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PIOUS WISHES OR DIRECTLY ENFORCEABLE HUMAN RIGHTS?: SOCIAL AND ECONOMIC RIGHTS IN SOUTH AFRICA'S 1996 CONSTITUTION

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'We vote once every five years, perhaps, but we have to eat every day.'

1 INTRODUCTION

Chapter 2 of South Africa's final constitution contains an extended list of 'universally accepted fundamental rights, freedoms and civil liberties'.¹ These include not only those rights traditionally called civil and political rights (or so-called 'first generation rights'), but also those referred to in traditional human rights debates as economic, social and cultural rights (or so called 'second and third generation rights').² The inclusion of these second and third generation rights alongside the more traditional rights is a truly radical constitutional development that poses an exciting challenge for judges, lawyers and academics who will be required to formulate

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1 The inclusion of 'all universally accepted fundamental rights, freedoms and civil liberties' was mandated by the second Constitutional Principle contained in Schedule 4 to the Constitution of the Republic of South Africa Act 200 of 1993. In terms of s 71 of this act, the new constitution will have no force or effect unless the Constitutional Court certifies that all the provisions of the new constitution comply with the principles contained in Schedule 4.

2 See Claude & Weston (eds) *Human Rights in the World Community* (1989) 17-18; Bertus de Villiers 'Social and Economic Rights' in Van Wyk, Dugard, De Villiers and Davis *Rights and Constitutionalism: the New South African Legal Order* (1994) 599 603; Sandra Liebenberg 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 *SAJHR* 359 361-2; Pierre de Vos 'The economic and social rights of children and South Africa's Constitution' (1995) *SA Public Law* 233 at 235-8. As will become obvious from my arguments in this article, I do not subscribe to the (to my mind) artificial distinction between 'first', 'second' and 'third' generation rights. The use of similar terminology throughout this article should therefore not be seen as an endorsement of this distinction, but merely as a practical necessity.

innovative and even unorthodox approaches to the enforcement of the various rights.

It is however, by no means assured that the various role-players will truly engage with this challenge. In the past, many lawyers, judges and political commentators have objected to the inclusion of the latter group of rights on the grounds that courts would find it difficult or even impossible to enforce these rights.³

In this article I argue that these fears and criticisms are unfounded and that they result from a poor understanding of the conceptual nature of the obligations engendered by all human rights. Most lawyers in South Africa still have a very restricted view of what a Bill of Rights is and ought to be. Many also fail to take cognisance of developments in international human rights law in which many of these issues are thoroughly dealt with. In the following sections I will analyse the nature of the relationship between 'first' generation rights and 'second' and 'third' generation rights. I will then attempt to show the multi-faceted nature of the obligations engendered by rights generally. Finally, I will make some suggestions regarding the enforcement of the various rights, with specific reference to international human rights law.

2 INTERDEPENDENCE AND INDIVISIBILITY OF SOCIAL AND ECONOMIC AND CIVIL AND POLITICAL RIGHTS IN SOUTH AFRICA'S 1996 CONSTITUTION

Although the Universal Declaration of Human Rights (UDHR)⁴ contains a whole range of human rights within one consolidated document, the United Nations General Assembly subsequently decided that two separate human rights covenants should be prepared, one on civil and political rights and another on social, economic and cultural rights.⁵ Underlying this decision were several assumptions about the nature of the two sets of rights, which have led many commentators to view these

3 See *SA Law Commission Interim Report on Group and Human Rights* (1991) 525; Didcott 'Practical Workings of a Bill of Rights' in Van der Westhuizen & Viljoen (eds) *A Bill of Rights for South Africa* (1988) 52 at 58; Dennis Davis 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *SAJHR* 475 at 482.

4 Adopted and proclaimed by United Nations General Assembly Resolution 217 A (III) of 10 December 1948.

5 In 1950 the General Assembly adopted a resolution (Res 421 (V) of 4 December 1950) in which it emphasized the interdependence of all categories of human rights and called upon the United Nations Commission on Human Rights to adopt a single Convention. The next year, the Western states were able to reverse the decision, asking the Commission to divide the rights contained in the UDHR into two separate international covenants. See General Assembly resolution 543 (VI) of 5 February 1952. See also Asbjorn Eide 'Economic, Social and Cultural Rights as Human Rights' in Eide, Crause & Rosas (eds) *Economic, Social and Cultural Rights: a Textbook* (1995) 21 22; and Liebenberg *supra* note 2, at 360-1.

two types of rights as conceptually different and have led them to oppose the inclusion of social and economic rights in domestic constitutions.⁶

These assumptions include many traditionally held views about the nature of rights, including the following. Economic and social rights are said to be positive rights and therefore require government action: their implementation is costly because they require the state to provide welfare to the individual; they are programmatic and therefore require time to be realised; they are also vague and therefore suffer from a high degree of imprecision and courts would be unable to translate such abstract values and aspirations into enforceable orders in specific cases; and they involve complex polycentric and diffuse interests in collective goods.⁷ Their inclusion is also opposed on ideological grounds, because it is said a Bill of Rights is a shield and not a sword. Rights, it is said, are there to protect citizens against undue interference from the state. They are freedoms: save in the event of abuse, the state cannot prevent the citizen from turning any of his or her recognised freedoms to account.⁸ Progressive opponents focus on the supposed undemocratic nature of the constitutional entrenchment of social and economic rights. They are suspicious of the courts and the legal process and argue that the constitutionalisation of social and economic interests invariably results in the transfer of power to an unelected and inherently conservative body, namely the court.⁹

On the other hand, civil and political rights are said to be negative in nature, placing negative obligations on the state not to interfere with the freedom and integrity of the individual. Their implementation is free or at least inexpensive because they merely require the state to refrain from acting; they are 'absolute' and immediately satisfiable; they are formulated with a high degree of precision and courts therefore find it relatively easy to establish the obligations generated by them; and they are comprehensible because they involve discrete clashes of identifiable individual interests.¹⁰ Civil and political rights are also said to be politically neutral because they merely protect individuals against undue state interference.

The South African Constitution of 1996 – in line with the emerging trend in international human rights – rejects this rigid conceptual distinc-

6 See for example, Eide op cit note 5, at 22-4; and A Berenstein 'Economic and Social Rights: Their Inclusion in the European Convention on Human Rights – Problems of Formulation and Interpretation' (1981) *Human Rights Law Journal* at 258-60.

7 See Scott and Macklem 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution (1992) *University of Pennsylvania Law Review* 1 at 44-5; Eide op cit note 5 at 22; De Villiers op cit note 2 at 606-7; and Berenstein op cit note 6 at 263.

8 See De Villiers op cit note 2 at 602. De Villiers refers to this as the 'Locockean' approach to human rights. See also Durga Das Basu *Human Rights in Constitutional Law* (1994) 82.

9 See Davis op cit note 3 at 482.

10 See Scott and Macklem op cit note 7 at 24; Eide op cit note 5 at 22; and De Villiers op cit note 2 at 605-6.

tion between civil and political and economic and social rights.¹¹ The Bill of Rights includes a full spectrum of both civil and political rights and social and economic rights. It accepts the internationally recognised idea that all human rights are interdependent and indivisible.¹² In this view there is no conceptual difference between civil and political rights and economic and social rights. A distinction between the former and the latter is usually based on the nature of the interests they aim to protect. All rights are aimed at guaranteeing each individual the freedom to live his or her life with dignity and respect. Civil and political rights are mostly concerned with guaranteeing an individual the autonomy freely to pursue personal and political choices without interference from the state or other powerful parties. Social and economic rights are mostly concerned with guaranteeing everyone an autonomous space within which the individual may pursue his or her social and economic well-being and, with appropriate assistance from the state, live a life free from economic and social want. However, it is not possible to make an absolute and

11 The Bill of Rights also rejects the idea of a Bill of Rights as a 'shield' which merely operates to protect individuals from the state. I say this not merely because it includes an array of social and economic rights, but also because it allows for extensive application of the Bill of Rights not only between the state and individuals, but also horizontally between different individuals and between individuals and private institutions. See s 8(2) which provides:

'A provision of the Bill of Rights binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right.'

12 This is obvious from the structure of the Bill of Rights which does not, in any formal way, distinguish between rights traditionally seen as civil and political rights, and rights traditionally seen as social and economic in nature. The approach of indivisibility is reflected in the documentation of the technical committee of experts to the constitutional committee (Theme Committee 4 of the Constitutional Assembly), most notably in an undated memorandum 'Supplementary Memorandum on Bill of Rights and Party Submissions' drawn up by the Technical Committee after publication of the first working draft of the Constitution in October 1995. In the course of objecting to a request by the Theme Committee to group social and economic rights together in a separate section of the Bill of Rights, the technical experts argue that grouping these rights together will devalue them and will make them seem 'like some special species of rights'. See also Memorandum of Panel of Constitutional Experts, 'The Meaning of Progressive (s 25 and 26)', dated 6 February 1996, where the 'interrelationship and indivisibility' of the different kinds of rights are accepted. For the admissibility of travaux préparatoires in interpreting the constitution, see Chaskalson P in *S v Makwanyane* 1995 (6) BCLR 665 (CC) where the Constitutional Court accepted its use in interpreting the interim constitution:

'The multi-party negotiating process was advised by technical committees, and the reports of these technical committees on the drafts are the equivalent of the travaux préparatoires, relied upon by the international tribunals. Such background material can provide a context for the interpretation of the Constitution and, where it serves that purpose, I can see no reason why such evidence should be excluded' (679E-F). On interdependence, see Craig 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* 769-878; also Economic and Social Council of UN, 'Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' E/CN.4/1987/17, at 2 and 3. In *Minerva Mills v Union of India* 1980 SC 1789 (at 111-12 per Bhagwati J) the Indian Supreme Court also endorsed this view when it found that both the Fundamental (civil) Rights contained in Part III of the Indian constitution and the Directive Principles of state policy found in Part IV are based on human rights and that the latter is in no way inferior to the former.

definitive distinction between the rights by referring to the interest they aim to protect. Civil and political rights will often operate to protect economic and social interests while social and economic rights will often operate to protect interests related to the personal and political choices of an individual.¹³ The different rights also operate in support of each other, since the realisation of one right might be dependent on the realisation of another. Starving people may find it difficult to exercise their freedom of speech while a restriction on freedom of speech may make it difficult for individuals to enforce their right of access to housing. Hence the idea that civil and political rights and economic and social rights are interdependent and indivisible.

This does not mean that there are absolutely no differences between the various rights. It must be conceded, for example, that economic and social rights require relatively greater state action for their realisation than do civil and political rights. In other words, social and economic rights are generally somewhat more dependent for their full realisation on positive state action than are civil and political rights.¹⁴ But, as I argue throughout this paper, this difference separates the two sets of rights more in terms of degree than in kind.

