PLEASE DO NOT CITE WITHOUT AUTHORS' PERMISSION.

Inclusion of Justiciable Socio-Economic Rights in Bills of Rights: Lessons for Northern Ireland from South Africa and Zimbabwe

Khanyisela Moyo and Anne Smith[1]

INTRODUCTION

Should a Bill of Rights include justiciable economic and social rights (hereafter ESRs)?[2] This question which confronted the drafters of the South African and Zimbabwean Constitutions is currently being debated in Northern Ireland. Both South Africa's and Zimbabwe's Bills of Rights include a range of ESRs, and this was a recommendation included in advice on a Bill of Rights which was submitted to the British government in December 2008 by the Northern Ireland Human Rights Commission (NIHRC)[3] However despite this advice, it was 'cavalierly rejected'[4] by the British government.[5] This raises a number of questions. Why and how were the constitution-makers in South Africa and Zimbabwe able to agree on the inclusion of justiciable socio-economic rights whereas in Northern Ireland there is no such agreement? Are the reasons historical or are they rooted in different approaches adopted by African and European countries? What lessons, if any, can be learnt from South Africa and Zimbabwe for Northern Ireland as the debate continues as to whether and how such rights should be justiciable.

The three case studies have been chosen for several reasons. Firstly, all three jurisdictions are significant in that they have each undergone major constitutional reform where the inclusion of justiciable ESRs in a Bill of Rights has been part of that constitutional process (this is an on-going process in Northern Ireland). Secondly, all three case studies are emerging from decades of violent political conflict where socio-economic inequalities (albeit on different levels, see below) played a central part in accentuating the conflict. As such they may be termed 'conflicted' or 'transitional' societies'.[6] The political process in these conflicted societies failed to address these inequalities, and indeed majoritarian politics can and have facilitated

[1] Lecturers, School of Law & Transitional Justice Institute, University of Ulster, Northern Ireland.

[2] Social and economic rights refers to rights such as the right to health, right to housing, right to an adequate standard of living, right to education and so on. The exclusion of cultural rights does not detract from their importance; their exclusion is explained due to time/space constraints.

[3] Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* 10 December 2008, 44-50, available at http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/51/A_Bill_of_Rights_for_Northern_Ireland_%28December_2008%29.pdf, (accessed 21 August 2013)

[4] Gormally B 'Human Rights and social justice' *Just News* (2013) June/July 2013 7.

[5] Northern Ireland Office, Consultation Paper, *A Bill of Rights for Northern Ireland: Next Steps* November 2009, available at http://www.nio.gov.uk/consultation_paper__a_bill_of_rights_for_northern_ireland__next_steps.pdf (accessed 21 August 2013)

[6] Bell C, Campbell C and Ni Aolain F 'Justice Discourses in Transition' (2004) 13(3) *Social and Legal Studies* 305, 310.

'divisions and provoked resentment and alienation'[7] in South Africa, Zimbabwe and Northern Ireland.

Thirdly, in the case of Zimbabwe and Northern Ireland, constitutional histories have been influenced by British colonial legacies.[8] It is noteworthy that when Britain ratified the European Convention on Human Rights[9] it did not become a state party to the 1952 Optional Protocol which included ESRs[10].This approach was extended to British dependencies in 1953 and was subsequently codified in Bills of Rights of British dependences and later former British colonies.[11] To date, the United Kingdom Human Rights Act[12] which is part of the country's unwritten Constitution does not include ESRs. Though Northern Ireland is as a devolved administration of the United Kingdom, bound by the ECHR, its discourse on the constitutionalisation of ESRs differs from the discussion on the constitutionalisation of these rights in the UK. This is because the drafting of a Bill of Rights that reflected the particular circumstances of Northern Ireland was a central part of the Good Friday Agreement which was subsequently translated into the 1998 Northern Ireland Act.[13]

Comment [A1]: Khanyisela, I don't get this point? What OP is this? Are you talking about the right to property?

Indeed there are axiomatic differences in terms of regional human rights cultures and approaches but it is too simplistic to conclude that these were the only influences on the three countries' decisions as to whether or not to include justiciable ESRs in their new Bills of Rights.[14] In particular, both Zimbabwe and South Africa are state parties

[7] Dickson B 'The Protection of human rights-lessons from Northern Ireland' [2000] 3 *EHRLR* 213, 214 Dickson draws upon Northern Ireland's experience of majoritarianism from 1921-1972.

[8] For a discussion of the imperial influences on colonial and postcolonial Constitutions see Go J, 'A Globalizing Constitutionalism? Views from the Postcolony,1945-2000,('2003)*18(1) International Sociology 71-95*. See also: Keith LC and Ogundele A, 'Legal Systems and Constitutionalism in Sub-Saharan Africa: An Empirical Examination of Colonial Influences on Human Rights, (*2007) 29 HRQ (1065–1097)*

[9] European Convention on Human Rights and Fundamental Freedoms, 1950, entered into force on 3 September 1953, 213 U.N.T.3. 221, E.T.S. 5 (1950), hereafter ECHR.

[10] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms , Paris , 20 March 1952, CETS No. 009. For a discussion of the British attitude to this protocol see van Dijk P et al, Theory and Practice of the European Convention on Human Rights. 4th edn 2006 Antwerp: Intersentia p.84.See also: Mowbray AR, The European Convention on Human Rights , in Baderin, Mashood A. and Ssenyonjo, Manisuli, eds. (2010) *International Human Rights Law: Six Decades after the UDHR and Beyond*. (2010) Aldershot: Ashgate, 271 -288 at 273.

[11] As Viktor Mayer-Schonberger aptly put it "the British Empire was successful in imposing both entire drafts, as well as major alterations of constitutions on its former colonies".See Mayer-Schönberger, V. (1994) Into the Heart of the State: Intervention Through Constitution-Making. *Temple International and Com¶tive Law Journal 8.*

[12] The Human Rights Act 1998 (hereafter HRA) gives 'further effect to rights and freedoms guaranteed under' the ECHR. The HRA was introduced in October 2000. The ECHR primarily contains civil and political rights though there are some ESRs such as Protocol 1 art. 1 refers to 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions and Protocol 1 art.2 states that 'No person shall be denied the right to education'.

[13] *Agreement Reached in the Multi-Party Negotiations* (Cm 3883, 1998); 37 ILM (1998).The Agreement resulted from the talks in Northern Ireland in 1998 which produced a blue-print for how future relationships within and between the Republic of Ireland, Northern Ireland and the United Kingdom should be developed. Hereafter the Agreement

[14] For a discussion of different regional approaches see Cerna CM, 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts,' (1994) 16 Hum. Rts. Q. 740.

;

to the African Charter on Human and Peoples' Rights(Hereafter ACHPR)[15] which in contrast to the ECHR, emphasises the indivisibility of rights, by giving equal status to both civil and political rights as well as ESRs.[16]

Nonetheless the inclusion of ESRs in the South African Bill of Rights was inserted into the Final Constitution 1996,[17] the same year when South Africa became a state party to the ACHPR. These rights have been recently enshrined in the 2013 Zimbabwean Constitution[18] although Zimbabwe has been a state party to the ACHPR since 1986. However, unlike South Africa and Zimbabwe, the process and the debate are still on-going in Northern Ireland. Thus, drawing upon the South African and Zimbabwean experience, as Northern Ireland continues to debate the inclusion of jusiticable ESRs in a Bill of Rights, this paper hopes to contribute to and inform the present discussion in Northern Ireland and in other jurisdictions. Adopting this comparative approach, we are cognisant of the dangers of inserting the language used in one jurisdiction into another. Comparative experience in this instance is used to offer the prospect of expanding an understanding of the problems in debating and drafting justiciable ESRs thus leading to a consideration of some solutions.

The paper is divided into three sections. Section 2 provides a brief outline of the key debates on the constitutionalisation of justiciable ESRs. Particular attention is paid to the separation of powers thesis and the nature and scope of a state's obligations under Article 2 of the International Covenant on Economic, Social and Cultural Rights.[19] Section 3 deals with case studies and explores the reasons for South Africa and Zimbabwe's decisions to insert a range of justiciable ESRs into their constitutions and the timing of this development. It also discusses Northern Ireland's reasons for not replicating the practice. Before addressing these issues, the case studies will briefly comment on the political, historical and socio-economic background of the three jurisdictions. This context setting is essential as it will help to explain the importance of the inclusion of justiciable ESRs for transitional societies such as South Africa, Zimbabwe and Northern Ireland. Section 4 is the conclusion which attempts to infer lessons for Northern Ireland from South Africa and Zimbabwe.

