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***79 BEYOND JUSTICIABILITY: CHALLENGES OF IMPLEMENTING/ENFORCING SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA**
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I. INTRODUCTION

On April 27, 1998, the new political dispensation in South Africa celebrated its fourth official birthday. In the relatively short period since its inception, the new order has gained a justifiable reputation, as an emergent constitutional democracy that is committed to and based on the rule of law and human rights. The old South African legal system was justifiably characterized, as a transplanted Euro-centric and was North American in orientation, [\[FN1\]](#) in addition to its indisputable racist institutional and legislative trademarks. [\[FN2\]](#) The present legal system is paradoxically gaining a measure of legitimacy without necessarily addressing the "missing African link;" a matter which received judicial recognition or notice in the first case to be filed in the Constitutional Court. [\[FN3\]](#) Indeed, part of the explanation for this process of legitimation of the South African legal order and legal system lies in the larger political changes that replaced the apartheid regime and its value systems and institutional expressions, *80 including transforming the judiciary and the judicial values and cultures. [\[FN4\]](#)

The creation of a Constitutional Court with clearly defined constitutional values that include human dignity, the achievement of equality, commitment to the advancement of human rights and freedoms, non-racialism and non-sexism, has not been insignificant. [\[FN5\]](#) Equally significant has been clear expression of commitment to political pluralism, multi-partyism and constitutional supremacy as a replacement for the traditional doctrine of parliamentary sovereignty. [\[FN6\]](#) The Constitutional commitment to national reconciliation and the establishment of transparent, albeit controversial, institutions, such as the Truth and Reconciliation Commission, to address national reconciliation in the context of seeking partial redress to gross violation of human rights in the past, has also contributed to this process of legitimation. [\[FN7\]](#)

From an international law and human rights perspective, the subject areas forming the focus of the present essay, the expressed constitutional imperatives that in particular require the interpretation of the entire Constitution and the Bill of Rights, as well as other legislation by paying attention to international law and appropriate comparative foreign law, is most significant. [\[FN8\]](#) So is the recognition of customary international law, which does not conflict with the Constitution or an act of Parliament, as constituting law in the Republic, similar to international agreements that are adopted by the legislature. [\[FN9\]](#) The *81 establishment of the Constitutional Court, and enjoining all courts to assume the power and duty to enforce the Constitution, including the Bill of Rights, is historic in the life of the nation. [\[FN10\]](#)

The power and duty of the courts to mediate constitutional and human rights disputes and to resolve such disputes by making authoritative and binding decisions, brings to the forefront the principle of justiciability. [\[FN11\]](#) When applied to a situation where the Bill of Rights requires justiciability for a whole range of human rights and freedoms: civil, political, economic, social and cultural, this enhanced role for the Courts require critical examination to determine its potential, scope and limits, given the structure of the South Africa society. [\[FN12\]](#) In other words, to what extent can the courts and other legal role players be able to contribute to the achievement of social reconstruction and social justice? If law, especially litigation, was used with some degree of effect for resistance purposes against the apartheid social and political order, [\[FN13\]](#) how can this

be turned around and used for reconstructive social redistributive justice? Assuming that it is used for this purpose, what are the limits of the justiciability strategy?

In part II, I will examine how the Constitution expresses the role of the courts in responding to constitutional interpretation in general and the *82 enforcement of rights and freedoms in particular. Part III will be a brief explanation of the historic and persisting division between civil and political rights on the one hand, and economic, social and cultural rights on the other, and the attempts by the world community and the community of South Africa to re-unite the two sides and treat them equally. Part IV examines what I characterize as the hidden and open expression of socio-economic rights in cases that go to courts for judicial determination with a view to demonstrating the overlapping nature of civil and political rights, as well as freedoms and social, economic and cultural rights. Part V analyzes socio-economic rights cases, and demonstrates how the courts have expressed what they recognize to be the limits to judicial remedies in certain circumstances. Finally, part VI will sketch out some preliminary conclusions on the need for legal human rights institutions, like the Centre for Applied Legal Studies, to understand the significance and limits of justiciability in public interest law in areas of socio-economic rights, to strive to stretch the limits and to balance justiciability with other legal roles and implementation or enforcement mechanisms anticipated by the socio-economic rights provisions.

II. THE CONSTITUTIONAL EXPRESSION ON THE INSTITUTION OF COURTS AND THE ROLE OF THE COURTS IN INTERPRETING THE CONSTITUTION, INCLUDING THE BILL OF RIGHTS

In addressing the issue of how the Constitution expresses the courts role in interpreting the Constitution including the Bill of Rights when adjudicating disputes before them, it may surprise those who are not familiar with the details of the Constitution to start by pointing out, as I do here, that the Constitution uses the word or concept "court" in three different ways: "general," "broad" and "narrow" meanings of the term "court."

The word or concept or term "court" is used in the "Application" provision in the Bill of Rights without qualification. [\[FN14\]](#) It appears that the use of the *83 term "court" in the "Enforcement of Rights" provision is also without qualification. [\[FN15\]](#) The same applies to the use of the term under the provisions relating to the "Application of International law" and the part of "Judicial System." [\[FN16\]](#) The term "court" is used generally in these circumstances.

