

## CHAPTER THREE

# THICKENING THE RULE OF LAW IN TRANSITION: THE CONSTITUTIONAL ENTRENCHMENT OF ECONOMIC AND SOCIAL RIGHTS IN SOUTH AFRICA

Evelyne Schmid\*

## 1. INTRODUCTION

This chapter examines the ability of the South African Constitutional Court to apply economic and social rights (ESR) and whether the constitutionalisation of ESR represents a mechanism capable of entrenching a substantive or ‘thick’<sup>1</sup> conception of the rule of law. After apartheid, South Africa adopted an impressive Constitution which considers international law and justiciable human rights as pillars of the new democracy. The negotiators of the new constitutional framework acknowledged that the decades of economic and social exclusion of a large proportion of South Africa’s population had to end if the rule of law was to be established in a meaningful way.<sup>2</sup> A mere retraction of discriminatory laws and an adherence to a formal (‘thin’)<sup>3</sup> notion of the rule of law was viewed as insufficient to break with the abusive past of the apartheid era. Instead, the drafters adopted a ‘thick’ account

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<sup>1</sup> A ‘thick’ or substantive conception of the rule of law is one which not only deals with formalist attributes of a legal framework, but also with substantive notions of justice, such as equality or dignity. In the Dworkinian conception, proponents of a ‘thick’ understanding of the rule of law emphasise that the formal legal rules should capture and enforce substantive rights. See J Stromseth, R Brooks and D Wippman, *Can Might Make Rights? Building the Rule of Law after Military Interventions* (Cambridge University Press, Cambridge 2006) ch 3.

<sup>2</sup> A Sachs, *Advancing Human Rights in South Africa* (Oxford University Press, Cape Town 1992) xii.

<sup>3</sup> A ‘thin’ or minimal conception of the rule of law is one which emphasises the rule of law’s formal and structural components, such as rules, legal processes and procedures regularly followed. In the Aristotelian view, a ‘government of laws, not men’ protects people against anarchy and allows the predictability of legal consequences. See Stromseth, Brooks and Wippman (n 1) ch 3.

of the rule of law. The aspiration of this substantive conception of the rule of law is characterised by the commitment to the values enshrined in South Africa's Bill of Rights, including justiciable economic and social rights.<sup>4</sup> The preamble of the 1996 South African Constitution states that the country modified its constitutional framework in order to '[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.'<sup>5</sup>

The present volume studies the effects of empowering domestic courts to apply international legal principles after countries emerge from conflict or oppressive rule. South Africa is an example of an attempt to empower domestic courts to consider international law. Perhaps even more importantly, South Africa is an example of a domestication of the international rule of law: whereas the previous constitutions of 1910, 1961 and 1983 had no bill of rights, the drafters of the current, 1996 Constitution made a deliberate effort to harmonise the new Bill of Rights with international law. The reliance on international human rights norms was not confined to civil and political rights, but the 1996 Constitution includes a wide range of justiciable socio-economic rights and adopts language from the International Covenant on Economic, Social and Cultural Rights (ICESCR) and from General Comments of the UN Committee on Economic, Social and Cultural Rights (the Committee).

This chapter examines the success of the constitutional entrenchment of ESR in South Africa's legal system. The chapter considers 'transformative constitutionalism'<sup>6</sup> and its ability to fulfil the ambitions, expressed in the new constitutional preamble, of setting out to establish a society based on social justice and fundamental human rights. The South African jurisprudence after the constitutionalisation of human rights, in particular ESR, has been praised by the international community. Nevertheless, the central tenets of the chapter are two cautionary findings. First, the analysis cautions against using constitutional change alone to enhance the rule of law after conflict or oppressive rule. Although constitutional adjudication in South Africa has had positive outcomes, modifying the place accorded to international law

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<sup>4</sup> On the varieties of substantive conceptions of the rule of law see *ibid* ch 3.

<sup>5</sup> Constitution of the Republic of South Africa, Act 108 of 1996 preamble <http://www.info.gov.za/documents/constitution/1996/index.htm>.

<sup>6</sup> S Liebenberg, 'South Africa: Adjudicating Socio-Economic Rights under a Transformative Constitution' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2009) 75 According to Liebenberg, a transformative constitution is one which is to 'facilitate a fundamental change in the legacy of injustice produced over three centuries of colonial and apartheid rule.' The term goes back to K Klare, 'Legal Culture and Transformative Constitutionalism' 14 *South African Journal on Human Rights* 146. The Constitutional Court emphasised that the new Constitution was to effect social change. *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 261f. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC) para 74.

in the domestic legal system is largely insufficient for the realisation of ESR and the ‘thick’ conception of the rule of law envisioned by the drafters of the 1996 Constitution. Second, the chapter finds that a domestic belief in the relevance of international and national legal norms was decisive in the South African experience. The constitutional empowerment of domestic courts to apply international legal principles would not, by itself, explain the practice of national courts insisting on the implementation of rights recognised in international law. Moreover, a number of unique factors related to the actors and process leading to the constitutional transformation in South Africa contribute to explain the remarkable transition towards an international law friendly constitution. While the empowerment of domestic courts in South Africa provides lessons for other states, those lessons are primarily ones regarding limitations, complexities and context-specific issues that arise in the empowerment of domestic courts to apply international legal principles in situations of transition.

Section 2 describes the role of international law in the domestic legal system before and after the end of the apartheid. Section 3 presents the most important constitutional cases that have arisen from the ESR provisions in the 1996 Constitution. It assesses the ability of courts to deal with socio-economic rights according to two alternative criteria: the degree of formal entrenchment of international norms and concrete improvements in the realisation of the socio-economic rights litigated before the Constitutional Court. Section 4 endeavours to identify some lessons as to what can reasonably be expected from modifications of the prominence given to international law and the role of domestic courts when it comes to the vindication of economic and social human rights. Section 5 offers conclusions.

## **2. SOUTH AFRICAN CONSTITUTIONAL LAW DURING AND AFTER APARTHEID**

The emphasis on international law and human rights in domestic proceedings in South Africa was minimal before the end of the apartheid. This section delineates historical changes following South Africa’s transition from apartheid.

## **2.1. The 'Thin' Rule of Law During Apartheid**

The apartheid regime was built on widespread violations of social, economic, civil and political rights.<sup>7</sup> Since the accession of the National Party (NP) to power in 1948, rights to freedom of movement, employment, electoral, education, and many others were severely restricted. Forced evictions were carried out on a massive scale.<sup>8</sup> In the absence of an instrument delineating constitutional human rights, the courts could not discuss or determine issues regarding potential violations of human rights by the Parliament.<sup>9</sup> The conception of judicial review was very narrow and courts were deferential to the (unrepresentative) legislative branch.<sup>10</sup> No law enacted by Parliament could be invalidated by the courts, except in relation to the 'entrenched clauses' which protected the equality of English and Afrikaans as the two official languages.<sup>11</sup> Judges gave effect to discriminatory and unjust laws and generally refused to interfere with administrative orders.<sup>12</sup> Was South Africa therefore lacking the rule of law? The answer of course depends on one's notion of the rule of law. While the apartheid regime was considered woefully illegitimate by the domestic majority and the international community,<sup>13</sup> apartheid was framed within a minimalist, formal rule of law regime.