3 ECONOMIC, SOCIAL AND CULTURAL RIGHTS PROTECTED IN THE 1996 CONSTITUTION

The 1996 South African Constitution contains a number of economic and social rights which are interspersed with other rights in the Constitution. These rights were included after the political parties in the Constitutional Assembly had agreed – once the technical advisors had made an in-depth analysis of public international law – that they were universally accepted fundamental rights in international law. The rights include:

Section 24 guarantees for everyone the right to an environment that is not harmful to the health or well-being, as well as the right to have the environment protected through reasonable legislative and other

13 For example, the right of freedom of expression may operate to protect the political and personal interests of a feminist author who writes erotic literature as a political statement about the erotic colonisation of women's bodies by men, but at the same time the right will potentially also protect the author's economic interest as she might be economically dependent on the proceeds of her writing. Similarly, a guaranteed right of access to health care may operate to protect a single mother's economic interests, but it may potentially also make it easier for the mother to have access to an abortion and will hence guarantee her autonomy to control her own body. I would therefore argue that it is almost impossible to make a clear distinction between rights merely on the basis of which interests it is aimed at protecting. For the reasons outlined in note 2 *infra* I will nevertheless adhere to the traditionally accepted distinctions as reflected in international human rights documents.

14 Phillip Alston and Gerard Quinn 'The Nature and Scope of State Parties Obligations Under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 158 at 184.

measures.¹⁵ The first part of this right strongly resembles the right to a healthy environment protected in s 29 of South Africa's interim Constitution.¹⁶ It was included in the final Constitution as a universally accepted fundamental right despite the fact that there are few specific provisions relating to the environment in international human rights instruments.¹⁷

Section 26 guarantees for everyone the right to access to adequate housing and also prohibits arbitrary evictions.¹⁸ This right was not included in the interim Constitution, but the right to adequate housing is recognised in a number of international human rights declarations and treaties¹⁹ and in

¹⁵ Section 24 reads:

'Everyone has the right

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecological sustainable development and use of natural resources while promoting justifiable economic and social development.'

On the right to a healthy environment, see Terry Winstanley 'Entrenching Environmental Protection in the New Constitution' in (1995) 1 *SAJELP* 85-97.

¹⁶ Section 29 states:

'Every person shall have the right to an environment which is not detrimental to his or her health or well-being.'

¹⁷ But as the Technical Committee to Theme Committee 4 pointed out in its explanatory memorandum to the first working draft, there are 'a multitude of multilateral and bilateral treaties between states as well as declarations, programmes of action and resolutions adopted by inter-governmental organisations forming a solid body of international environmental law'. See Theme Committee 4 – 'Fundamental Rights' (undated memorandum), s 17 at 117. The right to a healthy environment is included in the African Charter on Human and Peoples' Rights (Art 24: 'All peoples shall have the right to a generally satisfactory environment favourable to their development'), and in the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Art 11(1): 'Everyone shall have the right to live in a healthy environment and to have access to basic public services'). It can also be found in one form or another in the domestic constitutions of countries like Spain, Portugal, Slovakia, Brazil, Germany, India and Namibia.

¹⁸ Section 26 reads:

'(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

See generally Scott Leckie *When Push Comes to Shove: Forced Evictions and Human Rights* (1995).

¹⁹ Universal Declaration of Human Rights (1948) Art 25; European Convention on Human Rights and Fundamental Freedoms (1950) Art 8(1); International Convention relating to the status of Refugees (1951) Art 21; European Social Charter (1961) Art 16, 19(4) and Art 4 of Additional Protocol; International Covenant on Economic, Social and Cultural Rights (1966) Art 11; International Convention on the Elimination of All forms of Racial Discrimination (1966) Art 5(e)(iii); International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) Art 11(b) and (d); International Convention on the Elimination of All Forms of Discrimination against Women (1979) Art 14(2)(h); International Convention on the Rights of the Child (1989) Art 27(3).

several domestic constitutions.²⁰ The right in s 26 – like that in s 27 – is formulated in order to assert the right and then to specify certain dimensions of the right.

Section 27 provides for the right of everyone to have access to health care services, sufficient food and water and social security. Section 27 also prohibits anyone from refusing a person emergency medical treatment.²¹ This section bundles together a set of social and economic rights which engender more or less the same obligations and entail more or less the same policy considerations. The rights were specifically chosen because of their general acceptance in international human rights instruments and national constitutions.²²

Section 28 guarantees for every child younger than eighteen the right to basic nutrition, shelter, basic health care services, and social services.²³ This section resembles s 30 of South Africa's interim Constitution, although it has been streamlined and expanded.²⁴

20 For example, Belgium (1994) Art 23(3); Brazil (1988) Art 7(IV), Art 21(XX), Art 23(IX); Colombia (1991) Art 51; Dominican Republic (1966) Art 15(b), Art 17; Greece (1975) Art 21(4); India (1949) Art 39, Art 47, Mexico (1983) Art 4, Netherlands (1984) Art 22(2), Poland (1992) Art 79(5); Portugal (1982) Art 65; Russian Federation (1993) Art 39; Seychelles (1993) Art 34; Spain (1978) Art 47; Suriname (1978) Art 49.

21 Section 27 declares:

'(1) Everyone has the right to have access to
(a) health care services, including reproductive health care;
(b) sufficient food and water; and
(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
(3) No one may be refused emergency medical treatment.'

On the right to health in international human rights law, see Virginia A Leary 'The Right to health in international human rights law' in *Health and Human Rights* (1994) 25-56.

22 See Universal Declaration of Human Rights (1948) Art 25 (health care, access to sufficient food and clean water, social security); International Covenant on Economic, Social and Cultural Rights (1966) Art 9 (social security), Art 11 (sufficient food and clean water), Art 12 (health care); International Convention on the Elimination of All Forms of Racial Discrimination (1966) Art 5(e)(i) (social security), Art 5(e)(iv) (health care); International Convention on the Elimination of all forms of Discrimination against Women (1979) Art 11(1)(e) and Art 11(2)(b) (social security), Art 12(2) (sufficient food and clean water), Art 14(2)(b) (health care); Convention on the Rights of the Child (1989) Art 24(c) (sufficient food and clean water), Art 26 and Art 27 (social security); European Social Charter (1961) Art 11 and Art 13 (health care), Art 12 (social security); African Charter on Human and Peoples' Rights (1981) Art 16 (health care), Art 18 (social security).

23 Section 28 declares:

'(1) Every child has the right
... (b) to family care, parental care, or appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services, and social services;
(d) to be protected from maltreatment, neglect, abuse, or degradation;
(e) to be protected from exploitative labour practices ...'

On children's rights see De Vos supra note 2; and Angelo Pantazis 'Children's Rights' in Chaskalson et al (eds) *Constitutional Law of South Africa* (1996) 33-4.

24 Section 30 declared:

'(1) Every child shall have the right
....(b) to parental care;

Section 29 guarantees for everyone the right to a basic education including adult basic education.²⁵ This right, once again, can be traced to the similar but more restrictive right contained in s 32 of the interim Constitution.²⁶ This right is contained in many international human rights instruments²⁷ and in various national constitutions.

4 ENFORCEMENT BY SOUTH AFRICAN COURTS OF ECONOMIC AND SOCIAL RIGHTS

4.1 *The role of international human rights law and foreign case law*

The entrenchment of the principle of stare decisis in the Anglo-American legal tradition has engendered a judiciary with a very strong attachment to legal precedent. In this tradition judges justify their judgments by relying on previous decisions or, where they differ, carefully distinguishing their judgments from previous decisions. In the absence of clear precedent to support them, judges often shy away from formulating new or innovative legal rules and principles. This, I believe, is the result of the deep-seated positivism prevalent in the legal fraternity in South Africa that dictates that judges are not the 'makers of law', but merely the 'adjudicators of law'.²⁸ This also seems to be the road on which the

(c) to security, basic nutrition and basic health and social services;

(d) not to be subject to neglect or abuse;

(e) not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well being.'

25 Section 29(1) declares:

'Everyone has the right

(a) to a basic education, including adult basic education; and

(b) to further education, which the state must take reasonable measures to make progressively available and accessible.'

See generally Ross R Kriel 'Education' in Chaskalson et al (eds) *Constitutional Law of South Africa* (1996) 38-1 to 38-19.

26 Section 32 declared:

'Every person shall have the right

(a) to basic education and to equal access to educational institutions;

(b) to instruction in the language of his or her choice where this is reasonably practicable; and

(c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.'

27 See Universal Declaration of Human Rights (1948) Art 26; European Convention on Human Rights (1950) Art 2; Convention on the Elimination of All Forms of Racial Discrimination (1966) Art 5(e)(v); Convention on the Elimination of All Forms of Discrimination against Women (1979) Art 10; African Charter on Human and Peoples' Rights (1981) Art 17; and the Convention on the Rights of the Child (1989) Art 28 and Art 29.

28 For a general discussion of judges attitudes in the apartheid era, see Hugh Corder *Judges at Work: The Roles and Attitudes of the South African Appellate Judiciary 1910-50* (1984); John Dugard *Human Rights and the South African Legal Order* (1978); C F Forsyth *In danger of Their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950-80* (1985). Victor Soutwell 'Working for Progressive Change in South African Courts' (1995) 28 *Cilsa* 261 at 266 advances the following reason for this trend:

'[J]udges were able to lull themselves into believing that they had no choice when interpreting racist and repressive statutes. It was the body of statutory law which contained the law of apartheid and no more. Anything else would not have sat comfortably with the judiciary because if judicial choice were to be accepted as part of the interpretative process, this would entail personal accountability of judges in their interpretation, application and enforcement of these laws.'

majority of judges in the Constitutional Court has embarked.²⁹

In this context, the apparent scarcity of precedent in the form of comparable foreign case law that might facilitate the interpretation of directly enforceable economic and social rights in the South African Constitution, is potentially a major stumbling block to the effective enforcement of these rights by South African courts. The ability of domestic courts effectively to enforce social and economic rights will be a matter of will and experience. The more our courts adjudicate on these matters, the more clearly legal principles and precedents will emerge. The problem is how to get the courts to engage with the sometimes difficult conceptual and practical questions posed by the incorporation of directly enforceable social and economic rights.³⁰

From the outset judges, lawyers and academics will have to come to grips with the revolutionary nature of this legal development. Often there will be little or no comparable foreign case law or international human rights law directly relevant to the problem at hand. Hopefully judges will be brave enough in these situations to fathom new rules and principles. Even where comparable foreign case law is available, it will not always be directly applicable, particularly because it will often be the product of a system in which social and economic rights are not directly enforceable by courts. The courts' stated view that foreign case law should be treated with circumspection because of the fact that each legal system crafts rules to accommodate the idiosyncrasies peculiar to that particular system, also mitigates against the large scale dependence on foreign case law.³¹

29 See for example *S v Zuma* 1995(4) BCLR 401 (SA) (CC) where Kentridge AJ, while admitting that general language does not have a single 'objective' meaning, nevertheless warns that the main task of the judiciary should remain the interpretation of a written instrument and that a less rigorous approach may entail the danger that the Constitution may be taken to mean whatever one wishes it to mean (at 412F-G); also *S v Makwanyane* 1995 (6) SA 665 (CC) where Kriegler J remarks:

'In answering that question the methods to be used are essentially legal, not moral or philosophical. . . . The incumbents are Judges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics' (at 747F-748A).