However, the word/concept "court" is used much more broadly under the section dealing with "Access to Courts." "Access to Courts" in this section means access to "court" or, where appropriate, "another independent and impartial tribunal or forum." [\[FN17\]](#) This broader meaning of the term "court" is *84 repeated under the provision in the Bill of Rights dealing with "Interpretation of the Bill of Rights." [\[FN18\]](#)

In addition to the above two meanings of the concept "court," one general and unqualified, and the other broad and inclusive of other tribunals, and forums where disputes are resolved (alterative dispute resolution mechanisms included), there is yet a third use of the word "court" in the Constitution. The third use is what appears in the sections dealing with the vesting of "Judicial Authority" and part of "Judicial System." [\[FN19\]](#) It appears to me that this narrow and *85 specific meaning is what is meant by "courts" under the provisions relating to the criminal justice processes, [\[FN20\]](#) as well as the power and duty of "courts" to decide the validity of declaration or extension of states of emergency. [\[FN21\]](#)

*86 In identifying the above three different ways in which the Constitution uses the word/concept/term "court," it becomes important to indicate that the "justiciability" concept which is the focus of this essay is often or usually limited to the third narrow and specific use of the term "courts" as the agency of justiciability. However, in confronting issues of rights and their implementation or enforcement, it is critical that the term "courts" be understood in its broader or more general sense as envisaged in the Constitution. Justiciability, if confined to the role of the courts narrowly conceived, would greatly limit the

realization of human rights, or undermine the construction of a culture of human rights in South Africa.

The Bill of Rights chapter, an integral part of the Constitution, requires that it be interpreted more specially than the rest of the Constitution. [FN22] This special status of the human rights provisions in the Constitution needs to be recognized and appreciated, since a significant part of the rights and freedoms recognized in the Constitution are drawn from international instruments and norms, some of them binding and some not binding on South Africa. This is not necessarily the case with the rest of the provisions of the Constitution.

III. THE DIVISION OF RIGHTS AND FREEDOMS AND ATTEMPTS TO RE-UNITE THEM

A. The Historic Division of Rights at the United Nations and the Re-Unification Movement

Although the expression of specific rights or freedoms in the Universal Declaration of Human Rights [FN23] differs and may allow for different implementation or enforcement strategies and means, the Declaration did not categorize and divide rights and freedoms into the two main groupings that later came to characterize human rights and freedoms. These groupings are civil and political on the one hand, and economic, social and cultural on the other. The bipolar *87 ideological divisions within the United Nations that intensified after 1948, the year of adoption of the Universal Declaration, culminated in the adoption of two instruments on human rights and freedoms, [FN24] civil and political, [FN25] and economic, social and cultural, [FN26] with different implementation/ enforcement mechanisms and institutional arrangements at the UN level. The civil and political rights and freedoms came to be associated with "justiciability," while economic, social and cultural rights became associated with "non-justiciability," and with gradualist and less defined means and strategies of implementation/ enforcement. [FN27]

In 1993, at the Vienna World Human Rights Conference, the international community, represented officially by government representatives but under the shadow of the global civil society movement, grappled with the problems associated with the differential, and unequal approaches to the promotion and protection of rights on the basis of their being grouped as either belonging to the "justiciable" civil and political group or the so-called "non-justiciable" economic, social and cultural group. Vienna adopted a bold position that theoretically attempts to re-unite the rights and freedoms and to put them on equal footing.

All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and *88 religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote all human rights and fundamental freedoms. [FN28]

At the institutional and process levels, the UN Commission on Human Rights, the Committee on Economic, Social and Cultural Rights, international human rights experts and independent international legal and human rights organizations such as the International Commission of Jurists, have been developing an Optional Protocol to the ICESCR, [FN29] Principles [FN30] and Guidelines. [FN31] These changes should facilitate more effective implementation and enforcement of socio-economic rights through justiciability, and better programmed reporting criteria backed by sanctions.

B. The Interim Constitution and Socio-Economic Rights

In the intellectual debates leading to the adoption of the South African Interim Constitution, the debates, reminiscent of the old debates that had informed the UN processes leading to the division of rights and freedoms into the two camps was re-enacted. [FN32] The result was a chapter on "Fundamental Rights," not "Bill of Rights," that leaned very heavily on the civil and political rights side of the rights recognized and entrenched. [FN33]

*89 C. The Final Constitution and Socio-Economic Rights

The final Constitution effected the recognition of and an arrangement for rights and freedoms in three significant ways. Except for the "economic activity" freedom as expressed in the interim Constitution which was reformulated and either intentionally or unintentionally down-scaled to freedom of choice of trade, occupation and profession, [\[FN34\]](#) all the rights and freedoms identified in this essay as falling within the scope of socio-economic rights broadly defined were either retained, as they were in essence, or substantially expanded in scope in the final Constitution. [\[FN35\]](#) In addition to expanding the meaning and scope of those rights and freedoms, the final Constitution added the right of access to water, health care and social security, [\[FN36\]](#) the right of access to adequate housing and prohibition against arbitrary evictions and demolition, [\[FN37\]](#) and the right to internal self-determination. [\[FN38\]](#) The third area in which the final Constitution effects changes in relation to rights and freedoms is on implementation and enforcement. In both the interim and final Constitutions, all the rights are justiciable and the state/government is obligated to take appropriate measures to progressively realize them. The final Constitution spells out much more clearly the duty on the part of organs of state to report regularly to the Human Rights Commission on measures they have taken (and the difficulties they face) towards realization of a few of the recognized and protected socio-economic rights: housing, health care, food, water, social security, education and the environment. [\[FN39\]](#)

Despite the new constitutional dispensations, the debate regarding the proper place of socio-economic rights in the Bill of Rights and the methods of implementation and enforcement of these rights has not been fully settled; *90 academics continue and will continue to debate the issue. [\[FN40\]](#)

IV. OPEN AND HIDDEN EXPRESSIONS OF SOCIO-ECONOMIC RIGHTS AND FREEDOMS AND THE CHALLENGE OF CROSS-CUTTING RIGHTS AND FREEDOMS