[15] African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

[16] On the unique features of the ACHPR see; Amao O, The African Regional Human Rights System , in Baderin, MA. and Ssenyonjo, M, (ed). (2010) *International Human Rights Law: Six Decades after the UDHR and Beyond.* Aldershot: Ashgate, 236 -251 at 238-240.

[17] As section X explains, as part of the negotiated settlement, South Africa had two Constitutions, an interim Constitution (The Constitution of the Republic of South Africa Act 200 of 1993, ch. 3), and a final Constitution (Constitution of the Republic of South Africa 108 of 1996, ch 2).

[18] See Chapter 4, Constitution of Zimbabwe Amendment (No. 20) Act. 20 l 3, available at <http://www.parlzim.gov.zw/attachments/article/56/constitution.pdf> (Last visited 29 August 2013).

[19] International Covenant on Economic, Social and Cultural Rights, 1966 entered into force on 3 January 1976 2200A (XXI) UN Doc A/6316 (1966), hereafter ICESCR. South Africa signed the ICESCR in 1994, the United Kingdom signed and ratified the ICESCR in 1966 and in 1976 respectively; and Zimbabwe ratified the ICESCR in 1991.

PLEASE DO NOT CITE WITHOUT AUTHORS' PERMISSION.

CONSTITUTIONALISATION OF JUSTICIABLE ESRs: OPPOSITION, DEVELOPMENTS AND PROSPECTS

> {*E}ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*[20]

State parties to the ICESCR have an obligation to take steps which they consider best suitable for the full realisation of ESRs. Specifically, two forms of processes are obligatory, namely, legislative and non-legislative measures to respect, protect and fulfil ESRs.[21] The adoption of legislation is crucial to the realisation of all human rights since a comprehensive legal framework provides a basis for the protection and enforcement of these rights in case of infringements.[22] Are ESRs legislative or constitutional rights?

Legislative rights are secured and retained by the discretion of the government and are therefore subject to repeal. In contrast, constitutional rights, as opposed to legislative rights are regarded as fundamental rights and are placed beyond the reach of any government. Almost always this requires having another institution, most notably the judiciary, to act as an effective check and balance on government and it is the courts, not parliament which holds the hearing and provides the remedy.

However, placing fundamental rights such as ESRs beyond government and limiting the power of majorities and their elected politicians to decide on laws/policies regarding socio-economic rights has and continues to be one of the most controversial aspects of constitutionalisation/ or what the authors have coined the justiciablisation of ESRs. As this issue along with other debates such as the ideological legitimacy of ESRs, the negative/positive framework, the issue of resources have been well rehearsed in the works of socio-economic rights scholars such as Lienberg, Dennis, Stewart, Haysot, Pieterse, Mureinik, Hunt, Fredman and O'Connell,[23] it is not our intention to traverse their works by (re)presenting and regurgitating the arguments for and against making ESRs jusitciable. Rather, the object of this paper is practical, it is to draw out lessons for Northern Ireland and any other jurisdiction who are in the process of debating and drafting ESRs in Bills of Rights. To this end, we briefly address what O'Connell argues is the 'overarching argument'[24] against making ESRs jusiticiable. This is the separation of powers

[20] Part 1, art.2 ICESCR.
[21] ¶ 3 General Comment 3 and ¶ 56 General Comment 14 CESCR.
[22] See Ssenyonjo, M., Economic, social and cultural rights. In: Baderin, MA. and Ssenyonjo, M. (ed). *International Human Rights Law: Six Decades After the UDHR and Beyond*. Aldershot : Ashgate Publishing 49- 88 at 56 -57.
[23] This is by no means an exhaustive list. The 1992 issue of the *SAJHR* include several articles debating jusitciability of ESRs in the South African Bill of Rights and the different ways such rights should be entrenched.
[24] O'Connell P *Vindicating Socio-Economic Rights International Standards and Com¶tive Experiences* (2012) 12.

argument and the associated concerns relating to the legitimacy and competence of the judiciary to deal with issues relating to socio-economic rights.

Separation of powers

At its simplest, the separation of powers doctrine advocates the notion that the legislature makes the law, the executive implements the law, and the judiciary applies and enforces the law.[25] This doctrine has been described as the 'golden thread'[26] used by those who are opposed to making ESRs justiciable. The 'anti-constitutionalizers'[27] argue that the judicial enforcement of rights of ESRs is a 'serious derogation of the principle of separation of powers'[28] as such rights have huge monetary implications, require expenditure decisions, and it is therefore inappropriate and illegitimate for courts to determine such issues. As Cecile Fabre argues:

> *...Judges, it is thought, should not get involved in making policy and in allocating resources to individuals, first, because they would be encroaching upon the prerogative of the elected representatives of the people, and secondly, because even if one does not think that democracy should have pre-eminence over social justice, judges are not the best placed, institutionally, to make those kind of decisions.*[29]

In short this argument is concerned both about the legitimacy of courts usurping parliament's role and the court's ability to make decisions with financial and budgetary implications. As the 'anti-constitutionalizers' argues, the justiciablisation of ESRs leads to 'disabling of representative institutions',[30] displacing popular self-government[31] in favour of government 'by judiciary'. Rather than facilitating governance by the people for the people, embellishing judicial authority to this degree is clearly 'counter-majoritarian',[32] as it is displacing democratic politics in favour of judicial power. The 'anti-constitutionalizers' anxiety is rooted in a traditional and arguably rigid and formalistic understanding of the doctrine of separation of powers.

[25] For a more detailed discussion of the se¶tion of powers doctrine see Vile MJC *Constitutionalism and the Se¶tion of Powers* 2ed (1998).
[26] O'Connell, 2012 17.
[27] Mureinik E 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *SAJHR* 464 465. Another term to describe those opposed to constiutionalising rights is 'democratic positivists'. This phrase is borrowed from Hunt M 'Reshaping Constitutionalism' in Morison J McEvoy K & Anthony G (eds) *Judges, Transition and Human Rights Cultures* (2007) 468.
[28] Beatty D *The Ultimate Rule of Law* (2004) 125.
[29] Fabre C *Social Rights Under the Constitution - Government and the Decent Life* (2000) 2.
[30] Waldron J 'A Right-Based Critique of Constitutional Rights' (1993) 13 (1) *OJLS* 18 28.
[31] Gardbaum S 'The New Commonwealth Model of Constitutionalism' (2001) 49 *AJCIL* 707 740.
[32] This phrase was coined by Professor Bickel and has set out the contours of the debate in Bickel A *The Least Dangerous Branch: The Supreme Court at the Bar of American Politics* (1986); See Friedman B 'A History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy' (1998) 73 *NYULR* 333.

PLEASE DO NOT CITE WITHOUT AUTHORS' PERMISSION.

Constitutionalisation of ESRs: developments and prospects.

The authors of this paper postulate that the above 'anti-constitutionalizers' arguments are overly simplistic as they represent a misunderstanding of democracy in practice in societies and do not reflect reality. Realpolitik demands countenancing and facilitating the operation of a 'pragmatic mixture of functions'.[33] In fact emerging jurisprudence in jurisdictions which have enshrined ESRs and (even in those where ESRs have not been inserted into the Constitution) demonstrate competence and alacrity by the courts to enforce these rights.[34]

For example, in the first *Certification* judgment of the South African Constitutional Court[35] the SACC warned against the application of a strict approach to the separation of powers doctrine

> *[T}here is, however, no universal model of separation of powers and, in democratic system of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation of powers that is absolute …] The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessity or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers …*[36]

In the same judgment, responding to the objection that the inclusion of justiciable ESRs would result in the courts dictating to government on the allocation of the budget, the SACC stated:

> *{I}t 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 benefits to a class of people who formerly were not 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 results in a*

[33] Neuborne B 'Judicial Review and Se¶tion of Powers in France and the United States' (1982) 57 *NYULR* 363 370-371.
[34] See Klein A, 'Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights, (2007-2008) 39 Colum. Hum. Rts. L. Rev. 351.
[35] Before the Constitution could be formally adopted, the final text had to receive certification by the SACC to ensure that the Final Constitution satisfied the 34 constitutional principles of the interim Constitution. The hearing began on the 1 July 1996 and the SACC delivered its unprecedented judgment on the 6 September 1996 when it refused to certify the final text. Hereafter SACC.
[36] *Ex parte Chairperson of the Constitutional Assembly of the Republic of South Africa* 1996 (4) SA 744 (CC) p 810 ¶s 108-09 (hereafter *First Certification* case*).*