For an extensive discussion on the jurisprudence of the Constitutional Court, see Alfred Cockrell 'Rainbow Jurisprudence' (1996) 12 *SAJHR* 1-38. Cockrell argues that the judges of the Constitutional Court had by and large failed to go beyond the formulation of formal reasons for their decisions and had not engaged in the moral and political reasoning required when making the difficult decisions about matters of political morality.

30 See Michael K Addo 'Justiciability Re-examined' in Beddard & Hill *Economic, Social and Cultural Rights: Progress and Achievement* (1986) 93 at 95, where he contends that there 'is normally a degree of subjectivity involved' in the identification by courts of the entitlements and duties created by the bill of rights. Judges therefore have some discretion 'in the exact dimension of the legal regime to be put into effect'. Whether judges ever lack discretion is a moot point on which I would rather not pontificate here.

31 See *Park-Ross v The Director, Office for Serious Economic Offences* 1995(2) BCLR 198 (C); *Nortje v Attorney-General of the Cape* 1995(2) BCLR 236 (C); and *Fose v Minister of Safety and Security* 1996(2) BCLR 232 (W). The Constitutional Court has also shown an extreme reluctance to discover any principles of a universal nature in their investigations of foreign case law. See for example *Du Plessis v De Klerk* 1996(5) BCLR 658 (CC) at 677C-D ('A comparative examination shows at once that there is no universal answer to this problem').

This does not mean that courts should not have regard to both foreign case law and to the international human rights standards enunciated by judicial and quasi-judicial bodies and academic experts. South African lawyers and judges might find it particularly helpful to acquaint themselves more thoroughly with the principles developed in international human rights law regarding the enforcement of economic, social and cultural rights. The body of international standards developed by, amongst others, the United Nations Committee on Economic Social and Cultural Rights will be of particular interest. It is clear that in drafting the social and economic provisions of the Bill of Rights, the Constitutional Assembly (with the assistance of the technical committee and panel of experts) closely followed the formulations adopted in international human rights instruments, especially the Covenant on Economic, Social and Cultural Rights.³² This was done, first, to facilitate consistency between South Africa's domestic policies and laws, and its international human rights obligations and, second, to 'point the courts in the direction of a legitimate international source in interpreting the rights' in question.³³

When courts in South Africa are called upon to adjudicate on these issues, they will find much to guide them in the body of law built up in the interpretation of international human rights instruments, particularly in the deliberations and interpretations of the United Nations Committee on Economic, Social and Cultural Rights established in terms of the Covenant on Economic, Social and Cultural Rights. In fact, South African courts do not have a discretion in this regard: according to s 39(1)(b) of the final constitution courts or other tribunals or forums 'must consider international law' when interpreting the Bill of Rights.³⁴ This is arguably an even more general and broader injunction than the one contained in the interim Constitution in terms of which courts were only obliged to have regard to public international law 'where applicable'.³⁵ In the context of the interim Constitution the term 'public international law' in s 35(1) has been interpreted generously to allow recourse to treaties such as the European Convention on Human Rights to which South

32 See Technical Committee 4 report *supra* note 12, at 16 and 17 (where the committee explains that the term 'housing' was preferred to that of 'shelter' because it is 'consistent with the right as it appears in international human rights instruments'). See also Technical Committee 4 explanatory memorandum dated 14 February 1996 at 2. See also generally note 12.

33 Technical Committee *supra* note 32 at 2.

34 Of course, this does not imply that judges must follow international law positions slavishly. It does mean, I would contend, that courts cannot completely disregard international law. This, in turn, requires that where courts decide not to follow the precedents of international law, they must at least give cogent and well argued reason for why, after due consideration, they have decided not to follow international law.

35 See s 35(1) of the interim Constitution.

Africa is not a party and cannot become a party.³⁶ International Law in this context includes those sources of international law recognised by article 38(1) of the Statute of the International Court of Justice, viz. the international conventions, international custom, the general principles of law recognised by civilised nations, and judicial decisions and the teachings of the most highly qualified publicists of the various nations.³⁷ The latter includes sources arising out of the international human rights conventions such as the comments and opinions of the UN Human Rights Committee, General Comments of the Committee on Economic, Social and Cultural Rights, the comments of the European Commission, judgements of the European Court of Human Rights and judgments of the Inter-American Court of Human Rights.³⁸

The incorporation of directly enforceable social and economic rights in the final constitution is unique and judges will therefore not always find applicable comparative case law to guide them. The case law of one country – India – may, however, be of particular assistance to the courts when dealing with the enforcement of social and economic rights.³⁹ The Indian Constitution contains a Bill of Rights, Fundamental Rights in Part III of the Constitution. Social and economic rights are also incorporated as unenforceable directive principles in Part IV of the Constitution.⁴⁰

36 John Dugard 'The Role of International Law in Interpreting the Bill of Rights' (1994) 10 *SAJHR* 208 at 212; Neville Botha 'International Law and the South African Interim Constitution' (1994) *SAPR/PL* 245 at 248-252. In *S v Makwanyane* 1995(6) BCLR 665 (CC) at 686 par 35, Chaskalson P ruled that public international law would include 'non-binding as well as binding law'.

See also generally Dermott Devine 'The Relationship between International Law and Municipal Law in the Light of the Interim South African Constitution 1993' (1995) 44 *International and Comparative Law Quarterly* 1-18; John Dugard 'International Law and the 'Final' Constitution' (1995) 11 *SAJHR* 241 at 242; Lourens du Plessis & Hugh Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 121.

Dugard points out that since 27 April 1994 the European Convention on Human Rights has been invoked as a guide to the interpretation of rights contained in Chapter 3 of the interim Constitution in several cases, including *S v Zuma* 1995 (4) BCLR 401 (SA) (CC) at 422; *S v Williams* 1995(7) BCLR 861 (CC) at 877; *Coetzee v Government of the Republic of South Africa*; *Matiso v Commanding Officer, Port Elizabeth Prison* 1995(10) BCLR 1382 (CC) at 1410 (per Sachs); *Ferreira v Levin NO and Vryenhoek v Powell NO* 1996(1) BCLR 1 (CC) at 100; *Bernstein v Bester* 1996(4) BCLR 449 (CC) at 486 and 500.

37 Dugard (1995) op cit note 36 at 243.

38 Botha op cit note 36 at 248-252.

39 I am not suggesting that the case law of other countries will not, in certain cases, be of immense value to lawyers and judges when they come to grapple with the difficult task of interpreting the social and economic rights provisions in the Bill of Rights. I am merely noting that the Indian courts have handed down innovative and imaginative judges in defence of the poor and that these judgments may well be of assistance to South African judges.

40 The decision to 'relegate' social and economic rights to un-enforceable principles, was severely criticised by some delegates to the Indian Constitution Assembly. Delegate T T Krishnamarachi described the principles as 'a veritable dust bin of sentiment [. . .] sufficiently resilient as to permit any individual of this House to ride his hobby horse into it' *CAD* 1949 Vol VII 41-42. See further *CAD* 1949 Vol VII no 2 225-583 for the complete debate where the directive principles are variously described as 'platitudes' and 'pious wishes' on the one hand, and as 'the essence of the constitution' on the other.

Despite the fact that the directive principles are not directly enforceable, the Indian Supreme Court has managed to enforce them indirectly by reading them into the directly enforceable fundamental rights.⁴¹ In the process it has come up with innovative and even revolutionary decisions which could be of much value for the South African judges when they are called upon to adjudicate on social and economic rights.

For the purpose of interpreting the provisions on economic and social rights in the Bill of Rights, the General Comments on the Covenant of Economic, Social and Cultural Rights by the UN Committee on Economic Social and Cultural Rights, the relevant decisions of the European Court of Human Rights, and the foreign case law, particularly from India, will provide valuable precedential guidance to the courts, whereas the academic writings on the subject will hopefully assist the court in its conceptualisation of the rights and their concomitant obligations.

4.2 *Obligations engendered by the Bill of Rights*

Traditionalists who see a Bill of Rights as a shield and not as a sword – as a protective mechanism against state interference in the lives of individuals – usually hold that such rights merely place a duty on the state to refrain from interfering with the rights of individuals. In other words, they see a Bill of Rights as merely placing a duty on the state to respect the enumerated rights. South Africa's final Constitution emphatically rejects this notion of a Bill of Rights, not merely because it includes a wide variety of both civil and political, and social and economic rights, but also because it contains an express 'obligation clause in terms of s 7(2) which enjoins the state to act positively to enforce the constitutionally entrenched rights. Section 7(2) instructs the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.

This wording follows internationally accepted ideas of the various obligations engendered by rights first pinpointed by Henry Shue,⁴² who indicated that all rights – both civil and political and social and economic – generate at least four kinds of duties for a state that undertakes to

41 Durga Das Basu *Shorter Constitution of India* (11 ed) 317-318. See also *Randhir v Union of India* A 1982 SC 879 (at 8) and *Bandhua Morcha v Union of India* A 1984 SC 802 (at 10). For more about the directive principles in the Indian Constitution see John Murphy 'Second Generation Rights and the Bill of Rights Debate in South Africa' (1992) 30 *SA Sociology Review*; Bertus de Villiers 'Directive Principles of State Policy and Fundamental Rights: The Indian Experience' (1992) 8 *SAJHR* 29; Bertus de Villiers 'The Socio-Economic Consequences of Directive Principles of State Policy: Limitations on Fundamental Rights' (1992) 8 *SAJHR* 188; Pierre de Vos 'A Bill of Rights as an Instrument for Social and Economic Transformation in a New South African Constitution: Lessons from India' in Mervyn Bennun & Malyn Newitt (eds) *Negotiating Justice: A New Constitution for South Africa* (1995) 81-112; and Hugh Corder et al *A Charter of Social Justice: A Contribution to the South African Bill of Rights Debate* (1992) 65-66.

42 H Shue *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980) 5. See also Eide supra note 5 at 37-8.

adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations entail a combination of negative and positive duties, and apply to all rights whether they are classified as civil and political or social and economic.⁴³ It must be noted that the exact scope and extent of the duty in respect of each right will depend on both the nature of the right and the way in which it was drafted.