In discharging the historic and unprecedented mandate of certifying [\[FN41\]](#) the draft constitution, the Constitutional Court considered three main conceptual and theoretical issues in relation to socio-economic rights: what constitutes socio-economic rights among the rights and freedoms in the draft Bill of Rights chapter; whether or not the inclusion of socio-economic rights in a Bill of Rights impinged on the constitutional doctrine of separation of powers as it requires that courts make decisions that have budgetary implications, which traditionally is considered the domain of either the executive or legislative branches of government; and, lastly, the justiciability of socio-economic rights. [\[FN42\]](#)

A. "Open" Socio-Economic Rights

As for the third and last issue regarding justiciability, this is dealt with in Part 4 of the essay. On the question of what constitutes socio-economic rights, the Court was not called upon by the "objectors" to determine the issue in general. The Court appears to have simply adopted the phraseology used by the "objectors" with regard to the particular sections, in the then draft Constitution, that relate to securing the rights of access to housing, health care, sufficient food and water, social security and basic education. [\[FN43\]](#) In ruling that irrespective of whether or not these are universally recognized rights, they were properly included in the South African Bill of Rights, the Constitutional Court formally and openly recognised these as socio-economic rights. In the present *91 writer's view, the Court did not intend, by categorizing these as socio-economic rights, to exclude other rights that are recognized in the Constitution, international instruments and writings of leading jurists, as also falling within the category of socio-economic rights. [\[FN44\]](#) An example of this would be the environmental rights provision in the Constitution. [\[FN45\]](#) These rights identified by the Court and others are commonly regarded as belonging to the socio-economic rights category that we consider in this essay to be "open" socio-economic rights. Although the final Constitution does not have the "economic activity" right present in the Interim Constitution, the jurisprudence developed under the latter is also relevant to "open" socio-economic rights. [\[FN46\]](#)

B. Socio-Economic Rights and the Open or Hidden Financial/Budgetary Implications

Some legal and human rights theorists suggest that afford ability ought to be a criteria for determining whether or not certain rights should qualify to be recognized in binding international instruments and national Bill of Rights. A separate but related theory argues that in recognizing and entrenching rights which, by their assumed nature may require courts to make decisions with implication to the budgetary processes of government, the judicial role of courts is being politicized, thus interfering with the doctrine of separation of powers. In its Certification Judgment, the Constitutional Court rejected this latter theory, *92 and by implication the former:

The second objection was that the inclusion of these rights in the NT is inconsistent with the separation of powers required by the CP VI because the judiciary would have to encroach upon the proper terrain of the legislature and executive. In particular the objectors argued it would result in the courts dictating to the government how the budget should be allocated. It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state beneficiaries of such benefits. In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it can result in a breach of the separation of powers. [\[FN47\]](#)

The significance of the Court's decision for the present discussion is that it implicitly rejected the theory that categorization or recognition of justiciable rights should be based on the affordability test. Secondly, the decision rejected the theory that civil and political rights do not have financial and budgetary implications. Of course, the enforcement of certain rights under certain conditions may cost more or less than the enforcement of others. At the same time, the enforcement of some rights may have direct or open financial/budgetary implications while the enforcement of others may have indirect and hidden financial/budgetary implications. Cost implications are not a valid consideration in categorizing rights as either socio-economic or civil and political. The present author has argued elsewhere that human rights, unlike limited civil liberties, imposes additional responsibility on the state to direct *93 resources towards the realization of rights and freedoms. [\[FN48\]](#)

C. Hidden Socio-Economic Rights and Rights that are Cross-Cutting Between Socio-Economic Rights and Civil and Political Rights

Both in the "old" interim Constitution and the final Constitution, the Bill of Rights and some provisions outside the Bills of Rights do incorporate rights and freedoms that do not fall among those identified in the Certification judgment as socio-economic or, at best, as cross-cutting between the two analytical boundaries of 'socio-economic' and 'civil and political'. The following are the rights areas which are either of hidden socio-economic character or are cross-cutting between the two analytical categories identified above.

1. Self-Determination

In international law, self-determination is recognized as belonging to both economic, social and cultural rights and civil and political rights. [\[FN49\]](#) There is, thus, economic, social and cultural self-determination, and there is civil and political self-determination. Another consideration which is not important for the present discussion is whether self-determination is internal (within the state) or 'external'-calling for separation or national independence (divisive of an existing state or political sovereignty from colonial or foreign domination). The final Constitution recognizes the right to internal self-determination, but not under the Bill of Rights. [\[FN50\]](#) Even though the interim Constitution did not recognize it, the interpretation clause

allowed international and regional instruments to be used to introduce the right in the area of education, religion and culture, even though the underlying but unarticulated reasons were of race and racial discrimination. [\[FN51\]](#)

*94 2. Equality Before the Law and Protection Against Unfair Discrimination

The right to equality before the law and protection against unfair discrimination, like the right to self-determination, is not usually categorized as a socio-economic right. Quite often, it is treated as a civil and political right. A more careful examination, especially under the formulations adopted in the interim Constitution [\[FN52\]](#) and the final Constitution, [\[FN53\]](#) would suggest that it is really also a *95 core socio-economic right. It not only cross-cuts the two traditional categories of rights and freedoms, it also appears to be a normative construct used in constitutional rights struggles outside of the Bill of Rights provisions. [\[FN54\]](#) Its use is sometimes open and sometimes hidden, thus acting as an underlying assumption or premise.

