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THE SOUTH AFRICAN CONSTITUTION AND SOCIO-ECONOMIC RIGHTS: HAS 'JUSTICIABILITY' MADE ANY DIFFERENCE?

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I. Introduction

At the time of its entry into force in 1996, the final Constitution of South Africa became quickly world renowned as one of the few constitutions that incorporate socio-economic rights with a status of justiciable rights. This was seen by proponents of justiciability as revolutionary and heroic.[1] In fact, proponents of justiciability have foreseen results as if court's litigation would produced miracles for those who are socially disadvantaged.[2] In the South African context, the inclusion of justiciable rights has been done to improve the quality of life of South African citizens, especially in the view to correct past injustices and inequalities caused by the apartheid system. The ultimate goal was to provide access to adequate housing, sufficient food and water, access to health care, social security and education. Therefore, after two decades of constitutionalism, it becomes legitimate to wondering whether socio-economic rights have made a positive change in the lives of South Africans, whether 'justiciability' has really brought any significant difference to social conditions of those who suffered poverty and deprivation as a result of the apartheid legacy.

Beyond theoretical entrenchment, if socio-economic rights in the Constitution are to amount to more than paper promises, their enforcement must have pragmatically enabled people to gain access to basic social services and resources needed to live a life worthy of human dignity.[3]

To undertake such an analysis, Rodriguez-Garavito observes that the assessment of judicial-impact can be made from two perspectives, depending on the types of effects on which the study chooses to focus.[4] On the one hand, there is what he calls the

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[1] Christiansen E.C. 'Adjudicating non-justiciable rights: socio-economic rights and the South African constitutional court' 2007 (38):263 *Columbia Human rights Law Review*, p.323.

[2] Simmons BA. 'Should states ratify protocol? Process and consequences of the optional protocol of the ICESCR' 2009 27(1) *Nordisk Tidsskrift for Menneskerettigheter : Nordic Journal of Human Rights*, 64-81;p. 62.

[3] Liebenberg S. South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty' 2002 *Law, Democracy &. Development*, p.160.

[4] Rodríguez-Garavito C. 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' 2011 (89) *Texas Law Review*, 1669-1698, 1677.

neorealist perspective which focuses on the impact that the judicial decision has on the conduct of groups or individuals directly involved in the case. On the other hand, there is the constructivist conception which considers the ability of law and judicial decisions to generate transformation in social relations.[5] As far as the present research has gone, the neorealist approach was used to analyze the impact that court's litigation has had on the conduct of the South African government regarding its socio-economic rights obligations in the Constitution; while the constructivist approach was used to analyze how justiciability has shaped the interaction between holders of socio-economic rights and public institutions in the South African society.

As discussed later, the review of the South African jurisprudence revealed that in terms of the former approach, there have been some kinds of change in the South African government conduct, but not enough to meet the expectation of poor people because of the Constitutional Court excessive reluctance and deference,[6] while the latter approach led to the observation that the constitutionalization of socio-economic rights as justiciable rights has managed to open a permanent dialogue involving the three branches of the state (executive, judiciary and legislature) and rights holders, but in a context where expectations of poor have to face realism in terms of resources availability and allocation.

Besides these two approaches offered by Rodriguez-Garavito, it was also necessary to assess the behavior of judges in relation to the authority conferred upon them by the Constitution in socio-economic rights matters. This was very important because it revealed the extent to which South African judges have played an active role with regard to the objective of transforming South Africa in a just society where resources are equally redistributed among people.

As a general observation, there is a mixture of satisfaction and dissatisfaction, of positive and negative outcomes. Expectations of supporters of justiciability have not

[5] Id. pp.1677-1678.

[6] Ebadolahi M., 'Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa', 2008 83(5) *New York University Law Review*, 1565–606, p. 1579.

been fully met, while at the same time , it would be a lie to say that justiciability has been useless or meaningless. To some extent, there are landmark decisions delivered by the South African judiciary that have been able to influence the behavior of the government, at least in terms of passing new policies. However, this has not always been enough to get the right at issue enforced, that the question was raised about the usefulness of putting justiciable rights in the hands of a deferential judiciary, leading some to argue that justiciabilty has changed anything much.[7]

The purpose of the present study is to take stock of what justiciability has contributed, what it might contribute, and what barriers stand in the way of using this strategy more effectively to enforce socio-economic rights.

Justiciability has brought some measure of change, but at the same time 'reluctance' and 'deference' of the judiciary are the main factors that prevented judicial enforcement to operate at its maximum, causing a great disappointment among proponents and deprived people.

As a point of departure of the study, it was necessary to take a look at what was the process of constitutionalization of socio-economic rights in South Africa prior to review and then, assess developments that have taken place within the jurisprudence. As discussed later, the observation points to the assertion that there is an need to adjust the behavior of the judiciary to the extent that judicial review must bring forth its effects beyond the courtroom to ensure implementation of judicial decisions in the aftermath of litigation. In fact, this study found a discrepancy between the transforming goal of the South African Constitution which was strongly affirmed in the process of its negotiation and the considerable deference displayed by the Constitutional Court, a disproportion that can only be settled through more activism of the judiciary in monitoring compliance with its orders.

[7] Pieterse M. 'Eating socio-economic rights' 2007 29 *Human Rights Quarterly*,796–822, pp.797-798; Lehmann, Karin. "In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core." 2006 22 (1) *American University International Law Review* , 163-197, pp. 163-165.

Therefore, the research questions can be summarized as follows : To what extent justiciability has made the difference in the South African society and what should be the way forward with regard to aspects that have been unsuccessful?

II. Constitutionalization of socio-economic rights in South Africa

After a very long period of apartheid, the white minority ruling decided to open up to the African National Congress (ANC) and other racial groups that were excluded as a result of segregationist policies and practices. The lengthy negotiations that began in December 1991 led to the adoption of a transitional or interim Constitution in 1993. At this stage, some socio-economic rights were included like the right to adequate care and nutrition for prisoners (section25 (1) (b)), the right to fair labor practices (section27), children's rights to security, basic healthcare, basic nutrition and social services (section 30 (1) and education rights (section 32). But a more elaborated list and formulation[8] was undertaken in the Bill of rights contained in the final Constitution adopted in 1996. The draft of this latter Constitution had to go through a certification process before the Constitutional court.[9] The Court had the opportunity to address objections to the justiciability of socio-economic rights and reached the conclusion that though judgments in this field may have budgetary implications, it would not constitute an obstacle to the judicial enforcement of these rights.

To clearly perceive the difference made at this stage of incorporation, it is very important to understand what was the psychological context[10] in which the interactions between social groups involved in the negotiation process took place. It is important first to keep in mind that the process that led to the adoption of the South African final Constitution is only comprehensible against the background of the past. In this respect,

[8] The Interim constitution listed only few socio-economic rights and they did not contain the formula "every one".