> *breach of the separation of powers*.[37]

Similarly the United Nations Committee on Economic, Social and Cultural Rights[38] stated in General Comment No. 9:

> *{W}hile the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.*[39]

The authors of this paper share these views. There is no and possibly, there cannot and should not be separation of powers that is absolute. Elected politicians are not above the law, they too are bound by the rule of law and when it comes to making decisions relating to economic and social rights, they need to take decisions in an equitable and fair manner. If they fail to do so, including justiciable ESRs in a Bill of Rights, helps the most vulnerable to hold government to account. As the Director of one human rights NGO stated 'sensible and just politicians have nothing to fear from [justiciable] economic and social rights-..corrupt ones might have'.[40] In this context, Bills of Rights allow those who 'are passionate or desperate enough to seek change through legal means'.[41] This can and has resulted in governments having to change their policies with positive results for the most vulnerable. For example, the South African government's decision to refuse to provide a drug, nevirapine, that would prevent mother-to-child transmission of AIDS in public hospitals (the drug was only available to a few research and training sites) violated the right to have access to health care.[42] In 2004 the public health system started to administer treatment to people with AIDS. 10 years later it has been reported that since the *TAC* decision 327,000 children have not contracted HIV as a result of having access to the drug preventing mother to child transmission of HIV.[43] The impact of *TAC* is nicely captured by Geoff Budlender:

> *Many people see the TAC case as a model in a way which has a real impact on people's lives. The TAC case has literally saved the lives of very many*

[37] *First Certification* case ¶ 77.
[38] Hereafter CESCR.
[39] *General Comment No. 9, The Domestic Application of the Covenant*, UN ESCOR, 19th Sess., Annex, Agenda Item 3, UN Doc. E/C.12/1998/24 (1998), at ¶ 10 [*General Comment No. 9*]
[40] Gormally B 'Human Rights and social justice' *Just News* (2013) June/July 2013 7.
[41] Tapscott R 'Maximizing Achievements in Human Rights Development: Arguments for a Rights-Based Approach to Land Tenure Reform' (2012) XXVII *The Fletcher Journal of Human Security* 26 32
[42] *TAC (Treatment Action Campaign)* v. *Ministers of Health* 2002 (10) BCLR 1033 (CC), (hereafter *TAC*).
[43] . Honermann B & Heywood M 'South Africa: Ten Years Since the TAC Case - a Judgment That Saved a Million Lives', 5 July 2012, available at http://allafrica.com/stories/201207051137.html (accessed 14 August 2013)

> *thousands of kids. That destroys the arguments of those who say these are just paper rights and have no value*.[44]

In addition to the jurisprudence of the domestic courts discussed above, non-governmental organisations have now developed an interest in litigating ESRs. Academic renditions, principles developed by groups of experts and international organisations have also developed useful explanations of the nature and scope of states' obligations under Article 2(1) of the ICESCR.[45] At the UN level, the CESCR in its concluding observations on the UK has corrected the perception that ESRs are programmatic aspirational principles which are not justiciable and has confirmed the indivisibility, interrelatedness and interdependence of all rights.[46] It has also affirmed the justiciability of ESRs.

Comment [A2]: Khanyisela can you make reference to whatever GC you are talking about here in a footnote?

More specifically, the CESCR has seemingly recommended in its Concluding Observations to state parties' reports that the state's duty to 'take steps … by all appropriate means ' requires states to constitutionalise these rights. For example, in its 1993 Concluding Observations on Kenya, the CESCR noted:

> *{w}ith concern that the rights recognized by Kenya as a State party to the International Covenant on Economic, Social and Cultural Rights are neither contained in the constitution of Kenya nor in a separate bill of rights; nor do the provisions of the Covenant seem to have been incorporated into the municipal law of Kenya*[47].

Comment [A3]: NEED TO REFERENCE THIS

This suggests that there is an expectation at the UN level that member states will either insert ESRs in the Constitutions or include them in their Bills of Rights.[48]

SOUTH AFRICA

Although the SACC in the *First Certification* case was able to dispel the arguments against justiciable ESRs and thereby cleared the path for the inclusion of such rights in the South African Constitution, for the drafters, it was certainly not an easy path and ESRs were only included after considerable debate.What were these debates? Why did South Africa include a range of justiciable socio-economic rights in their Constitution and how?.

Prior to the adoption of the Constitution, inequality and systemic discrimination in access to housing, land, work and resources were hallmarks in South Africa during

[44] Interview with Geoff Budlender in the report by Centre on Housing Rights and Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, Challenged and Strategies* Geneva, 2003 98 available at http://www.cohre.org/library/Litigating%20ESCR%20Report.pdf (accessed 14 August 2013).

[45] Most of these developments have been discussed in Ssenyonjo M, Reflections on state obligations with respect to economic, social and cultural rights in international human rights law,(*2011) 15 (6) International Journal of Human Rights 969- 1012*.

[46] ¶ 24 CESCR, Concluding Observations on the United Kingdom, 2002, UN doc. E/C. 12/1/Add. 79.

[47] ¶10 CESCR, Concluding Observations: Kenya, 1993. UN Doc E/C.12/1993/6. Kenya inserted ESRs in its 2010 Constitution.

[48] See however, ¶ 4-8 General Comment No. 9.

the apartheid years. The white minority enjoyed better access to housing, health care, education and other services than the black majority.[49] For example, it has been reported that:

> *{B}lacks suffered from a lack of access to the official policy of racial segregation and inequality adversely affected most South Africans by reducing the provision of medical and mental health care. The government segregated public hospitals and allocated significantly more funds per capita to health care for whites than for blacks.* [50]

Pre-democratic South Africa has therefore been rightly described as one of most unequal societies in the world[51] and a 'rights pariah'.[52] However from the 1990s there were major changes to South Africa's political landscape. Some of the most important changes included the unbanning of the African National Congress (ANC), an anti-apartheid group, and the publication of various documents, most importantly, their draft Bill of Rights which included ESRs.[53] Albie Sachs, a member of the ANC's National Executive Committee and was later to become a Justice of the SACC, played an influential role in campaigning for a Bill of Rights and in particular for ESRs. Sachs opined that the inclusion of justiciable ESRs in a Bill of Rights were valuable mechanisms to correct the past injustices of the apartheid regime and to counter any new project to refine and modernise apartheid.[54] The ANC and their supporters argued that inclusion of justiciable ESRs would represent an 'explicit commitment to the redress of the socio-economic legacy of apartheid'.[55] The ANC was not the only political party supporting ESRs, the Democratic Party (DP) representing liberalism, had always been supportive of a Bill of Rights, likewise the Labour Party. Support also existed outside political circles with the trade union

[49] Govender K *Attempting to achieve substantive equality in one of the most unequal societies in the world:-The South African Experience*, paper presented at NICEM's Annual Human Rights and Equality Conference, Belfast, October 2005 at 5, on file with the authors.

[50] Chapman A Conceptualizing the Right to Health: A Violations Approach (1998) 65 *Tennessee Law Review* 389 403.

[51] Chaskalson A From wickedness to equality: The moral transformation of South African law (2003) 1(4) *IJCL* 590.

[52] Hart V 'The Contagion of Rights: Constitutions as Carriers' in Hanafin P and Williams M (eds) *Identity, Rights and Constitutional Transformation* (1999) 40.

[53] ANC Constitutional Committee *A Bill of Rights for a New South Africa* (1990) and in 1992 a revised draft was produced based on the 1990 Bill of Rights document, ANC Constitutional Committee, *Draft Bill of Rights: A Preliminary Revised Draft* (1992). Other important documents included the ANC's 1988 'Constitutional Guidelines for a Democratic South Africa', a modified version of the in the ANC's Freedom Charter of 1955.

[54] Sachs A Social and Economic Rights: Can They Be Made Justiciable? (2000) 53 *Southern Methodist University School of Law Review* 1381, 1383. However, it is important to note that at the beginning not all black South Africans supported a Bill of Rights. Indeed, a group of black students at the University of Natal in Durban, set up a body called the Anti-Bill of Rights Committee. The body was set up as the students viewed a Bill of Rights as a document established in advance by a privileged white minority to ensure that when eventually one-person, one-vote majority rule came to South Africa, and everyone enjoyed rights of citizenship, a Bill of Rights could act as an obstacle towards any move of major change. Even within the ANC, some of its members expressed concern about the inclusion of justiciable ESRs. Justice Sachs responded by invoking the need to create an 'Anti-Anti-Bill of Rights Committee' and was successful in gaining the support of the majority of South Africans. A. Sachs, *Protecting Human Rights in a New South Africa* (1990).

