

Introduction to socio-economic rights in the South African Constitution

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1 INTRODUCTION

Seminal bills of rights invariably emanate from periods of struggle and represent a collective commitment to ensure that the conditions which led to the conflict from which the society in question is emerging, are not allowed to develop again in the future. As such, these bills of rights by nature have a retroactive element. The South African Bill of Rights is a case in point.

The effect of the past could for example be seen in the South African Bill of Rights in the emphasis on substantive equality, the role assigned to dignity, the limitations on freedom of expression and the uniquely important position which socio-economic rights occupy in this document. The new South African Constitution¹ provides arguably the most sophisticated and comprehensive system for the protection of socio-economic rights of all the constitutions in the world today. This could be traced back in no small measure to the fact that one of the most hideous features of apartheid was the systematic violation of the norms of social and economic justice.

2 THE INITIAL DEBATE AND ITS CONCLUSION

Although there was a large measure of agreement on the eventual approach taken in respect of socio-economic rights in the new Constitution, there had been much disagreement on how to deal with this issue along the way. One side argued for and the other side campaigned against granting a significant role for socio-economic rights in the Constitution, with a range of options in between.²

1 Constitution of the Republic of South Africa, 1996, Act 108 of 1996.

2 See Rycroft 1988; Mureinik 1992; Davis 1992; Scott 1992; De Villiers 1992; De Villiers 1994; Haysom 1996; De Wet 1997; De Vos 1997.

2.1 The debate

The most persuasive parts of the arguments at both extremes centred around the effect which the inclusion of socio-economic rights could have on the legitimacy of the Constitution. Those who argued in favour of a significant role for these rights pointed out that it makes little sense to tell people that their civil and political rights will be protected, if they continue to be at the mercy of the elements and of social exploitation. Freedom of expression means little to someone who is dying of hunger. If socio-economic rights were not given meaningful protection by the Constitution, it was said, the legitimacy of the Constitution would suffer because people would be bound to say it does not deal with their most fundamental needs. This raised the spectre of angry and disillusioned people holding up the Constitution and asking whether this is what the struggle was all about.

The argument on the other side was that it would be equally erosive to the legitimacy of the Constitution if it promised too much. Rights impose corresponding duties, and the Constitution would lose its credibility if it told people they have rights in respect of which the state cannot deliver, due to a lack of resources. If socio-economic rights were to be portrayed in the Bill of Rights ultimately as rights which do not differ in any way from other rights, the entire Bill of Rights would be discredited when it becomes apparent that the country cannot meet the expectations the Constitution had created. Civil and political rights would go down together with socio-economic rights. The haunting picture of people saying the struggle has been betrayed reappeared.

A related issue was the question about the role of judges in this regard. Justice Albie Sachs would later, in a different context, refer to the danger of “dikastocracy”, or rule by judges.³ As independent agents judges are not accountable to anyone, not even to the electorate as a whole. They do not and should not represent the people in any direct way. It consequently becomes a question, in a system based on the principle that “the people shall govern”, how much power judges should be given in respect of budgetary issues, as would invariably be the case when socio-economic rights are justiciable in the same way as other rights. Should Parliament – the body representing the people – not have ultimate control over the budget? On the other hand, were judges going to be left in a position where they could adjudicate on what some would consider to be legal niceties, but have no power to deal with real issues of justice and injustice?

The different options that were available to solve this quandary included (1) the full recognition of socio-economic rights as justiciable rights without any special qualifications; (2) including socio-economic rights in the Bill of Rights as justiciable rights, but subjecting them to special qualifications (several options were mooted); (3) merely listing them as non-justiciable principles of state policy; or (4) not making any reference to these rights at all.

³ *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) para 181.

