this way contribute to poverty reduction; and (b) holds great potential for development in that it can provide space for people to participate in local development.

[521] N Steytler *The place and role of local government in federal systems* (Ed), (Johannesburg: Konrad-Adenauer-Stiftung, 2005), when discussing local government's importance, is of the view that "local government has an increasing role in the governance of federal countries, placing new demands on the theory and practice of federalism. Moreover, its status is changing along with its new role. Local authorities are seen as engines for growth and development, and more and more functions are being downloaded on them." The author adds that South African local government has arguably, from a comparative perspective, the closest ties with central government. A highly formalised system of intergovernmental relations has emerged through a variety of forums and processes.

[522] 1998 (12) BCLR 1458 (CC).

Section 152 of the Constitution ascertained local government as an autonomous sphere of government enjoined to act accountably and democratically, ensuring the provision of services in an equitable manner and encouraging the involvement of communities in its affairs.[523] Subsection 1(c) therein clarifies that local government must try not only to promote social and economic development but a safe and healthy environment as well. As per section 153(a) of the Constitution, the local government also bears the duty to engage in infrastructures in its own area and to manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community. It therefore makes sense to state that adequate housing is but one of the basic needs of the community.[524]

In addition, there are certain Acts which hold up this angle. Municipal Systems Act[525] requires that the council of a municipality "must undertake developmentally-orientated planning so as to ensure that it … together with other organs of state, contributes to the progressive realisation of the fundamental rights contained in sections 24, 25, *26*, 27 and 29 of the Constitution" whilst the Housing Act,[526] in its preamble recognises that shelter as adequate housing fulfils "a basic need." De Visser, on considering this needy-based approach, articulates that facilitating access to adequate housing is "the most fundamental aspect of development."[527]

Sections 9 of the Housing Act places housing development squarely within the realm of each municipality's integrated development plan (IDP). It goes without saying that housing development will unquestionably be one of the most pertinent areas of each municipality's IDP. Municipalities are mandated to take all reasonable and necessary steps within the framework of national and provincial housing legislation, *inter alia*, to enable residents of the municipal area to have access to adequate housing on a progressive basis. As De Visser stated, "the municipality must set housing delivery goals for its area and designate land for

[523] See section 152(1) of the Constitution. Section 151 propounds that each governmental sphere has the autonomy to "govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution." The Interim Constitution too ushered in constitutional recognition for local government by recognising its autonomy.

[524] See N Steytler, "Socio-economic rights and the process of privatising basic municipal services" (2004) 8 *Law Democracy and Development* 157 at 164 for a bit elaboration on this point.

[525] Act 32 of 2000.

[526] Act 107 of 1997.

[527] J De Visser, "A perspective on local government's role in realising the right to housing and the answer of the *Grootboom* judgment" (2003) 2 *Law, Democracy and Development* 201.

housing development. It must plan and manage land use and development and create and maintain a public environment conducive to housing development, which is also financially and socially viable."[528]

Section 156(1) of the Constitution deals with the powers and functions of municipalities. It reads:

A municipality has executive authority in respect of, and has the right to administer'

(a) The local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and

(b) Any other matter assigned to it by national or provincial legislation.

The Schedules to the Constitution, as mentioned above, offer an insight into the question of which sphere carries the primary obligation for the fulfilment of the right to housing. Schedule 4A lists housing as a concurrent competency of the national and provincial spheres. Schedules 4B and 5B of the Constitution do not directly confer on local government any function that can be seen to place the onus on it to be the primary responsible organ for the implementation of the housing agenda. Only the Courts have precisely highlighted that all spheres of the government partake in fulfilling housing rights.[529]

4.12 CONCLUSION

In recapitulating, it ought to be underscored that transformation and reconstruction initiatives were a long and sometimes a difficult process. The legislature has endeavoured to adhere to principles of transformation through pieces of legislation in the field of housing, hence falling away from the shadows of the oppressive laws to the dawn and sunrise of the moderate laws. Moderate in the sense that this housing legislative framework pushes towards realising access to housing for the needy, though constitutional recognition of housing rights or more general governmental duties in the housing sphere are rarely sufficient to ensure that adequate housing will be guaranteed to everyone. The laws discussed above address the issue: to what extent have the Constitution and law healed or facilitated the healing of the division of the past and established a society based on democratic values, social justice and fundamental

[528] Ibid, at 207.

[529] See *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 82.

human rights?[530] Moreover, South Africa, despite the fact that there might still be some short-falls, has registered a tremendous positive impact on legal systems throughout the world in the field of housing.

Again, the ideals of the Constitution are seen as the transitional commitments set to guide political change so that there may be devotion to the principles entrenched by the Constitution, namely the principle of co-operative government, local government's developmental mandate and finally the provisions setting out local government housing duties in supporting housing legislation and policy. The challenge for the new constitutional dispensation has long been to surmount the rift that has been present in South Africa since the early days of white occupation. It is noteworthy to state that access to adequate housing was first legislatively put in black and white in South Africa before the courts could embark upon its enforceability.

[530] This question was once addressed by Honourable Deputy Chief Justice Moseneke in Transformative Adjudication in a Post-Apartheid South Africa—Taking Stock after a Decade" (2007) 21 (1) *Speculum Juris* 2. See also PC Osode, "Law and Transformative justice in Post-Apartheid South Africa: A Conference to Celebrate the 90th Anniversary of the University of Fort Hare" (2007)21(1) *Speculum Juris* 1.

CHAPTER FIVE: OPENING DOORS TO ACCESSIBLE HOUSING THROUGH THE JUDICIAL PROCESS SYSTEM IN SOUTH AFRICA

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty.[531]

5.1 INTRODUCTORY ADVENT OF A RIGHT OF ACCESS TO ADEQUATE HOUSING: *AN APPRAISAL*

South Africa's transition from apartheid to democracy was a cautious, piecemeal process.[532] Thus, the Final Constitution[533] and its predecessor, the Interim Constitution,[534] possess features unprecedented in South African constitutional history.[535] Entrenchment of constitutional supremacy and sovereignty in the Bill of rights[536] are but some of them.[537] The

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[531] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC), para 8, (hereinafter referred to as *Soobramoney Case*).

[532] See L du Plessis & H Corder, *Understanding South Africa's Transitional Bill of Rights* (Kenwyn: Juta & Co. Publishers, 1994) 1-12 for a brief overview of South Africa's constitutional transition in the early 1990s.

[533] Constitution of the Republic of South Africa, Act 108 of 1996. On defining what this Constitution is, Deputy Chief Justice Dikgang Moseneke made some remarks at "address he delivered in a dinner held by judges of the Transvaal Provincial Division on the 31st January 2007 to mark the tenth anniversary of the Constitution" as follows: 'It bears repetition that our Constitution is a solemn pact to settle, strive and turmoil that ravaged this country for nearly 350 years. It holds a promise of a new beginning. It represents our collective quest for renewal. It is a product of the joint effort and will of our people who are deeply conscious of our unjust, unequal and divided past but opt for truth, reconciliation and reconstruction. The Constitution set for itself the object to heal these divisions by establishing a common citizenship, in an undivided country, which must strive to be united in its diversity. It reaffirms our common conviction that South Africa belongs to all who live in it, that the choice we make is of a democratic and open society in which every citizen is equally protected by the law. In the final analysis the renewal our Constitution promises is to improve the quality of life of all citizens and to free the potential of each person. In other words, embedded in the inner recesses of our transformative project is not only the meticulous observance of fundamental human rights but it is also the quest to ameliorate material deprivation and, so to speak, to make better life for all within reach." Similar expressions can also be found in Deputy Chief Justice Dikgang Moseneke, "Transformative Adjudication in a Post-Apartheid South Africa—Taking Stock after a Decade" (2007) 21 (1) *Speculum Juris* 2. The Final Constitution spells out normative value system or the juridical ideology. It displaces subjective ethical or intellectual preferences with a transparent and justiciable set of values.

[534] Constitution of the Republic of South Africa, Act 200 of 1993.

[535] Some of such features are the creation of provinces and the distribution of political power between the national government and provincial governments, and finally but foremost, the establishment of a Constitutional Court with final jurisdiction over constitutional matters and the reworking of the jurisdictions of the courts below in accommodating constitutional issues.

[536] It was explained in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC), (hereinafter referred to as *SARFU Case*) para 28, that "The Bill of Rights applies to all law, and binds the Legislature, the Executive, the Judiciary and all organs of State."

[537] M Chaskalson, (et al) share the same view in *Constitutional Law of South Africa*. Juta & Co. Ltd; Cape Town (First Edition, 1998).

South African Constitution emphatically compels social transformation.[538] This commitment has been recognized by the Constitutional Court and other courts[539] on many occasions. Furthermore, the Constitutional Court has been given the responsibility of being the ultimate guardian of the Constitution and its values.[540] The same view was classically articulated in *First Certification Case,*[541] that the fundamental structures and premises of a new constitutional text contemplated by the Constitutional Principles were grounded on a constitutional democracy based on the supremacy of the Constitution protected by an independent judiciary and enjoyment of all universally accepted fundamental rights, freedoms and civil liberties protected by justiciable provisions in the text. It is therefore considered as germane to embark upon the pronouncement of the courts in protecting socio-economic rights,[542] especially right of access to adequate housing. Furthermore, the subject percolated long enough in equal protection and due process doctrine for us to observe justiciable welfare rights as more than an idle aspiration, and the resulting precedents remain on the books.[543]

In order to embark on the contest of the *de jure* and *de facto* status and justiciability of socio-economic rights, it is crucial to significantly slot in the questions once postulated by Cooman as to whether socio-economic rights only exist on paper as part of treaties and constitutions to which governments often pay lip service at international fora, or whether they really mean something in practice for those who want to invoke these rights before the courts?[544]

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[538] This is plain from both its preamble and text. The preamble is to the effect that it heals the divisions of the past and establishes a society based on democratic values, social justice and fundamental human rights.

[539] Other courts are also given a constitutional jurisdiction, though the Constitutional Court will have to confirm their decisions. This was highlighted in *Zondi v MEC For Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) para 14 that if constitutional matters could, as a matter of course, be brought directly to this Court, this Court could be called upon to decide cases without the benefit of the views of the lower courts having constitutional jurisdiction; See also *Brink v. Kitshoff NO* 1996 (4) SA 197 (CC) para 8; *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC).

[540] SARFU Case (note 535 above) para 72.

[541] See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic South Africa* 1996 (4) SA 744 (CC) paras 44 and 45.

[542] It is imperative to stress that such rights have been given utmost attention as the first generation rights. This view was reiterated in *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC), para 40 that "the socio-economic rights in our Constitution are closely related to the founding values of human dignity, equality and freedom. The proposition that rights are interrelated and are equally important has immense human and practical significance in a society founded on these values".

[543] See *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *USDA v. Moreno*, 413 U.S. 528 (1973); *Sniadach v. Family Fin. Corp*., 395 U.S. 337 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969) and some cases that cames before then.

[544] F Cooman, (Ed) *Justiciability of economic and social rights* (Antwerp: Intersentia, 2006) 2.

5.2 HUMAN RIGHTS-BASED APPROACH

A human rights-based approach is more suitable for the protection of rights and interests that enjoy protection on the basis of their supportive and reliance to human dignity and right to life specifically. The need to adopt a human rights-based approach to housing is becoming increasingly important, for a number of reasons. Firstly, in an age of increasing globalization, the commitment of States to human rights policy instruments is becoming essential, and the right to adequate housing is regarded as a basic human right. Secondly, ever since the *Grootboom* Case it has become necessary that the State pays attention to its constitutional obligations, as the courts have become more assertive around rights issues. Thirdly, citizens and civil society are increasingly mobilizing around their rights (and using constitutional litigation as a strategy). Fourthly, and most importantly, the realization of human rights can be regarded as the very essence of human development.

In other cases, an obligation is placed on the State to give effect to these rights[545] over a period of time and in programmatic fashion. This is evident from the provision requiring the State to take measures to achieve the progressive realisation of some of these rights[546], including the right of access to social security. When these rights and the way in which they are provided for and protected are viewed in context and as a whole, the inference can be drawn that the Constitution clearly intends to regard South Africa as a social State. This also flows from the stated aim[547] to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights, and to improve the quality of life of all citizens and free the potential of each person. Also, the Constitutional Court has often reiterated that the meaning of the rights contained in the Bill of Rights must be determined and understood against the background of past human rights abuses, and that the Constitution endeavours to bring about reconciliation and reconstruction.[548]

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[545] This specifically refers to socio-economic rights as opposed to first generation right which are automatically enforceable.

[546] For instance, the right to have access to housing (Bill of Rights 1996, section 26(2)) and the right to have access to health care, food and water (Bill of Rights 1996, section 27(2)).

[547] See the Preamble to the Constitution 1996.

[548] In *S v Mhlungu* (1995) (3) SA 867 (CC) para 111, the court said that The Constitution introduces democracy and equality for the first time in South Africa. It acknowledges a past of intense suffering and injustice, and promises a future of reconciliation and reconstruction. It embodies compromise in the form of a Government of National Unity, and orderly reconstruction of the constitutional order in terms of the two-

5.3 UNDERPINNING AIMS AND VALUES OF THE CONSTITUTION

In various sections of the Constitution, reference is made to the fundamental values that underpin the objectives and aims of the Constitution. The courts and other tribunals are under obligation, when interpreting the Bill of rights, to promote the values that underlie an open and democratic society based on human dignity,[549] equality and freedom.[550] In *Government of the Republic of South Africa and Others v. Grootboom and others*,[551] the court held:

> Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in chap 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.

The universal aim and basis for the existence of housing rights is to protect a person's right to human dignity.[552] Human dignity, as a fundamental constitutional value[553] as well, as a

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phase process of constitution-making which it provides for. It is a momentous document, intensely value-laden.

[549] In *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC) paras 49-50, the Court pointed out that: "A constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position. After all, that was the whole aim of the struggle against apartheid - the restoration of human dignity, equality and freedom. . . . If human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected. .. ." see also *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000(8) BLCR 837 (CC) para 35; *Makwanyane Case* para 329; *S v Jordan (Sex Workers Education & Advocacy Task Force as Amici Curiae)* 2002 (6) SA 642 (CC) para 81.

[550] Section 39(2) of the 1996 Constitution of the Republic of South Africa; Sachs J reiterated in *S v Lawrance; S v. Negal; S v. Solberg* 1997 (4) SA 1176 (CC), para 141 that, "The Constitution required us when interpreting the bill of rights to promote the values of an open and democratic society based on freedom and equality.

[551] 2001 (1) SA 46 (CC), para 23.

[552] Goldstone J expressed in *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) para 41, that at the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked, while in *Egan v Canada* (1995) 29 CRR (2d) 79, L'Heureux-Dubé J stated that human dignity is at the heart of individual rights in a free and democratic society . . . . [E]quality . . . means nothing if it does not represent a commitment to recognising each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens; S Liebenberg, "The Value of Human Dignity in Interpreting Socio-Economic Rights" (2005) 21 *SAJHR* 1 has clarified that 'respect for human dignity requires society to respect the equal worth of the poor by marshalling its

fundamental right[554] contained in the Bill of Rights, plays a very vital role with regard to housing rights, and the equal treatment of those who were historically deprived. Without human dignity, a person is excluded from society. Housing rights (including social security rights) system aims to include an individual in the society through measures or schemes implemented by the government in order to show solidarity towards such an individual,[555] hence affording right to one's dignity.

In addition, in the development of the housing rights concept, a continuing effort must be made to promote this crucial right through a sense of shared responsibility. The aims of socio-economic rights enforcement cannot be achieved if those who benefit from them do not play a pivotal role in their development.[556] It is important for them to participate actively and accept responsibility for the agencies created for them. Moreover, Ubuntu[557] and nation

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resources to redress the conditions that perpetuate their marginalization'; see also *Law v Canada (Minister of Employment and Immigration)* (1999) 170 DLR 4th 1 (SCC) para 51, where it was stated that "Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored or devalued, and is enhanced when slaws recognize the full place of all individuals and groups within Canadian society."

[553] Dignity is invoked most often as a value. In *S v. Williams* 1995 (3) SA 632 (CC) para 77, the court was of the view that respect for human dignity is one such value; acknowledging it includes an acceptance by society that . . . even the vilest criminal remains a human being possessed of common human dignity.

[554] See *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC).

[555] See LJ van Rensburg and L Lamarche, "The Right to Social Security and Assistance" in D Brand and Christof H (Eds) *Socio-Economic Rights in South Africa*, (2005), Pretoria University Law Press; Cape Town) 235.

[556] In *Ferreira v Levin NO; Vryenboek v Powell NO* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) para 49 Ackermann J averred that "rights cannot be fully valued or respected unless individuals are able to develop their humanity, their "humanness" to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally." See also *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000(8) BLCR 837 (CC) (hereinafter referred to as *Dawood Case*) para 35, where the Constitutional Court enlightened that, "The value of dignity in our constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected."

[557] Langa J illustrates *Ubuntu* principle in *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (2) SACR 1; 1995 (6) BCLR 665 para 224 as follows: 'The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a

building within South African perspectives contribute to the sense of shared responsibility. Moseneke DCJ has recently indicated in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,[558] that "concept of ubuntu emphasises the communal nature of society and 'carries in it the ideas of humaneness, social justice and fairness'[559] and envelopes 'the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity.'"[560]

On this basis, it is clear that group solidarity is not a foreign principle in South Africa. The respect for and promotion of the principle of Ubuntu thus guarantee the success of a comprehensive housing rights system too. This in turn also emphasizes the importance to be given to group protection in the fight against poverty and deprivation. Upon analyzing the Constitutional Court's judgment in *Grootboom Case* and comparing it with the earlier decision of *Soobramoney Case*[561] on the enforcement of socio-economic rights, one is left with the impression that whenever the position of historically deprived and disadvantaged groups warrants judicial intervention, the courts will more readily come to assistance than in case of an individual claiming assistance.

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community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

[558] [2011] ZACC 30 para 71.

[559] *S v Makwanyane* 1995 (3) SA 391 (CC) para 237.

[560] See *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others, Amici Curiae* 2011 (4) SA 91 (CC), 2011 (8) BCLR 816 (CC) paras 164-5, 168, 210 and 216-8; *Le Roux and Others v Dey* (*Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae*) 2011 (3) SA 274 (CC), 2011 (6) BCLR 577 (CC) para 200; *Van Vuren v Minister for Correctional Services and Others* 2010 (12) BCLR 1233 (CC) para 51; *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) para 46, 2010 (3) BCLR 212 (CC) para 45; *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC), 2009 (12) BCLR 1192 (CC) para 62; *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC), 2009 (10) BCLR 978 (CC) para 78; *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) para 51; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC) paras 68-9, 86, 112-8 and 121; *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) paras 45 and 163; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) para 37; *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) para 50; and *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC), 1996 (8) BCLR 1015 (CC) paras 3, 19 and 48. For academic articles see Bennett "Ubuntu: An African Equity" (2011) 14 (4) *PELJ* 29; G Christian "The Historical Development of the Written Discourses on Ubuntu" (2011) 30 *SALP* 303; and Mokgoro "Ubuntu and the Law in South Africa" (1998) 4 *BHRLR* 15.

[561] *Soobramoney Case*.

Other illustrations can be seen in *Leon Joseph and Others v City of Johannesburg and others*,[562] where the court highlighted that when depriving residents of electricity, a service that is provided in fulfilment of constitutional and statutory duties, the City is obliged to provide them with procedural fairness, including fair notice of the disconnection. In *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others*,[563] the court said:

> Public interest dictates that there should be certainty as to the constitutionality of legislation, and the operation of an order of constitutional invalidity, a matter which falls squarely within the jurisdiction of this Court, should therefore not be held in abeyance for longer than is necessary. Here this concern was heightened by the fact that the applicants are indigent persons who find themselves in dire circumstances. There was therefore a need to bring these proceedings to a close. Remitting the matter back to the High Court would only have caused undue delay, contrary to the interests of justice.[564]

5.4 REVOLUTIONALIZING SOCIO-ECONOMIC RIGHTS[565] FROM TIGER-PAPER RIGHTS TO FULLY-FLEDGED RIGHTS: ECHOING COURTS' COMMITMENT TO THE CONSTITUTION

5.4.1 JUSTICIABILITY OF HOUSING RIGHTS: THE PLACE OF THE JUDICIARY IN A CONSTITUTIONAL DEMOCRACY

Conventionally, the justiciability of socio-economic rights was seen as a contentious issue at the inception of such rights into the Final Constitution in South Africa. The surge of such rights jurisprudence came as an eye-opener around the world and gradually called for a much more ambitious (and somewhat ambiguous) conception of socio-economic rights' justiciability. However, the question still remains as to whether there is a clear definition of such term. There have been attempts to delineate this term though a detailed description was given by Professor C. Okpaluba.[566] Justiciability, according to Okpaluba, relates to those

[562] 2010 (3) BCLR 212 (CC), 2010 (4) SA 55 (CC).
[563] 2006 BCLR 569 (CC).
[564] Para 24.
[565] According to G Erasmus, 'Socio-Economic Rights and Their Implementation: The Impact of Domestic and International Instruments' (2004) 32 *International Journal of Legal Information* 243 at 252, 'socio-economic rights are those human rights that aim to secure for all members of a particular society a basic quality of life in terms of food, water, shelter, education, health care and housing.'
[566] In Chuks Okpabula, "Justiciability and Constitutional adjudication in the Commonwealth: The problem of definition (1)" (2003) 66 (3) *THRHR* 424, the learned professor has supplied the academic scholarship with well-thought, broadened and fairly detailed explanation from different angles of the justiciability concept;

issues of which the courts of law decline adjudication where the question posed would require solutions of non-judicial nature; they decline to entertain matters that could better be settled by the executive, the legislature, the politician, the political parties or other governmental, quasi-public bodies or private organisations.[567]

In addition, there are two grounds upon which the court may decline to answer a matter at issue on the basis of non-justiciability, namely; (a) if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of the democratic form of government; or (b) if the Court could not give an answer that lies within its area of expertise, being the interpretation of law.[568] In quintessence, justiciability is the incapacity of the courts

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For DM Davis, "The case against the inclusion of socio-economic demands in a bill of rights except as directive principles" (1992)8 *SAJHR* 475, (hereinafter referred to as *DM Davis 1992*) quoting C Scott & P MacKlem "Constitutional ropes of rand or justiciable guarantees? Social rights in a new South African Constitution" (1992)141 *University of Pennsylvania Law Review* 1 "Justiciability is a contingent and fluid notion dependent on various assumptions concerning the role of the judiciary in a given place at a given time as well as on its changing character and evolving capability but may broadly be defined as the extent to which a matter is suitable for judicial determination." G Marshall "Justiciability" in A Guest (ed) *Oxford essays in jurisprudence* (Oxford: Oxford University Press, 1961) at 269 views the concept of justiciability as relating to "the aptness of a question for judicial solution", whilst LM Sossin *Boundaries of judicial review: The law of justiciability in Canada* (Toronto: Carswell, 1999) 2, also opens on the doctrine. In contextual nature, for Sossin, justiciability is "a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable. The criteria used to make this determination pertain to three factors: (1) the capacities and legitimacy of the judicial process, (2) the constitutional separation of powers and (3) the nature of the dispute before the court."

[567] Scrutinising Lord Parker of Waddington's wording in *The Zamara* [1916]2 AC 77 at 107, Chuks Okpabula, "Justiciability, Constitutional adjudication and the 'political question' doctrine in the Commonwealth: Australia, Canada, Nigeria ant the United Kingdom" (2003)18(1) *SAPR/PL* 149 at 166, highlighted that in "English law, an issue will be held to be non-justiciable if it is inappropriate for judicial intervention due to the unsuitability of judicial procedure to control the exercise of the power in question or if it is 'obviously undesirable' to subject the matter to the judicial process or to discuss it in public or in open court." The learned professor goes on to analysise Canadian jurisprudence on the doctrine. With Canada, he says that "justiciability is certainly not confined to the question whether the dispute disposes of a cognisable right; it extends to whether it is appropriately addressed by a court of law. The issue focused on must be capable of being formulated in a way that will elicit the legal answers." This conclusion was drawn after perusing through a well-celebrated Canadian Supreme Court judgement of *Reference re Canada Assistance Plan (BC)* [1991]2 SCR 525, where it was propounded that "while there may be many reasons why a question is non-justiciable, in this appeal the Attorney General of Canada submitted that to answer the questions would draw the Court into a political controversy and involve it in the legislative process. In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government . . . . In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another form whether is has a sufficient legal component to warrant the intervention of the judicial branch."

[568] See C Okpabula, "Justiciability, Constitutional adjudication and the 'political question' doctrine in the Commonwealth: Australia, Canada, Nigeria ant the United Kingdom" (2003) 18 (1) *SAPR/PL* 149 at 180 and the cases discussed thereon.

to avail a litigant judicial remedies which ordinarily should be channelled to another branch of government with the requisite competence to deal with the problem at hand.[569]

As shown in the previous chapter, there were hot scholarly and academic contests about not only the inclusion of socio-economic rights in the 1996 South African Constitution but their enforceability as well.[570] The major arguments made against justiciability of socio-economic rights are that judges lack both the legitimacy and the competence needed to adjudicate issues relating to economic and social policy.[571] The courts are considered to be ill-suited to formulate premeditated choices among financial means and, therefore, lack the necessary technical capacity to determine issues of social justice. Emanating from the objection based on technical competence, it is asserted that socio-economic rights discussions have polycentric repercussions which makes them unfit for judicial adjudication. This criticism gathers support from Lon Fuller's expression that, "What kinds of social tasks can properly be assigned to courts and other adjudicative agencies?"[572] This question is followed by the assertions that the courts, unlike administrative authorities, may not have in their possession large amounts of information to guide their decisions.[573]

Some enlightening remarks on enforcement of socio-economic rights were made by Cappelletti in that "to exclude social rights from a modern bill of rights, is to stop history at the time of laissez-faire; it is to forget that the state has greatly enlarged its reach and responsibility into the economy and welfare of people."[574] It makes sense to postulate that a need to constitutionalise a variety of social and economic demands of millions of the South

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[569] C Okpaluba, "Justiciability, constitutional adjudication and political the political question in a nascent democracy: South Africa (part 1)" (2003) 18 (2) *SAPR/PL* 331; same author, "Justiciability and Constitutional adjudication in the Commonwealth: The problem of definition (2)" (2003) 66 (4) *THRHR* 610.

[570] It is worth-noting that such controversies emerged prior to enactment of the 1996 Constitution.

[571] See RH Bork, "The Impossibility of Finding Welfare Rights in the Constitution" (1979) *Washington University Law Quarterly* 695; D Basson "Economic Rights:A Focal Point in the Debate on Human Rights and Labour Relations in South Africa" (1989) *SAPL* 120; H Corder, et al, *Justice: A Contribution to the South African Bill of Rights Debate* (1992) 18; S Liebenberg "Social and Economic Rights: A Critical Challenge" in Liebenberg S (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 79.

[572] L Fuller, "The forms and limits of adjudication" (1978) 92 *Harvard LR* 353 at 354.

[573] See V Abramovich, "Courses of action in economic, social and cultural rights: Instruments and allies" (2005) 2 *SUR – International Journal on Human Rights* 181 at 183.

[574] M Cappelletti, "The future of legal education. A comparative Perspective" (1992) 8 *SAJHR* 1. To support what M Cappelletti has said, it was articulated in DM Davis, "The case against the inclusion of socio-economic demands in a bill of rights except as directive principles" (1992) 8 *SAJHR* 475 at 476 that "the argument for the inclusion of social and economic rights such as housing . . . in the bill of rights rests of the on the premise that to deny these rights while according first-generation rights . . . is to engrave into society a distorted notion of democracy."

Africans is comprehensible and that it indeed symbolizes a predominantly essential character as it demonstrates a clear pledge to meet crucial demands to redress the apartheid legacy.[575] As Albie Sachs[576] depicted, constitutionalising social and economic rights within a legal document is based upon the idea that it is necessary to impose a duty on parliament to adopt legislation which, taking account of resources of the country, grants progressively increasing rights to every citizen.[577] There are numerous ways that socio-economic rights can be violated and remedied without forcing a state to establish a new social program. Even in circumstances where the state's obligation of fulfilment is being adjudicated, the courts still have the issue of progressive realisation to examine.[578]

Coming back to the legitimacy objection which claims that judicial intervention in issues of policymaking and budgetary decisions would inevitably entail a breach of the separation of powers, commentators argue that justiciable economic and social rights would grant the courts the power to order the state to take extensive positive action and make resource commitments, thus challenging the supremacy of the legislature in the realm of budgeting and social policy.[579] Also, given that judges are not elected and are often unaccountable to the public, it raises concerns about the democratic legitimacy of such a system. Sandra Liebenberg simply answers that the above "legitimacy" argument assumes a rigid, formalist concept of the separation of powers doctrine.[580]

The importance of a court's role in considering the constitutionality of legislative decisions relating to civil and political rights has undoubtedly been appreciated. This need for protection against the tyranny of the majority is just as essential in relation to socio-economic

[575] See DM Davis 1992 (note 565above).

[576] A Sachs, *Affirmative Action and Good Government: a fresh look at constitutional mechanisms for re-distribution in South Africa* (South Africa Constitutional Studies Centre, Institute of Commonwealth Studies, University of London, 1991) 28.

[577] As suggested by H Hershkoff, "Positive and state Constitutions: the limits of federal rationality review" (1998-1999) 112 *Harvard LR* 1131, "The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion."

[578] In such cases, a kind of soft enforcement mechanism may be put in place, where the courts offer a constructive criticism of the issue to both the executive and legislature. This approach was taken in *R v Askov* [1990]2 SCR 1199, "where the court drew attention to the problem, but stopped short of ordering the government to allocate resources."

[579] See S Liebenberg, "The Protection of Economic and Social Rights in Domestic Legal Systems," in Asbjorn Eide, Catarina Krause & Allan Rosas, eds *Economic, Social and Cultural Rights: A Textbook* (2nd ed)(Dordrecht: Martinus Nufhoff Publishers, 2001) 55 and 58. Hereinafter referred to as Sandra Liebenberg, *The Protection of Economic and Social Rights in Domestic Legal Systems*).

