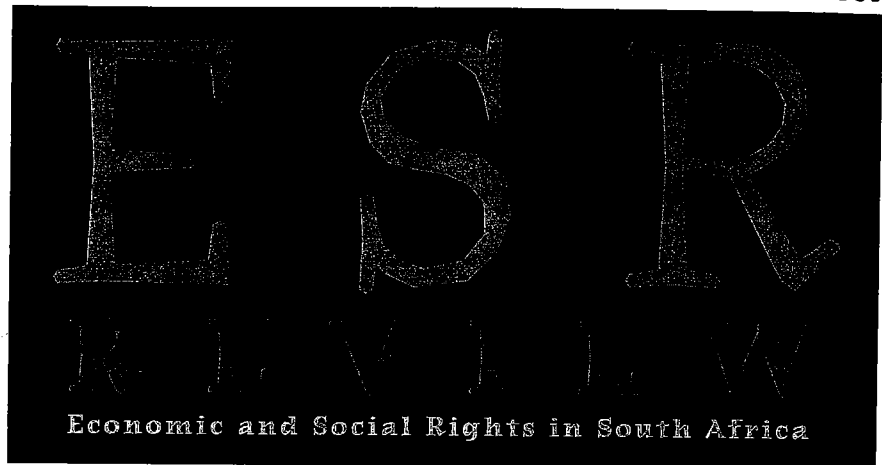


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A quarterly publication by the **COMMUNITY LAW CENTRE (University of the Western Cape)**  
and the **CENTRE FOR HUMAN RIGHTS (University of Pretoria)**

## Editorial

Sandra Liebenberg

This special edition of *ESR REVIEW* focuses on the papers delivered at a conference held on 6 and 7 October 1998 co-hosted by the Community Law Centre's Socio-Economic Rights Project and the Constitutional Litigation Unit of the Legal Resources Centre. The seminar gathered together members of the Constitutional Court, the Land Claims Court, the SA Human Rights Commission, the Commission for Gender Equality, the bar and sidebar, representatives of government departments, legal academics and human rights NGO's at the Parktonian Hotel in Johannesburg. Entitled, *Giving Effect to Socio-Economic Rights: The Role of the Judiciary and other Institutions*, it was attended by approximately 100 persons.

The purpose of the conference was to share information and ideas on practical ways in which the socio-economic rights entrenched in the SA Constitution can be implemented, monitored and enforced. Sessions were devoted to the respective roles of the various public institutions such as the judiciary, parliament, the executive and the independent commissions in giving effect to socio-economic rights. A related aim of the seminar was to share relevant materials and research on socio-economic rights in order to deepen participants' knowledge and understanding of this group of rights. Reading-packs were forwarded to participants in

advance of the seminar to facilitate discussion and debate. In addition, NGO's were invited to display their publications and other materials pertaining to socio-economic rights.

At the conclusion of the seminar, a networking and strategy meeting was held which was attended by about 30 representatives of human rights NGO's and academics. The aim of this meeting was to explore practical ways in which collaboration among NGO's interested in socio-economic rights advocacy and litigation could be strengthened. The outcomes of this meeting are also discussed in this edition.

One of the major themes emerging from the seminar was the complementary nature of the roles of the various public institutions in giving effect to socio-economic rights. Many speakers stressed the need to build an open, co-operative and responsive relationship between the different branches of government as well as the independent commissions. Our visiting guest speaker, Prof. Craig Scott from Canada, highlighted the need to move beyond formalistic conceptions of the doctrine of separation of powers in order to promote a "co-operative dialogue" between the different public institutions. This would pave the way for creative and effective remedies to deal with violations of socio-economic rights without one branch of government usurping the powers and functions of another.

From the perspective of civil society, a note of caution was sounded not to

focus exclusively on the courts as the primary mechanism for enforcing socio-economic rights. As Judge O'Regan pointed out in her opening address, all organs of State are under a duty to respect, protect, promote and fulfil the rights in the Bill of Rights. Litigation is thus only one strategy, among many, to advance socio-economic rights. Other strategies include advocacy and lobbying of public institutions, monitoring the realisation of the rights, and awareness campaigns.

Geoff Budlender stressed the urgent need for practical legal assistance to be given to the beneficiaries of socio-economic rights, particularly where these rights are protected in legislation, for example, the Extension of Security of Tenure Act.