The Constitutional Court has acknowledged the fact that the Bill of Rights engenders different kinds of obligations for both civil and political and social and economic rights.⁴⁴ It has also made it clear that it accepts the idea that social and economic rights are enforceable, despite the fact that it may give rise to budgetary implications.⁴⁵

In the remainder of this article I will attempt to provide a coherent framework for conceptualising the obligations engendered by the Bill of Rights and will also explore the contours of these obligations. In doing this, by way of example, I will specifically refer to the writings, comments and judgments of the various human rights bodies, as well as to some decisions of the Indian Supreme Court.

4.3 Negative enforcement

4.3.1 The primary obligation to respect social and economic rights⁴⁶

Once it is accepted that all rights are fundamental and that they are enforceable by courts, it becomes clear that they all require the state and other relevant institutions, on a primary level, to refrain from infringing the stated rights directly. This means that the state is required to

43 See Technical Committee 4 Memorandum 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights' 8 March 1996, par 2, p 1. Article 2 of the International Covenant on Civil and Political Rights (1966) requires states 'to respect and ensure' the rights in the Covenant to all individuals within their territory. The European Convention on Human Rights (1950) requires states 'to secure' to everyone the rights in the Convention while the American Convention on Human Rights (1969) refers to the obligation 'to respect and ... to ensure'.

44 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996, 1996 (4) SA 744 (CC) at 77, where the court states: 'It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications.'

45 *Ibid.* The court states:

'[W]e are of the view that these rights are, at least to some extent justiciable. . . . [M]any of the civil and political rights entrenched in the NT 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 a bar to their justiciability.'

46 The various obligations – including the obligation to respect – apply to both the 'civil and political' and 'social and economic' rights. See *In re: Certification of the Constitution of the Republic of South Africa* 1996 at 77, where the Constitutional Court reiterated this point. However, as this article specifically deals with social and economic rights, I will restrict my discussion to them. For examples of these, see De Vos *op cit* note 2 at 245-9.

respect the autonomy of the individual.⁴⁷ This duty to respect human rights is easiest to grasp because it corresponds to the traditional conservative view of the nature of the Bill of Rights as a shield against government interference. The way in which social and economic rights are framed in the Constitution makes it obvious that they too are intended to have this negative dimension. Like the civil and political rights, many of the economic, social and cultural rights in the Bill of Rights contain a general assertion of the right to be protected in its first sub-clause, followed by a specification of certain dimensions of the right. The Constitutional Court acknowledged as much in its recent certification of the South African Constitution.⁴⁸

On this primary level therefore, the Bill of Rights guarantees every person the right not to have her or his access to housing, health care, sufficient food and water, social security and the right to basic education subjected to unjustified interference.⁴⁹ An example: imagine that the Western Cape Provincial government, in preparation for a visit by members of the International Olympic Committee, decides to bulldoze a cluster of informal houses that have been erected on an open piece of land next to the airport. By acting thus, the government is failing to respect the right of informal settlers to access to housing. The action – and the legislation in terms of which the removal is effected – could constitute a *prima facie* infringement of the informal settlers' right of access to housing.

As with all other rights, the scope and contours of these negative obligations will take shape through interpretation by the courts. However, to assist courts, these general obligations to respect the rights are further amplified by additional sub-clauses that cast specific obligations on the state. For example, s 26(3) of the final constitution prohibits anyone from being evicted from their home or having their home demolished without an order of court made after considering all the relevant circumstances. It also prohibits legislation that permits arbitrary evictions.⁵⁰ This is a very clear prohibition in the traditional negative sense

47 Eide op cit note 5 at 37-8; G. Perces-Barba 'Reflections on Economic, Social and Cultural Rights' (1981) *Human Rights Law Journal* 281 289. Perces-Barba also refers to three levels of juridical protection of fundamental rights, which, according to him, assumes the existence of various juridical techniques. Similar to Shue, Perces-Barba refutes the idea that rights can be enforced in only one (negative) way. He refers to this first aspect as Autonomous Rights.

48 See *In re: Certification of the Constitution of the Republic of South Africa* at 78 where the Constitutional Court remarks:

'At the very minimum, socio-economic rights can be negatively protected from improper invasion.'

49 See Technical Committee 4 Memorandum supra note 32 at 3.4.

50 This is in accordance with the internationally accepted principle that the right to adequate housing places a duty on the state to refrain from 'carrying out, advocating or condoning the practice of forced or arbitrary evictions of any person or groups from their homes'. See Scott Leckie 'The Right to Housing' in Asbjorn Eide, Catarina Krause and Allan Rosas (eds) *Economic, Social and Cultural Rights* (1995) 107 at 113. See also s 27 (3) in the final Constitution, which states that no one may be refused emergency medical treatment.

and would, for example, mean that s 3(a) of the Prevention of Illegal Squatting Act⁵¹ is probably unconstitutional because it obliges courts to order the summary ejection of convicted squatters from land without first requiring the public authorities to ensure that there is suitable alternative accommodation available to such persons and their families. Section 3B of the Act that authorises an owner of land or officers of local authorities to demolish unauthorised structures erected on property without an order of court and without any prior notice of whatever nature to any person will also probably be unconstitutional.⁵²

In the absence of such specific prohibitions, courts might be reluctant to explore fully the range of negative obligations engendered by these rights. The incorrectness of such an approach is evinced by the substantial body of opinion that has been developed in foreign jurisdictions and in the international human rights field on the scope of the negative obligations engendered by the various economic, social and cultural rights. For example, in the context of the right of access to adequate housing, the UN Committee on Economic, Social and Cultural Rights has drawn up a very detailed general comment on the right to adequate housing.⁵³ On the most general level the committee states that

'a general decline in living and housing conditions, directly attributable to policy and legislative decisions by state parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant'.⁵⁴

In effect this means that the right places a duty on the state to respect an individual's existing access to adequate housing. The state and all its organs are therefore constitutionally bound 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'.⁵⁵

51 52 of 1951.

52 See Liebenberg *op cit* note 2 at 373.

53 Committee on Economic Social and Cultural Rights, General Comment No 4 (Sixth session 1991) [UN doc E/1992/23]. The Committee identified the right of adequate housing (Art 11(1)) in the Covenant on Economic, Social and Cultural Rights as the 'most comprehensive' and 'perhaps the most important' of the relevant international provisions (at paragraph 3).

54 General Comment no 4 see note 46 at 11. Even during times of economic contraction the obligations continue to apply 'and are perhaps even more pertinent' (at 11). See also Committee on Economic, Social and Cultural Rights General Comment no 3 (Fifth session, 1990) [UN doc. E/1991/23] on the general nature and scope of the state parties obligation in terms of Art 2(1) of the Covenant on Economic, Social and Cultural Rights. The comment questions the validity of deliberately retrogressive measures by the state which diminishes the enjoyment of rights by individuals and requires that such actions 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' (at 9).

55 Leckie *op cit* note 50 at 113. In the context of the right of access to health care services guaranteed in s 27(1)(a), this would mean that the right places a duty on the state to respect an

In the context of the right to adequate housing the Indian Supreme Court in the case of *Olga Tellis v Bombay Municipal Corporation* and *Kuppusami v State of Maharashtra*⁵⁶ has laid down a similar principle. In this case the Bombay Corporation (Bombay municipality) forcefully evicted pavement dwellers without prior notice from their shacks on the pavements of one of the main streets of Bombay in terms of the Bombay Corporation Act of 1888. The shack dwellers applied for a court order to stop further actions by the Bombay Corporation, claiming that their fundamental right to life under s 21 of the Constitution had been infringed. Chief Justice Chandrachud emphasized the wide ambit of this right to life and said an equally important facet of the right to life is the right to livelihood because no person can live without a means of living, that is, the means to a livelihood. While the state may not, by affirmative action, be compelled to provide adequate means of livelihood or work to the citizens, 'any person who is deprived of his (sic) right to livelihood, except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life by s 21'.⁵⁷ At first blush, this outcome seems a bit puzzling if measured against the ringing rhetoric of the earlier passages of the judgment. The decision has therefore been criticised and it has been suggested that the court failed to invalidate the enabling legislation because it did not have the courage to take such a politically risky step.⁵⁸ However, the decision can be explained by noting that the court order insisted that the pavement dwellers could only be removed on certain stringent conditions. Some categories of dwellers had to be given alternative sites for resettlements and those who had lived for more than 20 years in dwellings which had

individual's existing access to health care. Where the state decides to close a clinic in a rural area, thereby effectively denying thousands of residents access to health care services, it will constitute a *prima facie* infringement of the right to access to health care services. The state, through its closure of the facility, is interfering with the individual's right to health care and is therefore failing to fulfil its primary duty to respect that right.

56 AIR (1987) LRC 351.

57 At 369B-C. In this case the Indian Supreme Court distinguished between its power to force the state to take positive action to realise the right to adequate livelihood on the one hand, and its power to interfere where the state infringes on this right to livelihood. The court said it would only interfere in the latter case, and then only if the state interference was unreasonable and/or if it was not taken in terms of valid legislation. The reason for this restricted reading can be found in the nature of the Indian constitutional jurisprudence on social and economic rights. As social and economic rights are included in the Indian Constitution as unenforceable directive principles and are only enforced by being 'read into' the civil and political rights, the courts show a understandable reluctance to broaden the scope of these obligations.

In *casu* the court found that neither the legislation empowering the municipality to move the pavement dwellers, nor the action taken by the municipality in terms of the legislation was unreasonable, unfair or unjust (373 D). The road on which the pavement dwellers set up their houses was an important one and the settlement clearly constituted a nuisance to other pedestrians (374 D). The municipality therefore had a legitimate interest in removing the squatters.

58 C Singh 'Right to Life: Legal Activism or Legal Escapism?' (1986) *Journal of Indian Law Institute* 249-52.

been improved and developed could not be removed unless the land was needed for a public purpose.⁵⁹ The court in effect said that if the infringement on the right to livelihood of the pavement dwellers was restricted to what was absolutely necessary to achieve a necessary state objective, such an infringement would not be unreasonable. In other words, the court agreed that there had been an infringement of the right to livelihood but found in the present case that this infringement had been justifiable.

4.4 *Positive enforcement*

4.4.1 The secondary obligation to protect human rights

At a secondary level, all fundamental rights require the state to protect citizens against political, economic and social interference with their stated rights. The state is under a positive obligation to take steps to make sure that the enjoyment of the right is effective. This general obligation includes the obligation to have in place laws and regulations that grant individuals the legal status, rights and privileges required to ensure the proper protection of their rights.⁶⁰ Here, the obligation is not to act positively in the sense of providing money or resources directly to individuals, but to protect individuals by creating the framework in which they will be able to realise their protected rights without interference from others.⁶¹ In the context of the discussion of social and economic rights, this entails a duty to protect individuals from interference with their economic and social well-being.

In cases where courts find it difficult to delineate the boundaries and flesh out the contours of these obligations, the general comments of the UN Committee on Economic, Social and Cultural Rights, the various academic commentaries and the comparable foreign case law might prove helpful.