South Africa's experience differs from the situation of many other transitioning countries because its courts continued to function throughout apartheid. Oppressive practices were implemented according to laws promulgated by Parliament pursuant to formal legal rules. If one would define the rule of law as mere obedience to laws adopted through formal procedures – irrespective of the substance of those laws – then apartheid was a regime implemented according to a minimal ('thin') rule of law. But not even Steven Kautz, adherent of a 'thin' notion of the rule of law, would qualify the apartheid regime as one of the rule of

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<sup>7</sup> M Pieterse, 'Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience' (2004) 26 *Human Rights Quarterly* 882, 883. International Commission of Jurists (ICJ) and G Bindman, *South Africa: Human Rights and the Rule of Law* (Pinter, London 1988).

<sup>8</sup> ICJ and Bindman (n 7) 9.

<sup>9</sup> Constitution of the Republic of South Africa, Act 110 of 1983, s 34(3) (n 5).

<sup>10</sup> D Penna, 'Apartheid, the Law and Reform in South Africa' 37 (2) *Africa Today* 5, 7. South Africa has a mixed legal system based on Roman-Dutch substantive law and English procedural law. For an introduction, see R Zimmermann and D Visser, *Southern Cross: Civil Law and Common Law in South Africa* (Clarendon Press, Oxford 1996).

<sup>11</sup> Constitution of the Republic of South Africa, Act 110 of 1983, s 34(3) (n 5).

<sup>12</sup> D Ipp, 'Ethical Problems with Judicial Activism: Edited Version of a Paper Given at a Conference in Beijing Organised by the National Judicial College', Beijing, 12 October 2004 [www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_ipp12\\_191004](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_ipp12_191004) n 30. See also the final report of the Truth and Reconciliation Commission, analysing the role of the legal profession during apartheid: South Africa TRC, *Report of the Truth and Reconciliation Commission* (Cape Town, The Truth and Reconciliation Commission, 2002), Vol. 4.

<sup>13</sup> See for instance UNGA Res 2202 (1966) GAOR 21st Session (16 December 1966) determining that apartheid constituted a crime against humanity.

law. According to Kautz, it is only ‘reasonable obedience to laws that respect the natural equality of human beings’ which constitutes the rule of law.<sup>14</sup>

After closed door negotiations had been underway for some time, the 1990 release from prison of Nelson Mandela of the African National Congress (ANC) started the process towards a thicker notion of the rule of law. Not without violence,<sup>15</sup> a long and well-documented bargaining process between the protagonists of the main parties ensued.<sup>16</sup> A record of understanding, signed in 1992, formed the essential core of the broader and detailed agreement finalised in June 1993 – the ‘Interim Constitution’. The Interim Constitution contained 34 principles and provided for a Constitutional Court to have wide jurisdiction. The Interim Constitution also entrusted to the new Court to ‘certify’ the final constitution to ensure that it complied with the agreed 34 principles. In 1996, the new, amended Constitution was adopted.

## **2.2. International Law in the New Constitution**

In the early 1990s, the attitude in South Africa towards international law shifted profoundly. During apartheid, South Africa had not been a party to any UN or regional human rights conventions. Dugard notes how South Africa had become ‘a pariah state within the international community; a delinquent state in the context of the “new” international law of human rights. Domestically, international law fared little better.’<sup>17</sup> The lengthy process of formalizing a new constitution was used as an opportunity to establish anew what its drafters considered the most appropriate relationships between the different branches and levels of government, as well as between domestic law and international law. The two major political forces participating in the negotiations, the governing NP and the ANC, both appeared to

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<sup>14</sup> Kautz defines the rule of law as reasonable obedience to laws ‘to remedy our natural human condition of insecurity’. Law has to be followed, ‘for its own sake and not as a means to justice.’ S Kautz, ‘Liberty, Justice, and the Rule of Law’ 11 *Yale Journal of Law and the Humanities* 435, 438, 468 (emphasis in original).

<sup>15</sup> It is estimated that more than 14000 people lost their lives in political violence. P Du Toit, *South Africa’s Brittle Peace* (Palgrave, 2001) 31.

<sup>16</sup> See in particular M Newitt and M Bennun, *Negotiating Justice: A New Constitution for South Africa* (University of Exeter Press, 1995); R Spitz and M Chaskalson, *The Politics of Transition: A Hidden History of South Africa’s Negotiated Settlement* (Hart Publishing, 2000); B De Villiers, *Birth of a Constitution* (Juta, Kenwyn 1994); S Friedman and D Atkinson, ‘The Small Miracle: South Africa’s Negotiated Settlement’ 7 *South African Review*; H Cobban, ‘Mozambique, Rwanda and South Africa Assessed’ in W Schabas, R Thakur and E Hughes (eds), *Atrocities and International Accountability: Beyond Transitional Justice* (UN University Press, Tokyo 2007) 42.

<sup>17</sup> J Dugard, ‘International Law and the South African Constitution’ (1997) 8 *European Journal of International Law* 77, 77.

agree that human rights law was a necessary element of the new order. In the fall of 1992, the NP and the ANC established that the new constitution to be drafted ‘shall incorporate guaranteed justiciable fundamental rights and freedoms.’<sup>18</sup> The 1993 Interim Constitution included a first bill of rights and provisions on the place of international law in the domestic legal system. The Interim Constitution was therefore conceived as ‘a historic bridge between the past of a deeply divided society and a future founded on the recognition of human rights and opportunities for all South Africans’.<sup>19</sup>

The 1996 Constitution consolidated the interest in human rights and international law. There are four reasons for describing the 1996 Constitution as an instrument friendly to international law.<sup>20</sup> First, self-executing international treaty provisions can be directly implemented without prior legislative action.<sup>21</sup> Second, the Constitution provides that international law is a guide to judicial interpretation and must be considered by the adjudicators and law of other national jurisdictions may be considered.<sup>22</sup> Third, courts are required to give priority to any interpretation consistent with international law.<sup>23</sup> Finally, ‘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.’<sup>24</sup> This clause illustrates the conception of a ‘thicker’ notion of the rule of law and the willingness to empower courts to transform society in a way that would ‘establish a society based on democratic values, social justice and fundamental human rights.’<sup>25</sup> In addition, section 232 constitutionalises the rule that customary international law is part of South African law unless it is inconsistent with the Constitution or an Act of Parliament. By entrenching international norms in the legal system, the drafters of the new Bill of Rights deliberately sought to harmonise the Constitution with international law. Furthermore, they facilitated South Africa’s accession to human rights treaties and promoted reintegration of South Africa in the ‘family of nations’.<sup>26</sup>

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<sup>18</sup> Record of Understanding, Concluded at a Meeting Between the State President of the Republic of South Africa and the President of the African National Congress Held at the World Trade Centre on the 26 September 1992 <http://www.anc.org.za/show.php?include=docs/misc/1992/recordk.html>.

<sup>19</sup> (Interim) Constitution of the Republic of South Africa Act 200 of 1993 ‘postamble’ <http://www.info.gov.za/documents/constitution/93cons.htm>.

<sup>20</sup> C Heyns and F Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (Kluwer, The Hague 2002) 542.

<sup>21</sup> Constitution of the Republic of South Africa, Act 108 of 1996 s 231(4) (n 5).

<sup>22</sup> *ibid* s 39(1)b.

<sup>23</sup> *ibid* s 233.

<sup>24</sup> *ibid* s 39(2).

<sup>25</sup> Constitution of the Republic of South Africa, Act 108 of 1996 preamble (n 5).

<sup>26</sup> *ibid*.