2.2 The conclusion

The interim Constitution, which was in force from 1994 to 1997, followed what has been called a “minimalist” approach.⁴ Since the negotiations where this Constitution was drafted, were aimed merely at facilitating the transition to democracy when a fully representative Constitutional Assembly would draft a new Constitution, the approach followed in respect of the Bill of Rights in the interim Constitution was to include only the largely uncontroversial rights contained in most other democratic constitutions. In practice these were almost exclusively civil and political rights and as a consequence only a very limited list of socio-economic rights were included: section 32(a) guaranteed the right of everyone to basic education; section 30(1)(c) guaranteed the right of every child to security, basic nutrition and basic health and social services; section 25(1)(b) guaranteed the right of detained persons to be detained under conditions consonant with human dignity, which include the provision of adequate nutrition, reading material and medical treatment at state expense; and section 27 enshrined various labour related rights, including the rights of workers to fair labour practices, to form and join trade unions and to strike. The question of the possible inclusion of socio-economic rights in the “final” Constitution was left for the Constitutional Assembly to resolve.

Against this background, the following balance was struck by the Constitutional Assembly in respect of socio-economic rights in the final Constitution: With regard to the question whether these rights should be recognised as human rights – we may call it “norm setting” – it was agreed that socio-economic rights would be recognised in the Bill of Rights as such, as rights on the same level as civil and political rights. However, while some of these rights or aspects of these rights would not be subjected to special qualifications, it was decided that extensive internal limitations would apply in respect of most aspects of these rights, to restrict the obligations placed on the state.

As far as the enforcement of these rights is concerned – we may call it “norm enforcement” – two institutions would be given explicit roles: the courts and South African Human Rights Commission. The rights as defined – that is, given their internal limitations, where applicable – would in the first place be justiciable, and would consequently be subject to the “hard protection” offered by the binding decisions which courts can take.⁵ As will be indicated, the justiciability of these rights means that they can be invoked both directly and indirectly by litigants. In the second place, the South African Human Rights Commission would be given a special mandate to monitor the realisation of these rights. Since the Commission’s

4 See Du Plessis and Corder 1994: 45.

5 For the observations of the Constitutional Court on the justiciability of socio-economic rights, see *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC); 1996 10 BCLR 1253 (CC) paras 77 and 78. For the first decision of the Constitutional Court dealing with a socio-economic right protected in the final Constitution, see *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 12 BCLR 1696 (CC).

decisions are not legally binding, this could be referred to as a mechanism for the “soft protection” of socio-economic rights, emphasising the programmatic involvement of all sectors in government in the implementation of socio-economic rights.

The role played by the two institutions mentioned above should of course be seen in the context of and in interaction with the role of those institutions with an implicit, but vital function in the process of implementing socio-economic rights, such as the legislature, elected by popular franchise.

3 SOURCES OF LAW

The inclusion of socio-economic rights as justiciable rights in a national constitution is a relatively recent development, and the scale on which this was done in the South African Constitution is certainly unique. While some guidance could be obtained from the experience in other countries,⁶ there is a particularly strong need to obtain guidance from the jurisprudence which has been developed on the level of international law. The legal protection of socio-economic rights, after all, largely has its roots in international law.

The primary United Nations human rights instrument dealing with socio-economic rights is the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, to which South Africa is in the process of becoming a state party.⁷ Other international instruments with strong socio-economic rights dimensions are the Universal Declaration on Human Rights (1948),⁸ the Convention on the Elimination of All Forms of Discrimination Against Women (1979)⁹ and the Convention on the Rights of the Child (1989).¹⁰ South Africa is a state party to the latter two conventions.

The applicable regional instrument, from the South African point of view, is the African Charter on Human and Peoples’ Rights, to which South Africa is a state party. The African Charter contains both civil and political and socio-economic rights, which, when the African Court on Human Rights is operational, will in principle be justiciable.¹¹ Other regional instruments that deal with economic and social rights are the European Social Charter (1961) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”) (1988) which is not yet in force.

The international body tasked with the supervision of compliance with the ICESCR by state parties is the Committee on Economic, Social and Cultural Rights (“the Committee”). As is the case with most treaty monitoring bodies which deal with socio-economic rights, they receive regular

6 See e.g. De Vos 1997.

7 See Liebenberg 1995.

8 A 22-26.

9 A 3 and 10-14.

10 A 4, 6(2), 19, 20, 24, 26-29, 31.

11 For discussion, see Viljoen 1998.

reports from states parties on the realisation of these rights in the respective countries. The reports are submitted by the governments in question, but the practice has developed that NGOs also submit alternative or “shadow” reports, which are then considered alongside those of the states when performance of the state in question is evaluated.