[55] Kapindu RE *From the global to the local The role of international law in the enforcement of socio-economic rights in South Africa* (2009) Socio-Economic Rights Project Community Law Centre University of the Western Cape 4

movements, most notably the powerful Congress of South African Trade Unions (COSATU) and the United Democratic Front (UDF), a coalition of over 600 anti-apartheid civil, church, labour, and women's organisations broadly endorsed ESRs.
If the Bill of Rights was to help transform South Africa from a society 'based on socio-economic deprivation to one based on equal distribution of resources',[56] these groups argued that the inclusion of such rights was central in achieving this transformation.[57]

However, on the other hand, others argued against the inclusion of ESRs. The National Party (the minority government during apartheid) and the Inkatha Freedom Party (IFP) opposed or were sceptical about including some ESRs but supported the right to protect property. Their support for property rights can be explained as the National Party realised that they would no longer be the dominant political power 'pulling the political strings'[58] after the first democratic elections in April 1994.[59] They therefore saw a Bill of Rights as a means of 'fencing off certain aspects of white privilege from the reach of parliamentary politics'.[60] As Sachs noted, it was only when the majority promised to be black that constitutional doubts and the need for checks and balances suddenly became allegedly self-evident.[61] The National Party's conversion was therefore essentially good political dexterity based on 'reactionary constitutionalism',[62] a means of preserving the interest of the whites and to prevent an effective redistribution of wealth and power in South Africa. To quote Sachs again:

> *{A }Bill of Rights was one of the essential tools without which the relatively peaceful transition from this history of racial oppression and apartheid to a nonracial democracy would not have been possible. Without some guarantee of protection for the rights of minorities, the previous ruling white minority would not have relinquished power to an inevitably black-controlled majority government.*[63]

Outside the political arena, a report by the South African Law Commission,[64] favoured the National Party's position. The Report looked at the main arguments against the inclusion of justiciable ESRs, most notably the separation of powers.

---

[56] Mbazira, C 'You are the "weakest link" in realising socio-economic rights: Goodbye – Strategies for effective implementation of court orders in South Africa', (2008) Research Series 3 Community Law Centre, University of the Western Cape 6

[57] Corder H et al. *A Charter for Social Justice: A Contribution to the South African Bill of Rights Debate* (1992) Capetown: University of Capetown 21

[58] Cockrell A 'The South African Bill of Rights and the 'Duck/Rabbit' (1997) 60 *MLR* 513 515 521.

[59] The ANC had 312 members (63.7 per cent); NP, 99 members (20.2 per cent); IFP, 48 members (9.8 per cent); FF, 14 members (2.8 per cent); DP, 10 members (2 per cent); PAC 5 members (1 per cent); and ACDP, 2 members (0.4 per cent). These figures are taken from Ebrahim H *The Soul of a nation: constitution-making in South Africa* (1998) 189.

[60] Cockrell A 'The South African Bill of Rights and the 'Duck/Rabbit' (1997) 60 *MLR* 513 515 521.

[61] Sachs A 'Towards a Bill of Rights for a Democratic South Africa' (1989) 12 *Hastings and International and Com¶tive Law Review* 289 294.

[62] Cockrell A 'The South African Bill of Rights and the 'Duck/Rabbit' (1997) 60 *MLR* 513 515 521.

[63] Quoted by Justice Richard J. Goldstone 'The South African Bill of Rights' (1997) 32 *Texas International Law Journal* 451 452.

[64] South African Law Commission *Interim Report on Group and Human Rights* Project 58 (1991) quoted by Haysom N 'Constitutionalism, Majoritarian Democracy and Socio-Economic Rights' (1992) 8 *SAJHR* 451 453. Hereafter Olivier Commission Report.

The Report argued that if such rights were to be included, they would 'wreck the whole process of negotiation and plunge the country into chaos'.[65] Some of the Report's findings were also shared by commentators such as Dennis Davis[66]:

> *[t]o assert a right is to argue that another party has a duty to provide conditions in terms of which that right can be fulfilled. Once social and economic rights are included in a bill of rights, the Constitution trumpets to the society at large that each is entitled to demand enforcement of such rights whether they be rights to housing, to employment, to medical care or to nutrition. To include these rights as being of equivalent status to first generation rights is to raise expectations within a society that these rights can indeed be enjoyed by all. For members of society to then find that all that is entailed thereby is a process of negative constitutional review is to create a situation where expectations are raised only to be dashed on the rock of a technical legal review **....** Certainly Mr and Ms Citizen will demand more than review from a fully fledged right.*[67]

In light of the conflicting views both about the purpose of a Bill of Rights and the inclusion of ESRs, a key point in ensuring a 'relatively peaceful transition' and to avoid the country being plunged into 'chaos', was the adoption of two Constitutions both of which included a Bill of Rights.[68] For the purposes of this paper, it is interesting to note that the only ESRs to be included in the interim Constitution were the 'right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory', labour relations and property rights. [69]

In contrast, the Final Constitution includes a range of ESRs (see below).[70] Why then were only some ESRs included in the Interim and not others and why and how were these rights finally included in the Final Constitution. We proffer several reasons. First, as stated earlier, one of the reasons why the National Party supported property rights can be explained by Hirschl's theory of the 'self-interest hegemonic

[65] Cottrell J 'Making ESC Real in a Constitution: People, Politicians and Pedants' in Heymann J & Cassola A (eds) Making Equal Rights Real Taking Effective Action to Overcome Global Challenges (2012) Cambridge University Press

[66] Dennis Davis later became a High Court Judge in Durban.

[67] Davis D 'The Case Against the Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *SAJHR* 475, 484-85. Davis argued that ESRs should only be included as directive principles of state policy such as the Irish and Indian Constitutions. The directive principle approach means that politicians not the courts are responsible for the implementation of ESRs. For a more detailed discussion on directive principles see Mureinik E 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *SAJHR* 464 and Villiers de B 'Directive Principles of State Policy and Fundamental Rights: The Indian Experience' (1992) 8 *SAJHR* 29 and 'The Socio-Economic Consequences of Directive Principles of State Policy; Limitations on Fundamental Rights' 8 *SAJHR* 188.

[68] Interim Constitution ch 3; Final Constitution ch 2.

[69] Interim Constitution ss26-28 .

[70] The specific ESRs are included in ss26-29, the right to have access to adequate housing (s26), the right to have access to health services, food, water and social security (s27) and guaranteeing the right to education (s29); s 35(2)(e) also refers to the rights of arrested, detained and accused persons to the provision, adequate accommodation, nutrition, reading material and medical treatment; s7(2) is also relevant to ESR: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights'.

preservation' and Ginsburg's thesis of the 'insurance model of judicial review'.[71] In other words, they viewed the constitutionalisation of the right to property as a means of protecting themselves against 'destructive revenge'[72] and of protecting their property and freedom against threats they perceived to be implicit in the notion of an unrestrained 'African' democracy. Secondly, the interim Constitution was drafted under the auspices of the Convention for a Democratic South Africa (CODESA). The National Party was one of the two dominant political organisations in CODESA [73] and was able to advance and protect the interests of their constituencies. Thirdly, the process leading up to the interim Bill of Rights was 'hopelessly closed',[74] lacked transparency and involved little public consultation. This meant that concerns affecting ordinary people's lives such as education, health and housing were not on the top of list of rights to be included in a Bill of Rights. Two members involved in the drafting process admitted that due to both the closed nature of the process and as they started off working 'against time'[75] consultations with experts and interested groups were limited.[76]

In contrast, the Final Bill of Rights was preceded with an extensive and participative process where the public had an opportunity to have a say. The results of the wide consultation process undertaken by the Constitutional Assembly (CA)[77] have been described as 'amazing'.[78] That said, as one of the authors of this paper has argued elsewhere, it is questionable whether the drafters had any intentions to use the submissions from the public other than as a 'by-product'. In other words, the purpose of the public participation programme was to involve people primarily to enhance the legitimacy of the Bill of Rights and was not intended to provide a list of rights such as ESRs from the public to be included in the final product.[79] However, what is irrefutable is that the political landscape was remarkably different in 1996 than in 1993. As noted earlier, the ANC occupied a huge majority in Parliament following the

[71] Hirschl R *Towards Juristocracy The Origins and consequences of the new constitutionalism* 76-77. Ginsburg T *Judicial Review in New Democracies Constitutional Courts in Asian Cases* (2003) 25.