[9] *Ex Parte Chairperson* of the *Constitutional Assembly*: In *Re Certification* of the *Constitution* of *the Republic* of *South Africa*, 1996 1996 (4) SA 744 (CC) para. 77.

[10] Here, the concept 'psychological context' should be understood as the state of mind with which parties engaged themselves in the discussions regarded interests that needed to be secure under provisions of the final Constitution.

some insight into South Africa's pre-constitutional history[11] demonstrates that the determination of the drafters of the Constitution was to make a break with the previous culture of parliamentary supremacy through which the apartheid system had succeeded to establish its legacy.[12] This is what makes the South African experience to be described as a 'transformative constitutionalism' which seeks to transform the society in 'a democratic, participatory and egalitarian direction, in which large-scale social change is to be achieved through non-violent political processes based on the rule of law'.[13] However, though the unanimous viewpoint between parties to the negotiations was that change had to occur, a more detail analysis reveals that the deal implied the critical issue of how their respective interests, those for which they had always stood, could quite match in the new Constitution.

For instance, while on the one hand, the conservative force represented by the white minority sought to secure the right to property to ensure that what had been acquired in the past would not come to be illegally removed away by the upcoming wave of democratic governance; on the other hand, other groups that had suffered past injustice had legitimate fears that such a clause could prevent fundamental reforms in the redistribution of land and resources. Dixon and Ginsburg provide a good summary of the issue in the following terms:

> 'For left-wing parties to constitutional negotiations, the inclusion of a constitutional right to property carries a clear risk: that courts and others will interpret such a right to impede legislative attempts to redistribute resources, or realise basic socio-economic rights, such as the rights of access to housing, land or collective bargaining. One solution to this problem will be for left-wing parties to argue for the exclusion of a right to property from a constitution. This was the strategy successfully adopted, for example, by the National

[11] The expression should be understood here in respect of the history that preceded the adoption of the Final Constitution.

[12] McLean KS. *Constitutional Deference, Courts and Socio-economic Rights in South Africa* (PULP 2009) p.117.

[13] Klare K. 'Legal Culture and Transformative Constitutionalism' 1998 14 *South African Journal of Human Rights (SAJHR)* 146-88, p. 150; Coomans F. 'Reviewing Implementation of Social and Economic Rights: An Assessment of the “Reasonableness” Test as Developed by the South African Constitutional Court' 2005 65 *Heidelberg Journal of International Law, 1*67-169, p.168.

> Democratic Party in Canada, in the negotiations leading up to the adoption of the Charter of Rights and Freedoms 1982. 22 Such a strategy, however, will also often be impractical, given the demandfor political insurance on the part of conservative parties to constitutional negotiations. Attempts by left-wing parties to 'carve out' certain limits to constitutional property rights guarantees may also fail for similar reasons, relating to bargaining costs.'[14]

The inclusion of socio-economic rights was seen by the ANC and other excluded groups as a strategy to prevent an overly expansive reading of first generation rights, such as the right to property or any other right, which could hinder social reforms to correct past injustice and inequalities. For victims of past injustices, these rights had to be introduced in the Constitution as a mean to counter-balance. According to the conventional wisdom explained by some scholars, once 'it became clear that a Constitution on the liberal model was the inevitable cost of the transition, the ANC insisted on the inclusion of social rights as a counter to civil and political rights.'[15] It is at this level that the initial difference made by justiciable socio-economic rights in the South African Constitutional law has to be apprehended. The step of their inclusion had a psychological effect because it was seen by disadvantaged groups as an insurance swap, a guarantee that healing of past injustices would not be prevented by white minority's protected interests. This allowed them to look at their future with great serenity and optimism about the possibility to build an effective system of social justice leading to an equitable redistribution of economic resources. As discussed later , the competition between the constitutional rights that negotiating parties sought to secure has reverberated in the development of case law particularly in terms of the relationship between the right to property and other socio-economic rights, but without forcefully displaying the potential tensions that were foreseen. There have even been cases where

[14] Dixon R. and Ginsburg T. 'The South African Constitutional Court and socio-economic rights, as "insurance swaps"', Coase -Sandor Institute for Law and Economics Working Paper no.650(2nd series, 2013) Public Law and Legal Theory working paper no. 436, 1-33, pp. 5-6.

[15] Gargarella R., Domingo P. and Roux T. 'Courts, rights and social transformation: Concluding reflections' in Gargarella R., Domingo P. and Roux T. (eds.) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate, 2006) 255-282, p.256.

the right of property could only survive as a result of the constitutional protection afforded to the right of access to adequate housing.[16]

III. Developments in the jurisprudence

To date, there is a bunch of decisions dealing with socio-economic rights at all levels, including those rendered by the Constitutional Court or lower jurisdictions, that it would be impossible to provide a full account of them in this section. Attention here is given to some landmark decisions related to the right to health, access to adequate housing, education and water to the extent that they portrait what has been major developments in the jurisprudence.

Soobramoney v Minister of Health (Kwazulu-Natal) (Hereinafter the *Soobramoney* case)[17]

The *Soobramoney* case which is one of the early cases dealing with socio-economic rights involved a 41-year old diabetic suffering from ischemic heart disease, cerebro-vascular disease and irreversible, chronic renal failure. On the basis of sections 11 and 27(3) of the Bill of Rights, which respectively provide that 'everyone has the right to life 'and that 'no one may be refused emergency medical treatment', the claimant applied to the Durban High Court for an order directing the state to provide him with medical treatment. The application was dismissed, and the case then went before the Constitutional Court. At this stage, the Constitutional Court choose to display a considerable degree of deference towards the government, holding that 'a court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters'.[18] It was asserted that 'there are areas where institutional incapacity and appropriate constitutional modesty require the courts to be especially cautious'.[19] As a result, the

[16] See the section below on the development of the jurisprudence.

[17] *Soobramoney v Minister of Health Kwazulu-Natal* 1998 (1) SA 765 (CC).

[18] *Id.*, para. 29.