Government and the legislature have the primary role to give effect to constitutional rights through concrete policies, programmes and legislation. The courts have a residual role to provide redress for violations of these rights. However, it was not disputed that, in certain circumstances, it would be necessary for the courts to protect socio-economic rights. The types of cases in which a higher degree of judicial intervention

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**SPECIAL EDITION**  
**ESR Conference**

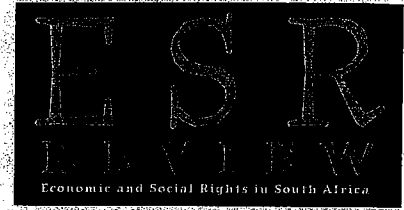
◀ *Continued from p1*

would be appropriate include: breaches of the duty "to respect" the rights (e.g. arbitrary evictions); children's "basic" socio-economic rights; unfair discrimination in access to socio-economic rights; and unreasonable or unprocedural administrative action. In cases relating to the "progressive realisation" of socio-economic rights, the *Soobramoney* case stands for the proposition that decision-making must conform to minimum standards of rationality and good faith.

It is encouraging that the human rights community in South Africa has clearly moved beyond rhetorical affirmations of the importance of this group of rights. The focus is now on practical and creative ways of enforcing and monitoring the realisation of these rights. In his paper, Adv. Wim Trengove gives examples of remedies that are specially tailored for redressing violations of socio-economic rights. Jody Kollapen gives an account of the progress made by the SA Human Rights Commission in fulfilling its mandate under s 184(3) of the Constitution to monitor socio-economic rights. He also draws attention to some of the difficulties and challenges of this process.

One of the important challenges facing the the Human Rights Commission in conjunction with the Commission for Gender Equality and civil society is to develop the core content of the socio-economic rights. This is essential for the monitoring and enforcement of socio-economic rights. Without clear goals and benchmarks, organs of State cannot be held accountable for the fulfilment of their constitutional obligations in relation to these rights.

Socio-economic rights are important tools for advancing social justice and a better life for all in South Africa. However, in order to fulfil their potential, all public institutions and organisations of civil society must take this group of historically marginalised rights seriously. The conference highlighted the need both for further conceptual work to develop the core content of the rights, as well as practical measures to ensure that these rights have a real impact on the lives of poor and disadvantaged communities. Finally, without knowledge of these rights, they cannot be claimed by the very people they are intended to benefit. Promoting greater awareness and knowledge of socio-economic rights among disadvantaged and vulnerable groups is thus a key challenge for government, the independent commissions and human rights NGO's.



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## Social Rights

### Towards A Principled, Pragmatic Judicial Role

Craig Scott

It is important to allow a national jurisprudence on socio-economic rights to develop with full vigour. The courts have particular qualities that they can bring to the enforcement of socio-economic rights. In particular, they have the potential to combine reflective, principled reasoning with the ability to test and enrich a legal principle in the light of concrete facts in a specific context. We should think of courts as being well-suited to listen to and respond to narratives that are linked to questions of principle. The 1996 Constitution has given a meta-democratic mandate to the judiciary to interpret and enforce socio-economic rights. This places a large responsibility on our courts, especially the Constitutional Court.

#### *Institutional dialogue*

However, we should be cautious not to create the perception that rights are the domain of the courts alone. The misplaced assumption that the judiciary is the only institution responsible for giving content to rights exacerbates the fears and concerns that judges have about social rights. We need a constitutional ethos to permeate all government decision-making. Our understanding of rights will be impoverished if other state institutions adopt the view that they will only do something if the courts order them to do so. A dialogue should in fact take place between the courts and legislatures. Following Amy Gutmann, I advocate thinking of rights interpretation and enforcement in terms of a co-operative enterprise in which the judiciary and the legislatures share "a unity of moral labour" (Amy Gutmann, "The Rule of Rights or the Right to Rule?" in J. Roland Pennock and John W. Chapman, eds., *Justification: Nomos XXVIII* New York: NYU Press, 1986, 15 at 166). In South Africa, the institutional dialogue is potentially far richer because of the presence of the State institutions specifi-

cally charged with supporting constitutional democracy, particularly the South African Human Rights Commission (SAHRC) and the Commission for Gender Equality (CGE). The proposed Canadian Alternative Social Charter provides an example of how this dialogue and co-operation between various institutions in interpreting and enforcing social rights can occur. Another axis of institutional dialogue is between the domestic courts and international human rights bodies.