[580] See S Liebenberg, *The Protection of Economic and Social Rights in Domestic Legal Systems* above.

rights as any other area.[581] There is a parallel need to have a constitutional check over legislation or executive action relating to economic and social issues. Arguments against the entrenchment of socio-economic rights tend to suppose a system of benevolent majority rule in which the legislature always considers the basic human rights of minority groups and marginalized constituencies when making budgetary decisions.[582] It has long been suggested that the principles of justice under Rawls's theory are what the public would accept in an ideal society with a fully developed sense of justice. Judicially enforceable welfare rights serve as an appropriate corrective device in a non-ideal society like ours to "cope with evolutionary deficiencies in the public's sense of justice."[583]

The legitimacy argument also overlooks the fact that courts frequently make decisions within areas of law that impact budgetary and economic policy.[584] While it is true that socio-economic rights impose duty on the state to secure for all members of society a basic set of social goods,[585] this is also true of civil and political rights.[586] There are numerous rights in

[581] See BW Katherine, "Justice for America's homeless children: Cultivating a child's right to shelter in the United States" (2009) 35 (3) *William Mitchell Law Review* 875 at 893.

[582] Letting everything be done at the discretion of legislature and not allowing the courts to review such legislative acts or administrative decisions from the executive, enhance declaring those acts or decisions invalid or compelling those organs to be in compliance with the constitutional norms would absolutely depict parliamentary sovereignty state which indeed has long lost sight.

[583] Certainly, it is acknowledged that, for a constitution to have a meaningful place in the hearts and minds of the citizenry, it must address the pressing needs of the ordinary people. It must promise both bread and freedom. As *ANC Constitutional Committee A Bill of Rights for a New South Africa (1990) ix,* profoundly briefs that the Constitution must also address the gross legacy of apartheid. It is not just a question of dealing with poverty as you might find in any other country, but with responding to the gross social indignities and inequalities created as a direct result of state policies under Apartheid.

[584] Thus, the fact that the adjudication of socio-economic rights may involve a consideration of policy issues and may raise budgetary concerns is not a principled reason for arguing that socio-economic rights are not justiciable, since the same issues are involved in the judicial review of administrative action and in the review of civil and political rights. In actual fact, justiciability relates to pragmatic considerations of degree, rather than absolute considerations of what is capable of judicial consideration and what is not. a court may find that in a particular matter before it, while socio- economic rights do not raise new problems for judicial consideration as such, the combined effect of a consideration of policy issues, which have budgetary implications, is to render them so problematic that it should view the matter as non-justiciable. *Soobramoney Case* is the epitomy of the articulated fact. This argument should not therefore be raised against the judicial review of all socio-economic rights matters. courts therefore weigh up each matter before them on a case-by-case basis and decide, on the basis of a consideration of the particular issues which that matter raises (whether civil, political or socio-economic) whether it is a matter which should be considered justiciable or not.

[585] J De Waal *et al The Bill of Rights: Handbook* (Cape Town: Juta & Co. Publishers, 2001) 432. *Vide* D. Brand "Introduction to Socio-economic Rights" in D. Brand and C. Heyns (eds) *Socio-economic Rights in South Africa* (Pretoria: Pretoria University Law Press, 2005) 432.

[586] In *Schachter v Canada* [1992]2 SCR 679, para 63, the Supreme Court of Canada concluded that "any remedy granted by a court will have some budgetary repercussions, whether it be a saving of money or an expenditure of money." Furthermore, simply because a right is classified as civil and political does not mean that substantial financial expenditure does not flow from a decision. In *R v Askov* [1990]2 SCR 1199, the Supreme Court of Canada heard a case dealing with the right to a fair trial; which is a civil and political right. In that decision, the Court ruled that the state must hold criminal trials in a more timely fashion. The

the latter category which also require positive state action, such as the right to a fair trial, the right to vote, and the right to legal representation.[587] In *August v Electoral Commission*[588] where the respondent had refused to register for voting the prisoners who at that time were serving their prison terms, the court held that the right to vote imposes positive obligations upon the state to take steps to create opportunity to enable eligible prisoners to register and vote, whilst in *S v Khanyile*[589] the court upheld the principle that a right to a fair trial includes the right to adequate legal representation. In *Gideon v Wainwright*[590] it was held that 'any person hauled into court, who is poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.'

One ought also to concur with Sachs's view as it is a fact that a positive constitutional right imposes an affirmative obligation on the state to realize and advance the objects and purposes for which, powers have been granted.[591] Positive rights do not therefore only restrain the government's exercise of power, but also compel its exercise, constraining the government to use its assigned authority to carry out a specified constitutional purpose. Drawing from different reasons advanced above, it is justified that the Court in the *First Certification case* stated that it is of the view that socio-economic rights are, at least to some extent, justiciable.[592] When a state constitution creates a right to a government-provided social service, the relevant judicial question should thereby be whether a challenged law achieves, or is at least likely to achieve, the constitutionally prescribed end, and not, as federal rationality review would have it, whether the law is within the bounds of state legislative power.[593] Furthermore, it is a well-known norm that when the legal process does establish that an infringement of an entrenched right has occurred, it must be effectively vindicated.

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court's ruling could have resulted in building additional court houses and hiring more judges and prosecutors; all would have had a significant budgetary impact. However, the Court did not rule as to the mechanism to be used by the government to meet this requirement; simply that it must. Ultimate power over budgetary considerations and implementation was left to the executive. It is easy to see that a similar approach could be adopted with socio-economic rights.

[587] Dwight G. Newman, "Institutional Monitoring of Socio-economic Rights: A South African Case Study and a New Research Agenda" (2003)19 *SAJHR* 189, at 190 averred that "Consider the costs of properly functioning election system, or a justice system with adequate procedural safeguards, and this mere fact does not undermine judicial legitimacy."

[588] 1999 (3) SA 1 (CC).

[589] 1988 (3) SA 795 (N).

[590] 372 US 343, 344 (1963).

[591] See D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Oxford University Press, 1986).

[592] This statement in itself catered for progressive realisation of such rights.

[593] The test was propounded many decades ago by NC Benjamin, *The nature of the judicia process* 94 (University of London Press, London, 1921) that the test of a state welfare law should be "one of fitness to an end, for the rule that misses its aim cannot permanently justify its existence."

The courts have particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies to achieve this goal.[594]

The first case on the enforcement of socio-economic rights, after the pronouncement of their justiciability, is *Soobramoney Case*. In this case, the court took into account lack of resources and held that the state did not violate its constitutional obligation to provide emergency facilities to the appellant. All that the courts test is the reasonableness of state action in the context of available resources.

In short, like all of the objections raised, the institutional competence of the judiciary (or lack thereof) cannot be hoisted as a bar to the justiciability of socio-economic rights in all circumstances. Though the judicial consideration on these rights may well raise polycentric issues, this is only one of many deliberations to be taken into account in determining whether a particular matter is justiciable and, if it is, then in determining the appropriate level of constitutional deference. It is not by accident that the courts in South Africa saw it fit to view socio-economic rights justiciable and that they compelled enforceability thereof through many cases.

5.4.2 ACCOUNTABILITY AND SEPARATION OF POWERS

(a) Embellishment of the doctrine

The doctrine of the 'separation of powers', heralded by Montesquieu, a French jurist, posits that the different functions of the government – administrative, legislative and judicial – should be carried out by different arms of the government – the Executive, the Legislature

[594] In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 94, Kriegler J said that "The core meaning of s 7(4)(a) is clear: violations of chap 3 rights must be remedied. The provision states in the context of chap 3 that persons who have standing 'shall be entitled to apply to a competent court of law for appropriate relief'. The provision does not provide relief 'where appropriate' but 'appropriate relief' *per se*. We did not need s 7(4)(a) to tell us that infringements of constitutional rights must be remedied. Section 4(1) makes unconstitutional conduct a nullity, even before Courts have pronounced it so. When Courts give relief, they attempt to synchronise the real world with the ideal construct of a constitutional world created in the image of s 4(1). There is nothing surprising or unusual about this notion. It merely restates the familiar principle that rights and remedies are complementary. The relationship holds true and is uncontroversial at common law. The Constitution is also a body of legal rules and we should expect to find in it the same pairing of rights and remedies."

and the Judiciary, respectively.[595] In its novel pure form, the doctrine served as a functional construct rather than as a measure of the validity of government action.[596] In terms of this doctrine there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. As Professor Thomas Merrill has put it, the Court's separation of powers doctrine assumes that "the Constitution contains an organizing principle that is more than the sum of the specific clauses that govern relations among the branches."[597]

Again, it is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers. Under this doctrine of separation of powers the courts must not be seen as usurping the executive or legislative functions,'[598] and as

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[595] O. Hood Phillips and Paul Jackson *O Hood Phillip's Constitutional and Administrative Law* (7th ed) (UK: Sweet & Maxwell, 1987) 12-13. As NW Barber "Prelude to the Separation of Powers" (2001) 60 *Cambridge LJ* 59, at 71-72 defined the doctrine, separation of powers is a distinctively constitutional tool. It addresses itself to the authors of the constitution; it enjoins them to match function to form in such a way as to realise the goals set for the state by political theory. Having decided that a particular goal ought to be striven after in a society, the doctrine then focuses our attention on the manner in which it may be achieved.

[596] It guarded against the overconcentration of state power by dividing government personnel, power and functions into the three organs. According to E Barendt "Separation of powers and constitutional government" (1995) *Public Law* 599 at 601 "the distinction between the more traditional, functional account of separation of powers and the more flexible, 'checks and balances' approach has also been described as a distinction between a 'pure' and 'partial' doctrine of separation of powers. A 'pure' theory constructs a complete separation between the legislature, executive and judiciary, while the 'partial' theory recognises that there are overlapping powers in order to allow the checks and balances to operate. These overlapping powers create deliberate tension between the branches, so that none of the branches is capable of operating, in all respects, autonomously -- E Barendt, *An introduction to constitutional law* (Oxford: Oxford University Press, 1998) 14-17.

[597] TW Merrill, "The Constitutional Principle of Separation of Powers" 1991 *Supreme Court Review* 225.

[598] Peete J in the High Court judgment of *Khathang Tema Baitsokoli v Maseru City Council* CONST/Case/1/2004 para 23. See also *Minister of Health and Others vs Treatment Action Campaign and Others* (2) 2002 (5) SA 721 (CC) para 98. In *The First Certification case*, The Court concluded that justiciable socio-economic rights did not confer upon the courts "a task . . . so different from that ordinarily conferred upon them by a bill of rights that the separation of powers principle would be breached." In *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 paras 37-38, Ngcobo J expressed that "The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution. But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament 'must act in accordance with, and within the limits of, the Constitution', and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled'. Courts are required by the

purported, socio-economic matters are said to be political, and the courts should not stray onto this political terrain.[599] On the rationale of the separation of powers, McMillan[600] propounded:

> The dissimilar functions that have to be discharged are mostly performed better in one arena of government in preference to another. The formulation of communal policy is best undertaken in a legislative forum, by elected representatives who participate in public debate, who face periodic re-endorsement by the people, and who embody the widely differing values and aspirations that are intrinsically part of each society. The ongoing application of general legislative rules is best undertaken by the executive arm of the government, which is in a position over time to accumulate experience, wisdom, intuition, sagacity and other diverse skills …. The essence of the judicial function [is that] judges … impartially and skilfully interpret legislative rules.[601]

The doctrine of separation of powers has been tacitly incorporated in a number of constitutions[602] and, as Pieterse[603] alluded, it underlies the South African constitutional

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Constitution 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations. This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values'. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that 'the obligations imposed by [the Constitution] must be fulfilled'. It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution."

599 Scholars of this idea posit that as bills of rights are often framed in broad terms, judges have great interpretive freedom such that rather than applying the law, they can create it. Thus, judicial review is criticised for being undemocratic and breaching the doctrine of separation of powers. For a discussion of this particular criticism, see T Campbell 'Democratic Aspects of Ethical Positivism' in T Campbell and J Goldsworthy (eds.) *Judicial Power, Democracy and Legal Positivism* (Ashgate; London, 2000) 28 and H Katherine, "Will Permitting Judicial Enforcement of a Bill of Rights Ensure That Political Debate Will Be Impoverished and Reduce the Scope of Democratic Debate and Dialogue?" (2009) 2 *University College London Human Rights Review* 188.

600 See J McMillan "Judicial Restraint and Activism in Administrative Law" (2002) 30 *Federal LR* 335 at 337.

601 Similarly, Montesquieu emphasised the importance of separation of powers for the preservation of liberty: When the Legislative Power is united with the Executive Power in the same person or body of magistrates, there is no liberty because it is to be feared that the same Monarch or the same Senate will make tyrannical laws in order to execute them tyrannically. There is again no liberty if the Judicial Power is not separated from the Legislative Power and from the Executive Power. If it were joined with the Legislative Power, the power over the life and liberty of citizens would be arbitrary, because the Judge would be Legislator. If it were joined to the Executive Power, the Judge would have the strength of an oppressor. All would be lost if the same man, or the same body of chief citizens, or the nobility, or the people, exercised these three powers, that of making laws, that of executing public decisions, and that of judging the crimes or the disputes of private persons -- *L'Esprit des Lois*, Book XI ch VI quoted in I Jennings *The law and the Constitution* (London: University of London Press, 1959) 22; As E Barendt 'Separation of powers and constitutional government' (1995) *Public Law* 599 at 613 articulates, "the primary purpose of the separation of powers doctrine is the prevention of the arbitrary government, or tyranny, which may arise from the concentration of power".

602 For example, 1993 Lesotho Constitution, Constitution of the Republic of South Africa Act 200 of 1993, Constitution of the Republic of South Africa Act 108 of 1996, and other constitutions in many countries.

603 Marius Pieterse "Coming to Terms with Judicial Enforcement of Socio-economic Rights" (2004) *SAJHR* 383 at 385 (hereinafter referred as Pieterse).

order.[604] As a constitutional tool, it demarcates the extent of state power and establishes mechanisms aimed at ensuring that the wielders of power are held accountable.[605] Each power is within its suitable limits. Cullinan CJ in *Swissbourough Diamond Mines (Pty) Ltd v The Military Council of Lesotho*,[606] commented with regard to doctrine of separation of powers that:

> It is not a matter of supremacy of Parliament nor of the Executive; neither is it a matter of supremacy of the Judicature. None of them is supreme. It is the rule of law which is supreme ensuring that each power is exercised within its proper limits.

Matters of socio-economic rights have constitutionally been placed beyond the domain of the courts. Thus, unswerving with a rigid application of the doctrine, these matters cannot and therefore should not be dealt with by the courts.

(b) The shifting Landscape of the Doctrine

Of course, no system of separation of powers is absolute.[607] A central feature of the doctrine is that its boundaries are mostly flexible and undetermined, and deviations from the "pure" notion of separation of powers for administrative expedience are common.[608] To begin with, the introduction of "checks and balances"[609] according to which one branch of government monitors and counterbalances the exercise of power by the other, has ameliorated the

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[604] See *The First Certification case*, para 112. This doctrine is a cardinal feature of our democracy which, in turn, is based on universal adult suffrage, a common voter's roll and regular elections.

[605] Legislation which sought to bring judicial organs of state under the control of parliament or the executive could be struck down under the separation of powers doctrine even if such legislation did not conflict with any of the express provision of the Constitution. See Justice Ackermann's *dictum* in *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC) para 105; in South *African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) paras 18-22 the Constitutional Court held that there 'can be no doubt that our Constitution provides for such a separation [of powers] and that laws inconsistent with what the Constitution requires in that regard, are invalid.

[606] 1991 – 96 LLR 1481 at 1697.

[607] See Pieterse, at 386. In *Glenister v President of the RSA* 2009 1 SA 287 (CC) paras 30-33, Langa CJ (speaking for the Court) wrote as follows: "There is no express mention of the separation of powers in the text of the 1996 Constitution. In the First certification judgment ... this court stated: There is ... no universal model of separation of powers and, in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute ... "

[608] Kirsty McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*, (Pretoria University Law Press: Pretoria, 2009) puts it that "The partial theory of separation of powers therefore ensures that liberty is adequately protected by making state action more difficult and by dividing up power so that no one branch of government becomes too powerful"(hereinafter referred to as Kirsty McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*). For a very detailed explanation, see J Cassels "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" (1989) 37 *American Journal of Comparative Law* 495 at 513 and M De Blacam 'Children, Constitutional Rights and Separation of Powers' (2002) 37 *Irish Jurist* 113 at 133-34.

[609] Judicial review of legislative and executive action is an epitome of such checks and balances.

starkness of the original doctrine.[610] In *The First Certification Case*,[611] the Constitution Court said:

> The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.[612]

For times without number, the courts have issued orders and granted reliefs which have socio-economic repercussions and impact on policies, holding that "there are no bright lines that separate the roles" of the three branches from one another, and that although certain matters are pre-eminently within the domain of one or the other of the arms of government and not the other,[613] "this does not mean that courts cannot or should not make orders that have an impact on policy."[614] In *Mohamed v President of the Republic of South Africa*,[615] the court stated that

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[610] For B Ackerman "The new separation of powers" (2000) 113 *Harvard Law Review* 633, rather than viewing a separation of powers as a coherent doctrine, it should be seen as fulfilling different functions — which are not necessarily best fulfilled through the same division of powers and functions in a particular model of government. He argues that there are three motivating factors behind the separation of powers doctrine, namely, the ideal of democracy; the 'professional competence' of the members of the three branches, that is, a functional specialisation; and the 'protection and enhancement of fundamental rights'. For him, the division of powers into the triadic legislature, executive and judiciary is, however, inadequate to fulfil these functions. What is required instead is a model of 'constrained parliamentarianism' (along the model of the British parliamentary system), where this central power is 'checked and balanced by a host of special-purpose branches, each motivated by one or more of the three basic concerns of separationalist theory'.

[611] Para 109.

[612] Frankfurter J embarked on this point in *Yougstown Sheet & Tube Co v Sawyer* 343 US 579 at 610 (1951) and said, "(t)he areas of separation of powers and checks and balance are partly interacting, not wholly disjointed." See Stone Geoffrey R. et al *Constitutional Law* (Boston: Little Brown & Co, 1986) 342; Tribe, Laurence, *American Constitutional Law* (2nd ed) (New York: Foundation Press, 1988) 18-22.

[613] In *De Lange v Smuts NO* 1998 (7) BCLR 779 (CC), 1998 (3) SA 785 (CC), Ackermann J made the following remarks: "I have no doubt that over time our Courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest." See also *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), (2000 (1) BCLR 39 para 66; *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC), (2000 (8) BCLR 837 paras 63 – 64; and *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC), (2001 (1) BCLR 77 para 46.

[614] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721para 98. Hereinafter referred to as *Treatment Action Campaign and Others (No 2).*

[615] 2001 (3) SA 893 (CC).

> To stigmatise such an order [against the government] *as a breach of the separation of state power* … is to negate a foundational value … namely, supremacy of the constitution and the rule of law.[616]

A closer look at the jurisprudence of other jurisdictions[617] on this score shows that courts in other countries also accept that it is appropriate to issue injunctive relief against the state.[618] Thus, these courts have been able to push back the frontiers, and widened the horizons, of the doctrine. It therefore makes sense to articulate that the doctrine of separation of powers is currently aimed at enhancing democracy, increasing accountability and efficiency, and protecting the fundamental rights of the citizenry against state tyranny.[619] To stigmatise judicial vindication of "these all-important rights"[620] as a breach of separation of powers does not only run in the face of logic and common sense and values which all humanity cherish, but also constitutes a scar on the nation's conscience.[621] The separation of powers principle is therefore not simply a formal guide to the organization of state power. It can be given teeth by constitutional courts to reinforce the protection conferred by the constitution on individual rights, and to prevent one branch of government from accumulating excessive powers.

One more protest to the legality of the courts dealing with socio-economic rights, at the inception of the Final Constitution, is that judicial involvement in social and economic rights claims will result in a violation of the separation of powers among the three branches or organs of government (the legislature, the executive and the judiciary).[622][623] This is because,

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[616] Para 71.

[617] United States of America (*Brown v Board of Education* 347 US 483 (1954)); India (*M C Mehta v State of Tamil Nadu* [1996] 6 SCC 756).

[618] But never has it been argued that this constitutes a breach of the separation of powers.

[619] B. Ackerman "The New Separation of Powers" (2000) 113 *Harvard LR* 634 at 640.

[620] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

[621] Is it not illogical to guarantee and protect through the courts luxuries (right to movement, to privacy, etc) and yet the same protection is not afforded to the necessities and matters of survival (food, water, health, etc)? What good is a right to vote while the voter lives in a human squalor? Are we not thus elevating luxuries above necessities? See E Mureinik "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 *SAJHR* 464.

[622] Under a "rigid" or "pure" version of the separation of powers doctrine, each branch of government is confined to the exercise of its own function and must not encroach upon the functions of the other branches. See M Vile, *Constitutionalism and the Separation of Powers* (Oxford; Clarendon Press, 1967) 13; Burt Neuborne, "Judicial Review and Separation of Powers in France and the United States" (1982) 57 *New York University Law Review* 363, at 370; *Attorney General for Australia v The Queen and the Boilmakers' Society of Australia and Others* [1957] AC 288 (HL); *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC); In *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic South Africa* 1996 (4) SA 744 (CC), paras 22, 24, 26, 45 and 46.

[623] The tendency has been to identify the legislature with the enunciation of rules; the executive with implementation; and the judiciary with interpreting the rules to particular circumstances, or "particularisation." See B Neuborne, "Judicial Review and Separation of Powers in France and the United States" (1982)57 *New York University Law Review* 363 at 370. As shown by B Neuborne, at 371, this

where courts deal with social and economic rights, such activity allegedly entails the courts exercising functions traditionally associated with the other, elected branches of government, such as considering budgetary implications and prioritising expenditure[624] or dealing with programs and policies that normally belong on the agenda of the legislature.[625] A final assertion is that, "if social and economic rights are made justiciable and are vindicated by the courts, the result will tend to distort the traditional balance of the separation of powers between the judiciary and other branches of government in that more power will flow to the judiciary." [626]

With regard to the concern on the budgetary implications of adjudication of social and economic rights, the Committee on Economic Social and Cultural Rights has observed that, "courts are generally already involved in a considerable range of matters which have important resource implications."[627] In the *First Certification Case*, the Constitutional Court made a similar point when it expressly rejected the argument that the inclusion of social and economic rights in the South African Constitution was incompatible with the separation of powers because, *inter alia*, it would result in the courts dictating to the government how the budget should be allocated:[628]

> A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including social and 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

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version of the separation of powers as mutually exclusive functional enclaves, however, does not reflect reality. In the words of one American commentator, the reality is more along the lines of a "pragmatic mixture of functions". "Courts enunciate policy whenever they decide a hard case; executive officials enunciate policy, both formally and informally, whenever they administer an even mildly complex scheme; legislatures implement policy whenever they act to advance existing goals (constitutional or otherwise); courts routinely implement policy whenever they act in aid of an existing rule; legislatures frequently resolve disputes about the meaning of existing policies; and the executive resolves factual and legal disputes as a matter of course."

[624] G Hogan "Directive Principles, Social and economic Rights and the Constitution" (2001) 36 *Irish Jurist*, 174 at 189.

[625] B De Villers, "Social and Economic Rights" in Van Wyk, J. Dugard, B. de Villiers and D. Davis (eds.), *Rights and Constitutionalism – The New South African Legal Order*,(Oxford: Clarendon Press, 1996) 529 at 606.

[626] G Hogan, "Judicial Review and Social and economic Rights" in Binchy & Sarkin (eds.), *Human Rights, the Citizen and the State: South African and Irish Approaches* (Dublin; Roundhall Sweet & Maxwell, 2001) 1at 8.

[627] *See* CESCR, *General Comment No. 9, The Domestic Application of the Covenant,* (Nineteenth Session, (1998), U.N. Doc. E/C.12/1998/24 (1998), para 10.

[628] *The First Certification Case* (note 540 above) para 76.

> the separation of powers … The fact that social and economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability.[629]

The problem arises when the judiciary is tasked with extra powers which would fall within the sphere of other governmental organs. It is well-known that courts are mandated to review state action for proper compliance with the constitution and others laws. Where a court reviews governmental decisions, policies or programmes for compliance with regulatory instruments, there is a "flow of power" to the judiciary that is part of the very notion of balance of powers[630] in democracies based on human rights. Excluding access to housing rights from judicial review is in essence to allocate the judicial role, in the case of such rights, to the legislature. As such, this would appear to deform the conventional roles of the respective institutions in a democracy. Granting the legislature authority to review its own actions for compliance with the entrenched rights would amount to granting it a function that is generally reserved to the judiciary and confers unchecked power to the elected branches of government in critical areas of decision-making.

While the doctrine of separation of powers is so momentous in any democratic country, it must be applied consistently with other principles, such as the rule of law[631] and, in the case of constitutional democracies, constitutional supremacy.[632] Under the principle of the rule of

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[629] *The First Certification Case* (note 541 above) paras 77and 78; See also *Minister of Health and Others v. Treatment Action Campaign and Others (no 2)* 2002 (5) SA 721 (CC) paras 38 and 99; *Government of the Republic of South Africa and Others v. Grootboom and others* 2001 (1) SA 46 (CC) para 20; *Khosa and Others v. Minister of Social Development and Others; Mahlaule and Others v. Minister of Social Development and Others* 2004 (6) SA 505 (CC) para 19.

[630] That is a "check" by the judiciary on the Executive branch as to whether it accords with its constitutional obligations upon exercising its powers. In *Azanian Peoples Organisation (AZAPO) and Others v. President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC) para 12, it was stipulated that Constitutional Principle VI provides that "(t)here shall be a separation of powers between the legislature, executive and the judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."

[631] The "rule of law" functions as a fundamental principle of any constitutional democracy. In its most basic form, it reflects the idea that a free people "should have a government of law, not men"; The doctrine of the rule of law has extensively been dealt with in Woolman, S. et al, in *Constitutional Law of South Africa* (2nd Ed.), (Cape Town: Juta & Co Ltd, 2008); there is also a wide trend with regard to its branch called 'legality'. In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC), the court said that "(t)he term 'lawfulness' in s 33(1) of the Constitution is an all embracing and an umbrella concept that encapsulates all the requirements for administrative legality including all those requirements and grounds for invalidity set out in Section 6 of the Promotion of Administrative Justice Act." See also *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC).

[632] Aoife Nolan, Bruce Porter, Malcolm Langford, "The justiciability of social and economic rights: An updated appraisal" (Centre for Human Rights and Global Justice Working Paper, NYU School of Law; New York, Number 15, 2007).

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.[633] In terms of constitutional supremacy,[634] the courts are obliged to ensure that 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, inclusive of access to adequate housing.

As Sandra Liebenberg eloquently urged, "The mere fact of far-reaching or unforeseen consequences should not imply total abdication by the judiciary of its primary responsibility of upholding the norms and values of the Constitution."[635] Cape of Good Hope Provincial Division High Court enunciated the same effort in *Rail Commuter Action Group & Ors.* v *Transnet Ltd t/a Metrorail & Others (No.1)*:[636]

> The problems of polycentricity must clearly act as important constraints upon the adjudication process, particularly when the dispute has distributional consequences. But polycentricity cannot be elevated to a jurisprudential mantra, the articulation of which serves, without further analysis, to render courts impotent to enforce legal duties which have unpredictable consequences.

In the same vein, in the Irish *TD* case, Denham J, in a minority judgment, pointed out that,

> [A]n important principle of the [Irish] Constitution is that the basic law - the Constitution - is supreme and the superior courts are its guardian … it is the power, duty and responsibility of the

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633 The Committee on Economic, Social and Cultural Rights has stated with regard to the rule of law that 'within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.' (CESCR *General Comment No. 9, The Domestic Application of the Covenant*, (Nineteenth Session, 1998), U.N. Doc. E/C.12/1998/24 (1998), para 14).

634 The principle of 'constitutional supremacy' is stipulated in Section 2 of the R.S.A. 1996 Constitution. Michelman F. I. in Woolman, S. et al, in *Constitutional Law of South Africa* (2nd ed.)(Juta & Co Ltd, Cape Town;2008) states that "whenever and insofar as a legal norm or rule of decision laid down by the final Constitution comes into practical collision with a legal norm laid down by any sort of non-constitutional law, the Final Constitution is to be given precedence by anyone whose project is to carry out the law of South Africa." It was classically propounded in *The First Certification case* para 44, that "a constitutional democracy is based on the supremacy of the Constitution protected by an independent judiciary."

635 S Liebenberg, "Social and Economic Rights" in M. Chaskalson et al (eds.), *Constitutional Law of South Africa* (Cape Town; Juta, 1996) para 41-11. Liebenberg has indicated how 'polycentricity' considerations may operate in the context of constitutional adjudication: "The fact that there is a wide range of policy options for giving effect to a particular right suggests that a broader margin of discretion should be accorded to the legislature. It also suggests a measure of remedial flexibility which affords the legislature an opportunity to fashion an appropriate scheme falling within the bounds of constitutionality."

636 2003 (5) SA 518 (C) at 576.

> High Court and the Supreme Court to guard the Constitution … The principles of the separation of powers and the principle that the Constitution is supreme must be construed harmoniously. . .[637]

A parallel approach was adopted by the Court in *Minister of Health* v. *Treatment Action Campaign (No.2)*[638] when dealing with the argument that judicial intervention in relation to governmental policymaking would violate the separation of powers doctrine. The Court stated that:

> [T]here are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy … The primary duty of courts is to the Constitution and the law, "which they must apply impartially and without fear, favour or prejudice"[639]. The Constitution requires the state to "respect, protect, promote, and fulfil the rights in the Bill of Rights"[640]. 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. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.[641]

The Supreme Court of Canada enunciated a similar position in response to a lower court judgment suggesting that applying the Canadian Charter so as to require governments to allocate resources in a particular fashion violated the separation of powers doctrine. "The *Charter* has placed new limits on government power in the area of human rights," the Court noted, "but judicial review of those limits involves the courts in the same role in relation to the separation of powers as they have occupied from the beginning, that of the constitutionally mandated referee."[642]

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[637] In *T.D.* v. *Minister for Education* [2001] IESC 86 para 140, while recognising that the separation of powers is an important aspect of the Constitution, Denham J pointed out that "in addition to that doctrine there is the jurisdiction of the courts to protect fundamental rights. This is not only a jurisdiction but a duty and obligation of the courts under the Constitution." At para 157, Denham J stated further that "where there is a balance to be achieved between the application of the doctrine of the separation of powers and protecting rights or obligations under the constitution, the Courts have a specific constitutional duty to achieve a just and constitutional balance (para 142)." Another member of the Court, Hardiman J, expressly disagreed with Denham J on this point in his judgment and a majority of the Supreme Court rejected her suggested approach, favouring a rigid interpretation of the separation of powers doctrine at the expense of the principle of constitutional supremacy.