[19] *Ibid.* para. 58.

appellant died soon after receiving news of the judgment. This case provides a good example of the gap between the promise held forth by the rights in the Bill of Rights and the harsh realities faced by beneficiaries

The position of the Court did not much its previous position in the *First Certification* judgment according to which despite the fact that the adjudication of socio-economic rights may have budgetary implications, the task conferred upon the courts does not differ significantly from that ordinarily conferred upon them that it would result in a breach of the separation of powers doctrine.[20] The fact that the reasoning of the Court rested on the United Kingdom approach in *R v Cambridge Health Authority, ex parte B*,[21] according to which it is undesirable for courts to question the executive on availability of resources,[22] was simply wrong because, unlike South Africa, the United Kingdom has not entrenched justiciable socio-economic rights. Not only the Constitutional Court was easily satisfied with the argument that 'there was a lack of resources',[23] it furthermore restricted interpretation of the rights to life and not to be refused emergency medical treatment, asserting that there is no connection between them in the South African context. In respect of the interpretation of the right not to be refused emergency medical treatment, the Court said that it was to be read as the fact that treatment should not be frustrated by reason of bureaucratic requirements or other formalities when a person who suffers a sudden catastrophe calls for immediate medical attention, excluding the case of chronic illness which according to the Court, is part of the an ongoing state of affairs resulting from a deterioration of the patient's health. [24]

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[20] In *Re Certification*, *supra* note 9, para. 77.

[21] *R v Cambridge Health Authority, ex parte B* [1995] 2 All ER 129 (CA) at 137dBf.

[22] The *Soobramoney* case, *supra* note 16, para 30.

[23] Even if the Court emphasized that there had been a significant increase in the budget of the Kwazulu-Natal Health Department (from 152 million to 700 million within three years), it failed to do a proper analysis of whether or not sufficient resources were allocated in the entire province to the treatment of renal failure. This would have helped to determine whether or not the amount allocated in this area was reasonable in comparison with other medical services that the province had to finance.

[24] The *Soobramoney* case, *supra* note 17, paras. 13,20-22.

As observed by Pieterse, this decision boil down to frustration because of the Court's abdication of responsibility to address the inequalities in access to care caused by an uneven distribution of resources in the health system; an abdication identified as defeatism, as the position of the Court suggested that 'the constitutional right to have access to health care services was powerless to address the unfairness inherent to the health system's response to poor patients in need of unaffordable care'.[25] This was likely to imply that the optimism sparked by the Constitution that justiciable socio-economic rights could be used by poor and marginalized members of society to demand that the health system respond to their individual needs, might have been misplaced.[26]

Minister of Health v Treatment Action Campaign (Hereinafter the *TAC* case)[27]

In this case, the Treatment Action Campaign (TAC), an HIV/AIDS advocacy group[28], brought a suit alleging that by not widely distributing anti-retroviral drugs (Nevirapine), and by not having a comprehensive programme for the prevention of mother-to-child HIV transmission, the government had violated the constitutional right to health care in terms of section 27 of the Bill of Rights. The Constitutional Court found that the government needed to devise and implement, within its available resources, a comprehensive programme, and to co-ordinate and progressively realize the right of pregnant women and their newborn children to have access to healthcare services in order to help prevent mother-to-child transmission of HIV.[29] The Court recalled the primary duty of courts, which is to apply the Constitution and the law impartially and without fear, favor or prejudice.[30] In the assessment of reasonableness, the Court went on to appreciate the well-being or not of delivering the Nevirapine and

[25] Pieterse M., *Can rights cure? the impact of human rights litigation in South Africa's health system* (PULP 2009) pp. 64-65.

[26] *Id.*, p.65.

[27] *Minister of Health v Treatment Action Campaign* 2002 (4) BCLR 359 (T).

[28] The applicants were a number of associations and members of civil society, the TAC being the principal actor among them.

[29] The *TAC* case, *supra* note 27, para. 135.

[30] *Id.* para. 99.

held that despite the fact that medical research was still in process, the Nevirapine should not be withheld from mothers and children who did not have access to research and training sites.[31] According to the Court, the probability of the child surviving if infected were so slim and the nature of the suffering so grave that the risk of some future resistance, as contended by the government, was well worth taking.[32]

This judgment remains as one of the world famous landmark decisions, showing that the judicial enforcement of the right to health can indeed make a difference in the lives of the beneficiaries.

However, the decision has been severely criticized for setting aside the supervisory order delivered by the Transvaal Provincial Division of the High Court where the case was decided before going to appeal before the Constitutional Court. As a result, reluctance to comply with the order of the Court was expressed in the aftermath of the judgment. Though the Constitutional Court reached the conclusion that the state's policy had evolved and was no longer as rigid as it was when the proceedings commenced' (because two provincial health departments extended the availability of Nevirapine in hospitals under their jurisdiction in the course of hearing the matter),[33] the Minister of Health continued to publicly express her opposition to broadening access to Nevirapine, going as far as to declare she would not comply with a court order to do so (though she retracted later), and at least two provinces failed to comply with the order.[34]

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[31] *Ibid.* para. 64.

[32] *Ibid*. para 59.

[33] The *TAC* case, *supra* note 27, para. 132.

[34] Heywood M. 'Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign case against the Minister of Health' 2003 19 *South African Journal on Human Rights* 278-315, p. 300.

TAC had to devote much more efforts to get the decision enforced by filling a complaint with the South African Human Rights Commission and the launch contempt of court proceedings, in order to stimulate greater compliance by these respondents.[35]

Government of the Republic of South Africa and Others v Grootboom and Others (Hereinafter the *Grootboom* case)[36]

The *Grootboom* case involved a group of families, mostly comprised of children, who were forced to leave their squatter camp and were evicted from their homes which had been built on private land. Many were on the municipal waiting list for affordable housing and some had been waiting as long as seven years. The applicant based their claim on two constitutional provisions. First, on section 26 of the Constitution which provides that everyone has the right of access to adequate housing. Section 26(2) imposes an obligation upon the state to take reasonable legislative and other measures to ensure the progressive realization of this right within its available resources. The second basis for their claim was section 28(1)(c) of the Constitution which provides that children have the right to shelter. The case went first before the High Court which ordered the government to provide applicants with adequate basic shelter or housing until they had obtained permanent accommodation. [37] Before the Constitutional Court, the appellants, who represented all spheres of government responsible for housing in the area in question, challenged the correctness of the High Court judgment. The Constitutional Court pointed out that 'contours and content of the measures to be adopted are primarily a matter for the legislature and the executive', but that 'such measures must be reasonable'.[38] The Constitutional Court found the state's housing programme to be inconsistent with the right to housing, to the extent that it failed to make provision for the housing needs of the 'absolutely homeless'.[39] However, the *Grootboom* decision despite the fact that it laid the groundwork for future cases

[35] Heywood M. 'Contempt or compliance? The TAC case after the Constitutional Court judgment' 2003 4 *ESR Review* 7-10, pp. 9-10

[36] *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC).

[37] *Grootboom v Ostenberg Municipality and others* 2000 (3) BCLR 277 (C).

[38] *Id.* para. 41.

[39] *Ibd.* para. 95.

involving access to adequate housing , has been criticized for rejecting the notion of minimum core on which the High Court decided to refer, [40] and for choosing to substitute the supervisory order delivered[41] by a declaratory order.