[72] Sachs A 'A Bill of Rights for South Africa: Areas of Agreement and Disagreement' (1989-1990) 21 *Columbia Human Rights Law Review* 13 22.

[73] The other main political party was ANC. Due to disagreement on issues such as federalism, the composition and role of the senate, the status of the interim constitution and the majority needed for adoption of the 'final' constitution, CODESA collapsed. The process continued in the form of the Multi-Party Negotiation Process (MPNP). The MPNP was comprised of twenty-six political groups, it was again dominated by the ANC and the National Party.

[74] Corder H & Plessis du L Understanding *South Africa's Transitional Bill of Rights* (1994) 208

[75] At the beginning of the process the Technical Committee (one of the Committees established to help with the drafting) thought it had to draft a transitional Bill of Rights within a few weeks. When members of the Committee asked the politicians for clarification over how long the transition was to be, they were not given a clear cut answer as the politicians themselves 'were none the wiser' See Spitz R & Chaskalson M *The Politics of Transition A Hidden History of South Africa's Negotiated Settlement* (2002) 260. Unexpectedly, the process lasted for almost six months.

[76] Corder & Plessis 1994 46.

[77] The newly elected parliamentary body after the elections in 1994. The CA had two years (May 1996) to draft a Final Constitution and Bill of Rights which would be the cornerstone of democracy in South Africa and which should also enjoy the support and allegiance of all South Africans. This was stipulated by the 34 constitutional principles (CPs) from which the Final Constitution and Bill of Rights could not deviate.

[78] Gloppen S South *Africa: The Battle over the Constitution* (1997) 257. During the process there were several surveys carried out by the Community Agency for Social Enquiry (CASE). The results of these surveys were primarily though not exclusively positive about the process.

[79] Smith A *A Dialogical Approach to Constitutionalising Equality: Lessons from South Africa and Canada for Northern Ireland* (unpublished PhD thesis, University of Ulster, 2007, ch 3).

democratic multiparty elections in 1994 and were politically stronger than they were at the MPNP. This subsequently increased their bargaining strength in arguing for ESRs during the drafting process. Another incontrovertible point in helping to explain the inclusion of ESRs in the Final Bill of Rights, is the influential role of international human rights law, in particular, the ICESCR.[80] This has been noted by Liebenberg: 'A perusal of the relevant minutes and memoranda prepared during the drafting process reveals the strong influence of international law on the drafting of the relevant sections protecting socio-economic rights.'[81] Similarly Mbazira argues:

> [*t]here is ample evidence to suggest that the drafters of the 1996 Constitution of South Africa … were greatly inspired by the International Covenant on Economic, Social and Cultural Rights … which explains why most socio-economic rights provisions are drafted along the same lines as those in the ICESCR...The differences between the Constitution and the ICESCR are at best nomenclatural [as] a closer scrutiny shows that the obligations engendered by the two instruments are similar in many respects.*[82]

Not only did international law inspire the drafters of the South African Bill of Rights, the ICESCR was also a useful external source in expanding and setting the boundaries of the debate by referring to international and minimum standards that already exist.[83] Therefore concepts such as progressive realisation and reasonable legislative and other measures, within the state's available resources in sections 26 27 and 29 [84] of the Bill of Rights mirror article 2 of the International Covenant on Economic, Social and Cultural Rights (the ICESCR).[85] Using this terminology helped

[80] Adopted by UN General Assembly Resolution 2200A(XXI), 21 UN GAOR Supp (No 16) 49; 993 UNTS 3, 6 ILM 360

[81] Liebenberg S 'The interpretation of socio-economic rights' in S. Woolman et al (eds.), *Constitutional Law of South Africa* (2006) 33-4.

[82] Mbazira C 'Judicial remedies for socio-economic rights violations in South Africa: Corrective and distributive justice' (2006) quoted by Kapindu Re *From the global to the local The role of international law in the enforcement of socio-economic rights in South Africa* (2009) Socio-Economic Rights Project Community Law Centre University of the Western Cape 3, 29.

[83] For further discussion on the role of international law in the South African process see Kapindu Re *From the global to the local The role of international law in the enforcement of socio-economic rights in South Africa* (2009) Socio-Economic Rights Project Community Law Centre University of the Western Cape; Smith A 'Internationalisation and Constitutional Borrowing in Drafting Bills of Rights (2011) 60 *ICLQ* 867

[84] Housing, health and education respectively.

[85] There are some differences such as South Africa uses the phrase 'reasonable' measures whereas the ICESCR uses 'appropriateness'. The ICESCR talks about compliance 'to the maximum of' available resources, ss 26 and 27's refer to 'within' available resources. As noted above by Mbazira, both obligations are materially similar though it is important to point out that the phrase 'reasonable' is important as the SACC has opted for the concept of 'reasonableness' opposed to the concept adopted by the CESCR, the minimum cope obligations when measuring state compliance. This has resulted in a heated debate between social activists and academics arguing that the SACC has shown too much deference to the State in adopting the 'reasonableness' test. Although this is an interesting and important discussion, as it is not the focus of this paper, this debate will not be examined further save to note some of the literature where this issue has been discussed: Pieterse M 'Possibilities in the Domestic Enforcement of Social Rights: Contemplating the South African Experience' (2004) 26(4) *Human Rights Quarterly* 882; Bilchitz D *Poverty reduction and fundamental rights: The justification and enforcement of socio-economic rights* (2007); S. Liebenberg, 'South Africa: Adjudicating Social Rights Under a Transformative Constitution' in Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Com¶tive Law* (2008); Wesson, M. 2004.

the drafters to refute one of the arguments discussed above against the justiciability of ESRs, namely that ESRs are resource intensive and due to the financial issues that may arise from their enforcement, it is not practical nor suitable for a court to be dealing with budgetary issues. The drafters acknowledged that the State is under no obligation to provide for some ESRs immediately.[86] Rather, the State is obliged to take steps to the maximum of their available resources, with a view to achieving progressively the full realisation of these rights by all appropriate means, including particularly the adoption of legislative and other measures. Therefore these rights are not a demand for state handouts, to the contrary, the demand is for Government to put in place special policies and, where appropriate, legislative arrangements to facilitate access to such rights. The word 'access' is important as the drafters were keen to formulate ESRs provisions that 'neither promise the moon nor deliver merely dust'.[87] Therefore the wording of ss 26-27 'refine[s] and perhaps limit[s] the full scope of these rights as it talks about 'the right to have *access* adequate housing' and the 'right to have *access* to health care services... sufficient food and water; and social security' (emphasis added). The rights do not talk about an immediate right to housing and health but access to such rights need to be something worked towards.

The ICESCR was also used by the SACC in both the *First* and *Second Certification* judgments [88] to rebuff and address the objections against the inclusion of ESRs. In particular, in the *Second* judgment, the SACC specifically referred to article 2(1) of the ICESCR to highlight the point made earlier about the enforceability of ESRs:

> *[T]he.. broader qualification in article 2.1 which makes it clear that the right in question is not fully enforceable immediately, each State Party only binding itself "to the maximum of its available resources" to "achieving progressively the full realization of the rights recognized in the present Covenant"...We merely point out that their nature and enforceability differ materially from those of other rights. [89]*

The *First Certification* judgment as discussed above, cogently addressed and exposed the objections to justiciable ESRs for what they are: inaccurate and misleading. With this landmark judicial vindication of the justiciability of ESRs, and in addition to the factors discussed above, the argument in favour of ESRs was 'irresistible' as the majority of the those involved in the debate and the majority of South Africans, saw the inclusion of such rights in a Bill of Rights as 'an

---

Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court 20(2) *SAJHR* 284.

[86] It is important to note that some ESRs are immediate as they are not subject to progressive realisation. These are rights of emergency medical treatment (s 27(3); arbitrary evictions (s 26(3) free primary education (s 29(1)(a); and children's rights to ' to basic nutrition, shelter, basic health care services and social services' (s 28(1)(c); and the right of detained persons to 'conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment' (s35(2)(e). These rights like ss26-27 are still subjected to the limitation clause s 36.

[87] Cottrell J 'Making ESC Real in a Constitution: People, Politicians and Pedants' in Heymann J & Cassola A (eds) Making Equal Rights Real Taking Effective Action to Overcome Global Challenges (2012) Cambridge University Press.