It is rather early in the development of jurisprudence around equality and non-discrimination to enable definitive conclusions to be drawn with regard to the trends and social implications of the use of courts in the new South Africa to either pursue or to forestall social transformation and reconstruction. Casual observation at this early stage appears to suggest that the relatively privileged sections of society are more visible as plaintiffs or defendants, applicants or respondents, in court cases where equality and non-discrimination issues are involved. The privileged are using equality and non-discrimination provisions to defend the social status quo. The struggle over rates and service charges by local authorities [\[FN55\]](#) as well as employment and promotion in the public service [\[FN56\]](#) are *96 cases in point.

For purposes of the present discussion, what is of central relevance is that the equality and non-discrimination is used to defend or gain economic and social interests for individuals and groups of people. In this instance, to defend employment arrangements that have direct economic and social advantages to the individuals and groups concerned, or to change such arrangements and thereby effect racial and gender diversity among those employed in the public service who would then benefit socially and economically. Secure employment with high levels of earnings contributes not only to well being, it is economically and socially empowering.

3. Labor Rights

Under international law and the South African Bill of Rights, "labor rights" is composite [\[FN57\]](#) and incorporates rights of association and organization, rights to equal work, right to a healthy working environment, right to a paid maternity and annual leave, right to strike and other forms of "industrial action," freedom from discrimination, etc. It is therefore a clear case of a straddling or a cross-cutting right which is both of a socio-economic and a civil and political in nature.

Both the Constitutional Court and the Labor Appeal Court have considered issues of strike and lockout and took judicial notice of the inequality of economic power relations between employers and employees, [\[FN58\]](#) and the implications of strike action to the economic arrangements and policies in the *97 society and to the litigants in particular. [\[FN59\]](#) Not conceptualizing labour rights as constituting an important part of socio-economic rights, without diminishing the importance of its aspects that constitute civil and political rights, is a reflection of the poverty of the prevailing legal theory. Discussions around justiciability of socio-economic rights do not get far in such a context.

4. Property Rights and Land Reform

Although property rights and land reform are not universally recognized both under international instruments or national Bills of Rights, [\[FN60\]](#) the interim Constitution provided for it, and the final Constitution provides for it. [\[FN61\]](#) Property in

wealth and resources forms the economic and social foundations of any society, whether property rights are recognized as fundamental human rights or not.

There seems to be little justification, if any, why property rights and land reform rights, as expressed in the South African constitutional framework, should not be considered to belong to the category of socio-economic rights. Like labor rights, property rights and land reform rights attract and will continue to attract heavy litigation. The justiciability issue only arises at the level of assessing the strategies and impact rather than the appropriateness of justiciability.

5. Legal Aid

Access to justice, linked to the rights of access to courts and equality before the law, depends to a large degree on the economic strength of individuals and groups in society. This is true for access to "courts," either broadly or narrowly defined, in criminal and civil matters where substantial injustice may result. [FN62] Fair trial, due process and similar other constitutional and *98 democracy principles and norms presuppose access to "courts," broadly defined.

The Constitution specifically bestows the right to a legal practitioner for detained, imprisoned and accused persons where substantial injustice would otherwise occur. [FN63] Is the provision of legal assistance, at public expense, in order to secure fair trial or to prevent the occurrence of substantial injustice in the courts an expression of a civil and political right and/or economic and social right?

It seems that the right to legal aid contains a component which is socio-economic in nature and the other component which is for the pursuit of a civil and political right. It is a cross-cutting or straddling right. The recent National Legal Aid Forum [FN64] was partly pre-occupied with the challenge of how the present budgetary allocation of three hundred and fifty million rand (R 350,000,000) could be used more strategically and effectively in meeting the state's constitutional obligations to provide legal assistance in the interest of justice.

V. JUDICIAL ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS AND ITS LIMITS

That the concept of socio-economic rights needs broadening and deepening should now be sufficiently clear. The "open" traditional socio-economic rights and the "hidden" and/or "cross-cutting" rights identified in this essay form an important part of the human rights recognized in the South African Bill of Rights and international instruments. From an international human rights point of view, the next important question to be addressed here is how effective the judicial remedies have been in contributing to the overall real, as opposed to theoretical, realization of these rights? [FN65]

The incorporation of justiciable rights in the Bill of Rights in the context of a constitutional democracy that respects the Rule of Law and under conditions of social inequalities as prevails in South Africa necessarily means that such rights and processes of their justiciability is open to all; rich and poor, the advantaged and the disadvantaged. The rich and advantaged are entitled to use the rights to *99 defend their position while the poor and disadvantaged are entitled to do so in pursuit of their interests to either be given entry into the camp of the rich and advantaged or to gain some improvement in their life conditions. The social actions of all social classes, and social strata in society in using rights tend to balance out. Thus, there is an overall limit to what individuals, groups and classes with contending interests, can achieve through the justiciability of rights, [FN66] without necessarily devaluing the critical importance of justiciability. Justiciability on economic and social rights is not only about what directly translates into goods and services, it includes impacting on the development of transformative normative ideas, values and institutional arrangements.

Given the international and comparative law friendly nature of the South African Constitution, including the Bill of Rights, the example of judicial activism to promote social justice by the Indian Supreme Court, among others, has been looked upon

as a possible role model. [\[FN67\]](#) Important reforms have been achieved in India as a result of judicial remedies arising from litigation. These and others could be followed as positive examples, bearing in mind that structural social inequalities and low levels of realization of socio-economic rights still exists in India. Litigation and judicial activism, however progressive, can only play a limited contributory role to social transformation.