The Committee on Economic, Social and Cultural Rights has issued a number of General Comments on the ICESCR, which are highly influential in the interpretation of socio-economic rights in general. On a more informal level bodies of experts have also formulated similar guidelines, the most important being the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* of 1986, the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* of 1997 and the *Bangalore Declaration and Plan of Action* of 1995.¹²

4 NORM SETTING AND NORM ENFORCEMENT

In what follows the most important provisions of the South African Constitution which deal with socio-economic rights will be discussed, with reference to the international documents discussed above where necessary.

4.1 Norm setting

The Preamble to the Constitution starts by recognising the injustices of the past, and then sets out national objectives, including the goal of establishing “a society based on democratic values, social justice and fundamental human rights”. Thereafter a wide range of socio-economic rights are recognised alongside civil and political rights as human rights in the Bill of Rights. The very structure of the Bill of Rights is designed to emphasise the fact that socio-economic rights in the South African Bill of Rights are part and parcel of the wider concept of human rights. Socio-economic rights are not listed separately under their own heading or even grouped together – they are interspersed between the other rights, on an equal level, emphasising the interdependence and indivisibility of the different generations of rights.

4.1.1 General provisions

A number of general provisions in the Bill of Rights apply to all the rights contained in the Bill of Rights, including the socio-economic rights, and are crucially important when the status and scope of these rights are considered. Before the specific rights are considered, these general provisions will now be considered.

The most important general provision which describes the duties imposed on the state by the rights contained in the Bill of Rights – including the socio-economic rights – is section 7(2), which provides that “[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights”. Exactly what these terms mean is not defined in the Constitution, but the jurisprudence developed on the international level does provide some guidelines.

12 For a discussion, see Hunt 1996; Donders 1997; Brand 1998.

Applied in the context of socio-economic rights, the obligation to *respect* means that the state itself has a negative duty not to interfere with the existing enjoyment of these rights. An example of a violation of this duty would be where the state, without proper justification or procedure, demolishes the shacks of squatters, thereby removing their existing access to housing. The duty to *protect* places a positive duty on the state to protect the bearers of these rights from unwarranted interference by private or non-state parties, or at least to provide an effective remedy should that have happened. Applied to the right to access to sufficient food for instance, this duty implies that the state is under an obligation to regulate the prices of basic foodstuffs, in order to ensure that they remain within the reach of ordinary people. The obligation to *promote* imposes a positive duty on the state to ensure that people are aware of their rights. The obligation to *fulfil* refers to the positive obligation on the state to ensure the full realisation of the rights in question. Applied to socio-economic rights, the duty to fulfil means that, except to the extent that this is excluded through internal qualifiers (and of course the general limitations clause), the state must ensure that everyone within its jurisdiction ultimately receives the social goods in question.¹³

The second general provision which has a potential impact on socio-economic rights that should be mentioned here is section 8(2), which provides as follows:

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

The implications are that in appropriate cases socio-economic rights do not only bind the state, and consequently apply to the “vertical” relationship between individuals and the state, but could also apply “horizontally”, in respect of the relationship between private entities. This is a controversial issue and its full implications have not yet been resolved. As will be pointed out, the provision on arbitrary evictions¹⁴ clearly binds private persons, and it is submitted that the provision that no one shall be denied emergency medical treatment¹⁵ will also bind private parties.

It should also be pointed out that all socio-economic rights – like other rights in the Bill of Rights – in addition to internal qualifiers where applicable, are subject to the general limitation clause contained in section 36.

4.1.2 *Specific rights*

When we turn from general provisions to the actual way in which the socio-economic rights are formulated in the Bill of Rights, it becomes clear that two categories of rights can be identified. As was indicated above, there are those with a fairly standard list of internal qualifications, and those without these qualifications. The standard qualifications referred to

¹³ See the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* para 6.

