

Monitoring the implementation of socio-economic rights in South Africa: Some lessons from the international community*

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1 INTRODUCTION

The real test for commitment to human rights norms lies in the mechanisms that are put in place for their enforcement. In order to ensure that socio-economic rights do not end up as mere paper rights, the progress made in realising these rights must be closely monitored. Monitoring must be designed to give a detailed overview of the existing situation. The principal value of such an overview is to enable the people to determine how government has performed in respect of the implementation of human rights, including socio-economic rights.

The South African Constitution¹ places a unique emphasis on socio-economic rights, both through the legally binding² or 'hard' protection of these rights by the courts, and the non-legally binding or 'soft' protection offered by non-judicial institutions such as the South African Human Rights Commission³ (SAHRC) and non-governmental organisations (NGOs).⁴ It is not exclusively or primarily through the courts that these rights are to be realised. In order to support the limited justifiability of socio-economic rights the Constitution introduced an additional soft mechanism for their protection.⁵ The decisions of the SAHRC are not binding enforcement mechanisms such as the decisions of the courts. Instead, the Constitution obliges relevant organs of state to report regularly to the SAHRC on the measures they have taken towards realising these rights. The SAHRC, in turn, reports to parliament and also exercises a monitoring function in this regard.

* This article is based on an unpublished LL.M thesis completed at the University of Stellenbosch in 2003.

1 Act 108 of 1996.

2 S 172(1)(b); and see also De Vos P 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* at 67, on the judicial protection of socio-economic rights under the Constitution.

3 S 184(3) (hereinafter referred to as the 'SAHRC').

4 S 38 (hereinafter referred to as 'NGOs').

5 The establishment of the South African Human Rights Commission in terms of s 181(1)(b) as an institution supporting constitutional democracy serves the purpose. As to the reasons for the establishment of the SAHRC, its aims, objectives and mandate are spelled out in its website (www.sahrc.org.za).

The role of the Commission is described in section 184(3) of the Constitution:

Each year the SAHRC must require relevant organs of state to provide the Commission with information on the measures they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

The SAHRC clearly has a special constitutional obligation to monitor the realisation of the rights enshrined in the Constitution. The mandate contained in section 184(3) of the Constitution must be read in conjunction with the other functions and powers of the Commission that are provided in section 184 of the Constitution. The purpose of section 184(3) cannot merely be for the SAHRC to gather information concerning socio-economic rights, the information gathered must be analysed and evaluated in terms of the SAHRC's duty under section 184(1)(c) to monitor and assess the observance of human rights in the Republic.

In addition, the SAHRC has the power to take a number of steps in relation to the information that it obtains. Of particular relevance are its powers to investigate and to report on the observance of human rights and to take steps to secure appropriate redress where human rights have been violated. If the SAHRC identifies a violation of any of the rights in the Bill of Rights, it may institute litigation or make recommendations to the relevant organs of state.⁶ In executing this mandate it has no direct precedent in the legal systems of other countries. The closest analogy would be with the reporting procedures on socio-economic rights under international and regional instruments, whereby states are required, at regular intervals, to provide information on the realisation of certain socio-economic rights in their jurisdictions to the relevant treaty monitoring bodies.

The SAHRC has, once again, an obligation to identify the organs of state that are responsible for socio-economic delivery. Its primary challenge is to establish what constitutes an organ of state and which organs are relevant for the purpose of this section. This entails an enquiry into which organs are charged with the task of taking measures towards the realisation of the rights in the Bill of Rights. The task of identifying relevant organs of state requires an analysis of the constitutional division of power between the different levels of government. The three levels of government are clearly organs of state as defined in section 239(a) and (b) of the Constitution.

Another key challenge in the process is the nature of the information that must be requested from the various organs of the state. It has been argued that the SAHRC should focus on socio-economic rights and develop guidelines to ensure that organs of state provide it with the relevant data.⁷

6 S 184(2)(a) and (b).

7 Pillay K 'Identifying Relevant Organs of State' (1998) Report of a Joint Workshop Organised by: Community Law Centre (University of the Western Cape) and Centre for Human Rights (University of Pretoria). The SAHRC is also in the process of developing toolkits that will serve as information-gathering tools in relation to socio-economic rights: e-mail correspondence with Mr Eric Watkinson, Deputy Director: Economic, Social and Cultural Rights Projects, SAHRC.