[638] 2002 (5) SA 721 (CC).

[639] Section 165(2) of the 1996 R.S.A. Constitution.

[640] A explicit reference can be made to Section 7(2) of the 1996 R.S.A. Constitution.

[641] *Treatment Action Campaign (No.2*) (note 614 above) para 99.

[642] *Newfoundland (Treasury Board) v. N.A.P.E.* [2004] 3 S.C.R. 381 para. 105.

It is paramount to assert that separation of powers concerns are important to the judicial review of socio-economic rights, since review of these rights appears to strain at the conventional role of the courts.[643] Due to this assertion, a large number of counter-socialists have advanced the argument that socio-economic rights have constitutionally been entrenched while in fact they are inherently non-justiciable.[644] As shown in previous pages, a pure theory of separation of powers is no longer appropriate. Fairly, separation of powers is predicated on a system of checks and balances where courts are, certainly, mandated to guarantee that public power is being exercised constantly within the constitution.[645] Again, it is a directive that courts shall enforce the bill of rights, which includes socio-economic rights. It cannot therefore be said that the judicial review of socio-economic rights, in itself, violates the separation of powers doctrine.[646] For these reasons, any bald assertion that socio-economic rights are non-justiciable because they violate the separation of powers doctrine must be rejected.

5.5 APPLICATION OF THE BILL OF RIGHTS

5.5.1 Interpretation of the Right of Access to Adequate Housing

The South African Constitutional Court[647] has had the opportunity to consider the scope and context of the various socio-economic rights in different decisions[648]. Such plethora of

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[643] See Kirsty McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*, at 108.

[644] See B Ackerman "The new separation of powers" (2000) 113 *Harvard Law Review* 633 at 724-25.

[645] See P Langa, "'A delicate balance': The place of the judiciary in a constitutional democracy" (2006)22 *SAJHR* 2.

[646] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 4 SA 490 (CC) para 46, O'Regan J avowed that "the need for courts to treat decision makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself." Whilst in the Supreme Court of Appeal's decision of *Minister of Environmental Affairs and Tourism & Others v Phambili Fisheries (Pty) Ltd; Minister of Environomental Affairs and Tourism & Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) para 50, where the Court held that "deference in the judicial review of government economic Policies was appropriate for the same institutional and democratic competence reasons," Schutz JA went on to state that "[j]udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function. It simply manifests the recognition that the law itself places certain administrative actions in the hands of the executive, not the judiciary."

[647] Even the Supreme Court of Appeal and other lower courts have played a vital role in the constitutional interpretation of people's rights as guaranteed by the Constitution. Cases such as *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W); *Agrico Masjinerie (Edms) Bpk v Swiers* 2007 (10) BCLR 1111 (SCA); *Member of the Executive Council of KwaZulu-Natal Province for Housing v Msunduzi Municipality and Another* 2003 (4) BCLR 405 (N); *City of Cape Town v Persons who are presently unlawfully occupying erf 1800, Capricorn: Vrygrond Development and Others* 2003 (8) BCLR 878 (C); *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) BCLR 643 (SCA); *Barnett and Others v Minister of Land Affairs and Others* 2007 (11) BCLR 1214 (SCA); *Standard Bank of SA Ltd v Snyders and Eight Similar Cases*

decisions and judicial dicta provide us with a legal framework within which the scope and context of the right of access to adequate housing and shelter, as well as the legal consequences from which such right can be drawn and evaluated. Furthermore, the time-honoured judgment of *Grootboom*[649] deals extensively with this right as engendered by section 26 of the South African Constitution[650]. However, it is imperative briefly to consider the canons of interpretation that have meanwhile been used as the goal of constitutional or statutory interpretation.[651] This is done simply because the Constitution is also law and the judiciary has to apply the law in deciding cases as a matter of obligation.[652] Though there are numerous methods of interpretation, only four of them will be embarked upon.

(i) Literal interpretation

Literal interpretation, also referred to as 'grammatical' interpretation, means that regard will be had to the 'ordinary' or 'dictionary' meaning of the words in a particular provision.[653] If

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2005 (5) SA 610 (C); *Lingwood and Another v The Unlawful Occupiers of R/E of Erf 9 Highlands* 2008 (3) BCLR 325 (W) support the above assertion.

[648] See *Soobramoney Case*; *Grootboom Case;* Treatment *Action Campaign (No.2*); *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (7) BCLR 652: 2001 (3) SA 1151 (CC)*; Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others 2004 (6) SA 505 (CC); Jaftha v Schoeman; Standard Bank of SA Ltd v Saunderson and Others* 2006 (9) BCLR 1022 (CC).

[649] 2001 (1) SA 46 (CC).

[650] D van Wyk, et al (Eds) *Rights and Constitutionalism: The New South African Legal Order* (Cape Town; Juta & Co. Publishers, 1994) at 599; J de Waal , et al, (Eds) *The Bill of Rights Handbook* (2005) 586-590;

[651] The constitutions leave us only with the broad principle that statutory interpretation has to be a judicial exercise which leaves considerable discretion about a correct and proper nature of judging the application of statute in individual cases.

[652] In the words of Chief Justice Marshall in *Marbury v Madison* 5 US (1 Cranch) 137 (1803), at 177- 178, "The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is consequently, to be considered, by this court, as one of the fundamental principles of our society. ... It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

[653] The legal meaning of a non-technical word used in an enactment is presumed to correspond to its ordinary meaning, which has been defined as its proper and most known signification. L du plessis, "Interpretation" in Stuart Woolman et al *Constitutional Law of South Africa*, (2nd ed.) (Cape Town; Juta & Co Ltd, 2008) 32-30 says that clear language is placed on the same footing as plain or ordinary language, in other words, the language that a native speaker would use and understand. In *Aviation Union of South Africa and Others v*

there is more than one ordinary meaning, the most common and well-established is taken to be intended. In *Exxon Corpn* v *Exxon Insurance Consultants International Ltd*,[654] Graham J said that "words must be treated as having their ordinary English meaning as applied to the subject-matter with which they are dealing."[655] In the constitutional sphere, this is normally referred to as textual approach to interpretation. The strength of this approach is that it enables citizens to rely on their understanding of the words of the law, whereas it would be undemocratic for legal specialists to exercise a monopoly over the meaning of legal texts. In *Geyser and Another v Msunduzi Municipality and Others*,[656] it was held that "a Court would usually begin its interpretation of a statute by applying the literal rule which is that the words had to be given their ordinary, literal, grammatical meaning. The object, in construing the statute, was to ascertain the intention the Legislature meant to express from the language it employed. This rule was, however, subject to exceptions when Courts modified such literal meaning of words where the meaning was at variance with the intention of the Legislature."[657]

This approach or method of interpretation, best known as "literalism" in Australia,[658] was applied by the Australian High Court centuries ago in the famous case of *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd*[659] where the court rejected any "implication which is formed on a vague, individual conception of the spirit of the compact

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South African Airways (Pty) Ltd and Others 2010 (4) SA 604 (LAC) para 14, it was stated that "A careful consideration of the arguments advanced on behalf of the 'ordinary meaning' school of thought reveals that this school of thought has the literal theory of statutory interpretation as its basis."

654 [1981]1 WLR 624 at 633; see *Selvey* v *DPP* [1970] AC 304 at 330; In *Black-Clawson International Ltd v Papierwerke Waldhof- Aschaffenburg* [1975] AC 591 (HL), Lord Reid emphasised that "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used."

655 Per Schreiner JA in *Jaga v Donges, NO and Another: Bhana v Donges, NO and Another* 1950 (4) SA 653 (A) 662G-H: "Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "the context", as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background . . ."

656 2003 (5) SA 18 (N) at 32D - E.

657 In *Azisa (Pty) Ltd v Azisa Media CC and Another* 2002 (4) SA 377 (C) at 385, Nel J reiterated that "When attempting to ascertain the often elusive and mythical collective intention of the Legislature, the words used must firstly be attributed their 'ordinary meaning', 'popular meaning', literal meaning', 'plain meaning' or 'grammatical meaning." See also *Waymark and others v Meeg Bank Ltd* 2003 (4) SA 114 (TkH), para 32; *Ebrahim v Minister of the Interior* 1977 (1) SA 665 (A); *Savage v Commissioner for Inland Revenue* 1951 (4) SA 400 (A) at 410; *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and others* 2000 (2) SA 797 (SCA).

658 Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Sydney: Federation Press, 1996) 6 at 16.

659 (1920) 28 CLR 129.

[i.e. the Constitution], which is not the result of interpreting any specific language to be quoted, nor referable to any recognized principle of the common law of the Constitution." It also said:

> It is the chief and special duty of this court faithfully to expound and give effect to [the Constitution] according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed ... In doing this, to use the language of Lord Macnaghten [in a 1913 case], "a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. ..."[660]

Du Plessis and Corder[661] have, however, noted that the full meaning of a constitutional provision can…only be comprehended if the other four methods of constitutional interpretation are invoked as well. Grammatical interpretation…is neither the only nor the supreme method of constitutional interpretation. It has to function in conjunction…with the other methods of constitutional interpretation. Thus, developed the golden rule of interpretation is the classical exhibition. In *Grey v Pearson,*[662] Lord Wensleydale has long asserted:

> The grammatical and ordinary sense of words to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument at issue, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no further.[663]

The literal interpretation has "probably reached its apogee and is on the wane."[664] In spite of the concrete pronouncements[665] on this approach, Kentridge JA contended that "the Constitution does not mean whatever we might wish it to mean" and that as a legal instrument its language must be respected.[666] Thus, while the literal or textual approach in

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[660] Ibid, at 142-143.

[661] L du Plessis and Corder, H *Understanding South Africa's Transitional Bill of Rights* (Durban: Juta & Co Ltd, 1994) 73.

[662] [1843-60] ALL Rep 21 (HL) at 36.

[663] *S v Toms; S v Bruce* 1990 (2) SA 802 (A) at 807H-J and *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (30 SA 582 (SCA), paras 10-13 in which golden rule was resorted to.

[664] See G E Devenish, *Interpretation of Statutes* (Cape Town: Juta & Co, 1992) 26.

[665] See *Standard Bank Investment Corporation Ltd v Competition Commission & others; Liberty Life Association of Africa Ltd v Competition Commission & others* 2000 (2) SA 797 (SCA), at 811A-H.

[666] In *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), paras 17-18, his lordship said, "While we must usually be conscious of the values underlying the Constitution, it is nonetheless out task to interprete a written instrument. I am well aware of the fallacy of supposing that general language must have a single meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean . . . Even a Constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to values the result is not

the canons of interpretation on interpreting section 26 is imperative, it is not necessarily conclusive as it has its own problems. Blignault J highlighted in Mercedes *Benz Financial Services South Africa (Pty) Ltd v Dunga*,[667] that:

> It is generally recognised in the judgments that I have seen, that a literal interpretation of s 86(10) of the National Credit Act 34 of 2005 read on its own, may give rise to unfortunate results.

(ii) Purposive interpretation

Purposive interpretation is also referred to as "value oriented" or "teleological"[668] interpretation.[669] The core of the purposive approach can best be understood when it is contrasted with the literal approach to interpretation. Both are the most basic approaches to the construction of ordinary statutes.[670] Whereas the literal approach centres around the ordinary meaning of the words in the legislative text, the purposive approach attempts to go beyond the plain meaning and to discern the purposes or objectives that the law was intended to achieve, and hence to interpret the provision in such a way as to enable the objective to be realized.[671] The purposive approach is not solely reliant on the grammatical or ordinary

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interpretation but divination . . . I would say that a Constitution embodying fundamental rights should as far as its language permits be given a broad construction." In *S v Gumede & Others* 1998 (5) BCLR 530, at 542A- C, Magid J observed the wording of section 39(1) of the Final Constitution and uttered that it requires a liberal interpretation of the Bill of Rights, but does not permit or encourage courts to ignore the actual language used in the Constitution. If it were felt that the rights of detained persons should be extended, this should be achieved by means of legislative action and not by means of judicial activism, or by interpretation which read words into provisions which were not there or excised words which were.

667 2011 (1) SA 374 (WCC) para 26. In *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 (1) SA 98 (SCA) at 107B – G, Scott JA propounded: "The starting point in statutory interpretation remains an endeavour to ascertain the intention of the Legislature from the words used in the enactment. Those words must be attributed their ordinary, literal, grammatical meaning. Before a court may do otherwise, whether by cutting down or adding to or varying the actual language of the statute, it must be shown that the case falls within what has been described as the rule in *R v Venter* 1907 TS 1910. That is, that a court may depart from the ordinary literal meaning of the words used only where not to do so 'would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account.'" See also *Summit Industrial Corporation v Claimants Against The Fund Comprising the Proceeds of the Sale of the MV Jade Transporter* 1987 (2) SA 583 (A).

668 Devenish *Interpretation of Statutes* (Juta & Co: Cape Town, 1992) 39.

669 It is also known as the mischief rule of interpretation. Walter F. Murphy et al. *American Constitutional Interpretation* (Westbury, NY: Foundation Press, 2nd ed. 1995) at 400-409 identify 5 kinds of purposive approaches or "systemic purpose" in constitutional interpretation : (a) the prudential approach; (b) the doctrine of the clear mistake (which advocates judicial deference to the acts of Congress unless a violation of the Constitution is very clear); (c) reinforcing representative democracy; (d) protecting fundamental rights; (e) the aspirational approach.

670 See e.g. M Zander, *The Law-Making Process* 3rd ed. (London: Weidenfeld and Nicolson, 1989) chap. 2.

671 It seeks the basic goal(s) that either an isolated clause or the text as a whole attempts to achieve, then interprets the clause or document in light of this objective. See generally WF Murphy et al. *American Constitutional Interpretation* (Westbury, NY: Foundation Press, 2nd ed. 1995) 388.

meaning of words. It recognises that language is inherently ambiguous, the meaning of which cannot be determined in isolation.[672] According to Botha:[673]

> The purpose or object of the legislation (the legislative scheme) is the prevailing factor in interpretation. The context of the legislation, including social factors and political policy directions, are also taken into account to establish the purpose of the legislation.

The purposive approach espouses a broader view of what are the relevant materials and factors to be considered in ascertaining that intention.[674] In *S v Mhlungu and Others*,[675] Sachs J said:

> A purposive and mischief-orientated reading as against a purely literal one always involves a degree of strain on the language. In the present case, the strain comes not so much from a counter-literal attempt to deal with inherent ambiguity of words on their own, or from the need to cut back the meaning of open-ended words, but from the tension of counter-posing the broad words of limited application in s 241(8) with the narrower words of wide application in chap 3. More concretely, it is established by the need to weigh the interest and purpose of s 241(8) read on its own, as against the intent and purpose of chap 3.

The purposive rights interpretation is said to be generous or liberal in that it seeks to optimize safeguards against interference with constitutionally entrenched rights. In *R v SOS for the environment ex parte Spath Holme*,[676] Lord Cooke affirmed that "While today the purposive principle of interpretation is the governing one if available, other established canons may come into play. … such as that Parliament does not lightly take the exceptional course of

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[672] See G Carpenter "More about language, meaning and statutory interpretation" (1999) 62 *THRHR* 626 at 628; and C Botha *Statutory Interpretation: An introduction for students* 4 ed (Juta & Co: Cape Town, 1999) 51.

[673] C Botha *Statutory Interpretation: An introduction for students* 4 ed (Juta & Co: Cape Town, 1999) 51. A classic dictum with respect to the contextual approach was postulated by Rumpff CJ in *SIR v Brey* 1980 (1) SA 472 (A) at 478A-B, where he held that "For purposes of ascertaining the meaning of words in a legal document like a contract, a will or a statute, a court never looks at the words in stark isolation. It looks at the words in their setting, at the context in which the words are used and at the purpose for which the words are intended."

[674] In *Government of the Republic of Namibia and Another v Cultura 2000 and Another* 1994 (1) SA 407 at 418, Mahomed CJ remarked that "A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government. An interpretation of art 140(3) which limits its potential operation only to acts by the previous Administration which were 'uncompleted' would not give to the clear words of the article a construction which is most beneficial to the widest possible amplitude'." See *Catnic Components Ltd and Another v Hill and Smith Ltd* [1982] RPC 183 (HL), [1981] FSR 60; *Kirin-Amgen Inc and Others v Hoechst Marion Roussel Ltd and Others; Hoechst Marion Roussel Ltd and Others v Kirin-Amgen and Others* [2005] 1 All ER 667 (HL); *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC), (2007) 28 ILJ 2405, 2008 (2) BCLR 158, [2007] 12 BLLR 1097.

[675] 1995 (3) SA 867 (CC) para 125.

[676] [2001] 2 WLR 15 (HL).

delegating to the executive the power to amend primary legislation; that, when it does so, a restrictive approach to interpretation is legitimate; and that, in the absence of clear language Parliament is presumed not to take away property rights without compensation."

Old as it is, in South Africa, *Hleka v Johannesburg City Council*,[677] is one of the decisions in which the rule was re-stated and applied. As Lourens du plessis[678] indicates, this line of reasoning likewise informs constitutional interpretation: it holds that the previous constitutional system of South Africa was the fundamental mischief to be remedied by the application of the new Constitution.[679] When interpreting the Constitution it is imperative, as Froneman J put it in *Qozoleni v Minister of Law and Order*,[680] to understand the mischief that the new constitutional order was meant to remedy and to extract the constitutional principles or values against which laws can be measured. Peete J articulated in *Khathang Tema Baitsokoli v Maseru City Council*,[681] that "It is . . . within the inherent right of the courts to interpret the constitutional clauses affecting the social and economic rights of the community in an expansive and purposive manner where this is appropriate."

In applying purposive interpretation too, though it has quickly been regarded as a primary consideration in constitutional interpretation, caution is warranted. Glib purposivism should not be allowed to dominate constitutional interpretation in the same manner and extent that *literalism-cum-intentionalism*[682] has been dictating statutory interpretation. In the same vein, the aim is therefore to determine the meaning of section 26 based on the purpose of its enactment and also the values which underlie the Constitution as a whole. Similarly, historical, doctrinal, prudential, structural and ethical approaches can be used to discuss the purpose behind a constitutional provision. It can therefore be seen that the purposive approach to constitutional interpretation can best be understood not as an independent modality of constitutional argument, but as an integral part of each of the other constitutional modalities discussed in this chapter, particularly where the argument being made departs from the plain meaning of the text or there is no such plain meaning which can be used to resolve the issue in question.

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[677] 1949 (1) SA 842.

[678] LM du plessis, "Interpretation of Statutes and the Constitution" in *Bill of Rights Compendium* Durban; Butterworth, 2002). See also L M Du Plessis and H Corder *Understanding Sotuh Africa's Transitional Bill of Rights* (Cape Town: Juta & Co Ltd, 1994).

[679] In *Potgieter v Kilian* 1995 (11) BCLR 1498 at 1515B-F.

[680] 1994 (3) SA 625 at 633.

[681] CONST/Case/1/2004, para 23.

[682] *Literalism-cum-intentionalism* is the combination of literalist and intentionalist assumptions or approaches of interpretation. See L du Plessis *Re-Interpretation of Statutes* (Durban: Butterworths, 2002).

(iii) **Contextual interpretation**

Contextual interpretation holds that the meaning of a legislative provision and its words and language can only be determined in the light of its context or background conditions.[683] Contextual interpretation is also referred to as 'systematic' interpretation.[684] In *Ferreira v Levin NO; Vryenboek v Powell NO*,[685] Ackermann J attributed:

> The meaning and ambit of these specifically and separately protected freedom rights must of course, in my view, be construed in the context of their specific entrenchment with due regard to the rules of constitutional construction and, in particular, the purpose they were intended to serve.[686]

It is imperative to construe the constitutional provision in context and their background.[687] The Constitutional Court has reiterated on several occasions that the rights in the 'Bill of Rights' cannot be interpreted in the abstract, but must rather be interpreted in the light of their context. Contextual interpretation will be well thought-out in two different ways. On the one hand, rights must be understood in their textual setting. This is because the rights are, as indicated earlier, interrelated and mutually supportive of one another[688]. Such interrelationship requires that any interpretation of sections 26, 28(1) (c) and 35(2) (e) of the Constitution be heeded in relation to other important and interrelated rights such as right to equality, human dignity and other socio-economic rights.[689]

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[683] In *Grootboom case* para 22, Yacoob J said that "Interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of chap 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context." The same exposition was expressed in *Treatment Action Campaign (No.2)* (note 614 above) para 24.

[684] *Jaga v Dongas NO & Another; Bhana v Dongas NO & Another* 1950 (4) SA 653 is a seminal case in South Africa for contextual interpretation too.

[685] 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC), (hereinafter referred to as *Ferreira case*).

[686] Para 54; In *Charlebois v. Saint John (City)* [2005] 3 S.C.R. 563, 2005 SCC 74, para 50, Supreme Court of Canada said: "In adopting a contextual approach, the courts focus on any provision or series of provisions that in their opinion is capable of shedding light on the interpretive problem at hand. Looking to other provisions is useful because courts make certain assumptions about the way legislation is drafted. . . . In some cases the courts focus on a particular provision or series of provisions found elsewhere in the Act. . . . The court's reasoning here is based on the presumption of orderly and economical arrangement. It would be contrary to the principles of sound drafting for a drafter to place a provision dealing with both commercial and non-commercial activities in the midst of a series of provisions dealing with commercial activities only."

[687] See *Ferreira case*, para 172; *Makwanyane case*, para 10.

[688] In *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others 2004 (6) SA 505 (CC)* para 44, the Court emphasized the interconnectedness of the rights in the Bill of Rights and held that a factor in ascertaining the reasonableness of a measure is its impact on the other rights.

[689] *Grootboom Case* paras 70-79; *Treatment Action Campaign (No.2*) (note 614 above) para 74; *Khosa Case* para 44.

The textual context is essential in as much as it may reveal a carefully construed constitutional scheme within which the various sections of the Bill of Rights should be interpreted[690]. For instance, The Court found that the obligation created by s 28(1)(c) can properly be ascertained only in the context of the rights and obligations created by sections 25(5), 26 and 27 of the Constitution. Each of these sections expressly obliges the State to take reasonable legislative and other measures, within its available resources, to achieve the rights with which they are concerned[691].

Secondly, when the provisions relating to access to housing are interpreted, it is imperative to take into consideration not only the social context but the historical perspective in which the state's action is being judged as well[692]. On its inegalitarian context, the Court indicated on interpreting the Bill of Rights that:

> 'This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done[693].

The contextual and purposive interpretations share a family resemblance and are mostly and lately preferred by the courts in South Africa. However, laudable as their shift is, they should not be understood as a panacea for all the inadequacies that relate to conventional approaches to constitutional interpretation.[694] In *In re Former Highlands Residents: Sonny v Department*

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[690] This view is also shared by P de Vos, 'The Right to Housing' in Danie Brand and Christof Heyns (Eds) *Socio-EconomicRrights in South Africa*, (2005, Pretoria Unirvesity Law Press; Cape Town); The Constitutional Court pronounced in *Grootboom Case* that "People who have children have a direct and enforceable right to housing under Section 28(1)(c), while others who have none or whose children are adult are not entitled to housing under that section, no matter how old, disabled or otherwise deserving they may be. The carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the State on demand. Moreover, there is an obvious danger. Children could become stepping stones to housing for their parents instead of being valued for who they are."

[691] *Grootboom*, para 74.

[692] In *Soobramoney Case* para 11; *Grootboom Case* para 25; *Treatment Action Campaign (No.2*) (note 614 above) para 24, the socio-economic rights, and the corresponding obligations of the State, were interpreted in their social and historical context.

[693] *Grootboom Case* paras 93-94.

[694] See GE Devenish 'Review of D van Wyk, J Dugard, B de Villers and D Davis (eds) *Rights and Constitutionalism: The New South Africa Legal Order* (1995) Tydskrif vir die Suid-Afrikaans Reg 595, at 597.

of Land Affairs,[695] Gildenhuys J expressed that 'important as the context or purpose of legislation may be, elevating it to the prevailing factor of interpretation will not always provide the key to unlock meaning.' It therefore means that even contextual interpretation must not be viewed as conclusive in all respects as it has potential to turn into a rather unruly horse too.

(iv) Historical interpretation

This approach advocates the meaning of the constitutional text at the time of its adoption, and the intention of its framers and ratifiers.[696] Historical arguments draw legitimacy from the social contract negotiated from an original position. The constitution is understood as a social contract entered into by the founding generation and binding on subsequent generations subject to the possibility of constitutional amendment. The terms of the contract, and their meaning, were fixed at the crucial historical moments of the adoption and amendment of the constitution, and the need for enforcement of such terms is the sole justification for judicial review of subsequently enacted legislation.

This historical, more commonly known as originalism in the US, is usually associated with the debate between "conservatives"[697] and "liberals" in the province of constitutional law. There are numerous versions of originalism. One focuses on the meaning of the constitutional text that the framers intended it to bear. Another upholds the meaning of the text as commonly understood by members of the community at the time of its enactment.[698] Within originalism, there are also different views regarding whether the interpretive enterprise should focus on the text or on the intention and purposes of the founders.[699] According to one school of thought (which can be described as the textualist version of

[695] 2000 (2) SA 351 (LCC); see also *Qozoleni v Minister of Law and Order* 1994 (3) SA 625 (E) at 633G.
[696] P Bobbitt, *Constitutional Fate* (Oxford: Oxford University Press, 1982) at 26.
[697] The conservatives rely on originalism to argue that it is wrong to read into the Constitution certain privacy rights such as the right to abortion, or to understand its prohibition of "cruel and unusual punishments" as including the death penalty. See D Davis et al., "Democracy and Constitutionalism: The Role of Constitutional Interpretation, in Dawid van Wyk et al. (eds), *Rights and Constitutionalism : The New South African Legal Order* (Kenwyn: Juta, 1994) 1 at 12.
[698] See Walter F. Murphy et al. *American Constitutional Interpretation* 2nd ed. (Westbury, New York: Foundation Press, 1995) 389-390.
[699] See P Brest, "The Misconceived Quest for the Original Understanding" (1980) 60 *B.U.L. Rev.* 204.

originalism), all that matters is the words of the constitutional text as understood by the founding generation.[700]

Another school (which can be called "intentionalism" to contrast it with "textualism") privileges the intention of the founders, what they had in mind and what objectives they sought to achieve, and advocates the liberal use of records of debates at the constitutional convention and other sources of historical evidence for the purpose of ascertaining such intention and purposes. Judge Bork advocates the following originalist approach to judicial review of legislation:[701]

> All that a judge committed to original understanding requires is that the text, structure and history of the Constitution provide him not with a conclusion but with a major premise. The major premise is a principle or ... value that the ratifiers wanted to protect against hostile legislation or executive action. The judge must then see whether that principle or value is threatened by the statute or action challenged in the case before him.[702]

In S v. *Makwanyane,*[703] the Court observed that "Our Constitution is also the product of a multiplicity of persons, some of whom took part in the negotiations, and others who as members of Parliament enacted the final draft. The same caution is called for in respect of the comments of individual actors in the process, no matter how prominent a role they might have played."[704] The Final Constitution, as a remedy to a fundamental mischief in South Africa's history, is inevitably part of a political history that can help determine the meaning and significance of many constitutional provisions in the Bill of Rights, in particular, section 26.[705] In *Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*

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[700] Sir A Mason, "The Interpretation of a Constitution in a Modern Liberal Democracy", in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Sydney: Federation Press, 1996) 13 at 14-15 is very authoritative in this regard.

[701] RH Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon and Schuster, 1991).

[702] Ibid, at 162. Antonin Scalia (Justice of the US Supreme Court), *A Matter of Interpretation* (Princeton: Princeton University Press, 1997) 38, asserted too that "The Great Divide with regard To constitutional interpretation is not that between Framers' intent and objective meaning, but rather that between *original* meaning (whether derived from Framers' intent or not) and *current* meaning. The ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and find that changing law. Seems familiar, doesn't it? Yes, it is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures."

[703] 1995 (3) SA 391 (CC); 1995 (2) SACR 1; 1995 (6) BCLR 665.

[704] Para 18.

[705] Such historical approach can best be seen in 1989 *South African Journal on Human Rights* 129- 132 in which The Freedom Charter, adopted in 1955 by the ANC and severally revised, submitted, Success of the constitution will be, to a large extent, determined by the degree to which it promotes conditions for the active

and Another (Lawyers for Human Rights as Amicus Curiae),[706] the Constitutional Court emphasised:

> Historical context is relevant to one's understanding of the constitutional protection against arbitrary deprivation of property and to access to adequate housing. Apartheid legislation undermined both the right of access to adequate housing and the right to property.

Besides, there are incidences where all these models of interpretation overlap or may be applied together. The courts do so in order to determine the most appropriate approach that will result in a fair and just decision. For instance, the Constitutional Court noted in *The Government of Republic of South Africa v Grootboom*,[707] that the facts of this case require a twofold method of interpretation. On the one hand, a textual interpretation of these socio-economic rights and, on the other hand, a contextual interpretation of these rights can be interpreted in their social and historical context.

Apart from all these models of interpretation, it must be echoed that value-based and need-based approaches in catering for socio-economic rights should be taken into cognizance. Just as Young[708] indicated, in the first formulation, the minimum core reflects the aspects of the right which satisfy the "basic needs" of the rights-holders, rather than any supplementary, elective, or more ambitious level of interests. This type of inquiry immediately orients the "core" of the right to the essential and minimally tolerable levels of food, health, housing, and education. Yet this formula provides little guidance in substantiating the minimum core without answering the second question—that is, what are the "basic needs" needed for?[709] Basic needs are requested as at least condition for an endurable life, or for a decent chance at a reasonably healthy and active life of more or less normal length.[710] Alternatively, basic needs are the material interests or resources required for basic functioning, or conversely for human flourishing. A connection between the minimum core and the basic needs required for

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involvement of all sectors of the population at all levels in government and in the economic and cultural life."

[706] [2011] ZACC 33 para 35.

[707] 2000 (11) BCLR 46 (CC).

[708] Katharine G. Young, "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008)33 *The Yale Journal of International Law* 113.

[709] For some discussions on the kinds of needs, see Nancy Fraser, *Unruly Practices: Power, Dicourse and Gender in contemporary social theory* (Minneapolis: University of Minnesota Press, 1989) at 163.