While the human rights provisions of the Interim Constitution were largely confined to civil and political rights,<sup>27</sup> the 1996 Bill of Rights extends protection to ESR. All six UN human rights conventions existing at that time were relied upon in the drafting process.<sup>28</sup> Interestingly, the ICESCR served as a normative guide despite South Africa's failure to ratify it.<sup>29</sup> According to Dugard, the importance given to international human rights norms is evident in the first case heard by the new Court: In 1995, in a decision on the death penalty, the Constitutional Court dispelled fears that the term 'international law' might be narrowly construed to cover only undisputed customary international law and conventions ratified by South Africa. Courts are obliged to consider public international law when interpreting the Bill of Rights,<sup>30</sup> and the Court insisted that this provision must be read to refer to international law broadly, including to international treaties not ratified by the Republic and soft law such as declarations or resolutions by the UN General Assembly.<sup>31</sup>

### ***2.3. The Bill of Rights and Reasons for a 'Thick' Conception of Rule of Law***

During the negotiations of the 1996 Constitution, the widely perceived need to break with the past caused many to argue for a comprehensive Bill of Rights. This position was in the end adopted and it led to the eventual constitutionalisation of ESR.<sup>32</sup> For the negotiators, a retraction of explicitly discriminatory laws was insufficient to building a legitimate and substantive rule of law and to consolidate a new and more equitable order.

#### **2.3.1. Justiciable Economic and Social Rights**

The core provisions regarding socio-economic rights are contained in sections 26, 27, 28(1)(c), 29 and 35(2)(e) of the 1996 Constitution.<sup>33</sup> Sections 26(1) and 27(1) contain the right of everyone to have access to adequate housing; health care services, sufficient food and

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<sup>27</sup> Heyns and Viljoen (n 20) 553. The main exception is the right to education which was already contained in the Interim Constitution.

<sup>28</sup> *ibid* 552.

<sup>29</sup> See *Re Certification of the Constitution* (n 51) n 46. Paradoxically, South Africa signed the treaty on 3 October 1994, but, after repeated promises, it has yet to ratify the treaty.

<sup>30</sup> (Interim) Constitution of the Republic of South Africa Act 200 of 1993 s 35(1) and Constitution of the Republic of South Africa, Act 110 of 1983, s 39(1)(b) (n 19).

<sup>31</sup> *S v Makwanyane* (n 6) para 35. The case concerned the death penalty, the ICCPR and foreign law were extensively used by the Court.

<sup>32</sup> T Maluwa, 'International Human Rights Norms and the South African Interim Constitution 1993' (1994) 19 South African Yearbook of International Law 14.

<sup>33</sup> Constitution of the Republic of South Africa, Act 108 of 1996 (n 5).

water; and social security. The state must, under sections 26(2) and 27(2) ‘take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights’. With minor differences, these subsections mirror article 2(1) of the ICESCR.<sup>34</sup> The drafters of the 1996 Constitution adopted the wording of that article and section 7 of the Constitution also embraced the tripartite typology of interdependent duties. Theoretically developed first by Shue<sup>35</sup> and later, by the jurisprudence of the supervisory Committee,<sup>36</sup> the state has three-dimensional obligations to respect, protect and fulfil human rights. Sections 26 and 27 have attracted the most attention from commentators because it was on the basis of them that the Constitutional Court developed its socio-economic rights jurisprudence.<sup>37</sup>

The Constitution gives South African courts the power to interpret socio-economic rights, to resolve disputes by relying on the principles of socio-economic rights and to make a just and equitable order, including the ability to award ‘appropriate relief’.<sup>38</sup> Brand describes South African courts’ impressive array of remedial powers: they can enforce constitutional socio-economic rights directly by hearing constitutional challenges to any legislation;<sup>39</sup> by hearing challenges that state or private conduct is inconsistent with socio-economic rights;<sup>40</sup> or by accepting an argument by the litigant that the law is inconsistent with the ‘objective value system’ underlying the particular provisions of the Bill of Rights.<sup>41</sup> At levels below the Constitutional Court, judges can also enforce socio-economic rights. The ability of lower courts to adjudicate these matters is significant since these courts are more accessible and often less constrained in their ability to enforce rights, particularly if legislative, executive or administrative action has already defined them. South Africa’s law on standing is broad, such

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<sup>34</sup> There are two subtle differences between the wording of the second sub-s of s 26 and 27 in the South African Constitution and art 2(1) of the ICESCR: First, the South African provision uses ‘reasonable measures’ instead of ‘appropriate’, and the ICESCR speaks of the ‘maximum of available resources’ while s 26 and 27 use the standard ‘within available resources’.

<sup>35</sup> H Shue, ‘Rights in the Light of Duties’ in P Brown and D MacLean (eds), *Human Rights and US Foreign Policy* (Lexington, Lexington Books 1979).

<sup>36</sup> UN Committee on Economic, Social and Cultural Rights ‘General Comment No 12 on the Right to Adequate Food’ (12 May 1999) UN Doc E/C.12/1999/5 para 15; and UN Committee on Economic, Social and Cultural Rights ‘General Comment No 14 on the Right to the Highest Attainable Standard of Health’ (11 August 2000) UN Doc E/CN.12/2000/4 para 33.

<sup>37</sup> See S Liebenberg, ‘Protecting Economic, Social and Cultural Rights under Bills of Rights: The South African Experience’ 16 *Human Rights Defender* 2.

<sup>38</sup> Constitution of the Republic of South Africa, Act 108 of 1996 s 38 (n 5).

<sup>39</sup> See D Brand, ‘Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale’ in F Coomans (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Maastricht Series in Human Rights, 5. Intersentia, Antwerpen 2006) 207.

<sup>40</sup> The Court could overturn such conduct and draft a constitutional remedy.

<sup>41</sup> If the court would accept this argument, it could interpret the statutory provision in question, or develop the common law rule so as to give effect to the spirit, purport and objects of the Bill of Rights.



that persons can also enforce statutory commitments against the state on behalf of a group of persons or in the public interest.<sup>42</sup>

### 2.3.2. Inspiration from International Law

The constitutionalisation of justiciable ESR was controversial. Those opposed to the inclusion of ESR argued that empowering courts to enforce them would breach the separation of powers and would interfere with the budgetary and policy competences of the legislative branch.<sup>43</sup> Furthermore, they considered that ESR were difficult to adjudicate due to the perception that they were of an exclusively ‘positive nature’, and ‘unclearly defined’.<sup>44</sup> The discussions largely mirrored the international debates on the justiciability of socio-economic rights. However, concerns of overly powerful courts or an infringement of the separation of powers eventually gave way to a thicker conception of the rule of law based on the values enshrined in the Bill of Rights.<sup>45</sup>

Civil society and supporters of a comprehensive Bill of Rights relied heavily on the ICESCR to campaign for the inclusion of ESR.<sup>46</sup> According to Liebenberg, three arguments proved particularly persuasive.<sup>47</sup> First, the Bill of Rights – the reflection of the highest normative commitments of the nation – should explicitly outline provisions for redressing the systemic socio-economic deprivation experienced by the black population under colonial and apartheid rule.<sup>48</sup> Second, without access to basic services and resources, it would be difficult to enjoy many of the civil and political rights.<sup>49</sup> Third, socio-economic rights were regarded as integral to the creation of a more equitable society. In the *First Certification* judgment, the Constitutional Court dismissed arguments that it was infringing on the legislature’s powers

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<sup>42</sup> Constitution of the Republic of South Africa, Act 108 of 1996 s 38 (n 5).

