TO ADJUDICATE AND ENFORCE SOCIO-ECONOMIC RIGHTS: SOUTH AFRICA PROVES THAT DOMESTIC COURTS ARE A VIABLE OPTION

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Historically, the development of socio-economic rights has lagged behind their civil and political counterparts. In recent years, this has started to change. This paper examines the South African courts' approach to the adjudication and enforcement of socio-economic rights. It is argued, that although the approach is not devoid of criticism, it assuages the fears typically associated with socio-economic rights adjudication and enforcement. The South African decisions clearly demonstrate that a national judiciary can have an important role in the enforcement of socio-economic rights.

I INTRODUCTION

In the latter half of the 20th century, international law began to transform. With the atrocities of the Second World War still fresh in the collective mind, international law expanded beyond its perceived scope and human rights emerged as a principle focus.[2] Human rights 'are regarded as those fundamental and inalienable rights which are essential for life as a human being.'[3] The duty to clarify the content of these rights was handed to the United Nations (UN).[4] Within three years, the UN adopted the *Universal Declaration on Human Rights* (*UDHR*).[5] The *UDHR* contains a list of rights that are considered fundamental to a person's well-being.[6] These rights were subsequently split into two separate international treaties: the *International Covenant on Civil and Political Rights (ICCPR)*[7] and the *International Covenant on Economic, Social and*

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2 J King Gamble et al, 'Human Rights Treaties: A Suggested Typology, An Historical Perspective' (2001) 7 *Buffalo Human Rights Law Review* 33, 39.

3 Ibid 34.

4 H Steiner and P Alston, *International Human Rights in Context* (Oxford University Press, 2nd ed, 2000) 137.

5 GA res 217A (III), UN Doc A/810, 71 (entered into force 10 December 1948).

6 Ibid. Although not originally intended to be legally binding, some of the rights in the *UDHR* have attained the status of customary international law. See: Steiner and Alston, above n 4, 143.

7 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976).

Cultural Rights (ICESCR).[8] While the preambles of both the *ICCPR* and the *ICESCR* state that the rights are interrelated and interdependent, many countries have treated the two sets of rights quite differently.[9] The rights contained in the *ICESCR* have been heavily criticized and remain significantly underdeveloped in comparison to those contained in the *ICCPR*.

It has been claimed that socio-economic rights have inherent flaws that render these rights non-justiciable, namely: the imprecision of the rights; the vagueness of the rights; and the positive obligations that arise from the rights. Furthermore, it has been argued that any judicial enforcement of socio-economic rights would result in judicial policy making. It is believed that by giving courts the power to enforce these rights, the separation of power within the state is threatened and it can result in judicial dictatorship.[10] Recent international developments have started to change attitudes towards socio-economic rights.

In December 2008, the UN adopted an individual complaints mechanism for violations of socio-economic rights.[11] This means that any country that signs on to the Optional-Protocol to the *ICESCR* (*OP-ICESCR)*, may be forced to answer to an international body for violations of the *ICESCR*. The typical criticisms associated with socio-economic rights will not justify their lack of implementation. If a state wishes to avoid adjudication of socio-economic violations under this new mechanism, their own domestic court system will have to be able to enforce socio-economic rights. Aside from merely being able to hear socio-economic rights disputes, domestic courts will have to be able to provide an effective remedy for their violation. This paper will argue that socio-economic rights can be properly adjudicated in a domestic court system and that courts can offer creative and effective remedies for socio-economic violations. An examination of South African jurisprudence will be used to support this assertion. The paper will begin with an examination of the development of socio-economic rights.

II HISTORY AND DEFINITIONS

A *The History of Socio-Economic Rights*

Prior to beginning the historical analysis, it would be useful to define socio-economic rights. Accordingly, '[s]ocio-economic rights are those human rights that aim to secure for all members of a particular society a basic quality of life in terms of food, water, shelter, education, health care and housing.'[12] Socio-economic rights and civil and political rights both originate from the *UDHR*, and were subsequently split. Numerous

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8 Opened for signature 16 December 1966, 999 UNTS 3, 6 ILM (entered into force 3 January 1976).

9 L M Keller, 'The American Rejection of Economic Rights as Human Rights & the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?' (2003) 19 *New York Law School Journal of Human Rights* 557, 562.

10 E Wiles, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' (2006-7) 22 *American University International Law Review* 35, 42; see also: N Jheelan, 'The Enforceability of Socio-Economic Rights' (2007) Issue 2 *European Human Rights Law Review* 146, 152.

11 The General Assembly adopted Resolution A/REs/63/117 on 10 December 2008. See the United Nations Human Rights Commission website for more information: <http://www.ohchr.org/EN/Pages/WelcomePage.aspx> at 12 August 2009.

12 G Erasmus, 'Socio-Economic Rights and Their Implementation: The Impact of Domestic and International Instruments' (2004) 32 *International Journal of Legal Information* 243, 252.

reasons, including the global political situation at the time of drafting, have been cited for the decision to split the rights.[13] The consequences of that decision are still felt today; with socio-economic rights suffering the repercussions. Beginning in the 1970's, through various declarations and world conferences, the UN has tried to remind states that the two covenants and the rights contained therein are 'universal, indivisible and interdependent and interrelated.'[14]

B *Human Rights Obligations*

Human rights, despite their classification as civil and political or socio-economic, share some identical characteristics. For instance, all human rights impose three types of duties on a state: the duty to respect; the duty to protect; and the duty to fulfill.[15] The duty to respect requires a state to cease any acts that directly violate the right. Since there is no requirement for government action or expenditure, the duty to respect is characterised as a negative duty.[16] A state's failure to respect a human right is often thought of only in the context of violations of civil and political rights; however, it should also be noted that many 'violations of socioeconomic rights consist of failures to respect.'[17]

The second dimension of a state's obligation is the duty to protect. This duty requires a state to prevent a third party from violating or interfering with an individual's enjoyment of their human rights.[18] Traditionally, this has also been viewed as imposing a negative duty.[19] However, this obligation is expanding and is now 'encompassing a responsibility on states to regulate the behavior of third parties so that the possibility that private persons, acting within the private domain, can violate these rights is

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13 Drafting for the Covenants occurred during the cold war; each side took a different view of socio-economic rights. The United States still questions the justiciability and enforceability of socio-economic rights and it has yet to ratify the treaty. See: Keller, above n 9, 560-4. See also: D Olowu, 'Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees' (2006) 69 *Saskatchewan Law Review* 39.

14 United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted 25 June 1993, reprinted in (1993) 14 *Human Rights Law Journal* 352, [5] as found in Steiner and Alston, above n 4, 237. See generally: C Scott, 'Reaching Beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights"' (1999) 21 *Human Rights Quarterly* 633, 633 where he argues 'for a return to the original promise of the *UDHR*: human dignity should be pursued in light of both the overarching purposes and the underlying values of human rights protection, rather than under the constraint of false dichotomies.'