A difficult balance will have to be struck between ensuring that it is practical and feasible for the relevant organs of state to provide the information while, at the same time, the SAHRC is provided with an effective basis for evaluating their performance.

The section 184(3) procedure captures the essential spirit of international reporting procedure. It introduces the procedure at the domestic level by placing an obligation on the state to justify itself to a domestic body – which, in this instance, is the SAHRC – in respect of socio-economic rights. By imposing this obligation, it ensures that organs of state will keep the realisation of socio-economic rights on their agendas. More than that, monitoring should galvanise organs of state by exposing shortcomings while highlighting the government's successes in the implementation of socio-economic rights. Through the introduction of a domestic reporting and monitoring procedure, the 'soft' protection of socio-economic rights in the constitution has the potential to be more significant than one might have thought.

Against this background and the mandate of the SAHRC that this article is put forward as a contribution towards establishing an effective system of monitoring socio-economic rights in South Africa, and thereby directly strengthening our democracy.

2 THE INTERNATIONAL SYSTEM OF MONITORING

Since the closest analogy to the domestic reporting procedure is in international practice, it is useful to analyse the reporting procedure under international law. I do not mean to imply that the international system should be emulated at the domestic level; it may or may not be suitable. Instead, the objective is to use the system as a point of reference for the development of a uniquely South African system. Therefore, considering the scarcity of jurisprudence in relation to socio-economic rights, reference to the international system of monitoring will be of great value to the effective implementation of these rights domestically.

The institution of international supervisory mechanisms, through the creation of human rights committees, has become one form of effecting compliance with human rights treaty obligations. The main function of such bodies is to ensure compliance with the relevant treaty obligations. The monitoring body has to clarify and develop standards that are to be implemented for the effective realisation of socio-economic rights. It has also to assess the degree to which states are acting in conformity with their obligations. Lastly, it has to recommend either remedial or preventive action to ensure compliance with the relevant treaty.⁸

The monitoring bodies play a constructive role in assessing the situation and giving advice to countries as to possible remedial actions. The procedure requires a certain amount of co-operation from states that might not be forthcoming if it were thought that the burdens of participation out

8 Van Dijk P *et al* (eds) *Restructuring the International Economic Order: The Role of Lawyers* (1996) 135 at 144.

weighed the benefits. As far as benefits are concerned, the importance of the promotional aspects of implementation should not be underestimated.⁹

The international body responsible for monitoring compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR) is the Committee on Economic, Social and Cultural Rights. It has been charged with the difficult task of ensuring that states comply with their obligations under the covenant. This monitoring body is composed of eighteen experts serving in their personal capacities. The Council elects them by secret ballot from a list nominated by state parties to the ICESCR. Furthermore, special considerations are given to equitable geographical distribution and to the representation of different forms of social and legal systems.¹⁰

Monitoring on the international plane draws on the reporting as well as the petition systems. Only the reporting procedure, which has a theoretical and practical basis, will be discussed below.¹¹

3 REPORTING OBLIGATIONS

Reporting obligations are often used as an enforcement mechanism of human rights norms at the international level.¹² A whole range of United Nations and regional human rights conventions require state parties on a regular basis to give an account to international supervisory bodies, created for this purpose, of all the steps they have taken to meet the obligations they assumed by becoming party to the conventions.¹³

According to the Committee¹⁴ the reporting process has a number of objectives. The state concerned should undertake to monitor and evaluate its own performance by conducting a thorough review of the degree to which the rights are enjoyed by all sections of the community. In doing so, it should stimulate public scrutiny of government policy in the areas concerned and pinpoint difficulties and shortcomings in existing arrangements. Promotion of human rights is often the first stage leading to the protection of rights. In short, it promotes respect for and protection, promotion and fulfilment of human rights.

The most important UN instrument that employs this mechanism in respect of socio-economic rights is the International Covenant on Economic,

9 Cohn C 'The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the International Covenant on Civil and Political Rights' (1991) 13 *Human Rights Quarterly* 95 at 97.

10 Bayat N 'A Comparative Overview of Reporting on Socio-Economic Rights Under International Human Rights Law Report' (1997) *Socio-Economic Rights Project*, Centre for Human Rights, University of Pretoria at 2.