¹⁴ S 26(3).

¹⁵ S 27(3).

typically provide that only "access" to the social good in question needs to be provided; that this is to be done "subject to available resources", and that only "reasonable legislative and other measures" are to be taken towards the "progressive realisation" of these rights. Because these internal qualifications in the South African Constitution are similar in formulation to qualifications attached to economic and social rights in the ICESCR, some guidance on the meaning of these terms may be obtained through reference to the international jurisprudence referred to above. The formulation of some socio-economic rights in the South African Constitution as rights to "access" to certain social goods, rather than as direct rights to the social goods in question, does not reflect the formulation of socio-economic rights in the ICESCR or other international instruments, where rights are formulated as direct rights. This formulation does, however, give expression to the interpretation attached to the rights on the international level as in the first instance rights to the creation of an enabling environment rather than rights to the provision of specific social goods.

The point of departure on the international level with regard to socio-economic rights is that of individuals who, given the right kind of enabling environment, are able to acquire the social goods implied by these rights for themselves.¹⁶ The initial obligation of states in terms of the rights is therefore to create the right kind of environment within which self-sufficient individuals are able to acquire social goods for themselves and not to provide the social goods directly, except in certain exceptional cases.

The phrasing of the rights in the South African Constitution as rights "to have access to" social goods points towards the application of the above understanding of the state's obligations. If one takes the example of the right to access to sufficient food,¹⁷ this means that the state is not ordinarily required to provide food to the population, but only to ensure that enough food of sufficient quality is available at affordable prices, so that ordinary people can reasonably access that food. Only where individuals or groups of people are objectively unable to acquire food for themselves, for example in the case of natural disaster or famine, or other forms of destitution, does the state become responsible for the actual provision of food. For the rights phrased as "access" rights, there is in other words, at least in the first instance, no absolute entitlement to the provision of the social goods in questions, free of charge and on demand.

The phrase "subject to available resources" in the South African Constitution mirrors the phrase "to the maximum of its available resources" found in article 2(1) of the ICESCR. The Committee on Economic, Social and Cultural Rights has made a number of observations about this qualification. It is intended to inject an element of realism into the discourse surrounding these rights, ensuring that the state is not required, as a matter of absolute obligation, to do more than it has the resources to do. It is, however, not a blanket excuse for failure to realise the right in question: States parties are required to "... ensure the widest possible enjoyment of

16 Craven 1995: 120-121.

17 S 27(1)(b).

the relevant rights under the prevailing circumstances".¹⁸ Even if resources are inadequate, the State must be able to show that it uses all the resources at its disposal, to the maximum extent, to satisfy its obligations in terms of the rights as a matter of priority.

The description of the means through which the state is required to realise the qualified socio-economic rights in the South African Constitution ("reasonable legislative and other measures") are similar to those mentioned in article 2(1) of the ICESCR ("all appropriate means, including particularly the adoption of legislative measures"). With regard to this qualification, the Committee has indicated that, although legislative measures are highly desirable and often indispensable, the adoption of such measures is by no means exhaustive of the obligations imposed on state parties. Many other measures can be appropriate (or in the South African context "reasonable"), depending on the circumstances. Examples of measures other than legislative efforts that may be appropriate ("reasonable") are the provision of judicial and other effective remedies for violations of the rights, and administrative, financial, educational and social measures.¹⁹

The last standard internal qualifier, the requirement that the state is only obliged to achieve the "progressive realisation" of the rights in question, is also mirrored in article 2(1) of the ICESCR by the requirement that states parties must "take steps . . . with a view to achieving progressively the full realisation of the rights recognized". Because the full realisation of socio-economic rights (building hospitals and universities, training doctors, et cetera) takes time, an obligation to realise the rights fully immediately would be unrealistic – the obligation is accordingly tempered to require only the full realisation of the rights over time. Again this is not a blanket reprieve, allowing the state to postpone fulfilling its obligations indefinitely. The state must "move as expeditiously and effectively as possible" toward the full realisation of the rights.²⁰ The state must take at least some steps toward the realisation of the rights in question immediately, with others to follow as soon as objectively possible. The state must also be able to show that measurable progress towards the realisation of the rights is being made. Any retrogressive measures, limiting or removing existing entitlements, would require special justification.²¹