As regard the minimum core, the main argument of the Constitutional Court was that the content of the concept as developed by the United Nations (UN) Committed was uncertain and made it difficult for the court to perceive what should be the minimum substance of the right to access adequate housing due to the fact that needs in this area are often of a different nature (access to land, access to shelter or need of financial assistance…).[42] This argument of the Constitutional Court should not be regarded as valid. This is because the concept of minimum court implies that there are levels of satisfaction for any given socio-economic right and that the minim level should be satisfied as a matter of emergency, while other elements of the right will be met with time. In this respect, it is clear that the minimum core for the right to access adequate housing is not to be limited to the need for access to land, but should include at least a shelter where one can live, be it on her/his own land or the one belonging to the state. The uncertainty of the minimum core concept as developed by the UN has led the Constitutional Court to champion the use of the reasonableness test as if this latter concept was in dark contrast with the first one (whereas this should not be the case). In fact, the difficulty arises from the constitutional interpretation of section 26 (2) of the constitution which requires from the government is to adopt reasonable "legislative and other measures".

The fact that the Constitutional Court adopted the reasonableness straight away after its dismissal of the minimum core is likely to suggest that in the view of the Court, the two concepts are irreconcilable. Depending on the circumstances of each case, I share the view that a nexus between both concepts can be established in as much as they fulfill

[40] Bilchitz D. 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *South African Journal of Human Rights* 1-26, pp. 9-11.

[41] The *Grootboom* case, *Supra* note 36, para. 99.

[42] *Id.* paras. 32-33.

functions that are different but not irreconcilable.[43] The minimum core serves to determine the bottom line of what is immediately expected from the state, while reasonableness serves as a tool to assess government policies and actions. I concur with the opinion offered by Bilchitz which implies that, in the legal framework for socio-economic rights, both should be regarded as distinct obligations resting upon the state, but whose interdependence can be provisionally[44] reconciled under the notion of "progressive realization".[45] The *modus operandi* is a quite simple one: When the government alleges impossibility to provide the minimum core immediately, not only must this assertion pass the reasonableness test, but the government must also disclose its plan and strategies to progress as quickly as possible towards the minimum standard and thereafter to the best attainable level of satisfaction of the right at issue. Therefore, it is with reason that the Constitutional Court has been criticized for failing to develop its own understanding of what should be the minimum expectation of the government in meeting its obligation under section 26.[46] This is in line with section 167 (7) which underlines that the interpretation of the Constitution is a matter for which the Constitutional Court is the highest authority. The legislature frames socio-economic rights in general terms, then courts, through their interpretive role give meaningful content to such rights, which can include a description of what can be considered as minimum core for the right in question. This has the advantage to clarify the obligation of the government. In addition, the excuse of uncertainty cannot stand the obligation devoted to the Court in section 39 of the Constitution which requires the judiciary, when interpreting the Bill of Rights, to have a due regard to value underlying an open and democratic society based on human dignity, equality and freedom. The Constitutional Court should elaborate and define the meaning of the right and what are implications that come with it. Taking into consideration that the situations in the *Grootboom* case and in many other cases are the result of past severe inequalities in land and resource distribution and ownership, mere consideration of 'human dignity' suggested that the

[43] Bilchitz D., *Supra* note 40, pp. 9-10.

[44] Here I use the adverb provisionally because the realization of these rights is not supposed to remain indefinitely progressive. The final goal remains the full realization of socio-economic rights.

[45] Bilchitz D., *Supra* note 40, p. 11.

[46] *Id.*

Constitutional Court should have taken a step to determine what was the minimum core to which these homeless poor were entitled and declared it as a matter of emergency.[47] Even in terms of the diversity of needs related to the right of access to adequate house, this argument of the Court was not insurmountable. It could easily be thrown out by the case-by-case principle developed by the Court itself. In other words, though the needs in respect of the right of housing may be different, the court should be able to determine what is the most essential that the government should meet as the minimum core of a particular right and then, following the circumstances of a particular case, consider as matter of emergency aspects of the right that need to be satisfied in the said case. One can read a seemingly contradiction in the Court approach to minimum core, as in its conclusion it seems to make a use of it by making a special reference to "Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril", categorizing them a segment of the society in crisis situation. Such a distinction could be made only by an implicit assessment of the socio-economic conditions in which these deprived people were living in comparison to other segments of the society whose situation appeared much better or at least already at the minimum level of what may be imagine of the right to housing. This implicitly suggested that the Constitutional Court had in mind a minimum standard which it used to draw a demarcation between different segments of the society.

Concerning the substitution of the High Court supervisory order by a the declaratory order, this strategy adopted by the Constitutional Court has been ineffective in the aftermath of the judgment. Most of people concerned by this case have remained homeless more than 15years after the judgment and in 2008, Irene Grootboom died homeless, still waiting for a decent home for herself and her children. Despite adoption of house policy by the government setting a target of delivering 300 000 social houses per year, yet delivery of these units has consistently fallen short of target.[48] There are

[47] Wickery E. 'Grootboom's legacy: securing the right to access to adequate housing in South Africa?' Center for Human rights and global justice working paper economic, social and cultural rights series number 5, 2004, p. 7.

[48] e.g. 161 854 housing units and 64 362 serviced sites were delivered in 2009/10. The Fuller Center for Housing 'Housing Delivery Challenges In South Africa' Draft Report 2014, p. 13.

factors that make the task of The government daunting, among which one can point out the fact that the family size is constantly changing with estimates ranging from 3.9 to 4.5.[49]).[50] However, there is a presumption that when court orders are vaguely drafted, there is always the danger that the government will interpret them narrowly.[51] This is why the exercise of a supervisory jurisdiction by the judiciary may be appropriate beyond the courtroom whenever the situation of vulnerable people calls for an urgent solution.[52]

Mazibuko v City of Johannesburg[53]

This case concerned a challenge by five residents of Phiri in Soweto to the City of Johannesburg's policy in relation to the supply of free basic water. They contended that the policy infringed section 27(1)(b) of the 1996 Constitution which provides the rights for everyone to have access to sufficient water and section 27 (2) which requires the state to adopt reasonable legislative and other measures to realize this right. In this case, the Constitutional Court attempted to describe the role that the courts have to play in respect of socio-economic rights. The Constitutional Court started by warning that determination of targets to achieve in correlation to available resources was primary a matter for the legislative and the executive.[54] The Constitutional Court concluded, in contrast to the High Court and the Supreme Court of Appeal, that it is not appropriate for a court to give a quantified content to what constitutes 'sufficient water' because this is a matter best addressed in the first place by the government. Describing the role of the judiciary, the Court held that courts should enforce socio-economic rights in one of the following ways: 'If government takes no steps to realize the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as

[49] *Id.* p.13.