#### *Three modes of co-operation*

Three modes of potential institutional co-operation can be identified:

1. *Subsidiary interaction*: This form of interaction involves one institution showing deference to one or more of another institution's functions, either on a systematic basis or on a contextually-determined basis. Deference can occur across a range of matters and can



*We need a constitutional ethos to permeate all government decision-making. Our understanding of rights will be impoverished if other state institutions adopt the view that they will only do something if the courts order them to do so. A dialogue should in fact take place between the courts and legislatures.*

vary in degree. One notion that is central to subsidiary interaction is the notion of waiting for another institution to "speak first" on a normative issue. For example, in a case where a complete or near-complete lack of regulation is alleged to result in a constitutional violation, a court may consider it desirable and useful to adjourn proceedings in order to allow the legislature to take the first step in enacting legis-

lation before the court is prepared to be fully seized of the matter. Depending on the urgency of the situation and the kind of suffering at stake, such adjournment could well be accompanied with some provisional injunctive relief. It is generally desirable that the legislature should, in the first instance, give content and definition to the more far-reaching obligations attached to rights and thereby provide a baseline from which a dialogue on sufficiency can begin with the courts. The rider to this mode of co-operation is that it applies provided there is (or has been) no unreasonable delay on the part of the legislature in dealing with the particular issue. At a certain point, courts must move out of a subsidiary mode and shoulder a residual burden of responsibility to measure state inaction against constitutional principles without the benefit of an existing regulatory framework.

2. *Supererogatory interaction*: This form of interaction is premised on an understanding by institutions that there is no ceiling involved in the protection of human rights – only floors. For example, Parliament should not limit its implementation of rights to the interpretations given by the courts as it is institutionally suited to go further than the courts. A second example is the interaction between the State's domestic legal system and international human rights bodies. The stan-

DEBATE

THE CASE FOR NEW INTERPRETATIONS

◀ dards set at an international level should not be seen as imposing a cap on how far domestic courts can (indeed, must) go. A good example is the judgment in *S v Makwanyane & another* 1995 (6) BCLR 665 (CC) in which the Constitutional Court avoided the more limited interpretation of the right to life under international law in deciding the case. Absent a specific commitment by a State to abolish the death penalty through ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights, international law does not currently appear to prohibit the death penalty absolutely. Yet this international legal state of affairs did not prevent the Court from interpreting the South African legal system to have evolved to the point where the right to life includes such a prohibition. A third example of possible supererogatory interaction is between independent Human Rights Commissions and Parliament. A key aspect of the mandate of Human Rights Commissions should be to challenge Parliament to achieve higher levels of rights' protection, including by suggesting detailed means by which to do so.

3. *Co-ordinate interaction*: This form of interaction involves two or more institutions co-ordinating (with varying degrees of explicitness) across institutional boundaries. This can occur in relation to normative mandates that overlap not just in substance, but also in function. An example of this type of interaction is the potential relationship of co-operation between the Human Rights Commission and the courts. Thus the courts can draw on a set of standards developed and studies conducted by the Commission as aids to deciding cases. The Commission can seek to give more detailed content to general or tentative statements of principle emanating from the courts.

#### *Creative remedies*

Institutional dialogue operates with particular appropriateness at the level of remedies. When a healthy interaction exists between the courts and other institutions, there is scope for the courts to make decisions and for other

institutions to formulate or propose remedies. However, there is probably a limit to how far the courts will (or should) go in this regard without feeling that their function is being undermined.

It is important to develop novel and creative remedies for dealing with violations of socio-economic rights.

Through utilising declarations of non-compliance or "problematic compliance", the courts can put the State to terms to remedy the defects. In this way, the courts can deal pragmatically, yet creatively, with perceived problems of polycentric decision-making.

The following are some of the remedies which may be considered in the context of socio-economic rights:

- declaring a violation coupled with putting the legislature or executive to terms to correct the defect: in so doing, the court makes clear the normative *result* that must be achieved, but does not specify the *means* to achieve it ("putting to means");
- ordering a time-delayed provisional remedy with a duty on the State to report back with proposed measures before final argument on remedies proceeds;
- ordering a structured, participatory process to recommend final remedies (taking seriously the solutions proposed by affected groups, including by involving local communities and representative organisations in the process);



*There is an important category of cases in which the most effective process would require a joinder of private and state parties in order to facilitate a legal analysis of how to allocate constitutional obligations as between private entities and the State.*

- ordering the promulgation or enactment of a regulatory regime in which measures are actually specified as being necessary to solve a defined and concrete problem; or
- ordering a government committee of inquiry to report on the situation prior to litigation, perhaps with a list of questions framed by the court as

the focus of the inquiry.

The appropriateness of such remedies, alone or in combination, will depend on a range of contextual factors and on the constant exercise of judgment in relation to the most effective mode of interaction on the issue.

#### *'Diagonality'*

There is an obvious overlap between the State's duty to protect socio-economic rights and 'horizontal' (constitutional obligations placed directly on non-state actors). However, there is an important category of cases in which the most effective process would require a joinder of private and state parties in order to facilitate a legal analysis of how to allocate constitutional obligations as between private entities and the State. I have coined the phrase 'diagonality' for the situation where human rights obligations are *prima facie* shared by both public and private actors. This conceptualisation has considerable potential for promoting a more holistic analysis of human rights violations that are located within a field of overlapping state and non-state power structures.