For example, if we want to determine the scope of the state's obligation

⁵⁹ At 382 D.

⁶⁰ Scott & Macklem op cit note 7 at 74; Eide op cit note 5 at 37. In Perces-Barba's terminology, the rights adopt a structure analogous to creditors rights. They are rights in which the beneficiary has the right to require the state to take positive action to ensure protection of the rights. See also D J Harris & M O Boyle *Law of the European Convention on Human Rights* (1995) at 284.

⁶¹ In the context of the European Court of Human Rights, the prime example is that of *Marckx v Belgium* ECHR (1979) Ser. A at 31, where the court said that Art 8(1) of the CCPR does not merely compel the state to abstain from interference – in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for family life. In the *Marckx* case, the court held that the state had a positive obligation to provide a system of domestic law which safeguarded the illegitimate child's integration into its family. See also *Golden v UK* ECHR (1985) Ser. A at 28 and *Airey v Ireland* ECHR (1979) Ser. A 32 at 24. In *X and Y v Netherlands* ECHR (1985) Ser. A 91 at 32, the European Court of Human Rights stated that there was an obligation on authorities to take steps to make sure that the enjoyment of the right is not interfered with by any other private person.

to protect the individual's right of access to housing, the UN Committee's General Comment on the right to adequate housing will be useful. The Committee identifies legal security of tenure as a core aspect of the right of access to housing and indicates that tenure takes a variety of forms, 'including rental accommodation, co-operative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property'. Security of tenure means at least a guarantee of legal protection against forced eviction, harassment and other threats.⁶² It could therefore be argued convincingly that the duty to protect the right of access to housing in s 26 of the final Constitution should be interpreted to include at least a duty on the state to take immediate measures to confer legal security of tenure on those persons and households currently lacking such protection.⁶³

On a practical level, such an interpretation indicates that s 26 of South Africa's final Constitution places a duty on the state to enact legislation or promulgate regulations to protect the occupancy rights of the individual against interference by landlords or other powerful actors. Failure to regulate the housing situation would constitute a *prima facie* infringement of the state's duty to protect the right of access to housing.⁶⁴

As is the case with the negative obligations, the economic, social and cultural rights clauses contain – over and above the general obligation to protect the rights – several sub-clauses that amplify and identify more specifically the detailed steps to be taken by the state to fulfil its duty to protect individual rights. For example, the right to a healthy environment is coupled with a stipulation in s 24(b) to the effect that the state is obliged to take reasonable legislative and other measures to prevent pollution and ecological degradation; to promote conservation; and to secure the ecologically sustainable development and use of natural resources. Where the state 'unreasonably refrains from taking the necessary legislative and other steps in accordance with this obligation, its omission will be reviewable by the courts as a failure to protect the guaranteed right'.⁶⁵

62 General Comment no 4 *supra* note 53 at 8(a).

63 As Leckie *op cit* note 50 at 114-5 explains in the context of housing rights:

'The obligation to protect the right to housing obliges the state and its agents to prevent the violation of any individual's right to housing by any other individual or non-state actor. Housing rights beneficiaries must, therefore, be protected from abuse by landlords, property developers, land owners or any other third party capable of abusing these rights.'

64 See De Vos *op cit* note 2 at 247. Liebenberg *op cit* note 2 at 373, suggests that as far as a right to housing is concerned special consideration should be given to the enactment of tenant protection legislation in relation to rental levels, dwelling maintenance, discrimination and security of tenure.

65 An example of an indirect injunction on the state to protect a right, can be found in s 28(1)(f) of the Constitution. This section guarantees for every child the right not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age, or that place at risk the child's well-being, education, physical or mental health, or spiritual, moral, or social development. This places a positive duty on the state to enact legislation and take such other reasonable measures that will ensure the protection of the child in this regard.

An example of how courts sometimes enforce this duty to protect the guaranteed right can be found in the decision by the European Court of Human Rights in the case of *Plattform 'Arzte fur das Leben' v Austria*.⁶⁶ In the context of the right to freedom of assembly guaranteed by s 11 of the European Convention, the European Court of Human Rights ruled that, even when a demonstration annoyed or gave offence to persons opposed to the ideas or claims which it sought to promote, the participants should be able to hold the demonstration without having to fear physical violence from their opponents. Such a fear would be liable to deter groups from openly expressing their opinions on controversial issues affecting the community. Genuine effective freedom of assembly cannot, therefore, be reduced to a mere duty on the part of the state not to interfere. Rights sometimes require positive measures to be taken by the state, even in the sphere of relations between individuals, if need be. The state therefore has a duty to take 'appropriate measures' to enable lawful demonstrations to proceed peacefully – in other words, they have a duty to take steps to protect individuals to enable them to exercise their rights. However, the Court stated that it cannot guarantee this absolutely as the police must have a wide discretion in the choice of means to be used. The court made it clear that its scrutiny would not be so strict as to substitute its opinion for that of the police, but it would assess the failure to prevent the clash in terms of measures taken and not results to be achieved.⁶⁷

The jurisprudence of the Indian Supreme Court also contain examples of how fundamental rights – both those traditionally viewed as civil and political rights and those seen as social and economic rights – sometimes place an obligation on the state to take positive action in order to protect the rights in question. For example, in the ground-breaking case of *Laxmi Kant v Union of India*,⁶⁸ the court for the first time issued detailed regulations which it ordered the state to enforce. In casu the applicant asked the court for an order instructing the national government to address the problems relating to the Child Aid Society (CAS), a statutory body set up by the state to oversee to the interest of children and regulate the adoption of babies. The applicant was in effect complaining that the CAS had failed to stop the selling of babies to foreigners. Because the CAS is a statutory body it had to act not only within the limits of the statute, but also in accordance with the constitution, specifically the provisions in s 21 of the Indian Constitution which guarantees

66 139 ECHR (ser A) (1988) 1.

67 Ibid. Here the court found that police had taken all appropriate measures and that the state had therefore not contravened the provisions of the Convention.

68 (1987) 1 SCC 67.

the right to life as well as the directive principles – specifically s 39(f).⁶⁹ The court now had to decide whether the right to life had been infringed by the inaction of the CAS and what order should be made in the wake of such an infringement.

The court declared that s 21 protected the right of children to life and livelihood. This included the right to be protected by the state against emotional and material neglect. The CAS had failed to protect these rights adequately and had acted contrary to its constitutional obligations. To ensure that the CAS in future acted within the boundaries of these constitutional obligations, the court issued a set of judicial regulations which made specific provision for the way the CAS had to deal with the adoption of children, especially the adoption of children by foreigners.⁷⁰ The court also ordered the state immediately to enforce the regulations set out by the court and where necessary to implement the rules set out by the court.⁷¹

4.4.2 The tertiary obligation to promote and fulfil human rights

At a tertiary level, all fundamental rights require the state to promote and fulfil the rights of everyone. Here the beneficiary has the right to require positive assistance, or a benefit or service from the state.⁷² The obligation can take many forms and is less precise in its scope and definition than the primary and secondary obligations. When it is formulated clearly, the right includes a duty on the state to assist in creating the conditions in which the rights can be realised by the individual. In other words, it places a duty on the state to use its power to assist individuals in realising their rights.⁷³ The exact scope of these obligations will depend on the way in which they are phrased. Depending on the formulation of the right, it could include a duty on the state to directly provide basic resources to fulfil an individual's basic needs when no other possibilities exist for individuals to realise their rights.⁷⁴

69 Ibid at 80 paragraph 12. Section 39 of the Indian constitution provides:

'The state shall, in particular, direct its policy towards securing . . . (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.'

70 Ibid at 70. The detailed rules are set out from 70-79. This was necessary to stop the trade in babies born in India to foreigners.

71 Ibid at 81.

72 Perces-Barba op cit note 47 at 290.

73 Eide supra note 5 at 38. For example, where a right to vote is included in a Bill of Rights, it places an obligation on the state to create the conditions which would make it possible for every individual to freely and informatively cast their vote. This would include a duty to create conditions for a free flow of information, but also to ensure reasonable access to polling stations.

74 Eide op cit note 5 at 37-8.

The obligation to fulfil rights could consist of the direct provision of basic needs, such as food or resources that can be used to obtain food in situations where no other alternatives are available to the individuals. For example, in cases of unemployment; for the disadvantaged or the elderly; during sudden situations of crisis and disaster; and for those who are marginalized.⁷⁵ The concept of the individual as an active subject of all economic and social development is fundamental to a realistic understanding of this obligation.⁷⁶ The individual is expected, whenever possible through his or her own efforts and by use of own resources, to find ways to satisfy his or her own needs, individually or in association with others. However, use of a person's own resources requires that the person has resources that can be used – typically political power, land and/or capital, or labour.⁷⁷

The interpretation of the scope of these rights will require very close scrutiny of the way in which each right is framed. The right to housing and the right to health care, food, water, and social services are framed as rights of 'access to' the social and economic entitlements. To my mind this formulation explicitly limits the obligation of the state and will never include an obligation, for example, to provide individuals with free housing. The right of access to housing does however, place a tertiary duty on the state to assist individuals realise this right. It places a duty on the state to ensure adequate and appropriate state assistance to the large number of people who are unable to secure access to housing. The state is under a duty to organise access to home loans and subsidies for low income households and the provision of sites for the informal settlement for particularly vulnerable groups of people.⁷⁸ It is important to note that this obligation to promote the right to housing does not entail a duty on the state to build houses on demand.⁷⁹

On the other hand, children's rights and the right to education are not qualified by the 'access to provision. This broad formulation leaves open the possibility of a constitutional duty on the state directly to provide the basic resources necessary to fulfil the targeted individual's basic needs. A starving child – to use a crude example – would have a possible constitutional claim against the appropriate state organ to provide him or her with food. These rights are formulated in such a way that they place a duty on the state directly to provide the basic resources for fulfilling the basic needs of an individual where no other possibilities exist for the

75 Ibid at 38.

76 This is stated in the Declaration on the Right to Development. General Assembly resolution 41/128 of 4 December 1986, Art 2.

77 Eide op cit note 5 at 36-7.

78 Liebenberg op cit note 2 at 373-4. See also De Vos op cit note 2 at 248.

79 Another example can be found in s 27 of South Africa's final Constitution. This section places a duty on the state to assist individuals in making it possible for them to have access to health care services, sufficient food and water and social security. This places a duty on the state to take steps which will make access to these facilities easier for individuals.

individual to realise them herself.⁸⁰ The rights of children are specifically protected in s 28 of the Constitution and include clear and immediate obligations on the state to fulfil them.