[50] *Ibid.* p13.

[51] Wasson G. 'Grootboom and beyond: reassessing the socio-Economic jurisprudence of the south African Constitutional court' 2004 2 *South African Journal of Human Rights* 284-308, p. 302.

[52] Wasson G., *Supra* note 51, pp. 305-306

[53] *Mazibuko v City of Johannesburg* 2009 ZACC 28.

[54] The *Mazibuko* case, supra note 53, para. 61.

to meet the constitutional standard of reasonableness".[55] These words of the Constitutional Court imply that the judiciary has to check whether the other branches fulfill their constitutional duty and if so, whether they do it in a manner that is reasonable. Unfortunately, the description offered by the Constitutional Court here fails to explain how these steps should be reflected in the design of remedies to allow a follow up and monitoring of the enforcement of the court's decision after the judgment has been handed down. Moreover, it is questionable how this role of checking on other branches could be plainly fulfill by the court prior to the design of the remedy in a context where the Constitutional Court had opted out to display considerable deference either by refusing to discuss relevant issue (eg. the content of minimum core) or simply by choosing the restrictive interpretation of a right (eg. *Soobramoney* case). The deference was so pronounced in this case that the Constitutional Court even made confusion in respect of who has to define the scope of rights entrenched in the Constitution; contending that applicants had not persuaded it what quantity of water was "sufficient water" within the meaning of section 27 of the Constitution.[56] This is actually a task for the Court and not the claimant as it results from the exercise of interpreting provisions of the Constitution.[57] The Constitutional Court finally upheld the appeal of the City and Johannesburg Water and the Minister and set aside the orders of the High Court and Supreme Court of Appeal.

Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others (Hereinafter the *jaftha* case)[58]

The case concerned the constitutional validity of sections 66(1)(a) and 67 of the Magistrates' Courts Act 32 of 1944 (the Act) which deal with the sale in execution of property in order to satisfy a debt. Ms Maggie Jaftha and Ms Christina van Rooyen approached the Constitutional Court appealing against the judgment of the Cape High

[55] *Id.*, para. 68.

[56] The *Mazibuko* case, *supra* note 53, para. 156.

[57] See section 39 of the 1996 Constitution.

[58] *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (8 October 2004).

Court which upheld the sale in execution of their homes. The main issue was about the question whether a law which permits the sale in execution of peoples' homes because they have not paid their debts, thereby removing their security of tenure, violates the right to have access to adequate housing, protected in section 26 of the Constitution. The Constitutional Court set aside the order of the High court, asserting that allowing sale in execution in unjustifiable circumstances and without judicial intervention was unconstitutional.[59] The Constitutional Court said that since access to adequate housing already existed, appellants should not be rendered homeless.[60]

Obviously, what is interesting in this case, is the fact that owners were able to maintain their ownership (right to property) on their homes only through the protection of the right of access to adequate housing. As a result, the antinomy between the right to property and socio-economic rights as perceived by different groups involved in the negotiation of the Constitution had vanished in this case. Security of tenure was granted as a direct consequence of the judicial enforcement of a socio-economic right in its negative dimension.

Occupiers of 51 Olivia Road v City of Johannesburg and Others (Hereinafter the *City of Johannesburg* case)[61]

In this case, the city of Johannesburg applied to the High Court to get 400 occupiers evicted from buildings in the inner City on the basis that the buildings were unsafe and unhealthy. The High Court rejected the eviction request, but instead order the City to remedy its housing programme which was found to be inadequate. The case went then to the Supreme Court of Appeal which upheld the appeal by the City, provided that the City would offer alternative accommodation. Then the case went before the Constitutional Court which before rendering the final judgment, issued an order

[59] The *Jaftha* case, *supra* note 58, para. 61.

[60] *Id*., paras. 31, 39, 51.

[61] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC) ; 2008 (5) BCLR 475 (CC) (19 February 2008).

requiring the parties to engage meaningful negotiations with each other to address the possibilities of short term steps to improve current living conditions and alternative accommodation. The parties reached consensus and agreed that instead of ejecting occupiers, the City would renovate and upgrade the building and, in the meantime, provide temporary accommodation.

This decision that was rendered 8 years after the *Grootboom* judgment has shown the extent to which this landmark decision had paved the way for the settlement of future matters related to the right of access to adequate housing. Indeed, based on the observation made in *Grootboom* where the Court a *quo* fustigated the failure of the municipality to engage with occupiers of the New Rusts Land,[62] the Constitutional Court has implemented an new procedure requesting "engagement" between parties to find a solution, as a prerequisite to eviction. In 2004, a similar requirement was also made by the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers*,[63] requesting the municipality to seek mediation with occupiers. At this occasion, the legitimacy of such a process was explained. The Constitutional Court, based on provisions of section 25 of the Constitution, considered that this solution was commanded by the fact that those who have suffered dispossession of property after 1913 as a result of past racially discriminatory law or practices are entitled to restitution or at least any other suitable remedy. There is therefore a general presumption that, except for the white minority, the condition of all South Africans living in informal settlement is forcefully to be seen as a result of the segregation policy applied during the apartheid. If this is relatively true for the majority of South Africans living in poverty, it is nevertheless relevant to underline that many other factors can make some dwelling homeless or in informal settlement.[64] In doing so, the Constitutional Court has been active and innovative insofar as the requirement of prior discussion between parties is now used as a strategy to prevent that eviction turns to make occupiers homeless, which will be then a violation of section 26 of the Constitution. The Constitutional Court has described engagement as

[62] The *City of Johannesburg* case, *Supra* note 61, para 11.

[63] *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC).

[64] See for instance, the case of those households that receive a subsidy but then decide to remain in an informal area. The Fuller Center for Housing , *supra* note 48, p. 19.

'a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives',[65] namely to determine what the consequences of the eviction might be; whether the city could help in alleviating those dire consequences; whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period; whether the city had any obligations to the occupiers in the prevailing circumstances; and when and how the city could or would fulfill these obligations'.[66] This step is motivated by the desire to find a viable solution that will be in conformity with the letter and spirit of the Constitution. In the *Elizabeth port municipality case,* The Constitutional Court made it explicitly clear that no eviction can take place unless a reasonable alternative is available.[67] At present, engagement has become a generalized strategy to avoid that other socio-economic rights be infringed in case eviction has to occur. [68] This is what Courtis identifies as a duty of immediate effect, to mean that the state is prevented from violating socio-economic rights in their negative dimension by providing an alternative.[69]

Juma Musjid Primary School v Essay (Hereinafter the *Juma* case)[70]

On 11 April 2011, the Constitutional Court issued a ruling in a case concerning the right to basic education as a private landlord sought to evict a public school conducted on his property. The applicants, the School Governing Body (SGB), parents and guardians of students enrolled in the school , appealed against an order of the High Court of KwaZulu -Natal which upheld the application of the owner of the premise to evict the school. In its application for leave to appeal to the Constitutional Court, the SGB

[65] The *City of Johannesburg* case, *Supra* note 61, para 11.