15 See: P Hunt, 'The Right to Health: a Way Forward at the International Level' in P Hunt (ed), *Reclaiming Social Rights: International and Comparative Perspectives* (1996) 107, 112. See also: V Dankwa, C Flinterm and S Leckie, 'Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 705, 713. It should be noted that this approach to human rights obligations is not universally accepted. See: M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008) 13.

16 D Marcus, 'The Normative Development of Socioeconomic Rights Through Supranational Adjudication' (2006) 42 *Stanford Journal of International Law* 53, 57.

17 Ibid 58. See: A Chapman, 'A "Violations Approach" for Monitoring the International Covenant on Economic Social and Cultural Rights' (1996) 18 *Human Rights Quarterly* 23.

18 A E Yamin, 'The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social and Cultural Rights into the Mainstream Human Rights Agenda' (2005) 27 *Human Rights Quarterly* 1200, 1216.

19 R Pejan, 'The Right to Water: The Road to Justiciability' (2004) 36 *George Washington International Law Review* 1181, 1187.

precluded.'[20] This expansion would require more government action and expenditure in terms of implementing and enforcing new laws.

Finally, the duty to fulfill requires a state to take action to ensure a right.[21] This obligation moves beyond a state's non-interference and will require the state to take action.[22] It is often viewed as the most difficult to implement because it 'effectively requires the state to take positive steps that often have long-term implications'.[23] This obligation is most often identified with socio-economic rights. Despite proclamations that all human rights place these types of obligations on a state, socio-economic rights still languish behind their civil and political counterparts. As will be examined in the next section, the very structure of the *ICESCR* distinguishes them from the *ICCPR* as the less important human rights.

C *The ICESCR*

The *ICESCR* came into force on 3 January 1976 and currently has 157 state parties.[24] As stated by the Committee on Economic, Social and Cultural Rights (CESCR), '[t]he central obligation in relation to the Covenant is for state parties to give effect to the rights recognized therein.'[25] Furthermore, the CESCR has attempted to strengthen socio-economic rights by claiming that such rights:

> must be recognized in appropriate ways within the domestic legal order, appropriate means of redress or remedies must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.[26]

The very structure of the *ICESCR* has made the recognition and implementation of socio-economic rights difficult. Historically, two key features of the *ICESCR* differentiated it from the *ICCPR*: the first is found in article 2, the progressive realisation clause; the second dealt with the lack of an enforcement mechanism.

1 *Article 2*

The rights contained in the *ICESCR* are subject to a standard of progressive realisation as outlined in article 2. Article 2 states:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full

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20 Dankwa, Flinterm and Leckie, above n 15, 714.

21 Pejan, above n 19.

22 I E Koch, 'The Justiciability of Indivisible Rights' (2003) 72 *Nordic Journal of International Law* 3, 15. Koch sees the duty to fulfill a human right as a state having to transfer to a welfare based system. Government action will be required. The type of action is varied, but can include implementing social programs.

23 Pejan, above n 19, 1187.

24 For the latest information on the status of the *ICESCR*, visit the United Nations Human Rights: Office the High Commissioner for Human Rights, online: <http://www.ohchr.org/EN/Pages/WelcomePage.aspx> at 14 August 2009.

25 *General Comment No 9: The Domestic Application of the Covenant* (1998) UN CESCR, comm on econ, soc and cultural rts, 19th sess, agenda item 3, UN Doc E/C 12/2000/4, [1].

26 Ibid [2].

> realization of the rights recognized in the present covenant by all appropriate means, including particularly the adoption of legislative measures.[27]

The progressive realisation standard means that not all of the obligations arising from the rights are immediately enforceable; rather, a state must strive to achieve these rights. The notion of progressive realisation also means that there can be no fall in a standard. Once a state has achieved a certain level of realisation of a socio-economic right, any actions or programs that fall short of the state established standard will be considered a violation.[28] Comparatively, the rights contained in the *ICCPR* are not subject to progressive realisation; a state must immediately implement and enforce the rights contained therein.[29] As will be noted in the paper, the progressive realisation standard creates some issues for socio-economic rights; it is often blamed for the rights being imprecise and vague. Unfortunately, this is not the only criticism of the *ICESCR* structure.

2 *The Optional Protocol*

Until recently, the rights outlined in the *ICESCR* did not have an individual complaints system.[30] This historical failure has been cited as a key factor which has contributed to the underdevelopment of socio-economic rights.[31] It is argued that while:

> [s]tates may permit their own courts to scrutinize budgetary decisions when they have committed to such adjudication through the legislative process … [i]nternational adjudication of these sorts of decisions … may seem an improper intrusion into sovereign concerns.[32]

Nonetheless, it was believed that 'the absence of strong enforcement mechanisms in the *ICESCR* has marginalized economic, social and cultural rights and stymied their full realization.'[33]

The adoption of the *OP-ICESCR* has been described as 'a milestone which will mark a high point of the gradual trend towards greater recognition of the indivisibility and interrelatedness of all human rights.'[34] Although many states have yet to adopt the *OP-ICESCR*, it is easy to envisage that countries, such as Australia, Canada and many European Union countries, may face public pressure from various lobby groups and non-governmental organisations (NGOs) to sign on to the treaty. In order for these

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27 *ICESCR*, opened for signature 16 December 1966, 999 UNTS 3, 6 ILM, art 2 (entered into force 3 January 1976).

28 If a state does take retrogressive measures, the state will have to justify their actions. P Hunt, *Mission to the WTO Commission on Human Rights*, 60th sess, E/CN 4/2004/49/Add1 (2004) [40].

29 S Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 81, 93.

30 Marcus, above n 16, 54.

31 Ibid.

32 Ibid 66.

33 M J Dennis and D P Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?' (2004) 98 *American Journal of International Law* 462, 463.

34 Statement by Ms Louise Arbour, High Commissioner for Human Rights to the Open-Ended Working Group on *OP-ICESCR,* 5th sess, 31 March 2008, as cited in C Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2008) 8(4) *Human Rights Law Review* 617, 618.

states to avoid a number of potentially embarrassing claims of violations, they may consider strengthening their own domestic enforcement system. Violations of socio-economic rights will only be heard by the CESCR after the exhaustion of all domestic remedies; if a court of competent jurisdiction were able to hear the case and provide an effective remedy, a complaint would not proceed past the domestic courts.[35] The remainder of this paper will examine why the traditional criticisms are no longer viable and how states can strengthen their own court systems to ensure the enforceability of socio-economic human rights.