11 The petition procedure is not discussed because the purpose of this article is to seek a system that will have a bearing on the domestic level.

12 Heyns C 'Taking Socio-Economic Rights Seriously: The Domestic Reporting Procedure and the Role of the South African Human Rights Commission' (1997) 30 *De Jure* 195 at 205.

13 *Ibid* at 197.

14 General Comment No 1 (1989) at 12.

Social and Cultural Rights.¹⁵ Several other international human rights instruments enunciate socio-economic rights in respect of certain vulnerable groups and pose corresponding reporting obligations. They include the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁶ the Convention on the Elimination of Discrimination against Women¹⁷ and the Convention on the Rights of the Child.¹⁸

South Africa has ratified the African Charter and other UN instruments, including those listed above, except for the ICESCR. The latter has been signed and is in the process of being ratified.¹⁹ Ratification will mean that South Africa will be subject to reporting obligations in respect of socio-economic rights on three distinct levels. The most important will be the ICESCR, which requires an initial report after two years and thereafter a report every five years. On the regional level, the country is required to report to the African Commission on Human and People's Rights every two years.²⁰ On the domestic level these international obligations will be supplemented by the internal reporting procedure, created by section 184(3), that requires yearly reports.

As I have stated above, reporting requires the state to submit periodic reports on the domestic implementation of the treaty rights. Generally, the reports are considered by the supervisory body, which reviews them and makes recommendations. It is to a large extent dependent on the good faith of the states concerned. The international bodies are reliant upon the provision of accurate and relevant information by the states, and the monitoring body is mandated purely with the function of assisting and advising states. Reporting is therefore considered as a mechanism for fact-finding and, more specifically, the verification or the promotion of human rights in contrast to the protective function of a petition system.

4 LESSONS FROM THE INTERNATIONAL COMMUNITY

There is a meaningful connection between the international and the domestic monitoring systems. In my view, the domestic system can rely on the international system to enhance the protection of socio-economic rights.

The international monitoring system has advantages that the domestic system cannot offer. It provides a basis for a cross-national assessment of a country's performance in the world, as seen from an impartial international

15 It was adopted on 16 December 1966; see Eide A *et al* (eds) *Economic, Social and Cultural Rights* (1995) at 15 and Chapman A 'A violations approach for monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 20 *Human Rights Quarterly* 21 at 23.

16 Adopted 1965 and entered into force in 1969.

17 Adopted 1979 and entered into force in 1981.

18 Adopted 1989 and entered into force in 1990.

19 It was signed on 3 October 1994.

20 See Mugwanya GM 'Examination of State Reports by the African Commission: A Critical Appraisal' *African Human Rights Law Journal* 2001 (1) 268. Mugwanya spells out the role of the African Commission in effecting the implementation of the African Charter on Human and People's Rights where it has to play a leading role in assessing the observance of human rights by states party to the Charter.

perspective. A body of jurisprudence on these rights has already started to develop on the international level, which provides a time-tested starting point. The SAHRC would be well advised to take cognisance of this jurisprudence. Moreover, through co-ordination of the international and domestic procedures the cost and effort of obtaining and assessing the required information can be reduced. The time frame for domestic reporting could be co-ordinated with South Africa's obligations under the ICESCR because of the large degree of overlap between the rights in question.

The first step, for the SAHRC, should be to issue guidelines on what is expected from the various organs of state. It should have access to government's reports submitted to the international supervisory body and to the findings issued by UN Committee. The relationship of the report to the National Assembly and South Africa's report to the UN Committee will also have to be carefully considered. The SAHRC has compiled an inventory of the international human rights instruments relating to the rights in question that the government has ratified or intends ratifying. According to international practice, states are encouraged to make use of cross-referencing between different reports instead of re-submitting the same information where they have overlapping reporting duties.²¹

Internationally, NGOs have been recognised as prominent players in the process. The ability of NGOs to participate freely and effectively in the review process is critical for putting more pressure on government for the effective realisation of human rights, including socio-economic rights. Therefore the SAHRC has to bring on board NGOs. It is not enough to recognise them in theory without giving them a platform to exercise their functions.

