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FOR MY GRANDMOTHER

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CHAPTER 1:

INTRODUCTION:

The *UNDP Human Development Report 1994* informs us that "a fifth of the developing world's population goes hungry every night, a quarter lacks access to even a basic necessity like safe drinking water, and a third lives in abject poverty - at such a margin of human existence that words simply fail to describe it".¹ From other sources it can be learned that more than 1 billion people in the world today live in poverty, and some 550 million go to bed hungry each night. More than 1.5 billion lack access to clean drinking water and sanitation, some 500 million children do not have access to even primary education, and approximately one billion adults remain illiterate.² Although these statistics reflect the global situation, it is quite obvious that statistics peculiar to South Africa are just as appalling. In fact, it doesn't require statistics to reveal the magnitude of poverty facing the majority of South Africa's citizens. This is a glaring, obvious, undeniable and blatant fact and, as such, desperately needs to be addressed.

A natural concomitant of poverty on this magnitude is gross malnutrition, lack of education, low life expectation and sub-standard housing. It is this poverty that embraces, clutches and clings to so many South African people that the hopes and efforts of escape remain an unattainable ideal glimmering in the distant future. But the tragedy is that for many, in fact most, that vision of liberation from poverty will never come. And so life continues, those surrounded by an abundance of wealth, riches and comfort whilst the rest remain trapped within the impregnable circle of poverty striving in a desperate, but futile, attempt to abandon those shackles.

The irony lies primarily in the fact that, whilst most commentators in legal literature place unsparing emphasis on supposed first generation rights - the right to freedom of expression, the right to freedom of association, the right to vote, the neglect for the other category of human rights (the so-called second generation rights), such as the right to food, water, housing, health care, social security and education is indeed blatant. What do these supposed "first generation" rights mean to those at the bottom-most echelon of society, those whose thoughts are dominated by where their next plate of food is coming from, where they are going to sleep, or which area is most lucrative to go begging in.

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Whilst the successes of the struggle against apartheid and the birth of a democratic South Africa are indeed laudable, the journey ahead remains, it is a journey which, although fraught by an infinity of obstacles and challenges, one which is by no means insurmountable. In the pursuit of this journey, the

* The writer wishes to acknowledge with deep gratitude the assistance of Professor Maluwa who was responsible for reading and providing invaluable comments on earlier drafts of this paper, Sandy Liebenberg, for providing research material on the subject, Yanesh Ramiah, for her assistance with the numerous computer problems experienced in the course of writing this paper and Meshanthan Pillay, for his extensive help in researching the topic.

¹ Human Development Report 1994, at page 2

² Eide "Obstacles and Goals To Be Pursued" in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1995) 381 at page 381

point of departure should unequivocally lie in the realm of socio-economic rights. After all, what does it mean to be free from torture, or the death sentence, if famine and disease still claim the lives of so many? Basic humanity demands that poverty, starvation, homelessness, illiteracy and disease existing on the scale that they do desperately demand attention. It is these issues that form the focus of the present study.

The study will begin with a definition of socio-economic rights. It will then proceed to address the controversial notion of different generations of rights and engage in a brief historical note concerning these. The emerging trend seems to reflect a departure from the separatist approach to human rights; hence it will be necessary to examine the reasons motivating such a departure. This will be discussed in Chapter 2

Chapter 3 will illustrate the imperative nature of socio-economic rights in an attempt to indicate reasons for them being recognized as legally enforceable rights. The chapter will deal with its importance from four facets: the role of socio-economic rights in recognizing the humanity of the poor, such recognition in fact, being a pre requisite for peaceful co-existence, the danger of the non-recognition of socio-economic rights frustrating a democracy and the role socio-economic rights play in effectively ensuring an adherence to other fundamental rights provided for in the Final Constitution³.

The following chapter will elucidate the profound impact the non-recognition of socio-economic rights will have on other constitutional provisions namely, the right to life, equality, human dignity and self determination in extensive detail.

Finally, certain specific constitutional provisions pertaining specifically to socio-economic rights will be examined. These will include the right to housing, food and water, health care, social security and education. In this section the writer aims to engage in a brief examination of the obligations these socio-economic rights incur on the State, and the limitations that these rights are subject to.

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³ Reference to 'The Constitution' or 'constitutional provisions' through out this study will refer to the Final Constitution unless specific reference is made to the Interim Constitution.

CHAPTER 2:

DEFINING SOCIO-ECONOMIC RIGHTS

Prior to an examination of socio-economic rights and the numerous controversies surrounding them, it is perhaps pertinent to begin with a definition as to exactly what socio-economic rights are. Socio-economic rights are often referred to as the rights that protect the bare necessities of life or that provide the foundations of an adequate standard of living. These necessities of life generally encompass, at a minimum rights to adequate nutrition, housing, health, education and social security.⁴ These have historically been distinguished from civil and political rights which encompass rights such as freedom of expression, freedom of information, freedom of religion, belief and opinion, freedom of assembly and freedom of association. Perhaps, at this point it would be apt to engage in a brief history of the distinction between the two categories of rights and the reasons motivating such a distinction.

Although the Universal Declaration on Human Rights (hereinafter referred to as the UDHR) of 1948 adopted an integrative approach to the protection of human rights by including both civil and political rights as well as economic, social and cultural rights, this approach was not followed by the United Nations in its attempt to protect human rights. In 1952 it was decided that two separate Covenants were to be drafted one, dealing with civil and political rights and the other dealing with economic, social and cultural rights. At the time the justification offered was that each set of rights entailed legal obligations and modes of supervision of a different nature. This was substantiated primarily by the much over-stated positive/negative nature of State obligations, the argument being, that whilst civil and political rights merely imposed negative obligations on the State, socio-economic rights imposed primarily positive obligations on the State which necessarily involved a high level of resource commitment. Hence, due to the varying economic capacities of States, complemented by the fact that socio-economic rights involved gradual and progressive steps on the part of the State in their implementation, as opposed to civil and political rights which were capable of immediate implementation, each category of rights deserved to be protected in separate instruments. In addition, it was argued and accepted that socio-economic rights were vague and undefined and therefore could not be implemented through justiciable procedures, as well as the fact that concepts of standing made it difficult to raise issues on socio-economic rights. It was on this basis that the argument was accepted that compliance with civil and political rights were to be assessed differently from that of socio-economic rights. As will become evident in the course of this study, this distinction was both over-stated and grossly misconstrued at the time of the decision and, in so being has led to respect for and adherence to socio-economic rights often being undermined in favour of civil and political rights⁵.

It must be noted, however that this was by no means the only reason motivating the decision for two separate Covenants for, in addition, there was

⁴ Scott and Macklem "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" 141 *University of Pennsylvania Law Review* (1995) 1 at page 9

⁵ The fallacy of each of these arguments will be canvassed in extensive detail at a later stage of this study.

also the fundamental ideological divide between the 'Western'/ 'Liberal' and the 'Soviet'/ 'Socialist' conceptions of rights that contributed largely to having two separate Covenants. Whilst a preference of civil and political rights against socio-economic rights was the view of Western States at the time of drafting the Covenants, the Soviet States, on the other hand bore a preference for socio-economic rights against civil and political rights. This divide elucidated the impossibility of having only one of the two categories of rights provided for in a Covenant. Hence, this discussion in the UN and the eventual decision to produce two separate Covenants, rather than one, were partly due to this fundamental ideological divide between the socialist and liberal conceptions of rights.

As a result of both this debate and the gross misconceptions surrounding the nature of these rights, socio-economic rights are often considered to constitute a 'second generation' of human rights, the so-called 'first generation' being civil and political rights. In recent years a 'third generation' of solidarity rights has been added, for which credit is largely due to third world jurists and scholars, and in particular, Keba M'baye of Senegal who is primarily responsible for the right to development. This notion of the different generations of rights was first put forward by Karel Vasak⁶ in 1979 and since, whilst there may have been many who have advocated such an approach to human rights, it has equally been challenged by many in recent years and, in fact, the emerging trend in international law seems to be an integrated approach to the protection of human rights, a trend that South Africa's Constitution has followed⁷.

However, due to the distinction that was made and accepted between the two sets of rights, the International Bill of Rights has historically been considered to consist of two distinct categories of human rights: the Convention on Civil and Political Rights and the Convention on Economic, Social and Cultural Rights. At the time the General Assembly decided to distinguish two separate sets of rights, it also passed a resolution emphasizing that the different sets of human rights were inter-related and indivisible⁸. But, in spite of this, as

⁶ Quoted in Eide "Economic, Social and Cultural Rights: A Universal Challenge" in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1995) 15 at page 16

⁷ This integrative approach to the protection of human rights has recently been repeated and endorsed at the World Conference on Human Rights (Commonly referred to as the Vienna Conference) in which 171 States participated. Here, it was stated that the Vienna Declaration enjoins the World Community to "treat human rights globally in a fair and equal manner on the same footing and with the same emphasis."

The World Conference on Human Rights: Vienna Declaration and Programme of Action, UN doc. A/CONF. 157/23, part I paragraph 5

⁸ In defence of this integrated approach to human rights Shadrack Gutto has stated:

"The earlier views by some establishment ideologues that only civil and political rights are worthy of considering as 'human rights', or, on the other hand that, only economic, social and cultural rights are proper 'human rights' must now be rejected and have in fact been rejected by a multi ideological intellectual community"

Shadrack Gutto, "The Role of Mass Struggles In The Search For Popular Democracy And Integrated Human Rights in Africa: Aspects of Theory and Practice" in (2) *Review of the African Commission on Human and Peoples' Rights* (1992) 71 at page 73

Sachs has also said, in support of an integrated approach:

"The fundamental constitutional problem, however, is not to set one generation of rights against another, but to harmonize all three. The possessor of the rights is the same physical human being...."

already mentioned, history has shown that the implementation of socio-economic rights have generally been subordinated to that of civil and political rights.

However, a departure from this separatist model of approaching human rights followed in later years, when the two sets of rights were included side by side in many other single human rights documents. Perhaps the best example of this integration is the Convention on the Rights of the Child (1989), which was ratified by South Africa in June 1995. The Convention, in Article 24 provides for the right to health, social security in Article 25, the right to an adequate standard of living in Article 27, the right to protection from economic exploitation in Article 32, along with certain civil and political rights.

but NOT self-executing.

In addition, both the International Convention on the Elimination of all Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter referred to as CEDAW) include express references to the right to equal enjoyment of economic, social and cultural rights as well as civil and political rights, the latter of which is binding on South Africa since it has been ratified.

To digress for a moment, it is worthwhile noting that, in addition to South Africa's constitutional obligations on a national level regarding socio-economic rights, it is also obliged to do so in terms of its international obligations, and in particular, the Convention on the Rights of the Child and CEDAW.

On the integrated approach to human rights it is accepted that:

"[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 interest 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 to freely pursue personal 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."⁹

They do not exercise one set of rights in the morning, another in the afternoon, and a third at night. The web of rights is unbroken in fabric, simultaneous in operation, and all extensive in character."

Sachs, *Protecting Human Rights in a New South Africa* (1990) page 8

⁹ de Vos, "Pious Wishes or Directly Enforceable Human Rights? : Social and Economic Rights in South Africa's 1996 Constitution" (Forthcoming in 1997 *SAJHR*)

CHAPTER 3:

ACKNOWLEDGING THE IMPORTANCE OF PROTECTING SOCIO-ECONOMIC RIGHTS:

Although there seems to be universal consensus that the plight of the poor, homeless and starving deserve to be dealt with by the State, in that the State has an obligation to devise policies that will improve the standard of living of all its citizens, the point of controversy seems to lie in whether the protection of socio-economic rights are deserving of protection as *legally enforceable rights* or as *ideals and aspirations* in the sense of being *morally or politically enforceable*. It is the view of the author that socio-economic rights should be protected as legally enforceable rights, and hence, it is felt necessary to examine the importance of protecting these rights in such a way.

3.1 RECOGNIZING THE HUMANITY OF THE POOR:

The overwhelming reason for the protection of socio-economic rights has been aptly stated by Pierre-Henri Imbert:

“[Because] it is in fact a concept of human kind that is in question in the violation of the rights of the poor: if these rights are not respected, it is fundamentally because the humanity of these men and women is not truly recognized. At the very bottom of the social ladder everything happens as if it were no longer a matter of being a human being who has rights, but rather the fact that it is these rights that confer the title of human being.”¹⁰

Political
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p 7.

¹⁰ Pierre-Henri Imbert “Rights of the Poor? Reflections on Economic, Social and Cultural Rights” in Dieng (ed) *Economic, Social and Cultural Rights and the Role of Lawyers* (1995) 85 at page 94.

- The point has been reiterated by Scott and Macklem as follows:
“Perhaps the strongest reason for including a certain number of economic and social rights is that by constitutionalizing half of the human rights equation, South Africans would be constitutionalizing only part of what it is to be a full person. A constitution containing only civil and political rights projects an image of truncated humanity. Symbolically, but still brutally, it excludes those segments of society for whom autonomy means little without the necessities of life.”