III THE INHERENT CHARACTERISTICS OF SOCIO-ECONOMIC RIGHTS

The justiciability[36] and enforceability[37] of socio-economic rights will now be discussed. There will be two major sections in this analysis. The first will be an examination of the inherent characteristics of socio-economic rights which raise the argument that these rights are non justiciable. Namely, the paper will examine the arguments that socio-economic rights are vague, imprecise and positive in nature. These criticisms and their counter-arguments will only be briefly examined because they 'are well-rehearsed and some commentators have declared the debate almost over.'[38] The utter volume of socio-economic case law indicates that the content of the rights can be delineated and that socio-economic rights can be justiciable.[39] In essence, the historical arguments have withered and are now merely a 'quiet echo from the past'.[40] Nonetheless, a brief examination will help contextualise the debates surrounding socio-economic adjudication. The second area of analysis will center on the inherent problems of court adjudication and the institutional limitations of the courts; this raises concerns about both the justiciability of socio-economic rights and the actual enforcement of these rights. The analysis surrounding the inherent problems of court adjudication will focus on the separation of powers principle and will thus examine the justiciability of socio-economic rights. The institutional limitations analysis will deal with budgetary consideration and judicial competency, and therefore, will tie in with the enforceability of socio-economic rights.

A *Vagueness and Imprecision*

Socio-economic rights are often criticised for being imprecise and vague. It is claimed that the rights are 'by nature, open-ended and indeterminate, and there is a lack of conceptual clarity about them.'[41] Essentially, the rights lack accuracy because they fail

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35 The General Assembly adopted Resolution A/REs/63/117 on 10 December 2008, art 3(1) *OP-ICESCR*. See the United Nations Human Rights Commission website for more information: <http://www.ohchr.org/EN/Pages/WelcomePage.aspx> at 12 August 2009. See generally: Mahon, ibid.

36 Justiciability 'refers to the ability to judicially determine whether or not a person's right has been violated or whether the state has failed to meet a constitutionally recognized obligation to respect, protect or fulfill a person's right.' C Scott and P Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1, 17.

37 Enforceability refers to legal enforceability; namely enforcement of a right through a national court system and the courts ability to impose its judicial decisions.

38 Langford, above n 15, 2.

39 Ibid 29.

40 Ibid 30.

41 Wiles, above n 10, 50.

to outline the extent and nature of the obligations that are imposed on a state.[42] For instance, with the right to health, a state is obliged to improve all aspects of environmental and industrial hygiene, yet nowhere in the *ICESCR* does it outline the programs or laws that must actually be implemented.[43] This means that each state is left to interpret the standards as they see fit.

Furthermore, socio-economic rights are vague in regards to the timeline for state compliance. As mentioned, article 2 of the *ICESCR* imposes upon states an obligation of progressive realisation. This requirement 'contributes to the vagueness of socioeconomic rights since states can never be sure exactly what their obligations are at any particular time.'[44] This lack of precision challenges the very justiciability of socio-economic rights. In order for a court to hear a matter, it must know the obligations that the state is required to meet; hence, without a clear delineation of the content and timeline of socio-economic rights a court will be unable to render a decision.[45] The remainder of this section will demonstrate that these concerns are no longer justified.

It is important to note that simply because a right is imprecise or vague does not mean that it cannot be adjudicated before a court of law. Historically, civil and political rights were criticised as being imprecise and vague.[46] While these rights were imprecise at the outset, state enacted laws and judicial review have helped define these rights. To this day, civil and political rights have yet to be completely delineated.[47] Thus, while critics can argue that socio-economic rights are not as precisely defined as civil and political, it must be remembered, that:

> our present understanding of civil and political rights as fairly precise rights is due to the fact that treaty bodies such as the European Court of Human Rights and the Human Rights Committee, via individual petition procedures, gradually have defined the legal content of the rights.[48]

Aside from the theoretical discussion above, more concrete steps have been taken by the CESCR to show that socio-economic rights are not vague and imprecise. In recent years, the CESCR has begun to issue a series of General Comments which are meant to help clarify the scope and content of the rights contained in the *ICESCR*.[49] These Comments are a clear indication that such rights are capable of definition.[50] In fact, these General Comments have been used in South African jurisprudence to help define the scope of disputed socio-economic rights.[51] Aside from delineating the scope and content of the rights in the General Comments, the CESCR is 'of the view that a minimum core

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42 Jheelan, above n 10, 147.

43 ICESCR, opened for signature 16 December 1966, 999 UNTS 3, 6 ILM, art 12 (entered into force 3 January 1976).

44 Marcus, above n 16, 61.

45 Jheelan, above n 10, 147; ibid.

46 Wiles, above n 10, 53.

47 Ibid.

48 Koch, above n 22, 7.

49 Past topics include: the right to health, the right to water, and the right to education. For a complete list, see: Office of the United Nations High Commissioner for Human Rights, *Committee on Economic, Social and Cultural Rights – General Comments* <http://www2.ohchr.org/english/bodies/cescr/comments.htm> at 14 August 2009.

50 Wiles, above n 10, 51.

51 See: *Mazibuko and Others v The City of Johannesburg* [2008] 06/13865 (Unreported, Tsoka J, 30 April 2008) it discussed the General Comment on the right to water in [36], [37] and again in [128].

obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party.'[52] These minimum core obligations are also identified in the General Comments. As such, it is clear that institutionally, at the UN, there is a recognition that socio-economic rights are capable of precision and are thus justiciable before the courts.

B *The Positive Nature of Socio-Economic Rights*

Another major criticism surrounding socio-economic human rights is that they are positive in nature. As discussed, human rights impose three duties on governments: respect, protect and fulfill.[53] It is often argued that socio-economic rights only give rise to an obligation to fulfill; whereas, civil and political rights generally impose the former two obligations. This means that socio-economic rights give rise to a positive obligation and thus are positive rights. Since civil and political rights generally impose the duties to respect and protect they are viewed as negative rights.

Negative rights 'involve discrete cases, they examine precise rights and their remedies implicate only a cessation of action by government beyond the scope of judicial authority.'[54] This means that the court remedy is quite easy to identify and apply.[55] In disputes over socio-economic rights, the matter is not as simple. In order to ensure that socio-economic rights are met, such as the provision of medical services, education or access to clean drinking water, the state is required to act in a positive manner.[56] Normally, a state will be required to enact legislation or create social programs in order to fulfill their obligation; this requires significant expenditure, both in time and resources.[57] Given the distinction between civil and political rights and socio-economic rights, critics argue the positive nature of socio-economic rights renders them non-justiciable. Such an argument is oversimplified and many legal scholars have recognised that it is an invalid distinction.[58]

It is true that in most situations there will have to be government expenditure in order for a state to fulfill its socio-economic obligations; however, it is important to remember that the same can be said for civil and political rights. Since all human rights impose three obligations on a state, it follows that civil and political rights also impose positive obligations on a state.[59] For instance, in order to grant an individual a fair trial, the state will have to make courts and court resources available to the defendant. This obligation imposes a positive duty on the state and will require considerable government expenditure.[60]

Furthermore, despite the heavy emphasis on the positive aspects of a socio-economic right, it is possible for a state to violate non-positive aspects of a socio-economic right. As is evidenced by the South African's Constitutional Court decision in *Jaftha v*

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52 Chapman, above n 17, 409.
53 See generally: Hunt, above n 15.
54 E C Christiansen, 'Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court' (2006-7) 38 *Columbia Human Rights Law Review* 321, 345.
55 Erasmus, above n 12, 244.
56 Ibid.
57 Pejan, above n 19, 1182.
58 Scott and Macklem, above n 36, 46. See: Christiansen, above n 54, 346.
59 Dankwa, Flinterm and Leckie, above n 15, 713.
60 *R v Askov* [1990] 2 SCR 1199.