[88] *First Certification* case ¶s 15, 32; *Second Certification case*, 1997 (12) BCLR 1653; 1998 (1) SA 655 (hereafter *Second Certification* case).

[89] *Second Certification* case, 1997 ¶ 19.

indispensable way of expressing a commitment to overcome the legacy of apartheid'.[90]

Zimbabwe

The process which led to the adoption of Zimbabwe's 2013 Constitution was steered by a Constitutional Select Committee (herein after COPAC).[91] This Committee's formation was in fulfilment of Article 6 of the 2008 Global Political Agreement (GPA).[92] Specifically, Article 6 of the GPA acknowledged:

> {*T}hat it is the fundamental right and duty of the Zimbabwean people to make a Constitution by themselves and for themselves; Aware that the process of making this Constitution must be owned and driven by the people and must be inclusive and democratic; Recognising that the current Constitution of Zimbabwe made at the Lancaster House Conference, London (1979) was primarily to transfer power from the colonial authority to the people of Zimbabwe …and Mindful of the need to ensure that the new Constitution deepens our democratic values and principles and the protection of the equality of all citizens, particularly the enhancement of full citizenship and equality of women.*[93]

The GPA ushered in a transitional coalition, made up of ZANU PF and the two MDC formations following the election dispute between Robert Mugabe and Morgan Tsvangirai.[94] This was after the country had experienced a decade of international isolation and total economic failure with 2008 being the worst year in the country's economic history. There was a clear humanitarian crisis evidenced by cholera epidemics, mass starvation and unprecedented levels of inflation.[95] The background to the 2008 economic collapse can be explained with reference to a number of factors including the legacy of the skewed economy of racist Rhodesia, the impact of the Economic Structural Adjustment policies of the early 1990s, and the

[90] Sunstein C *Designing Democracy: What Constitutions Do* (2001) 224.
[91] For more details on COPAC see http://www.copac.org.zw/ (accessed 29 August 2013)
[92] Agreement between the Zimbabwe National Union Patriotic Front(ZANU –PF) and the two Movement for Democratic Change (MDC) Formations, on Resolving the Challenges Facing Zimbabwe, Done in Harare on the 15th of September 2008, Available at: http://www.copac.org.zw/index.php?option=com_phocadownload&view=category&id=7:government-of-national-unity&Itemid=60 (Accessed 29 August 2013).
[93] The article regulated COPAC and mandated the same to lead the constitution making process. It stipulated COPAC 'S terms of reference. The article also stipulated that COPAC's recommendations should be validated by a referendum. Further, the deadlines for the tasks to be completed before the referendum were specified.
[94] The 2008 election dispute was merely a catalyst to the GPA otherwise the country had faced numerous challenges before 2008. Some of the challenges are noted in the GPA's preamble.
[95] On the 2003 humanitarian crisis see; Hughes K , 'Operation Drive out the Trash': The case for imposing targeted United Nations Sanctions Against Zimbabwean Officials,' *(2007) 76 Fordham L. Rev* October 323 and Boon, KE ,'Coining a New Jurisdiction: The Security Council as Economic Peacekeeper,'(2008) 41 46 VAND. J. TRANSNAT'L L. 991.

consequences of the economic policies adopted since then (especially the radical land reform program which started in 2000).[96]

Nonetheless, the 2013 Constitution replaced the "imposed" 1979 Lancaster House Constitution which was often criticised by both civil society and government.[97] Civil society viewed the later as compromised by a number of features including frequent amendments by the ZANU PF- dominated parliaments, its undemocratic origins and absence of ESRs.[98] ZANU PF saw the Lancaster House Constitution's imperial origins and liberal tenor as a hindrance to social justice. Thus the radical land reform process was in part a rejection of the Lancaster House Constitution.[99] For these reasons, amongst others, between 1999 and 2007 both civil society and government had made unsuccessful attempts to change the Lancaster House Constitution.[100]

Therefore the COPAC Constitution making process began with the advantage of four pre-existing complete Constitutions which reflected different socio-political perspectives.[101] These are the Lancaster House Constitution and the three draft Constitutions, namely the Constitutional Commission Draft Constitution of 1999,[102]the National Constitutional Assembly's draft Constitution of 2001[103] and the Kariba Draft Constitution of 2007.[104] Of these drafts only the NCA Constitution included ESRs as justiciable rights. Both the Constitutional Commission draft Constitution of 1999 and the 2007 Kariba draft, which were initiated by political

[96] Tibaijuka A K, 'Report of the Fact Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina' by the UN Special Envoy on Human Settlements Issues in Zimbabwe, 18 July 2005 pages 14-16, available at: http://ww2.unhabitat.org/documents/ZimbabweReport.pdf (Accessed 29 August 2013).

[97] The 1979 Lancaster House Constitution was negotiated by political elites in Britain as part of the decolonization process,. See: Vollan K, (2013) 'The Constitutional History and the 2013 Referendum of Zimbabwe, Special Report, and Oslo: Norwegian Centre for Human Rights. For a discussion of issues of legitimacy, colonial origins and Constitutinal making in Zimbabwe see Ndulo M, 'Zimbabwe's Unfulfilled Struggle for a Legitimate Constitutional Order', in Miller LE (ed)*Framing the State in Times of Transition: Case Studies in Constitution Making*, (Washington, DC: United States Institute of Peace Press,) 2010 176-203 and John Hatchard, 'Some Lessons on Constitution-making from Zimbabwe,' (2001) 54(2) Journal of Afr L.

[98] Dzinesa GA, 'Zimbabwe's Constitutional Reform Process: Challenges and Prospects' (2012) Institute for Justice and Reconciliation(IJR), available at http://ijr.org.za/publications/ijrop5.php (accessed 29 August 2013)

[99] Most of amendments to the Lancaster House Constitution related to the right to property clause. For a relevant discussion of the Zimbabwe's land reform program see; Villiers DEB. (2003), 'Land Reform: Issues and Challenges' A Com¶tive overview of experiences in Zimbabwe, Namibia, South Africa and Australia, (Johannesburg: Konrad-Adenauer- Stiftung). See also chapter 5 Moyo K, 'The Multitudinous Complexities of Transitional Justice in Postcolonial Societies: A Zimbabwean Case Study', *Unpublished Doctorate Thesis, University of Ulster, 2009.*

[100] Discussed in Vollan K, (2013) Norwegian Centre for Human Rights.

[101] All four documents are available at < http://www.mlgi.org.za/resources/local-government-database/by-country/zimbabwe/constitution> (Accessed 30 August 2013). On the three Constitutional drafting processes see Dzinesa GA, 'Zimbabwe's Constitutional Reform Process: Challenges and Prospects' (2012*) IJR,* available at http://ijr.org.za/publications/ijrop5.php (accessed 29 August 2013) and Vollan K, (2013) Norwegian Centre for Human Rights.

[102] This is also referred to as the rejected draft Constitution, its process was initiated by the government of Zimbabwe and led by a Constitutional Commission. It was rejected at the national referendum of 2000.

[103] This draft was produced by the National Constitutional Assembly (NCA), a non-governmental organisation formed in 1997 by different interest groups for the purposes of producing a " people driven" constitution which would replace the Lancaster House Constitution.

[104] The Kariba Draft Constitution was unilaterally negotiated and adopted by ZANU Pf and the two MDC formations at Lake Kariba in Zimbabwe in September 2007. Reference was made to this draft in Article 6 of the GPA.

parties, had ESRs as national objectives and not justiciable ESRs. All the four previous Constitutions were an instructive reference point in later deliberations on the inclusion of ESRs.[105]

Two other factors which could have useful for COPAC with regards to the inclusion of ESRs are the ideological grounding of ZANU PF and pre- existence of domestic legislation which complied with the state's obligation under the ICESCR even though these rights were not provided for in the 1979 Lancaster House Constitution.[106] Most of the legislative ESRs frameworks were adopted and implemented relatively well in the first decade of the country's independence as the new government had been inspired by socialism in its quest for the country's independence from Rhodesia.[107] Indeed, the Zimbabwe's government shared most of the theories of "economic relativity" [108]which are usually advanced by African countries in opposition to the Western proclivity to marginalise ESRs. In contrast to the Eurocentric 's ranking of civil and political rights over ESRs, the economic relativity thesis believes that owing to the economic differences between developing countries and developed states, ESRs should take precedence over civil and political rights.[109]

Nonetheless, what distinguishes the 2013 Constitution from the 1979 Lancaster House and the three previous drafts Constitution [110] is the recent version's recognition of the inherent dignity and worth of human beings and 'partial' inclusion of justiciable ESRs.[111] ESRs enshrined in this Constitution include the right to a safe environment, education, health care, food and water and marriage rights.[112] Also included are ESRs of vulnerable groups such as children, the elderly, women, people with disabilities and veterans of the liberation struggle.[113] Furthermore the

[105] There was also a Zimbabwean People's Charter of 2008 adopted by domestic organisations representing various stakeholders which called for the inclusion of ESRs in a new Constitution. The document is available at: http://zimpeoplescharter.org/ (Accessed 29 August 2013).