For example, s 28(1)(c) states that every child⁸¹ has the right to basic nutrition, shelter, basic health care services, and social services. What does this mean? I would venture that the constitution enunciates the rights of children as clear, near-absolute core entitlements that are necessary to provide the basic subsistence needs of children, the most vulnerable group in any state. These rights have been worded in a precise and restrictive way, first by referring to 'basic' nutrition and health care services, and secondly by restricting the right holders to children.⁸² I believe that these rights are provided as a safety net in cases of deprivation, neglect, starvation and abuse, and place an onus on the state to deliver such services only where they are non-existent or inadequate. Whenever a challenge is brought, the court will have to determine whether the level of the services delivered meets the basic needs. If they do not, the court will have to order the state to comply with its obligations under s 30.

Section 29(1)(a) also guarantees everyone the right to 'a basic education, including adult basic education, in a state or state-aided institution'. This right is also not qualified by a reference to progressive realisation within the bounds of available resources and therefore places a duty on the state to realise it immediately. However, it is qualified by requiring merely the provision of basic education. The court is given a wide latitude to determine exactly the standard of education is prescribed.⁸³

As the examples show, the obligations engendered by the rights become less clearly defined at this tertiary level.⁸⁴ This does not mean that

80 Eide op cit note 5 at 37-8. In international human rights law it has generally been accepted that while the full realisation of the rights recognised in the international covenants is to be attained progressively, the application of some of the rights can be made justiciable immediately. See Limburg Principles op cit note 12.

81 A child is defined in s 30(3) as a person under the age of 18 years.

82 See Cachalia et al *Fundamental Rights in the new Constitution* (1994) at 102; and Dion Basson *South Africa's Interim Constitution: Comments and Notes* (1994) at 46, who make similar comments on children's rights in the interim Constitution. Basson remarks:

'Only children are awarded this important socio-economic right clearly because they are most vulnerable and accordingly the courts will have to accept this priority in state expenditure when the judiciary is called upon to allocate economic resources in order to realise this right.'

83 Kriel op cit note 25 at 38-3. Kriel refers to the West Virginia Supreme Court case of *Pauley v Kelley* 255 SE2d 859 (1979) at 877, which offers guidance in this regard.

84 This is true of the obligations engendered by both the rights traditionally referred to as civil and political rights and those referred to as social and economic rights. For example, where a right to vote is included in a Bill of Rights (as it is in s 19(3)(a)), it places an obligation on the state to create the conditions which would make it possible for every citizen to cast their ballot freely as a well-informed individual. This implies that the state is under an obligation to create the conditions in which free and fair political activity can take place and must ensure that all eligible voters have reasonable access to polling stations. It is difficult to say exactly when the state's failure to act will amount to a dereliction of its constitutional duties. How many people must be intimidated before a campaign is not free and fair anymore? How inactive must the police be shown to be? How far away can a polling station be from voters before it is too far? These questions are difficult in the same way that questions regarding the promotion and fulfilment of social and economic rights are.

courts will not be able to identify core obligations and enforce them. It will, however, mean that courts will tread carefully and will probably show some deference to the legislative and executive branches of government in these matters.⁸⁵ In this endeavour judges will not be left entirely to their own devices. As with other obligations, comments and opinion exist in international human rights law. General Comment no 4 of the UN Committee on Economic Social and Cultural Rights, emphasizes that the state is under an obligation to ensure that the cost of housing is commensurate with income levels. This means that the state may have a constitutional obligation to establish housing subsidies for those unable to obtain affordable housing.⁸⁶

A practical example of how courts may enforce this obligation can once again be found in some decisions of the Indian Supreme Court. Without explicitly classifying obligations as a tertiary obligation to assist and fulfil, the court has made orders in which it required the state to take positive action to fulfil their constitutional duties. For example, in *State of Himachal Pradesh v Umed Ram Sharmas*⁸⁷ the Supreme Court ratified

85 Some judges on South Africa's Constitutional Court have recently shown a new awareness of the fact that rights depend not only on the state refraining from interfering with individual choice, but on the state helping to create the conditions within which individuals can effectively enjoy these rights. See *Ferreira v Levin* and *Vryenhoek v Powell NO 1996(1) BCLR 1 (CC)*, where Sachs J, in a concurring judgment states that:

'meaningful personal interventions and abstinences in modern society depend not only on the state refraining from interfering with individual choice, but on the state helping to create the conditions within which individuals can effectively make such choices' (at 126E-F).

This view was endorsed by O'Regan J in her concurring judgment in *Bernstein v Bester 1996(4) BCLR 449 (CC)* at 512H-I.

From this realisation, it is only a small step to acknowledge that rights not only create negative obligations, but sometimes also place positive obligations on the state. See *In re The School Education Bill of 1995 (Gauteng) 1996(4) BCLR 537 (CC)*, where Mahomed J explicitly acknowledges that the right to basic education protected in s 32(a) of the interim Constitution creates a positive obligation on the state (at 545 I).

86 General Comment no 4 supra note 53 at 7(c). See generally Audrey R Chapman 'A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) *Human Rights Quarterly* 18 at 23-66 for an exposition on what constitutes core minimum standards. Chapman reviewed the official records of the Committee on Economic, Social and Cultural Rights (from the sixth session of 1991 to the eleventh session of 1994) and quotes extensively from these opinions to show how the Committee is in the process of establishing principles related to core minimum standards which must be met by states, including minimum standards related to an adequate standard of living, including food, clothing and housing; a right to health and a right to education (at 58-65). These opinions summarised by Chapman could clearly be of assistance to South African courts when they begin to grapple with the exact contours of the obligations to promote and fulfil the rights in the Bill of Rights.

Chapman argues that the monitoring of social and economic rights should be approached in the same way as civil and political rights, namely by asking whether there was a violation of the right in question. She identifies three types of violations: (1) violations resulting from actions and policies on the part of governments; (2) violations related to patterns of discrimination; and (3) violations taking place due to a states failure to fulfil the minimum core obligations contained in the Covenant (at 43). This approach is very much in line with the way the drafters of South Africa's final Constitution conceptualised the enforcement of social and economic rights.

87 AIR (1986) SC 847.

an order by the High Court which sanctioned the placing of a positive duty on the state to fulfil its constitutional obligations created by the fundamental rights. Fifteen inhabitants – all poor harijans – of a remote village in the state of Himachal Pradesh applied to the High Court⁸⁸ for an order against the state to complete the construction of a road to their village. The applicants claimed that the construction of the road was stopped at the adjacent village through collusion between the authorities and two families of the adjacent village whose land had to be expropriated for the building of the road.⁸⁹ The building of the road had already been sanctioned by the authorities, some money had been allocated for the task, and building was in progress in some parts of the road when all work on the road was stopped.

After hearing expert evidence from the state superintendent engineer, the High Court ordered the superintending engineer of the Public Works Department to proceed with the construction of the 5km stretch of road to the applicant's village. The court further directed the superintendent engineer to make an application to the state government for an additional sum of 50 000 rupees to be allocated for the project and directed the state government to favourably consider this demand.⁹⁰ The superintendent engineer was also ordered to report back to the High Court on the progress in the building of the road.⁹¹ The Supreme Court rejected an appeal against this order. Sabyasachi Mukharji J stated that the applicants were personally affected by an absence of a road because they were poor harijans (untouchables) of the area and their access to communication, indeed to life outside the village, was obstructed and prevented by the absence of a road. It found that there was a constitutional duty on the state, as far as is feasible and possible, to provide roads for communication to residence in hilly areas.⁹² In deciding that the High Court had not exceeded its powers, the Supreme Court stressed that the applicants had in effect asked the court to review the administrative inaction of the state where the constitution placed a positive duty on the state to act. Providing access to life is a constitutional obligation of the state, albeit primarily within the domain of the legislature and the executive to decide the priority as well as determine the urgency of providing such access. Judicial review of the administrative inaction should therefore be carried out with caution and not haste.⁹³ In cases where the availability of resources had a material bearing on the case, where policy regarding priorities were involved, or where specific expertise not available to the court was involved, the court would not be in the position to make an affirmative

88 The High Court is the highest court in each federal state.

89 *State of Himachal Pradesh v Umed Ram Sharma* supra note 87 at 849 paragraph 3.

90 At 850 paragraph 8.

91 At 851 paragraph 9.

92 At 851 paragraph 11.

93 At 854 paragraph 27.

directive.⁹⁴ In the instant case money had already been allocated and the road was already partially built. The directive by the High Court was designed to get the government to fulfil existing obligations.⁹⁵ The order was therefore valid.

4.5 *Qualifications to enforcement*

Few, if any, rights contained in an enforceable bill of rights are formulated in such a way that the protected conduct or interest may never be restricted,⁹⁶ and economic, social and cultural rights are no exception. In the context of economic, social and cultural rights we therefore find different forms of permissible limitations in the text of the Bill of Rights. These limitations can be divided into 'internal limitations' – which refer to specific qualifications regarding the scope of the obligations engendered by the right in question – and 'general limitations' – which refer to the general limitations clause which operates as a uniform qualification on the scope of the obligations engendered by all the rights included in the Bill of Rights.⁹⁷

94 At 855 paragraph 31.

95 At 855 paragraph 32. See also *Manubhai Pragaji Vashi v State of Maharashtra* AIR 1989 Bom 296, where the High Court ordered the state of Maharashtra to continue its monetary assistance to a privately run legal college. The college was the only one providing legal education in the state and the state government had continued its assistance to other colleges. When article 14 of the constitution, which guarantees equality before the law, was read along with article 41, which directs the state to provide for the right to education, the court discovered the right to equal treatment in the provision of education. The state action infringed on this right to equal education and was therefore discriminatory. The court ordered the state to provide the legal college with funding by using the same formula it used in funding other colleges of commerce, engineering and physics (at 303).

96 See Du Plessis & Corder op cit note 36 at 123; Ig Rautenbach *General Provisions of the South African Bill of Rights* (1995) at 81; and Basson op cit note 82 at 49.

97 For the relationship between internal limitations and general limitations see Stuart Woolman 'Limitations' in Chaskalson et al *Constitutional Law of South Africa* (1996) at 12-13. Woolman further distinguishes between internal limitations – which require an 'enquiry regarding the government's behaviour and whether the objective pursued and the means employed are acceptable' – and internal modifiers – which require 'an inquiry regarding the applicant's activity and whether it falls within the protective sphere'. This distinction, formulated with South Africa's interim Constitution in mind, does not make provision for the horizontal application of the Bill of Rights. Neither does it foresee the internal limitation of a right which engenders a positive obligation. In the context of a tertiary obligation to promote and fulfil the right in question, the internal qualification of the right may speak to both the action of the state and the activity of the applicant. For example, the fact that the right of access to housing is qualified in that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right, means (on the one hand) that the state's obligation to provide individuals with access to housing is limited to the extent stipulated. On the other hand it also means that the individual applicant will have to show that he or she has done everything in their power to realise this right because the state's obligation to take reasonable measures will not include measures to provide access to housing to individuals who have other means of acquiring access to housing. In other words, these clauses also have an internal qualifier aspect to them. For the sake of clarity and for practical necessity I will nevertheless refer to these clauses as internal limitations. As we shall see shortly, whether a qualification of a right is called an internal limitation or an internal modifier, has no real practical effect.