[710] See Jeremy Waldron, *Rights and Needs: The Myth of Disjunction, in Legal Rights 87, 92-93* (Austin Sarat & Thomas R. Kearns eds., 1996).

life and survival is useful because it focuses attention on the most urgent steps necessary for the satisfaction of particular rights, which precondition the exercise of all rights.[711]

Turning to value-based approach, it is significant to explain that a value-based core goes further than the "basic needs" inquiry by emphasizing not what is strictly required for life, but rather what it means to be human.[712] This approach points its emphasis on human dignity, equality, or freedom for the realisation of socio-economic rights. The value of dignity evokes the individual's claim to be treated with respect and to have one's intrinsic worth recognized. In a variety of constitutions, jurists have relied almost inevitably on human dignity when peeling back the justifications for rights.[713] The Constitutional Court has also affirmed the important relationship between dignity and social assistance in many ways.[714] The African Commission on Human and Peoples' Rights has held that the right to food "is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of other rights as health, education, work and political participation."[715] It is incumbent upon the interpreters that all modes of interpretation should be called when a right is to be effectuated.

It is of utmost importance that any model of interpretation engaged should not be seen in isolation from section 39(1) of the Constitution which explicitly commands the mode of interpreting the Constitution as it would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which the court was confronted.[716] In *Glenister v President of the Republic of South Africa and Others*,[717] Ngcobo CJ articulated:

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[711] S Henry, *Basic Rights: Subsisence, Affluence and U.S. Foreign Policy* (2nd ed) (Princeton: Princeton University Press, 1996) 19, says that "Rights are basic . . . if enjoyment of them is essential to the enjoyment of all other rights."

[712] See GY Katharine, "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008) 33 *The Yale Journal of International Law* 113.

[713] See LE Weinrib, "Constitutional Conceptions and Constitutional Comparativism," in Vicki C. Jackson & Mark Tushnet eds, *Defining the field of Comparative Constitutional Law*, (Westport; Praeger Publishers, 2002).

[714] See *Khosa Case* paras 27 and 33; *Mashavha v President of the RSA* 2004 (12) BCLR 1243 (CC), para 29; Arthur Chaskalson, "Human Dignity as a Foundational Value for Our Constitutional Order" (2000) 16 *SAJHR* 193 at 204 alluded, that "The social and economic rights . . . are rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health-care, food, water or in the case of persons unable to support themselves, without appropriate assistance?"

[715] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria Communication 155/96 Social and Economic Rights Action Centre v Nigeria* Fifteenth Annual Activity Report Annex V (SERAC case).

[716] In *Bernstein and Others v Bester and Others NNO* (1996 (2) SA 751 (CC) para 133, O'Ragen J clarified that "Comparative study is always useful, particularly where Courts in exemplary jurisdictions have grappled

> Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law. Firstly, section 233 requires legislation to be interpreted in compliance with international law; secondly, section 39(1) requires courts, when interpreting the Bill of Rights, to consider international law; finally, section 37(4)(b)(i) requires legislation that derogates from the Bill of Rights to be 'consistent with the Republic's obligations under international law applicable to states of emergency'. These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.

On assessing the state's action in relation to access to housing or provision for shelter, one will have to take into account the fact that many of South Africa's poorest citizens have either no access to housing or shelter,[718] or that they only have access to rudimentary forms of informal housing. Again, some have no choice but to live in mainly desperate conditions, often on land not originally earmarked for housing. It therefore warrants saying that where the state policy fails to take cognizance of these factors, and completely ignores the plight of the most vulnerable group in the community, it will indeed be highly material when coming to a decision on whether the state policy is reasonable and therefore constitutionally valid or not.

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with universal issues confronting us. Likewise, where a provision in our Constitution is manifestly modelled on a particular provision in another country's constitution, it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision." Kriegler J in *Sanderson v AG Eastern Cape* 1998 (2) SA 38; 1997 (12) BCLR 1675 para 26, said that "comparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies."See also *S v Makwanyane and Another* 1995 (3) SA 391 (CC); *S v Thebus and Another* 2003 (6) SA 505; S Choudry "Globalisation in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" (1999) 74 *Indiana Law Journal* 819; D Visser "Cultural Forces in the Making of Mixed Legal Systems" (2001) 78 *Tulane Law Review* 41; D Fontana, "Refined Comparativism in Constitutional Law" (2001) 49 *UCLA Law Review* 539; L Epstein & J Knight, "Constitutional Borrowing and Non-Borrowing" (2003) 2 (1) *International Journal of Constitutional Law* 196.

[717] 2011 (3) SA 347 (CC) para 97. Langa CJ also expressed in *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* 2007 (6) SA 350 (CC) para 26, that "the High Courts and the Supreme Court of Appeal should at all times view the interpretation of legislation as well as the development of the common law and customary law in light of the spirit, purport and objects of the Bill of Rights. It is accordingly necessary that the provisions of section 39(2) of the Constitutions should always be borne in mind by these courts. This is particularly so when the Court is engaged with applying an open textured normative rule, such as wrongfulness or fairness, to a set of facts."

[718] P de Vos, "The Right to Housing" in Danie Brand and Christof Heyns (Eds) S*ocio-Economic Rights in South Africa*, (Cape Town: PULP, 2005) 89.

5.6 LIMITATION OF ACCESS TO HOUSING RIGHTS

Section 36[719] rightly outlined that "the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."[720] In *National Council for Gay and Lesbian Equality v Minister of Justice,* the Court held that the application of section 36(1) involves a process of weighing up competing values and ultimately making an assessment based on proportionality.[721] The Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check.[722] This means that section 36(1) reveals that the limitation of any other right in the Bill of Rights can only be permitted if: (a) the limitation is in terms of a law of general application; and (b) the limitation is reasonable and justifiable in

[719] The Section at issue deals with limitation of the Constitutional rights and it is usually called "limitation clause"; For further clarity on 'the limitation clause', See Woolman, S. et al, in *Constitutional Law of South Africa* (2nd Ed.), (Cape Town: Juta & Co Ltd, 2008).

[720] It is stated that unless exception is provided for in section 36(1) or any other provision of the 1996 Constitution, no law shall limit any right entrenched in the Bill of Rights.

[721] *National Council for Gay and Lesbian Equality v Minister of Justice* 2000 (2) SA 1, 2000 (1) BCLR 39; In *S v Bhulwana* 1996 (1) SA 388 (CC) para 18, the Court has held that the proportionality test requires a weighing up of competing interests in order to determine whether the values intended to be protected by a limitation outweigh the right being limited. According to the Court, in sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds for justification must be. Another case where the Court has applied the proportionality test is *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* 2001 (3) SA 1151 (CC), the Court applied the proportionality test to uphold the right of access to adequate housing against the right to property. The Court held that although the property interests of the Kyalami residents was a factor to consider, it was not only the only factor, the interests of the flood victims and their constitutional right of access to adequate housing was also a factor. The Court held "that the fact that property values may be affected by low cost housing development on neighbouring land is a fact that is relevant … it is only a factor and cannot in the circumstances of the present case stand in the way of the constitutional obligation that government has to address the needs of homeless people."

[722] *National Council for Gay and Lesbian Equality v Minister of Justice* 2000 (2) SA 1, 2000 (1) BCLR 39; In *S v Makwanyane* 1995 (6) BCLR 665, the court said that "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. . . Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

an open and democratic society.[723] The Court emphasised that "different rights have different implications for … an open and democratic society based upon freedom and dignity" and, accordingly, there is no absolute standard which can be laid down for determining reasonableness.[724]

According to Stu Woolman and Henk Botha,[725] the limitation clause has a four-fold purpose. First, it functions as a reminder that the rights enshrined in the Final Constitution are not absolute.[726] The rights may be limited where the restrictions can satisfy the test laid out in the limitation clause.[727] Secondly, the limitation clause is to the effect that rights may *only* be limited where and when the stated objective behind the restriction is designed to reinforce the values that animate the constitutional project.[728] Thirdly, the test set out in the limitation clause allows for frank consideration of those public goods or private interests that the law sets in opposition to the rights and freedoms enshrined in the Bill of Rights.[729] Fourthly, the limitation clause represents an attempt to elegantly deal with the problem of judicial review by establishing a test that determines the extent to which the democratically elected branches

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[723] The Constitutional Court of South Africa adopted this two pronged approach to the limitation of rights enshrined in the Bill of Rights in *Harksen v Lane* 1998 (1) SA 300 (CC); *Van Rooyen v S* 2002 (5) SA 246 (CC); *S v Manamela* 2000 (3) SA 1 (CC) *and Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

[724] *Makwanyane Case* para 104. The Court also observed in *S v Mamabolo* 2001 (3) SA 409, that "where section 36(1) speaks of less restrictive means it does not postulate an unattainable norm of perfection. The standard is reasonableness. And in any event, in theory less restrictive means can almost invariably be imagined without necessarily precluding a finding of justification under the section. It is but one of the enumerated considerations which have to be weighed in conjunction with one another, and with any others that may be relevant."

[725] S Woolman & H Botha 'Limitations' in S Woolman *et al* (eds) *Constitutional Law of South Africa* (2nd ed, OS, 2008) Chapter 34 para 34.1(a).

[726] It was expressed in *Rudolph and Another v Commissioner for Inland Revenue and Others NNO* 1994 (3) SA 771 (W), at 774D, that "It must be recognised that the rights and freedoms guaranteed by the Constitution are not absolute. These rights and freedoms may be limited by laws which are not contrary to the provisions of the Constitution." See also *S v Moila* 2006 (1) SA 330 (T) at 348B; *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others* 2000 (4) SA 621 (C); *S v Coetzee and Others* 1997 (3) SA 527 (CC) para122; *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) para 25; However, it must be emphasised that right to life is absolute in South Africa.

[727] As indicated in *S v. Mamabolo* 2001 (3) SA 409, s 36 permits limitations which are reasonable and justifiable in an open and democratic society based on dignity, freedom and equality.

[728] *Khumalo v Holomisa* 2002 (5) SA 401 (CC); *Bhe & Others v Magistrate, Khayelitsha, & Others (Commission For Gender Equality As Amicus Curiae); Shibi v Sithole & Others; South African Human Rights Commission And Another v President Of The Republic Of South Africa And Another* 2005 (1) BCLR 1 (CC) 2005 (1) SA 580 (CC) at paras 72 – 73; *National Director of Public Prosecutions & Another v Mohamed NO & others* 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC) para 52 ('The limitation of the s 34 right enables the Act to function for the legitimate and most important purpose for which the Act was designed and to reduce the risk of the dissipation of the proceeds and instrumentalities of organised crime').

[729] In *Makwanyane Case*, para 104 ('The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based upon proportionality ... [P]roportionality ... calls for the balancing of different interests').

of government may craft laws that limit the constitutionally protected rights and the extent to which an unelected judiciary may override the general will by reference to the basic law.[730]

The Final Constitution, like the Canadian Charter of Rights and Freedoms, adopts a two-stage structure for analysis. At the first stage, a court must determine whether the exercise of a right has been impaired by law or conduct. At the second stage, the government or the party looking to uphold an impugned law has an opportunity to justify that limitation if it serves "an open and democratic society based on human dignity, equality and freedom."[731] In *Soobramoney case*, the court averred, in regard to limitation of the rights, that:

> What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 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. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which section 27(3) must be construed.

With regard to access to housing, section 26(2) makes it clear that the obligation imposed upon the State is not an absolute or unqualified one. The extent of the State's obligation is defined by three key elements, namely: (a) the obligation to "take reasonable legislative and other measures";[732] (b) "to achieve the progressive realisation" of the right;[733] and (c) "within

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[730] By making the guidelines for judicial nullification reasonably precise, the drafters hoped to provide at least a partial solution to the counter-majoritarian dilemma.

[731] S Woolman & H Botha 'Limitations' in S Woolman *et al* (eds) *Constitutional Law of South Africa* (2nd Edition, 2008) Chapter 34; *New Jersey v TLO* 469 US 325, 369 (1985).

[732] It has been said in *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC) para 39 that "What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government, and the powers and functions allocated by the Constitution amongst them with emphasis on their obligations to co-operate with one another in carrying out their constitutional tasks."

[733] International Covenant on Economic, Social and Cultural Rights Committee [in General Comment 3, 1990] has helpfully analysed this requirement in the context of housing as follows 'nevertheless, the fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving 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 realisation 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 State parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources; *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC) para 45 is also of great assistance in this regard.

available resources."[734] Even renowned scholars like De Waal, Currie and Erasmus[735] mention that:

> In the absence of available state resources, the failure of the state to address socio-economic rights is therefore not a violation of the rights. However, should resources become available, it will be difficult for the state to justify its failure to devote those resources to the fulfilment of the rights.

The relationship between the qualified positive duties of the state in section 26(2) and the general limitation clause, namely section 36, is said to be complex.[736] Reasonable measure is always a tool to be used in determining the state's positive duties. Should it be established, as a matter of constitutional inquiry, that the state's conduct or omission is unreasonable in a given scenario, it is thereafter thorny to envisage situations where state may possibly succeed in showing a reasonable limitation of a right in terms of section 36.

This limitation of resources or lack of resources has the result that the court sees it as a justifiable limitation on provision for realisation of each socio-economic right and that the court is always extremely careful not to interfere with the political decision making processes of government and especially with the health authorities.[737]

5.7 ADJUDICATING AND MONITORING MECHANISMS

5.7.1 THE JUDICIARY AS THE MAIN VEHICLE

[734] The content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the State than is achievable within its available resources. As Chaskalson P said in *Soobramoney Case* that "what is apparent from these provisions is that the obligations imposed on the State by sections 26 and 27 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. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled."

[735] *The Bill of Rights Handbook* (Cape Town: Juta & Co., 2005) 423.

[736] In *Khosa Case*, the CC held that "there is a difficulty in applying section 36(1) of the Constitution to the socio-economic rights entrenched in sections 26 and 27 because these sections contain an internal limitation which qualifies the rights. According to the Court, the state's obligation in respect of these rights goes further than to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the rights. The Court was of the view that section 36 can only have relevance if what is 'reasonable' for the purpose of section 36(1) is different from what is 'reasonable' for purposes of sections 26 and 27."

[737] See L Jansen van Rensburg "Interpreting socio-economic rights - Transforming South African society?" 2003 (6) 2 PER/PELJ 55/167 who remarks that "judges prefer to exercise self-restraint on account of the doctrine of separation of powers and view the matter as one that should essentially be resolved elected by politicians."

According to Danie Brand, courts can protect socio-economic rights in two ways. Firstly, through their law-making powers of interpreting legislation and developing the rules of the common law, and secondly, by adjudicating constitutional and other challenges to state measures that are intended to advance those rights.[738] Again, one of the most noteworthy features of the Constitutional Court's jurisprudence is the way it conceives the relationship between the different factors that section 36 of the Constitution suggests that one has to consider. The Court understands these factors to be closely interrelated. Far from representing a "sequential check-list" that can be adhered to "mechanically," the factors are to be considered within the broader context of a "balancing exercise"[739] and a "global judgment on proportionality." Balancing exercise takes two basic forms.

Sometimes balancing means that one right (or interest or value) will simply "outweigh" another right (or interest or value). In *Makwanyane Case,*[740] the Court held that the applicant's right not to be subject to cruel, inhuman and degrading punishment (informed by the right to life and the right to human dignity) outweighed the state's interest in the death penalty for the sake of retribution and communal catharsis. In purely clinical terms, the death penalty impaired the right not to be subject to cruel, inhuman and degrading punishment and could not be justified in terms of section 33 of the Interim Constitution.

On the other hand, balancing means "the striking of a balance" between competing rights or interests. No right is asked to pay the ultimate price. In *Minister of Home Affairs v Fourie,*[741] same-sex life partners contended that their rights to equality and to human dignity were impaired by laws that prevented them from entering into civilly sanctioned marriages. Leaders of religious and traditional communities contended that the state and the Court had no business demanding that they alter their beliefs or practices to accommodate gay and lesbian unions. While acknowledging that the rights of partners to equality and to dignity

[738] See D Brand, 'Introduction to socio-economic rights in the South African Constitution' in D Brand and C Heyns (eds), *Socio-Economic Rights in South Africa* (Pretoria University Law Press, Pretoria, 2005).

[739] Balancing means the "head-to-head" comparison of competing rights, values or interests; Nowhere is this made clearer than in the judgment of Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2005 SA 217 (CC) para 23, as follows: "The judicial function [in adjudicating an eviction application] is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or *vice versa*. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case."

[740] Paras 84, 100 and 102-104.

[741] *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others, Amici Curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others 2006* (1) SA 524 (CC), 2006 3 BCLR 355 (CC).

were unjustifiably limited by rules of common law and statutory provisions that prevented them from entering civilly-sanctioned marriages, the Court went out of its way to note that religious prohibitions on gay and lesbian marriage did not constitute an unjustifiable infringement and that religious officials could legitimately refuse to consecrate a marriage between members of same-sex life partnership.

With reference to 'right of access to adequate housing," the right is enforceable only in relation to the availability of state resources.[742] This has been the case in many Court's consideration on the enforcement of the right in issue. In *Grootboom Case,*[743] Yacoob J said that there is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.

5.7.2 SOUTH AFRICAN HUMAN RIGHTS COMMISSION

The South African Human Rights Commission is described by many as the first amongst state institutions that support constitutional democracy[744]. As one of its functions, South African Human Rights Commission[745] must (a) promote respect for human rights and a culture of human rights; (b) promote the protection, development and attainment of human rights; and (c) monitor and assess the observance of human rights[746]. The court observed in *Grootboom*[747] that the South African Human Rights Commission must be furnished with yearly reports concerning the implementation of socio-economic rights from relevant state organs. The Commission is legislatively empowered (a) to investigate and report on the

[742] Chaskalson P pointed out in *Soobramoney Case* para 11, that "what is apparent from the Constitution is that the obligations imposed on the State by sections 26 and 27 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."

[743] 2001 (1) SA 46 (CC) para 46.

[744] See K Govender 'The South African Human Rights Commission' in P Andrews & S Ellmann (Eds) *The Post- Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 571; Woolman, S. et al, in *Constitutional Law of South Africa* (2nd Ed.), (Juta & Co Ltd, Cape Town; 2008) Chapter 24A. This assertion adds value to the fact that the Final Constitution sets as a goal the establishment of a society based on democratic values, social justice and fundamental human rights and declares that the Constitution lays the foundation for a democratic and open society.

[745] Hereinafter called SAHRC.

[746] Section 184(1)(c) of the Constitution places a duty on the Commission to "monitor and assess the observance of human rights in the Republic." Subsections (2)(a) and (b) give the Commission the power (a) to investigate and to report on the observance of human rights; and (b) to take steps to secure appropriate redress where human rights have been violated.

[747] 2001 (1) SA 46 (CC) (2000 (11) BCLR 1169).

observance of human rights, and (b) to take steps to secure appropriate redress where human rights have been violated.

Section 184(1) of the Constitution gives SAHRC a general mandate to promote, to monitor and to assess the observance of human rights in South Africa. As Jonathan Klaaran articulated, while the content of the function may not be precise, the Constitution does not clearly envision a separate and special role for the SAHRC with respect to socio-economic rights.[748] In terms of section 184(3), the relevant state organs are obliged to provide the Human Rights Commission with information, on an annual basis, on the measures that they have taken towards the realisation of socio-economic rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.[749]

The Commission's special mandate requires that, every year, it demands relevant organs of state to provide it with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.[750] The *Economic and Social Rights Reports* of the SAHRC serve as the primary measure in the fulfilment of its constitutional obligations and despite various criticisms which can be levelled against both the reporting procedures and the contents of the reports, have thus far been relatively successful in the evaluation of government's activities relating to this mandate.

5.8 CRITICAL ANALYSIS OF ACCESS TO HOUSING THROUGH CASE LAW

[748] Section 184(3) of the Final Constitution says that "Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment."

[749] See *Ntombentsha & Others v Premier of the Western Cape & Others*, Case No: 21332/10.

[750] See Heyns 1998 *ESR Review* http://www.communitylawcentre.org.za/ 31Oct.

In 1996, South Africa took the bold step of including enforceable socio-economic rights in its new Constitution.[751] The task of interpreting and applying the social and economic rights in the Constitution is arguably the most challenging task facing lawyers and courts in South Africa. Kirsty McLean identifies that we need to develop a jurisprudence which gives concrete meaning and effect to social and economic rights,[752] and that the more we debate and consider the proper approach to socio-economic rights in our Constitution, the more likely it will be that we will develop a progressive and democratic jurisprudence.

Section 26 places both negative and positive duties on the State in realising the right of everyone to have access to adequate housing.[753] The overall aim of section 26 is to create "a new dispensation in which every person has adequate housing and in which the State may not interfere with such access unless it would be justifiable to do so."[754] It is therefore not uncommon that the question of availability of resources has been raised in all cases that have come before the South African Constitutional Court involving socio-economic rights and that housing is not different from that list. Thus, the constitutional provisions proclaim interconnectedness and mutually reinforce one another.[755] Suffice here to say that despite the fact that the Court initially stuttered in its decision in *Soobramoney Case*,[756] it was later to redeem itself in the consequent decisions in *Grootboom Case*, and those that followed.

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[751] W Murray, "Grootboom and beyond: Reasoning the socio-economic jurisprudence of the South African Constitutional Court" (2004)20 *SAJHR* 284; see also Marius Pieterse, "Coming to terms with judicial enforcement of socio-economic rights" (2004)20 *SAJHR* 383.

[752] See Kirsty McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*, (Pretoria University Law Press: Pretoria, 2009) vii.

[753] Section 26 of the Final Constitution of the Republic of South Africa; In *Government of the RSA v Grootboom and Others* 2001 (1) SA 46 (CC) para 34, it is shown that Section 26(1) imposes a negative obligation "upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing", whislt in *City of Johannesburg Metropolitan Municipality v Blue Moonlight* [2011] ZASCA 47, the court vowed that "The right of access to adequate housing is not to be seen in isolation. It must be seen as a whole, in light of its close relationship with other socio-economic rights, all read together in the setting of the Constitution. It is unquestionable that the State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty and intolerably inadequate housing."

[754] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140; 2005 (1) BCLR 78 (CC) paras 28 – 29.

[755] *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) para 40.

[756] In this case, the Court was well-aware that the applicant was living a poverty-stricken life, hence it emphatically opined that "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty…. 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." However, since there was no available resources catered to such right, applicant's claim could not be enforced.

In *Grootboom*, the Court laid the foundations for its future adjudication of socio-economic rights. In the beginning, *Grootboom* was received by the academic community with cautious approval.[757] This case is the foundation for realisation of access to housing in South Africa and it has largely injected a healthy jurisprudence throughout the whole world. In this case, a group of adults and children had been rendered homeless as a result of eviction from their informal dwellings situated on private land ear-marked for low cost housing. They applied for an order directing the local government to provide them with temporary shelter, adequate basic nutrition, health care and other social services. The Constitutional Court held that the state had failed to meet the obligations placed on it by section 26 and declared that the state's housing programme was inconsistent with section 26(1) of the Constitution.

In *Treatment Action Campaign and others v Minister of Health and others*,[758] the Court held that the measures taken by the state cannot leave out those whose needs are most urgent and thus whose ability to enjoy all rights is most at peril. In *Jaftha v Schoeman*[759] Mokgoro J held that "any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1)" and cannot thereby be allowed.[760]

Besides, where an eviction[761] is likely to lead to homelessness, the section must be interpreted with regard to the historical and social context of homelessness. This approach has been defined in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)*[762] as follows:

> The problem of homelessness is particularly acute in our society. It is a direct consequence of apartheid urban planning which sought to exclude African people from urban areas, and enforced this vision through policies regulating access to land and housing which meant that far too little

[757] S Liebenberg "The Right to Social Assistance: The Implications of Grootboom for Policy Reform in South Africa" (2001)17 *SAJHR* 232 classified *Grootboom Case* as a positive precedent for the judicial enforcement of economic and social rights while P De Vos "Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness" (2001) 17 *SAJHR* 258 identifies *Grootboom case* as "relatively" good law.

[758] 2002 (5) SA 721 (CC); 2002 (10) BCLR 1075 (CC).

[759] 2005 (2) SA 140; 2005 (1) BCLR 78 (CC).

[760] Para 28, In these circumstances, the Court found that eviction proceedings must be understood within the context of the right to housing as a whole: "Section 26 of the Constitution must be read as a whole. Section 26(3) is the provision which speaks directly to the practice of forced removals and summary eviction from land and which guarantees that a person will not be evicted from his or her home or have his or her home demolished without an order of court considering all of the circumstances relevant to the particular case. The whole section, however, is aimed at creating a new dispensation in which every person has adequate housing and in which the state may not interfere with such access unless it would be justifiable to do so."

[761] Eviction must only be carried on by the order of competent court; See *Veldsman and Others v Overberg Regional Services Council and Another; Martin and Others v Overberg Regional Services Council and Another* 1991 (2) SA 651 (C).

[762] 2005 (5) SA 3 (CC).

> land and too few houses were supplied to African people. The painful consequences of these policies are still with us eleven years into our new democracy, despite government's attempts to remedy them. The frustration and helplessness suffered by many who still struggle against heavy odds to meet the challenge merely to survive and to have shelter can never be underestimated.[763]

However, the Constitutional Court once concluded that the owner's right to property could not be regarded as wholly unqualified in enquiries concerned with whether an eviction would be just and equitable.[764] And it indicated that a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted. An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE.[765]

In *Sailing Queen Investments v The Occupants La Colleen Court,*[766] is a clear example of the above situation. It concerned an application for the joinder of the City of Johannesburg to evict the respondents from La Colleen Court and for the stay of the main eviction application pending determination of the relief sought by the respondents. This application raised certain fundamental issues, which included the obligations of a municipality, in this instance the City, in evictions under section 4 of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ("PIE") of individuals in desperate need, likely to become homeless or continue to be unlawful occupiers should they be evicted.

The court held that once respondents such as those in the present matter were evicted, it inevitably became the responsibility of the City either as a result of the homelessness of the respondents, or the need to resort to further unlawful occupation for shelter. As such the municipality responsible should have been joined so that it would be obliged to fulfill its statutory duty to see that the occupants have shelter. The Court went on to illustrate that Local authorities have an obligation under section 26 of the Constitution. They are also required to cater for individuals in emergency situations, and to provide information regarding their fulfillment of statutory requirements for plans to provide access to adequate

[763] Para 36.
[764] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (Lawyers for Human Rights as Amicus Curiae)* [2011] ZACC 33.
[765] Ibid para 40.
[766] 2008 (6) BCLR 666 (W).

housing in terms of section 26 of the Constitution and their implementation. Again, the landowner's right is subject to the limiting effect of eviction proceedings that are designed to accommodate the personal, social and economic circumstances of the unlawful occupiers. By taking the occupiers' personal and social circumstances into consideration, the court in effect gives recognition to the rights imposed by the relevant constitutional and statutory provisions.[767]

A recent articulation of this notion can be found in *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Limited, City of Tshwane Metropolitan Municipality & Others*.[768] The owner of a land (PPC Quarries) successfully obtained an eviction order against the applicants in the High Court. The court also made certain orders against the City aimed at ensuring that the applicants would be provided with alternative land by that municipality. The applicants challenged the correctness of the High Court order on the basis that it was not just and equitable within the meaning of section 4(6) of the PIE Act for them to have been evicted. The Constitutional Court held that it was neither just nor equitable for those applicants who would be rendered homeless consequent upon the eviction to be thrown onto the streets for an intervening time before they are provided appropriate help by the City.

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[767] In *Johnson Matotoba Nokotyana and Others v Ekuruleni Metropolitan Municipality and Others* [2009] ZACC 33, the Court highlighted that "the need for housing and basic services is still enormous and the differences between the wealthy and the poor are vast. It is perhaps ironic, but not coincidental, that the Settlement carries the name of a well-known icon of the struggle against the oppression and inequality of apartheid, who dedicated his life to the pursuance of social, political and economic equality through the socialist principles in which he believed and taught . . . The case shows that the role of courts in the achievement of socio-economic goals is an important but limited one and that bureaucratic efficiency and close co-operation between different spheres of government and communities are essential." In *Lingwood and Another v Unlawful Occupiers of Erf 9 Highlands*, 2008 (3) BCLR 325 (W), the court held that where evictees were in similar circumstances to the respondents in *the Occupants La Colleen Court case*, the City had an obligation towards the respondent regarding alternative accommodation. The court further held that while it was not the Legislature's intention to exclude eviction where no alternative accommodation was available, that court was reluctant to order an eviction without joinder of the City and more information on any programmes that the City has for emergency housing. Furthermore, in *ABSA Bank Bpk v Murray and Another* 2004 (2) SA 15 (C), 2004 (1) BCLR 10 paras 41 and 42 the court held that, "The failure by municipalities to discharge the role implicitly envisaged for them by statute, that is, to report to the court in respect of any of the factors affecting land and accommodation availability and the basic health and amenities consequences of an eviction on the occupiers, especially the most vulnerable such as children, the disabled and the elderly, not only renders the service of the notice a superfluous and unnecessarily costly exercise for the applicants, but, more importantly, it frustrates an important object of the legislation. It will often hamper the court's ability to make decisions which are truly just and equitable… If PIE is to be properly implemented and administered, reports by municipalities in the context of eviction proceedings instituted in terms of the statute should be the norm and not the exception." see also *Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg*, [2007] JOL 18960 (T); *BHT Water Treatment* (*Pty*) *Ltd v Leslie and Another* 1993 (1) SA 47 (W) [1993] 3 ALL SA 126 (W); *Cashbuild* (*South Africa*) (*Pty*) *Ltd v Scott and Others* 2007 (1) SA 332 (T).

[768] [2011] ZACC 36.

Further, that the city is obliged to provide alternative accommodation one month before the date of eviction.

Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquility in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that established itself on a site that has become its familiar habitat.[769]

In similar vein, the African Commission on Human and Peoples' Rights observed in the case of *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*[770] that forced evictions have a drastic impact on people's social, economic, physical and psychological well-being, Wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of the means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic deaths. Evictions break up families and increase existing levels of homelessness.

The implementation of Section 26 results in nullifying the provisions of many pieces of legislation. In *Grootboom Case*,[771] a declaratory order issued with a view that section 26(2) of the Constitution requires the State to devise and implement comprehensive and co-ordinated program to progressively realise the right of access to adequate housing, including obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need within available resources, eviction of unlawful settlers should not be arbitrary. The question of arbitrary eviction has also been considered in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another,*[772] where the Constitutional Court has held that the consideration of substantive arbitrariness requires an analysis of the interplay between the means employed and the ends sought to be

[769] See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 17.
[770] African Commission on Human and Peoples' Rights, Communication No. 155/96; (2001) AHRLR 60 (ACHPR 2001) para 63. In this case, the Commission derived a right to adequate housing, including a prohibition on unjustified evictions, from a combined reading of articles 14, 16 and 18(1) of the African Charter on Human and Peoples' Rights (1981).
[771] 2001 (1) SA 46 (CC).
[772] 2002 (4) SA 768 (CC) para 100.

achieved, and the full complexity of the relationships involved: Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case.