<sup>43</sup> See D Davis, 'The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights except as Directive Principles' (1992) 8 South African Journal on Human Rights 475; A Sachs, 'Concluding Comments on the Panel Discussion' 8 ESR Review 17 (describing opponents’ arguments).

<sup>44</sup> South African Law Commission, *Group and Human Rights: Interim Report* (Pretoria, The Law Commission, 1991).

<sup>45</sup> See for instance: ANC Submission to the Theme Committee, 23 September 1995, and Lawyers for Human Rights Submission, 30 July 1995; both discussed in Heyns and Viljoen (n 20) 553.

<sup>46</sup> Heyns and Viljoen (n 20) 553.

<sup>47</sup> Liebenberg, 'Protecting Economic, Social and Cultural Rights under Bills of Rights: The South African Experience' (n 37).

<sup>48</sup> For the arguments of proponents: N Haysom, 'Constitutionalism, Majoritarian Democracy and Socio-Economic Rights' 8 South African Journal on Human Rights 451; E Mureinik, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' 8 South African Journal on Human Rights 464; C Scott and P Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees Social Rights in a New South African Constitution' 141 University of Pennsylvania Law Review 1.

<sup>49</sup> In Mandela’s words, ‘we do not want freedom without bread, nor do we want bread without freedom’. N Mandela, 'Address on the Occasion of the ANC’s Bill of Rights Conference' (A Bill of Rights for a Democratic South Africa: Papers and Report of a Conference Convened by the ANC Constitutional Committee, 1991), 12.

when it adjudicates socio-economic matters having budgetary implications.<sup>50</sup> The Court held that it had the power to determine accountability of the government with respect to all rights included in the Bill of Rights and thus also the enforcement of ESR.<sup>51</sup> The road was thus paved for constitutional litigation of ESR provisions which are, according to the Constitutional Court, ‘clearly modelled’<sup>52</sup> on the most relevant international instrument in this respect – the ICESCR.

### **3. EVALUATING THE EMPOWERMENT OF COURTS TO ADDRESS ESR**

The Constitutional Court has developed extensive jurisprudence on socio-economic rights and in so doing has relied upon international norms. This section outlines the Court’s approach to some of the socio-economic rights enshrined in the Bill of Rights.

#### ***3.1. If and How International Norms Have Been Used***

References to international ESR norms serve as potential indicators of the extent to which these norms are entrenched at the domestic level. Another possible indicator is the emphasis given to ESR by the highest instance court; in other words, whether it uses its constitutional powers to review ESR related cases.

The first case on ESR following the certification of the 1996 Constitution involved an application for an order directing a hospital to provide the appellant with ongoing renal dialysis. The Court held that, given the limited resources and the patient’s poor health condition, the denial of the treatment, even if life-sustaining, did not breach constitutional rights.<sup>53</sup> While it was factually a difficult first case, the Court was able to confirm its role as an adjudicator of socio-economic rights claims. In several subsequent cases, the Court has

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<sup>50</sup> *In Re Certification of the Constitution of the Republic of South Africa* (1996) (10) BCLR 1253 (CC).

<sup>51</sup> *ibid* para 76-78.

<sup>52</sup> *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (Witwatersrand Local Division) para 15.

<sup>53</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696 (CC).

refused the government's arguments that resource constraints were the sole reason for a lack of progress in the realm of ESR, holding that the government failed to demonstrate that every reasonable effort had been made to use all resources at its disposition. Cases such as *Government of the Republic of South Africa v Grootboom*,<sup>54</sup> *Minister of Health v Treatment Action Campaign*,<sup>55</sup> *Khosa v Minister of Social Development*,<sup>56</sup> *Port Elizabeth Municipality v Various Occupiers*<sup>57</sup> or the more recent cases *Occupiers of 51 Olivia Road v City of Johannesburg*,<sup>58</sup> *Joe Slovo Community v. Thubelisha Homes & Others*,<sup>59</sup> and *Mazibuko v City of Johannesburg*,<sup>60</sup> all underscore the reality of the judicial enforcement of ESR. Cases on purely negative duties, which are not subject to the qualifications of progressive realisation and resource constraints, have also been successfully litigated by claimants.<sup>61</sup> In the *Treatment Action Campaign (TAC)* case, the Court requested the government to provide anti-retroviral drugs to reduce the rate of HIV transmission from mothers to children. The *TAC* case stands for the unequivocal dismissal of the government's argument that courts are not empowered to grant remedies other than declarations in complex ERS cases.<sup>62</sup>

In these landmark decisions on rights mostly qualified by progressive realisation and resource constraints,<sup>63</sup> the Court has adopted a standard of 'reasonableness'.<sup>64</sup> A particularly interesting decision is *President v Modderklip*, in which the Constitutional Court expressly linked the implementation of constitutional ESR with the rule of law. The Court found that the state's failure to avoid the eviction of a community with no alternative housing secured was a violation of section 1(c) of the Constitution which states that South Africa is a

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<sup>54</sup> *Government of the Republic of South Africa et al v Grootboom et al* 2001 (11) BCLR 1169 (CC).

<sup>55</sup> *Minister of Health v Treatment Action Campaign (TAC)* 2002(5) SA 721 (CC).

<sup>56</sup> *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (2004) (6) BCLR 569 (CC).

<sup>57</sup> *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC).

<sup>58</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC).

<sup>59</sup> *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes & Others*, CCT 22/08 [2009] ZACC 16.

<sup>60</sup> *Lindiwe Mazibuko and Others v City of Johannesburg and Others*, Case CCT 39/09, 2009 ZACC 28.

<sup>61</sup> The case of *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (1) BCLR 78 (CC) involved a successful challenge to an Act that permitted the sale in execution of people's homes in order to satisfy debts without judicial oversight.

<sup>62</sup> Pieterse (n 7) 894 and *TAC* (n 55) para 38.

<sup>63</sup> Not all economic and social rights are qualified by progressive realisation. Exceptions are for instance children's ESR, the right not to be refused emergency treatment, or the right not to be evicted without a court order.

<sup>64</sup> The *Soobramoney* Court started to establish criteria for assessing reasonableness, and these criteria have since been elaborated. A government program must be comprehensive, coherent, coordinated; appropriate financial and human resources must be made available; it must be balanced and flexible and make appropriate provision for short, medium and long-term needs; it must be reasonably conceived and implemented; it must be transparent, and its contents must be made known to the public. In *Grootboom*, the Court mentioned that those whose needs are most urgent must not be ignored by the measures.

democratic state founded on the ‘supremacy of the constitution and the rule of law’.<sup>65</sup> In the view of the Court, the rule of law therefore requires substantive steps taken by the state to actively protect ESR. By holding that the failure to avoid the homelessness of the community amounted to an infringement of the rule of law, the Court thus indicated that the constitutional framework favours a ‘thick’ account of the rule of law characterised by the commitment to the values enshrined in the Bill of Rights.