Schoeman and Others,[61] negative components of socio-economic rights do exist and can be violated.[62] A remedy to such a violation would be akin to one often associated with violations of civil and political rights. An argument that simply states that socio-economic rights are not properly justiciable because they are positive in nature fails to take into account the very nature of all human rights; namely, that both positive and negative obligations arise from each right.

IV THE PROBLEMS WITH COURT ADJUDICATION

Moving on from the characteristics of socio-economic rights; the paper will now turn to the discussion surrounding the court system. While the arguments criticising the characteristics of socio-economic rights have withered, 'a more persistent argument is that social rights adjudication is anti-democratic in nature.'[63] A key feature in a democratic system is the separation of powers between the three branches of government (legislature, executive and the judiciary); it has been argued that adjudication of socio-economic rights threatens this core principle of democracy. 'These concerns feature in a number of judgments, where Courts have addressed doctrines of separation of powers when dismissing cases, explaining an order or defining the boundaries of their powers.'[64] Furthermore, it is argued that such adjudication is beyond the understanding of the judiciary, and accordingly, court enforcement of socio-economic rights should be avoided.[65] Each of these arguments will be discussed, prior to turning to a brief canvass of case law in the area of socio-economic rights.

A *Separation of Powers*

The separation of powers principle rests in the basic notion that the powers and responsibilities of governing a state should be spread across the three branches of government.[66] With power being shared, it is hoped that corruption of state actors can be avoided.[67] In order for the principle to work, each branch must only act within their capacity and not encroach on another's domain. Separation of powers 'encompasses the notion that there are fundamental differences in governmental functions…which must be maintained as separate and distinct, each sovereign in its own area, none to operate in the realm assigned to another.'[68] The legislature lays down the general principles that the government is endorsing and the executive decides how to implement them.[69] The judiciary serves to oversee and review the application of those principles to ensure they accord with the rule of law.[70] With the adjudication of socio-economic rights, the lines between the different government branches blurs and critics argue that this can threaten the democratic legitimacy of the state.

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61 (2005) (2) SA 140 (CC) (South Africa).

62 In *Jaftha*, the Court 'examined a limitation on the negative aspect of a social right under the general limitations clause, the standard for assessing limitations on a civil or political right.' Christiansen, above n 54, 371.

63 Langford, above n 15, 31.

64 Ibid 21.

65 Jheelan, above n 10, 153; see also: Koch, above n 22, 30.

66 Jheelan, above n 10, 152.

67 Ibid.

68 P B Kurland, 'The Rise and Fall of the "Doctrine" of Separation of Powers' (1986) 85 *Michigan Law Review* 592, 593, as cited in Scott and Macklem, above n 36, 17-8.

69 Wiles, above n 10, 43.

70 Koch, above n 22, 30.

As discussed, socio-economic rights are viewed as having a large positive component which requires state action and expenditure.[71] As such, social programs are often implemented, with the executive deciding on key budget issues and programs based on the availability of resources.[72] It is believed that if a court enforced socio-economic rights, judges would make decisions regarding the types of programs the government implements. This would mean the court would begin deciding how the government allocated the budget, thus completely disregarding the separation of powers principle.

As with all the analysis thus far, this paper will begin by looking at the issue of judicial involvement by examining how civil and political rights are viewed. Generally, civil and political rights, being characterised as negative rights, are not viewed as a threat to the principle of separation of powers. It has been argued these rights have little budgetary considerations and the impact from judicial review is relatively minor.[73] With this point of view, it is easy to understand why it can be argued that civil and political rights are properly adjudicated before a court of law, while socio-economic rights are not. Fortunately, this argument is substantially flawed.

In *Schachter v Canada,*[74] the Supreme Court of Canada concluded that '[a]ny remedy granted by a court will have some budgetary repercussions, whether it be a saving of money or an expenditure of money.' Furthermore, simply because a right is classified as civil and political does not mean that substantial financial expenditure does not flow from a decision. In *Askov*, the Supreme Court of Canada heard a case dealing with the right to a fair trial; which is a civil and political right. In that decision, the Court ruled that the state must hold criminal trials in a more timely fashion.[75] This decision could have resulted in building additional court houses and hiring more judges and prosecutors; all would have had a significant budgetary impact. However, the Court never ruled how the government must meet this requirement; simply that it must. Ultimate power over budgetary considerations and implementation was left to the executive. It is easy to see that a similar approach could be adopted with socio-economic rights. This will be examined further in the final part of the analysis.

B *Political Legitimacy*

Another argument against court adjudication of socio-economic rights is tied to concerns about the political legitimacy of such adjudication.[76] This argument arises when discussing the appropriateness of having an unelected judiciary rule on a democratically elected government's social programs; and as a result, the allocation of state resources.[77] In most countries, judges are appointed to the bench; therefore, '[j]udges are not responsible to the electorate in the sense that the elected governments are … they should not perform a function where the allocation of state resources to targeted groups is decided.'[78] If this were to occur, the judiciary would be usurping the

71 Wiles, above n 10, 43.
72 Jheelan, above n 10, 150.
73 Ibid.
74 [1992] 2 SCR 679, [63].
75 *R v Askov* [1990] 2 SCR 1199.
76 Christiansen, above n 54, 347.
77 Ibid 348.
78 Erasmus, above n 12, 244.

role of the legislator and with all the power concentrated within one branch of the government 'democracy would be under serious threat'.[79]

While the above criticism is a concern, it too can be rejected. The very role of the courts is to question the decisions of the legislator and executive. In most cases involving the state, the court's primary obligation is to ensure that the actions of the government are carried out in a manner that respects the state's laws.[80] 'The essential argument is that courts are not being asked to make law or policy but review it against a set of criteria, in this case human rights.'[81] While the court is not responsible to the majority, this only serves to strengthen the argument that socio-economic rights should be adjudicated before the courts. The courts serve as a protection mechanism against the tyranny of the majority.[82] 'As executives and bureaucracies are usually only indirectly accountable to the people, and given their extensive power to affect people's socio-economic well-being, there is an evident need for mechanisms to hold them accountable'.[83] Without the ability of judicial review, the legislator will be granted all the power and this too would threaten the separation of powers. Allowing judicial review of socio-economic rights would create a dialogue between the two branches and this would best serve to protect the citizens.[84]

C *Judicial Competency*

The final issue dealing with justiciability of socio-economic rights is the question of judicial competency. There are two main concerns in this area: the first deals with the training, knowledge and resources to actually hear the cases; and the second deals with the competency and resource availability to draft appropriate remedies.