[66] *Id.* para. 15.

[67] *Ibid.* para. 28.

[68] See the case of eviction and the right to education in the next case.

[69] Courtis C. 'Standards to make rights justiciable: a summary exploration' 2009 2 (4) *Erasmus Law Review,* 379-396, p.382.

[70] *Juma Musjid Primary School v Essay* N.O. 2011 8 BCLR 761 (CC).

challenged first the conduct of the Trust in seeking the application of its rights under section 25 of the Constitution as Private owner of land ; and then the conduct of the High Court in its failure to perform its constitutional duty to develop the common law to protect learners and make proper order. At the first hearing of the case, the Constitutional Court provisionally set aside the eviction order made by the High Court based on the view that the order had an impact on the learners' right to a basic education under section 29(1) of the Constitution and on the learners' best interests under section 28 of the Constitution. The Constitutional Court ruled that (a) the Trustee had a constitutional duty to respect the learners' right to a basic education under section 29 of the Constitution and that, including the negative obligations in terms of articles 8 of the Constitution not to infringe that right. Because of the imminent end of the 2010 school-year, the provisional order directed the Member of Executive Council (MEC) to engage meaningfully with the Trustees and the SGB in an effort to resolve the dispute and allow for the continued operation of the school. In case of failure, the Court ordered the MEC to take steps to secure alternative placements for the learners. As it became clear that parties had not reached an agreement and that the closure of the School had become inevitable, the Court ordered the MEC to submit a further report to indicate that the MEC complied with the obligation to provide alternative schooling. A second report was then filed by the MEC setting out sufficient information regarding the schools where the learners would continue their schooling. The Court was satisfied that alternative arrangements for the placement of the children for the 2011 school-year had been made and that the learners' right to a basic education would be protected. This case is also a reflect of how beneficial is the principle of engagement prior to eviction.

IV. Assessment

The interactions between the Government, holders of socio-economic rights and the judiciary in the development of the South African jurisprudence reveal the existence of an ongoing struggle between the need for rapid and radical transformation and constraints raised by budgetary and resources allocations, considerations which call for some degree of realism in public policy choices.

View from the neorealist viewpoint, the judicial enforcement of socio-economic rights has hardly succeeded to influence the behavior of the South African government. In the aftermath of a judgment, the response of the government has been at time either ineffective or very slow. After the *Grootboom* case, despite the adoption of new housing policy announcing an average of 300.000 houses per year,[71] yet delivery of these units has consistently fallen short of target with the consequence that after 14 years, millions of South Africans are still on the waiting list.[72] The head of the Finance and Fiscal Commission has recently said that South Africa needs at least R800 billion to clear its housing backlog of 2.1 million houses by 2020, a task that he describes as a 'miracle'. In terms of expenditure, the achievement of this target requires up to R120Billion per year, whereas the government provides only R30billion per year.[73] This set the execution rate to only 25% . The Fuller Center for Housing noted that the main issue is more about updating the policy to reflect the nature of the goals.

It has been observed that 'the laudable objectives contained in the Breaking New Ground (2004) housing document cannot be achieved using existing policy instruments and that New instruments, particularly financial instruments, are required If social housing is to become a significant plank of South African housing policy. In fact, it is correct to assume that the concept of "progressive realization of socio-economic rights" commands frequent update of the policy over the years, and that the best way for the judiciary to compel the government to a policy that may be outdate, is to require periodical reports after a judgment has been rendered. This strategy should help to avoid the scenario where the government chooses to be reluctant to the court order as was the case after the *TAC* decision,[74] or chooses to offer a slow response as was the case with the right of access to adequate housing in post-*Grootboom*. The development of jurisprudence leads to the observation that South African government representatives often have to be forced to comply, otherwise there is room for

[71] The Comprehensive Plan for the Development of Sustainable Human Settlements also known as the Breaking New Ground Policy was adopted in 2004.

[72] The Fuller Center for Housing, supra note 48, p.13.

[73] *Id.*p14.

[74] The *TAC* had to devote Additional efforts to get the Government comply with the Constitutional Court order.

constitutional rights to be transgressed.[75] Nevertheless, it is questionable whether this should be accepted as a general assumption to such extent that it would call for a higher judicial control over governmental actions? A look in comparative law advocates for a positive response. Indeed, though every society faces its own realities, it should be noted that some western countries with the strongest socio-economic rights have very little litigation as a result of a relatively pretty good performance due to government commitment and the existence of optimum social policies addressing social needs (See the case of Finland, Holland and Sweden).[76] Therefore, it is clear that when the government level of commitment is low, there is a need for the courts to have a more assertive attitude in adjudicating socio-economic rights cases. As observed by Viljoen, justiciability becomes more incisive where the government fails to allocate its resources to realize socio-economic rights.[77]

Before assessing the extent to which the judiciary in South Africa has contributed to make socio-economic rights a living reality, it should be pointed out that, in terms of the Rodriguez-Garavito's constructivist approach, justiciability as practiced so far, has brought a strong disappointment with the government and its leaders.[78]

At the end of the first decade of constitutionalism, Lehmann was describing the disappointment as follows:

> 'Constitutional scholars and human rights activists had high hopes for the "transformative potential" of the South African Constitution. Today, ten years into our post-apartheid

[75] Tomasevski K. 'Strengthening pro-poor law: Legal enforcement of economic and social rights' in *Human rights and poverty reduction: Realities, controversies and strategies*, p.1; Available at: www.odi.org.uk/rights (accessed on 2/8/2012).

[76] Wickery E., *Supra* note 47, pp. 38,40.

[77] Viljoen F. *International Human Rights Law in Africa* 2nd ed. (Oxford, 2012) p.545. A look to the level of corruption in public institutions can be an factor that determines the behavior or the degree of activism that the courts should display. A more assertive judiciary will be justified where the corruption perception index is very bad.

[78] Booysen S. 'Twenty years of South African democracy: citizens views on human rights, governance', Report of the Freedom House study on the South African democracy (2013) p.1; available at http://www.freedomhouse.org/sites/default/files/Twenty%20Years%20of%20South%20African%20Democracy.pdf (accessed on 10/27/2014).