The Committee has also pointed out that, even though the full realisation of the rights can occur over time, certain minimum essential levels of realisation have to be provided immediately (the so-called "minimum core content" of the rights). If a significant number of individuals within a state is deprived of, for instance, essential basic foodstuffs, or essential primary health care, then that state would *prima facie* be in violation of the rights to food and health care, even though generally it only has to realise these rights progressively.²²

18 General Comment No 3 (1990) para 11.

19 General Comment No 3 (1990) paras 4, 5 and 7.

20 General Comment No 3 (1990) para 9.

21 See the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, para 8.

22 General Comment No 3 (1990) para 10.

Where socio-economic rights in the Constitution are not subject to the internal qualifications discussed above, the obligation on the state is much more immediate, and could be compared to the duties imposed by most civil and political rights, including duties to directly provide certain benefits.

Based on the difference between provisions that do include these qualifications, and those that do not, the different kinds of obligations placed on the state can consequently be distinguished. Where the internal qualifications do not apply, one is dealing with what could be described for the sake of convenience as “priority obligations”; those rights in respect of which they do apply could be described as “internally qualified rights”.

“Priority obligations” are created by a number of provisions. First, section 28(1)(c) provides that every child has the right “to basic nutrition, shelter, basic health care services, and social services”.

Second, section 29(1)(b) provides that everyone has the right “to a basic education, including adult basic education”. In *In re The School Education Bill of 1995 (Gauteng)*²³ the Constitutional Court, dealing with the right to basic education enshrined in section 32(a) of the interim Constitution, held that this right imposes positive obligations on the State to provide education of a certain standard to every person, and not merely a negative obligation allowing a person to pursue his or her own education.²⁴ In *Motala and Another v University of Natal*²⁵ the then Supreme Court discussed the meaning of the term “basic education” as used in section 32(a) of the interim Constitution and held that basic education does not include education at tertiary institutions, or other forms of higher education.

Third, section 35(2)(e) provides that every detainee, including every sentenced prisoner, has the right

“to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment”.

The implications of this section, in so far as it relates to adequate medical treatment, have been interpreted in *B and Others v Minister of Correctional Services and Others*.²⁶ In this case HIV positive prisoners claimed that they had a right to receive certain anti-viral medication at state expense. Such medication was provided to non-paying patients at provincial hospitals outside prison only under very limited circumstances. Internationally accepted medical practice, however, considered anti-viral therapy to be necessary in such cases.

The Court held that the question as to what constitutes “adequate” medical treatment of prisoners should not be established with exclusive reference to what is being prescribed outside of prison – prisoners might be entitled to a higher level of care. This does not mean that they are entitled to optimal medical care, irrespective of costs, since budgetary

23 1996 4 BCLR 537 (CC).

24 Para 9 per Mohamed J.

25 1995 3 BCLR 374 (D).

26 1997 6 BCLR 789 (C) (also cited as *Van Biljon and Others v Minister of Correctional Services and Others* 1997 4 SA 441 (C)).

constraints do play a role in determining what is to be considered “adequate”. However, because the Department had not proved that it did not have the necessary funds to provide the anti-viral treatment, the application was granted.

It could also be said that sections 26(3) and 27(3) create priority obligations. Section 26(3) provides that

“[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions”.

In *Despatch Municipality v Sunridge Estate and Development Corporation (Pty) Ltd.*²⁷ the High Court held that section 3B of the Prevention of Illegal Squatting Act 52 of 1951, which permitted the summary demolition of unauthorised buildings or structures, without a court order, was in conflict with section 26(3) and accordingly invalid.