The recent ruling by the Constitutional Court in the difficult case involving the right to access to health care has underscored the fact that the judiciary is very much aware of the limits to remedies it can give when certain rights are denied or violated. In the case in point, Arthur Chaskalson, the President of the Constitutional Court observed:

one cannot but have sympathy for the appellant and his family, who face the cruel dilemma of having to impoverish themselves in order to secure the treatment ... [Soobramoney] seeks in order to prolong his life. The hard and unpalatable fact is that if the appellant were a wealthy man *100 he would be able to procure such treatment from private sources; he is not and has to look to the State to provide him with the treatment. But the State's resources are limited... [\[FN68\]](#)

Mr. Soobramoney died shortly after the Court's ruling that the right to access to health care services does not mean the right to access to expensive specialist health care services which the government cannot afford.

The Constitutional Court has also observed that legal aid does not attract the best legal services, [\[FN69\]](#) and also that the State should try to boost allocations to legal aid even though the courts recognized that the resources are limited and what may be allocated may not be sufficient. [\[FN70\]](#) Its clear explanation that the power of organized labor, or workers in general, is unequal to that of the power of employers, or owners of capital is instructive. Furthermore, the Constitutional Court has judicially determined that the right to strike action by workers does not alter that social structural reality. [\[FN71\]](#) This clearly demonstrates the limits to rights discourse in the labour/industrial relations field.

The Constitutional Court has settled the issue as to whether socio-economic rights are justiciable:

The objectors argued further that socio-economic rights are not justiciable, in particular because of the budgetary issues their enforcement may raise.... Nevertheless, we are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the NT will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to *101 their justiciability. [\[FN72\]](#)

Other judicial decisions on socio-economic issues have also rooted the justiciability of socio-economic rights. The constitutional construction in South Africa is clear that socio-economic rights are as justiciable as any other rights and freedoms. The real challenge is how to make justiciability really contribute to social deconstruction and reconstruction.

VI. BEYOND JUSTICIABILITY WITH REGARD TO SOCIO-ECONOMIC RIGHTS: CHALLENGES TO PUBLIC INTEREST AND HUMAN RIGHTS INSTITUTIONS

If we were to be permitted to use the language of industrialists, both those who provide its labor and capital components, we could say that the South African constitutional democracy is moving from the stage of design to that of development, production and distribution. The design of socio-economic rights and their justiciability, though not perfect or conclusive, has been achieved under the new rule of law and human rights dispensation. To go beyond this initial foundational phase, the public interest legal and human rights institutions, especially academic and activists ones like the Centre for Applied Legal Studies, are challenged to extend the limits of justiciability through the broadening and deepening of the theoretical perspectives of legal role players who contribute to the overall implementation/enforcement of the rights. But, there is also the challenge of institutional capacity building within the public domain, in strategic organs of state and in the community and civil society.

Lawyers and other professional paralegals engaged in justiciability roles need to improve their knowledge of rights and strategies when implementing them. This is not only a constitutional imperative, [\[FN73\]](#) it is also a need necessitated by the challenging demands of interpretation that is informed by broader understanding of international and comparative law, which appears to require expert academic interventions. [\[FN74\]](#) To have a greater impact, such an enterprise may require strategic interventions at all levels, not only at the High Court, Court *102 of Appeal and Constitutional Court levels. Of course, the courts depend on good lawyering by litigating lawyers. Effective contributions to constitutional, human rights and commercial law legal training and continuing legal education, especially to those formerly disadvantaged, is critical.

The promotion and implementation of socio-economic rights, in the South African context, requires development of sharpened normative guidelines that favour redistributive social justice at production and consumption levels. A different kind of critical legal studies is called for in this field.

The Constitution envisages the implementation and enforcement of socio-economic rights via the agency of "courts," broadly and generally defined. Hence, the contributions to institutional development and functioning in bodies such as the Human Rights Commission, Commission on Gender Equality and the CCMA, with which the Centre for Applied Legal Studies is already involved, should be strengthened. In addition, strategic training of lawyers in the public service and intervention in institutions like the Legal Aid Board can make a difference to the strengthening of human rights and rule of law. Given the role that institutions, such as the police, play in the maintenance and enforcement of law, [\[FN75\]](#) efforts to infuse such institutions with relevant human rights education and to monitor their functioning appear to be necessary and relevant.

Overall, legal and human rights academic institutions and individuals need to reposition themselves and to contribute meaningfully and relevantly to the building of strong foundations for constitutionalism, democracy and human rights for the present and future South Africa. There seems to be a need for partisanism in our approach to human rights by engaging lawyering roles with the commitment either to strengthening the status quo, with its glaring inequalities and class-based injustices, or to contribute to uplifting the status of the disadvantaged and marginalized which may imply making demands on the historically privileged sections of the society.

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[\[FN1\]](#). See Hugh Corder and Dennis Davis, Law and Social Practice: An Introduction, in *ESSAYS ON LAW AND SOCIAL PRACTICE* 1, 4 (Hugh Corder ed., 1988).

[\[FN2\]](#). See generally, JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* (1978); see also CALS Documentation Centre, *Apartheid Legislation Chronology, 1997* (a consultancy Research Report to the Truth and Reconciliation Commission, on file with author).

[\[FN3\]](#). See *S v Makwanyane* 1995 (3) SA 391, ¶¶ 252-60 (CC) (Madala, J., concurring); ¶¶ 300-303 (Mogoro, J., concurring); ¶¶ 362-64 (Sachs, J., concurring); See *Mthembu v. Letsela*, 1997 (2) SA 936 (CC), *Bangindawo v. Head of the Nyanda Regional Authority*, 1998 (3) BCLR 314 (TK) (showing the influence of the new constitutional Order to partially enable the courts to look more favorably into indigenous African law and institutions).