> constitutional democracy proximately forty percent of South Africans remain unemployed, approximately thirty percent do not have either adequate housing or access to piped water in their dwelling or on their site, and close to forty percent lack access to hygienic toilet facilities. About fifty percent survive, somehow, on an income of less than R500 per month. Life, for the majority of South Africans, remains appallingly hard, despite the socio-economic promises of the Constitution. It is not surprising that scholars, activists, and the poor themselves are disappointed, and feel that the Constitution has not realized its promise of transforming the lives of South Africa's poor.'[79]

Similar observations were made by some other scholars in more recent research works.[80] However surprisingly in spite of all this, citizens retain their faith in democratic institutions established by the Constitution for the improvement of their social conditions.[81]

The rationale behind such a contrasting attitude can probably be the result of the fact that justiciability, as a strategy to alleviate poverty and correct past inequalities, is implicitly a channel through which poor are empowered to pursue a dialogue with public institutions involved in the implementation process of their rights. The fact that individuals or groups in need of a particular socio-economic right were able to make a claim and get a response from the state, either directly or indirectly through adjudication of the case, is surely a source of motivation despite broken promises. Compare to many other African countries, this is something for which the justiciability strategy should receive a fair measure of praise in South Africa. Indeed, despite the efforts of democratization and adherence to international agreements dealing with socio-economic rights, a formal exchange between citizens and public institutions about

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[79] Lehmann K. 'In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core' (2006) 22 *American University* International *Law Review* 163-197, pp.163-164.

[80] Mbazira C. *Litigating Socio-economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (PULP 2009) p.v. Makdonaldo D.B. *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and C*olombia (Cambridge, 2013) p.319.

[81] *Id.*

the implementation of these rights is yet quasi-inexistent in many African countries.[82] This is particularly true for African countries where the influence of the French colonialism has been strong, in which the famous theory of '*actes de gouvernments*'[83] have been used by the government as a legal objection to escape the judicial review of some important decisions affecting fundamental rights of citizens. Despite dissatisfaction, the continuous development of the vast jurisprudence on socio-economic rights proves that South Africans are not losing interest in having their case decided by the courts. Especially with regard to eviction, the introduction by the Constitutional Court of the requirement of "engagement" as a precondition allows poor and the government to come together and address challenges raised by socio-economic rights that would be affected if occupiers were ejected. However, this dialogue between those that I indentify here as stakeholders (rights holders and all public institutions upon whom rests the obligation to implement them) will remain weak in the absence of a clear conception of normative principles which should guide the implementation process of these rights.[84] After rejecting the minimum core and displaying considerable deference in remedies, the present context is one where potential litigants cannot predict what to expect because case law have been and are still decided under a process of multiple competing criteria.[85] As a result, the empowerment that the constitutionalization of justiciable socio-economic rights seeks to achieve upon citizens in their interactions with public institutions is weaken.

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[82] See by way of illustration, the case of Congo (Kinshasa) and Cameroun. Mpiana JK. *La Position du droit international dans l'ordre juridique congolais et l'application de ses normes*: *l'application de ses normes* (Publibook, 2013) pp. 266-267; Fall AB. 'Le juge, le justiciable et les pouvoirs publics. Pour uneappréciation concrète de la place du juge dans les systèmes politiques en Afrique' 2003 3 *Revue d'étude et de recherche sur le droit et l'administration dans les pays d'Afrique*, 309-346, p.338

[83] This concept refers to acts of states that courts cannot review because they involve issues covers by the political question doctrine (eg. decisions affecting the relationship between the three branches of the state or dealing with the conduct of foreign relations).

[84] Bilchitz D. 'Socio-economic rights. economic crisis and legal doctrine', p.36; Available at file:///C:/Users/oracle/Downloads/SSRN-id2320432.pdf (accessed on 10/28/2014).

[85] *Id.* p. 36.

Turning to the assessment of the south African judiciary, it generally displayed excessive self-restraint,[86] namely the reluctance to develop a comprehensive description of a minimum core content; the rejection to embrace a broad interpretation of the concept 'emergency' in respect of the right to health and the deference in terms of the remedies. The scholarship is full of criticisms on these questions, that there is no need to overemphasize them here. Nevertheless, the following observations should be made:

- Concerning the minimum core, the reluctance of the Constitutional Court to define the content was disheartening. The uncertainty perceived by the Court in the description offered by the UN Committee could have been overcome by a contextualization or transposition of the concept within south African realities. Indeed, this step is one that every country which adheres to the International Covenant on Economic Social and Cultural Rights should take. The fact that every country has its own realities makes it impossible for the UN Committee to provide a detailed description of minimum core that can fit equally in the specify context of any society.[87] This remark goes in line with the observation made by a scholar that the constitutionality of state action or inaction cannot be assessed in abstract, but should always take in consideration the specific social and historical context of South Africa.[88] As far as this is accurate, the Constitutional Court should have taken the step to develop a South African perception of minimum core. This task was eminently doable that Courtis brought forth the example of the United States, known as a country unfavorable to justiciable socio-economic rights, but where a minimum core has been successfully developed by state courts in many cases involving the right to education.[89] However, It seems important here to clarify my

[86] Ian Curie has qualified the attitude of the Constitutional Court in general as 'judicial avoidance'. Makdonaldo, *Supra* note 80, p.319. One of the well know exceptions is the High Court judgment in the *Grootboom* case which delivered a supervisory order that was later on reversed by the Constitutional Court.

[87] The UN Committee description could only be abstract or of general nature.

[88] De Vos, 'So much to do, so little done" the right of access to anti-retroviral drugs post Grootboom' 2003 7 *Law, Democracy and Development* 83-112, p.88

[89] Courtis provides a list of 21 case law where litigants has been successful, where state supreme courts have developed a minimum content approach of the right to education, finding in many cases that the government did

remarks to the extent that, though I totally support the view that what is needed to reach a minimum core can be determined according to the particular circumstances of the case, I totally disagree, as was the case in *Soobramoney,* with the approach that chooses to restrict the content of a right based also on the circumstances of the case which mainly include a look at the availability and allocation of resources.

- Concerning the restrictive interpretation of the 'emergency medical treatment' which commands the state to provide urgent healthcare assistance, a look in comparative law, may lead to the assumption that the Constitutional Court was concerned with the negative consequence that a very broad interpretation of the right to health can have on equality between citizens as reflected in the Brazilian jurisprudence. The right to health in this latter jurisprudence has been interpreted as a right to any health good (treatment, equipment, etc.) that an individual can prove he or she needs, irrespective of its cost.[90] Under this approach, collective and intractable issue of resource allocation among the numerous competing needs of the population are disregard because cases are dealt with as a bilateral dispute between single needy individuals and a the state. With an average of 40,000 lawsuits yearly against the Brazilian government in which claimants rely on the right to health, Ferraz contends that there is unequal repartition of resources between the litigant minority and the non litigant majority in need of healthcare.[91] This led this scholar to conclude that when the situation is framed like this, the justiciability of socio-economic rights, instead of contributing to an egalitarian society, serves to reinforce between citizens.[92] Therefore, the Constitutional Court's fear of such pervasive effect was justified, but yet the issue had not been properly addressed. Indeed, instead of choosing a restrictive interpretation, the Constitutional Court could have situated the limitation to

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not meet its obligations, for instance because of its failure to provide measurable standards to assess compliance. Courtis, *supra* note 69, p. 390.