The manner of protecting socio-economic rights is to an extent dependent on global developments and trends. Increasingly, claims must be advanced within the international as well as the domestic legal order. In so doing the capacity of both domestic and international human rights institutions are enhanced. Courts are more likely to hold their governments to a purely internal standard of the right to social security or to an adequate standard of living. They are less likely to enforce standards and entitlements linked to internationally recognised social and economic rights.²²

In other words, our domestic claims will be more successful if international human rights bodies have identified certain areas in which domestic protection fails against international standards. That being the case, it is important to take our claims and issues forward internationally as well as domestically and to ensure that UN treaty monitoring bodies give clear directions to our courts, SAHRC and the government.

21 General Comment No 1 (1989) at 13.

22 While the courts have a role to play in holding the government to its obligations and supervise the implementation of its orders in respect of these rights, their role will not be discussed in this article. See Ntlama N 'Unlocking the Future: Monitoring Court Orders in Respect of Socio-Economic Rights' (2005) 68 *THRIIR* (forthcoming).

There is a need to collaborate to ensure that the pressing issues of domestic socio-economic rights struggles are addressed at the international level. The effective monitoring of socio-economic rights requires constant interaction between the international and domestic monitoring bodies. The consideration by the UN Committee of the right to social security and to an adequate standard of living may be useful in convincing the SAHRC, courts and Parliamentarians of the importance of effective legal remedies to ensure the realisation of these rights and universal and justiciable standards.

5 DOMESTIC SYSTEM OF MONITORING

In this section, I discuss the role and the steps to be taken by the SAHRC in fulfilling its constitutional obligation of monitoring human rights, including socio-economic rights. Its primary aim should be to promote socio-economic rights rather than to criticise the state's performance in respect of these rights.

5.1 The role and the nature of the commission's mandate in section 184(3)

The SAHRC was established in terms of section 181(1)(b) of the Constitution and has a key role in monitoring the implementation of socio-economic rights. It is one of the institutions described in the Constitution as 'state institutions' supporting and strengthening constitutional democracy in the Republic. It is a watchdog, whose main task is to monitor actions of the government and the private sector that may affect human rights.²³

It is therefore equipped with a powerful information-gathering tool on the steps taken by the relevant organs of state to respect, protect, promote and fulfil socio-economic rights.²⁴ Section 184(3) of the Constitution places an obligation on the SAHRC to request information each year from the relevant organs of state on the steps that they have taken towards the realisation of the socio-economic rights. With this information and information obtained from other independent sources, it will be in a strong position to monitor and assess the observance of socio-economic rights in South Africa.

The question could therefore be asked whether it is correct to describe the system which section 184(3) creates as a domestic reporting procedure. In other words, does the section 184(3) procedure do something similar for socio-economic rights on the domestic level to that which the reporting procedure in terms of treaties like the ICESCR does for these rights on the international level? In my view, section 184(3) creates precisely such a system on the domestic level, whereby state organs are placed under a legal duty to report to an independent body on their performance.

23 Liebenberg S and Pillay K *Socio-Economic Rights in South Africa* (2000) at 53.

24 S 7(2), Human Rights Commission Act 54 of 1994.

The essence of the international system of reporting, as I have stated above, is that organs of state are required by law to inform an independent monitoring body, on a regular basis, on the extent to which they have managed or failed to comply with treaty norms. At the heart of the reporting procedure, as an enforcement mechanism, lies a duty of justification on the one side and a system of monitoring on the other. The South African Constitution creates such a duty of justification.

There are differences between the two types of reporting. In the one case the monitoring body is international and dedicated only to monitoring the particular set of rights in question. In the other case the monitoring body is domestic and has some other functions as well. However, in both cases the bodies serve as independent monitors. The sources of the legal obligations on the national and international levels are also different. In the case of international reporting, the source is the voluntary decision of the state in question to become a party to a treaty. In the case of the section 184(3) procedure the obligation is imposed by the Constitution. That does not diminish the fact that legal obligations are created in both instances to provide information on performance in respect of the rights in question.