Cases arising from a violation of a socio-economic right generally occur in complex social conditions and the court is often given only a fraction of the overall problem.[85] A judge is asked to look at the case from the viewpoint of a single plaintiff and to render a decision that would have a disproportionately larger impact on the society.[86] Furthermore, many of the cases require extensive review of social programs created from vague laws.[87] Critics argue that such complex cases are beyond the competency of the courts.[88] When the government decides to pass a social program, it engages in extensive fact-finding and can spend years formulating the implementation of such a program.[89] In comparison, judges are given a short time to resolve the issue, have little discretion to research beyond the facts presented to them, and may have little experience in the area in which the dispute arose.

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79 Jheelan, above n 10, 153.
80 Koch, above n 22, 229.
81 Langford, above n 15, 34.
82 Koch, above n 22, 229.
83 S Liebenberg, 'Needs, Rights and Transformation: Adjudicating Social Rights' (2006) 17 *Stellenbosch Law Review* 5, 14.
84 Langford, above n 15, 33.
85 Christiansen, above n 54, 349.
86 Ibid 351.
87 Ibid. See also: Scott and Macklem, above n 36, 44.
88 Jheelan, above n 10, 149.
89 Christiansen, above n 54, 351.

The arguments that adjudication of socio-economic rights is too complex for members of the judiciary are exaggerated. Judges are, on a daily basis, called to analyse complex legal matters in a variety of different fields.[90] In fact, judges 'are trained directly to be able to analyse and evaluate many different types of legal cases involving an extensive amount of complex evidence.'[91] If a judge is provided with all of the relevant facts and research that the government used when creating the program, there is absolutely no reason why a judge would be unable to competently adjudicate an issue arising from a possible violation of socio-economic rights.[92] Thus, despite the relative vagueness of the principles and the complex social situations in which disputes over socio-economic rights arise, a properly trained judiciary should possess the requisite capability to review and adjudicate the matter.

D *Budgetary Constraints*

Finally, it is often argued that even if a violation of a socio-economic right was to be heard before the courts, any decision would still be unenforceable because of severe budget restraints. This argument primarily arises in the context of implementing and creating judicial remedies to violations.[93] For critics who primarily see socio-economic rights as eliciting positive obligations, this is a significant concern. Viewed from this point, remedies that arise in response to a violation of socio-economic rights would generally entail either the creation or expansion of a social program. Thus, courts must grapple with the question of how to 'appropriately tailor a social rights remedy so as not to bankrupt the state?'[94] This will be the subject of significant review in the final part of the paper; however at the outset it is important to make a few significant notes about the budgetary considerations of socio-economic rights adjudication.

As noted, '[i]n any country, resources are inevitably limited and since some social and economic rights can be positive in nature, it has been suggested that budgetary constraints can make their enforcement impossible.'[95] This argument is not a powerful motivator to prevent the enforcement of socio-economic rights. Some socio-economic rights can be upheld by the courts without any severe budgetary impact. As noted in Audrey Chapman's article, there are numerous ways that a socio-economic right can be violated and remedied without forcing a state to establish a new social program.[96] Additionally, even in situations where the state's obligation of fulfillment is being adjudicated, the courts still have the issue of progressive realisation to examine.[97] Thus, if a remedy would seriously impede on the state's resources, the court could simply acknowledge the violation, but not impose a remedy with immediate effect.

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90 Jheelan, above n 10, 150.
91 Wiles, above n 10, 54.
92 Ibid.
93 Jheelan, above n 10, 69.
94 Christiansen, above n 54, 352.
95 Jheelan, above n 10, 150.
96 Chapman, above n 17. In her article, Chapman lists ways in which the right to health can be violated and remedied without the creation of a social program.
97 In such situations, a type of 'soft enforcement' mechanism can be used, whereby the court offers constructive criticism of the issue to the legislature and executive. See, Scott and Macklem, above n 36. This approach was taken in *Askov,* 'where the court drew attention to the problem, but stopped short of ordering the government to allocate resources.' Jheelan, above n 10, 149.

The role of the courts should not be brushed aside simply because there are budgetary considerations. Every single case has budgetary considerations. In civil and political rights adjudication, courts often impose remedies that can have very broad repercussions, including budgetary repercussions. The Supreme Court of Canada, in its *Askov* decision, granted a remedy that could have had significant budgetary repercussions.[98] This effect did not impede the decision making or make the remedy unenforceable. As will be demonstrated in the next section, courts can adjudicate such cases while still being aware of budgetary considerations and still adhering to the separation of powers principles.

V JUDICIAL APPROACHES TO SOCIO-ECONOMIC LITIGATION

This section of the paper will examine some of the approaches and remedies to socio-economic violations. For any state considering the adoption of the *OP-ICESCR*, their domestic court system will need to be able to review socio-economic rights and must be able to offer effective remedies for violations. As discussed, the rampant criticisms of socio-economic rights have often focused on a courts inability to play such an important role in the adjudication and enforcement of socio-economic rights. Now, with the recent adoption of the *OP-ICESCR*, states will have to overcome this fear. As will be demonstrated, it is possible for a domestic court system to have a strong and legitimate role in the enforcement of socio-economic human rights.

The analysis will focus on South African jurisprudence. South Africa is among the most progressive enforcers of socio-economic rights.[99] Not only are South African courts obliged to adjudicate socio-economic rights:

> when the legal process does establish that an infringement of an entrenched right has occurred, it [must] be effectively vindicated. The courts have particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies … to achieve this goal.[100]

As will be evidenced throughout the remainder of the paper, the courts have crafted a way of effectively enforcing socio-economic rights while still maintaining the separation of powers principle and allowing the government control over budgetary considerations. Such approaches prove that a state's court system can, if given the opportunity, have a very valuable role in the adjudication and enforcement of socio-economic rights.

A *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal*

The first substantive socio-economic case heard by the South African Constitutional Court, occurred in 1997, in the case of *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal* [*Soobramoney*].[101] Mr Soobramoney, who was terminally ill, was in need of dialysis treatment to prolong his life; the hospital refused treatment because the

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98 See generally: *R v Askov* [1990] 2 SCR 1199.

99 South African courts have had the constitutional obligation to implement and enforce socio-economic right since the introduction of the new Constitution in 1996. Pejan, above n 19, 1195.

100 *Fose v Minister of Safety and Security* (1997) (3) SA 786 (CC) [94] as cited in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (5) SA 3 (CC) [57].