The new constitutional era has led to the inclusion of international law principles in the decisions of the Constitutional Court. The practice of construing the term ‘international law’ broadly to include soft-law instruments was reaffirmed in a 2009 decision on the right to housing. In *Joe Slovo Community v. Thubelisha Homes*, the Court affirmed an eviction order but referred to General Comment No 7 of the UN Committee supervising the implementation of the ICESCR to make the point that evictions should not result in people being rendered homeless.<sup>66</sup> According to de Wet, the Court however lacks a uniform and consistent strategy in considering non-applicable human rights instruments and soft law; it is often reluctant to consider international law norms other than those contained in human rights instruments.<sup>67</sup> Other commentators have noted that the Justices sometimes have failed to carefully ascertain the existence of an international rule before concluding whether its interpretations were consistent with international law.<sup>68</sup>

### ***3.2. Similarities and Differences Between the South African ESR Jurisprudence and International Normative Developments***

Three aspects of the South African jurisprudence reveal similarities and differences in the ways ESR have been interpreted by the South African Constitutional Court and at the international level. As the sub-sections below describe, first, there are examples of the Court in the past overlooking the applicability of relevant ESR provisions. Second, the Court has refused to apply the controversial minimum core concept developed by the UN Committee.

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<sup>65</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (2005) (8) BCLR 786 (CC) para 47.

<sup>66</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (2009) (9) BCLR 847 (CC), para 232. The Court insisted on meaningful engagement between public authorities and the persons to be evicted.

<sup>67</sup> E de Wet, 'The "Friendly but Cautious" Reception of International Law in the Jurisprudence of the South African Constitutional Court: Some Critical Remarks' (2005) 28 *Fordham International Law Journal* 1529.

<sup>68</sup> See e.g. Dugard, 'International Law and the South African Constitution' (n 17) 90; discussing the use of amnesties in *Azanian Peoples Organisation and Others v. President of the Republic*, 1996 (8) BCLR 1015 (CC).

Third, the interaction between international and domestic norms is two-directional and South African jurisprudence was incorporated into the newest international human rights law treaty, the Optional Protocol to the ICESCR.

### 3.2.1. Non-Application of Relevant ESR Provisions

Commentators have raised concerns that the Constitutional Court has sometimes denied applicability of the provision on ESR most specifically dealing with the core of a claim.<sup>69</sup> For instance, despite the clear language in section 28 of the Bill of Rights that children's rights to basic food, shelter and health are not subject to progressive realisation,<sup>70</sup> the Court's openness to international law did not result in the prioritisation of economic and social rights obligations contained in the Convention on the Rights of the Child.<sup>71</sup> Instead of applying section 28 that relates to children's ESR, the Court held in *Grootboom* that section 26, subject to progressive realisation, was the only applicable right in that case.<sup>72</sup> Despite the generally progressive approach by the Court of ESR interpretation, here, its interpretation appears more limited than the text of the Constitution would require it to be.

### 3.2.2. Rejection of the Minimum Core Concept

There is at least one area in which the South African jurisprudence differs from concepts developed at the international level. Although not uncontroversial at the international level,<sup>73</sup> the UN Committee has developed a 'minimum core standard' of socio-economic rights as a means of delineating the most basic state obligations under the ICESCR. These minimum levels of rights are, according to the Committee, not subjected to progressive realisation.<sup>74</sup> The South African Constitutional Court did not adopt this concept. Claimants in the *Grootboom* case were about to be evicted from slums with no alternative housing solution. The Constitutional Court ruled that the individuals could not be evicted until an acceptable

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<sup>69</sup> See C Scott, 'Reaching Beyond (without Abandoning) the Category of Economic, Social and Cultural Rights' (1999) 21 Human Rights Quarterly 633, 639.

<sup>70</sup> Constitution of the Republic of South Africa, Act 108 of 1996 s 28(1)c providing that 'every child has the right to basic nutrition, shelter, basic health care services and social services'.

<sup>71</sup> South Africa ratified the Convention on the Rights of the Child in 1995.

<sup>72</sup> *Grootboom* (n 54) para 71. Discussed in Pieterse (n 7) 900 and C Scott and P Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise' 16 South African Journal on Human Rights.

<sup>73</sup> K Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale Journal of International Law 113.

<sup>74</sup> The concept first appears in UN Committee on Economic, Social and Cultural Rights 'General Comment No 3 on the nature of States parties obligations' (14 December 1992) UN Doc E/1991/23 para 10.

housing alternative had been provided for them, but it explicitly rejected the existence of a minimum core obligation underlying sections 26 and 27.<sup>75</sup> The Court confirmed this stance in the *Mazibuko* case, in which poor residents in Soweto challenged the authorities' plan for a new water policy to curb water losses, leaking pipes and unpaid bills. The question of whether the Court should adopt a minimum core approach (in this case, the number of litres of free water per person) was at the centre of the decision. The unanimous Court underscored that while international law, including soft-law, was relevant and helpful for the resolution of constitutional disputes, it would not adopt the minimum core approach as posited by the UN Committee.<sup>76</sup> Rather, as already held in *Grootboom* and *TAC*, the Court repeated that the appropriate test for assessing whether ESR are 'progressively realised within available resources' was one of 'reasonableness'. This standard of review has been criticised as being deferential and failing to engage with the substance of the rights in question. However, recourse to the principle of reasonableness allowed the Court to find a policy unreasonable without having to prescribe to the other branches of government what they must do in order to act reasonably.<sup>77</sup> Pieterse has sceptically appraised that standard, comparing it to the standard of reasonableness in administrative law,<sup>78</sup> a principle of common law that also applied during apartheid.<sup>79</sup> According to Pieterse, 'By retreating to the comfort zone of administrative law, the *Grootboom* Court has made an important conceptual gain – it has mapped out a (what it considers appropriate) role for the judiciary in adjudicating the often polycentric issues raised by social rights claims. In doing so, *Grootboom* illustrates that vindicating social rights is not as far removed from courts' "ordinary" review function as is often contended.'<sup>80</sup>

There are, however, three reasons why the rejection of the minimum core test in the South African jurisprudence should not be overemphasised. First, reasonableness is a standard found in the South African Constitution and as such, it is natural that the Court invokes it over the unsettled concepts developed by the UN Committee. Second, the idea of a minimum core is actually similar to the South African reasonableness test. Fredman for instance has convincingly likened the minimum core with a right to action from the state and right to

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<sup>75</sup> *Grootboom* (n 54) para 30-33. For an analysis of the implications of the refusal to acknowledge the existence of minimum core obligations, see Pieterse (n 7) 898.

<sup>76</sup> *Mazibuko* (n 60) para 52-61.

<sup>77</sup> Brand (n 39) 227 and Liebenberg, 'Protecting Economic, Social and Cultural Rights under Bills of Rights: The South African Experience' (n 37) 5.

<sup>78</sup> Pieterse (n 7) 893.

<sup>79</sup> J Meierhenrich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000* (Cambridge University Press, Cambridge 2008) 287.

<sup>80</sup> Pieterse (n 7) 893. See also CR Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press, New York 2001) 234.

require the state to take immediate steps according to a plan that has to be designed taking equality and public participation into account.<sup>81</sup> This understanding of the minimum core concept, as opposed to an approach interested in a predetermined baseline of a bundle of goods, indeed closely resembles the South African reasonableness test. Third, regardless of whether the Court refers to a minimum core or a test of reasonableness, the more important question is whether deference has gone too far so that the test employed no longer provides for practical meaning of constitutional rights. The recent *Mazibuko* decision indeed illustrates the implications of turning the reasonableness standard into a very deferential test. As Fredman explains, while the Court considered it appropriate to demand justification for government policies,<sup>82</sup> it was overly forthcoming in accepting the justification advanced by the authorities.<sup>83</sup> While the *Mazibuko* case was litigated in South African courts, the conceptual approach of reasonableness review turned out to be the one which resolved the last remaining issue in the negotiation of the Optional Protocol to the ICESCR, as the next section illustrates.