The SAHRC must submit an annual report that must be tabled in Parliament. In addition, it is obliged to submit quarterly reports to the President and Parliament on investigations and its findings. It may also submit reports at any time if it deems this necessary.²⁵ Importantly, the end-goal of the section 184(3) process should not be seen simply as the production of the report. These reports have the potential to provide a valuable public record of the monitoring process if they identify instances of the violation of socio-economic rights, engage organs of state in measures to improve access to these rights and educate them regarding their obligations, make well-considered recommendations, follow up on such recommendations, raise public awareness and identify areas of priority for the next monitoring cycle.

At the end of the day, the value of the section 184(3) mandate lies in the SAHRC's ability to contribute to making socio-economic rights a reality in the daily lives of disadvantaged groups.²⁶ The tabling of a formal report in Parliament will not achieve this goal on its own; it is essential that the report receive some form of consideration in the parliamentary system. The report should be considered by the relevant portfolio committees and perhaps debated in the National Assembly. In addition, a user-friendly version of the report should be disseminated to the press and media. These institutions bear the responsibility of taking matters further by informing the public through the radio, internet and television.

It may consequently be concluded that section 184(3) does create a system that can legitimately be referred to as a domestic reporting procedure.

25 S 15(2), Human Rights Commission Act 54 of 1994.

26 Brand D and Liebenberg S 'The Second Economic, Social and Cultural Rights Reports' (2000) 2 *ESR Review* 12 at 16.

6 NGO INVOLVEMENT IN THE MONITORING PROCESS

In this section I will analyse NGO involvement in the monitoring process. The sad reality is that most human rights NGOs are not directly involved in the area of socio-economic rights. There are a number of factors that have contributed to this shortcoming that I will briefly dwell on.

There is considerable room for NGO participation in the monitoring process. Because NGOs are often close to the people, they can provide information on the real problems people experience in obtaining access to socio-economic rights. They can also use the Promotion of Access to Information Act²⁷ to obtain information in respect of these rights.

The information gathered can be valuable in helping NGOs to compile a shadow report. Liebenberg defines a shadow report in this context as an NGO report that aims to highlight information and problems relating to the realisation of socio-economic rights that are not covered in the official government report.²⁸ Governments usually assess themselves in a more favourable light than do NGOs, which are often critical of government. NGOs can also monitor the implementation of the National Action Plan for the Promotion and Protection of Human Rights.²⁹ This is a detailed plan for implementing a full range of civil, political, economic, social and cultural rights, as well as rights to development, self-determination, peace and environmental protection.

Shadow reports can also be submitted to international human rights bodies. International reporting systems have shown that civil society is central to an effective monitoring process. For example, the UN Committee on Economic, Social and Cultural rights, which is responsible for supervising state parties' obligations under the International Covenant on Economic, Social and Cultural Rights, has developed innovative ways of involving NGOs in the reporting system under the covenant. These include inviting the submission of shadow reports or alternative reports as well as opportunities for oral representations. Mugwanya strongly recommends that NGOs should not only participate in the processes of preparing reports but should also be encouraged to supplement these reports by providing the monitoring bodies with additional information.³⁰

Indeed, participation by NGOs in the work of the UN Committee is the most significant and perhaps the most controversial aspect of the supervision system.³¹ The reason for this is that the covenant makes no reference to NGO participation in the process. Similarly, the South African Constitution makes no reference to NGO participation in the monitoring process. It does provide for the possibility of class action and for NGOs to act on

27 Act 2 of 2000.

28 Liebenberg and Pillay (fn 23 above) at 55.

29 This Plan was handed in to the UN on 10 December 1998 in response to the commitment in the Vienna Declaration of Human Rights and Programme of Action adopted by the World Conference on Human Rights in June 1993.

30 See fn 20 above.

31 Craven M *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) at 81.

behalf of victims if the government fails to honour its obligations.³² By analogy, NGOs should be entitled to submit written statements and make oral representations to monitoring bodies and the government on how they have performed in respect of the delivery of basic services. The objective of allowing representations is to foster wider participation that will make the monitoring process more transparent. NGO participation should therefore be institutionalised and not merely encouraged informally.