101 (1998) (1) SA 765 (CC).

procedure was not life saving.[102] In response, Mr Soobramoney sued the hospital with the hope that the court would order the hospital to perform the procedure.[103] The court ruled that the right to emergency medical treatment 'could not extend to life-prolonging treatment for terminally ill patients,'[104] and thus concluded that the state had not violated their socio-economic obligation.

In *Soobramoney*, the court explicitly recognised that socio-economic rights are a state responsibility and are judicially enforceable.[105] It also acknowledged a 'standard of qualified deference to the legislature.'[106] In Mr Soobramoney's situation, the legislature had adopted public guidelines that were in line with legitimate medical opinions and these guidelines were applied in a fair and reasonable manner.[107]

The *Soobramoney* decision also dealt with the other criticisms frequently associated with socio-economic rights. Prior to issuing the decision, the court reviewed evidence regarding the budgetary limitations of the hospitals and the government to provide such medical services.[108] The court clearly demonstrated that economic limitations will be taken into account when rendering a decision.[109] Again, this shows that despite the criticisms regarding socio-economic rights, they can be adjudicated and given proper consideration if heard by a competent judiciary. Lastly, the court conducted the *Soobramoney* analysis with regard to the larger social context. It recognised that Mr Soobramoney represented only a single person from the larger class and was careful to evaluate the case as such; therefore not overburdening the legislature with unrealistic remedies.[110] While the decision in *Soobramoney* did not find a violation of a socio-economic right, it clearly laid important foundations that can be applied in subsequent decisions.

B *The Government of the Republic of South Africa and Others v Grootboom and Others*

The South African Constitutional Court's second major socio-economic rights case was *Grootboom.*[111] Irene Grootboom represented a class of defendants, comprised of 510 children and 390 adults; all of whom were forced, by the government, to leave their squatter development.[112] The land they had settled had been chosen by the government as a site for the development of state-sponsored, low income housing; the squatters were forcibly removed from the site and their possessions and homes that remained were subsequently bulldozed and burned.[113] The Constitutional Court heard the appeal from the Cape High Court which had ordered the national, provincial and local government

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102 Ibid [1].
103 Ibid [5].
104 Christiansen, above n 54, 360.
105 Ibid 361.
106 Ibid.
107 *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal [Soobramoney]* (1998) (1) SA 765 (CC) [25]; see also: ibid 361-2.
108 Christiansen, above n 54, 362.
109 *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal [Soobramoney]* (1998) (1) SA 765 (CC) [31].
110 Ibid [26].
111 *The Government of the Republic of South Africa and Others v Grootboom and Others* (2001) (1) SA 46.
112 Ibid [4].
113 Ibid [10].

bodies to provide shelter for all plaintiff children and their parents, until such time as the parents could provide appropriate shelter.[114]

The Constitutional Court issued their landmark decision in 2001. This paper will proceed with a review of the key principles that can be taken from this case and will argue that these can be adopted and applied by courts adjudicating socio-economic rights. The Constitutional Court did not follow the UN's approach of identifying a minimum enforceable core of each socio-economic right (thus effectively establishing a floor for each socio-economic right). Some have argued that the Constitutional Court has completely rejected the idea of a minimum core; however, Tsoka J in the *Mazibuko* decision, argues that he 'do[es] not agree that the learned Judge disavowed the core minimum principle.'[115] It was not applied in the Grootboom decision because the court reasoned that the needs of a vulnerable group are extremely diverse and the court felt that it was not presented with enough information to determine such diverse needs, and therefore could not adequately identify a minimum core in this situation.[116] The court, however, did agree with one key aspect of the UN analysis.[117] The court concluded that any determination of socio-economic rights must be made 'having regard to the needs of the most vulnerable group that is entitled to protection of the right in question.'[118]

The court ruled that the best approach to socio-economic adjudication was the adoption of the standard of reasonableness. Therefore, the ultimate question is not whether the minimum core of the right was violated, which would entail an examination of what constitutes the minimum core, but rather, 'whether the measures taken by the state to realise the rights … are reasonable.'[119] Accordingly, in such situations, the court will not 'inquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent.'[120] Instead, it will examine whether the decision and program adopted by the state is reasonable; this gives the state considerable flexibility to adopt any program. This approach quickly dispels the criticism that court enforcement of socio-economic rights threatens the principle of separation of powers. With this approach, the legislature still has the ability to decide which types of programs to implement and how to implement them; the court is only making sure that the program is reasonable given the state's obligations and resources.

Applying the reasonableness test to the Government's housing programme, the court found that the programme was inconsistent with section 26 of the Constitution because 'it failed to provide relief for the people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.'[121] The court was

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114 Ibid [16].

115 See: *Mazibuko and Others v The City of Johannesburg* [2008] 06/13865 (Unreported, Tsoka J, 30 April 2008) [131].

116 Christiansen, above n 54, 367. See also: ibid.

117 Christiansen, above n 54, 367; *Mazibuko and Others v The City of Johannesburg* [2008] 06/13865 (Unreported, Tsoka J, 30 April 2008) [131].

118 *The Government of the Republic of South Africa and Others v Grootboom and Others* (2001) (1) SA 46, [9]; see also: Christiansen, above n 54, 367.

119 *The Government of the Republic of South Africa and Others v Grootboom and Others* (2001) (1) SA 46, as cited in Pejan, above n 19, 1197.

120 Erasmus, above n 12, 248-9.

121 *The Government of the Republic of South Africa and Others v Grootboom and Others* (2001) (1) SA 46, [99]. See also: S Liebenberg, 'Adjudicating Social Rights Under a Transformative Constitution' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 85.

then left to grapple with how to formulate an effective remedy to deal with the constitutional violation. Bearing in mind the separation of powers principle, the court did not specify the relief; rather it made a declaratory order, 'to the effect that the state's housing programme should include "reasonable measures" to provide relief for this group of housing beneficiaries.'[122] It also stated that the new programme should be similar, though not limited, to a program that had been drafted by the local authority, but had yet to be implemented.[123]

The remedy awarded in *Grootboom* has been the subject of much criticism; most of which stemmed from the state's 'tardy implementation' of the award.[124] The reality of the court victory did little to change the social conditions of the complainants; reports stated that more than five years after the decision, most of the complainants were still located 'in crowded, unsanitary conditions on the periphery of the sportsfield with highly inadequate services.'[125] Kent Roach has argued that:

> judicial bodies that use declarations will find themselves dependent on the legislative and executive branches of government to provide remedies for socio-economic rights … Declarations proceed on the assumption that governments will take prompt and good faith steps to comply with the court's declaration of constitutional entitlement.[126]

Grootboom stands as a perfect example of this problem. While declarations are meant to create a dialogue between the court system and the government, hence keeping in line with the separation of powers principle; they can 'suffer from vagueness, insufficient remedial specificity, an inability to monitor compliance, and an ensuing need for subsequent litigation to ensure compliance.'[127] Thus, while declarations can be a powerful tool if the government has simply been inattentive, they may prove to be an ineffective remedy for socio-economic rights violations if the state is unwilling or unable to provide for socio-economic rights.[128] This would mean that if a state wanted to avoid adjudication before the *OP-ICESCR*, a domestic court system must be able to provide remedies beyond a mere declaration. Again, South African jurisprudence has provided more guidance in this area.