### 3.2.3. South African Jurisprudence Influences the Optional Protocol to the ICESCR

The Optional Protocol to the ICESCR is the procedural instrument that will, once entered into force, allow the supervisory body to receive individual communications on rights contained in the ICESCR.<sup>84</sup> The appropriate standard of review of communications was resolved only in the last moments of the drafting. The Gordian knot was cut with language borrowed from the jurisprudence of the South African Constitutional Court. Article 8(4) of the OP directs the Committee ‘to consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant.’<sup>85</sup> Porter appropriately summarises that ‘just as the South African Constitutional Court has incorporated jurisprudence from the ICESCR into its own domestic jurisprudence, so has South African jurisprudence now informed the text of an international human rights instrument.’<sup>86</sup> Thus, although South Africa is still not a state party

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<sup>81</sup> S Fredman, 'Socio-Economic Rights in the South African Constitutional Court: Is the Honeymoon Over?' (Oxford Transitional Justice Research 8 March 2010) [media.podcasts.ox.ac.uk/socleg/otjr\\_seminars/michalowski-fredman-medium-audio.mp3](http://media.podcasts.ox.ac.uk/socleg/otjr_seminars/michalowski-fredman-medium-audio.mp3).

<sup>82</sup> *ibid.*

<sup>83</sup> For instance, the Court accepted a legalistic interpretation that residents who cannot afford additional water credit do not suffer ‘discontinuation’ of water unlawful under the Water Services Act, but merely a ‘suspension in water services’. *Mazibuko* (n 60) para 115.

<sup>84</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008) UN GA Res A/Res/63/117 (OP to the ICESCR).

<sup>85</sup> OP to the ICESCR, art 8(4).

<sup>86</sup> B Porter, 'The Reasonableness of Article 8(4) - Adjudicating Claims from the Margins' (2009) 27 Nordisk Tidsskrift for Menneskerettigheter 39, 50.

to the Covenant,<sup>87</sup> it has influenced the relevant normative reference to assess a state's compliance with the obligations contained in the ICESCR.

So far, this chapter has discussed the jurisprudence of the South African Constitutional Court in light of the references it has made to international norms on ESR, affirming international principles pertaining to socio-economic rights on multiple occasions. It has dismissed arguments denying its institutional competence to deal with ESR and it has shown a notable openness to a variety of international legal sources. At the same time, discomfiting signs of a potentially deferential use of the reasonableness review and a rejection of the applicability of some ESR provisions indicate that the Court's comfort zone has its limits. Measured against the legal situation prevailing two decades ago, the country has shown remarkable capacity to transform its legal system and the place it accords to international law and human rights law in particular. But to what extent has the entrenchment of ESR norms led to concrete improvements in the realisation of human rights? An assessment of purely formal aspects, such as whether the Court cites international human rights treaties or General Comments does not answer the question whether progress has been made towards realising the ends of human rights law and, by extension, of the rule of law.

### ***3.3. Whether Entrenching International ESR Norms Has Led to Concrete Improvements***

Kleinfeld is justifiably critical of the fact that the current rule of law literature is overly focused on institutions and formal legal outcomes, rather than on what she calls 'the ends of rule of law'.<sup>88</sup> Ends of the rule of law include substantive criteria, such as concrete protection of human rights and equality.<sup>89</sup> To evaluate success in realising such ends, the analysis must go beyond an assessment of the interactions between international legal norms of ESR and the case law of courts. The preamble of the 1996 Constitution describes unabashedly ambitious ends-based criteria: that the entrenchment of ESR in the Bill of Rights would lead to 'a society based on democratic values, social justice and fundamental human rights'.<sup>90</sup>

For a former Chief Justice of the South African Constitutional Court, 'what counts is the effect on the ground. Judicial protection of human rights must ultimately translate into a

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<sup>87</sup> See Heyns and Viljoen (n 20) 546 and n 29.

<sup>88</sup> R Kleinfeld, 'Competing Definitions of the Rule of Law' in T Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace, 2006) 34.

<sup>89</sup> *ibid* 35.

<sup>90</sup> Constitution of the Republic of South Africa, Act 108 of 1996 preamble.



utility that is real and accessible to those that need it the most.’<sup>91</sup> Despite the international praise of *Grootboom* and other decisions, the actual impact of that judgment on the housing situation of the litigants and those who find themselves in a similar situation has been very limited.<sup>92</sup> In 2008, Irene Grootboom, the main litigant in the 2001 landmark case died homeless.<sup>93</sup> A study completed a few months prior to her death found that the decision of the Court did not translate into effective implementation essentially because of a ‘failure to plan proactively, lack of co-operative governance and inadequate controls over financial and human resources’ at the level of local government.<sup>94</sup> From a constitutional law perspective, the *Grootboom* judgment propelled the jurisprudence on ESR and even influenced the wording of a new international treaty. But the picture is rather bleak if one measures the success according to ends-based criteria about the concrete realisation of the economic and social rights of the litigants and others similarly placed.

Apart from sometimes weakly implemented decisions, the wider effects of the constitutionalisation of ESR have also fallen short of achieving the ambitious transformative goals expressed in the Constitution’s preamble which envisages ‘a society based on democratic values, social justice and fundamental human rights’.<sup>95</sup> In the decade after the adoption of the new Constitution, the country has improved in the protection of civil and political rights,<sup>96</sup> but despite significant economic growth, South Africa remains a country where large parts of society *de facto* continue to be denied access to work, health, or education.<sup>97</sup> Paradoxically, fifteen years after this remarkable negotiated transition, socio-economic inequalities have increased in South Africa.<sup>98</sup>

The effects of constitutionalising ESR norms have been modest both on a formal and a practical level. Further complicating the picture are a number of factors specific to South Africa. These contextual factors cast doubt on the independent value of textual

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<sup>91</sup> P Langa, 'Taking Dignity Seriously - Judicial Reflections on the Optional Protocol to the ICESCR' (2009) 27 *Nordisk Tidsskrift for Menneskerettigheter* 29, 31.

<sup>92</sup> K Pillay, 'Implementing Grootboom - Supervision Needed' (2002) 3 *ESR Review: Economic and Social Rights in South Africa* 1,3.

<sup>93</sup> P Joubert, 'Grootboom Dies Homeless and Penniless' *Mail & Guardian* (Johannesburg 8 August 2008) [www.mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless](http://www.mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless).

<sup>94</sup> H Kruuse, 'Life in the Suburbs After ‘Grootboom’: The Role of Local Government in Realising Housing Rights in the Eastern Cape' (LLM thesis, Rhodes University 2008).

<sup>95</sup> Constitution of the Republic of South Africa, Act 108 of 1996 preamble (n 5).

<sup>96</sup> Two available measurements are Freedom House, *Freedom in the World 2009: South Africa* (Washington D.C., Freedom House, 2009). M Gibney, L Cornett, R Wood, *Political Terror Scale 1976-2008*, [www.politicalterroryscale.org](http://www.politicalterroryscale.org).

<sup>97</sup> M Leibbrandt et al, *Trends in South African Income Distribution and Poverty since the Fall of Apartheid* (OECD, Paris 2010) 67.

<sup>98</sup> *ibid* 4.

transformations of a constitution. Some of the assumptions behind transformative constitutionalism as a rule of law strategy may thus have to be rethought. Yet, we do not have to end on an entirely pessimistic note.