[90] Ferraz, OLM. 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil' 2011 89 *Texas Law Review* 1643-1678, p.1660.

[91] *Id.* pp.1652,1663.

[92] *Ibid.* p.1663.

satisfy the applicant's demand at the level of the reasonableness test. This strategy would have the advantage to leave the scope of the right intact, without denying the fact that its satisfaction was contingent upon the availability of resources. It is unfortunate that the Constitutional Court rejected the generous interpretation which implies that 'a constitutional provision is interpreted with a view to granting the interested party the largest possible measure of constitutional protection.'[93] This generous interpretation is in accordance with the transformative purpose of the Constitution which seeks to eradicate adverse effects of the apartheid legacy. In such a context, the judiciary has no choice but to provide rights' holders an interpretation that secure the full protection of the right. However, this is not to say that the right cannot suffer some limitations in the implementation process. Indeed, my all point is simply that a court should never refrain from providing a right with the broadest interpretation that can be imagined as long as it matches the transformative purpose of the constitution. As far as the circumstances of the case may be concerned (eg. availability of resources), they should only dictate limitations in terms of implementation and not in terms of the scope of the right. This why one should regard as wrong the fact that the Constitutional Court considered scarcity of resources as a determinant to define the scope of the right to health in the *Soobramoney* case.[94] This approach implicitly suggests that the content of a right may vary from one case to another, depending on fluctuations of state's resources.

- As regard deference in terms of remedy, it is clear that this strategy of the Constitutional Court has seriously attenuated the strong effect that justiciability should have produced. Actually, the problem is not the judgment itself, but rather the response of the state to the court's order.[95] The major reason for which the Constitutional Court delivered simply declarative orders has been the fact

[93] Webb H. 'The Constitutional Court of South Africa: Rights interpretation and a comparative constitutional law' 1998 1 (2) *Journal of Constitutional Law,*205-283 p.217.

[94] *Soobramoney*, *supra* note 17, paras. 17, 19.

[95] Wesson M. 'Grootboom and Beyond. Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court', *South African Journal on Human Rights* 20: 284–308, p.306.

that it trusted fully the government to comply with its order or that there had been an evolution in the attitude of the government in the course of proceedings or hearing the case (see for instance the *TAC* case). However, based on experience, there is now sufficient argument to consider that the judiciary should not blindly trust the government. What can be rather suggested is that courts engaged in what Rodriguez identifies as "dialogic activism", which implies that the judgment set broad goals and clear implementation paths through deadlines and progress reports, while leaving substantive decisions and detailed outcomes to government agencies.[96] As underlined by Wesson, such supervisory jurisdiction should no more be regarded as an unwarranted assertion of authority on the part of the judiciary, but as established relationship of collaboration between the state and the judiciary in terms of which each branch of government brings its particular skills to bear on the problem of realizing socioeconomic rights.[97] This description corresponds to what Dixo calls a theory of 'constitutional dialogue'.[98] It should be considered as the response to the puzzling question of the extent to which courts should go in judicial review in respect of the positive duties imposed by socio-economic rights. Because a constitutional dialogue is continuous, the judiciary should be able to adjust the extent of its intervention according to the commitment of the government which can only be assess through time as well. See this, it becomes easily to understand that the situation can call for further actions of the court in the aftermath of the judgment whenever progress is latent or unsatisfactory (eg. the *TAC* case). To keep the window open, it would be appropriate for the court *a quo* to grant a supervisory order.

[96] Rodríguez-Garavito C., *Supra* note 4, p.8.

[97] Wesson M., *Supra* note 95, p.307.

[98] Dixon r. 'Creating dialogue about socio-economic rights: strong v. weak-form judicial review revisited', Center for Human rights and Global justice working paper economic, social and cultural rights series (2006) p.1

Now that all the above observations have been made, it is accurate to confirm that the justicability of socio-economic rights in South Africa so far amounts to a mixture of satisfaction and dissatisfaction.

V. Conclusion: the way forward

The justiciability of socio-economic rights has brought some positive impacts, but not enough to produce the expected change for millions of South Africans still living in poverty. As observed in the course of this study, the very first impact was a psychological one. By enclosing justiciable socio-economic rights in the Constitution, drafters put a smile back on the face of those who had suffered past injustices caused by the legacy of apartheid, giving them hope that their social conditions would improve in the next few years. However, this impact was somehow limited as public awareness about the possibility to approach the court increased more as a result of the massive publicity surrounding first socio-economic rights cases decided by the Constitutional Court. [99] In addition, it was observed as another positive result that strategic litigation has led to the introduction of the new procedure called "engagement", which helped prevent that socio-economic rights are violated in the case where the eviction has to take place. Where a combine reading of the right to property and the right to access housing was possible, this procedure has reinforced security of tenure. The obligation to engage discussion prior to eviction is indeed part of the dialogue that justiciability has facilitated between holders of socio-rights and public institutions. However, it is clear that more could have been done during these two decades of constitutionalism in South Africa if the judiciary, especially the Constitutional Court was less deferential and more ingenious in developing the drafting of remedies. This inspires the conclusion that there is to date a significant disproportion between the goal of transformation embraced by the constitution and the deferential attitude of the Constitutional Court. This necessarily calls for adjustment in the behavior of the judiciary to operate in a more

[99] Bentley K. and Calland R. 'Access to information and socio-economic rights: a theory of change in practice' in Malcolm Langford, Ben Cousins, Jackie Dugard, Tshepo Madlingozi (eds.) *Socio-Economic Rights in South Africa: Symbols or Substance?* (Oxford, 2013) 341-364, p. 356.

assertive manner. This should be done in consideration of intrinsic value like equality, justice and human dignity. The Constitutional Court should learn from the development of its case law and bring improvements that would make justiciability efficient to foster the transformation desired in the South African Society. In this respect, it is not yet late for the Constitutional Court to develop its own perception of what should be the minimum core because. As argued in this paper there is no inconsistency with the reasonableness test. Also, because supervisory orders oblige the government to act within a fixed period of time and report to the court on progress achieved, it is advisable that as far as possible, the judiciary makes use of them to generate concrete results. Preference for deferential remedies is likely to delay the realization of socio-economic rights despite the binding nature of the judicial decision delivered.