[106] These include among others (among others) the Education Act [Chapter 25:04], Housing and Building Act [Chapter 22:07] Manpower Development Act of 1994 ,Model Buildings by-laws of 1977 ,Rural Electrification Funds Act [Chapter 13:20] . All these legislation are available at: http://www.parlzim.gov.zw/ (Accessed 29 August 2013)

[107] See the relevant discussion in Gumbo, J. 'Enhancing protection of Economic, Social and Cultural Rights in Zimbabwe'. (*2010) Masters Thesis, University of Oslo*

[108] The subject has been discussed by Whelan D J, 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight*(2007) 29 (4)HRQ 908-949* and Cobbah J A M, 'African Values and the Human Rights Debate: An African Perspective' *9(3) HRQ 309-331.*

[109] See Shahnawaz HMD , ' Human Security in Asia: by Universal Human Right or Cultural Relativism? Available at: http://humansecurityconf.polsci.chula.ac.th/Documents/Presentations/Shanawez.pdf((accessed 20 August 2013)

[110] The Lancaster House Constitution did not provide for ESRs and environmental rights. It however, included the controversial right to property .(See Article 16 of the Constitution of Zimbabwe (S.1 1979/1600 of the United Kingdom) as amended to(No. 17) Act, 2005).

[111] S44 of the 2013 Constitution provides that " the state and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect and fulfil the rights and freedoms "

[112] S73, 75, 76, 77 and 78, 2013 Constitution.

[113] S79-84, 2013 Constitution

Constitution recognises rights and obligations of both state and non-state actors in accordance with contemporary thinking in human rights law.[114]

However, the Constitution fails short of fully complying with the state's obligation under the ICESCR as it does not provide for the right to housing but rather provides for "access to adequate shelter" as a national objective.[115] It also removes the jurisdiction of courts to adjudicate on issues related to the expropriation of agricultural land.[116] Further, it clearly discriminates on the basis of sexual orientation when it comes to marriage rights. [117]

An instructive aspect of Zimbabwe's recent constitutionalisation of justiciable ESRs is the process itself and central role played by the main political parties. COPAC was made up of 25 members of parliament with representation from all the three main political parties and representatives of the traditional chiefs. It also reflected parliament's gender balance. In common with the process which preceded South African's final Constitution, Zimbabwe's 2013 Constitution was produced after a wide public consultation exercise. The COPAC draft Constitution was endorsed at a referendum on the 16th of March 2013.There was no meaningful debate after the referendum as the key political parties had actively campaigned for the endorsement of the Constitution. This is because the parties were eager to meet the GPA deadlines thus proving compliance to the external facilitators and end the inclusive government. For this reason the NCA led an unsuccessful campaign against the 2013 Constitution claiming that this was not a "people driven Constitution" but rather a document reflected party political interests.[118]

Nonetheless, in outreach programs, people had clearly stated that they wanted ESRs to be included in the new Constitution *albeit* not in the language of rights.[119] It would seem that the decision to "include" these rights was not contentious.[120] The debate seemed to be on the content and status of ESRs. This can be inferred from the COPAC Outreach manual, public consultation "talking points" [121] and drafting instruments.[122] In particular, the question of ESRs was framed thus in the outreach talking points on the Bill of rights:

[114] S44 and 45 2013 Constitution
[115] Article 28 2013 Constitution
[116] S72 (3) 2013 Constitution.
[117] S78(3) 2013 Constitution
[118] For the NCA's " no vote" campaign see http://www.youthforumzim.org/ (Accessed 29 August 2013).
[119] This is noted in the reports of COPAC's 2nd stakeholder conference , see : http/ www.copac.org.zw/index.php?...2nd...stakeholders-conference (Accessed 29 August 2013)
[120] As part of its process COPAC " packed" some contentious issue and the inclusion of ESRs was not one of those " packed issues".
[121] The " talking points " were the 16 constitutional themes drawn up by COPAC as part of the work plan to guide the public consultation exercise.
list of 16 constitutional themes.
[122] All these documents are available at http://www.copac.org.zw/ (accessed 29 August 2013)

{W}hat social, economic and cultural rights should be included in the Constitution?[123]

In terms of the issue of whether ESRs were to be enshrined as national objectives or justiciable rights, it can be deduced from the earlier Constitutional drafts that the political parties' preference would have been to have these rights enshrined as national objectives.[124] There are several explanations for the final decision of including some ESRs as justiciable and the "access language" which was used in relevant Constitutional provisions. Some of them are the role of experts and comparative African experiences (including the case of South Africa).[125] Whereas the draft Constitution was a schedule of a national report of the outreach programme, the chief drafters were assisted by 17 Constitutional experts'.[126] For example, South African constitutional expert Hassen Ebrahim[127]also assisted at the drafting stage. Submissions were also made by non-governmental organisations and academics.[128]

Decisions to include environmental rights, exclude the right to housing, discriminate against same–sex partners in marriage rights and oust the jurisdiction of the courts in relation to land expropriation can be attributed to party political interests and the particular circumstances of Zimbabwe. In particular, the decision to include environmental rights is progressive and it takes cognisance of emerging issues such as concerns about the mining-waste pollution that is currently affecting livestock and people in Zimbabwe's newly found Marange diamond field.[129] The exclusion of the right to housing and the decision to include " access to adequate shelter" instead can be seen a defensive response from ZANU PF's following international condemnation after its 2005 urban clean up exercise labelled "operation Murambatsvina".[130] Similarly the limitation of agrarian rights by ousting the court's jurisdiction in cases of the expropriation of agrarian land was a way of pre-empting land reform related litigation. Also, the political parties which led the Constitution making process were influenced by popular notions of morality. Indeed most leading politicians at the time of the Constitutional making process often cited

[123] The "talking points" are available at http://www.copac.org.zw/ (accessed 29 August 2013)
[124] The Constitutional Commission Draft Constitution of 1999 and
[125] The use of the word access has been discussed with reference to the South African case study drawing on Cottrell J (2012).
[126] Though some individuals who were asked to assist with the process were " party loyalists" who had no notable background in transitional constitutional making and international human rights.
[127] Hassen Ebrahim' has experience of drafting Constitutions in Nepal, South Africa, Somalia and Uganda.
[128] See, Zimbabwe Lawyers for Human Rights et al, (2009) "Economic, social and cultural rights in Zimbabwe: options for constitutional protections" available at http://hrp.law.harvard.edu/ (Accessed 29 August 2013). See also Stiftung, F-E (2009), Constitution in Transition: Academic Inputs for a New Constitution in Zimbabwe, Conference "Constitution in transition--academic inputs for a new constitution in Zimbabwe" Available at http://library.fes.de/pdf-files/bueros/simbabwe/07322.pdf (accessed 29 August 2013).
[129] On pollution and the Marange diamonds see: Murombo T, 'Regulating Mining in South Africa and Zimbabwe: Communities, the Environment and Perpetual Exploitation', 9/1 Law, Environment and Development Journal (2013), p. 31, available at http://www.lead-journal.org/content/13031.pdf (accessed 29 August 2013).
[130] For example the UN response to Murambatsvina gives insights of international views on this operation. See Tibaijuka A K (2005).

biblical verses and African culture in their rejection of the Constitutional protection for sexual minorities in Zimbabwe.[131] Respect for minorities in a transitional constitution is of added significance as it demonstrates the state's movement from an intolerant regime to a democratic dispensation.[132] Zimbabwe's decision to prohibit same sex marriage in a Constitution undermines the fundamental principles of non-discrimination and equality which underpin the constitutional protection of human rights.[133] Article 2(2) of the ICESCR clearly states that:

> {S}tates Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[134]

It is observed that the exclusion of certain ESRs, limitation of the application of certain rights and discrimination against sexual minorities are an infringement of Zimbabwe's obligations under the ICESR.[135] In rushing through a Constitution for political expediency and not thoroughly engaging with the nature of a state's obligations under Article 2(1) of the ICESR as developed by the CESR Zimbabwe lost an opportunity to reflect and improve on its international relations. International law recognises that a developing country such as Zimbabwe needs "'international assistance and co-operation' to meet its ESRs obligations.[136] Thus, a human rights-based perspective would have offered a better approach in the constitutional protection of ESRs in the Zimbabwean 2013 Constitution. This would be compatible with Zimbabwe's international human rights obligations as a State party to several international human rights treaties and regional instruments including the ICESR and the ACHPR.