Section 27(3) guarantees that “[n]o one may be refused emergency medical treatment”. This provision was considered in the case of *Soobramoney v Minister of Health, KwaZulu-Natal*,²⁸ which concerned an application for kidney dialysis at state expense by an unemployed person. In turning down the application, the Court said that the treatment of chronic diseases was not covered.²⁹ The section merely provided that “a person who suffers a sudden catastrophe which calls for immediate medical attention should not be refused ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment”.³⁰

“Internally qualified rights” are created by the following provisions:

First, section 26 which reads:

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

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

Second, section 27 which reads:

“(1) Everyone has the right to have access to –

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

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

Section 27(1)(a) and section 27(2) (as it relates to section 27(1)(a)), received the attention of the Constitutional Court in the *Soobramoney* case referred to above. The applicant in this case claimed the provision of kidney dialysis treatment from a provincial state hospital, based on his right

27 1997 8 BCLR 1023 (SE).

28 1998 1 SA 765 (CC).

29 Para 21.

30 Para 20.

to emergency medical treatment³¹ and his right to life,³² on a substantive reading. The Court dismissed the claim based on these two rights, but then went further to discuss the possibilities of success of the claim had it been brought on the basis of the section 27(1)(a) right to access to health care services. The Court stated that section 27(1)(a) was qualified by section 27(2), which, *inter alia*, determines that the state is only required to give effect to the section 27(1)(a) right "within its available resources". The Court then found that the respondent had shown that it had limited resources available for the provision of kidney dialysis treatment (this was not only true about the particular hospital involved, but applied nationally) which did not allow it to provide the treatment to all who required it. The respondent had further shown that it had developed a set of reasonable and fair criteria according to which to decide who would receive the limited treatment available and who would not and that those criteria had been applied in good faith in the instant case. Stating that courts would be "slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters", the Court found that the claim would also have failed, had it been brought on the basis of section 27(1)(a).

Finally, section 29(1)(b) provides that everyone has the right "to further education, which the state, through reasonable measures, must make progressively available and accessible".

A set of rights that are enshrined in the Bill of Rights, and that can be classified as socio-economic rights, but which do not fit easily into the scheme of "priority" rights and "internally qualified" rights set out above, are the rights concerning labour relations found in section 23 of the Bill of Rights. These are:

- the right of everyone to fair labour practices;
- the rights of workers to form and join, and to participate in the activities and programmes of a trade union and to strike;
- the rights of every employer to form and join, and to participate in the activities and programmes of an employers' organisation and to engage in collective bargaining; and
- the rights of trade unions and employers' organisations to determine their own administration, programmes and activities, to organise, form and join a federation, and to engage in collective bargaining.

As was pointed out above, all socio-economic rights, the "priority" rights, the "internally qualified" rights, as well as the labour rights, are subject to the general limitations clause.

4.2 Norm enforcement

Two distinctive kinds of norm enforcement mechanisms could play a role. As was stated above, they are the "hard" enforcement mechanism of the courts, and the "soft" mechanism of the South African Human Rights Commission.

³¹ S 27(3).

³² S 11.

4.2.1 *Judicial enforcement*

The “hard” or legally binding enforcement mechanism of the courts could play a role in two different ways. The first is through the direct justiciability of socio-economic rights, that is, an application could be based directly on one of the rights in question. An example involving a priority obligation would be where the state fails to provide basic education to those who cannot afford it; an example involving internally qualified rights could be the closing of a rural clinic, when those who used to be treated there are left with no other alternatives.

In the few cases decided on socio-economic rights so far in South African, courts have shown themselves, with regard to priority rights, to be willing to enforce positive obligations, with direct and substantial monetary implications, against the state.³³

The only reported case in which one of the qualified rights came under discussion was the *Soobramoney* case referred to above. In this case the Constitutional Court, on its own initiative, discussed the possibilities of success of a claim for the provision of kidney dialysis treatment by the state, if it had been brought on the basis of the section 27(1)(a) right to access to health care services.