Scott and Macklem “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution” (141) *University of Pennsylvania Law Review* (1995) 1 at page 29

- For Albie Sachs, constitutionalizing socio-economic rights within a legal document is based on the idea that it is necessary:

“to impose a duty on Parliament to adopt legislation which, taking account of the resources of the country, grants progressively increasing rights to every citizen”

He goes on to say that constitutionalizing these rights:

“forbids the Constitution under the guise of false libertarianism, from becoming an instrument of human abandonment, heartlessness and neglect; it prevents good constitutional concepts like equal rights and freedom of association from being turned on their heads so as to promote the privatization of misery.”

Quoted in Davis “The Case Against The Inclusion Of Socio-Economic Demands In A Bill Of Rights Except As Directive Principles” (8) *SAJHR* (1992) 475 at page 477

- President Roosevelt in his ‘Four Freedoms Address’ in 1941 stated:
“Necessitous men are not free men”

3.2 SOCIO-ECONOMIC RIGHTS ENSURE PEACEFUL COEXISTENCE:

In 1919 the International Labour Organization (hereinafter referred to as the ILO) set forth in its preamble that a violation of fundamental workers rights would constitute a threat to world peace. This link between respect for human rights, democracy and peaceful coexistence has been raised by numerous authors since and seems to now be generally accepted. Empirical research supports the contention, revealing that relatively few wars have been fought between countries that respect democracy and human rights. Instead, wars seem to have generally been fought between those countries that respect human rights on the one hand, and those that do not on the other. United States Secretary of State George Marshall told the General Assembly of the United Nations in 1948 that:

“[g]overnments which systematically disregarded the rights of their own people were not likely to respect the rights of other nations and other people, and were likely to see their objectives by coercion and force in the international field”¹¹

3.3 THE NON RECOGNITION OF SOCIO-ECONOMIC RIGHTS FRUSTRATES A DEMOCRACY:

Yet, perhaps the most fundamental reason for protecting socio-economic rights as legally enforceable rights is that such absence or non-recognition would greatly impair and compromise the true attainment of civil and political rights, with the obvious consequence of jeopardizing a democracy. The essence of the contention is that economic and social inequality is, in fact, a form of political inequality in that the absence of basic socio-economic necessities actually disables citizens from participating fully in the political process. To state the point crudely, what is the point of a vote without food?

As early as 1944 President Roosevelt acknowledged this by advocating the adoption of an ‘Economic Bill of Rights’ saying that:

“We have come to the realization of the fact that true individual freedom cannot exist without economic security and independence. ‘Necessitous men are not free men’. People who

Quoted in A. Eide “Economic, Social and Cultural Rights as Human Rights” in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1995) 21 at page 29

¹¹Stein contends in this regard:

“History confirms that it is the democratically governed states that by definition are likely to respect basic rights of their people - and there is impressive empirical evidence that ‘[w]ith only the most marginal exceptions, democratic states have not fought each other in the modern era’; hence, a democratic world would be a more peaceful world.”

Stein “International Law In Internal Law: Toward Internationalization Of Central-Eastern European Constitutions?” (88) *The American Journal Of International Law* (1994) 427 at page 427.

• Franck, too notes in this regard:

“[o]ne way to promote universal and perpetual nonaggression - probably the best and, perhaps, the only way - is to make democracy an entitlement of all peoples. He notes further: “The symbiotic linkage among democracy, human rights and peace is now widely recognized”

Franck “The Emerging Right To Democratic Governance” (86) *The American Journal Of International Law* (1992) 46 at page 88/89

are hungry and out of a job are the stuff of which dictatorships are made."¹²

The Parliamentary Assembly of the Council of Europe in Recommendation 893 (1980) relative to poverty in Europe underlined that the situation of the poorest members of the population had repercussions beyond material difficulties which meant (for instance) exclusion from society and a lack of participation in political and cultural life. ✓

Democracy is a concept which does not lend itself to easy definition and it is beyond the ambit of this study to engage in the extensive debates concerning the concept, but, irrespective of the debates and controversies surrounding the concept, a system of governance based on the principle of sovereignty, is an underlying assumption inherent in the concept of democracy. Hence, whether accorded its traditional meaning of "a government by the people for the people", or as Yvonne Burns¹³ points out, what democracy has more recently come to mean, "responsive government", it necessarily requires that participation from the country's citizens form both an indispensable and crucial component of that democracy. Hence, in order to secure a *true* democracy, it is important to ensure that participation comes from the people, *all* the people. Whilst it is acknowledged that all people cannot be compelled to engage in such participation, it is crucial that they be provided with the tools to do so if they so wish. Such tools necessarily require the realization of socio-economic rights. After all, what does participation mean if the tools to secure such participation, such as food, shelter and education are denied? True, it cannot exist! ?

Taking even the most elementary level of that participation - the right to vote. How many of our citizens living in conditions of starvation, squalor and abject poverty whose primary concern and efforts are vested in making it through the day will bother themselves with going out there to vote? The energy and effort to do so will remain within the domain of those who command the necessary resources to do so. Hence, though somewhat far-fetched, there exists a possibility that the government of the day commands the respect and support primarily of those bestowed with the resources to engage in the luxury of voting. If this can pass as a democracy, then there is little difference between the present system and our history of apartheid and disenfranchisement - perhaps the only major point of distinction being that whilst previously disenfranchisement rested on race, on the present system it will rest on resources. Furthermore, it is not difficult to realize which groups apartheid has vested with those necessary resources, thereby reducing the fundamental right to vote to a luxury of the elite and those with the necessary social standing (taking account of course, of the correlation between race and social class in South Africa, a correlation that is unsurpassed by that of any other country in the world). Nature of a divided Society ✓

Taking the inquiry a level deeper, to engage in meaningful participation on decisions affecting the citizens of the country on the whole, one has to command a basic education to so in a meaningful way. The national statistics ✓

¹² President Roosevelt in his 'Four Freedoms Address'. Quoted in Eide "Economic, Social and Cultural Rights as Human Rights" in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1995) 21 at page 29

¹³ Burns, "Administrative Justice" (9) *South African Public Law* (1994) 347

reveal that, out of an estimated population of 35 million people in South Africa, an estimated 11 million are thought to be illiterate adults. Of the total labour force of South Africa, 30% is thought to have no formal education and 38% thought to have primary school education only. This means that 55% of the population have 'a problem', a problem so great that it precludes them from active participation in the politics of the country,¹⁴ that it threatens our claim of a democracy.

This severe lack of education of the majority of our citizens can be attributed to numerous factors, but which indisputably renders poverty lying at the heart of it. A child with an empty stomach, living in a shack lacking even the necessities of running water and electricity, certainly faces more pressing concerns than gaining an education for himself or herself.

The fact that illiteracy commands the lives of so many means that this many of the country's citizens are probably even oblivious even to their basic constitutional rights, let alone being able to engage in meaningful debate concerning these rights. What, then is the purpose of the Constitution one may ask? True, a legitimate question it is, it remains a weapon in the hands of the powerful, a weapon capable of monopolization and manipulation by those fortunate enough to command the resources.

In engaging in the democracy argument, it seems apt to take heed of Pierre-Henri Imbert's warning, which goes as follows:

"We must not fall into the trap of a "pure" conception of democracy - but, in fact, an abstract and theoretical one - which would cause us to reject or view with suspicion any possible solutions, under the sole pretext that they would imply an intervention of the State: once a government reduces its contribution to the system of social protection, inciting its citizens to rely more on private insurers, do we really have the feeling that democracy has progressed as a result of State disengagement?"¹⁵

In support of the contention advocated earlier one can rely substantially on the conception of democracy as advocated by Dyzenhaus¹⁶. He advocates an integrative conception of democracy. He argues that there are three constitutive principles that are necessary preconditions to ensure the workings of such a democracy: equal participation, equal stake and independence. Regarding equal participation, he argues that each individual must be allowed to make a difference to the character of political decisions and the magnitude of the difference he or she can make may not be structurally fixed or limited by assumptions about his or her worth, talent or ability. He asserts that in order to have such a role requires more than universal suffrage - in addition, there must also be universally protected rights of freedom of speech and other means of influence. Although he acknowledges

¹⁴ Matsepe, *The Great Challenge: Affirming the Majority Character of South African Society During and After Negotiations* (1992) at page 4

¹⁵ Pierre-Henri Imbert "Rights of the Poor? Reflections on Economic, Social and Cultural Rights" in Dieng (ed) *Economic, Social and Cultural Rights and the Role of Lawyers* (1995) 85 at page 90.

¹⁶ Dyzenhaus, "Democracy, Rights and Law" (7) *SAJHR* (1991) 24 at page 35 / 36

that there may be no guarantee of equal influence, the point is that individuals are guaranteed of the opportunity of exercising influence.

The second principle of respect of equal stake realizes that an individual cannot count as a full member of society unless collective decisions treat him or her as an equal. This would require that the success of any decision be judged by its impact on a particular member's life and interests which must matter as much as its impact on the life and interests of any other member.

The third principle of independence requires members to see moral and ethical judgement as their responsibility rather than the responsibility of the collective unit.¹⁷

The integrative model of democracy would appeal to an idea of equal membership in a political community. However, none of these principles can operate in the context of gross social and economic inequality. Arblaster¹⁸, too argues that economic and social inequality is a form of political inequality as it disables individuals from utilizing the means given to them to participate in politics and detracts from any claim that government is in their interests. An integrative model requires redistribution of economic resources to the less well-off in order that the claim can be made that they matter equally.

In addition, it is important to take account of the trend in developing countries concerning the concept of democracy. In such countries the State is seen as the creator of employment and provider of welfare and is generally responsible for improving the overall standard of living of its citizens. Public expectations of democratization are often focused on the belief that liberation will *necessarily* ensure socio-economic advancement. Such perception has been aptly summarized by Bazaara: "Democracy should not be understood in the narrow sense of elections held every four or five years. **Democracy means access to resources.**"¹⁹

Shadrack Gutto too, notes in this regard:

"The twin phenomena of struggles for human rights and popular democracy are shown to be very much an integrated affair, a fact not very much appreciated by many human rights academics."²⁰

¹⁷ *ibid*, Dyzenhaus relies extensively on the view advocated by Ronald Dworkin 'What is Equality? Part 4: Political Equality' (1) *University of San Francisco L R* (1987) at 22

¹⁸ Arblaster, *Democracy* (1987)

¹⁹ Quoted in de Villiers, "The Protection of Social and Economic Rights: International Perspectives" *Occasional Paper No.9* (Publication of the University of Pretoria) (May 1996) at page 2 (Emphasis Added)

Shivji agrees with the contention in stating:

"... from the point of view of the African people, human rights struggles constitute the stuff of their daily lives..."

Quoted in Shadrack Gutto, "The Role of Mass Struggles In The Search For Popular Democracy And Integrated Human Rights in Africa: Aspects of Theory and Practice" in *Review of the African Commission on Human and Peoples' Rights* (Vol. 2, Parts 1 and 2) (1992) at page 75

²⁰ *ibid* at page 72

He states further:

“In looking at how human rights and democracy are connected it may be instructive to start by asking whether it would be possible to have a non democratic State that promotes human rights or, in the reverse, if a State structured in such a way that it is involved in systematic denials and violations of human rights can be regarded as democratic? If the answer to the two sides of the question are ‘no’ as most people may respond, then the crazy idea spread around by some intellectuals that one can pursue human rights without addressing the fundamental question of political power relations in society, the democratic question, is absurd.”²¹

This interrelatedness and indivisibility of human rights, as discussed earlier lend support to the idea that civil and political rights cannot exist without socio-economic rights, participation from the country’s citizens cannot exist without socio-economic rights and above all, a democracy cannot exist without socio-economic rights. So, in South Africa’s endeavor to ensure a democracy, that ideal that it has fought so hard and long to secure, it has one of two options: either to abandon its pretense of a democracy and openly admit elitist totalitarianism as the order of the day or, to *meaningfully* secure socio-economic rights for the majority of our citizens and give *true* meaning to the concept of democracy. The contention is that it is the latter that must unequivocally prevail!

3.4 SOCIO-ECONOMIC RIGHTS ENSURE COMPLIANCE WITH FUNDAMENTAL CONSTITUTIONAL VALUES:

The imperative nature of socio-economic rights in the South African context is complemented by certain other constitutional rights. First, the right to life, which incidentally is listed as non derogable. Is this fundamental right not violated when our people are dying from starvation and disease? But, treading on more controversial ground, does the *quality* of that life not matter? Second, human dignity. One may be inclined to ask what human dignity a starving, homeless, illiterate and thereby a silenced on-looker to the politics of his /her country may have? And, finally, the hope of any real equality must be abandoned so long as inequalities and disparities exist on the scale that they do in South Africa. Whilst differences in social status and varying degrees of wealth are indeed inevitable in any capitalistic society, the reality is that South Africa is somewhat unique position in this regard, in that the disparity in its socio-economic resources is on a scale that offers little comparison with that of any other country. Hence, in order to secure the right to life, human dignity and equality in a meaningful way regard for socio-economic rights is indisputable.²²

Other approaches to achieving socio-economic rights?
(Social State...)

²¹ ibid at page 82

²² The impact of socio-economic rights on these Constitutional rights will be examined in extensive detail in the section that follows.

CHAPTER 4:

? Through legislation?