#### **4. IDENTIFYING LESSONS FROM A GLASS HALF EMPTY**

The legal literature discusses a number of factors which may have made South Africa a unique case and which may explain the relative success of its formal transition. As discussed below, these factors include special characteristics of the process and actors through which the 1996 Constitution came into being, as well as a shared belief among the stakeholders in the relevance of law.<sup>99</sup>

##### ***4.1. Process and Actors***

One unique factor of South Africa's transition is that most, if not all, of the protagonists negotiating the new constitutional framework were domestic actors. While there was international pressure to end apartheid,<sup>100</sup> and a number of foreign academics played a role in informing the debate,<sup>101</sup> the actual negotiation process was domestically driven: domestic civil society lobbied for the new Bill of Rights in general and for the inclusion of ESR in particular<sup>102</sup> and law clinics at non-white universities drew attention to abuses during the apartheid era.<sup>103</sup> While international pressure and the years of naming and shaming likely influenced the constitutional negotiations, it was the government itself that, to the surprise of

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<sup>99</sup> Other unique aspects not discussed here were the ability of the leadership to overcome inter-group enmity, other elements which helped to legitimise the State (such as the Truth and Reconciliation Commission), economic interdependency, and the country's ability to move from an initial period of formal, guaranteed power sharing (consociationalism) to a more integrative approach of power-sharing.

<sup>100</sup> D Rothchild, *Managing Ethnic Conflict in Africa* (Brookings Institution Press, D.C. 1997).

<sup>101</sup> Aucoin recommends that outside actors should confine their role in constitution-making to form the debate and to create a participatory process. L Aucoin, 'The Role of International Experts in Constitution-Making-Myth and Reality' (2004) 5 *Georgetown Journal of International Affairs* 89, 90.

<sup>102</sup> For an overview of civil society in South Africa, see J Stremlau and H Zille, *A House No Longer Divided: Progress and Prospects for Democratic Peace in South Africa* (Washington D.C., Carnegie Commission on Preventing Deadly Conflict 1997).

<sup>103</sup> J Stromseth, R Brooks and D Wippman, (n 3) 334.

most jurists, changed its attitude to the Bill of Rights and abandoned its original opposition to human rights.<sup>104</sup> Domestic ownership of such a process heavily influences the degree of legitimacy afforded to the new constitution.<sup>105</sup> Equally important is the degree of public involvement in the process of constitution-making. Posters, pop songs, television debates and cartoons explained the process and urged people to share their thoughts on the new constitutional order. This unparalleled degree of public involvement meant that 1.9 million people offered their ideas on the new Constitution.<sup>106</sup>

The constitutional process in South Africa differed from recent experiences in other transitional countries. Despite the rhetoric of 'local ownership', international actors and foreign states often impose impetus, resources and timetables. Since its transition was domestically driven, South Africa had no external time restrictions in its constitutional process, engaging in a five to seven-year transformation project.<sup>107</sup> Conversely, Kosovo's recent constitutional process took hardly more than a year,<sup>108</sup> and Iraq is a textbook example of a rushed process driven by international timetables.<sup>109</sup> It is likely that the domestic ownership over the process and its timing helps explain the largely positive attitude of South Africans towards this document.<sup>110</sup> Commentaries also suggest that a separation of the process into different phases, namely the record of understanding in 1992 and the 1993 Interim Constitution, helped to facilitate transparency and credibility over time.<sup>111</sup>

#### ***4.2. Legal Tradition and a Shared Belief in the Relevance of Law***

Meinerheinrich has examined another significant distinctiveness of the South African example: the shared belief in the centrality of law. His main argument is that in South Africa, law assisted the negotiators in the framing of complex problems and contributed to the enforcement of credible commitments. While he insists that his analysis is in no way apologetic about apartheid, he points out that even the illiberal legal norms and institutions of

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<sup>104</sup> International Commission of Jurists and Bindman (n 7) 142.

<sup>105</sup> T Carothers, *Aiding Democracy Abroad: The Learning Curve* (Carnegie Endowment for International Peace, 1999), 260.

<sup>106</sup> T Sisk, *International Mediation in Civil Wars* (Routledge, London, 2009) 104.

<sup>107</sup> Stromseth, Brooks and Wippman (n 3) 96.

<sup>108</sup> J Tunheim, 'Rule of Law and the Kosovo Constitution' (2009) 18 *Minnesota Journal of International Law* 371, 365.

<sup>109</sup> J Morrow, 'Iraq's Constitutional Process II an Opportunity Lost' (Washington D.C., USIP 2005) 8 f.

<sup>110</sup> Stromseth, Brooks and Wippman (n 3) 343.

<sup>111</sup> *ibid* 92 and United States Institute of Peace, *Iraq's Constitutional Process: Shaping a Vision for the Country's Future* (Washington D.C., United States Institute of Peace, 2005).

the apartheid era had an important structuring effect on democratic outcomes.<sup>112</sup> Meinerhenrich argues that path-dependent confidence in the utility of law in the transition from authoritarian rule created the conditions for the emergence of trust between democracy-demanding and democracy-resisting elites.<sup>113</sup> Mandela and De Klerk – lawyers themselves – both acknowledged the legacy of South Africa’s legal tradition. The perceived capacity of the legal order to positively matter for the purposes of social change is eloquently described by former Justice Albie Sachs:

In the case of South Africa, the rules that govern purchase and sale and insurance and companies and cheques, that deal with self-defence and dishonesty and with when people should be held responsible for injuries to others, happened to have come from Europe. Like the railways and trousers and dresses and Bibles and the English language, they came in the context of dispossession and domination, but like the railways and trousers and dresses and the Bible and the English language, they [...] have now become South Africanised. [...] Shorn of their associations with domination, there is no reason why these institutions should not be taken over and infused with a new spirit so as to serve the people as a whole rather than just a minority.<sup>114</sup>

In South Africa, there was a shared conception that law matters. Unfortunately, there is no reason to assume that such a belief is ubiquitous in other states emerging from a repressive regime or from an armed conflict. Courts cannot invent such belief in the relevance of law. As Stromseth explains, ‘when people believe law matters, it will matter; when people think law does not matter, it rarely can, and few rule of law programs pay explicit attention to the conundrum of how to go from the latter stage to the former’.<sup>115</sup> With regard to ESR in South Africa, the formal status of the ICCPR was not of decisive importance for its relevance in the domestic jurisprudence.<sup>116</sup> Rather, the ICCPR was relevant due to the attitude of the judiciary and their opinion about the division of power between the legislature and the judiciary.<sup>117</sup>

The recommendation that follows is that the South African experience should not be considered as a model that can be readily replicated in other situations. The belief in the relevance of international human rights norms and the perceived jurisdictional authority of the

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<sup>112</sup> Meierhenrich (n 79) 3.

<sup>113</sup> *ibid* 4 (footnotes omitted).

<sup>114</sup> A Sachs, ‘The Future of Roman Dutch Law in a Non-Racial Democratic South Africa: Some Preliminary Observations’ (1992) 1 *Social and Legal Studies* 217, 223.

<sup>115</sup> Stromseth, Brooks and Wippman (n 3) 312.

<sup>116</sup> A similar argument is made by Heyns and Viljoen (n 20) 569f.