[\[FN4\]](#). One academic commentator characterized the change in the legal system as spearheaded by the Constitutional Court to be reflective of a transformation from a "formal vision of law" to a "substantive vision". See Alfred Cockrell, *Rainbow*

Jurisprudence, 12 S. AFR. J. HUM. RTS. 1, 3 (1996).

[FN5]. See S. Afr. Const. §§ 1, 7-39. See S. Afr. Const. §§ 7-35 (Interim Const. 1993).

[FN6]. See S. Afr. Const. §§ 1(C-D), 2, 19.

[FN7]. See S. AFR. CONST. postamble (Interim Const. 1993); Promotion of National Unity and Reconciliation Act 34 of 1995; S. AFR. CONST. sched. 6, ¶ 22.

[FN8]. See S. Afr. Const. §§ 231-32. For comments by some academics on the application of international law in South Africa under the interim and the final Constitution, see John Dugard, International Law and the "Final" Constitution, 11 S. Afr. J. Hum. Rts. 241 (1995); John Dugard, The Role of International Law in Interpreting the Bill of Rights, 10 S. Afr. J. Hum. Rts. 208 (1994); John Dugard, International Law and the South African Constitution, 1 Eur. J. Int'l L. 77 (1997); Raylene Keightly, Public International Law and the Final Constitution, 12 S. Afr. J. Hum. Rts. 405 (1996).

[FN9]. See S. Afr. Const. § 39 (1)(b-c). These sections enjoin the appropriate organs, including the courts, when interpreting the Bill of Rights that they "must consider international law and may consider foreign law." *Id.* The corresponding provisions in the Draft Constitution state "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law". *Id.* § 233.

[FN10]. See *id.* §§ 167-69. The lower courts, the Magistrates' courts, are only disempowered from ruling "on the constitutionality of any legislation or any conduct of the President." See *id.* § 170.

[FN11]. A prominent Nigerian constitutional scholar defines justiciability as a combination of judicial power and duty bestowed constitutionally on the courts to adjudicate violations of the law, justiciability of the Constitution is not an inherent power enjoyed by all courts-it is constitutionally bestowed. BENJAMIN OBI NWABUEZE, JUDICIALISM IN COMMONWEALTH AFRICA: THE ROLE OF THE COURTS IN GOVERNMENT 21 (1977). In the South African context, Loots has suggested that justiciability implies determining whether a particular issue is appropriately resolvable by the courts and that this involves procedural and substantive considerations. See Access to Courts and Justiciability, in CONSTITUTIONAL LAW OF SOUTH AFRICA I (Matthew Chaskalson et al. eds., 1996).

[FN12]. South Africa's dominant economic system is capitalist. Like all other capitalist social formations, social differentiation based on class and gender is clearly manifest. However, two features that are not inherently capitalistic are the heightened social inequalities where the poor and disadvantaged form a significant majority and its composition along racial lines.

[FN13]. See generally R. ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980-1994 (1995).

[FN14]. See S. Afr. Const. § 8; Application:

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

...

(3) In applying the provisions of the Bill of Rights to natural or juristic persons ..., a court-

(a) in order to give effect to a right in the Bill, must apply, or when necessary, develop the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

[\[FN15\]](#). See S. Afr. Const. § 38; Enforcement of Rights:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

[\[FN16\]](#). See S. Afr. Const. § 233; Application of International law:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

See S. Afr. Const. § 166; Judicial System:

The courts are...

(e) any other court established or recognized in terms of an Act of Parliament, which may include any court of a status similar to either the High Courts or the Magistrates Courts.

[\[FN17\]](#). See S. Afr. Const. § 34; Access to Courts:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, were appropriate, another independent and impartial tribunal or forum.

[\[FN18\]](#). See S. Afr. Const. § 39; Interpretation of Bill of Rights:

(1) When interpreting the Bill of Rights, a court, tribunal or forum...

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights.

[\[FN19\]](#). See S. Afr. Const. § 165; Judicial Authority:

(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favor or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

See S. Afr. Const. § 166; Judicial System:

The courts are:

- (a) the Constitutional Court;
- (b) the Supreme Court of Appeal;
- (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from

High Courts;

(d) the Magistrates Courts.

[FN20]. See S. Afr. Const. § 35; Arrested, Detained and Accused Persons:

(1) Everyone who is arrested for allegedly committing an offence has the right...

...

(d) to be brought before a court as soon as reasonably possible, but not later than...

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;

(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released;

(2) Everyone who is detained, including every sentenced prisoner, has the right...

...

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released.

(3) Every accused person has a right to a fair trial, which includes the right...

...

(c) to a public trial before an ordinary court;

...

(o) of appeal to, or review by, a higher court.

[FN21]. See S. Afr. Const. § 37; States of Emergency:

(1) A state of emergency may be declared only in terms of an Act of Parliament, and only when...

...

(3) Any competent court may decide on the validity of...

(a) a declaration of a state of emergency;

(b) any extension of a declaration of a state of emergency; or

(c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

[FN22]. See S. Afr. Const. §§ 8(3), 39(1-2); Bill of Rights; see also S. Afr. Const. §§ 2, 233.

[FN23]. See Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR]. The rights recognized in the Universal Declaration of Human Rights range from prohibition against torture (art. 5) to the right to work (art. 24).

[FN24]. See Asbjorn Eide & Allan Rosas, Economic, Social and Cultural Rights: A Universal Challenge, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 15-40 (Asbjorn Eide et al. eds., 1995).

[FN25]. See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. The covenant was accompanied by an optional protocol allowing for petition or complaints by individuals against states alleging violation of rights and freedoms enshrined in the main covenant. See Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302 (entered into force Mar. 23, 1976).