CONSTITUTIONAL PROVISIONS THAT IMPACT ON SOCIO-ECONOMIC RIGHTS

Although socio-economic rights such as the right to property, housing, health care, water and social security are specifically provided for in the Constitution, to stress their crucial importance it must be noted that they impact to a large extent on other fundamental rights. If not adhered to can, therefore result in a violation not only of the specific provisions but also of other fundamental rights. Since, the relationship between socio-economic rights on the one hand, and the right to human dignity, equality, life and self determination on the other may not be wholly obvious, it is the aim of the present section to elucidate that relationship, thereby illustrating the impact that the non-recognition of socio-economic rights may have on these rights.

4.1 THE RIGHT TO HUMAN DIGNITY:

Human dignity is one of the foundational principles of the Constitution. The importance attached to human dignity is, in fact, evident in not only the first provision²³, but also listed as one of the fundamental rights²⁴. In addition, there are several references made to human dignity, as is evident on a reading of Section 1; 7(1); 36(1) and 39(1)²⁵ of the Constitution. Given the era of gross injustices and indignities that we have just emerged from, it is undeniable that this is a right to be treasured and nurtured, meaningfully secured and heralded. In such an attempt, the contention is that account must be taken of socio-economic rights. The fact that so many of our people live 'at such a margin of human existence that words simply fail to describe'²⁶ is an affront not only to their dignity but also to that of the entire nation.

Indian cases
→
✓

²³ Section 1 of the Final Constitution reads as follows:

The Republic of South Africa is one sovereign democratic state founded on the following values:

- (a) **Human Dignity**, the achievement of equality and advancement of human rights and freedoms.

(Emphasis added)

²⁴ Section 10 provides as follows:

Everyone has inherent dignity and the right to have their dignity respected and protected.

²⁵ Section 7 (1) reads as follows:

This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

Section 36 (1) reads as follows:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom ...

Section 39 (1) reads as follows:

When interpreting the Bill of Rights, a court, tribunal or forum -

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

²⁶ UNDP Human Development Report 1994 at page 2

Various commentators as well as provisions in numerous human rights instruments have addressed this issue. The Preamble to UDHR states that the:

“recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

The adoption of the European Social Council opinion²⁷ is but a single indication of the acceptance that poverty and social exclusions are human rights violations. It seems obvious when considering that the central notion human rights is that of dignity of human beings. The contention is that human dignity, being as fundamental as it is to the very essence of life, should prevail above all other utilitarian arguments for the recognition and acceptance of socio-economic rights.

Indian jurisprudence, for its distinguished opportunity in dealing with socio-economic rights and its long standing experience with social action litigation will prove of invaluable assistance to South Africa in this regard and hence, some reference will be made to it in the course of this study. In this regard, it should be noted that Indian jurisprudence, too bears testimony to the importance of the right to human dignity. In *Doctor Upendra Baxi v State of Uttar Pradesh*²⁸ the right to human dignity was held to be implicit in the fundamental right to life and liberty enshrined in Article 21 of the Indian Constitution. Here, a letter was sent to the Supreme Court by two law professors, urging an examination of a protective home for women in Agra where inmates were living under barbaric conditions, which was converted into a writ petition and resulted in the court coming to the relief of the women.

The vital importance of human dignity has been succinctly stated by Eide:

“The essential point is that everyone shall be able, without shame and without unreasonable obstacles, to be a full participant in ordinary, everyday interaction with other people. This means *inter alia*, that they shall be able to enjoy their basic needs under conditions of dignity. No one shall have to live under conditions whereby the only way to satisfy their needs is by degrading or depriving themselves of their basic freedoms, such as through begging, prostitution or bonded labour.”²⁹

²⁷ “Poverty: A Serious New Phenomenon is a Violation of Human Rights” (chapter 1.3 of the report by the Secretary -General of the Council of Europe on “Social Cohesion), 6 May 1987; “Considering the fact that social exclusions constitute the real gaps in the fabric of human rights in societies which intend to consider, as they rightly should, these rights are fundamentally theirs” (The resolution on the fight against poverty in the European Community, adopted on 16 September 1988 by the European Parliament).

²⁸ (1986) 4 SCC 106

²⁹ Eide “The Right To An Adequate Standard Of Living Including The Right To Food” in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1995) 89 at page 89/90 The point has also been made by O. Schachter who states:

“We are led more deeply into the analysis of human dignity when we consider its relation to the material needs of human beings and to the ideal of distributive justice. Few will dispute that a person in abject condition, deprived of adequate means of subsistence or denied the opportunity to

At the heart of human rights the notion of dignity and therefore it is not survival alone that refers to life but also human dignity. "Only a life full of dignity deserves to be named as such for oneself and one's children."³⁰ Hence, abject poverty is by no means restricted to being an economic or financial problem but penetrates much deeper than that, it is essentially a question of life, a life of dignity.

Implicit in the concept of human dignity lies the notions of self respect, honor and nobility. With so many of our people living in squalor, misery and suffering, how can even the most basic elements of that self respect exist? Therefore, in order to ensure such self-respect and dignity for all our people it is crucial that basic socio-economic rights be addressed, as human dignity is, to a very large extent dependent on such rights.

4.2 THE RIGHT TO EQUALITY:

The right to equality too, is one of the most important rights enshrined in the Constitution, as is obvious from the numerous references to the right throughout the Constitution³¹, namely, Sections 1; 3(2); 7(1); 9; 36(1) and 39(1). In fact, the right to equality represents the very essence of the new South Africa. In addition, the value of the principle of equality in the context of a democracy is crucial as has been indicated already. At the outset the writer finds it necessary to distinguish two concepts - formal equality from substantive equality, the confusion of which can often lead to dire consequences. The contention is that the non-recognition of socio-economic rights not only

work, suffers a profound affront to his sense of dignity and intrinsic worth. Economic and social arrangements cannot therefore be excluded from a consideration of the demands of dignity. At least, it requires recognition of a minimal concept of distributive justice that would require satisfaction of the essential needs of everyone."

See: Schachter, "Human Dignity As A Normative Concept" (77) *The American Journal of International Law* (1983) 848 at page 852

³⁰ Pierre-Henri Imbert "Rights of the Poor? Reflections on Economic, Social and Cultural Rights" in Dieng (ed), *Economic, Social and Cultural Rights and the Role of Lawyers* (1995) 85 at page 92

³¹ Section 7 (1); Section 36 (1) and Section 39 (1) are quoted in footnote 25

Section 3 provides as follows:

- (2) All citizens are -
 - (a) equally entitled to the rights, privileges and benefits of citizenship; and
 - (b) equally subject to the duties and responsibilities of citizenship.

Section 9 reads as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of sub section (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

violates the essence of substantive equality but also that of formal equality. The submission being that whilst it is advocated that the equality clause be read so as to encompass a substantive notion of equality, even in the event of it not being accepted, disregard for socio-economic rights would constitute violation of a formal conception equality.

4.2.1 Formal Equality:

Formal equality refers to equal treatment for individuals regardless of their actual circumstances. "It presupposes that all persons are equal bearers of rights within a just social order - inequality is an aberration which can be eliminated by extending the same rights to all in accordance with some 'neutral' norm or standard or measurement"³²

The concept is blind to entrenched structural inequality, the burden that the curse of apartheid has bequeathed on the lives of the majority of the country's citizens. Its 'neutral' standards of measurement in truth, embody the interests and perspectives of the socially privileged groups. Thus, its application may work not only to *maintain* inequalities, but to actually *perpetuate* and *exacerbate* them. Given these critical and detrimental consequences of a formal conception of equality, it is suggested that such a reading of the concept in the Constitution be avoided.

4.2.2 Substantive Equality:

Unlike formal equality, the concept does not abstract individuals but locates them within their socio-economic reality. Although substantive equality encompasses equal treatment in appropriate circumstances, it goes beyond this, and recognizes that more proactive preferential measures may be necessary in order to achieve genuine equality. Fundamentally, it embodies a vision of effective socio-economic equality. To take for instance racially discriminatory laws, formal equality requires nothing more than the repeal of such laws. However, substantive equality "mandates, in addition to the removal of racially discriminatory laws, the eradication of social, economic and political barriers impeding access to land and education."³³ An assessment of both outcomes reveals that a formal conception of equality undermines the deepest commitments of the Constitution whilst a substantive conception of equality, is supportive of these fundamental values and on this basis, it must be stressed, that it is submitted that the equality provision should be read and understood as an embodiment of the latter conception of equality. In addition, the argument may be substantiated by sub section (2) of the equality provision which makes specific mention of measures to advance the plight of those previously disadvantaged by unfair discrimination. By taking account of the structural inequalities that exist in our society, the submission is that the provision envisages a substantive conception of equality.³⁴

³² Albertyn and Kentridge "Introducing the Right To Equality in the Interim Constitution" (10) *SAJHR* (1994) 149 at page 152

³³ *ibid* at page 155

³⁴ See Albertyn and Kentridge for an in-depth discussion on the issue. Footnote 33

4.2.3 The Application of Equality to Socio-Economic Rights:

The principle of equality and non discrimination are among the pillars of contemporary human rights: These principles are evident in the International Covenant on Civil and Political Rights, the International Covenant on Social, Economic and Cultural Rights, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, the European Convention on Human Rights and the European Social Charter. In addition, the principle of equality is part of international customary law. In fact, even prior to the coming into being of these numerous instruments which refer to the fundamental principles of equality and non discrimination, the UDHR made reference to these principles. Article 1 of the Declaration asserts that: "all human beings are born free and equal in dignity and rights....."

To engage in a historical digression for a brief moment: it was decided that interference by the State with the freedom of the individual should be made by a general law which should be equally applicable to all, hence, *equality before the law*. Industrialization required that the scope of the legislation be extended considerably. Protection had to be provided against disability resulting from industrial accidents, against deprivation of income caused by illness, old age or by unemployment. To some extent the burden was placed on the employer, equal protection by law thus got an extended meaning, encompassing also social and economic rights. Economic and social rights were also extended with time and culminated in the wide list in the UDHR: the right to work, the right to education, the right to health, the right to participate in the cultural life of society. The centerpiece is encapsulated in Article 25 which reads as follows:

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

The general right to non discrimination also encompasses socio-economic and cultural rights i.e. The right to non discrimination in social benefits. The UN Covenant on Civil and Political Rights contains in its Article 26 a more general provision on equality before the law. This provision has also been interpreted to prohibit discrimination in the application of legislation concerning social benefits although such social rights are outside this Covenant.³⁵

Equal protection, an expanding floor of minimum rights and regional equalization are profound means of attacking the problem of inequalities. But, the main concern should be to reach the goal of equality in the enjoyment of human rights, the goal of a real and meaningful substantive equality for all. Given South Africa's history of apartheid, as has been stressed already, there is understandably a significant correlation between race and social class. However, the application of socio-economic rights will not mean that it is done so on the basis of race, the point is that it is an application of good government, that recognizes the importance of socio-economic rights in

³⁵ Matti Pelonpaa "Economic, Social and Cultural Rights" in Macdonald, Matscher and Petzold (eds), *The European System For The Protection Of Human Rights* (1993) 855 at page 875

European
Cases re
Equality →
impact on
Soc/econ.

securing human rights, democracy and peaceful coexistence for all its citizens complemented by a constitutional commitment to such rights that demands its application. Hence, although the recognition of socio-economic rights will inevitably result in certain race groups benefiting more so than others, it is important to note that they are not doing so on the basis of race, but rather on that of need.

One this approach, to ensure the restoration of equality means simply to implement, without discrimination, economic and social rights. The manner of restoring that equality in our unequal society will operate in terms of an objective need based criteria. The approach takes account of the structural inequalities in society by using a need based criteria by which such rights would operate.

Governments all over the world bear testimony to the fact that the basic entitlements to nutrition, education, health and shelter must be equal for all. Most post World War II Constitutions including those of Germany, Japan, Italy and nearly all post dictatorship Constitutions including those of Portugal and Brazil make the provision of equal living conditions for all citizens not simply a political, but a constitutional duty. Choice is extended not reduced when everyone is guaranteed are least the minimum decencies to life. Securing socio-economic rights therefore gives real autonomy to millions who would otherwise spend their energies and thought on survival.

Moreover, it should be reiterated that socio-economic rights play a fundamental role in guaranteeing *civil equality*. Socio-economic rights have a profound effect on formal conception of equality. The vision of democracy is premised on the need to guarantee political and civic equality - to ensure that all individuals are equal social and political participants. This notion of citizens as equals can be construed as a formal equality of opportunity to impart and receive information and opinions.

“Can an illiterate, hungry person participate in the political process let alone social life? Does a marginalized, rural woman - untrained and unemployed have anything remotely akin to civic equality to her urban, middle-class compatriot? The question barely needs an answer. Those who argue against all socio-economic rights per se, are akin to those who argue for a fair trial but oppose the provision of any assistance to those who cannot afford a lawyer.”³⁶

Hence, in view of the foregoing, it is indeed indisputable that a failure to recognize socio-economic rights not only violates the equality provision with regard to the rights themselves but also the true attainment of civil and political rights on the basis of equality, thereby violating not only certain specific constitutional provisions but, as already mentioned the very essence of what South Africa is claiming - Democracy! Although a substantive conception of the equality clause has been advocated, it is interesting to note that even in the unlikely event of it not being accepted, a denial of socio-economic rights may still violate even a formal notion of equality, in that given the correlation between race and social standing in South Africa it is

³⁶ Haysom “Constitutionalism, Majoritarian Democracy and Socio-economic Rights” (8) *SAJHR* (1992) 450 at page 460

conceivable that indirect discrimination may be claimed by the race groups that are denied such rights.