C *Minister of Heath and Others v Treatment Action Campaign and Others*

The South African Constitutional Court followed *Grootboom* with its ruling in *Treatment Action Campaign.*[129] In 2002, a group of NGOs, led by the Treatment Action Campaign, brought the South African government to court over their program on the prevention of mother-to-child transmission of HIV.[130] The government had implemented a policy whereby doctors could administer a drug to women to reduce the risk of mother-to-child transmission only if the women attended at a specific pilot site;

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122 Liebenberg, above n 121, 85.
123 Ibid.
124 Ibid 99.
125 Ibid 99 [original footnotes omitted].
126 K Roach, 'The Challenges of Crafting Remedies for Violations of Socio-Economic Rights' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 53.
127 *Little Sisters v Canada* (2000) 2 SCR 1120, [258-61]. See also: ibid.
128 Roach, above n 126.
129 *Minister of Heath and Others v Treatment Action Campaign and Others* (2002) (5) SA 703, 721.
130 Christiansen, above n 54, 368.

doctors outside of these sites were prohibited from administering the drug. Statistics showed that only 10 percent of those who needed to receive the drugs were covered at the sites; the remainder of the women could not receive treatment.[131] The state's intention was not to deny women access to the drugs; rather the state was conducting a study on the distribution of the medicine with the hopes of launching a nation-wide program.[132] The NGO's sought to have the prohibition on distribution outside of the pilot sites struck down and an order forcing the state to immediately create a more expansive program.[133]

The court, which had already begun to lay the groundwork for socio-economic rights adjudication, reached a unanimous decision. Once again, the court ruled that in regards to positive obligations arising from the socio-economic rights, 'all that can be expected from the state is that it act reasonably to provide access to socio-economic rights … on a progressive basis.'[134] The court, concluded that the state's 'policy was an inflexible one that denied mothers and their newborn children … [a] potentially lifesaving drug.'[135] Given the fact that the program was inflexible and 90% of the vulnerable group it was meant to help were denied the benefit of the program, the court concluded that the state's program was unreasonable.[136] Unlike in *Grootboom*, in this decision, the court granted quite a stringent remedy against the state.

The court ordered that the state 'plan and implement an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout the country.'[137] Furthermore, it ordered that the prohibition against the distribution of the drug off the pilot site be immediately removed.[138] Despite these extensive orders, the court refused supervisory jurisdiction to ensure the remedy be effectively implemented because 'there were no grounds for believing that the Government would not respect and execute the orders of the Court'.[139] Again, the state was slow to implement the court remedy. After months of correspondence, meetings and a complaint to the Human Rights Commission, the Treatment Action Campaign (TAC), in December 2002, launched contempt of court proceedings against the state to seek enforcement of these orders.[140] Eventually, a national program was adopted, but again this case shows that in the future courts may need to order more effective remedies to ensure compliance with socio-economic rights.

Despite the problems with the initial implementation of the remedy, the case is critical to the development of more effective remedies. In *TAC*, the state had claimed that the separation of powers principle 'precluded the courts from making orders 'that have the effect of requiring the executive to pursue a particular policy.'[141] The Constitutional

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131 Ibid.
132 *Minister of Heath and Others v Treatment Action Campaign and Others* (2002) (5) SA 721, [14-15].
133 Christiansen, above n 54, 368-9.
134 Pejan, above n 19, 1200. Recall, the progressive realisation restriction can also be found in the *ICESCR*.
135 *Minister of Heath and Others v Treatment Action Campaign and Others* (2002) (5) SA 721, [80].
136 Christiansen, above n 54, 369.
137 *Minister of Heath and Others v Treatment Action Campaign and Others* (2002) (5) SA 721, [5].
138 Ibid [135]; see also: Christiansen, above n 54, 370.
139 *Minister of Heath and Others v Treatment Action Campaign and Others* (2002) (5) SA 721, [129]; Liebenberg, above n 121, 98.
140 Liebenberg, above n 121, 100.
141 Ibid 98.

Court rejected the argument that courts were restricted to issuing a declaratory order.[142] While the court did acknowledge that special attention must be paid to the separation of powers principle, it affirmed that courts have the jurisdiction to order mandatory injunctions in cases involving violations of socio-economic rights.[143] Furthermore, when courts order injunctions, they have the ability to retain supervisory jurisdiction if they deem it necessary in the context of the case.[144]

In terms of socio-economic rights violations, a court order that contains supervisory jurisdiction can be a very powerful remedy. In South Africa, the courts have discussed when it is appropriate to grant a remedy with supervisory jurisdiction and what it would entail.[145] Accordingly, it would force the state to devise a plan to stop the socio-economic violation and present this plan to the court; following the initial report, the state would regularly update the court on its implementation. At all stages, the complainant and other interested parties would be allowed to comment.[146] Yet, despite this active involvement, the courts will remain very cognisant of the separation of powers principle; thus alleviating any concerns about the proper role of the court. The state is the one to design their program and can choose any program that is reasonable and that would resolve the socio-economic violations. 'Such orders should strive to preserve the choice of means of the legislative and executive as to the precise manner in which to remedy the situation while not abdicating the court's responsibility.'[147] States that want to avoid adjudication before the *OP-ICESCR* should grant their domestic court system the ability to issue such strong remedies.

D *Mazibuko and Others v City of Johannesburg and Others*

The Constitutional Court has yet to issue a decision that grants a remedy retaining supervisory jurisdiction for a violation of a socio-economic right, but it has affirmed that the option is available to the courts. One of the next cases that the Constitutional Court may rule on is the case of *Mazibuko and Others v City of Johannesburg and Others*.[148] The *Mazibuko* case, heard originally by the Johannesburg High Court and then appealed to the Supreme Court of Appeal, dealt with the right to water. Mazibuko represents a class of citizens from the Phiri township located in Johannesburg. The majority of residents in Phiri, a historically black neighbourhood, are 'poor, uneducated, unemployed and are ravaged by HIV/AIDS.'[149] The area also had old water piping infrastructure that was losing considerable amount of water and money for the City. In an attempt to upgrade the system, the City introduced prepayment meters in Phiri.[150] Each prepayment meter dispensed six kilolitres of free water per stand per month; once

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142 *Minister of Heath and Others v Treatment Action Campaign and Others* (2002) (5) SA 721, [104-6]; See also: ibid.

143 *Minister of Heath and Others v Treatment Action Campaign and Others* (2002) (5) SA 721, [104-6]; See also: Roach, above n 126, 54.

144 *Minister of Heath and Others v Treatment Action Campaign and Others* (2002) (5) SA 721, [104-6]; See also: Roach, above n 126, 54.