In *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)*[773] the issues raised by the appeal concerned the powers of the national Executive to provide relief to flood victims. The court finally acknowledged that all the parties have reached consensus that the flood victims have a constitutional right to be provided with access to housing. Funds have been made available for this purpose. The State is therefore obliged to act as it has made budget for that. In *Jaftha v Schoeman,*[774] the failure to provide judicial oversight over sales in execution against immovable property of judgment debtors in section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 was declared to be unconstitutional and invalid. The court was of the view that someone's house cannot be sold in execution of judgment, hence leaving an individual homeless, contrary to Section 26 of the Constitution.

Jaftha v Schoeman[775] was rightly considered as the backbone and directive on deciding *Menqa & Another v Markom & Others.*[776] The present cases concerned nullification of section 66(1)(a) of Magistrates' Courts' Act[777] which gave a right of execution against one's property, either immovable or movable, in case such party failed to satisfy the judgment in paying a debt one owes to someone[778]. In *Menqa's* case, the court indicated that section 66(1)*(a)* of the Magistrates' Courts Act was declared to be constitutionally invalid in the *Jaftha* case on the ground that it unreasonably and unjustifiably limited judgment debtors' fundamental right of access to adequate housing entrenched in section 26(1) of the Constitution. The warrant of execution in the present case was invalid as it was issued without the judicial oversight required by the Constitutional Court in *Jaftha* and the absence of this procedural safeguard imperilled Markom's constitutional rights under section 26(1).

[773] 2001 (3) SA 1151 (CC).
[774] 2005 (2) SA 140 (CC).
[775] 2005 (2) SA 140 (CC).
[776] 2008 (2) SA 120 (SCA).
[777] Act No. 32 of 1944.
[778] Section 66(1)(a) of the Act prescribes the process from the time a court gives judgment in favour of a creditor until the ultimate sale in execution of the debtor's property.

This approach was once followed in *First Rand Bank ltd v Soni*.[779] This is one of the cases in which section 26 of the Constitution was given effect. In this case, the defendant caused to be registered and executed in favour of the plaintiff a mortgage bond as security for moneys loaned and advanced by the plaintiff to the defendant. The defendant breached the terms and conditions agreed upon by both contracting parties on the bond. In breach of the bond, the defendant failed to pay the installments payable by her to the plaintiff. The plaintiff applied for the summary judgment and execution of defendant's property, especially. At the material time, defendant had sold the property to the third parties who were already in use of the property. The defendant opposed the application for summary judgment. Before the court, one of the main issues was whether the plaintiff has complied with section 26(3) of the Constitution of the RSA, 1996 in seeking the remedy.

The court held that at the commencement of the proceedings, the plaintiff was well-aware that defendant had sold the property to the third parties and the arrangements to have property transferred in the names of the third parties were already afoot. Further, notwithstanding such knowledge, the plaintiff has not shown that the third parties, who have now purchased the property from the defendant, have been duly notified of an application for an order declaring the property they had purchased executable. Finally, it was the court's view that the order for declaring the property executable would be unjust and inequitable in the absence of the proof of notice to the third parties who might be prejudiced by the operation of the order sought, particularly the order that will affect their right as entrenched in section 26 of the constitution.

Grootboom case has precisely been used as directive in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*[780] in which the Court allowed removal of the residents so that section 26 could strictly be complied with. The court has ruled, with an analytical scrutiny, on the eviction of the residents in order to give meaningful and permanent housing to the said community in this case. *Residents of Joe Slovo Community, Western Cape* is a classical case in which the eviction of the residents was declared lawful so long as it was made with a view to giving effect to Section 26 of the Constitution. In this case, the court was called to consider the difficult and important question of the requirements, including those of fairness and justice, that must be complied with in the process of the relocation of a large community so that better housing may be built in these informal settlement areas. It comes as

[779] 2008 (4) SA 71.
[780] 2009 (9) BCLR 847 (CC).

an application for leave to appeal against a judgment and a rather unusual order of the Western Cape High Court, Cape Town[781] for the relocation of 4 386 households (said to consist of around 20 000 residents) from a large informal settlement known as Joe Slovo settlement area (Joe Slovo settlement). The relocation order was sought and granted in order to facilitate the development there of better quality housing than the informal housing presently in use. The applicants are, in effect, all the people who are obliged by the order of the Western Cape High Court, to relocate.

The City of Cape Town (the City), the owner of the property occupied by the applicants, did not participate in the eviction proceedings. The relocation order was instead obtained at the instance of the three respondents. Thubelisha Homes, the first respondent, has been charged with the responsibility of developing the housing at the Joe Slovo settlement. The national and Western Cape provincial Ministers responsible for housing are the second and third respondents respectively.

Yacoob J observed that, on the analysis of the evidence in the present case, eviction is a reasonable measure in terms of the Constitution to facilitate the housing development programme. In addition, all the factors discussed in relation to the question whether it is just and equitable to grant the eviction order also justify a conclusion that the eviction is, in the circumstances, reasonable.[782] In meticulous way, Moseneke DCJ started by stating that the Constitution[783] bears a transformative purpose in the terrain of socio-economic rights[784]. It evinces a deep concern for the material inequality closely associated with past exclusion and poverty that is manifested by lack of proper housing. That explains why section 26(1) of the Constitution provides in express terms that everyone has the right to have access to adequate housing. The state is required to take reasonable measures within its available resources to provide everyone with access to adequate housing. Section 26(3) in particular, creates an important shield to anyone who may be subject to eviction from their home or to have their home demolished. The Constitution makes judicial intervention mandatory by requiring that

[781] Previously referred to as the Cape High Court, the Court's name was changed to the Western Cape High Court, Cape Town under the Renaming of High Courts Act 30 of 2008, which commenced on 1 March 2009.

[782] In all the circumstances, the respondents have acted reasonably in compliance with the state's housing obligations and there has been reasonable engagement almost all the way- *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).

[783] Reference is made to 1996 Constitution of the Republic of South Afica.

[784] Para 142.

eviction from or demolition of a home must occur through a court order made after considering all relevant circumstances.

In the wake of our new constitutional dispensation, Parliament has enacted a cluster of legislation designed to protect and secure the tenure of those who reside on land unlawfully. Even so, evictions may still take place legally, but their consequences can be just as devastating as they have been in the past for many poor South Africans. In turn, our courts have correctly held that the government's obligations in terms of section 26(2) mean that eviction sought by the state should not occur without the provision of alternative housing[785].

Finally, on balance, it is found that it is just and equitable to make the order of eviction and relocation coupled with a further order guaranteeing that the applicants shall be allocated the specified proportion of the new houses to be built on the site of Joe Slovo within a process of meaningful engagement with the people who are the subject of the eviction and relocation order[786]. Justice O'Reagan stated the following, dealing with the section 26 matter: "In considering this and similar cases courts need on the one hand to be aware of the enormity of the task that Governments perform in seeking to improve the quality of life of all citizens, and be astute not to impair the government's ability to perform this task. On the other hand courts must not permit government to treat citizens in a manner that is not consistent with human dignity of pursuing laudable programs."[787]

A similar concept was recently reiterated in *Ntombentsha & Others v Premier of the Western Cape & Others.*[788] In this case, The City of Cape Town made the decision to upgrade the informal settlement at Silvertown Khayelitsha in terms of the Upgrading of Informal Settlements Programme (UISP). However the Silvertown area, known as SST, was not big enough to accommodate the number of people in the area based on the erf size that the city had intended for the residents. The City then decided to use two undeveloped sites nearby and relocated some of the residents in the SST area to the two other sites known as Makhaza and Town 2, in an effort to allow for all 1316 households to be accommodated. Therefore the three areas, being Makhaza, Town 2 and SST now all formed part of the Silvertown project.

[785] Para 170.
[786] Para 175. it may be mentioned that all judges on concuring to the judgement, were all at their own best in writing exclusively supportive reasons.
[787] Para 265.
[788] Case No: 21332/10.

One of the issues was whether any constitutional rights of the affected community was infringed.

The Court followed *Residents of Joe Slovo Community, Western Cape* and stated that the City's decision to install unenclosed toilets lacked reasonableness and fairness; the decision was unlawful and violated constitutional rights. The legal obligation to reasonably engage the local community in matters relating to the provision of access to adequate housing which includes reasonable access to toilet facilities in order to treat residents *"with respect and care for their dignity"* was not taken into account when the City decided to install the unenclosed toilets.

Apart from that, the courts will not lightly try to protect people who are mere tenants upon expiration of the time specified in the lease. In *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd*,[789] the respondent brought an application in the South Gauteng High Court, Johannesburg, for the eviction of the appellants and their families from the flats on the basis that their leases had been duly terminated by notice on its behalf. The appellants opposed the application, essentially on two grounds. First, that the respondent's purported termination of the leases was invalid. Second, that, even if the leases were validly terminated, it would not be just and equitable to evict them from the flats. For the second ground they relied on the provisions of s 4(6) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. The appellants' further argument relied on the proposition that the termination of the leases was contrary to public policy, because it constituted an infringement of their right of access to adequate housing in terms of s 26(1) of the Constitution. Brand JA held that what the appellants' arguments appear to lose sight of is that a lessee of property has no security of tenure in perpetuity. The duration of the lessee's tenure is governed by the terms of the lease.[790] Beyond the period of the lease, the lessee has no security of tenure.[791] It therefore cannot be said that termination in accordance with the leases, constituted an infringement of their right to security of tenure.[792]

5.9 ADMINISTRATIVE JUSTICE

[789] 2011 (5) SA 19.
[790] Para 28.
[791] Para 29.
[792] Para 30.

Section 33 of the Constitution guarantees the right to administrative action that is lawful, reasonable and procedurally fair.[793] This right is given further content in sections 3 and 4 of Promotion of Administrative Justice Act.[794] In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae),*[795] the Constitutional Court found unequivocally that PAJA was enacted to give effect to section 33 of the Constitution and that "a litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33(1) of the Constitution or the common law."[796] Section 3 of PAJA sets out the procedure to be followed in relation to "administrative action which materially and adversely affects the rights or legitimate expectations of any person."[797] In *Du Bois v Stompdrift - Kamanassie Besproeinggraad,*[798] it was expressed:

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[793] In an "Address by Justice Dingang Moseneke at the official opening of the academic year 2008 of The University of South Africa" he said, "The exercise of all public power is subject to constitutional control inasmuch as everyone has the right to a lawful, reasonable and procedurally fair administrative action reviewable by an independent judiciary." In *Pennington v Friedgood and Others* 2002 (1) SA 251 (C), Hodes AJ added that "Since the advent of the Constitution and, pursuant thereto, the PAJA, a requisite jurisdictional fact for success on judicial review is that the impeached conduct must constitute administrative action. From the above-quoted dicta from Pharmaceutical Manufacturers and from the PAJA, it is clear that whether such conduct constitutes administrative action falls to be decided by reference to whether such action amounts to the exercise of public power or the performance of a public function." A similarly elaborated expression was said in *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) para 34 at 865A - J that: "(a) Administrative law is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of Government; (b) The question relevant to s 33 of the Constitution is not whether the action is performed by a member of the executive arm of Government, but whether the task itself is administrative or not and the answer to this is to be found by an analysis of the nature of the power being exercised; and (c) What falls to be considered is, *inter alia*, the source of the power exercised, the nature of such power, its subject-matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters which are not administrative, and on the other to the implementation of legislation, which is."

[794] The Promotion of Administrative Justice Act 3 of 2000; In the academic writing on PAJA, reference is made to the fact that certain of its provisions have been borrowed from German and Australian law. PAJA must, however, be interpreted by the South African Courts in the context of their own law, and not in the context of the legal systems from which provisions may have been borrowed. In neither of the countries is there a defined constitutional right to just administrative action. Transplanting provisions from such countries into South African legal and constitutional framework may produce results different from those obtained in the countries from which they have been taken-as per Chaskalson P in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC), para 142; See also Hoexter, *The New Constitutional and Administrative Law*, Volume II (Juta, Lansdowne, 2002) at 107-110.

[795] 2006 (2) SA 311 (CC).

[796] Para 96.

[797] See *Law Society, Northern Provinces (Incorporated as the Law Society of the Transvaal) v Maseka and Another* 2005 (6) SA 372 (BH) at 382B/C - F. In *Vulindlela Furniture Manufacturers (Pty) Ltd v MEC, Department of Education and Culture, Eastern Cape, and Others* 1998 (4) SA 908 (Tk) at 930F – H, Van Zyl J, in commenting upon section 24 of the Interim Constitution, said the following: "As already indicated, the essence of the applicant's case in the present matter is that the respondents have failed to comply with their statutory duty, and not that they have failed to follow or adopt procedures which are 'right and just and fair'. The only other section which may find application in the present matter is s 24(a). This section entitles every person to lawful administrative action where any of his or her rights or interests are affected or threatened. 'Administrative action' should in my view not be limited to administrative acts or decisions.

> The *audi alteram partem* doctrine, as also expressed in the Promotion of Administrative Justice Act 3 of 2000, means that fairness will very often require that a person who may be adversely affected by the decision of a functionary should have an opportunity to make representations on his own behalf either before the decision is taken, with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will also frequently require that he is informed of the gist of the case which he has to answer.[799]

Section 4 of PAJA applies to cases where an administrative action "materially and adversely affects the rights of the public."[800] Procedural fairness is critical in bringing all the relevant considerations to the attention of the administrator before decisions are taken. In *Minister of Home Affairs v Eisenberg & Associates: In re Eisenberg & Associates v Minister of Home Affairs and Others*,[801] Chaskalson CJ held that "the Minister failed to comply with the provisions of s 4(1) of PAJA prior to making regulations. Section 4(1) addresses the question of procedural fairness required where administrative action materially and adversely affects the rights of the public. Section 4(4) provides, however, that the provisions of s 4(1) may be departed from if it is reasonable and justifiable in the circumstances to do so. It was assumed for the purposes of the judgment that PAJA was applicable."

They should also include the failure by a body exercising public power to act where it has a duty to act. 'Lawful administrative action' is wide enough to also include an omission to take administrative action where such a duty is imposed." A similar expression was long postulated by Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 115 that: "Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court, which has jurisdiction to entertain all civil causes and proceedings arising . . . in such a cause as falls within the ordinary jurisdiction of the Court." See also *Ntame v MEC for Social Development, Eastern Cape, and Two Similar Cases* 2005 (6) SA 248 (E); *Vumazonke v MEC for Social Development, Eastern Cape, and Three Similar Cases* 2005 (6) SA 229 (SE); *Mbanga v MEC for Welfare, Eastern Cape, and Another* 2002 (1) SA 359 (SE); *Mahambehlala v MEC for Welfare, Eastern Cape, and Another* 2002 (1) SA 342 (SE); and, *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA).

[798] 2002 (5) SA 186 (C) at 192E - E/F, 194A - D and F – H.

[799] Nugent JA widened the meaning of section 3 in *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 23, saying that "While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."

[800] See *City of Johannesburg v Rand Properties (Pty Ltd and Others* 2007 (6) BCLR 643 (SCA), para 56.

[801] 2003 (5) SA 281 (CC), 2003 (8) BCLR 838 paras 52 - 53.

It is important to recognise the paradigm shift brought about by the constitutional entrenchment of the right to administrative justice. The rules of procedural fairness can no longer simply be viewed in instrumental terms. Just as C Hoexter[802] summed up the correlation between PAJA, the Constitution and the common law:

> The principle of legality clearly provides a much-needed safety net when the PAJA does not apply. However, the Act cannot simply be circumvented by resorting directly to the constitutional rights in section 33. This follows logically from the fact that the PAJA gives effect to the constitutional rights. (The PAJA itself can of course be measured against the constitutional rights, but that is not the same thing.) Nor is it possible to sidestep the Act by resorting to the common law. This, too, is logical, since statutes inevitably displace the common law. The common law may be used to inform the meaning of the constitutional rights and of the Act, but it cannot be regarded as an alternative to the Act.

This assertion goes to a core value of the society which the Constitution seeks to achieve. Procedural fairness is at the heart of the notion of participatory democracy, an essential characteristic of the Constitution's vision of South African society. In *Doctors for Life International v The Speakers of the National Assembly and Others,*[803] Ngcobo J held that "commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated."

Procedural fairness as an element of administrative justice is a key driver of participatory democracy in South Africa. It guarantees individuals an active role in that aspect of state functioning that impacts them most directly and most often, namely state administration. In this role, procedural fairness reinforces the dignity of beneficiaries of state socio-economic programmes. Comprehensive socio-economic assistance from the state inevitably runs the risk of creating a culture of dependence. The problem is not so much dependent on the provision of the actual assistance (e.g. food, housing or social assistance), but the perception

[802] This is an extract from "'Administrative Action' in the Courts" a paper delivered by Professor C Hoexter for a comparative administrative justice workshop held at Cape Town from 20 - 22 March 2005.

[803] *Doctors for Life International v The Speakers of the National Assembly and Others* 2006 (6) SA 416 (CC) para 111; see also *Minister of Health and Another NO v New Clicks South Africa (Pty)Ltd and Others (Treatment Action Campaign and Another as Amici Curiae*) 2006 (2) SA 311 (CC) para 627.

it may create amongst recipients and non-recipients of the former as dependent, passive, weak, subjugated "external objects of judgment."[804]

It is the latter perception which principally undermines such beneficiaries' dignity. By affording them the opportunity actively to participate in decisions in this regard, procedural fairness can achieve much in giving such beneficiaries a sense of control, participation and accordingly significance and worth. Plasket J put it as follows in *Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others*:[805]

> Because of the purpose of the requirements of procedural fairness and the values that due observance of these requirements is designed to further – accurate, rational and legitimate decision-making that can further the public interest, and that serves as something of a safeguard against oppressive or otherwise improper official decision-making – an insistence by the courts that they be observed "is an end in its own right". As a result, the rules of procedural fairness "are considered to be so important that they are enforced by the courts as a matter of policy, irrespective of the merits of the particular case in question.

There is, therefore, a need for an integrated and coherent approach to the body of human rights entrenched in the Constitution. It is essential to recognize the interconnectedness of the entrenched rights, in this context particularly administrative justice and socio-economic rights such as housing. Procedural fairness facilitates the reasonable realisation of other (substantive) rights. It must therefore be a central element of both a *priori* design, when administrators set up and implement state programmes aimed at the realisation of substantive rights, and of *ex post facto* scrutiny, when courts constitutionally assess such state action.

In *President of the RSA v SARFU,*[806] when dealing with the acts of the President of the Republic it was said:

> The test for determining whether conduct constitutes administrative action is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not.[807]

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[804] Nedelsky "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) *Yale Journal of Law and Feminism* 7 at 27.

[805] *Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others* [2006]2 All SA 175 (E) para 76.

[806] 2000 (1) SA 1 (CC).

[807] Para 41. In *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 24, Nugent JA pointed out that "whether a particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so."

Under PAJA, which now governs the position, conduct only amounts to administrative action if it is the exercise of public power or the performance of a public function in terms of any legislation. The nature of the power or function is paramount, the identity of the functionary exercising the power or performing the function, secondary.[808] The question requires an analysis of the nature of the power or function exercised.

For Sunstein,[809] *Grootboom Case* is best understood as an administrative law judgment. In a typical administrative law case, he argues, an agency has a duty of accountability; it must explain why it has adopted a particular allocation of resources and not another. The role of the court is to guard against arbitrariness by ensuring that the resource allocation adopted by the agency is rational. It was through such an approach, Sunstein[810] suggests, that the Court reached its decision in *Grootboom*. *Associated Provincial Picture Houses Ltd v Wednesbury*[811] is a classic exposition for guiding decision arrived at by Sustein.

5.10 CONCLUSION

The right of access to housing does not provide the individual with a right to demand that the government provides one with a house. It rather begins to spell out the duties of the state in progressively realising the right of access to housing. It is clear that the exact duties of the state depend on the specific context and that cases will have to be adjudicated on their individual merits. Provision has to be made for the most vulnerable and desperate in society[812]. The courts may or may not be hesitant to grant relief where individuals assert their constitutional rights.

However, where communities are negatively affected, and the right infringed is fundamental to the well-being of (categories of) people (such as housing), the Constitutional Court appears to be more willing to intervene. This is in particular the case where the said communities

[808] *Transnet Ltd and Others v Chirwa* 2007 (2) SA 198 (SCA) para 15.
[809] Cass R. Sunstein *Designing Democracy* (note 15 above) 224-37.
[810] Ibid.
[811] [1948] 1 KB 223.
[812] *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC) paras 52 and 69, where the failure to make express provision to facilitate access to temporary (housing) relief for people who have no access to land, no roof over their heads or who live in intolerable conditions was found to fall short of the obligation set by s 26(2) in the Constitution 1996. See also *Soobramoney Case* para 31.

have historically been marginalised and/or excluded or appear to be particularly vulnerable. A statistical advance may not be enough and the needs that are the most urgent must be addressed; it is not only the State that is responsible for the provision of (for example) houses, but it may be held responsible if no other provision has been made or exists[813]. This does, of course, imply priority-setting.

Again, the housing and eviction cases viewed in the context are momentous not only because of the impact they have had on communities living in intolerable conditions and crisis situations but, as essentially, because of their standards on jurisprudential development as well.[814] The challenge is now to test whether government (through its responsible departments) has taken cognisance of the guidelines identified in *Grootboom Case* and a plethora of cases that came thereafter when conducting their planning and budgetary processes for housing. Failure to ensure that these jurisprudential developments guide policy and budgetary processes could have the effect that South Africa's constitutional scheme itself is put at risk.[815]

[813] *Grootboom Case*, (note 811 above) para 35.

[814] These case show the stutter faced by the court in *Soobramoney Case*, and the basis for housing laid in *Grootboom Case*. It finally goes to the extent of discussing cases in which *Grootboom* was seen as a guideline in arriving at their conclusion or *stare decisis*. See K Roach and G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?" (2005) *SALJ* 325 for a general discussion of structural interdicts.

[815] K Creamer "The implications of socio-economic rights jurisprudence for government planning and budgeting: The case of children's socio-economic rights" (2004) 2 *Law, Democracy and Development* 221.

CHAPTER SIX: LESOTHO'S PERSPECTIVE- IS THERE AN ELEPHANT IN THE ROOM?

> "The process of erosion of rights is constant and unceasing, and when one awakens to the dangers, it is only an eroded right that remains to be protected."[816]

6.1 INTRODUCTION

The Government of Lesotho has acceded to, signed or ratified a number of international instruments[817] thereby undertaking to give effect to full realisation of socio-economic rights.[818] These accessions and ratifications became a "goose that was to lay the golden eggs" and aroused a legitimate expectation on the part of Basotho who have hitherto been at the receiving end of deplorable socio-economic conditions, which conditions must addressed and redressed.

In 1993 Lesotho became a constitutional democracy.[819] A culture of justification – a culture in which every exercise of power is expected to be justified and every action or inaction of government is to be accounted for – was established. The need for justification and therefore accountability was also created in respect of government decision, action or inaction which impact on enjoyment of socio-economic rights. Given the lack of accountability on the part of the executive and legislative branches of the government which became evident soon thereafter, the Basotho people can now only look up to the courts to translate the pious promissory statements on socio-economic rights rhetoric into practical social reality and to address government lack of accountability.

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816 C.G. Weeramantry, *Justice Without Frontiers: Furthering Human Rights* 92 (The Hague: Kluwer Law International, 1997).

817 International Covenant on Social Economic and Cultural Rights (ICESCR) (acceded to on 9/9/1992); United Nations Convention on the Rights of a Child (CRC) (ratified on 10/3/1992); African Charter on Human and Peoples' Rights (African Charter) (ratified on 10/3/1992); See, for ICESCR and CRC, United Nations Centre for Human Rights *A Compilation of International Instruments* (1988). For African Charter, see C. Heyns and M. Killander *Compendium of Key Human Rights Documents of the African Union* (2nd ed) (Pretoria: PULP, 2006).

818 Under 1993 Lesotho Constitution, socio-economic rights are in Chapter III therein and are termed "Principles of state policy". It may also be indicated that such rights are non-justiciable in Lesotho.

819 Sections 1 and 2 of the 1993 Lesotho Constitution.

This notwithstanding, there are legal and ideological obstacles which impede judicial involvement and adjudication of socio-economic matters. For instance, non-justiciability of socio-economic rights, the doctrine of separation of powers, fears about astronomical expenses, and the legitimacy and the competence of the courts, have been cited as the reasons why Lesotho judiciary should not be involved in socio-economic rights matters.

This chapter engages in a search of how the wide gap between the rhetoric of the social reality of socio-economic rights in Lesotho can be abrogated by the legislature, not leaving behind judicial involvement in and adjudication of, socio-economic rights matters. It therefore begins by traversing the realm of rhetoric: it examines the universality of human rights in Lesotho's context. It then identifies and examines critically the legal and ideological obstacles impeding judicial vindication of housing rights in Lesotho, namely, land tenure system as a major hindrance to realisation of this right. It will finally screen socio-economic obligations of Lesotho and the normative nature and scope of socio-economic rights.[820]

It has already been set out against the backdrop of South African courts' experience, which has largely unearthed socio-economic jurisprudence, how these rights can be rendered meaningful for the Basotho. Lastly, it maps out Lesotho's future socio-economic blueprint, in a quest for social reality of socio-economic rights. In particular, it specifies people's expectation or needs with regard to the access to adequate housing, access to land and circumventions of evictions as grant of all these result in meaningful enjoyment of housing or shelter.

6.2 UNIVERSALITY OF HUMAN RIGHTS IN LESOTHO'S CONTEXT

There has, for many years, been a global commitment declared to the ideal of the *"indivisibility"* and *"universality"* of human rights, be they civil and political, social, economic or cultural, and that if the socio-economic rights are to be meaningful to real human life, these rights ought not to exist only at an abstract or wishful level.[821] The United

[820] Housing right content and scope will not be explained as such has already been done in the previous chapters. It will just be taken on board in the discussion.

[821] In a well-developed country in legal jurisprudence, the Court held, in *Government of RSA v Grootboom* 2001 (1) SA 46 (CC), that "the state has a positive duty to take reasonable measures to practicalise such rights on a progressive manner; The universal legal protection of human rights can be stressed as a value-oriented requirement of legal policy and can be institutionalized in the various branches of law, through legal guarantees of life and limb, of property and social security." See W Christopher. "Four Challenges Facing a

Nations World Conference on Human Rights held in Vienna in June 1993 highlighted this acknowledgment by proclaiming 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.[822]

Despite the worldwide rhetoric on the equal relevance, interdependence, and indivisibility of all human rights, in practice states have paid less attention to the enforcement and implementation of socio-economic rights, and their attendant impact on the quality of life and human dignity of the citizenry, than other rights.[823] Socio-economic rights are perceived by some writers as engendering only positive obligations, contrary to the civil and political rights which only impose negative obligations.[824] Socio-economic rights are also perceived as vague and incapable of precise definition in terms of the obligations they engender.[825] This is in addition to assertions that they lack the essential characteristics of rights *per se*: They lack universality and are not completely available on the basis of one being a human being as their realisation is subject to a number of conditions. These conditions, it is argued, include realisation of the rights progressively and subject to the available resources.[826]

Compatibilist Philosophy" (1989) 12 *Harvard Journal of Law and Public Policy* 835 and McNeece, C.Aaron, and AR Roberts, *Policy and Practice in the Justice System* (New York: Nelson-Hall, 1966).

822 Vienna Declaration and Programme of Action' (12 July 1993) *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument UN Doc. A/CONF.157/23 art 5.last accessed on 17th October 2011; In the *Algiers Declaration,* OAU Doc. AHG/Dec.I (XXXV) (July 1999) paras 17-18, the Organisation of African Union reiterated its commitment to the protection and promotion of human rights and fundamental freedoms . . . emphasize the indivisibility, universality and interdependence of all human rights, be they political and civil or economic, social and cultural, or even individual or collective . . . are convinced that the increase in, and expansion of the spaces for freedom and the establishment of democratic institutions that are representative of our peoples and receiving their active participation, would further contribute to the consolidation of modem African States underpinned by the rule of law, respect for the fundamental rights and freedoms of the citizens and the democratic management of public affairs.

823 Christof Heyns and Karen Stefiszyn, *Human Rights, Peace and Justice in Africa: A Reader* (Pretoria; Pretoria University Law Press, 2006) 70. See also C Scott "The interdependence and permeability of human rights norms: Towards a partial fusion of the International Covenants on Human Rights" (1989) 27 *Osgoode Hall Law Journal* 769 and Katherine Barrett Wiik, "Justice for America's homeless children: Cultivating a child's right to shelter in the United States" (2009) 35 (3) *William Mitchell Law Review* 876.

824 See C Dlamini "The South African Law Commission's working paper on group and human rights: Towards a bill of rights for South Africa" (1990) 5 *South African Public Law* 96.

825 A Neier "Social and economic rights: A critique" (2006) 13 *Human Rights Brief* 13.

826 Anti-socialists like Cranston M., "Human rights real and supposed" in Raphael, D., (ed.) *Political theory and rights of man* (London: Macmillan Press, 1967) submit "that socio-economic rights are not human rights because they lack the essential characteristics of universality and absolutism. Human rights are said to be universal if they accrue to every individual by virtue of their humanity rather than as a result of their position

Cranston describes socio-economic rights as "mere utopian aspirations."[827] On the other hand, civil and political rights are said to be morally compelling; they belong to a human being simply because he is human. Cranston's criticism could more tentatively be portrayed as being based on the idea of substantive universality as opposed to conceptual universality. The theory of substantive universality is intended to prove or disprove certain norms as having all the qualifications that make them human rights.[828] While in contradistinction, conceptual universality is not intended to prove the existence or even justiciability of certain categories of rights. It is merely based on the belief that by their very nature human rights once accepted apply to all human beings equally simply by virtue of their being human.[829]

As Christopher Mbazira articulates, Cranston's use of the concept of universality to discredit socio-economic rights lacks merit. Both categories of rights have elements that focus on the individual as the beneficiary, but they also have elements that are intended to protect collective interests.[830] A number of civil and political rights are only meaningfully enjoyed in groups. The freedoms of association and assembly is but one of them. It has previously been shown that civil and political rights may impact on the budgetary plan too. To see socio-economic rights purely as individual rights, is so isolating and illusory.[831] This connotation lost sight of the concept habitually used, the concept of *ubuntu,* a very central notion from African philosophy that simply means, "*I am a person because you are a person. I can't separate my humanity from yours- from a mutual acknowledgment of humanity.*"[832]
Though individuals may we seem, we are undeniably interdependent individuals, and it is found that the concept of *ubuntu* is used quite recurrently in the legal pronouncements as a South African philosophical quality that has significant application in legal decision-making.