In South Africa, the situations that would seem ripe for 'diagonality' analysis may be as numerous as the combination of 'vertical' cases (where only the state need be sued) and 'horizontal' cases (where only a specific private actor need be sued). There are examples of fact situations drawn from outside

South Africa which would benefit from the 'diagonality' approach. In Britain, the government's recent Social Exclusion Report notes that there are many poor housing estates throughout the UK where "[l]ocal shops ... often charge 60 per cent more than supermarkets" in adjoining areas and, "[y]et, tenants are often trapped with no ▶

◀ cars" (Peter Hetherington, "Blair pledges help for the jobless" *The Guardian Weekly*, Sept. 27, 1998, p. 10). One could conceive of a justified horizontal claim against shop-keepers if there is evidence of opportunistic price-gouging. Equally, one can conceive of a claim against the State for increased social assistance for food. Yet, a case which looked at potential joint responsibility in the context as a whole might lead a court to:

- (a) order the State to put an efficient and adequate public transportation system in place to and from various key parts of estates; and
- (b) order an independent review of profit margins at similar small off-estate shops.

After this second order, the case would be reconvened to look at price levels once enough time has passed to see what effect transportation has had on freeing up market pressures to force down prices and to see how effective the combined transportation and price adjustment have been in improving access to adequate food by groups that may have a greater need to shop locally on the estate (e.g. disabled and elderly persons).

#### *Interpretative Approaches*

I conclude with a synopsis of some interpretative approaches I would advocate. Institutions such as the executive should treat the interpretations of rights by the courts as floors not ceilings. The notion of binding precedent in the context of human rights interpretation should also be adapted. Courts need to be open to new and different interpretations of rights in the future as fresh information and research comes to light, and as new understandings evolve. Overly technical and formalistic interpretations should be avoided.



*Prof Craig Scott is Associate Professor of Law at the University of Toronto, Canada*

## A Response to Craig Scott

### A South African Perspective

Bongani Majola

One of the envisaged effects of our new Constitution is the transformation of South African society to a democratic society characterised by freedom and equality. The transformative nature of our Bill of Rights, which is based on human dignity, equality and freedom, is central if we are to shift ground and free ourselves from the vestiges of apartheid. Our Bill of Rights is unique in the manner in which it seeks to bring about the transformation of South African society, not only in terms of their civil and political entitlements, but also in terms of social and economic entitlements.

While many constitutions place emphasis only on civil and political rights, ours goes a step further and attempts to transform the social and economic dimensions of our lives through the entrenchment of social and economic rights.

#### *The problem of enforcement*

The problem of the enforcement of socio-economic rights, (which are generously spelt out in international human rights instruments and in the constitutions of some countries), is a vexed one. While there is a clear international understanding that one of the keys to the alleviation of poverty and suffering is the realisation of socio-economic rights, there is still no agreement on effective ways of bringing about the realisation of these rights. There is even less agreement regarding the judicial enforcement of socio-economic rights. I would like to acknowledge that judicial enforcement is not the only means of bringing about the desired changes in our society. However, the role of judicial enforcement should not be downplayed. Neither should the option of judicial enforcement be abandoned because it proves to be too difficult.

#### *Still a distant dream*

One of the difficulties associated with the judicial enforcement of socio-economic rights under the constitutions of many countries is the fact that socio-economic rights are not entrenched directly as rights, thus creating the debate whether or not they are rights in the true sense. This debate does not arise in South Africa since socio-economic rights are clearly entrenched as justiciable rights in the Bill of Rights. This creates an opportunity and raises hopes for the success of judicial enforcement. The Legal Resources Centre (LRC) believes that the alleviation of poverty and the social and economic transformation of the lives

of the poor and marginalised masses in South Africa hinge, to a great extent, upon the realisation of socio-economic rights. Enforcement of these rights must take place both through judicial and other means. As a human rights organisation primarily involved in litigation, the LRC sees judicial enforcement as one of the weapons in the arsenal against poverty. Its partnership in this seminar with the Community Law Centre is based on the acceptance that, notwithstanding the entrenchment of these rights in our Constitution, the enforcement thereof by judicial means is still a distant dream. It is therefore an honour for me to be invited to contribute to this very important discussion.

There are a number of factors which contribute to the difficulties of using courts to enforce socio-economic rights. Among those that we have encountered as legal practitioners are the following:

- Jurisprudence relating to the judicial enforcement of socio-economic rights is scarce. There are therefore few concrete examples of enforcement of socio-economic rights by municipal courts. Although

RESPONSE

USING THE COURTS