4.3 THE RIGHT TO LIFE:

Positive obligations have been read into several provisions of the European Convention on Human Rights, with one such example being Article 2 (the right to life), the first paragraph of which reads as follows:

“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

The Commission has repeatedly held that the concept that “everyone’s life shall be protected by law” enjoins the State *not only to refrain from taking a person’s life ‘intentionally’ but also to take appropriate steps to safeguard life....*³⁷

Likewise, Indian jurisprudence has expanded the meaning of the right to life to include the quality of life of a person, thereby providing the Supreme Court of India with a rationale for preventing the eviction of people from their dwellings. According to the Supreme Court of India the right to life “includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter”³⁸

A more recent case in Indian jurisprudence further substantiates an extended interpretation accorded to the right to life. *Olga Tellis v Bombay Municipal Corporation*³⁹ “portrays the plight of lots of persons who live on pavements and in slums in the city of Bombay. Rabid dogs in search of stinking meat and cats in search of hungry rats keep them company. They cook and sleep where they please, for no conveniences are available to them. Their daughters come of age, bathe under the nosy gaze of passers-by unmindful of the feminine sense of bashfulness”⁴⁰ The case rose out of a series of social action litigation cases filed by the pavement dwellers themselves and certain social action groups on behalf of the pavement dwellers who were facing forced eviction and demolition of their dwellings by the Bombay Municipal Corporation. The dwellers claimed that their eviction would effectively result in a deprivation of their means of livelihood as hawkers, casual laborers, domestic servants, construction workers and luggage carriers in the city of Bombay. They argued that they had a fundamental right to live, a right which could not be exercised without the means of livelihood. The court accorded a wide interpretation to the right to life as provided for in Article 21 of the Constitution so as to include the right to livelihood. In the likely event of such an interpretation being accorded to the right to life in the South African context, it would necessarily result in socio-economic rights impacting significantly on the right to life.



³⁷ Matti Pelonpaa “Economic, Social and Cultural Rights” in Macdonald, Matscher and Petzold (eds), *The European System For The Protection Of Human Rights* (1993) 855 at page 862 (Emphasis added)

³⁸ Francis Coralie v Union Territory AIR 1981 SC 746

³⁹ AIR (1987) LRC 351

⁴⁰ *ibid* at 355

In addition, the right to life has often been interpreted so as to encompass the right to health care. General Comment 6(16) reads as follows:

“The Committee has noted that the right to life has been too often narrowly interpreted. The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for State’s parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics”⁴¹.

The quote is supportive of the general consensus that the right to life as recognized by international human rights instruments means more than the absence of the death penalty. It addresses also the material conditions of our living and the maintenance of adequate standards of living. Therefore, when people do not have food, shelter, access to education, when governments pursue policies that impoverish the large majority of their peoples or deny them access to health services, it invariably results in the right to life being violated.

It thus becomes evident that the protection on the right to life encompasses a certain quality of life that is necessary to ensure human existence, a quality that seeks to secure the basic necessities of food, water, housing, education, health and social security benefits to all individuals. A quality that acknowledges the absence of these necessities undeniably results in a lower life expectation, thereby violating the right to life. Hence, the contention is that socio-economic rights play a significant role in securing the right to life and, a violation of socio-economic rights necessarily results in a violation of the fundamental right to life.

4.4 THE RIGHT TO SELF DETERMINATION:

The right to self determination is expressly provided for in both the 1966 International Covenants. The provision in the International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR) and the International Covenant on Economic Social and Cultural Rights (hereinafter referred to as ICESCR) reads as follows:

“the right of all peoples freely [to] determine their political status and freely [to] determine their economic, social and cultural development, their right to freely dispose of their natural wealth and resources, and their right not to be deprived of their own means of subsistence.”⁴² The right to self determination has often been said to concern the ability of all peoples to participate

⁴¹ Leary “Justiciability and Beyond, Complaint Procedures and The Right To Life” in Dieng (ed), *Economic, Social and Cultural Rights* (1995) 105 at page 115

⁴² Article 1 of both the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966

fully in decisions concerning the political, economic, social and cultural rules by which their society operates.⁴³

The right may be exercised in two areas: external and internal. External self determination applies to where “the exercise concerns directly the territory of the State - its division, enlargement or change - and consequently the State’s international (external) relations with other States.”⁴⁴

“Internal self determination concerns the right of peoples within a State to choose their political status, the extent of political participation and the form of their government (i.e. in ‘internal’ relations). The exercise of internal self determination can take a variety of forms, from autonomy over most policies and laws in a region or part of a State, to a peoples having exclusive control over certain aspects of a policy, for example, education, social and/or cultural matters.”⁴⁵

So far as internal self determination goes, there exists the contention by some that the right establishes minimum rules for the entire population to economic and social rights against its own government.⁴⁶ The argument goes as follows, “In this context the last sentence of Article 1 (2) should be noted: ‘In no case may a people be deprived of its own means of subsistence.’ This provision builds a bridge between the right of self determination and such basic individual rights as the right to life of the ICCPR (Article 6), the right to an adequate standard of living in the ICESCR (Article 11) and property rights recognized in Article 17 of the UDHR and Article 1, Protocol No. 1 to the ECHR.”⁴⁷ Should this interpretation be accepted, which the writer contends it should, the result is that socio-economic rights impact significantly on the right to self determination.

The right of self determination is often referred to in international treaties and instruments, it is part of customary international law and some jurists have even argued that it forms part of the *ius cogens*.⁴⁸ The fact that the right to self determination, is recognized as part of international customary law and not inconsistent with the Constitution or an act of Parliament in itself renders it part of the law of the country, as is recognized in terms of Section 232 of the Constitution. However, in addition, the Constitution accords the right specific mention in terms of Section 235.⁴⁹ The suggestion is that the section endorses an internal conception of self determination as well as an external one.

⁴³ This is encapsulated by Judge Dillard in his separate opinion in *The Western Sahara Case* 11975 ICJ Rep 12, at 122, where he said: “it is for the people to determine the destiny of the territory and not the territory the destiny of the people”.

⁴⁴ McCorquodale “South Africa and the Right of Self Determination” (10) *SAJHR* (1994) 5 at page 7
⁴⁵ *ibid* at page 7 / 8

⁴⁶ Rosas “The Right of Self Determination” in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1995) 79 at page 85

⁴⁷ *ibid*

⁴⁸ Supporters of the view that the right of self determination could be a *ius cogens* include:

- Brownlie *Principles of Public International Law* (1991) 513
- Cassese *International Law In A Divided World* (1986) 136
- Crawford (ed) *The Rights Of Peoples* (1988) 166

⁴⁹ Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980) 5

In view of the foregoing it becomes apparent that socio-economic rights do impact substantially on the right of self determination, referring specifically to internal self determination, thereby rendering a violation of socio-economic rights a violation of the right to self determination too.

4.5 THE IMPACT OF THESE RIGHTS ON SOCIO-ECONOMIC RIGHTS:

This section has attempted to illustrate that respect for socio-economic rights can by no means be viewed in a vacuum, and that they do, in fact, impact significantly on other constitutional rights. Furthermore, the interpretation and definition accorded to certain rights namely the right to life, equality, human dignity prove to be very useful in the South African context, where the normative content of these rights are still deserving of attention. In addition, the link between the right to self determination and socio-economic rights as advocated by Allan Rosas in the previous section, if accepted, will result in the non-recognition of socio-economic rights impacting negatively, to stress the point, not only on the right to life, the right to human dignity and the equality provisions, but also the fundamental right to self determination. The suggestion is that South Africa adopt and follow the interpretation and understanding accorded to these rights in the international arena.

This contention may be further substantiated by the Constitution itself, and more specifically in terms of Section 233⁵⁰. The result, will indisputably render the recognition of and respect for socio-economic rights, both integral and indispensable to the true realization of the rights enunciated in the present section.

See also Eide "Economic, Social and Cultural Rights as Human Rights" Eide, Krause and Rosas (eds), in *Economic, Social and Cultural Rights: A Textbook* (1995) 21 at page 37 / 38

See also Perces-Barba "Reflections On Economic, Social and Cultural Rights" (7) *Human Rights Law Journal* (1981) 281

⁵⁰ The section reads as follows:

"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

CHAPTER 5:

DISPELLING SOME COMMONLY HELD MISCONCEPTIONS REGARDING SOCIO-ECONOMIC RIGHTS

In spite of the strong arguments for the recognition of socio-economic rights both in the international context and in South Africa, there still exist numerous reservations concerning the viability of recognizing such rights. This section seeks to address these reservations. The experience of the international community as well as that of foreign jurisdictions will prove to be of invaluable assistance in this regard, and perhaps is the only fortunate consequence of South Africa's recently declared commitment to a culture of human rights. But, in spite of this, it is acknowledged that, especially in the realm of socio-economic rights there is no universal system of ensuring success but, is very much dependent on the resources and the prevailing circumstances of the country in question and this needs to be taken into account, issues which the writer will have regard for. However, whilst acknowledging this, there still remain some important lessons which will be extracted for South Africa in its pursuit of a culture of human rights.

5.1 NON JUSTICIABILITY:

As already mentioned, a point of distinction which is often raised between civil and political rights on the one hand, and socio-economic rights on the other, is that whilst the former are justiciable in the sense that they can be easily applied by courts and judicial bodies this cannot be said of the latter. Socio-economic rights are often argued to be of more of a political nature, and obligations of conduct as opposed obligations of result. This is often captured in the age-old Latin maxim *ubi jus, ibi remedium* (where there is a right there must exist a remedy). Since socio-economic rights are dependent to a large extent on the resources of the country in question, a violation of the right to food, for instance may not be so easily resolved so as to require the State to provide food to its citizens since the resources to do so may not always be at its disposal. It is perhaps this over-stated as well as over-simplified contention that has borne influence on the views of numerous writers for the non-recognition of socio-economic rights in a constitutional document. Whilst these rights have been provided for in the Constitution, this question of non-justiciability still lies at the heart of much of the scepticism regarding these rights. The overwhelming fear seems to be that due to the fact that they are not capable of facile application by the judiciary, the inclusion of these rights carry the risk of undermining the value of the entire Constitution as the supreme law of the country.

With this fear forming the focus of so many views against the constitutionalizing of socio-economic rights it is one that deserves to be dealt with, hence, such an attempt will be made in the present section. The matter will be approached from two perspectives: firstly, the recognition of socio-economic rights does, by no means entail *solely* positive obligations on the part of the State. As will become evident in the course of this study, the protection of socio-economic rights actually imposes negative obligations on the State at some levels, for instance, the obligation to respect these rights. Secondly, although recognition of socio-economic rights does impose positive obligations on the State at the tertiary level, this should by no means operate as a justifiable ground for their non-recognition as there are numerous civil

See Constitutional
Judgment.

and political rights which likewise, impose positive obligations on the State. This section will address some of the major arguments which are put forward to justify the non-justiciability of socio-economic rights.

5.1.1 SOCIO-ECONOMIC RIGHTS IMPOSING POSITIVE OBLIGATIONS ON THE STATE:

This misconception that the recognition of socio-economic rights in a Constitution necessarily requires the State to be the provider of these rights, thereby imposing positive obligations on the State, acts as a major obstacle both to their recognition and implementation and it is therefore necessary to elucidate the fallacies of this over-simplified and grossly misconstrued approach.

The writer can do no better than refer extensively to salient analyses of the State's obligations which made by such writers as Henry Shue and Eide⁵¹. In terms of this methodology, the State's obligations are divided into three levels: primary, secondary and tertiary. At a primary level, Shue submits that the State's obligation lies essentially in *respecting* the resources owned by an individual, her or his freedom to find a job of preference and the freedom to take the necessary actions and use the necessary resources - alone or in association with others to satisfy his or her own needs. The obligation at this level would essentially require the State to *refrain* from infringing the individual's rights directly. In its most basic form the obligation at this level amounts to a protection of the individual's right from State interference.

Comparative
Criticism.

State obligations at a secondary level, he argues, consist of the *protection* of freedom of action and the use of resources against the State as well as other, more assertive or aggressive subjects or more powerful economic interests. Such protection may operate for instance, against fraud or against unethical behavior in trade and contractual relations. Although the obligation on the State at this level involves a positive one it is important to note, as Pierre de Vos points out "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 realize their protected rights without interference from others."⁵²

Shue submits that at the tertiary level, the State has the obligations to *assist and fulfill* the right of everyone under economic, social and cultural rights. This obligation to assist may include, in the area of access to food, the State taking measures to improve the production, conservation and distribution of food by making full use of technical and scientific knowledge. However, this obligation to fulfill could consist of direct provision of basic needs such as direct food aid when no other possibility exists.⁵³ Hence, the State's obligation

⁵¹ Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980) 5

See also Eide "Economic, Social and Cultural Rights as Human Rights" in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1995) 21 at page 37 / 38

See also Perces-Barba "Reflections On Economic, Social and Cultural Rights" (7) *Human Rights Law Journal* (1981) 281

⁵² de Vos, "Pious Wishes or Directly Enforceable Human Rights? : Social and Economic Rights in South Africa's 1996 Constitution" (Forthcoming in 1997 *SAJHR*) at page 11

⁵³ Eide "Economic, Social and Cultural Rights as Human Rights" in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1995) 21 at page 37 / 38

at this level entitles the beneficiary to claim a benefit or service from the State. It essentially places a duty on the State to use its power to assist individuals to realize their rights.