The major obstacle to creative NGO participation seems to be a lack of awareness and willingness as well as physical and financial constraints on the organisations working within the sphere of socio-economic rights.³³ Human rights NGOs have shown reluctance to become involved with the promotion of socio-economic rights.³⁴ However, there have been calls by organisations such as the Congress of South African Trade Unions (COSATU) and the Black Sash for access to the information provided to the SAHRC by organs of state and for public hearings where comments can be made on the information.³⁵

The SAHRC's reporting mechanism offers an institutionalised opportunity to comment on the extent of socio-economic rights delivery.³⁶ Public hearings should therefore be arranged to allow comments on the information provided by government departments. For example, the Black Sash has a particular interest in monitoring the realisation of the right of access to social security in South Africa.³⁷ Its efforts are frustrated by its lack of access to government reports and its inability to comment on them.

What role then does the SAHRC currently envisage for NGOs? The approach adopted by the SAHRC is that civil society should not be provided with information received from the government departments until the provisional composite report has been prepared.³⁸ This makes it impossible for NGOs to participate meaningfully.

As I have stated, the participation of NGOs is vital to the long-term success of the monitoring mechanism.³⁹ Denying NGOs immediate access to relevant information is at odds with the sentiments of the former Chairperson of the SAHRC, Dr Barney Pitso, who has argued that the implementation of social and economic rights requires democratic participation by society at all levels: an informed civil society, a democratic government and state institutions that monitor and inspire human rights action.⁴⁰

32 S 38.

33 Craven (fn 31 above) at 82.

34 *Ibid.*

35 Liebenberg S 'The South African Human Rights Commission' (1998) 1 *Economic and Social Rights Review* at 7.

36 Bevan G 'The Impact of the Different Conceptions of Socio-Economic Rights in South Africa' (1999) LLM thesis, University of Witwatersrand, Johannesburg at 62.

37 Interview with the Black Sash, held in Cape Town on 3 June 2001.

38 The First and Second Report on The Monitoring of the Realisation of Socio-Economic Rights.

39 Bevan (fn 36 above) at 63.

40 Concluding Address, Workshop on the South African Human Rights Commission (1997) 35 at 37.

People must be enabled to tell the SAHRC and the government what the situation is on the ground.⁴¹

If this is the objective, the SAHRC cannot be the only monitoring body. If monitoring is to succeed, there has to be more public and NGO participation.⁴² NGOs and the public should have access to the information provided by the organs of state as soon as it is released to the SAHRC. The SAHRC can only assess progress made in the realisation of socio-economic rights in South Africa if the information provided by the government is checked against alternative information submitted by NGOs, individuals and trade unions.

This would also be a more inclusive procedure and would give NGOs and others an opportunity to comment before the SAHRC drafts its final report.⁴³ More should be done to analyse the information submitted before the report is drafted. A more inclusive and critical approach will not only promote a more balanced assessment, but will also place a wealth of resources and experience at the disposal of the SAHRC, free of charge. We need a civil society which knows where change should come from. According to Danie Brand:

Experience has shown that state representatives often portray the situation in their country in too rosy a manner, whereas NGOs and civil society tend to be more critical. It is only by being exposed to both perspectives that a balanced and credible assessment can be made.⁴⁴

Also, parliamentary processes are at their most effective when complemented by lobbying and advocacy of civil society. Civil society is able to create political pressure, unlike the interventions by the SAHRC and the Constitutional Court. Civil society may remove barriers that stood in the way of people gaining access to socio-economic rights⁴⁵ by highlighting the cases of groups who are particularly vulnerable and by placing pressure on the state to assist these groups and ensure that they gain access to the rights in question. They are often the only voice for rural women, people living with disabilities or chronic illness, poor children and elderly persons.

Finally, the State, the SAHRC and the Constitutional Court have to be informed about grassroots experiences of people if a more holistic conceptualisation of these rights is to be achieved. The Poverty Hearings, organised by the Commission for Gender Equality (CGE), South African National NGO Coalition (SANGOCO) and the South African Human Rights Commission (SAHRC), illustrated the hardship and suffering experienced by people on the ground.⁴⁶ A closer look at the poverty hearings reveals how NGOs may open space for the marginalised to be heard.

41 *Ibid.*

42 Interview with Dr Meidlay, Department of Welfare, Eastern Cape, 21 May 2001.

43 Interview with Mr Kumalo, Department of Education, Eastern Cape, 21 May 2001.

44 Brand D 'South African Human Rights Commission' (1998) 2 *Economic and Social Rights Review* at 11.

45 Bevan (In 36 above) at 81.

46 The hearings were launched on 24 February 1998 and ran from March to June 1998.

7 NETWORKING STRATEGIES FOR NGOS

Effective participation will require NGOs to share information and collaborate in formulating strategies for their involvement in the monitoring process.