[FN26]. See International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st

Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S., 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

[FN27]. See PAUL HUNT, RECLAIMING SOCIAL RIGHTS: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 7-9, 24-31, 53-63 (1996); see Eide & Rosas, *supra* note 24, at 15-17.

[FN28]. See Vienna Declaration, World Conference on Human Rights, Vienna, June 14-25, U.N. DOC. A/CONF. 157/24 (Part 1) (1993).

[FN29]. See Economic, Social and Cultural Rights: A Compilation of Essential Documents, 1997 I.C.J. 55.

[FN30]. See *id.* at 63.

[FN31]. See *id.* at 79.

[FN32]. See Nicholas Haysom, Constitutionalism, Majoritarianism, Democracy and Socio-economic Rights, 8 S. AFR. J. HUM. RTS. 451, 452 (1992); see Etienne Mureinik, Beyond a Charter of Luxuries: Economic Rights in the Constitution, 8 S. AFR. J. HUM. RTS. 464 (1992); see generally D. M. Davis, The Case Against the Inclusion of Socio-economic Demands in the Bill of Rights Except as Directive Principles, 8 S. AFR. J. HUM. RTS. 475 (1992).

[FN33]. See S. AFR. CONST. (Interim Const. 1993) (In the economic, social and cultural rights broadly defined, the interim Constitution provided for affirmative action and restitution of land (§§ 8(3), 121-123), economic activity (§ 26), labor relations (§ 27), property (§ 28), environment (§ 29), basic nutrition, health and social services for children (§ 30) and culture and education (§§ 31-32). The rest of the "Fundamental Rights" chapter covered civil and political rights.

[FN34]. See S. Afr. Const. § 22.

[FN35]. See S. Afr. Const. §9(2) (Affirmative Action), §23 (labor rights), § 24 (environment), §25(4)-(8) access to land, land restitution and strengthening security of tenure for insecure land rights, § 28 basic nutrition, shelter, basic health and social services for children, § 29-31 culture and education.

[FN36]. See *id.* §§ 25(8), 27.

[FN37]. See *id.* § 26.

[FN38]. See *id.* § 235. The only diminution of the scope of the socio-economic rights previously recognized in the interim Constitution is the omission of the "economic activity" right. See S. Afr. Const. § 26 (Interim Const. 1993).

[FN39]. See S. Afr. Const. § 184(3).

[FN40]. See ERICA DE WET, THE CONSTITUTIONAL ENFORCEMENT OF ECONOMIC AND SOCIAL RIGHTS: THE MEANING OF THE GERMAN CONSTITUTIONAL MODEL FOR SOUTH AFRICA introduction, chs. 3, 4 (1996); see generally Pierre de Vos, Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution, 13 S. AFR. J. HUM. RTS. 67 (1997).

[FN41]. See Certification Judgment, 1996 (10) BCLR 1253, 1264 ¶ 1 (CC) (the court makes an observation that "Judicial 'certification' of a constitution is unprecedented and the very nature of the undertaking is to be explained.").

[FN42]. See *id.* at ¶¶ 76-78.

[FN43]. See *id.* at ¶ 76.

[FN44]. As already noted, the right to work, which is not recognized in the South African Bill of Rights, is recognized in the Universal Declaration of Human Rights. See UDHR, *supra* note 23, art. 23(1).

[FN45]. See S. Afr. Const. § 24. A more restrictive environmental rights provision was provided for in the interim Constitution. See S. Afr. Const. § 29 (Interim Const. 1993). As has been observed the environmental right is grouped together with those stated in the Certification judgment as requiring additional enforcement mechanism. See *supra* note 39 and accompanying text. Several cases have given interpretation and defined the scope of application of the environmental rights provision in the interim Constitution. See *Van Huyssteen v Minister of Environmental Affairs and Tourism*, 1996 (1) SA 283 (C); *Wildlife Society of Southern Africa v. Minister of Environmental Affairs and Tourism of the Republic of South Africa*, 1996 (3) SA 1095 (Tks); *Minister of Health and Welfare v. Woodcarb (Pty) Ltd.*, 1996 (3) SA 155 (N).

[FN46]. See *S v Lawrence*, 1997 (4) SA 1176 (CC); *Ynuico Ltd. v Minister of Trade and Industry*, 1995 (II) BCLR 1453 (T); *Ynuico Ltd. v. Minister of Trade and Industry*, 1996 (3) SA 989 (CC); *South African Tea, Coffee and Chicory Association v. Ynuico Ltd.*, 1997 (8) BCLR 1101 (N).

[FN47]. See Certification Judgment, (10) BCLR at ¶ 77.

[FN48]. See Shadrack B. O. Gutto, *Constitutions and Bills of Rights: Limitations and Obligations on the State's Participation in Economic and Social Development*, in *DEMOCRACY, HUMAN RIGHTS AND ECONOMIC DEVELOPMENT IN SOUTHERN AFRICA* 173, 173-200 (Nico Steytler ed., 1997).

[FN49]. See ICESCR, *supra* note 26, art. 1; see also, ICCPR, *supra* note 25, art. 1.

[FN50]. See S. Afr. Const. §§ 185-186; Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; § 235 Self-determination.

[FN51]. See *Matukane v. Laerskool Potgietersrus*, 1996 (3) SA 223 (T).

[FN52]. See S. Afr. Const. § 8; Equality (Interim Const. 1993):

(1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic and social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(3) ...

(a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with section 121, 122 and 123.