In the light of this analysis it becomes clearer as to the magnitude of the misconception regarding the so-called *positive nature* of socio-economic rights, for, as has been illustrated, the obligation on the part of the State to respect the right is clearly a negative one.

The second leg of the argument that deserves to be addressed is the all-too-often cited view that civil and political rights impose only negative obligations on the State. True, it often does but the contention is that socio-economic rights do not *necessarily* involve a negative obligation and may in many cases, in fact, require *positive* action on the part of the State. Given this fact, the distinction often raised between civil and political rights and socio-economic rights regarding the positive versus negative obligations on the State, as a ground for the non-recognition of socio-economic rights is, in actual fact ill-founded and must be abandoned.

Some examples are necessary in order to illustrate the point - the right to a fair trial, is the much often cited civil right that has been accorded a 'social dimension'. In the celebrated *Airey*⁵⁴ case the European Court of Human Rights emphasized that the right to a fair trial included the right to free legal assistance. The court explicitly discussed the relationship between civil and political rights and socio-economic rights and the following excerpt of the judgement has often been cited in this regard:

"Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature....[T]he mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation, there is no water-tight division separating that sphere from the field covered by the Convention."⁵⁵

Another such example may be found in a decision by the European Court of Human Rights in the case of *Plattform Ärzte für das Leben v Austria*⁵⁶ where the court held that the right to freedom of assembly imposed a positive duty on the State to take 'appropriate measures' to enable lawful demonstrations to take place peacefully.

In so stating in both these cases, the European Court of Human Rights affirmed that States' obligations go beyond mere non-interference, and include taking concrete steps to ensure that the dignity of people is preserved.

A similar approach has been adopted in Indian jurisprudence, and in particular in the case of *Maneka Gandhi v Union of India*.⁵⁷ Here, the Supreme Court interpreted for the first time, a fundamental right to impose a positive duty on the State. The right in question was Article 12, "no person shall be

⁵⁴ *Airey v Ireland* (1979) 2 EHRR 305

⁵⁵ *ibid* para 26

⁵⁶ 139 European Court of Human Rights (ser A) (1988) 1

⁵⁷ (1978) 1 SCC 248

deprived of his life or personal liberty except according to procedure established by law". The right was interpreted as requiring any State action which interfered with life or liberty to be *right, just and fair*. It is this case that has laid the foundation for several other civil and political rights being interpreted as imposing positive duties on the State, and as a result such rights have become a haven for the poor.

In the South African context too, certain civil and political rights impose positive obligations on the State. One such example being the right to vote - the right requires that there be a fair election procedure to secure the right. To ensure such a fair election procedure clearly requires action on the part of the State. Access to information being another such example - in terms of the Constitution everyone has the right to access to information⁵⁸ that might be held by the State. Access to information, falling into the category of civil and political rights, imposes a positive obligation on the State by obliging it to provide or make available such information to individuals or groups of individuals who may so request. And, yet a third such example being the right to freedom of assembly⁵⁹ which may similarly impose a positive duty on the State to ensure that lawful demonstrations proceed peacefully.

In acknowledging the weakness of the positive/negative dichotomy, as an argument against the justiciability of socio-economic rights, the Constitutional Court has stated:

"[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."⁶⁰

With this knowledge it becomes obvious that the distinction between civil and political rights on the one hand and social and economic rights on the other hand on the basis of the positive/negative dichotomy must, beyond a shadow of doubt be jettisoned. Not only is it an overstatement to argue that socio-economic rights *necessarily* impose positive obligations on the State but, in addition, it is blatantly wrong to contend that this warrants a ground for distinguishing civil and political rights from socio-economic rights. The writer does, by no means deny that socio-economic rights may require *a greater degree* of positive action on the part of the State than civil and political rights would, but emphasizes that the argument for the non-recognition of socio-economic rights should be that of a question of the *degree* of positive action required by the State as opposed to it being a point of *distinction* between civil and political rights and socio-economic rights.

⁵⁸ The right is provided for in terms of Section 32 of the Constitution.

⁵⁹ The right is provided for in terms of Section 17 of the Constitution.

⁶⁰ *In re: Certification of the Constitution of the Republic of South Africa* 1996 para 77

5.1.2 SOME SOCIO-ECONOMIC RIGHTS ARE VAGUE AND UNDEFINED AND THEREFORE CANNOT BE IMPLEMENTED THROUGH JUSTICIABLE PROCEDURES:

As already mentioned vagueness has often been cited as one of the greatest obstacles to the true attainment of socio-economic rights in the international arena and, it is perhaps due to this that the question of justiciability in this regard has come into play. However, the suggestion is that, this issue is by no means an insuperable obstacle to the justiciability of socio-economic rights, in that it warrants their non-recognition in a Constitution.

The emphasis should rather lie in defining the rights in question, ascertaining their normative content, what would constitute a violation of the right, would action would be required in order to secure the fulfillment of the right and issues of the like, as opposed to the facile abandonment of them due to a lack of knowledge pertaining to their content. These are issues that obviously need to be embodied in legislation, which when done, would make implementation by the courts a much easier task. It deserves to be mentioned that the origins of civil and political rights required similar measures and like in that area, the solution should be to ensure detailed legislation which would undoubtedly greatly alleviate, if not totally eradicate the problem, as opposed to simply dismissing these rights that are so fundamental to the existence of the majority of our citizens. An attempt will be made at a later point of this study, to indicate in brief detail what sort of obligations some of these socio-economic rights incur on the State. It is hoped that this knowledge will alleviate the problems of vagueness, by providing a baseline from which other details of the rights can be developed. For the present purposes suffice it to acknowledge, that vagueness in itself does not warrant the non-recognition of these rights. It is an issue that is capable of being dealt with and hence, should be.

5.1.3 THE IMPLEMENTATION OF THESE RIGHTS ARE EXPENSIVE AND DEPENDS ON THE ECONOMIC RESOURCES OF THE COUNTRY:

The 'expense' argument is largely dominated by the misconception that socio-economic rights *necessarily* incur positive obligations on the State. The issue, as already mentioned has been partially addressed by Eide's analysis. However, it is acknowledged that the issue does deserve further attention which it will be accorded in the present section.

In tackling the 'expense' argument it is perhaps the utilitarian argument that offers the best justification. In dealing with the issue, it is submitted that the State's *primary* aim should lie in it empowering its people so as to become self sufficient. Although significant costs by the State are expected in attaining this goal, the focus should lie in its undeniably positive impact on society on the whole. By empowering the citizens of the country, in fear of oversimplifying the issue, the labour market has a wider pool of skill and expertise to draw from which will undoubtedly result in greater productivity, thereby ultimately ensuring an amelioration in the economics of the country. In addition, it is likely to also impact positively on South Africa's soaring crime rate, taking account of the correlation between poverty on the magnitude that it does exist and crime.

Addressing the expense argument will also mean a degree of reprioritizing for a State that is willing and prepared to take account of the misery, squalor and poverty that the majority of its citizens are living in, a prioritizing that recognizes the importance of socio-economic rights over issues like military expenditure. Exorbitant costs are allocated to military expenditure, not only in South Africa but, also many other developing countries, and in this regard, Eide captures the point most cogently by noting:

“The ‘expenditure of death’ should be turned into ‘expenditure of life’ (public action to combat poverty) which could solve many of the problems now said to be insoluble owing to lack of resources, at international as well as national level.”⁶¹

5.1.4 CONCEPTS OF STANDING MAKE IT DIFFICULT TO RAISE ISSUES ON SOCIO-ECONOMIC RIGHTS:

It is in addressing this issue too, Indian jurisprudence offers considerable assistance. The Indian approach ascribes to a somewhat radical departure from the traditional rules of standing - the rules that permit only a party who has suffered a legal injury *personally* to approach the court for relief, and, instead has opted for a much wider doctrine of *locus standi*. The doctrine allows any public spirited individual or group to file a case on behalf of those, who by virtue of circumstances are unable to do so themselves⁶².

The essence of the doctrine is evident in the judgement of Bhagwati J in *SP Gupta v President of India*⁶³:

“Where a legal wrong or legal injury is caused to a person or determinate class of persons by reason of violation of any constitutional or legal right and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction or order.”⁶⁴

The issue has already been addressed to a large extent by the Constitution, and in particular, in terms of Section 38⁶⁵, which specifically applies to the

⁶¹ Eide “Economic, Social and Cultural Rights as Human Rights” in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1995) 21 at page 40

⁶² Meer, “Litigating Fundamental Rights: Rights Litigation and Social Action Litigating in India: A Lesson for South Africa” (9) *SAJHR* (1993) 359 at page 362

⁶³ AIR 1982 SCC 149

⁶⁴ *ibid* at 189

⁶⁵ The section reads as follows:

38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are-
- (a) anyone acting in their own interest;
 - (b) anyone acting on behalf of another person who cannot act in their own name;
 - (c) anyone acting as a member of, or in the interest of, a group or a class of persons;
 - (d) anyone acting in the public interest; and
 - (e) an association acting in the interests of its members.

question of *locus standi*. As becomes evident from the above-mentioned section, the rules governing the question of standing are exceptionally wide and, as a result alleviate to a large extent the possibility of standing acting as a contributing factor to the question of non-justiciability of socio-economic rights. In this regard the ground work has been laid for South Africa to follow the shining Indian example and the hope is that the results which will follow will be as impressive.

5.2 SOCIO-ECONOMIC RIGHTS ACTING AS A HINDRANCE TO THE ATTAINMENT OF A DEMOCRACY:

Contrary to the argument made at an earlier stage of this study that the non-recognition of socio-economic rights may frustrate a democracy, there is an argument that the actual *recognition* of socio-economic rights may actually frustrate a democracy. The argument has been approached from many different perspectives but essentially amounts to the concern of an unaccountable judiciary, lacking in the requisite degree of expertise in the field to decide on issues involving socio-economic rights is quite anathema to the whole concept of democracy. The issue of concern is exacerbated by the lack of credibility of the judiciary primarily due to its history of collusion with the apartheid regime. Whilst the argument is understandable to some extent, an inherent fallacy underlies the essence of the argument - the fallacy that these concerns are peculiar to the realm of socio-economic rights. The point has been cogently made by Liebenberg as follows:

“The question we should be posing is not whether it is appropriate to give judges power to decide on questions of policy. Having opted for a constitutional democracy in which “all universally accepted fundamental rights, freedoms and civil liberties ... shall be provided for and protected by entrenched and justiciable provisions in the Constitution”, (44) we have already given judges this power. The question we need to ask is rather: what are the implications of emphasizing one group of rights at the expense of another?”⁶⁶

It is often argued that judges should not decide on issues that involve massive expenditure, but the reality is that they often do, even in areas outside of the realm of socio-economic rights. To take for instance, the protection of personal liberty, if judges implement the constitutional provision, that no one may be imprisoned without a fair trial, which they do, then they must ensure that a person detained without a trial is secured a release with the consequence of burdening the State with exorbitant costs of a criminal justice system, to pay the salaries of judges, prosecutors, administrative staff and the like. Such expenses are increasing as certain first generation rights develop. Take the right to a fair trial, which is presently being understood to include state funded legal representation, which again, requires massive expenditure on the part of the State.

⁶⁶ Liebenberg, “Social and Economic Rights: A Critical Challenge” in Liebenberg (ed) *The Constitution of South Africa From A Gender Perspective* (1996) 79 at page 90

Whilst accepting that socio-economic rights are invariably more expensive than civil and political rights, the difficulty lies not in the fact that they entail expenditure on the part of the State, nor that they require a decision on how much to spend, but rather that they call for a decision on *how* to spend. Hence, what distinguishes socio-economic rights is that there will always be multiple theories as to how to realize them and it is fundamentally this issue that calls into question the expertise and political accountability of the judiciary.

A second facet of the democracy argument is that the content of socio-economic rights is inherently vague and indeterminate and therefore not susceptible to judicial enforcement. To do so, it is argued, requires complex legislation, for which judges lack the necessary expertise again.

Yet a third argument is that such rights require positive action rather than inaction and thus unsuitable for judicial enforcement. The difficulty lies in judges being required to fashion remedies so as to deliver the content of socio-economic rights which may require judges to make choices they are not qualified to make.

Although approached from different perspectives all these objections essentially amount to a single fundamental one, one that deserves to be repeated: that judges are lacking in expertise and accountability so as to adjudicate on such matters falling within the realm of socio-economic rights. The issue is complemented by the vagueness of socio-economic rights, the costs involved and their budgetary implications and, that by their very nature they require the judiciary to implement provisions that require positive action on the part of the State.