At the moment there are limited opportunities for NGOs to participate in the monitoring function entrusted to the SAHRC by the Constitution. One of the creative ways in which NGOs could play a vital role is through a compilation of the shadow report, as mentioned above. This will require a joint effort. Another way in which NGOs may become more directly involved is by implementing a carefully thought-out socio-economic rights litigation strategy with the aim of incrementally establishing positive precedents. Establishing and funding a group of progressive lawyers, who would assist communities to enforce their socio-economic rights, can do this. NGOs should further identify and take up cases, including the preparation of *amicus* briefs, as the Legal Resources Centre and the Community Law Centre (University of the Western Cape) did in the *Grootboom*⁴⁷ case.

Other activities that should be co-ordinated include social mobilisation, policy research and formulation, lobbying individuals, legislatures, statutory bodies and international agencies, and information sharing.⁴⁸ Co-ordinated actions have greater impact and results, as recognised by the report on the Poverty Hearings.⁴⁹ This could cover both the process of giving effect to socio-economic rights and the substantive impact of government programmes on socio-economic rights.

Although both the Constitution⁵⁰ and the Promotion of Access to Information Act⁵¹ provide for access to information, knowledge of legal rights and remedies among poor people leaves much to be desired. Legal advice offices could play an important role in providing the necessary information. The restructuring of the Legal Aid system should address the right of poor people to be provided with information and advice on their constitutional rights, particularly their socio-economic rights. NGOs could lobby for a portion of the State's Legal Aid budget to be allocated to local citizens' advice offices for the purpose of providing access to information and advice on all human rights, including socio-economic rights, and it is encouraging that there are developments in this direction.

Lastly, it is also encouraging that Schools for Practical Legal Training have included socio-economic rights in their curricula. This could be used by NGOs to contribute to the emergence of a new generation of human rights lawyers and activists.

47 *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1253 (CC).

48 Ntombela-Ndzimande P 'The Role of the Independent Commissions and Civil Society' (1999) 1 *Economic and Social Rights Review* at 20.

49 Report on Poverty Hearings Organised by CGE, SANGOCO, SAHRC, UWC Community Law Centre, July 1998 at 171.

50 S 32.

51 Act 2 of 2000.

8 CONCLUSION

The fact that socio-economic rights have been entrenched in the Covenant and in our Constitution is commendable, but the acid test lies in the manner in which these rights are realised. It is encouraging to note that the bodies entrusted with the responsibility of ensuring the effective realisation of these rights are using everything at their disposal to do so. As the process is new for the SAHRC, it is extremely important that they look for guidance from the international community as to how to do it effectively.

The SAHRC, in fulfilling the mandate, has developed protocols in accessing information from the relevant government departments on the manner in which they have promoted socio-economic rights. It has made mistakes, but useful experience has been acquired. The stance of not involving NGOs before a final report is drawn up is quite disheartening, considering the role that NGOs could play in monitoring socio-economic rights. Africa has also taken a vital step in promoting human rights, including socio-economic rights, by establishing the African Commission on Human and People's Rights. Therefore, lessons from the international community will provide a basis for the realisation of socio-economic rights in South Africa.

I conclude by quoting the former chairperson of the SAHRC, Dr Barney Pityana, on the Commission's role:

The constitution makers decided in their wisdom to provide a mechanism whereby economic and social rights (considered by some to be of dubious justiciability and enforceability) could go beyond mere aspirations and unenforceable directives. The constitution makers intended to make these rights substantial and effective.

In order to take up this challenge we must hold the government accountable through requiring them to justify their laws and policies, the setting of priorities and the way in which the resources of our country are being spent. We will assess whether decisions taken by the government are reasonably targeted at the realisation of the economic and social rights enshrined in the Bill of Rights.

As we seek to do this work, we recognise that we have enormous resources in our country. The NGOs and other organisations have been working on these issues in other ways. We need to consult with them.⁵²

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52 Fn 40 above at 18.

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