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or role in society." James W. Nickel, *Making sense of human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (Berkeley and Los Angeles: University of California Press, 1987) 164 notes that "one of the largest barriers to the acceptance of welfare rights as universal human rights is the belief that they are simply too expensive for many countries today."

827 See Arambulo, K., *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and procedural aspects* (1999) INTERSENTIA.

828 Donnelly J, "The relative universality of human rights" (2007)29 *Human Rights Quarterly* 281 at 283, (Hereinafter referred to as *Donnelly: 2007*).

829 Ibid.

830 Christopher Mbazira, *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice,* (Pretoria; PULP, 2009) 23, (hereinafter referred to as *Christopher Mbazira, 2009*).

831 We live in communities. We need communities. We get our identity, our personality from our interaction with other people.

832 Captured from Albie Sachs, "Enforcement of social and economic rights" (2007) 22 *Amerian University International Law Review* 673 at 705.

Sachs J emphasised in *Dikoko v Mokhatla*[833] that "in the constitutional democracy, the basic constitutional value of human dignity relates closely to *ubuntu* or *botho*, an idea based on deep respect for the humanity of another."[834]

Furthermore, even the so-called collective rights empower the individual: Better health, freedom from hunger, and the proceeds of employment all benefit the individual in as much as they are also necessary for the promotion of societal cohesion.[835] On this note, Raes has asserted that:

> 'The fact that human rights are the rights of individuals does not make these rights "individualistic rights". To say that human rights discourse focuses on individuals as bearers of those rights and thus places individuals at the centre of the world is not to say that human rights discourse is intrinsically individualistic …. Although human rights are rights of individuals, they are not mainly meant to serve only individual interests. On the contrary they facilitate rational, non-violent change of existing communities by means of exercising democratic rights.[836]

Besides, socio- economic rights have to be read within the meaning of other fundamental rights as full realisation of rights can only be achieved if all rights are protected and implemented together. As long as 1985, the courts were already aware that some socio-economic rights should, as a matter of must, be read within civil and political rights in order to effectuate the rights at wide spectrum. In *Olga Tellis v Bombay Municipality Corporation*,[837] the Indian Supreme Court was faced with the issue as to whether the forcible eviction and removal from the pavements of City of Bombay deprived the street dwellers and

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[833] 2007 1 BCLR 1 (CC).

[834] Para 68. This concept of *ubuntu* views an individual as part of a bigger whole, who cannot live in isolation from society. It therefore calls for compassion, honesty, love and care in relationships between individuals. Human rights in South Africa have been integrated with this concept. It is therefore obligatory to conclude that the scholars' views shown above about socio-economic rights, together with Orwin, C., and Pangle, T., "The philosophical foundation of human rights" in Plattner, M., (ed.), *Human Rights in our time – Essays in memory of Victor Baras* (Boulder, CO: Westview Press, 1984) are clearly misplaced. Orwin and Pangle argue that the introduction of socio-economic rights carries with it a danger of moving human rights away from the individual as the focal point. In their opinion, this will make it possible for the justification of infringements upon the individual's freedom in the name of the common good. They argue that this will be detrimental to the practical achievements of the established human rights tradition. See also *Afriforum & Transvaal Agricultural Union v Julius Sello Malema & Others* EC07/10. It is submitted that the most important dicta on *ubuntu* appears in *Masethla v President of the RSA* 2008 (1) SA 566 (CC), 2008(1) BCLR 1 (CC). Again, *Ubuntu* also played a part in the judgments in *Union of Refugee Women v Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC) 2007 (4) BCLR 339 (CC); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) para 38*; Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) para 50.

[835] Christopher Mbazira, 2009 (note 829 above) 23.

[836] Raes, K "The Philosophical basis of economic, social and cultural rights" in Van der Auweraet, P., De Pelsmaeker, T., Sarkin, J. & Vande Lanotte, J. (eds.) *Social, economic and cultural rights: An appraisal of current European and international developments* (Antwerp: Maklu, 2002).

[837] [1985] 3 SCC 545.

vendors of their means of livelihood and consequently their right to life - i.e. whether right to life *per se* included the right to a livelihood. First, the Supreme Court had to consider whether administrative action of removal had been done reasonably, fairly and justly e.g. had proper notices being given to the affected parties; secondly whether removal, as a matter of statistics, would render the parties totally jobless and without means of livelihood - this necessitated an enquiry into whether there were other alternative job opportunities in the *metropolis.*

The Supreme Court correctly took due cognizance of the fact that "*The right to and opportunity for work is the most precious liberty that a man possesses in order to sustain his livelihood. Every person has as much right to work as he has to live . . . It can be argued, with some merit, that the right to live and the right to work are inseparable and interdependent and that if a person is deprived of his job his very right to life is put in jeopardy."*[838] The Court thereby held that Article 21 of the Constitution of India also encompassed the right to livelihood. The right under Article 21 is the right to livelihood because no person can live without a means of living, i.e. the means of livelihood. If the right to livelihood is not treated as part of the Constitutional right to life, 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. There is thus a close nexus between life and means of livelihood. And as such that which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life.[839]

In Lesotho, the High Court[840] was faced with the predicament of an administrative decision that compelled removal of street vendors from the pavements in which they were contending that their right to life and "right to a livelihood" were eventually infringed. The case in point

[838] Emphasis added.

[839] The Court went further to state that Article 21 of the Constitution also encompassed the right to livelihood and that this right was indivisible from the right to shelter. Eviction of the petitioners from their dwellings would result in the deprivation of their livelihood. Article 21 includes livelihood and so, if the deprivation of livelihood is not reasonable, the same would be violative of Article 21; *Madhu Kishwar v State of Bihar [*1996]5 SCC 125 affirmed the decision in *Olga Tellis* and held that Articles 13, 14, 15 and 16 of the Constitution of India and other related articles aim at the elimination of obstacles to enjoy social, economic, political and cultural rights on an equal footing. Legislative and executive actions must conform to and give effect to the fundamental rights guaranteed in Part II and the directive principles enshrined in Part IV and the Preamble of the Constitution and the Covenants of the United Nations. See also *Francis Coralie Mullin v Union Territory of Delhi* AIR 1981 SC 746, at 753.

[840] In Lesotho, when a constitutional matter arises, the High Court sits as a Constitutional Court. A panel is constituted of three or five judges in terms of "*Constitutional Court Litigation Rules*".

is *Khathang Tema Baitsokoli & one v. Maseru City Council & others*.[841] The most pertinent issue to be decided in these proceedings was whether in removing street vendors from their chosen locations along Kingsway and its pavements or precincts, the applicants' right to life was violated in contravention of section 5 of the Constitution - even in its widest sense. The High Court held that *"the right of life"* guaranteed under section 5 of the Constitution of Lesotho does not include a socio-economic right like *"livelihood"*.

In casu, there was no proper judicial oversight on the interpretation of livelihood, in spite of the existence of a wide international guidance of a similar nature. Both the High Court and Court of Appeal failed to read such right within the constitutionally entrenched rights. It is unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which the court was confronted.[842] Finally, the courts dismally misdirected themselves in that they should have encapsulated the concept of universality of human rights as all rights are interdependent and that violation of one right impacts on the other. The preambles of both the *ICCPR* and the *ICESCR* proclaim that the rights are interrelated and interdependent.[843] In *Residents of Bon Vista Mansions v Southern Metropolitan Council*,[844] the Court found that the disconnection of water supply would constitute a prima facie breach of the State's duty to respect people's right of access to water. The Supreme Court of Appeal thereafter described adequate water as:

> A commitment to address a lack of access to clean water *and to transform our society into one in which there will be human dignity and equality*, lying at the heart of our Constitution, it follows that a right of access to sufficient water cannot be anything less than a right of access to that quantity of water that is required for dignified human existence.[845]

In the above quotation, the Court unequivocally acknowledged the transformative potential of the right to access to water as a socio-economic right, stressing that the aspiration of transformation is to generate a society based on human dignity and equality. It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal

[841] Const/C/1/2004.
[842] This case will be discussed in detail later.
[843] For extensive discussion, see L M Keller, "The American Rejection of Economic Rights as Human Rights & the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?" (2003) 19 *New York Law School Journal of Human Rights* 557.
[844] 2002 (6) BCLR 625 (W).
[845] In *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA), 2009 (8) BCLR 791 (SCA), [2009] 3 ALL SA 202 (SCA) para 17. see also *Manqele v Durban Transitional Metropolitan Council* 2002 (6) SA 423 (D).

importance for human dignity. Therefore, States are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights. The Court then describes the right to sufficient water by specifically referencing the constitutional values of equality and human dignity. It emphasized the interdependence of fundamental rights in terms of General Comment No. 15, which provides that

> The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.[846]

On the other hand, it must still be remembered that socio-economic rights are not absolute. As opposed to civil and political rights, their realisation is subject to conditions and it depends on availability of resources. Bossuyt maintains that civil and political rights can be realised immediately because their realisation does not require resources; all the state has to do is to abstain from infringing them.[847] However, it lays emphasis that this idea is misconceived. The implementation of civil and political rights, just like the socio-economic rights, requires resources.[848] The principle of universality of human rights should not only be the cornerstone of international human rights law but in the regional and domestic spheres as well. The fundamental right to life and dignity, thus properly understood, affords an eloquent illustration of the indivisibility and interrelatedness of all human rights.

6.3 LAND TENURE SYSTEMS AS A HINDRANCE TO HOUSING RIGHTS IN LESOTHO

The Constitution provides that all land is vested in the Basotho nation.[849] There has, however, been a number of pieces of legislation that seem to control, one way or another, allocation and distribution of land in Lesotho. To mention just a few, these are (a) The Land Act of 1979, which was the principal law governing landholding in Lesotho. This Act has been repealed in 2010; (b) The Deeds Registry Act 1969 which is principally a registration statute for various deeds; (c) The Town and Country Planning Act 1980, which is the principal planning law; (d) The Local Government Act 1997, which establishes community, rural,

[846] *See Mazibuko v. City of Johannesburg* [2008] 4 All SA 471.
[847] M Bossuyt "International human rights systems: Strengths and weaknesses" in K Mahoney & P Mahoney (eds) *Human rights in the twentieth century* (London: Martinus Nijhoff Publishers, 1993) 52.
[848] For a broad alalysis on this point, see P Alston & G Quinn, "The nature and scope of States Parties' obligations under the International Covenant on Economic, Social and Cultural Rights" (1987) 8 *Human Rights Quarterly* 156 at 172.
[849] See section 107 of 1993 Lesotho Constiution.

urban and municipal councils; and The Urban Government Act 1983, which provides for the establishment of urban councils. Related legislation includes the Land Husbandry Act 1969 and the Valuation and Ratings Act 1980.

Besides, land in Lesotho was traditionally governed by customary law. The primary source of customary law is a codified text of custom known as the *Laws of Lerotholi*. This codification is further augmented by several authoritative writings.[850] Through it land was considered to be part of the communal heritage of its users. It was not capable of belonging to any one individual. Land was held by the chiefs in trust on behalf of the larger community. Such land was allocated for use to the allottee and his family.

It could not be bought, sold, transferred or exchanged. Rights to allocation were traced from one's membership in the community, although in certain circumstances outsiders could obtain land. However, this trend has been changed by the introduction of local councils and there is no one who can be allocated land or buy a site, as they are now sold, without knowledge of council. This customary root has entirely shifted from the chiefs' authority and it is currently governed by the new Land Act No. 42 of 2010 and Local Government Act 1997, as amended.

Section 25 of the Constitution provides that the directive principles shall not be enforceable by any court but, subject to the limits of the economic capacity and development of Lesotho, shall guide the authorities and agencies of Lesotho, and other public authorities, in the performance of their functions with a view to achieving progressively, by legislation or otherwise, the full realisation of these principles.[851] One principle requires the state to adopt policies that encourage its citizens to acquire property, including land, houses, tools, and equipment. Such principles, however, are not enforceable by the Constitution. As a consequence, a direct and enforceable right to housing does not exist in Lesotho.

The bill of rights in the Constitution provides for the "right to respect for private and family life", which provides that "every person shall be entitled to respect for his private an (sic) family life and his home" unless this conflicts with the interests of "defence, public safety,

[850] Duncan, P, *Sotho Laws And Customs* (Cape Town: Oxford University Press, 1960); Poulter, S. M , *Legal dualism in Lesotho* (Maseru; Morija Publishers, 1981); Palm and Poulter *The Legal System of Lesotho*, Virginia; Michie Co. Publishers, 1972).
[851] Section 25 of 1993 Lesotho Constitution.

public order, public morality or public health."[852] The Constitution also circuitously protects against eviction. It prohibits "arbitrary seizure of property" except when "provision is made by a law applicable to that taking possession or acquisition for the prompt payment of full compensation."[853] Property may only be acquired by the state in the interests of "defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit.[854]

6.4 LEGISLATURE INVIGORATING SOCIO-ECONOMIC RIGHTS

In Lesotho, only the legislature and executive are at *carte blanche* to take care and cater for socio-economic rights. It is a well-known fact that the judiciary has a major role to play in ensuring that there exists a rule of law. The judiciary is the overseer for the other two arms of the government: - Executive branch - ensuring that it exactly obeys and implements these laws in line with the Constitution - the Legislature, ensuring that laws enacted are within the Constitutional parameters and that the rule of law is borne in mind when making the laws.[855] The courts, as the watchdogs for realisation and proper administration of all the laws, seem to have sat back and left everything at the hands of other organs of the state, hence neglecting their duties.[856] In this section, focus is much on the advancements made by legislature in realising certain socio-economic rights.

6.4.1 The Normative Content of the Right to Education

Education is both a human right in itself and an indispensable means of realising other human rights.[857] This truth is now nearly universally recognized. It means that education is both a source of dignity and an essential part of the development of the human personality. It is also necessary in today's world if one wishes to become an effective part of the political decision-

[852] Section 11 of 1993 Lesotho Constitution.

[853] In this situation, there may be execution of a judgement that may result in depriving an individual a right to accessible housing one is already enjoying. It means that a situation that may arise can be contrary to *Jaftha v Schoeman Decision*.

[854] It may by way of expropriation. However, there have been people affected when Katse and Mohale dams were constructed. The government of Lesotho and other involved stakeholders took a task of relocating all affected and build new houses for them in different places.

[855] *S v Mamabolo* 2001 3 SA 409 (CC) para 16, per Kriegler J: "Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights — even against the state."

[856] *Khathang Tema Baitsokoli & one v. Maseru City Council & others* is illustrative on this point.

[857] General Comment No. 12, para 1.

making process. Moreover, the right has been hailed an indispensable part of the process of effective economic development, upon which several other rights, both political and social depend.[858] Article 13(1) of *the International Covenant on Economic, Social and Cultural Rights* states specifically what the purpose and objective of education should be. It states that education shall: (a) Be directed to the full development of the human personality and the sense of its dignity; (b) Strengthen the respect for human rights; (c) Enable all persons to participate effectively in a free society; (d) Promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups; and (e) Further the activities of the United Nations for the maintenance of peace.

In Lesotho context, the legislature enacted Education Act,[859] which repeals the old Act. In terms of this Act, there is indeed improvement in that right to Education is realised. There is free primary education as a form of basic education. Section 3 of the Education Act of 2010 states that this Act "makes provision for free and compulsory education at primary level and that it amplifies a provision for education for all in accordance with the provision of section 28 of the Constitution." Lesotho has, at least, once been on a reasonable standard for realisation of a socio-economic right. It probably saw it that a purely textual analysis of this right yields a "hybrid" result, as far as the state's obligations are concerned.[860]

In addition, it is known that denial of access to education is obviously denial of the full enjoyment of other rights that enable an individual to develop his potential and participate meaningfully in the society.[861] It has also been recognised that this right should impose a positive duty or positive obligations upon the state to adopt proactive measures in order to grant everyone equal access to education. The state's positive obligation was duly noted in *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of the Gauteng Education School Bill of 1995*,[862] in which the Constitutional Court held that

[858] See A. Sen, *Development as Freedom* (New York: Alfred Knopf, 2000).
[859] Education Act No. 20 of 2010.
[860] As F Veriava and F Coomans, "The right to education" in Brand and Heyns C et al (eds) *Socio-Economic Rights in South Africa* (Pretoria: PULP, 2005) 59 say, "the hybrid nature of right to education is a clear demonstration of the interdependence and indivisibility of all human rights."
[861] See F Veriava and F Coomans, "The right to education" in Brand and Heyns C et al (eds) *Socio-Economic Rights in South Africa* (Pretoria; PULP, 2005).
[862] 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) para 9.

Section 32(a) of the Constitution[863] creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.

With a similar constitutional provision to that of Lesotho, an Indian Supreme Court was once faced with a problem of directing as to whether the right to education could be enforced. The right existed in Article 45 of the Indian Constitution, but it was a Directive Principle of State Policy and, therefore, not 'justiciable', i.e. not enforceable in a court of law. But in 1993, in the famous case of *Unni Krishnan v the State of Andhra Pradesh,*[864] the Supreme Court emphasised the importance of education and included this as a fundamental right under Article 21 of the Constitution. The Constitution 93rd Amendment Bill, 2001, formally introduced this in the Constitution. This right is now a fundamental right in the Constitution of India in Article 21A.

6.4.2 **The Normative Content of the Right of Access to clean Water**

Brand notes that access to water is both a pre-requisite for food production and forms a key part of a healthy diet.[865] It is further rephrased by Anton Kok and Malcolm Langford[866] that the right to water is an indispensable element of other rights, particularly the rights to adequate food or nutrition, to health and a clean and/ or healthy environment and water conservation.[867] Section 27(1)(b)[868] proposes that everyone should have access to clear and decent water.[869] It accordingly reflect the central requirement for affirming a human right, namely that the claimed right can be universally enjoyed.[870] The Committee on ESCR has adopted such a universalistic approach when interpreting right to water and states:

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[863] Section 32(a) the Constitution of the Republic of South Africa Act 200 of 1993 reads "Every person shall have the right to basic education and to equal access to educational institutions. Section 28 of the Constitution of Lesotho 1993 is expressed similar to section 32 with necessary changes only.

[864] 1993 AIR 217, 1993 SCR (1) 594, 1993 SCC (1) 645.

[865] Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* (Pretoria; PULP, 2005) at 163.

[866] Anton Kok and Malcolm Langford, "The right to water" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* (Pretoria; PULP, 2005) at 191.

[867] Woolard I and C Barberton "The extent of poverty and inequality" in C Barberton et al (eds) *Creating action space:The challenge of poverty and democracy in South Africa* (Claremont; IDASA & David Philip, 1998) 31 state that "Access to clean water . . . has the most obvious and direct consumption benefits in reducing mortality and poor health and increasing the productive capacity of the poor."

[868] Section 27(1)(b) of the 1996 South African Constitution.

[869] As per this section, "Everyone has the right to have access to sufficient . . . water . . ."

[870] See Dereveux A, "Australia and the right to adequate housing" (1991) 20 *Federal Law Review* 232.

> The water supply for each person must be sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothing, food preparation, personal and household hygiene. The quantity of water available for each person should correspond to World Health Organization (WHO) guideline. [871]

As a socio-economic right, right to water too enhances life and should indivisibly be treated together with other rights on an equal basis. The courts have opined on this right too. In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*,[872] the Court held that the obligation to respect existing access to water entails that the state may not take any measure that result in the denial of such access and further that the disconnection of the applicants' water by the Council without justification amounted to violation of the duty to respect the right of access to sufficient water.[873] In Lesotho, it cannot be said that there is realisation of such a right since Water And Sewarage Authority, a parastatal company responsible for providing and cleaning water, connects the meter to any tap it installs for a family and charges individuals according to the water one has use. One is even billed for installation of a tap. It may be emphasised that there is no subsidy at all in this regard since one pays for the installation and will thereafter keep paying for monthly usage of water.

6.4.3 The Normative Content of the Right to Food

The right to sufficient food is realised when every man, woman and child, alone or together, has physical and economic access at all times to sufficient food or a way in which to get hold of it. The key elements of the right to food are the following:[874] First, every one must have access to food that is enough in quantity and nutritiously adequate in quality. Second, food must be physically accessible, that is, it must be within reach of all the people at all times. It must also be economically accessible in the sense that it has to be affordable. This is so since price increases limit people's ability to access food. Food must be available and there must be enough food supply in a country at all times.

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[871] Paras 12 and 37(b) of the General Comment No 15 on the Right to Water by the UN on Economic, Social and Cultural Rights (29th Session, 2002).

[872] 2002 (6) BCLR 625 (W).

[873] In *Mazibuko v. City of Johannesburg* 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC), the Constitutional Court said that "Human beings need water to drink, to cook, to wash and to grow our food. Without it, we will die. It is not surprising then that our Constitution entrenches the right of access to water."

[874] CESCR General Comment No.12 (1999) para 8 – 13.

For Goler Teal Butcher, whereas the practical conception of a right to food arises out of a biological imperative, the theoretical conception of a right to food arises out of a trilogy of factors. Firstly, the evolution of human rights concepts; secondly, the convergence of moral imperatives and notions of distributional justice; and, thirdly, the reality of collective responsibility regarding both the enormous disparities between the North and South and the situation of the least developed countries and of the almost one billion people living in dire poverty on the edge of existence, utterly without the basic necessities of life.[875] Robert E. Robertson has defined the scope of this right as:

> A condition in which each person can eat food which, by prevailing medical standards, is judged adequate for the full realization of physical and mental health. A person's diet should also consist of food which satisfies cultural preferences. The food should be obtained in a manner which is not an affront to the dignity or self-esteem of the person and the process by which the food is made available should be stable and sustainable, thus ensuring continuous access to food of acceptable standards.[876]

In other parts of the world, especially, India and South Africa, judicial protection to this right is at its best. The Indian judiciary has on many occasions reaffirmed that the "right to life enshrined in Article 21 means something more than animal instinct and includes the right to live with dignity and that includes all aspects which make life meaningful, complete and living."[877] The Supreme Court in *Chameli Singh v. State of U.P.*[878] while dealing with Article 21 of the Constitution has held that the need for a decent and civilised life includes the right to food, water and a decent environment. The Supreme Court further observed "In any organised society, right to live as a human being is not ensured by meeting only the animal needs of men. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this subject. Right to live guaranteed in any civilised society implies the right to food, water,

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[875] Goler Teal Butcher, "The Relationship of Law to the Hunger Problem" (1987) 30 *Howard L J* 193. The author stated that "Law is relevant to the problem of hunger and securing food for hungry people with respect to both the short and long term approaches to the problem because it is through law that we structure both the various mechanisms to respond to hunger in a crisis and the means to assist people with pursuit of a development policy aimed at achieving food self-sufficiency. Moreover it is through law that we implement our convictions: on the right of hungry people to food and on the duty of the well-endowed to assist in the alleviation of hunger." According to Philip, in Philip Alston and Katarina Tomasevski eds., *The Right to Food: Guide Through Applicable International Law* (Boston: Martinus Nijhoff Publishers, 1984) "it is not the same as the right not to starve, nor the right not to be hungry", while Katarina Tomasevski, in the same book, alluded that "the right to food is not synonymous with the right to be fed, for that implies an unhealthy dependency upon others."

[876] Robert L. Bard, "The Right to Food" (1884-85) 70 *Iowa Law Review* 1279.

[877] *Maneka Gandhi v. Union of India* AIR 1978 SC 597.

[878] (1996)2 SCC 549.

decent environment, education, medical care and shelter. These are basic human rights known to any civilised society. All civil, political, social and cultural rights enshrined in the Universal Declaration on Human Rights and convention or under the Constitution of India cannot be exercised without these basic human rights."[879]

In Lesotho, the donation has only been a major source for provision of food. There is Public Health Order 1970[880] which is certainly outdated. The government, through Ministry of Health and Social Welfare, is currently trying to revise the Order but main focus is on a draft for a Health Policy.[881] As one of its objectives, the policy alludes that it is meant to improve the nutrition status of the population for socio-economic development. The specific objectives are to: (1) eliminate childhood and maternal malnutrition; and (2) reduce micronutrient deficiencies.[882]

6.4.4 **The Normative Content of the Right to Health**

Health is a "state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[883] The right to health is not the right to be healthy: it contains both freedoms and entitlements. It is the right to the enjoyment of a variety of facilities, goods and services and conditions necessary for the realisation of the highest attainable standard of health. It is not confined to health care alone; it extends to the underlying conditions for health such as food, nutrition, housing, access to safe and potable water and adequate nutrition, safe and healthy working conditions and healthy environment.[884]

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[879] In *Shantistar Builders v. Narayan Khimalal Totame* MANU/SC/0115/1990, the Supreme Court held that basic needs of man have traditionally been accepted to be three-food, clothing and shelter, whilst in *Air India Statutory Corporation, etc. v. United Labour Union and others* AIR 1997 SC645- the Supreme Court held that the enforcement of the provisions to establish canteen in every establishment under Section 16 of Contract Labour (Regulation and Abolition) Act, 1970 is to supply food to the workmen at the subsidized rates as it is a right to food, a basic human right.

[880] *Public Health Order* 12 of 1970.

[881] Lesotho Health Policy – 2011. It is obtained on the 26th October 2011. It must be mentioned that the policy is still under meticulous scrutiny when this work is written.

[882] See para 5.4 of Lesotho Health Policy – 2011.

[883] First Preambular paragraph of the World Health Organisation, available online (http://www.searo.int/EN/section898/section1441.htm) accessed on 14/10/2011.

[884] Article 12 of ICESCR. This understanding is important since access to medicine alone may not be sufficient to ensure good health.

The essential primary health care forms the minimum essential level of the right to health, and includes education concerning prevailing health problems and the methods of preventing and controlling them; promotion of food supply and proper nutrition; adequate supply of safe water and basic sanitation; maternal and child health care, including family planning; immunisation against major infectious diseases; prevention and control of locally endemic diseases; appropriate treatment of common diseases and provision of essential drugs.[885] The right to health in all its forms and at all levels contains the following interrelated and essential elements:[886] availability,[887] accessibility,[888] acceptability and quality.[889]

In Lesotho, the Health Policy under preparation touches unswervingly on right to health. On the preamble, it specifies that the Ministry of Health and Social Welfare is charged with the responsibility of policy formulation and strategies for the delivery of health and social welfare services, with the ultimate goal of ensuring that every Mosotho has the opportunity for good health and an acceptable quality of life.[890] The health objectives under the policy are, inter alia, (a) To reduce morbidity, mortality and human suffering among the Basotho; (b) To reduce inequalities in health and access to health services; and finally (c) To strengthen the health systems through a stable health workforce and other essential systemic elements.[891]

It is indicated that this policy is aimed at "contributing to improved health status through equity of access to quality health care in both public and private domains guided by the principles and strategy of primary health care and health systems strengthening."[892] Interestingly, the policy clarifies that there will be Environmental Health Services aimed to address all potential, emerging and actual threats to human health and welfare, as well as the

[885] Para 9 of Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, adopted at Maastricht on January 22 – 26, 1997, available online (http://www1.umn.edu/humanrts/intrees/maastrichtguidelines-html) accessed on 13/10/2011.

[886] C. Ngwena and R. Cook "Rights Concerning Health" in D. Brand and C. Heyns (eds) *Socio-Economic Rights in South Africa* (Pretoria; PULP, 2005) at 116; *Vide* also CESCR General Comment No.3 (1990), para 12.

[887] Functioning public health and health care facilities, goods and services, as well as programmes have to be available in sufficient quantity within Lesotho.

[888] They should also be accessible to everyone without discrimination.

[889] They must also be scientifically and medically appropriate and of good quality. This requires, *inter alia*, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.

[890] See forward on Lesotho Health Policy 2011.

[891] Para 4.0 of Lesotho Health Policy 2011.

[892] See 5.0 of Lesotho Health Policy 2011.

environment.[893] These threats are addressed through the implementation of environmental health interventions, that include promotion of appropriate water supply and sanitation; food hygiene and safety; occupational health and safety; pollution control; emergency preparedness and response; housing; and port health services. These interventions are carried out through education, promotion, advisory functions, inspection, monitoring and setting of standards and/or guidelines.[894]

Again, though there is no documentation to be accurately referred to, there is subsidy in the health care sectors. Some medication is freely given by the state to its nationals. The health sector is endowed with a fair complement of donors whose support is in areas of HIV and AIDS, TB, Family Health, Infrastructure, Laboratory services, Social Welfare and Health Systems in the context of Health Sector Reforms Program. Donor coordination was relatively more problematic before introduction of the Medium Term Expenditure Framework (MTEF). Current efforts are focused on strengthening the Ministry monitoring and accounting for donor inflows and assessing AID effectiveness and sector reforms.

6.5 DISMANTLING OBSTACLES IMPEDING JUDICIAL VINDICATION OF SOCIO-ECONOMIC RIGHTS IN LESOTHO– JUDICIAL ACTIVISM

6.5.1 Introduction

To break the ice, social reality through Indian and South African Courts' socio-economic jurisprudential lenses has for decades been obviously admirable. It is recognised that the brief snapshots of the historical background and the legal culture from which the present socio-economic jurisprudence of the Indian and South African judicial branches, together with similarly current jurisprudence, broke away and emerged are not without significance for the full appreciation of the important role these courts played in translating socio-economic

[893] Environmental health is determined by physical, chemical, biological, social and psychological factors.

[894] See 5.5 of Lesotho health Policy 2011. This portion of the policy aims to promote environmental conditions and interventions that will improve health and social welfare.

rhetoric into social reality. As far back as the 1980s, the Indian Supreme Court, per Justice Ranganath Misra in *Vincent Panikurhangara v Union of India,*[895] stated that:

> In a series of pronouncements … this Court has culled out the provisions of Part IV [on directive principles of state policy] of the Constitution these several obligations of the state and called upon it to effectuate them in order that the resultant pictured by the Constitutional Fathers may become a reality… Attending to public health … therefore is of high priority – perhaps the one at the top.[896]

The choice of India and South Africa for a comparative socio-economic jurisprudential discourse in this chapter is not arbitrary as it is based on at least two justifications. First, the system in which socio-economic rights are protected under the Lesotho Constitution is cast in the same mould as the Indian Constitutional framework,[897] but this notwithstanding, the Indian courts have been able to "move away from formalism and use judicial activism for achieving the objectives of making human rights a living reality for the people served."[898] Second, South Africa has arguably been one of the most sophisticated systems for the protection of socio-economic rights in the world and the work at hand is formulated on its jurisprudence. Thus, the Indian and South African courts' socio-economic jurisprudence can endow with important lessons for Lesotho. Again, a mention of this comparative system will only be enunciated in a nutshell while showing Lesotho's inefficacy in giving rights living and vibrant reality.