In addressing these scepticism's, it is necessary to briefly examine the tasks of the judiciary. The court's task is generally to assess whether a certain action is justified given a constitutional commitment to a certain value. Take for instance, the right to freedom of expression, in a defamation case the court's task is to ask whether, given the court's commitment to freedom of expression, is it justifiable and in accordance with the limitation clause to restrict defamation. However, this does not mean that the text of the Constitution is unimportant; in fact, quite the contrary, it is precisely that text which determines the content of the constitutional commitment on the basis of which an assessment into the justification is made.

It is precisely this task that the courts will be pursuing in a matter concerning socio-economic rights. To take its review function in the realm of budgetary matters, the court's function will be to ask if, given the constitutional commitment to food or housing, is the budget justified? In making this consideration, the court will be obliged to apply the rules of administrative justice. Of course, with unreasonableness *per se*, now being a ground for judicial review, as opposed to gross unreasonableness the court's do have a greater degree of leeway, but this by no means results in it usurping the power of the executive branch of government.

The court, in making its assessment on the basis of rationality review is restricted to an examination of the *means* to attaining a specific result as opposed to an assessment of the *correctness* of the decision itself. Hence, the aim of the inquiry will be confined to:

- a) Whether the decision-maker has considered all the serious objections to the decision taken and has answers which plausibly meet them;
- b) Whether the decision-maker has considered all the serious alternatives to the decision taken, and has discarded them for plausible reasons; and
- c) Whether there is a rational connection between the premises and the conclusion: between the evidence and the argument.⁶⁷

An assessment such as this will, by no means result in substitution of judgement but, instead restricted to merely a review function. Hence, the court will be precluded from striking down an issue merely because it does not agree with it, the *manner* in which it was reached has to violate the rules of judicial review. Essentially, all that such review will result in, is in fact better justified decisions. A decision-maker, who knows that his or her decisions are likely to be reviewed will invest greater effort during the decision-making process in order to ensure that it passes the review process, thereby ensuring better justified decisions.

Therefore, such review, if properly practiced is a powerful tool in support of accountability and good government, as well as participation. It tends to guard against the participation process being monopolized by those who command the necessary resources to the detriment of the rest of society. And this is precisely what review of socio-economic rights will ensure, and in so doing it will work to *enhance* that democracy we are desperately striving for, not *frustrate* it. The court will therefore be *reviewing* policy choices not making them. The question before them will always be that given a constitutional commitment to socio-economic rights will a certain government program be justified.

Such review will not require the courts to engage in actually securing the right but will be confined to reviewing such right and only if it is dishonest or irrational will it be set aside. It cannot be stressed enough the actual choices will be left to the executive and legislature.

However, whilst accepting and advocating this approach, it is acknowledged that a certain degree of expertise might be required even to successfully engage in rationality review and hence, the suggestion is the creation of more administrative tribunals with a specific expertise in socio-economic rights. True, it does necessarily involve massive expenditure but the contention is that in doing so it will be with the fundamental aim of securing justice, an aim so legitimate and fundamental that it leaves no room for compromise.

Nevertheless, as has already been mentioned the Constitutional Court has already acknowledged and dealt with the implications of a judiciary deciding on budgetary matters in the realm of socio-economic rights, concluding that it often does so with civil and political rights anyway and, although adjudicating on socio-economic rights will inevitably result in such budgetary implications,

⁶⁷ Mureinik, "Reconsidering Review: Participation and Accountability" in Corder (ed), *Administrative Law Reform* (1993) at 35

this would not bar their justiciability.⁶⁸Hence, given this fact together with the rules of judicial review, the contention is that socio-economic rights can, by no means frustrate a democracy and, instead, if properly practiced can work so as to *enhance* that democracy.

⁶⁸ See footnote 60

CHAPTER 6:

THE NATURE OF THE OBLIGATIONS INCURRED ON THE STATE IN SECURING THE SPECIFIC SOCIO-ECONOMIC RIGHTS ENSHRINED IN THE CONSTITUTION:

Given the fact that the justiciability of socio-economic rights is closely tied to the determination of the minimum content of each right and of the minimum obligations assumed by the State, it is the obligations that socio-economic rights incur on the State that will form the primary focus of the present section. The study will ultimately assist in ascertaining exactly what constitutes due observance of the right and what is required for a violation of the socio-economic rights enshrined.

The imperative nature of the task at hand is complemented by the much oft raised criticism of vagueness leveled against socio-economic rights both in the international arena and in the context of national measures, which, of course is primarily due to the lack of normative content of the specific rights. Quite obviously this is an issue must be dealt with in detail by legislation, as provided for in terms of the relevant sections of the Constitution, but the aim of the present section is to elucidate some ideas and content that should be elaborated on in such legislation.

The examination will follow the methodology that was initiated by Henry Shue and later advocated by Eide, amongst others, and currently reflected in the international trend of dealing with socio-economic rights. These different layers of the State's obligations are explicitly provided for in terms of Section 7 (2) of the Constitution which provides: "The State must respect, protect, promote and fulfill the rights in the Bill of Rights".

The rights to housing, health care, food and water, social security and education will be dealt with, examining the State's obligations at the various levels, namely, in its duty to respect, protect, promote, assist and fulfill these rights. Although, susceptible to criticism for its brevity and superficiality, it must be stressed that the aim is to provide a broad and basic framework that outlines the State's obligation with no emphasis on the details of such obligations.

6.1 THE RIGHT TO HOUSING:

Based on pronouncements made concerning the definition of adequate housing under international law, an estimated one-half of the world's population do not currently enjoy the full spectrum of entitlements recognized under the housing rights sphere.⁶⁹

⁶⁹ Scott Leckie, "The Right to Housing" in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1995) 107 at page 107

This fundamental constitutional right⁷⁰ finds explicit recognition within an array of international instruments, including the Universal Declaration of Human Rights (Article 25(1)), the International Covenant on Economic, Social and Cultural Rights (Article 11(1)), the European Convention on Human Rights and Fundamental Freedoms (Article 8 (1)), the Convention on the Elimination of All Forms of Racial Discrimination (Article 5 (e) (iii)), the International Convention relating to the Status of Refugees (Article 21), the European Social Charter (Articles 16, 19 (4) and Article 4 of the Additional Protocol to the Charter), the Convention on the Rights of the Child (Article 27), the Convention on the Elimination of All Forms of Discrimination against Women (Article 14(2)). In addition a large number of national constitutions contain various formulations of the right to housing and thereby imposes obligations on the State in this regard.⁷¹

As the Constitution explicitly provides in Article 26(1), “Everyone has the right to have access to adequate housing”⁷², it is vital that, at the outset a definition of the term *adequate housing* be addressed. The UN Global Shelter Strategy to the year 2000 (GSS), adopted unanimously by the UN General Assembly affords the following definition: adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost.⁷³ Although the UN Committee has pointed out that an assessment of adequacy will depend, in part on cultural, climatic and other contextual factors, it has identified certain core factors which must be taken into account: legal security of tenure, availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy.⁷⁴

It is important to take account of the Committee’s guidance in relation to this right and in particular, the Committee’s view that the right to housing should not be interpreted in a narrow or restrictive sense which equates it with shelter provided, as merely having a roof over one’s head or shelter exclusively as a commodity. Instead, it has advocated that the right should be viewed as a right to live somewhere in security, peace and dignity.⁷⁵

⁷⁰ The right is expressly provided for in Section 26 of the Constitution which reads as follows:

26. (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 realization 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 the relevant circumstances. No legislation may permit arbitrary evictions.

⁷¹ These Constitutions include Brazil, the Dominican Republic, the Netherlands, Portugal and Switzerland

⁷² Notice that the rights refers to *access* to adequate housing as opposed to a right to housing per se. The distinction between the two is to prevent an unqualified obligation on the State to guarantee free housing on demand to everyone.

⁷³ Scott Leckie, “The Right to Housing” in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1995) 107 at page 110

⁷⁴ General Comment No 4 para 8

⁷⁵ Scott Leckie, “The Right to Housing” in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1995) 107 at page 112

In applying the widely accepted methodology to the right, the obligation to *respect* housing rights requires the State and all of its organs to abstain from pursuing, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual by denying or obstructing the access to housing of the individual. It essentially implies a series of limits on State action which would effectively preclude an individual from his/her right to access to housing. In addition, the State is obliged to refrain from depriving people of access to housing without justification. Of particular importance, inherent in this duty to respect housing rights requires the State to refrain from carrying out, advocating or condoning the practice of forced or arbitrary evictions of persons from their homes. This facet of the duty to respect on the part of the State is specifically provided for in terms of sub section (3) of the section, thereby stressing its importance, which is complemented by the fact that it is not subject to the “resource constraints” and the “progressive realization” provisos, which are applicable to the other facets of the right. The State’s obligation at this level are applicable to all of the rights examined can be largely regarded as negative in nature.

The obligation to *protect*, requires that housing rights beneficiaries must be protected from abuse by landlords, property developers, land owners or any other third party capable of abusing these rights⁷⁶. In complying with this obligation the State can ensure proper contracts of tenure of housing, transform de facto tenure into legally binding tenure and adopt rent regulations. However, in the event of a deprivation, the State must prevent further deprivations and afford legal remedies for infringements caused.

In complying with its duty to *promote* the right, the State is compelled to ensure that no measures are taken with the intention of deliberately eroding the legal and practical status of this right. In addition, the State is obliged to place sufficient legal and policy emphasis on the full realization of housing rights. It is obliged to identify where and to what extent the right is not in place so as to target housing policies and legal measures towards attaining the right for everyone in the shortest possible time.

The obligation to *fulfill* the right to adequate housing quite obviously is the most positive in nature. Understandably, it involves issues of public expenditure, governmental regulation of the economy and land market, housing subsidies, monitoring rent levels and the provision of public housing. In pursuing this task the State must establish forms and levels of expenditure adequately reflecting society’s unmet housing needs and which are consistent with the Constitution. De Vos argues as follows in this regard:

“The right of access to housing does, however, place tertiary a duty on the State to assist individuals to make it possible for them to realize this right. In other words, 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 organize access to home loans and subsidies for low income households and provision of

⁷⁶ *ibid* at page 107

sites for informal settlement for particularly vulnerable groups of people.⁷⁷

The section has attempted to establish, rather briefly the basic nature of the State's obligation at various levels in securing the right to access to adequate housing. With some sort of knowledge as to what these obligations may entail, it renders the right more susceptible to some normative content.

6.2 THE RIGHT TO HEALTH CARE:

The right to health care is provided for in terms of Section 27⁷⁸ of the Constitution. In addition, there are numerous international treaties and declarations that make reference to the right to health: the International Convention on Social Economic and Cultural Rights (Article 12), the Convention on the Rights of the Child (Article 24), the African Charter on Humans and Peoples' Rights (Article 16), the European Social Charter (Article 11 and Article 13), the Convention on the Elimination of all Forms of Racial Discrimination (Article 5 (e) (iv)) and the Convention on the Elimination of all Forms of Discrimination against Women contain provisions prohibiting discrimination relating to the protection of health. There are also numerous national constitutions also make reference to access to health care and medical services.⁷⁹

However, in spite of this international endorsement of the right to health, there is still lacking an authoritative international interpretation of the right. Although trite, it deserves to be repeated that the very concept of a *right* necessarily carries with it the implication of the opportunity to demand that the right be protected.

At the outset it is necessary to distinguish two concepts that are often confused in this regard, namely the right to health and the right to *health care*. It is the latter that is provided for in the Constitution which is simply *one aspect* of the right to health. The right to health, does not mean that an individual can be guaranteed *good* health - but the concept of health as a human right emphasizes the social and ethical aspects of health care and health status and stresses that, like other rights, individuals may legitimately protest the denial of that right.⁸⁰

⁷⁷ de Vos, "Pious Wishes or Directly Enforceable Human Rights? : Social and Economic Rights in South Africa's 1996 Constitution" (Forthcoming in 1997 *SAJHR*) at page 14/15

⁷⁸ The provision reads as follows:

Health, Food Water, Social Security

27. (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 dependents, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

(3) No one may be refused emergency medical treatment

⁷⁹ Examples of such Constitutions include those of the Netherlands, Greece, Italy, Portugal, Turkey, Spain, Namibia, Uganda, Angola, El Salvador.

⁸⁰ Leary "Justiciability and Beyond, Complaint Procedures and The Right To Life" in Dieng (ed), *Economic, Social and Cultural Rights* (1995) 105 at page 108

In analyzing the State's obligation in relation to this right, the task must once more be undertaken in terms of the methodology outlined above. The duty on the part of the State to respect this right, as with other rights requires it not to violate this right directly by its actions by, for instance, not injuring the right as it would do by committing torture and the like.

On the second level, the obligation of the State is to protect the right by preventing others from violating it. A prime example of the State fulfilling this would be, for instance, controlling the promotion of tobacco use.