The Court pointed out that the obligations imposed by section 27(1)(a) were directly qualified by section 27(2). As a consequence the Court applied a form of substantive administrative review to the decision of the particular provincial hospital not to provide Mr Soobramoney with kidney dialysis treatment. It found that the hospital had clearly and convincingly demonstrated that its resources only allowed it to provide dialysis treatment to a limited number of patients. The decision of which patients would get the benefit of the treatment and which would not was taken according to a set of rational and objectively fair criteria, which had been applied fairly in the particular case. The Court accordingly decided not to overturn the decision of the hospital.

The *Soobramoney* decision provides some clues as to the Constitutional Court’s approach to the implications of the qualified socio-economic rights. In the first place the Court made it clear that the qualifications imposed on a qualified right such as the section 27(1)(a) right to access to health care have the implication that decisions related to the implementation of these rights are in the first place the province of political organs and service providers and not of the courts. The Courts will review the decisions of these organs in the light of the rights protected in the Bill of Rights, but in doing so would show deference to their discretion.

The Court further emphasised that, in the application of the qualified socio-economic rights, the issue would often be one of equitable distribution of limited resources. In this context the rights of individuals to the provision of particular benefits would have to be balanced against the needs of the broader community.

³³ See the *B*-case referred to above, where the Department of Correctional Services was ordered to provide a particular type of HIV treatment, at great expense, to prisoners.

Secondly, and importantly, courts could enforce socio-economic rights indirectly, by allowing these rights to exercise some kind of weight in the process whereby the scope and reach of other rights are determined. The fact that socio-economic rights are included is bound to exercise a significant role in the process of interpreting and limiting civil and political rights. The recognition of socio-economic rights in the Constitution, and the duties which this places on the state, could, for example, bring a court to the conclusion that the protection provided by certain civil and political rights is more limited than would have been the case if socio-economic rights were not recognised in the Bill of Rights. An example would be where the state requires students in certain disciplines, such as health, to perform community service. Civil and political rights such as equality, freedom of movement and the right against forced labour may be infringed by such a practice, but where the state is now under a constitutional duty to realise socio-economic rights, such as health rights, it would be much easier for the state to justify such requirements.³⁴

4.2.2 *South African Human Rights Commission*

In contrast with the courts, decisions of the South African Human Rights Commission are not legally binding, and could consequently be called a “soft” enforcement mechanism. It nevertheless has the potential to play a significant role. The South African Human Rights Commission has a monitoring role in respect of all human rights, but it has a special role to play as far as six sets of socio-economic rights, and the rights concerning the environment in the Bill of Rights, are concerned. This mandate is created by section 184(3) of the Constitution, which provides as follows:

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

The closest analogy to this unique provision in the South African Constitution is the international reporting procedures created by conventions such as the International Covenant on Economic, Social and Cultural Rights (1966). As has been indicated above, in terms of these conventions state parties have to submit reports on a regular basis to international treaty monitoring bodies, who then have to assess their performance in complying with the norms articulated in the Convention.

It has been said that the objective with these international reporting procedures are inspection and introspection. The performance of the state party in question is assessed from the outside, but in the process the state itself is also compelled to look at what it has achieved in respect of socio-economic rights in a critical way. The underlying idea is that an obligation of justification is placed on the state in this respect.

The domestic reporting procedure created by section 184(3) is largely moulded on the international model, and it has potentially the same

34 See Heyns 1997.

objectives, but is unique in the sense that it operates on the domestic level. Should international practice be followed by the South African Human Rights Commission, NGOs will have the opportunity to submit their own reports to the Human Rights Commission on the rights in question, which will then be considered alongside those submitted by state organs. Based on inputs from both sides the Human Rights Commission will then be in a position to prepare an independent and objective evaluation, which is then presented to Parliament. This process ideally leads to "constructive dialogue" between organs of state, the Human Rights Commission, Parliament and the public. Ultimately the only sanction is public shame – enforcement through embarrassment as on the international level.

The constitutional protection granted to socio-economic rights in the South African Constitution as described above is truly unique. Only a number of constitutions recognise socio-economic rights as human rights; very few made them justiciable at all; none give the courts potentially as large a role as is the case in South Africa, and no national system has a domestic reporting procedure on socio-economic rights.

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