6.5.2 From deference to vigilance

Kirsty McLean highlights that constitutional deference is viewed as an integral aspect of judicial review.[899] Suffice it therefore to emulate that 'judicial review' is defined as the evaluation undertaken, by the courts, of the exercise of public power to gauge its consistency with a set of pre-defined or constructed legal norms. The courts undertake judicial review

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[895] [1987] 2 SCR 468 at 478.

[896] In South African's context, the dictum of the then Chief Justice, Mr Chaskalson in *Soobramoney v Minister of Health, KwaZulu Natal,* para [8] is a good example.

[897] Section 37 of the Indian Constitution provides that "The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in the making of laws." This resembles section 25 of 1993 Lesotho Constitution.

[898] P.N. Bhagwati "Fundamental Rights in their Economic, Social and Cultural Context" (1989) *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms* 79. Hereinafter referred to as *P.N. Bhagwati "Fundamental Rights in their Economic, Social and Cultural Context.*"

[899] Kirsty McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa,* (Pretoria; Pretoria University Law Press, 2009) at 23. See also Christof Heyns and Karen Stefiszyn (eds) *Human Rights, Peace and Justice in Africa: A Reader,* Pretoria; PULP, 2006) at 128-9.

when they consider whether such legislation, policy or action is consistent with these legal norms. The precise content of these norms will depend on the constitution; the values of the dominant culture; the type of democracy which a country espouses; and the court's understanding of its role and of judicial review.

The justification for judicial review is, mostly, that the courts act as a check on the exercise of public power, ensuring that it is exercised in a manner consistent with the constitution of a particular country.[900] It goes without saying that this justification is grounded in the rule of law, as well as the doctrine of separation of powers and the system of checks and balances that is part of the doctrine.[901] The discussion to follow focuses much on the constitutional deference shown by courts in spreading the realistic gospel in the realm of socio-economic realisation.

(a) India Experience and Jurisprudence

When India became independent,[902] it faced "enormous challenges of introducing a new socio-economic order, restoring human dignity and justice. The Indian Constitution rose to meet these challenges"[903] by guaranteeing specific enforceable fundamental rights, traditionally dubbed civil and political rights, and setting out non-justiciable directive principles of state policy. The directive principles were aimed at the furtherance of social justice and served as an instruction to all government agencies to adopt certain policies in furtherance of socio-economic rights and as a code of conduct according to which the governance of India should take place.[904] Of late, India's constitutional document is not only one of the most comprehensive in the world, but also one whose every phrase has been

[900] See C Forsyth (ed) *Judicial review and the Constitution* (Oxford: Hart Publishing, 2000) for a good overview a number of competing theories on the justification for judicial review and the debate in the UK, in the context of administrative law.

[901] Shapiro M, "The success of judicial review and democracy" in M Shapiro & A Stone Sweet (eds) *On law, politics, and judicialisation* (Oxford: Oxford University Press, 2002) 149 elaborates the justification for judicial review by arguing that constitutional judicial review is politically justified by the twin aims of division of powers (both between national and provincial/ state power, and between and within the legislature and executive) and the enforcement of rights. These aims are not understood as excluding each other, but rather as a 'branching pair', where either one or both of these aims may be true for a particular country at a particular time.

[902] on 15 August, 1947.

[903] See Shehnaz Meer 'Litigating Fundamental Rights: Rights Litigation and Social Action Litigation in India: A Lesson for South Africa' (1993) 9 *SAJHR* 358.

[904] Bertus De Villiers 'Directive Principles of State Policy and Fundamental Rights: The Indian Experience' (1992) 8 *SAJHR* 29 at 32, (hereinafter referred to as *Bertus De Villiers 1992*).

animated by vibrant judicial interpretation. It is not a bare text, but rather a living, evolving document.[905] Again, even though constitutional jurisprudence has fluctuated between periods of expansion and retraction, and of self-denial and activism,[906] as a general trend, it struck a balance in favour of perceived social good *vis-`a-vis* individual rights.[907]

However, the British Raj[908] had bequeathed to India a colonial legal culture and transactional, highly individualistic jurisprudence which was ill-equipped to meet the challenges of distributive justice for the underprivileged millions.[909] As a result, for the first three decades after the independence, the judiciary in India laboured unsuccessfully within the confines of a borrowed foreign legal culture and jurisprudence to administer justice, with the result that the bulk of the population of India knew only the majesty of the court without having felt its justice.[910] The rights, both socio-economic and civil and political, in the Indian constitution remained academic and mere paper statements. This situation changed in the 1970s when the Indian courts adopted an activist posture.

Besides, in India, Courts interfere in governmental matters, in the interest of good governance. Governance is not a mere political principle. It is a process defined, determined and regulated by the Constitution.[911] The institutions given the task and responsibility of governance are expected to act and function within the limits of and principles enshrined in the Constitution. Several provisions of the Constitution act as "Sign posts" and "Road maps" for governance.[912] The preamble to the Constitution, the Directive Principles of State Policy, and the provisions relating to local self Government etc. are such constitutional signposts.[913]

Article 37 of the Constitution particularly declares that the Directive Principles of State Policy (DPSP) "shall not be enforceable by any court, but the principles therein laid down are

[905] See *State of West Bengal v. Kesoram Indu. Ltd.* 2005 SCC 1646 at 1678-79.
[906] Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation, in the role of the judiciary in plural societies 32* (neelan tiruchelvam & radhika coomaraswamy eds., 1987).
[907] *Coelho v. State of Tamil Nadu* (2007) 2 S.C.C. 1, 98, 107
[908] The British Raj is a term of history. "Raj" is a word of Indian languages which means "rule", so "British Raj" means rule by the British in India. This rule was before 1947 and was over parts of what are now four countries, the Republic of India, Pakistan, Bangladesh, and Burma.
[909] Ibid, 35.
[910] Ibid.
[911] See *Markendeya v. State of A.P. & others* (1989) 3 SCC 191and *UPSC Board v Harish* [1979] 1 SCR 355.
[912] *Mumbai Kamghar Sabha v Abdul Bhai* (1976) 3 SCC 832: AIR 1976 SC 1455.
[913] *Bhimsinghji v Union of India* (1981) 1 SCC 166 : AIR 1981 SC 234 : (Directive Principles as Instruments of Instructions) see also *State of Gujarat v Mirzapur Moti* (2005) 8 SCC 534; *Jillubhai Nanbhai Khachar* 1995 Supp. (1) SCC 596 : AIR 1995 SC 142.

nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws." The thrust of the command contained in Article 37 can be taken to mean that the State shall respect, protect, promote and fulfill the obligations set out in part IV. State action which does not respect, protect or promote the directives may be considered to be in derogation of public interest and deemed to be arbitrary and amenable to the Court's review.[914] Social, economic and political justice is a goal as per the Preamble of the Constitution and the administration of justice can no longer be seen to be merely protect legal rights but must be also include the dispensing of social justice. In *Sadhuram v. Pulin,*[915] the court clarified that "…it is the duty of Indian courts not only to decide justiciable causes between two parties, as in other countries governed by the rule of law, but also to ensure social and equal justice 'between chronic unequals' in a more positive and meaningful sense: India, therefore, needs a Judiciary "which is in tune with the [this] social philosophy of the Constitution…"

It is not a mere coincidence that the apparent difference that is drawn by scholars between the ICCPR rights and socio-economic rights holds good for the distinction that is drawn in the Indian context between fundamental rights and DPSP.[916] Thus the bar to justiciability of the DPSP is spelled out in some sense in the Constitution itself. However, the Indian judiciary has risen above this perceptible limitation by a creative and interpretative exercise. In what context that happened and how what is is proposed to be examined in this case study in relation to Lesotho. After briefly tracing the development of this interpretative exercise through case law in different consecutive decades of the working of the Constitution, it will be apparent that Lesotho's judicial branch stands to adapt a similar approach to that on Indian when it comes to justiciability and enforceability of specific socio-economic rights.

[914] *Kasturilal v State of J&K* 1980 AIR 1992, [1980] 3 SCR 1338.
[915] AIR 1984 SC 1467. See also *S.P. Gupta v. Union of India*, AIR 1982 SC 149.
[916] D. J. Ravindran, Human Rights Praxis: A Resource Book for Study, Action and Reflection (Bangkok: Asian Forum for Human Rights and Development, 1998) 124, doubts the validity of the view that civil and political rights are human rights and economic, social and cultural rights are only aspirations.

(I) Civil and Political Rights and Directive Principles of State Policy: From Madras to Maneka

In an effort to lay down a working symbiotic relationship between the chapters on fundamental rights (Part III) and directive principles of state policy (Part IV) of the Constitution, and to tackle the socio-economic repercussions facing the Indian masses, the Indian courts have gone through numerous phases.[917] During the first phase, beginning in 1951 with *Madras v Champakam Dorairajan*[*918*], the Supreme Court regarded fundamental rights as sacrosanct and superior to the directive principles of state policy.[919] Any legislation adopted in furtherance of the directive principles should not infringe the fundamental rights, and if it does, it would be declared null and void.

In *Madras* the state government had reserved a certain number of places in medical and engineering colleges on a community basis. The petitioners argued that such reservations were in conflict with the fundamental right of an individual to admission to educational institution.[920] The state, on the other hand, argued that the places were reserved in furtherance of the directive principles which aim to protect the scheduled castes and tribes, and that therefore the reservations were valid. The Supreme Court rejected this argument by the state and ruled that the reservations were void on account of their encroachment on the fundamental right to admission. When the tussle for primacy between fundamental rights and DPSP was tied before court, it said, "The directive principles have to conform to and run subsidiary to the chapter on fundamental rights."

The second phase, beginning around 1965, was characterised by efforts to interpret fundamental rights and directive principles as complementary and supplementary to each other. In *Chandra Bhawan Boarding and Lodging Bangalore v The State of Mysore*[921] the petitioner challenged a certain provision of the Minimum Wages Act on the basis that it violated its right to freedom of trade. The state argued that in terms of the directive principles, it was its duty to provide a basis for minimum wages. The Court ruled that there was no conflict between fundamental rights and directive principles of state policy:

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[917] Johan De Waal *et al The Bill of Rights: Handbook* (Juta and Co: Cape Town, 2001) 219.
[918] AIR 1951 SC 226.
[919] Bertus De Villiers 1992.
[920] Section 29(2) of the Indian Constitution.
[921] 1970 SCR 600.

> Freedom to trade does not mean freedom to exploit. … While rights conferred in Part III are fundamental, the directives given under Part IV are fundamental in the governance of the country. We see no conflict on the whole between the provisions contained on Part III and Part IV. They are complementary and supplementary to each other.[922]

The *stare dicisis* formulated in *Chandra Bhawan case* was welcome and approved in a case that revolved around fundamental right and that is *Keshavananda Bharati v. State of Kerala*.[923] The majority court's opinions reflected the observation that what is fundamental in the governance of the country cannot be less significant than what is significant in the life of the individual. Another judge constituting the majority in that case said: "In building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to directive principles."[924] This assertion, that the fundamental rights and DPSP are complementary, "neither part being superior to the other," has held the field since.[925] This advances the point that the socio-economic rights are seen as aids to interpret the Constitution, and more specifically to provide the basis, scope and extent of the content of a fundamental right. In *Keshavananda Bharati v. State of Kerala*,[926] the court emphasised that:

> Fundamental rights have themselves no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgement, curtailment and even abrogation of these rights in circumstances not visualised by the constitution makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in Part IV.[927]

The third and current phase is characterised by an even greater awareness by the judiciary of the need for socio-economic restructuring (or the active role that the courts are playing in effecting socio-economic rights),[928] and of the obligations placed upon the state by the directive principles. This approach is based on two arguments: The first is that it was the intention of the framers of the Indian Constitution that the state should not only be aware of what is expected of it, but that it should have constitutional support for undertaking certain

[922] At 612.
[923] (1973) 4 SCC 225.
[924] Mathew J, Para 1707 at 879.
[925] V.R.Krishna Iyer,J. in *State of Kerala v. N. M.. Thomas* (1976) 2 SCC 310 para 134. see also *State of Bihar v Kameshwar Singh*, [1952] SCR 889 : AIR 1952 SC 252 and *Bijoy Lakshmi Cotton Mills v State of West Bengal* [1967] 2 SCR 406 : AIR 1967 SC 1145.
[926] (1973) 4 SCC 225.
[927] Para 1714.
[928] Bertus De Villiers 1992, 45.

socio-economic projects. The second is that, due to conservative approach of the courts through the preceding years, the state had not succeeded in effectively fulfilling its obligations as formulated in the directive principles. The desperate conditions in which millions of Indian people still found themselves necessitated a joint approach by the legislature, the executive and the judiciary to address the intense socio-economic disparities.[929] The courts were then faced with no option but to take upon itself the task of infusing into the constitutional provisions the spirit of social justice. This can be seen in a series of cases of which *Maneka Gandhi v. Union of India* was a landmark.[930]

The 1977 *Maneka Gandhi v Union of India*[931] case is a landmark case of the post-emergency period. This case showed, for the first time, an overt tendency in the Supreme Court to go beyond the ambit of simply judging whether an executive action complied with State-made law, to assuming an active role in assessing the substance of the content or procedure prescribed by the law in light of principles of natural justice. A great transformation came about in the attitude of the judiciary after the emergency of 1975 towards the duty of the judiciary to play an active role in protection of personal liberty.

In this case, Maneka Gandhi was issued a passport on 1/06/1976 under the Passport Act 1967. The regional passport officer , New Delhi issued a letter dated 2/7/1977 addressed to Maneka Gandhi , in which she was asked to surrender her passport under section 10(3)(c) of the Act in public interest, within 7 days from the date of receipt of the letter. Maneka Gandhi immediately wrote a letter to the Regional passport officer New Delhi seeking in return a copy of the statement of reasons for such order. However the government of India, Ministry of External Affairs refused to produce any such reason in the public interest.

The main issues before the court in this case were as follows:

- whether right to go abroad is a part of right to personal liberty under Article 21.
- Whether the Passport Act 1956 prescribes a ‘procedure’ as required by Article 21 before depriving a person from the right guaranteed under the said Article.

[929] Ibid.

[930] Until the decision in *Maneka Gandhi*, the court stuck to the view it first took in *A.K.Gopalan v. State of Madras* 1950 SCR 88, that article 21, which stated that "No person shall be deprived of his life or personal liberty except according to the procedure established by law," meant that as long as there was a law made by the legislature taking away a person's liberty, such law could never be challenged as being violative of fundamental rights.

[931] [1978] 1 SCC 248, 1978 AIR 597, 1978 SCR (2) 621.

- Whether section 10(3) (c) of the Passport Act is violative of Article 14, 19(1) (a) and 21 of the constitution.
- Whether the impugned order of the regional passport officer is in contravention of the principles of natural justice.

The Indian Supreme Court said that the expression 'personal liberty' in Art. 21 is of the widest amplitude and covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental, rights and given additional protection under Article 19(1) of the Constitution. It reiterated the proposition that the fundamental rights under the constitution of India are not mutually exclusive but are interrelated.[932] According to Justice K. Iyer, "a fundamental right is not an island in itself." The expression "personal liberty" in Article 21 was interpreted broadly to engulf a variety of rights within itself.

The court further observed that the fundamental rights should be interpreted in such a manner so as to expand its reach and ambit rather than to concentrate its meaning and content by judicial construction.[933] Article 21 provides that no person shall be deprived of his life or personal liberty except in accordance with procedure established by law but that does not mean that a mere semblance of procedure provided by law will satisfy the Article , the procedure should be just , fair and reasonable. The principles of natural justice are implicit in Article 21 and hence the statutory law must not condemn anyone unheard. A reasonable opportunity of defense or hearing should be given to the person before affecting him, and in the absence of which the law will be an arbitrary one.

Justice Krishna Iyer observed further that, "the spirit of man is at the root of Article 21", "personal liberty makes for the worth of the human person" and "travel makes liberty worthwhile."[934]

The court finally held that the right to travel and go outside the country is included in the right to personal liberty guaranteed under Article 21.[935] Section 10(3) (c) of the Passport Act is not violative of Article 21 as it is implied in the provision that the principles of natural

[932] At 669B - 670A-H.
[933] At 669.
[934] At 721- 722.
[935] At 643G.

justice would be applicable in the exercise of the power of impounding a passport. The defect of the order was removed and the order was passed in accordance with procedure established by law.

(II) Post-Maneka Period: An Era of Judicial Activism

Since the *Maneka Judgment*, the Indian courts have been taking an increasingly positive action in addressing the dilemma of the underprivileged, by trying to force the government to create favourable conditions for effective realisation of socio-economic rights in Part IV of the Indian Constitution. Whereas in the first two phases the Supreme Court followed a very stringent approach as to the limits of the directive principles, it has in the post-*Maneka* period "shown a great interest in the implementation of directive principles."[936] This case was followed by *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*[937] in which the court broadly captured the scope of right to life as:

> "The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self."[938]

Similarly, the viewpoint of the third stage is also captured in *Randhir Singh v Union of India*[939] thus:

> Hitherto the equality clauses of the Constitution, as other articles of the Constitution guaranteeing fundamental and other rights, were most often evoked by the privileged classes for their protection and advancement and for a fair and satisfactory distribution of the buttered loaves among themselves. Now, thanks to a rising social and political consciousness and the forward looking posture of his [sic] Court, the underprivileged also are claiming their rights.

P.N. Bhagwati highlights the activist role of the Indian judiciary in the following terms:

> The Indian judiciary has adopted an activist goal-oriented approach in the matter of fundamental rights. The judiciary has expanded the frontiers of the fundamental rights and in the process re-

[936] Bertus De Villiers 1992 (note 891 above) 46.
[937] (1981) 2 SCR 516.
[938] At 529 B-F.
[939] AIR 1982 SC 879.

> written some parts of the Constitution through a variety of techniques of judicial activism. It is identified by people as the last resort for the purpose of the bewildered.[940]

Olga Tellis v Bombay Municipal Corporation[941] epitomises this approach. In this case, the Supreme Court gave a wide interpretation to the right to life[942] and held that since the right to life cannot be exercised without the means of livelihood, the right to life included the right to livelihood. Thus, by expanding "the frontiers" of the enforceable right to life by reading in its content the right to livelihood, the Court was able to enforce the right to livelihood notwithstanding that the latter was a directive principle and unenforceable.

Shortly thereafter, benches of the Supreme Court have followed the *Olga Tellis* aphorism with approval. In *Municipal Corporation of Delhi v. Gurnam Kaur*,[943] the court held that the Municipal Corporation of Delhi had no legal obligation to provide pavement squatters alternative shops for rehabilitation as the squatters had no legal enforceable right. In *Sodan Singh v. NDMC*[944] a constitution bench of the Supreme Court reiterated that the question whether there can at all be a fundamental right of a citizen to occupy a particular place on the pavement where he can squat and engage in trade must be answered in the negative. These cases fail to account for socio-economic compulsions that give rise to pavement dwelling and restrict their examination of the problem from a purely statutory point of view rather than the human rights perspective.

Providentially, a dissimilar note has been struck in a decision of the court following the above ones. In *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan*,[945] in the context of eviction of encroachers in a busy locality of Ahmedabad city, the court said:

> Due to want of facilities and opportunities, the right to residence and settlement is an illusion to the rural and urban poor. Articles 38, 39 and 46 mandate the State, as its economic policy, to provide socio-economic justice to minimise inequalities in income and in opportunities and status. It positively charges the State to distribute its largesse to the weaker sections of the society envisaged in Article 46 to make socio-economic justice a reality, meaningful and fruitful so as to make life

[940] P.N. Bhagwati "Fundamental Rights in their Economic, Social and Cultural Context" a paper presented at the Judicial Colloquium held in Bangalore, India on 24 – 26 February,1988, now available in Commonwealth Secretariat (1988) *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms* 63.
[941] [1985] 3 SCC 545
[942] Guaranteed in Article 21 of the Indian Constitution.
[943] (1989) 1 SCC 101.
[944] (1989) 4 SCC 155.
[945] (1997) 11 SCC 123.

> worth living with dignity of person and equality of status and to constantly improve excellence. Though no person has a right to encroach and erect structures or otherwise on footpaths, pavements or public streets or any other place reserved or earmarked for a public purpose, the State has the constitutional duty to provide adequate facilities and opportunities by distributing its wealth and resources for settlement of life and erection of shelter over their heads to make the right to life meaningful.[946]

Moreover, although the Indian courts, through a wide interpretation of civil and political right, were able to enforce socio-economic rights, still there was difficulty in enforcing the human rights of the poor and the disadvantaged, because they are not aware of their rights, they lack the capacity to assert these rights and they do not have material resources to approach the courts. As a result a large number of human rights remained unenforced.[947]

The courts "therefore developed the strategy of Public Interest Litigation."[948] This concept is a home-grown Indian jurisprudence which enables and empowers the disadvantaged citizens to invoke the judicial system without being hamstrung by the above problems and the technicalities of procedural requirements such as *locus standi*.[949] Thus the activist Indian Judges[950] broke with the Anglo-Saxon perception of the judicial role, and transformed the courtroom from "the arena of legal quibbling for men with long purses" to an arena for hope for the underprivileged.[951] Public Interest Litigation has opened an adaptation jurisdiction to the Indian Courts under which a court's action is activated through letters and telegrams which are not even accompanied by an affidavit. The court "responds to a letter addressed to

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[946] Para 13.

[947] P.N. Bhagwati "Fundamental Rights in their Economic, Social and Cultural Context" (note 939 above) 81.

[948] Public interest litigation is understood as a means or process of delivery of legal services and access to administration of justice premised on (i) the obligation of the State that it shall secure that the operation of the legal system promotes justice, (ii) the basis of equal opportunity, and (iii) the obligation of the State that it shall guarantee the opportunities for securing justice which are not denied to any citizen by a reason of economic or other disabilities. Public interest litigation is understood and treated as the citizens' invocation and use of the delivery of legal services in aid of and as a tool of the administration of justice as understood above. See *State of Himachal Pradesh v A Parent* (1985) 3 SCC 169: AIR 1985 SC 910; *Bandua Mukti Morcha v Union of India* AIR 1984 SC 802: (1984) 2 SCC 161; *Janata Dal v H.S. Choudhary* (1992) 4 SCC 305: AIR 1993 SC 892; *Balco Employees v Union of India* (2002) 2 SCC 333: AIR 2002 SC 350 and *State of Himachal Pradesh v A Parent* (1985) 3 SCC 169: AIR 1985 SC 910.

[949] Sakoane Sakoane "Access to Courts by the Disadvantaged: Public Interest Litigation as a Vehicle" a paper presented at the Lesotho Justice Sector Conference held at Maseru Sun, Lesotho on 26 – 30 July, 2004, now available in Lesotho Justice Sector (2004) *A Full Report of the Conference Proceedings and Recommendations* 58 at 61.

[950] Public Interest Litigation can be attributed to the innovation and creativity of the two outstanding Judges Justices V.R. Krishna Iyer and P.N Bhagwati both of whom committed themselves relentlessly to the course of justice for the underprivileged. *Vide* Bertus De Villiers 1992 (note 891 above).

[951] Dwivendi CJ (as he then was) in *Kesavananda Bharti v The State of Kerela* 1973 SCC 225 at 947.

it by such an individual acting *pro bono publico*."[952] There is a plethora of cases that demonstrate this concept's dynamic jurisprudence of the Indian judicial rescue of victims of socio-economic rights (or directive principles) violations.[953] In *PUCL v Union of India*[954] the petitioners brought an action by way of petition against the national and state authorities claiming violations of the right to food on behalf of the poorest section of the community. They claimed that various people have been removed from the list of those most in need while others on the list had seen their monthly family allocation of 10kg of grain reduced to 5kg. In granting the relief, the Supreme Court held that "the aim is to ensure that the destitute do not suffer from hunger and starvation in the face of plentiful supplies of food. Food must reach the hungry. Therefore, it is necessary to issue certain directions in order to provide at least some temporary relief."[955] The court then directed that regular supplies be made to the needy and that midday meal scheme be implemented by providing children in every school with a prepared meal of a certain quantity and quality.

(b) South Africa Experience and Jurisprudence

The history of South Africa is well documented.[956] South African legal culture shared the classical liberal foundations of the Anglo-Saxon legal culture and was accordingly not favourably disposed towards socio-economic rights. Combined with this, South African legal culture inherited from its British coloniser a stark positivism, with an accompanying culture of judicial deference cultivated over the decades-long ascendancy of parliamentary sovereignty. During the apartheid era, the conservatism of South African positivism involved "virtually limitless deference to the executive. The judiciary was perceived by many as

[952] Bhagwati J (as he then was) in *S.P Gupta v President of India* AIR 1982 SCC 149 at 189.

[953] In *Kishen Pattnayak v The State of Orissa* [1989]1 SCR 57, two social workers addressed a letter (which was treated as a petition by the court) to the court bringing to its notice the miserable conditions of the people in one district of the respondent state on account of extreme poverty. The petitioners accused the state of failure to protect the lives of the people and sought directives that the government should be directed to take immediate steps to alleviate the miseries and sorrows of the people. The Supreme Court allowed the petition and directed the state to take prompt action to help end the misery of the people. It ordered further that a committee of a certain voluntary social organisation must keep watch over the social welfare measures taken and to be taken by the government.

[954] [2003] 4 CHRLD 219.

[955] *Per* Sabharwal and Sema JJ.

[956] See, for instance, D. Nicholson "Ideology and the South African Judicial Process – Lessons From the Past" (1992) 8 *SAJHR* 50; E Cameron "Legal Chauvinism, Executive-mindedness and Justice – L.C. Steyn's Impact on South African Law" (1982) 99 *SALJ* 38 and J. Hlophe "The Role of Judges in a Transformed South Africa – Problems, Challenges and Prospects" (1995) 112 *SALJ* 22.

forthrightly favouring and supporting executive interests"[957] and condoned the vast political injustices of apartheid.

Since 1993, there was a paradigm shift in the constitutional order of South Africa.[958] South Africa became a constitutional democracy, with the inclusion of socio-economic rights in a justiciable Bill of Rights[959] and the creation of the Constitutional Court to, *inter alia*, protect these rights. However, as Chaskalson P observed, it is in this new democratic South Africa where "millions of people are living in deplorable conditions and in great poverty and for as long as these conditions continue to exist that aspiration will have a hollow ring."[960]

The socio-economic jurisprudence and experience of the Indian and South African courts[961] have best been illustrated by major cases that were before these courts and the tone is now turned to Lesotho, which should view all these as lessons to realization of its socio-economic rights—more specifically the right to housing which is the topic of the present thesis.

Even where the courts of Lesotho have been called upon to interpret the civil and political rights in conjunction with socio-economic rights, they have dismally failed. They were unable to interpret the law in line with the international socio-economic obligations. It therefore means that the judiciary was not ready to check the government of Lesotho's actions in respect of its socio-economic accountabilities.

The Constitution of Lesotho clearly concentrates on civil and political rights, paying only modest attention to the observance of economic, social and cultural rights. It becomes obvious that it retained the classification stereotype, with a heart of stone to be tempered with only by the judiciary. It appears that conceptions of rights and duties in socio-economic rights are at the heart of judicial decision making, both as to justiciability and relief, but these conceptions have not been explored deeply in Lesotho. Suffice it to say that the conceptions

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[957] E. Cameron, E. Cameron "Legal Chauvinism, Executive-mindedness and Justice – L.C. Steyn's Impact on South African Law" (1982) 99 *SALJ* 38 at 52 -- 62

[958] The *Constitution of the Republic of South Africa Act* of 1996 ushered in a democratic dispensation based on constitutional sovereignty.

[959] As an antidote to the flagrant violations of socio-economic justice that have dogged South Africa during the apartheid era and, as the Preamble to the South African Constitution states, to ' improve the quality of life of all citizens.'

[960] See *Soobramoney* Case, para 8, per Chaskalson CJ (as he then was).

[961] The South African Courts' jurisprudence has long been alluded to in previous chapters and it would be redundant to go back to it.

surrounding socio-economic rights are teasing and tempting, though one cannot, at the moment, determine if they are nutritious. As a budding democracy, Lesotho has faced many challenges in the political and socio-economic fields, and the pivotal role of the judiciary to dispense justice under the constitution is fully recognized.

John Dugard has once pointed to the unpleasant situation in the judiciary's stance on its law-making function thus:

> The . . . judiciary has been relatively frank about its law-making function in the development of the common law . . . Why, then, is it that the myth of judicial sterility is preserved in the case of the interpretation of statutes? Why do we still adhere to the phonographic theory of the judicial function in this sphere?[962]

Professor Dugard answered these questions by pointing to the judiciary's acceptance of crude positivism,[963] with its 'servile obedience to the will of the sovereign',[964] which made it difficult for judges to challenge statutes while allowing them to engage in law-making regarding the common law.[965] It is advocated that, while the positivist label is appropriate, what underlay the judiciary's reluctance to engage in law-making, other than developing the common law, is jurisprudential conservatism about the role of courts in society. Professor Dugard hinted at this when he referred to judges hiding behind the 'fig leaf of positivism'. What it is believed the judges are attempting to hide is a jurisprudential conservatism about their limited role in transforming and closing a radical gap between the rich and the mostly poverty-stricken in society. In *Khathang Tema Baitsokoli* case, both the High Court and Court of Appeal insubordinated the whole judiciary to other branches of the government, hence deeming the constitutional drafters' word as ultimate that it only has to confirm without first testing reasonableness of their utterance.

The facts of *Khathang Tema Bait'sokoli* case are that, the first appellant sought to ply their trade along Kingsway, Maseru, the capital's main thoroughfare, selling foodstuffs and other items to the public. The first and second appellants then instituted a constitutional challenge

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962 A. Du Plessis, 'John Dugard's Magisterial Accomplishments Rewarded with a Raw Deal', (2006) 6 (10)*Without Prejudice: The LawMagazine* 30; see also J. Dugard, *Human Rights and the South African Legal Order* (1978), xvi.

963 In Lon L. Fuller, "The case of the speluncean explorers" (1949)62(4) *Harvard LR* 616, in that case study, Keen, J. is one of the hard and crude positivists. For a thorough understanding of legal positivism, see the theories of Bentham Jeremy, Austin John, Hans Kelson and HLA Hart.