The obligation on the part of the State to fulfill the right would necessarily require the adoption of primary health care. In doing so, it is submitted that the Primary Health Care Approach as described in the Declaration of Alma-Ata, adopted in 1978 at an International Conference, be followed. The essential aspects of that approach may be summarized as follows:

- a) An emphasis on *preventive* health measures (such as immunization and family planning) more than on curative measures;
- b) the importance of participation of individuals and groups in the planning and implementation of health care;
- c) an emphasis on maternal and child health care;
- d) the importance of education concerning health problems;
- e) high priority to be given in provision of health care to vulnerable and high risk groups, such as women, children, underprivileged elements of society;
- f) equal access of individuals and families to health care at a cost the community can afford.⁸¹

The list is indeed laudable for numerous reasons amongst which, is its emphasis on *preventative* health measures. This sort of focus is undeniably required especially in the context of developing countries where a lack of education and an adequate standard of living often preclude people from engaging in preventative measures regarding their health. This emphasis on preventative measures when accompanied by the basic fundamental rights to food, water, housing and education is more than likely to ensure a more positive result on the health care of all South Africans. But, perhaps the most impressive aspect of this list is the emphasis on participation, education, equality and special concern for vulnerable groups - aspects which are particularly important in a human rights approach.

In dealing with the issue of equality the World Health Organization Declaration of Alma-Ata on Primary Health Care states:

"The existing gross inequality in the health status of people particularly between developed and developing countries as well as within countries is politically, socially and economically unacceptable and is, therefore, of common concern to all countries."⁸²

The emphasis on the equality principle bears special significance for the South African context, a country in which such gross inequalities persist, complemented by equality being one of the founding pillars of our

⁸¹ *ibid* at 109

⁸² *ibid* at 110

Constitution and our new legal order. Its rights approach to health care subordinates a cost-benefit analysis to the fundamental concept of equality in health care, thereby taking account of the prevailing inequalities that are especially pertinent in our society.

The general right of access to health care although, like most of the other socio-economic rights, is subject to the qualification of 'progressive realization' and resource constraints. It is important to note in this regard that there is an exception to this qualification in sub section (3) with regard to emergency medical treatment. The purpose of this sub section is to ensure that no one is denied the medical treatment vital to prevent long-term damage to health.

6.3 THE RIGHT TO FOOD AND WATER:

The right to food and water find express recognition in terms of Section 27 (b) of the Constitution⁸³. In addition, there are numerous international instruments that recognize the right to food and adequate nutrition: The Universal Declaration of Human Rights (Article 24), the International Covenant on Economic, Social and Cultural Rights (Article 11), the International Convention on the Elimination of All Forms of Discrimination against Women (Article 12 (2)) and the Convention on the Rights of the Child (Articles 24 (c) and 27(3)). International formulations on the right to food revolve around freedom from hunger as the minimum human rights level which should be secured for all, with this minimum level being indicative of the primacy of the right to life. Furthermore, the right to nutrition is provided for in some national Constitutions.⁸⁴

Although the right to water is not explicitly recognized in many international treaties, there is an integral link between food and water. Water is a vital component of nutrition to the extent that without water the right to food is meaningless. Access to water is also an essential element in the national food production.⁸⁵

Access to food as provided for in the Constitution normally means access to food producing resources or possibilities such as agricultural land, fishing grounds, markets or work. The corollary government obligations, as with the other socio-economic rights lie in respecting, protecting, and fulfilling this right. In complying with the primary obligations, Kunneman offers the following explanation:

"A violation of the State's denial to respect, protect or fulfill access to food, leading to hunger or malnutrition"⁸⁶

⁸³ The provisions of the right are referred to in Footnote 78

⁸⁴ The Indian Constitution recognizes the duty on the State to raise the level of nutrition, the standard of living and to improve the public health of its people as a Directive Principle of State Policy in terms of Article 47. The Namibian Constitution also entrenches a similar principle of State policy.

⁸⁵ The Convention on the Elimination of All Forms of Discrimination Against Women is one such example of where the right to water is provided for expressly. In terms of Article 14(2)(h) the Convention recognizes the right of rural women to enjoy adequate living conditions, in relation to water supply and sanitation amongst other things.

⁸⁶ Kunnemann, "Comments on Defining Violations of the Right to Food" in Coomans and van Hoof (eds), *The Right to Complain about Economic, Social and Cultural Rights* (1995) at 127 at page 129

The right to food in the present section shall be understood to be that level which exceeds the poverty line. The poverty line can, according to the World Bank "be thought of as comprising two elements: The expenditure necessary to buy a minimum standard of nutrition and other basic necessities and a further amount that varies from country to country, reflecting the cost of participating in the everyday life of society."⁸⁷

In applying the three fold methodology of the State's obligation to the present section, the State's first obligation is to *respect* the individual or group entitlements, by respecting the citizens' own means to produce their own food or to obtain it through purchase on the market. As with the obligation incurred on the State regarding all socio-economic rights and as has already been mentioned, on the primary level which involves respecting the right, the State must refrain from interfering with the right in a manner that is unjustified. A typical example of this obligation being violated is land dispossession in the apartheid South Africa, or for that matter, any forced land alienation by the State without proper rehabilitation or compensation to the persons concerned. Furthermore, if access to food for a specific group occurs through trade or transport into a vulnerable area, the blocking of such food transport would once again constitute a violation of the State's duty to respect the right. While, yet a third manner of violating such duty would be by the State carrying out policy measures which deprive people of their access to food, as may be the case with a State policy affecting trade prices. The issue is not that these actions on the part of the State would go so far as to constitute a violation of human rights per se, but rather these actions *complemented* by an absence of compensation, which would *necessarily* lead to hunger and malnutrition of the peoples concerned that results in a failure on the part of the State to uphold its duty to respect the right.

The second layer in the trilogy of the State's obligations lies in protecting entitlements which secure their access to food against third parties. The obligation, at this level includes a duty on the State to assist in creating the conditions for the right to food to be realized by its citizens. It may do so by taking measures at improving productivity, engaging in resource programmes such as transfers of food producing resources. It would further include technical and vocational training programs to improve the capacity of persons to earn their own living, as well as through price regulation and subsidies. To stress the point more crudely, never must a State's act or omission to act destroy a citizen's access to food. Hence, this obligation is violated for instance, when the State has colluded or failed to protect in instances of alienation or destruction of food producing resources such as the alienation of indigenous land or small holders' land. In fact, the point seems quite obvious when consideration is given to the fact that land very often means livelihood for both indigenous people and small holders, and therefore barely requires any further explanation.

The State's obligation to assist and fulfill will consist of helping, particularly, those close to the poverty line or below it to make better use of the entitlements they already have, or where there are no other alternatives available to such individuals, to assist them in their efforts to feed themselves, which would often consist of a direct provision of food. In addition, of

⁸⁷ Eide, "The Right to an Adequate Standard of Living Including the Right to Food" in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1995) 89 at page 90

particular pertinence to South Africa, is that the obligation to assist may also consist of providing equal opportunities when past developments have caused serious inequalities.

As might have become evident by this stage, the contention is that in securing the right to food, it is not done at the expense of the State at *all* levels. Instead, what is being advocated is that the key word in securing these rights is *empowerment*. What the State needs to do is to empower these individuals by creating an *enabling* environment with the ultimate goal of *self sufficiency* in mind. Understandably this will be a costly operation, but, because the State is obliged to do so in terms of the Constitution, complemented by the fact that, when weighed against the long term benefits for the country as a whole, the result is that this fundamental socio economic right *should* unequivocally prevail and it is this critical point that needs to be borne in mind in such a task.

Due to the manner in which the section is phrased i.e. as *access*⁸⁸ to the right it is unlikely that the State is obliged to provide free food on demand for its citizens. Instead, at a tertiary level the State is obliged to provide the necessary resources that can be used to *obtain* food in the circumstances. "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."⁸⁹

Food, being an imperative and indispensable commodity for human existence impacts significantly on the very essence of the right to life and, as such desperately needs to be translated into action that it capable of implementation. However, account must be taken of the fundamental realities facing South Africa, namely, the issue of resources, or more operative, the lack thereof and when balancing this harsh reality against it being a vital necessity, the contention is that the approach advocated seems most viable. It not only ensures long term sustainability but also instills dignity in individuals both by creating an enabling environment and empowering them.

Legislation

6.4 THE RIGHT TO SOCIAL SECURITY:

The right to social security as with most of the other socio-economic rights, finds recognition in numerous international instruments: the Universal Declaration on Human Rights (Article 22), International Labour Organization Convention No 102 Concerning Minimum Standards of Social Security, the International Covenant on Economic, Social and Cultural Rights (Article 9), the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5(e)(i)(iv)), the International Convention on the Elimination of All Forms of Discrimination against Women (articles 11(1)(e), 11(2)(b), 14(2)(c)), the Convention on the Rights of the Child (Articles 26 and 27), the European Social Charter (Articles 12,13, 16 and 17) and the African Charter on Human and Peoples' Rights (Article 18). In addition, the right to benefit from social security and social assistance is recognized in various

⁸⁸ The way in which the right is phrased can clearly be distinguished from children's rights and the right to education where *access to* is omitted and are merely provided for as *the right to...*

⁸⁹ de Vos, "Pious Wishes or Directly Enforceable Human Rights? : Social and Economic Rights in South Africa's 1996 Constitution" (Forthcoming in 1997 *SAJHR*) at page 14

national constitutions.⁹⁰ Furthermore, the right is expressly provided for in terms of Section 27(1)⁹¹ of the Constitution.

In an examination of the section it is important to distinguish between the terms *social security* and *social assistance*. The former refers to 'earned' social security benefits of workers and their families, whilst the latter refers to any individual or group receiving need-based assistance from public funds, raised through tax revenues and other measures⁹².

The approach in the realm of international law is once again deserving of attention. International treaties which requires from their States parties a *system* of social security which is understood as covering most of the specific forms of social security such as old age, disability, unemployment, illness, child birth, widowhood and orphanhood.

The principal ILO instrument in the field of social security is the Social Security (Minimum Standards) Convention of 1952 (No. 102) which is structured around nine specific branches of social security: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit. This list of social security benefits is repeated in Article 9 of the ICESCR thereby reflecting the importance of the ILO instrument. Both these instruments focus on social security in the narrow sense: income-based and situation based cash benefits for workers and their families. However, in the South African context, there are also provisions that relate to social assistance and other need-based forms of social benefits.

Hence, it becomes evident that there are several different forms of social security. Whilst social security benefits are expressly provided for in the wide sense i.e. covering not only income based and situation based but also need based by making provision for social security *and* social assistance, it still remains uncertain as to which branches of such social security are to be provided for in terms of legislation.

The right to access to social security provided for in Section 27 (1) (c) of the Constitution guarantees that individuals will not be deprived of the means of subsistence in circumstances where they are unable to support themselves or their families. This can be achieved either through contributory schemes usually linked to formal employment or, where subsistence needs cannot be met through such a scheme, by way of publicly-funded social assistance. This positive obligation on the State to fulfill this right, as with most of the other rights is subject to the qualification that it must be progressively realized through reasonable measures, including legislation Section 27(2) This allows the legislature and executive a 'choice of means' regarding various forms of social protection, provided that the means selected are reasonable in relation to the goal of achieving access by everyone to social security.

⁹⁰ These include the Constitutions of Germany, Denmark, Greece, Italy, Japan, the Netherlands, Spain, Portugal, Switzerland and Turkey.

⁹¹ The provision is expressly in footnote 78

⁹² Scheinin, "The Right to Social Security" in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1995) 159 at page 159

It is also worth noting that social security receipts within a national economy vary dramatically and is largely dependent on the country in question.⁹³ But, in spite of this, the suggestion is that the branches of social security followed by the ILO be adopted in South Africa too. The specific provision for the right to social assistance is one that must be heralded, for by providing that as a right, it successfully evades the notion of charity whilst taking account of poverty existing on the magnitude that it does in South Africa, a balance that is indeed impressive.

6.5 THE RIGHT TO EDUCATION:

The right to education is widely recognized in international law and is included in: the Universal Declaration of Human Rights (Article 26), the American Declaration on the Rights and Duties of Man (Article XII), the European Convention on Human Rights (Protocol I, Article 2), the United Nations Educational, Scientific and Cultural Organization Convention Against Discrimination in Education, the Convention on the Elimination of All Forms of Racial Discrimination (Article 5 (e)(v)), the Convention on the Elimination of All Forms of Discrimination Against Women (Article 10), the African Charter on Human and Peoples' Rights (Article 17), the Convention on the Rights of the Child (Article 28 and 29), the United Nations World Declaration and Education for All and the International Covenant on Economic, Social and Cultural Rights (Articles 13 and 14). In addition, 58 of the countries with written constitutions have included the right to education⁹⁴. This fundamental right is provided for in Section 29 of the South African Constitution⁹⁵.

The right to education can be characterized as an 'empowerment' right. Such a right provides "the individual with control over the course of his or her life,

⁹³ According to ILO statistics, their share of total gross domestic product varied in 1983 from 0.008% in Bangladesh to 37.3% in the Netherlands.

⁹⁴ Examples of such countries include the Federal Republic of Germany, Canada, several state Constitutions in the United States, the Netherlands, Norway, Sweden, Denmark, India and Namibia.