4.5.1 General limitation clause

Constitutional analysis of the Bill of Rights usually takes place in two stages.⁹⁸ First the applicant must show that the relevant duty to respect, protect, promote or fulfil the obligation engendered by a right protected in the Bill of Rights has not been met. At the second stage, the party looking to uphold the restriction will be required to demonstrate that the infringement is justifiable.⁹⁹ This second stage allows for some of the obligations engendered by these rights to be legitimately restricted in accordance with the general limitation clause contained in s 36 of the Constitution.¹⁰⁰ This section will be relevant specifically where the obligation engendered by the right is limited in terms of 'law of general application'. Not all the different kinds of obligations engendered by the rights – specifically not those requiring positive action from the state – will come into play when considering the scope of the legitimate limitation on rights, but where it does, the limitation clause will apply.

For example, the right of access to housing, as I have already argued, engenders an obligation on the state to respect or protect this right and this places a duty on the state to enact laws to provide legal security of tenure. Where Parliament enacts a law to regulate the informal housing sector and this law makes provision for the eviction of informal settlers from state or private land in certain circumstances, a court may very well find that these provisions infringe the right of access to housing. In such a case the duty will rest on the state to demonstrate that this restriction on the right to housing is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the factors set out in s 36(1). The same principle will apply where a right is infringed by any rule of the common law, because the common law is clearly also included in the meaning of 'law of general application'.

4.5.2 Internal limitations

The drafters of the economic, social and cultural rights were obviously acutely aware of the potential political and conceptual difficulties that

98 *S v Zuma* 1995(4) BCLR 401(CC) at 414.

99 See Woolman *op cit* note 97 at par 12-2. Woolman's formulation fits into a regime of negative obligations only. I have therefore reformulated it, to apply to both negative and positive obligations engendered by a right.

100 Section 36(1) states:

'The rights in this 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.

may be faced by the adjudicators of these rights. One of the ways in which this issue was addressed, was by the inclusion of internal limitations. Whereas some rights – such as the right to education and children's rights – are, without qualification immediately applicable, others – such as the right of access to housing, as well as the rights of access to health care, food, water and social security – are qualified in that the state is obliged to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of these rights.¹⁰¹

The inclusion of these 'internal limitations' is an acknowledgement that not all the rights can be immediately and completely fulfilled by the state. The concept mirrors the inevitable conditional nature of the state obligations. Does this mean that the nature of the obligations are so contingent as to deprive them of any normative significance? In other words, does the qualification of the rights enable the obligations of the state to be postponed to an indefinite time in the distant future? In the interpretation of the Covenant on Economic, Social and Cultural Rights by academic commentators¹⁰² and by the Committee on Economic, Social and Cultural Rights¹⁰³ it has been made clear that very definite obligations are engendered by rights, even when they are subject to 'progressive realisation'. The same is true for the obligations engendered by the state in South Africa's final Constitution.

In practice, the economic and social rights which contain internal limitations, will require the court to engage in a three-stage process of constitutional analysis. At the first stage, the applicant will have to show the relevant duty to respect, protect, promote or fulfil the obligation engendered by a right protected in the Bill of Rights, has not been met. If this is done successfully, there appears to be a burden shift which will require the state or other affected party to demonstrate that it has taken reasonable legislative and other measures, within its available resources to achieve the progressive realisation of the right. If the state or other affected party make the requisite showing, the applicant's challenge will be 'knocked out' and will fail. If the state or other affected party fail to make the requisite showing the applicant's claim will succeed unless the infringement of the obligation falls within the ambit of the general limitations clause as explained above. If this is the case, the party looking to uphold the restriction will have a second chance to demonstrate on a more general level that the infringement is justifiable.¹⁰⁴

To my mind, the way in which the internal limitations are phrased is an

101 See s 26(2) and s 27(2).

102 See for example Alston and Quinn *op cit* note 14 at 172-7; Liebenberg *op cit* note 2 at 365-6.

103 General Comment No 3 see note 54.

104 See Woolman *op cit* note 97 at para 12-2. Woolman argues that the internal limitations inquiry will not directly affect the general limitations clause analysis. What will be affected will be the 'ability of the government to offer particular justifications for the restriction it places on fundamental rights'.

indication that they only apply to the positive obligations engendered by the particular right, in other words the obligation to protect, promote and fulfil the right in question. A negative obligation never entails the direct disbursement of funds and operates to protect individuals from interference by the state or, where appropriate, other private actors. The obligations engendered on this level is relatively clear and precise. 'Internal limitations', which were specifically included to deal with problems surrounding the enforcement of more complicated, vague and expensive obligations engendered by the rights, would therefore clearly be inapplicable here. These 'internal limitations' should therefore never be interpreted by the courts as an invitation to water down the negative obligations engendered by the rights.

It is clear from this analysis of the working of 'internal limitations', that the nature and scope of the internal limitations clause will be of utmost importance in litigation surrounding the qualified social and economic rights. In order to further unpack the issues here, I will now attempt a dissection of the various aspects of the qualifying phrase. In the field of international human rights jurisprudence, the Limburg Principles¹⁰⁵ and the General Comment by the UN Committee on Economic, Social and Cultural Rights on the nature of state parties obligations¹⁰⁶ are of particular assistance in understanding the nature and scope of the different aspects of the qualifying clause.

4.5.2.1 'reasonable legislative and other measures'

This part of the internal qualification clearly indicates that the state is under an obligation to begin immediately to take steps towards the full realisation of the rights contained in the Bill of Rights.¹⁰⁷ Such steps

¹⁰⁵ The Limburg Principles are the result of a meeting of international experts convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg in Maastricht and the Urban Morgan Institute for Human Rights at the University of Cincinnati in Ohio. The 29 participants came from Australia, the Federal Republic of Germany, Hungary, Ireland, Mexico, Netherlands, Norway, Senegal, Spain, United Kingdom, United States of America, Yugoslavia, the United Nations Centre for Human Rights, the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the World Health Organisation, the Commonwealth Secretariat and the sponsoring organisations. The participants unanimously agreed to a set of principles which they believed reflect the present state of international law as well as further recommendations which do not form part of international law, but which they believe should form part of it. See Limburg Principles see note 12, paragraphs (ii) and (iii) at page iv.

¹⁰⁶ General Comment No 3 see note 54.

¹⁰⁷ Limburg Principles see note 12 at 16. See also General Comment 3 see note 54 at 2:

'[W]hile the full realisation of the relevant rights may be achieved progressively, steps towards the goal must be taken within a reasonably short time after the Covenant's entry into force for the state concerned.'

should be 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant'.¹⁰⁸

First, special emphasis is placed in the wording of the final Constitution – in accordance with international human rights jurisprudence – on the adoption of legislative measures in the realisation of the rights. Does this mean that legislation is mandatory? In the international field it has been held that legislation is not mandatory¹⁰⁹ but in many instances legislation will be 'highly desirable and in some cases may even be indispensable'.¹¹⁰ At the same time legislation, although very often essential, will not on its own be sufficient to fulfil the obligations. The state is also obliged to take 'other measures'. This is in line with the interpretation of the Covenant of Economic Social and Cultural Rights by the Committee.¹¹¹ State action will therefore not be limited to legislation but will also require adoption of 'administrative, ... economic, social and educational measures',¹¹² the establishment of action programmes, the creation of appropriate bodies, and the establishment of other procedures as well as the adoption and implementation of appropriate policies and detailed plans by government.¹¹³ In the absence of any legislative or other measures it will become more difficult for the state or other affected party to justify its infringement of the guaranteed obligation in terms of the internal limitation.

Second, the state must, over and above the adoption of legislation, provide for appropriate judicial remedies to enable the rights in question to be enforced.¹¹⁴ The Bill of Rights in South Africa's final Constitution, by explicitly placing a duty on the state to respect, protect, promote and fulfil the rights in the bill of rights,¹¹⁵ creates a constitutionally based judicial remedy. However, this remedy is broad and general and may not always address the specific complaints of an aggrieved party. The state will, in particular cases, be obliged to provide more appropriate judicial remedies to enable the effective realisation of the rights in the Bill of

108 General Comment No 3 see note 54 at 2. See generally about the progressive realisation, Liebenberg op cit note 2 at 265. In terms of the right to housing, see General Comment 4 see note 53, at 10 ('there are certain steps which must be taken immediately').

109 See Alston & Quinn op cit note 14 at 167. See also Limburg Principles note 12 at 19: 'state parties shall provide for effective remedies including, where appropriate, judicial remedies.

See also General Comment 3 at 3.

110 General Comment No 3 at 3.

111 Alston & Quinn op cit note 14 at 168. According to the guidelines governing the form and content of state's reports under the Covenant, states should provide details not only of relevant laws but also of relevant agreements, court decisions, policies, programs, techniques, measures etc. A consolidated set of guidelines is contained in UN Doc A/40/500/Add. 1 (1985) Annex at 3-22. See also Limburg Principles at 18.

112 Limburg Principles at 17.

113 See General Comment No 3 at 7.

114 Ibid at 5. See also Alston & Quinn op cit note 14 at 169; Liebenberg op cit note 2 at 365.

115 Section 9(2).

Rights. Liebenberg argues, for example, that the right of access to housing obliges the state to provide legal remedies to prevent or compensate for enforced demolitions and evictions, complaints against public and private landlords in relation to rent levels, dwelling maintenance, racial and other forms of discrimination, and any form of discrimination in the allocation and availability of access to housing.¹¹⁶

Thirdly, the state is entitled to a wide measure of discretion, but this discretion is by no means open-ended and does not in any way diminish the state's obligation. Put differently, whereas the state does not have a discretion to fulfil its constitutional obligations, it does have a discretion to choose the means of their attainment. The state is therefore not under any obligation to adopt a specific political or economic system.¹¹⁷

4.5.2.2 'to achieve the progressive realisation of the right'

Some commentators see the inclusion of this phrase as a handy back door through which the state may evade its constitutional obligations. To my mind, such an interpretation is wrong: the fact that the obligation may be realised progressively does not mean that the state may postpone its obligations to some distant unspecified time in the future. International law principles state that this provision should not in any circumstances be interpreted as implying that the state has the right to defer efforts to ensure full realisation indefinitely.¹¹⁸ In other words, the state must demonstrate that it has done its utmost within the constraints of its available resources to realise the rights protected.

The concept of progressive realisation has been included in recognition of the fact that the full realisation of all economic, social and cultural

116 Liebenberg op cit note 2 at 365. General Comment 4 see note 46 at 17 spells out the possible domestic remedies which will include, but will not be limited to, the following:

'(a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions; (b) legal procedures seeking compensation following an illegal eviction; (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination; (d) allegation of any form of discrimination in the allocation and the availability of access to housing; and (e) complaints against landlords concerning unhealthy or inadequate housing conditions.'