964 J. Dugard, 'The Judicial Process, Positivism and Civil Liberty', (1971)88 *SALJ 181* at 185.

965 However, a contradistinction has been proved beyond doubt in South Africa since the beginning of post-apartheid regime and even in other countries such as India and Canada.

pursuant to section 22 (6) of the Constitution of Lesotho 1993, read with General Gazette 104 of 14 December 2000. The challenge was against their removal by the first respondents (with the assistance of the other respondents), from Makhetheng to a market some 200m away (according to the respondents), to the Old Local Government Premises ("the new market"). Their challenge was founded on the right to life, entrenched by the Bill of Rights in Chapter II of the Constitution of Lesotho. The second appellant alleged that at Makhetheng he used to gross about M300 in sales daily, whereas under the present arrangement, he hardly made anything per day because of being out of convenient reach of the public who would buy his goods. As a result of his removal from his long-term place of business he has been unable to meet his basic needs. He no longer able to purchase food and clothing for his dependants and that they were slowly starving to death. The respondents denied that the statutory provisions which the traders had contended were relevant, indeed did not apply. They invoked the powers vested in the first respondent under section 37 of the Urban Government Act 1983, in the exercise of which the orderly development of Maseru town and the new market were established. The respondents further denied that the traders were prohibited from trading in the urban area of Maseru. That statutory duties of the first respondent required an orderly regulation of trading areas. In particular the respondents denied that moving the traders to the new market imperiled their livelihood, let alone (as the traders contend) threatening their very survival. The essential question for determination was whether the right to life in Lesotho encompasses the right to a livelihood.

The Court of Appeal first analysed the rights at issue and held that it is well-established now as a principle of constitutional interpretation that a fundamental right entrenched in this way in a justiciable Bill of Rights should be given a generous interpretation.[966] The court went further to hold that section 5 (1) of the Constitution states the right to life in both positive and negative terms: it recognises an inherent right to life and it prohibits its arbitrary deprivation. Gauntlett JA said:

> The further provisions of section 5 to my mind made it clear that the protection accorded by the right relates to life in the ordinary sense of human existence (as the Full Bench of the High Court expounded in its judgment). Section 5 (2) is the derogation clause in respect of the right conferred by

[966] Para 14. See also *Sekoati v President of the Court-Martial* **[**1995 – 99] LAC 812 at 820-2. In *S v Zuma* 1995 (2) SA 642 (CC) para 18, Kentridge AJ pointed out that "We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the law giver is ignored in favour of a general resort to 'values', the result is not interpretation but divination."

> section 5 (1). Section 4 (1), in legislating generally for the rights which follow, provides for derogation in these explicit and narrow terms:
>
> "Subject to such limitations of that protection as are contained in those provisions…"
>
> In other words, the right may only be limited in terms of these specific provisions.[967]

The court stated that the limitations specified in section 5(2) of the Constitution are hardly consistent with an interpretation of the right to life as encompassing the right to a livelihood. These limitations are both exclusive and specific, and nowhere authorise curtailment in any circumstance, however pressing, of a right to livelihood. Thus if the right to life includes the right to a livelihood, the appellants' argument would have the effect of recognising an absolute right to livelihood in Lesotho.[968] It concluded that:

> The position is not that there is no provision elsewhere in the Constitution of Lesotho relating to the right to livelihood. In accordance with a number of other constitutions and international covenants on human rights, Lesotho has dealt with what are generally described as socio-economic rights (or "green rights") in a way which is distinct from the treatment of fundamental rights (or "blue rights"). In Lesotho's case this is to provide separately for a chapter in the Constitution (chapter III) entitled "Principles of State Policy". One of these (s.29 (1)) is that "Lesotho shall endeavour to ensure that every person has the opportunity to gain his living by work
>
> which he freely chooses or accepts".[969]

Gauntlett JA held further that the right to life in section 5 of the Constitution of Lesotho does not encompass a right to a livelihood. That is the subject of specific and separate provision, in section 29. The latter derives its status from its inclusion as a principle of State policy. It is not included as a Chapter II right,[970] hence unenforceable.

It is entirely agreed with both the Constitutional Court and Court of Appeal that in Lesotho, principles of State policy are not justiciable and enforceable. They are just political manifestos that guide the government in its policy-formulation. Section 25 of the Constitution of Lesotho 1993 is clear on this aspect. The government will progressively realise this policies, taking into account its financial resources. The courts are not ready to impose a duty on the government to afford the citizens socio-economic rights, when there are no means to

[967] Para 16.
[968] Para 17.
[969] Para 18.
[970] Para 28.

provide them. For instance, in *Grootboom*[971] and *Treatment Action Campaign (No 2)*, the court took care not to draft policies of its own and impose them on government. In *Grootboom* the court did not order that each applicant be provided with a house, but required government to revise its housing programme to include "reasonable measures . . . to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations."[972]

In *Treatment Action Campaign (No 2)*[973] the court did order the government to make Nevirapine available at clinics subject to certain conditions. But it did so because government itself had decided to make Nevirapine available, though on a restricted basis, and the court found that there was no reasonable ground for that restricted basis. Moreover Nevirapine was at least for a period being made freely available to government by its manufacturer. In a sense all the court did was to render the existing government policy available to all. However, the court made it expressly clear that government might revise and amend its policies if it needed to do so. Thus the court expressly provided that its order did not "preclude government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission of HIV."[974]

Khathang Tema Bait'sokoli case, *Olga Tellis v Bombay Municipality Corporation*,[975] and *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan* have similar facts and one would expect that the Indian jurisprudence might have been treated as highly persuasive when deciding *Khathang Tema Bait'sokoli case*. However, a completely different pronouncement was made in Lesotho. Furthermore, since Lesotho is still at the early stage in the field of socio-economic rights, India appears to be a precise jurisdiction to learn from because both countries' principles of state policy framed in a similar manner. Again, the Indian courts have enforced such principles once they realized that government would be able to provide and afford compliance with socio-economic provisions. Moreover, there cannot be discussion of socio-economic rights in world-wide without making reference to South Africa.

[971] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (2000 (11) BCLR 1169.
[972] Para 99.
[973] *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) (2002 (10) BCLR 1075.
[974] Para 135.
[975] [1985] 3 SCC 545.

It is viewed as a country with the best jurisprudence in the socio-economic field. This is a reason why a broad lesson is drawn from it in this work.

6.6 CONCLUSION

There is unending list of countries that may be used as examples in which the fundamental rights are interpreted in conjunction with socio-economic rights or directive principles of state policy as the case may be. In *Krishnan v State of Andhra Pradesh*,[976] a note was also made in relation to art.45, which requires the State "to endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of 14 years." It was indicated that the fact that 44 years had passed since the Constitution came into force is enough to convert the obligation into a directly enforceable fundamental right to education of every child under the age of 14 years. This was necessary in order to prevent the Directive from becoming a "mere pious wish." It therefore stands to be mentioned that it is a paramount a duty for courts to harmonize the Directive Principles and fundamental rights.[977]

The Supreme Court of India has further drawn on the Directive Principles to enlarge the scope of rights such as the right to life, as to include the right to the basic necessities of life such as adequate nutrition, clothing, reading facilities,[978] the right to a livelihood,[979] the right to shelter,[980] the right to health care,[981] and the right to an education,[982] hence it appears perplexing to hear the court averring that a constitutional dilemma is posed when one seeks to define the nature, scope and content of the "*right to life*."[983] Though the State is not expected to provide its citizens with adequate means of livelihood or shelter, the Indian constitutional jurisprudence has instead created a basis for negative review in the sense that persons may not be deprived of their livelihoods or other socio-economic needs without a just and fair

[976] (1993) 4 LRC 234.
[977] See *State of Tamil Nadu v Abu Kavier Bai AIR* (1984) SC 725 and Sandra Liebenberg "Socio-economic Rights" in Matthew Chaskalson et al (eds.) *Constitutional Law of South Africa* (Cape Town: Juta & Co, 1998).
[978] *Francis Coralie Mullin v The Administrator Union Territory of Delhi* (1981) 2 SCR 516 at 529.
[979] *Tellis & others v Bombay Municipal Corp & others* (1987) LRC (Const) 351.
[980] Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan & others (1997) AIR SC 152; *Shantistar Builders v Narayan Khimalal Totame & others* (1990) 1 SCC 520.
[981] *Pashim Banga Khet Mazdoor Samity v State of West Bengal* (1996) AIR SC 2426.
[982] *Krishnan v State of Andhra Pradesh & others* (1993) 4 LRC 234; *Jain v State of Karnataka* (1992) 3 SCC 66.
[983] *Khathang Tema Baitsokoli & one v. Maseru City Council & others* Const/C/1/2004), para 13.

procedure established by law.[984] In the same vein, Lesotho Constitution should, in most cases where socio-economic rights are in issue, draw on the socio-economic right to enlarge the scope of a fundamental right and to infuse it with substantive content. The directive principles are included in many constitutions such as those of India, Namibia, Ireland and Lesotho, and are expressly declared to be unenforceable by the courts.[985] Truly, there is an elephant in the room that makes judicial focus on socio-economic rights implementation difficult and unbearable.

[984] See Sandra Liebenberg, "Socio-economic Rights" in Matthew Chaskalson et al (eds.) *Constitutional Law of South Africa* (Cape Town: Juta & Co, 1998) p.41-21.

[985] Section 37 of the Indian Constitution states that "The provisions contained in this part shall not be enforceable by any court, but the principles laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making the laws"; Article 101 of the Namibian Constitution says that "the Directives are not legally enforceable by any court, but expressly entitles the courts to have regard to the said principles in interpreting any laws based on them" and the Irish Constitution, article 45, states the same. See also the constitutions of the following countries; Nigeria, Spain and Sri Lanka.

CHAPTER SEVEN: CONCLUSION AND RECOMMENDATIONS

In 1966, the adoption of the International Covenant on Economic, Social and Cultural Rights (the ICESCR) come across numerous problems. It was met with objections with regard to the legal nature of socio-economic rights. A number of countries, mostly from the 'West', disputed that these rights were incapable of legal enforcement because they are vague in nature and their realisation is dependent on resources.[986] During the 1960s and 1970s, socio-economic rights held a prominent place on the public agenda not only in the legislative process but also in mainstream constitutional discourse.[987] These rights were also perceived as engendering only positive obligations as opposed to the negative obligations engendered by civil and political rights.[988] On the other hand, Eastern countries argued for the legal protection of socio-economic rights. They looked up to these rights to guarantee people's socio-economic development and for the protection of the basic needs of the poor such as shelter, food, clothing, access to medical care and work.[989]

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[986] As the Cold War emerged, the global political divide threw a wedge into the concept of universal human rights, with the United States of America and its allies focusing on civil and political rights and the Soviet states espousing socio-economic rights. The international division also forced domestic organizations to disavow economic, social and cultural rights, lest their opponents paint them "red", and discredit them amongst their audience - See Philip Alston, "U.S. ratification of the covenant on economic, social and cultural rights: the need for an entirely new strategy" (1990) 84 *AJIL* 365.

[987] See Peter B. Edelman "The Next Century of Our Constitution: Rethinking Our Duty to the Poor" (1987) 39 *Hastings Law Journal* 1; Erwin Chemerinsky "Making the Case for a Constitutional Right to Minimum Entitlements" (1993) 44 *Mercer Law Review* 525; Charles L. Black "Further Reflections on the Constitutional Justice of Livelihood" (1986) 86 *Columbia Law Review* 1103 at 1115; Archibald Cox "The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights" (1966) 80 *Harvard Law Review* 91;); Laurence H. Tribe "Unravelling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services" (1977) 90 *Harvard Law Review* 1065; Arthur J. Goldberg "Equality and Governmental Action" (1964) 39 *N.Y.U. L. Rev.* 205; Lawrence Gene Sager "Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent" (1969) 21 *Stan. Law Review* 767; Charles A. Reich "The New Property" (1964) 73 *Yale Law Journal* 733; John E. Coons et al. "Educational Opportunity: A Workable Constitutional Test for State Financial Structures" (1969) 57 *Cal. Law Review* 305; Kenneth L. et al. "A Telophase of Substantive Equal Protection" (1967) *Supreme Court Review* 39. For dubious views on constitutional socio-economic rights, see Ralph K. Winter "Poverty, Economic Equality, and the Equal Protection Clause" 1972 *Supreme Court Review* 41; Robert H. Bork, "The Impossibility of Finding Welfare Rights in the Constitution" (1979) *Wash. U. L.Q.* 695 and Philip B. Kurland "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined" (1968) 35 *University of Chicago Law Review* 583.

[988] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* 2005 (4) BCLR 301 (CC) paras 70 – 71.

[989] See generally Craven, M., *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (Oxford: Oxford University Press, 1998). As Craven states, at 9, "The Eastern states championed the cause of socio-economic rights because they associated these rights with socialistic ideals emphasising the fulfilment of the basic needs of all, whilst the Western States championed civil and political rights as the foundation of liberty in the free world." See also Kenneth, R., "Defending economic, social and cultural rights: Practical issues faced by an international human rights organisation" (2004) 26 *Human Rights Quarterly* 63.

The chief motive for the split between civil and political rights[990] and socio-economic rights relates to differences in conception of the obligations engendered by the rights.[991] According to Scott and Macklem, the split was not influenced by the view that socio-economic rights are somehow inferior to civil and political rights. "Rather, social rights were not viewed as justiciable because courts, or *quasi-judicial* bodies, were not thought to be competent bodies to deal with them."[992] Hence the raison d'etre to counterbalance the above assertion that basic human needs "must be taken not as window dressing but as a window into the decisions themselves."[993]

Channelling down the discussion, every scholar will concede that the fulfilment of scocio-economic rights calls for more extensive state action in comparison to civil and political rights, hence it is mostly appropriate to adjudicate on such rights having the concept of availability of resources in mind. Furthermore, socio-economic rights should, by and large, be read within the content of fundamental rights. Chief Justice Chaskalson observed that dignity informs the content of all the rights entrenched in the Constitution.[994] It suffices to indicate that many civil and political rights have social and economic aspects or implications[995] and

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[990] According to Robert Plant, 'Needs, Agency and Rights' in C. Sampford & D. Galligan (eds.), *Law, Rights and the Welfare State* (London: Croom Helm, 1986) 31, "The heart of assertion is that, since civil and political rights are 'rights that certain things not be done', they are largely costless or resource-independent, and therefore always realisable."

[991] See Dennis, J., and Stewart, P., "Justiciability of economic, social and cultural rights: Should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health?" (2004) 98 *American Journal of International Law* 462 at 477.

[992] Scott, C., & Macklem, P., "Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution" (1992) 141 *University of Pennsylvania Law Review* 1 at 89.

[993] See Laurence H. Tribe "Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services" (1977) 90 *Harvard Law Review* 1065 at 1080.

[994] A Chaskalson "Human Dignity as a foundational value of our Constitutional order" (2000) 16 *SAJHR* 173 at 204; In *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), para 328, O'Regan J enlightened that "the importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many other rights that are specifically entrenched in chapter 3." To add on, As Schachter, "Human Dignity as a normative concept" *(1983) 77 American Journal Of International Law* 848 at 852, has pointed out, the term "dignity" (which he equates with "intrinsic worth") connotes notions of independence, individual responsibility and distributive justice," and Annemarie Devereux, "Australia and the right to adequate housing" (1991)20 *Federal Law Review* 223 at 225, broadly aligns his point that "whether dignity is perceived to be upheld or infringed in a particular situation varies according to the relative weighting given to each factor. For J Hausermannand, "Myths and Realities" in P Davies (ed), *Human Rights* (1988) 126 at 142 and K Tomasevski, "Human Rights: the right to food" (1985) *Iowa Law Review* 1321 at 1325, "in order to maintain human dignity, the right to food means the right to access to food, rather than the right to be fed."

[995] At a regional level, the European Court of Human Rights has stated in *Airey* v. *Ireland* (32 Eur Ct HR Ser A (1979), [1979] 2 E.H.R.R. 305 para 26 that, "While the Convention sets forth what are

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.[996] 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.[997]

"Reading in" as a remedy for social and economic rights violations has been developed by a number of courts as a way of ensuring that the court need not unnecessarily strike down legislation which only needs to be altered. The South African Constitutional Court has employed this on several occasions in order to, *inter alia*, ensure the right of permanent residents to have access to social security,[998] and the right of debtors whose homes had been attached to have access to housing.[999] In Canada, this remedy has been used to extend security of tenure protections to public housing tenants and to extend a number of other legislative protections and benefits to excluded groups.[1000]

There has never been any sphere to find appropriateness of this application other than in the realm of socio-economic rights, especially access to housing rights. For how can there be dignity in a life lived in a shack made of cardboard or zinc, in a backyard, under stairs,

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essentially civil and political rights, many of them have implications of a social or economic nature… 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". In *Henry and Douglas* v. *Jamaica*, Communication No. 571/1994, 25 July 1996, the Human Rights Committee held that the failure to provide adequate medical care to prisoners (a violation of the social and economic right to health) constituted a violation of the right to freedom from torture or to cruel, inhuman or degrading treatment or punishment and of the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (provided for by Articles 7 and 10 of the International Covenant on Civil and Political Rights, respectively.

[996] For instance, the Indian courts have held the right to life to "take within its sweep" the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in (see *Shantistar Builders* v. *Narayan Khimatal Tomtame,* Supreme Court of India, Civil Appeal No. 2598/1989, 31 January 1990).

[997] For example, the Human Rights Committee has held in *Zwaan-de Vries v. the Netherlands* (Communication No. 182/1984, CCPR/C/29/D/182/1984, (1987) that "The right to equality/non-discrimination provided for in Article 26 ICCPR applies to the enjoyment of social and economic rights, including social security benefits."

[998] *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) SA 505 (CC) (2004 (6) BCLR 569).

[999] *Jaftha v Schoeman; Van Rooyen v Scholtz* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC)

[1000] *Dartmouth/Halifax County Regional Housing Authority* v..*Sparks* [1993] 101 D.L.R. (4th) 224 (N.S.C.A); *Schachter v. Canada*, [1992] 2 SCR 679; *Vriend v. Alberta*, [1998] 1 SCR 493; (1998), *Rosenberg* v. *Canada (Attorney General)*,158 D.L.R. (4th) 664.

precariously close to railway lines, and under highway bridges? It would be naive to pretend that we are oblivious of the fact, both in South Africa and Lesotho, that people live in deplorable conditions and particularly in shacks or even in culverts. The Constitutional Court has precisely acknowledged in *Jaftha v Schoeman; Van Rooyen v Scholtz*[1001] that "relative to homelessness, to have a home to call one's own, even under the most basic circumstances, can be a most empowering and dignifying human experience" and Sachs J added in *Port Elizabeth Municipality v Various Occupiers*[1002] that, "as with all determination about the reach of constitutionally protected rights, *the starting and ending point of the analysis* must be to affirm the values of *human dignity*, equality and freedom."

Besides, the argument that economic and social rights lack the qualities of justiciability cannot, therefore, be sustained in the face of any reasonable survey of jurisprudence at the national and international levels.[1003] The same is true in relation to the contention that only 'some' aspects of economic, social rights are, or might be, inherently justiciable.[1004] It is too settled for argument that the South African, Indian and even Canadian Constitutions protect socio-economic rights as justiciable,[1005] whilst these rights are not justiciable in Lesotho.

[1001] 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC).
[1002] 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) para 15.
[1003] For other international and comparative reviews of case law, see Craig Scott & Patrick Macklem "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 *University of Pennsylvania Law Review* 1; Fons Cooman and Fried van Hoof (eds.), *The Right to Complain about Economic, Social and Cultural Rights: Proceedings of the Expert Meeting on the Adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights held from 25-28 January 1995 in Utrecht*, (Utrecht: SIM Special No. 18); J. Squires, M. Langford and B. Thiele, *Road to a Remedy: Current Issues in Litigation of Economic, Social and Cultural Rights* (Sydney: Australian Human Rights Centre and University of NSW Press, June 2005); and Danwood Chirwa, "African Human Rights System: The Promise of Recent Jurisprudence on Social Rights" in M. Langford (ed.) *Social and Economic Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008).
[1004] This proposition was given some support in the earlier General Comments of the UN Committee of Economic, Social and Cultural Rights but discarded later as the Committee became apprised of jurisprudential developments and itself applied all aspects of the rights: *See* CESCR, *General Comment No. 3, The Nature of States Parties' Obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III, 86 (1990) with CESCR *General Comment 9, The domestic application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998). However, this fragmented vision of justiciability is sustained by some other commentators: see Michael Dennis and David Stewart, **"**Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?" (2004) 98 *American Journal of International Law* 462, at 515.
[1005] It must be emphasised that justiciability of socio-economic rights does not only exist in the abovementioned countries but lately exist in many jurisdictions as well. There are numerous leading cases from different jurisdictions where socio-economic rights were deemed justiciable. For instance, in Bangladesh, the Supreme Court was once approached in *ASK v. Government of Bangladesh* 1999 19 BLD (HCD) 488, wherein the inhabitants of a large number of *basties* (informal settlements) in Dhaka City were evicted without notice and their homes were demolished

There might be a number of reasons why socio-economic rights are not justiciable and/or enforced in Lesotho. The courts of Lesotho seem to have no capacity to compel the government to respect its constitutional obligations, particularly the right to housing due to a non-conducive atmosphere of the true operation- lack of independence and separation of powers which result in courts shifting the blame that the Constitution does not allow enforcement of socio-economic rights. The courts may still view socio-economic rights as "not universally accepted fundamental rights and that they are inconsistent with the doctrine of separation of powers."[1006] A point that emerged is that South African courts do not accept the rigid, traditional interpretation of the theory of separation of powers, and such an interpretation has guaranteed that poor people are treated with dignity as citizens and not as objects of administration.[1007] In spite of criticisms levelled by legal scholars and academicians against the South African Constitutional Court's activism, the Court has proved itself to be independent and effective.

Drawing observation from *Khathang Tema Bait'sokoli case*, it may be acceded that the courts turned a blind eye from protecting the interests of vulnerable sectors of society and refrained from compelling and even reminding the executive to meet its constitutional obligations with respect to socio-economic rights, while at the same time trying to avoid imposing policy that may have budgetary implications on it.

Lesotho's judiciary must interpret socio-economic rights within the meaning of fundamental rights. Normatively, the realisation of socio-economic rights requires far more resources and

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by bulldozers. Two inhabitants and three NGOs lodged a complaint. The Court held that the State must direct its policy towards ensuring the provision of the basic necessities of life including shelter, a directive principle enshrined in the Constitution (Article 15). While such directive principles are not judicially enforceable, the Court held that the right to life included the right not to be deprived of a livelihood and shelter. It was further ordered that the government should develop master guidelines or pilot projects for the resettlement of the slum dwellers. In *Memorial Hospital v. Maricopa County* 415 U.S. 250 (1974) at 259-60, the Court acknowledged that "governmental privileges or benefits necessary to basic sustenance have greater constitutional significance than less essential forms of governmental entitlements. the Court recognized medical care to be "as much 'a basic necessity of life' to an indigent as welfare assistance," adding that "It would be odd, indeed, to find that the State was required to afford the plaintiff welfare assistance to keep him from discomfort of inadequate housing or the pangs of hunger but could deny him the medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness." See Cecile Fabre, *Social Rights under the Constitution – Government and the Decent Life* (Oxford: Oxford University Press, 2000) 49-51.

[1006] Sandra Liebenberg, "The Interpretation of Socio-Economic Rights" in Staurt Woolman et al (2nd ed.) *Constitutional Law of South Africa* (Juta & Co: Cape Town, 2008) para 33.2b.

[1007] See M Pieterse "Coming to Terms with Judicial Enforcement of Socio-economic Rights" (2004) 20 *SAJHR* 384 and *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) para 98.

yet, procedurally, the courts may not have the institutional capacity to deal with some of the issues to which the enforcement of these rights gives rise if they do not regard them as enhancing the fundamental rights.

These factors become explanatory not only to the approach of the South African courts in interpreting the obligations engendered by socio-economic rights, but in determining the remedies that follow their violation as well. However, other than the nature of the rights, the approach of the courts, and particularly the South African Constitutional Court, also has been influenced by the notion of justice to which the courts are inclined. The Constitutional Court has inclined more towards the theory of distributive justice as opposed to corrective justice. Taking into account that the Constitution favours a human-rights approach by giving special protection to certain fundamental rights, the Court makes its pronouncements towards addressing both civil and political rights as well as socio-economic rights. Social rights have exactly the same status as other civil and political rights.

Given the socio-political and economic history of South Africa, it has, since 1994, been the concern that addressing poverty should be adopted as one of the key goals of a comprehensive social security system, with explicit provision to deal with poverty. Other goals also have to be developed, and should factor in constitutional values and principles, such as equality, non-sexism and non-racism. Again, in adopting a proper and suitable approach towards the interpretation of fundamental rights, it is suggested that the underlying rationale and purpose of the right to access to housing and to social assistance is to provide to everyone an adequate standard of living.

In developing and interpreting the concept of social assistance for constitutional purposes, it might be apposite to take note of developments internationally[1008] and in terms of enlightened social assistance thinking. In addition, according to the Constitutional Court in the *Grootboom* case, the state is required to fulfil its constitutional obligations to provide families with access to land, access to adequate housing, as well as access to healthcare, food, water and social security.

[1008] See chapter 3 on international benchmark on housing rights.

The inherent unambiguity of the phrase a "right to adequate housing" is undeniable.[1009] This "dignified standard" approach seems in keeping with interpretations afforded to similar phrases in other international documents.[1010]

Besides, in spite of the categorization of human rights into civil and political rights, and social, economic and cultural rights, there is no water-tight division between them. The rights complement each other in the sense that the enjoyment of political rights cannot be isolated from that of socio-economic rights. They are interconnected and interdependent and they cannot be graduated in order of importance. The right to life means nothing in the absence of the right to housing. In *New Patriotic Party v Inspector–General of Police Accra*,[1011] the Supreme Court of Ghana emphasised:

> All human rights and fundamental freedom are indivisible and interdependent: equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights. In the last resort, they are all-exercisable within a societal context and impose obligations on the state and its agencies as well as on the individual not to derogate from these rights and freedoms.

There is a close inter-linkage between civil and political rights and economic and social rights; neither category of human rights can be fully realized without the enjoyment of the other.[1012] Both are complementary, neither part being superior to the other.[1013] Closely related to the indivisibility of human rights, is the discourse on the universalism of human rights.

[1009] See General Comment No. 4 of United Nations Committee on Economic, Social and Cultural Rights 1991.

[1010] These documents have been discussed upon above. However, as a form of reiteration, The International Labour Organisation has been insistent that the "right to housing" for workers included in its Recommendation 115 of 1961 concerning Workers Housing represents more than "the minimum necessary for subsistence", while in the "Burdekin Report", the HREOC concluded that "the right to adequate housing of children contained within the Declaration of the Rights of the Child must be read consistently with the child's other rights. The housing must therefore be sufficient to protect a child's security, health, freedom and dignity." See the discussions in P Bailey, *Human Rights: Australia in an International Context* ((Butterworths: Sydney,1990) 321; H von Hebel "The implementation of the right to housing in article 11 of the United Nations Covenant on Economic, Social and Cultural Rights" (1987) 20 *SIM Newsletter* 26; C Leckie, "The Right to Housing" (1987)20 *SIM Newsletter* 10 at 17.

[1011] (2000) 2 HRLRA 1 at 79A-B.

[1012] See Harare Declaration on Human Rights, being the Concluding Statement of the Judicial Colloquium on the domestic application of international human rights norms held in Harare, Zimbabwe, 19-22 April, 1989 .

[1013] See *State of Kerala v N.M. Thomas* 1976 2 SCC 310 at 367.

Lessons for Lesotho

From the overview in previous chapters, some important lessons for Lesotho are identifiable. First, the decisions related to the formulation and implementation of socio-economic policies and programmes are the domain of the political organs of the state and not of the courts. The courts will review these decisions where such policies and programmes are unreasonable and do not conform to the constitutional obligations. As long as the state acts reasonably it is entitled to adopt options it deems fit. Second, the test of reasonableness is applied by the courts when assessing the government's plea of inadequate resources. To pass the muster, government policy or programme relating to socio-economic rights must be capable of facilitating the realisation of the right in question.

Third, the courts play an important role in translating constitutional socio-economic objectives or rights into social reality, and through judicial activism, respond to government failures, non-accountability and lack of responsiveness. Fourth, in socio-economic rights matters there is a need for an independent body to monitor and implement judgments of the court. Five, in adopting a delicate balance between deference and vigilance, courts still respect the lines dividing the functional roles of the organs of state imposed by the reconceptualised doctrine of separation of powers. Lastly, where there is no clear provision stipulating promotion and implementation of socio-economic rights, the second and third generation rights should be treated indivisible from the first generation rights.

In Lesotho, socio-economic rights also continue to be perceived as vague and devoid of any normative content.[1014] In normative terms, socio-economic rights have not been as developed as civil and political rights. Socio-economic rights have been neglected and have not been the subject of as much judicial interpretation as civil and political rights. This has left the normative content of socio-economic rights relatively undeveloped.

It is important, however, that courts involved in socio-economic rights litigation should not be complacent but should rather strive to develop the normative content of these rights. It must be clear that much focus in this work is on housing right. Seeing the judicial translation of socio-economic rights rhetoric into social reality through South African socio-economic

[1014] See Munoz, C., "Stand up for your rights" *The Economist* 22 March 2007.

jurisprudential lenses, Lesotho should courageously do away with the obstacles impeding judicial involvement in, and adjudication of, socio-economic matters in Lesotho to the credit of Basotho. Kindiki correctly puts it:

> "take comfort in the fact that courts will ordinarily not force governments to spend resources they do not have. Instead, they will be helping those entrusted with safekeeping and spending public money in achieving optimal and rationalised expenditure."[1015]

Lastly, the legislature has put its best foot forward in enacting Education Act 2010 that provides for free education. However, the controversies surrounding justiciability and enforcement of this right in Lesotho will only be laid to rest if there can be litigation that impacts or is based directly on Education Act 2010. In the realm of access to adequate housing, there must be legislative intervention that first amends the constitution to treat socio-economic rights as justiciable though their progressive realisation will depend on availability of resources. Secondly, there must be promulgation of an Act that deals with and provides specifically for housing rights for the vulnerable people.

[1015] K. Kindiki 'Towards Constitutional Protection of Socio-economic Rights in Kenya: Any Lessons From South African Experience?' (2001 – 2004) 14 *Lesotho Law Journal* 51 at 74.

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9. DISSERTATIONS

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