(4) Prima facie proof of discrimination on any grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

[FN53]. See S. Afr. Const. § 9; Equality:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

[\[FN54\]](#). See *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council*, 1997 (5) BCLR 657 (W) (displaying the normative construction used by the litigants concerning local authorities rates and service charges and discussing § 8 of the interim Constitution 1993). More or less similar social groupings are behind the on-going constitutional battles over budgetary allocations by the new local governments. See *Eastern Metropolitan Substance of the Greater Johannesburg Transitional Metropolitan Council v. Democratic Party*, 1997 (8) BCLR 1039 (W) (appeal to the Supreme Court of Appeal which has referred it to the Constitutional Court).

[\[FN55\]](#). See, e.g., *Municipality of the City of Port Elizabeth v. Prut NO*, 1997 (6) BCLR 828 (SE) (holding by J. Liebenberg that writing off of arrears in respect of formerly black areas and not doing the same in respect of formerly white areas did not constitute unfair discrimination under §8(2) of the interim Constitution); see also *City Council of Pretoria v. Waler*, 1998 (3) BCLR 257 (CC); *Benkes v. Krugersdorp Transitional Local Council*, 1996 (3) SA 467 (T).

[\[FN56\]](#). See *Public Servants' Association of South Africa v. Minister of Justice*, 1997 (3) SA 925 (T). J. Swart ruled that the Minister has acted without proper consultation and, more importantly, that the targets and quotas suggested by the Minister was unfairly discriminatory of mainly Afrikaner men and the few Afrikaner women lawyers in public service. But cf. *Mlambo AJ in Public Servants' Association v. Minister of Correctional Services*, Labour Court, case no. J174/97 (unreported). The proposed arrangements for transforming the employment profile in the public service was similar to that in the previous case.

[\[FN57\]](#). See S. Afr. Const. § 27; S. Afr. Const. § 23 (Interim Const. 1993); Convention for Freedom of Association and Protection of the Right to Organize, adopted July 9, 1948 (entered into force July 4, 1950), 31 ILO C87; Convention for Equal Remuneration, adopted June 29, 1951 (entered into force May 23, 1953), 34 ILO C100; Convention for Holidays with Pay, adopted June 24, 1970 (entered into force June 30, 1973), 54 ILO C132; Convention for Occupational Safety and Health, adopted June 22, 1981 (entered into force Aug. 11, 1983), 67 ILO C155.

[\[FN58\]](#). See *Certification Judgment*, 1996 (10) BCLR 1253, ¶¶ 63-69.

[\[FN59\]](#). See *Business South Africa v The Congress of South African Trade Unions* 1997 (6) BCLR 681 (LAC) (Nicholson, J.A, dissenting) and (5) BCLR 511 (LAC) (Myburg, J.P., Froneman, D.J.P.)

[\[FN60\]](#). See *Certification Judgment*, 1996 (10) BCLR 1253, at ¶¶ 71-72 (CC).

[\[FN61\]](#). See S. Afr. Const. §§ 25,28; Themnis Roux, Property, in *Fundamental Rights in the Constitution: Commentary and Case 237-55* (D. Davis et al. eds., 1997); see generally Matthew Chaskalson & C Lewis, Property, in *Constitutional Law of South Africa* (Matthew Chaskalson et al. eds., 1997).

[\[FN62\]](#). See *Legal Aid Board v. Msila*, 1997 (2) BCLR 229, (CC), 1996 SACLR LEXIS 57, at *9 (Kroon, J.); See also *S v. Vermaas*, 1995 (3) SA 292 (CC) (Didcott, J., concurring).

[FN63]. See S. Afr. Const. § 35(2c-3g).

[FN64]. Convened by the Ministry and Department of Justice and organized by the Centre for Applied Legal Studies, Wits University, Jan. 15-17, 1997 at the World Trade Centre, Kempton Park, Johannesburg.

[FN65]. In creating the right to effective remedy for human rights, article 8 states that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law". UDHR, supra note 23, at art. 8.

[FN66]. One of my former students, now a prominent human rights scholar and academic in the USA who was in the UN human rights team to South Africa, recently pointed this out. See Makau wa Mutua, [Hope and Despair for a New South Africa: The Limits of Rights Discourse](#), 10 HARV. HUM. RTS. J. 63 (1997).

[FN67]. See Dennis Davis, Matthew Chaskalson and Johan de Waal, Democracy and Constitutionalism: The Role of Constitutional Interpretation, in RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER, §, 45-52 (D. Van Wyk et al. eds., 1994).

[FN68]. *Soobramoney v. Minister of Health (KwaZulu-Natal)*, 1997 (12) BCLR 1696 (CC) ¶ 31. Contrast this Constitutional Court's ruling to the decision of the Cape Provincial Division of the High Court in the case involving the issue of medical care for prisoners suffering from HIV/AIDS. In *B. v. Minister of Correctional Services*, the court decided that whereas budgetary considerations are relevant, prisoners are constitutionally entitled to higher levels of medical care than ordinary citizens. 1997 (6) BCLR 787, ¶¶49-53.

[FN69]. See *S v. Makwanyane*, 1995 (6) BCLR 665, ¶¶ 49-50, n.79 (CC).

[FN70]. See *S v Vermaas*, *S v de Plessis*, 1995 (7) BCLR 851 (CC), ¶¶161-300.

[FN71]. See *In Re Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253, ¶ 66 (CC).

[FN72]. *Id.* at ¶ 78.

[FN73]. See S. Afr. Const. § 180(a) (providing for training programmes for judicial officers).

[FN74]. The critiques of the judgment in the AZAPO case, *AZAPO v President of the Republic of South Africa*, 1996 (4) SA 562 (CC), is suggestive. See John Dugard, *Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question*, 13 S. AFR. J. HUM. RTS. 258 (1997).

[FN75]. See S. Afr. Const. § 205(3) (providing that "[t]he objects of the police service are to prevent, combat and investigate crime,...to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.").

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