117 Limburg Principles see note 12 at 6; and General Comment 3 see note 54 at 8. The European Court of Human Rights also recognises that state parties have a discretion in giving effect to their obligations under the European Convention on Human Rights. But it has been prepared to place limits on this discretion and find that the state has not taken sufficient measures to fulfil its positive obligations under the Convention. See *Marckx v Belgium* ECHR 31 Ser A (1979) at 25.

118 Limburg Principles at par 21. See generally Alston & Quinn op cit note 14 at 177; Liebenberg at 366; De Vos op cit note 2 at 251. Although the state is entitled to a wide measure of discretion, this discretion is by no means open-ended and in no way does it diminish the state's obligation. The state is therefore under a burden to begin the process of rectifying the situation, but the courts leave a large margin of discretion to the legislature in choosing the means and schedule for the ultimate fulfilment of the rights.

rights will generally not be achieved in a short period of time. As the Committee has said, this concept is flexible,

'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.'¹¹⁹

This would mean that any deliberate retrogressive measures would constitute a *prima facie* infringement of the relevant right. Such an infringement would have to be justified with reference to available resources and the totality of the rights.¹²⁰

It is important to note that the obligation to ensure progressive achievement exists independently of an increase in resources. This means that regardless of constraints on resources, the state will have to demonstrate that it is taking steps to realise the rights in question progressively. In the absence of increased resources this would mean that what is required is at least the effective use of existing resources.¹²¹ Furthermore, progressive implementation can be effected by the development of the societal resources necessary for the realisation of the recognised rights for everyone.¹²²

This internal limitation is, however, subject to a qualification of its own. According to international human rights standards, it cannot negate the obligation of the state to realise a 'minimum core obligation' that would ensure 'at the very least, minimum essential levels' of each of the protected rights. If a significant number of individuals are deprived of essential foodstuffs, essential primary health care, or basic shelter and housing, there is a *prima facie* breach of the obligation.¹²³

4.5.2.3 'within its available resources'

The inclusion of this phrase reflects the practical economic and political reality that it is the state of the country's economy that most vitally determines the level of its obligations. This qualification does not mean that complete deference must be accorded to the state's subjective determination as to what constitutes an adequate allocation of resources. If this were the case, the rights would be largely deprived of their *raison d'être*. It is difficult to determine the extent to which courts will be deferent to the legislature in this matter. There is no need for courts to abdicate their responsibility in this regard, as certain rules and practices

¹¹⁹ General Comment 3 see note 54 at 9.

¹²⁰ *Ibid.*

¹²¹ *Limburg Principles* see note 12 at 23.

¹²² *Ibid.* at 24.

¹²³ General Comment 3 at 10.

regarding the content of this phrase can be identified with reference to international human rights norms.

First, the 'available resources' refer to the real resources of the country and not to the budgetary appropriations. This implies that the court may probe beyond government allocations as reflected in the national budget and may take account of the country's 'real' resources.¹²⁴ Available resources also refer to both the resources within the state and those available from the international community through international co-operation and assistance.¹²⁵

Second, as I have noted in the previous section, the state is obliged, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.¹²⁶ Failure to fulfil these minimum core obligations will constitute a *prima facie* breach of the guaranteed rights. Where such a *prima facie* breach has been established, account may be taken of resource constraints to justify the infringement. In order for the state to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate 'that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.¹²⁷

Third, even where the available resources are demonstrably inadequate, the state retains the obligation to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. In such cases a process-requirement remains for the state to show that adequate consideration has been given to the possible resources available to satisfy each of the requirements, even if the effort was ultimately unsuccessful. In other words, the state is under an obligation to monitor the extent of non-realisation and to devise appropriate remedial strategies and programmes.¹²⁸

Fourth, even in times of severe resource constraints, or in a time of structural adjustment or economic recession, the vulnerable members of society 'can and indeed must be protected by the adoption of relatively low-cost targeted programmes'.¹²⁹

124 Alston & Quinn op cit note 14 at 178. This view is supported by Alston and Quinn, who after analysing the travaux préparatoires of the Covenant of Economic, Social and Cultural Rights, conclude that State Parties' claims of lack of resources are open to 'some sort of objective scrutiny by the body entrusted with responsibility for supervising state compliance with the obligations. For a general discussion on the way in which the maximum available resources criteria could be made more quantifiable, see Robert E Robertson 'Measuring State Compliance with the Obligation to Devote the Maximum Available Resources to Realising Economic, Social and Cultural Rights' (1994) *Human Rights Quarterly* 16 at 693-714.

125 Limburg Principles see note 12 at 26.

126 Ibid at 25.

127 General Comment 3 see note 54 at 10.

128 Ibid at 11. See also Liebenberg op cit note 2 at 366; Alston & Quinn at 180. On monitoring the realisation of these rights, see infra 4.5.3.

129 General Comment 3 at 12.

4.5.3 *Monitoring of obligations*

To ensure the effective realisation of the totality of obligations engendered by the economic, social and cultural rights, an effective monitoring system is essential. The need is explicitly acknowledged by the final Constitution, in terms of which the Human Rights Commission is charged with the task of monitoring the implementation of the various social and economic rights.¹³⁰ Whereas the Human Rights Commission will probably not be directly involved in the enforcement of the rights, the yearly data gathered by the commission in terms of their mandate could begin to play a pivotal role in the social and economic rights litigation.

By monitoring the progress of the state, the Commission will annually be able to provide a detailed overview of the existing situation regarding the realisation of rights and this will provide the basis for the elaboration of clearly stated and carefully targeted policies in the years to come.¹³¹ In other words, the first set of statistics will form the bottom-line position against which the state's plans and actions, and the subsequent impact thereof, could be measured in years to come. It will be possible each year to measure the position of the previous year against the figures for the present year, thereby giving a clear indication of the progress, if any, that has been made.

In the context of the enforcement of the Covenant of Economic, Social and Cultural Rights, the UN Committee on Economic, Social and Cultural Rights has suggested that it would be useful for a state to identify specific benchmarks or goals against which their performance in a given area can be assessed.¹³² Without these benchmarks, it would be difficult to evaluate the extent to which progress had been made towards the realisation of the obligations engendered by the constitution.

This information may also prove invaluable to courts called upon to decide whether the *prima facie* breach of one of the obligations is justified by either the internal limitation of a specific right or the general limitations clause. As I argued earlier, where a right contains internal limitations there will be a shift in the burden of proof. This will require the state or other affected party to demonstrate that it has taken reasonable legislative and other measures, within its available resources to achieve the progressive realisation of the right. If the state or other affected party

130 Section 184(3) states:

'Each year, the 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.'

131 See General Comment 1 of the Committee on Economic, Social and Cultural Rights (Third session, 1989) [UN doc. E/1989/22] at 4.

132 General Comment 1 at 6. For example, it is generally agreed that it is important to set specific goals with respect to the reduction of infant mortality, the extent of vaccination of children, the intake of calories per person the number of persons per health care provider, etc. See also Limburg Principles see note 12 at 79.

make the requisite showing, the applicant's challenge will be 'knocked out' and will fail. If the state can demonstrate that progress has been made in a particular field by referral to the information compiled by the Human Rights Commission, it will go a long way to satisfy this burden. It will therefore be in the state's own interest to closely co-operate with the Human Rights Commission in the compilation of information on the implementation of the social and economic rights.

5 HORIZONTAL APPLICATION OF THE RIGHTS

The Constitution provides for the horizontal application of the Bill of Rights, if and to the extent that it is applicable, taking into account the nature of the right and the duty imposed by the right.¹³³ It is therefore impossible to make a blanket statement about the instances in which the social and economic rights will, or will not, apply to juristic persons and private individuals. When making this enquiry, one will first have to ascertain the kind of obligation that is at stake in the case: is it a duty to respect, protect, promote or fulfil the right? Secondly, one will have to look at the way in which the right itself is phrased and glean from this whether effective enforcement requires that juristic persons and/or private individuals are also bound.

For example, the way in which s 26 guarantees everyone the right to access to adequate housing, makes it clear that the realisation of this right will fall primarily on the shoulders of the state.¹³⁴ However, as I have indicated earlier, the duty to respect the right of access to housing will clearly include a duty on private individuals not to interfere with the rights of the aggrieved person, since it is private landlords who will most often be in a position to interfere with the enjoyment of a person's access to housing in this way.

The social and economic rights may also have a more indirect horizontal application in other kinds of situations. Section 8(3)(a) of the Constitution orders the court when applying a provision of the Bill of Rights to a natural or juristic person, to apply, and where necessary develop, the common law in order to give effect to a right.¹³⁵ This in effect means that all common-law principles regulating private relations between individuals will have to conform with the principles of the Bill of Rights, including those enunciated in the social and economic rights clauses. A possible example: A landlord and tenant sign a contract which

¹³³ Section 8(2).

¹³⁴ Section 26(2) explicitly places a duty on 'the state' to take steps to realise the right.

¹³⁵ Section 8(3)(a) states:

When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –
in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right

includes a provision which gives the landlord an absolute right to terminate the contract with immediate effect if the tenant engages in any immoral behaviour in the apartment. When the landlord discovers that the tenant is a gay man who regularly invites his boyfriend to sleep over at the apartment, he invokes this clause and attempts to evict the tenant. The tenant resists his eviction as unlawful, stating that he should not be bound by the provision of the contract because it is not in accordance with the principles of the Bill of Rights. In the light of s 9(3) (the right not to be discriminated against on grounds of sexual orientation), s 14 (the right to privacy) and s 26(1) (the right of access to adequate housing), the tenant would have a very strong case. In order to give relief, the court will have to re-interpret the common-law rules regarding freedom of contract. A possible way to do this would be to broaden the rule that contractual provisions which are *contra bonos mores* are unenforceable, to include provisions which are clearly at odds with the basic principles enshrined in the Bill of Rights.¹³⁶

6 CONCLUSION

The inclusion of economic, social and cultural rights as directly enforceable rights in South Africa's final Constitution, signals a decisive break with the idea that a Bill of Rights is only a shield which protects citizens against government interference. This means that the Bill of Rights will require judges, lawyers and academics to scrutinise and reject many of the accepted practices and assumptions in relation to judicial review. Whether the Bill of Rights fulfils its true potential will depend, to a large extent, on whether judges will discover in themselves the courage and imagination to engage in these challenges. Those judges willing to take on the challenge will find a wealth of writing and opinion in the field of international human rights to assist them in their endeavour.

¹³⁶ Section 39 (2) might have more or less the same kind of effect. This section states that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport and objects of the Bill of Rights. The social and economic rights provisions might therefore also influence the way in which legislative provisions are interpreted.