145 Liebenberg, above n 121, 98.

146 Ibid.

147 Ibid.

148 *Mazibuko and Others v The City of Johannesburg* [2008] 06/13865 (Unreported, Tsoka J, 30 April 2008). Please note that the Constitutional Court has not yet heard the appeal, the City has simply stated that it intends to appeal decision.

149 Ibid [5].

150 Ibid [4].

that amount was exceeded the water was automatically shut off.[151] The resident could then pre-pay to purchase more water or wait until the next month's allocation to have their water turned back on. Given the poverty of the area, the end result was that individuals could go for over two weeks without being able to access water.[152]

Among other requests, the court was asked to review the constitutionality of prepayment meters. Tsoka J found that the introduction of prepayment meters was unlawful and unconstitutional.[153] The court then proceeded to examine the policy allotment of six kilolitres per household per month. The court, in this case, actually endorsed the UN approach of establishing a minimum core. It ruled that the difficulties which prevented the Constitutional Court from adopting that approach in the *Grootboom* case were not present here; 'the diverse needs presented by the right to adequate housing do not, in my view, arise in the context of the right to access to water.'[154] While the court did contend that the right to water can be progressively realised,[155] the minimum core obligations of the right to water are easy to identify and therefore should be enforced. After a careful review of the actual living conditions in Phiri and the ability of the respondents to increase water supply to the area, the court ordered that the City provide each applicant with 'free basic water supply of 50 litres per person per day and the option of a metered supply installed at the cost of the City of Johannesburg.'[156] Following the ruling of the High Court, the City of Johannesburg has stated that they intend to appeal.[157] It will be interesting to see if the Constitutional Court continues to take more proactive steps in the implementation of effective remedies for violations of socio-economic human rights.

The four cases described above all deal with enforcing a state's positive obligations in relation to socio-economic human rights. This means that all the remedies would entail a significant review of a state's social programs, or lack thereof. The South African courts have demonstrated that these cases can be properly adjudicated and that the tools to achieve effective remedies are within their jurisdiction. Before concluding the analysis on the South African jurisprudence, a brief mention of jurisprudence that arises from violations of negative duties of socio-economic human rights will be discussed. These cases are important because they help demonstrate the courts ability to craft creative and effective remedies to deal with socio-economic violations.

E *Jaftha v Schoeman and Occupiers of 51 Olivia Road v City of Jhb*

As mentioned previously, a state can violate a negative duty of socio-economic human rights. This occurred in the South African case of *Jaftha v Schoeman and Others; Van Rooyen v Stolz and Others*. Here, the claimants challenged a portion of the *Magistrates Court Act* that allowed the sale of a person's home in order to satisfy outstanding

151 Ibid [3].
152 Ibid [92].
153 Ibid [183-4].
154 Ibid [134].
155 The court examined the City's social policy to see if they were trying to progressively realise the right to water. The court ruled that 'the various policies adopted to alleviate the plight of the applicants and all other residents in Phiri appear irrational.' Furthermore, the court ruled that the actual implementation attempts were unreasonable. Ibid [148-50].
156 Ibid [78].
157 Liebenberg, above n 121, 98.

debts.[158] In effect, the law allowed 'a person to be deprived of existing access to adequate housing.'[159] In order to rectify the violation of the socio-economic right, the court 'read in' provisions to the Act to ensure that the sale of a person's home only occurred after proper judicial oversight.[160] In this situation, striking down the legislation would not have been appropriate 'as it would have deprived many others of important rights and benefits;' it would be a retrogressive step in the implementation of socio-economic rights.[161]

Finally, the case of *Occupiers of 51 Olivia Road v City of Jhb*[162] needs to be mentioned. Again, this case dealt with the eviction of individuals from their squatter development. The decision of 19 February 2008, was an endorsement of the agreement that had been reached between the city and the occupiers after the court had ordered them to engage in meaningful discussion with each other.[163] The Constitutional Court 'affirmed the basic principle that in situations where people face homelessness due to an eviction, public authorities should generally engage seriously and in good faith with the affected occupiers.'[164] There were other key features in this decision, including reading words in to the legislation, but again, the purpose is to demonstrate that the South African courts have developed an arsenal of creative remedies to socio-economic rights violations. As the South African courts have so clearly demonstrated, courts are capable of adjudicating socio-economic rights in a manner that is consistent with the separation of powers principle. They have also shown that a domestic court can remedy violations of socio-economic rights. This will be crucial to any state that would like to avoid the new individual complaints mechanism.

VI CONCLUSION

South African jurisprudence demonstrates that socio-economic rights can be adjudicated by a competent judiciary. Any country that is considering the adoption of the *OP-ICESCR* should scrutinise these decisions. As demonstrated, by adopting a standard of reasonableness, the South African courts have created a standard of review that clearly handles the concerns that many critics have in regards to the justiciability of socio-economic rights. One of the primary concerns was that the adjudication of socio-economic human rights would challenge the separation of powers principle and would therefore have no political legitimacy. The standard of reasonableness clearly adheres to this principle. The court will not question whether the government adopted the best program, but will simply ensure that the measures adopted are not unreasonable.

Furthermore, the courts have also demonstrated that while there is a need to craft remedies for the individuals who have been affected, such remedies can be done in a manner that still considers the limited resources of the government and the separation of powers principle. While South Africa has encountered some problems in the actual implementation of remedies, the remedies that have been issued have been creative and

158 Ibid 93.
159 *Jaftha v Schoeman and Others; Van Rooyen v Stolz and Others* (2005) (2) SA 140 (CC) (S Afr) [31-4]; Liebenberg, above n 121, 93.
160 Liebenberg, above n 94.
161 Ibid 100.
162 2008 (5) BCLR 475 (CC).
163 Liebenberg, above 121, 95.
164 Ibid.

in the long run, effective.[165] South African courts also have the ability to strengthen the immediacy of implementation by exercising supervisory jurisdiction. The Constitutional Court has yet to order this remedy for socio-economic rights violations, but it may prove to be a powerful tool.

Since the human rights were split into two separate treaties, socio-economic rights have languished behind. With the *OP-ICESCR* now a reality, views towards socio-economic rights are changing. States will no longer be able to rely on the historical and unwarranted criticisms of socio-economic rights to justify their lack of implementation. Any state that is considering adopting the *OP-ICESCR* will have to make changes and increase the role the court plays in the enforcement of socio-economic rights. If a state party to the *OP-ICESCR* is unwilling to do so, they may face numerous claims before the international body. States should realise that all human rights are indivisible and interdependent; the newly adopted *OP-ICESCR* may mean that socio-economic rights can finally be adjudicated in the manner that was originally envisioned.

[165] For instance, despite the slow implementation of the *TAC* orders, the South African government did introduce a nationwide medical program that has undoubtedly saved thousands of lives. Liebenberg, above n 121, 100.