<sup>117</sup> P Van Dijk, ‘Domestic Status of Human Rights Treaties and the Attitude of the Judiciary - the Dutch Case’ in M Nowak, D Steurer and H Tretter (eds), *Progress in the Spirit of Human Rights: Festschrift für Felix Ermacora* (Engel, Kehl 1988) 631; M Craven, ‘The Domestic Application of the International Covenant on Economic, Social and Cultural Rights’ (1993) 403 *Netherlands International Law Review* 367, 389.

South African courts appear to have been a precondition for the entrenchment of ESR in the domestic legal system – and even under those fertile conditions, the practical success so far has been relative. Considering that these contextual factors present in South Africa differ radically from many other transitioning states, should we therefore be pessimistic about the effects of entrenching international norms in the domestic legal system? The concluding section offers broader considerations on the benefits that the South African experience with ESR may offer to assist the merits and pitfalls of constitutional engineering.

## **5. CONCLUSION**

This chapter has dealt with South Africa's efforts to entrench a thicker conception of the rule of law by constitutionalising ESR rights within the domestic Bill of Rights. Severe poverty, inequality and discrimination were key features and consequences of the apartheid. Rather than 'merely' clarifying the role of different branches of government and restraining the state's power from interfering with citizens' lives, the South African Bill of Rights was envisioned as assisting in the creation of a more equal society based on respect for human rights. By delineating the inclusion of ESR and therefore the new emphasis placed upon international law in the domestic legal system, this chapter has provided a mixed picture of the success of the transformative constitutionalist ambitions. While the judicial system has demonstrated a significant increase in the adoption of international legal principles, the practical impact of the Constitutional Court's decisions on socio-economic rights are insufficient in themselves to establish a society based on social justice and fundamental human rights. The effects of constitutionalism can only be considered as one, albeit crucial, aspect of a much larger societal project. This chapter therefore cautions that rule of law programming that tries to entrench ESR in a domestic legal system should consider the South African experience as a reminder of the complexities involved in a such project, rather than an example of a fast-track solution to redress past and present inequalities.

Arthurs exposes assumptions underlying contemporary models of transformative constitutionalism that are based on a belief in constitutional adjudication as a way of transforming economies and politics, societies and cultures. He points out that 'written texts,

entrenched rights and constitutional litigation do not and cannot actually contribute much to fundamental social and political transformations'.<sup>118</sup> Examining India, South Africa and Germany as countries that adopted a new constitutional regime in the aftermath of conflict, colonialism and authoritarianism, Arthurs observes that in all three cases the judiciary 'often, if not always, applied [human, political and social rights] energetically and imaginatively'.<sup>119</sup> Ultimately however, as suggested in this chapter, the most relevant question is one which inquires as to the actual contribution of this new constitution to social, political or economic transformation. In Arthurs' view, 'constitutional litigation has only a marginal effect on public policy, practical governance and the allocation of public goods'.<sup>120</sup>

There are nevertheless good reasons to be somewhat more optimistic. By affirming human rights, courts legitimate their practice and advocacy, which in turn contributes to the wider legitimisation of claims based on socio-economic rights language.<sup>121</sup> It seems that in South Africa, the best outcomes were achieved where constitutional litigation was not an alternative strategy to social mobilisation, but rather an essential element of a wider campaign.<sup>122</sup> In other words, where civil society was able to combine the court-based litigation strategy rights with a broader mobilisation, as in the *TAC* case, the new Bill of Rights had good prospects of contributing to practical changes. The *TAC* judgment probably saved thousands of lives by ordering that the government act 'without delay' to provide antiretroviral drugs and that it undertake reasonable measures to provide testing and counselling facilities.<sup>123</sup> Moreover, unlike the *Grootboom* decision, *TAC* was much better implemented in practice.<sup>124</sup> The *Mazibuko* water case was another example of a case which was pursued in tandem with social mobilisation efforts. Even if the Court ultimately rejected the applicants' arguments, it emphasised that the constitutional obligation to ensure progressive realisation of ESR entails

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<sup>118</sup> H Arthurs, 'Constitutionalism: An Idea Whose Time Has Come...And Gone?' (2008) 75 *Amicus Curiae* 4.

<sup>119</sup> Arthurs (n 118) 6.

<sup>120</sup> *ibid* 6.

<sup>121</sup> *ibid* 8.

<sup>122</sup> S Robins, *From Revolution to Rights in South Africa: Social Movements, NGOs & Popular Politics after Apartheid* (Woodbridge, University of Kwazulu-Natal Press 2008); *The Road to a Remedy: Current Issues in the Litigation of Economic, Social, and Cultural Rights*, 2005, (Céligny, University of New South Wales Press), 233; D Davis, 'Socio-Economic Rights: The Promise and Limitation: The South African Experience' in D Barak-Erez and AM Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Oxford, Hart 2007) 211.

<sup>123</sup> *TAC* (n 55) para 135.

<sup>124</sup> See also Centre on Housing Rights and Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (Geneva, COHRE 2004) ch 11. Implementation has been much better than in *Grootboom*, but not entirely without problems. See for instance, 'TAC submits complaint to Human Rights Commission Against Minister of Health and MEC for Health of Mpumalanga' (2 December 2002) <http://www.tac.org.za/community/node/2478>.

that any policies must be continually monitored.<sup>125</sup> It has been argued that at least some engagement by the authorities was spurred by the litigation in the case itself.<sup>126</sup> Hence, even unsuccessful cases can sometimes lead to changes in policies during the process of litigation, while successful but unimplemented cases like *Grootboom* can lay the foundation for effective future decisions.<sup>127</sup> Wickeri explains that ‘despite the absence of sweeping change for South Africans living in informal settlements, *Grootboom* provided a powerful tool for communities involved in evictions proceedings, building a growing body of right-to-housing case-law based on discrete victories for various communities.’<sup>128</sup>

Many countries emerging from conflict or oppressive rule face daunting challenges as a result of denials of socio-economic rights for large parts of their populations. Even if several crucial aspects made South Africa’s transition unique, its constitutional moment enables us to think anew of the complexities facing actors promoting the rule of law. The drafters of the 1996 Constitution acknowledged that a substantive or ‘thick’ understanding of the rule of law must be established if the structural injustices were to be addressed. They hoped that the constitutionalisation of socio-economic rights would contribute to the country’s social transformation. Fifteen years later, it can be said that entrusting courts to enforce ESR norms was a partial, but modest success in South Africa and results were strongest where court-based strategies were complemented as part of broader campaigns. In short, the constitutional entrenchment of ESR did have positive effects, but we should not expect that constitutionalism, in isolation, will necessarily lead to ground-breaking social transformations in every situation.

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<sup>125</sup> *Mazibuko* (n 60) para 40.

<sup>126</sup> P Danchin, 'A Human Right to Water? The South African Constitutional Court’s Decision in the Mazibuko Case' [2010] EJIL Reports [www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court%E2%80%99s-decision-in-the-mazibuko-case/](http://www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court%E2%80%99s-decision-in-the-mazibuko-case/).

<sup>127</sup> *The Road to a Remedy* (n 122) 231 ff. The *TAC case* for instance undoubtedly benefitted from the earlier jurisprudence in *Grootboom*.

<sup>128</sup> E Wickeri, 'Grootboom’s Legacy: Securing the Right to Access to Adequate Housing in South Africa' (2004) Center for Human Rights and Global Justice Working Paper No 5 <http://www.chrgj.org/publications/docs/wp/Wickeri%20Grootboom%27s%20Legacy.pdf>.