⁹⁵ The section provides as follows:

29. (1) 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.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the State must consider all reasonable educational alternatives, including single medium institutions, taking into account -
- (a) equity;
 - (b) practicability; and
 - (c) the need to redress the results of past discriminatory law and practice.
- (3) Everyone has the right to establish and maintain at their own expense, independent educational institutions that-
- (a) do not discriminate on the basis of race;
 - (b) are registered with the State; and
 - (c) maintain standards that are not inferior to standards at comparable public institutions.
- (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

and in particular, control over (.....) the state.”⁹⁶ Exercising such a right enables a person to experience the benefit of other rights. The enjoyment of not only socio-economic rights, such as the right to choose work, equal pay for equal work, the right to food or the right to health: an educated person undeniably has better job prospects ahead, but also civil and political rights such as the right to vote, the right to freedom of expression and the right to political participation are largely dependent on education. In short, the right to education contributes in an important way to the essence of promoting human rights, namely living in dignity.

Regarding the right to a basic education, the Education Department has given a generous interpretation to its obligations in terms of the right to a basic education which was also provided for in terms of Section 32 (a) of the Interim Constitution. In its White Paper on Education and Training published in March 1996 it stated: “basic education is a flexible concept which must be defined so as to meet the learning needs appropriate to the age and experience of the learner, whether child, youth or adult...”

It is submitted that a basic education should, at least, provide learners with the foundations for being successful in society, including the minimum tools of literacy and numeracy⁹⁷. One of the key aspects in defining ‘success in society’ must include the ability to engage in and enjoy basic civil and political rights such as the right to freedom of speech and the right to make informed political choices⁹⁸.

The right to education is phrased in a substantially different manner from that of the other socio-economic rights provided for in Section 26 and 27 of the Constitution, in that there is neither a reference to resource constraints nor progressive realization, hence, rendering it subject to immediate implementation.

In applying the right to the three fold methodology that has been used through out this study - at the first level of the State’s obligation to respect prohibits the State from acting in contravention of this right to education, by constraining or interfering with the exercise of this right. Hence, it must respect the free exercise of this right by individuals, in addition to exercising a non discriminatory policy regarding entrance into public learning institutions.

Language,

However, in interpreting the Section 32 (a) of the Interim Constitution⁹⁹ in the *Re The School Education Bill of 1995 (Gauteng)* Judge Mahomed has affirmed that the right “creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.” He also referred to the

⁹⁶ Donnelly and Howard, “Assessing National Human Rights Performance: A Theoretical Framework”, (10) *Human Rights Quarterly*, (1988) 214 at page 215

⁹⁷ Such a definition would be in accordance with the definition in terms of Article 1 of the United Nations World Declaration on Education For All.

⁹⁸ The United States Supreme Court has suggested that the government may be under an obligation to ensure a minimum standard of education to avoid inequalities in the right to speak or vote - See *San Antonio Independent School District v Rodriguez* (1973) 411 US at 36 /37

⁹⁹ The section provides that everyone shall have the right to a basic education and equal access to educational facilities.

right to basic education being at “public expense”¹⁰⁰. It is submitted that due to the similarity in the wording of the provision in the interim and final Constitutions, that Section 29 of the final Constitution is subject to the same interpretation.

The obligation to protect requires the State to take steps through legislation or other means to prevent and prohibit the violation of this right by third parties. This is essentially a guarantee on the part of the State to secure the exercise of the right in horizontal relationships such as combating discriminatory policies for entrance into private schools. This obligation is specifically provided for in terms of Section 29(3) of the Constitution.

On the third level, the State’s obligation to fulfill requires the State to make various levels of education available and accessible for all. In an attempt to achieve this aim it is crucial that the State undertake a variety of measures. This obligation is of particular importance in South Africa, where the gross inequalities bequeathed by apartheid still persist. Although education might be available to all South African’s, the levels of inequality that mark the education system is a gross violation of the equality provision and, this needs to be addressed by equalizing the education system for all South Africans. This would necessarily require a substantially greater degree of positive action on the part of the State in South Africa than it would in many other countries.

It is contended that the right to a basic education does not necessarily require that it be free for all the country’s citizens and does not preclude a system of charging school fees¹⁰¹. But, given the fundamental nature of the right and the constitutional commitment to it, complemented by the fact that it is an “empowerment” right such positive action on the part of the State is indeed crucial, and hence, no one should be denied the right to basic education due to a lack of resources. The White Paper on Education accepts that the provision of schooling for all children to the General Education Certificate level (which is one year reception class plus 9 years of schooling) is a public responsibility which must be borne from public funds.¹⁰² In addition, Article 28 (1) (a) of the Convention on the Rights of the Child obliges South Africa to “make primary education compulsory and available free to all” with a view to progressively achieving the right of the child to education. The submission is that this provision together with the constitutional provision offer strong support for the point made above, namely, that no child shall be deprived of the right to education due to a lack of resources. Of course, there are various other aspects and sub sections of the right that need to be dealt with but, it is beyond the ambit of this study to do so.

6.6 LIMITATIONS THAT APPLY TO THE SOCIO-ECONOMIC RIGHTS DISCUSSED:

It must borne in mind that in dealing with socio-economic rights, as with all of the other fundamental rights, they too are subject to the general limitation clause. However, there are also certain internal limitations that are applicable to most socio-economic rights. Quite obviously these limitations prove crucial

¹⁰⁰ *In Re The School Education Bill of 1995 (Gauteng)* 1996 (4) BCLR 537 (CC) at para 8-9

¹⁰¹ The contention is based on the phrasing of the provision which may be distinguished from Article 20 of the Namibian Constitution.

¹⁰² Chapter 7 para 17; Chapter 13 paras 37-44

to an interpretation of the right and, therefore, will be given brief attention in the present section.

6.6.1 Internal Limitations:

To begin with the internal limitations, the right of access to housing, the right to health care, food, water and social security are all subject to the qualification that the State is obliged to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of these rights.” This renders each of the rights subject to two internal limitations: the limitation of resource constraints and the limitation of progressive realization.

These internal limitations acknowledge the progressive implementation of these rights as opposed to the immediate implementation of civil and political rights, a fundamental point that is often used to distinguish both sets of rights as has been discussed at length, and often used to justify the status of “second generation rights” accorded to socio-economic rights.

There are essentially three issues that deserve to be dealt with in examining the internal limitations - the first of which is a consideration of exactly what *reasonable legislative and other measures* entails. Whilst this accords the legislature and executive a substantial degree of discretion pertaining to the ‘choice of means’ in adopting appropriate legislation and policies in fulfilling this right, it is important to note that such discretion is by no means unlimited.

The obvious question in approaching the issue would be: what constitutes reasonable measures? In defining reasonableness in that context the UN Committee has noted that the State must be in a position to demonstrate that it has taken measures that are “deliberate, concrete and targeted as clearly as possible” towards meeting its obligations.¹⁰³ It has further noted that such policy and legislation must reflect a serious and rational attempt to meet constitutional commitments as a matter of priority.¹⁰⁴ In its assessment of reasonableness the European Court of Human Rights has, whilst recognizing a certain margin of appreciation, noted that such discretion is by no means unfettered, but subject to certain constraints.¹⁰⁵

Although the State is obliged to fulfill its obligations, it is allowed some latitude in doing so, by making it subject to the qualification of progressive realization. The General Comment notes in this regard:

“The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic,

¹⁰³ See General Comment No 3 UN Committee para 2

¹⁰⁴ See General Comment No 1 (Third Session 1989)

¹⁰⁵ See *Marckx v Belgium* ECCHR 31 Ser A (1979) at 25 where the court placed limits on such discretion and found that the State had not taken sufficient measures to fulfill its positive obligations

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 the State parties in respect of the full realization of the rights in question¹⁰⁶

The UN Committee has interpreted the term 'progressive realization' as an obligation on the part of the State "to move as expeditiously and effectively as possible towards that goal"¹⁰⁷ This has been further interpreted as any unreasonable delay or a failure to exercise due diligence in adopting measures to secure the right has been recognized as the standard.

The third leg of the internal limitation being that of *within its available resources* - the Limburg Principles interpret the phrase so as to include both the resources within the State as well as those available from the International Community.¹⁰⁸ The essence of the qualification has been noted by Alston and Quinn that although the State has a wide discretion in the allocation of its resources, it should be in a position to demonstrate that its decisions are based on a serious and principled consideration of what is needed to meet its constitutional commitments.¹⁰⁹

6.6.2 The General Limitation Clause:

As already mentioned, in addition to the internal limitations there is also the general limitation clause, namely Section 36¹¹⁰. The section differs substantially from the limitation clause in the interim Constitution and, in being so deserves extensive research to establish its parameters and its impact on socio-economic rights.

However, in applying this limitation clause it is unlikely that administrative convenience, cost saving or reprioritisation of resources will in themselves constitute sufficient grounds for limiting the right.¹¹¹ For the present purposes suffice it to acknowledge that the socio-economic rights discussed in the course of this paper, as with most of the other rights provided for on the Bill of

¹⁰⁶ General Comment 3: The Nature of States Parties Obligations (Fifth Session 1990) para 1

¹⁰⁷ General Comment No 3 para 9

¹⁰⁸ Part 1 para 26

¹⁰⁹ Alston and Quinn "The Nature and The Scope of the States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" in (9) *Human Rights Quarterly* 1987 156 at 177

¹¹⁰ 36 (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose

(2) Except as provided in sub section (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

¹¹¹ This is consistent with the approach in *Re Singh and Minister of Employment and Immigration and 6 Other Appeals* (1985) 1 SCR 177

Rights, are subject to this general limitation clause, the exact interpretation of which awaits determination by the Constitutional Court.

6.6.3 The Test that a Claimed Violation of Socio-Economic Rights Would Have to Undergo:

The process that is necessary for the court to engage in when socio-economic rights (those that are subject to internal limitations) come under challenge has been aptly stated by Pierre de Vos and the author could do no better than to quote the learned writer at length:

“In practice 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 fulfill 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 affected party to demonstrate that it has taken reasonable legislative and other measures, within its available resources to achieve the progressive realization 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 limitation 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.”¹¹²

¹¹² de Vos, “Pious Wishes or Directly Enforceable Human Rights? : Social and Economic Rights in South Africa’s 1996 Constitution” (Forthcoming in 1997 *SAJHR*) at page 14

CHAPTER 7:

CONCLUSION:

As might have become evident by this stage, the fundamental aim of this study has been three-fold: to illustrate the vital importance of socio-economic rights, to elucidate and address the various reservations and scepticisms relating to the subject and to attempt to provide a basic framework of the obligations these rights impose on the State at various levels.

The crucial importance of socio-economic rights was examined in an attempt to provide an argument for their recognition as legally enforceable rights as opposed to ethical, moral or political aspirations ~~that a State should strive for~~. The contention has been that, given the role socio-economic rights play in recognizing the humanity of the poor, ensuring peaceful co-existence between individuals as well as States, strengthening a democracy or perhaps, forming an integral component of that democracy and their fundamental role in ensuring the adherence to other fundamental rights in the Constitution, they deserve to be, and are justifiably, elevated to the status of constitutional provisions.

However, in acknowledging that, in spite of them being provided for in the Constitution, there still exist numerous reservations concerning these rights, Chapter 5 has attempted to address these issues. It has divided these reservations into broadly two categories: the justiciability of socio-economic rights and the possibility of socio-economic rights frustrating a democracy. The Chapter has elucidated these reservations and has attempted to address them by illustrating certain inherent fallacies and gross misconceptions which characterize most analyses.

Though these chapters might be considered futile by many, given the fact that though these reservations may exist, the fundamental point is that these rights are provided for in the supreme law of the land. Yet, in spite of this, it is felt that in order to secure their optimal success it is imperative that these reservations be addressed. The point here is two-fold: to illustrate their importance as well as to jettison the misconceptions surrounding these rights in a legitimate and justifiable manner. It is hoped that this will lend support to the idea that priority be given to their implementation as opposed to issues like military expenditure for instance, as well as to ensure that the integrity of the Constitution is not placed in jeopardy by their non-recognition.

Chapter 6 has outlined the nature of the State's obligations in securing some of the socio-economic rights provided for in the Constitution. With legal recognition of socio-economic rights being somewhat novel in South Africa, it is an area that implores extensive research, so as to, establish their normative content in order to provide clarity on certain issues. This would broadly involve an analysis of what adherence to the right actually requires, what would constitute a violation of the right, and various similar issues. The intention has been that in applying a methodology, which, although susceptible to criticism for its lack of originality, is largely accepted in the international arena, as well as consistent with the Constitution itself, forms the framework for answers to the numerous other issues on the subject.

Crucial to the implementation of socio-economic rights is the question of monitoring, which has been outlined as another problematic area of socio-economic rights in the international arena. Suffice it to merely mention that a proper system of monitoring proves crucial to securing socio-economic rights. However, monitoring, in itself is a complex issue with a vast array of intricacies that need to be dealt with, and in so being, falls beyond the ambit of the present study.

Whilst the theoretical foundation has been laid for South Africa to develop a culture of human rights, it is vital that we seize this opportunity to ensure real and meaningful human rights for all South Africans, as well as secure the fundamental objective South Africa has been striving for, for so very long - a true and meaningful democracy! It is hoped that the study has successfully indicated the crucial role of socio-economic rights in fulfilling this aim, in addition to establishing that it is both a possible and attainable one.

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