Northern Ireland[137]

In light of the landmark inclusion of ESRs as justiciable rights in the South African and Zimbabwean Bill of Rights,[138] and other examples such as regional bodies and

[131] See BBC News Africa (2011), "Zimbabwe's PM Morgan Tsvangirai in gay rights U-turn" Available at http://www.bbc.co.uk/news/world-africa-15431142 (Accessed 29 August 2013) and Voice of America(2012), "Zimbabwe Constitutional Draft Excludes Language Protecting Gay Rights" 11 January 2012, Available at http://www.voazimbabwe.com/content/(Accessed 29 August 2013). COPAC's view was that the decision was based on public opinion.

[132] On the nexus between minority rights and transitional constitutionalism see Moyo K, 'Minorities in Postcolonial Transitions: The Ndebele in Zimbabwe', (*2011) 4(2) AJLS 149-185.*

[133] Article 2 (2) ICESCR as read with CESCR General Comment No. 20, 'Non-Discrimination in Economic, Social and Cultural Rights' (art. 2, ¶. 2).

[134] Article 2(2) ICESCR.

[135] Zimbabwe became a state party to the ICESCR on the 13th of May 1991.

[136] Article 2(1) ICESCR as read with ¶14 CESCR General Comment 14.

[137] The interviews are part of a project funded by the Joseph Rowntree Charitable Trust that one of the co-authors (Anne Smith) with Professor Monica McWilliams is conducting with the Northern Ireland political parties and the British/ Irish governments on the proposed Northern Ireland Bill of Rights.

[138] For list of some other examples of constitutions including ESRs as justicable rights see Cottrell J ((2012), Nolan A, Porter B & Langford M *The Justiciability of Social and Economic Rights: An Updated*

domestic courts adjudicating on these rights[139], and with the recent entry into force of the optional protocol to the ICESCRs in May 2013, it would be reasonable to assume that the debate about the inclusion of justiciable ESRs is 'over'.[140] However, the discussion on the inclusion of justiciable ESRs in a Northern Ireland Bill of Rights shows that the debate is far from 'over' and continues to be one of the most contentious issues. Before examining why the discussion has been controversial, there follows a brief note on the historical and socio-economic situation prior to the introduction of the Agreement.

Similar to South Africa and Zimbabwe, socio-economic inequality was pervasive under Unionist rule who dominated the government for half a century and exercised 'hegemonic control in Northern Ireland'.[141] Under this 'hegemonic control' the Nationalist/Catholic minority suffered discrimination on grounds of religion and political belief in areas of public and private employment, housing, education and welfare.[142] Although there were several attempts to push for greater socio-economic equality from the 1960s onwards during the violent conflict,[143] the discussion over the content of a Bill of Rights had been general or abstract. The debate only received clearer focus with the advent of the Agreement and subsequent advice from the NIHRC to the British government on a Bill of Rights for Northern Ireland in 2008. As noted earlier, this advice includes justiciable ESRs. These rights include property rights, education rights, right to health; the right to an adequate standard of living; the right to accommodation; the right to work, the right to social security.[144] The NIHRC turned to international law, the ICESCR in particular, and comparative constitutional law such as South Africa when drafting their recommendations.[145]

Appraisal Prepared for the Human Rights Consortium, Belfast November 2005, 5 on file with authors 3, 4

[139] Nolan, Porter & Langofrod provide an extensive list of regional bodies and domestic courts, Nolan, Porter & Langford A. Nolan, 2005, 5.

[140] Nolan, Porter & Langford A. Nolan, 2005, 3

[141] O'Leary B & McGarry J *The Politics of Antagonism, Understanding Northern Ireland* (1996) 110.

[142] There was also discrimination in the areas of policing and emergency law. *Disturbances in Northern Ireland Report of the Cameron Commission appointed by the Governor of Northern Ireland* Cmnd. 532, September 1969; Smith DJ & Chambers G *Inequality in Northern Ireland* (Clarendon Press: London, 1991); Whyte J 'How much discrimination was there under the Unionist regime, 1921-68?' in T Gallagher and J O'Connell (eds) *Contemporary Irish Studies* (Manchester University Press, 1983).

[142] The Agreement.

[143] A member of the Northern Ireland parliament, Shelagh Murnaghan proposed a Human Rights Bill on the 27 May 1964 (Northern Ireland Parliamentary Debates, 27 May 1964, vol 57, 1296). See also the Northern Ireland Civil Rights Association's proposal (NICRA) for a Bill of Rights, Northern Ireland Civil Rights Association, Bill of Rights (Northern Ireland) Act 1975 (Belfast: NICRA, 1975); and the Standing Advisory Commission on Human Right's report (SACHR) *The Protection of Human Rights by Law in Northern Ireland* (1977), Cmnd 7009.

[144] Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* 10 December 2008, 37-8, 45-50 available at http://www.nihrc.org/documents/bill%20of%20rights/bill-of-rights-for-northern-ireland-advice-to-secretary-state-2008.pdf (accessed 21 August 2013). Hereafter the NIHRC 2008 advice.

[145] The Agreement enjoins the NIHRC to draw 'as appropriate on international instruments and experience'. The NIHRC also looked at other international and regional treaties, Convention on the Rights of the Child; Convention on the Elimination of All Forms Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women Revised European Social Charter; the African Charter on Human and Peoples' Rights of 1981; Article 10 of the Additional Protocol

Therefore the advice includes the following expressions: 'progressive realisation', 'to the maximum of their [public authorities] available resources'; and to 'take all appropriate measures, including legislative measures'. Therefore, like South Africa and Zimbabwe, the NIHRC recognises that justiciable ESRs fall along a 'justiciability spectrum.'[146] Some of these rights cannot be enforced immediately; rather the state is under an obligation to work towards the full implementation of these rights bearing in mind the availability of resources. That said, similar to South Africa and Zimbabwe, the NIHRC includes immediate rights such as 'emergency medical treatment.[147] However, in contrast with South Africa and Zimbabwe, the NIHRC advice talks about 'the right to the highest attainable standard of physical and mental health' and 'the right to an adequate standard of living',[148] not a right to have access to these rights. In doing so, the NIHRC's advice mirrors the wording of Articles 11(1) and 12 (1) of the ICESCR and does not refine nor limit the full scope of these rights.[149]

However the British government's response[150] to such wording and in general to the inclusion of justiciable ESRs has been negative.[151] Referring specifically to 'the right to the highest attainable standard of health', in its consultation paper, the British government states that it is a 'far-reaching' right and to enforce such a right in courts would be a 'step that ...goes far beyond the service provision'. [152] The report continues to state that if the right to health and the other ESRs proposed by the NIHRC are to be considered, they should be addressed not in terms of a regional debate but in a national discussion on a possible UK Bill of Rights.[153]

---

to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988. The European Convention on Human Rights also played an important role when submitting the advice as the wording of the Agreement stipulates that the rights to be included have to be 'supplementary to those in the European Convention on Human Rights'.

[146] Brand D 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand D & Heyns C (eds), *Socio-Economic Rights in South Africa* (2006) 22.

[147] The NIHRC also adds 'essential primary healthcare,' NIHRC 2008 advice, 45.

[148] NIHRC 2008 advice, 45-6

[149] It is important to note that like South Africa and Zimbabwe, these recommendations would be subjected to a limitation clause (s86).

[150] In 2009, Labour was in government.

[151] Northern Ireland Office, *Consultation Paper, A Bill of Rights for Northern Ireland: Next Steps* November 2009, 18-20 available at *http://www.nio.gov.uk/consultation_paper_-_a_bill_of_rights_for_northern_ireland__next_steps.pdf* (accessed on 21 August 2013). Hereafter the NIO's 2009 response. Overall, the NIO's response supports the inclusion of only two out of the 78 recommendations put forward by NIHRC. These are the right to vote/be elected and the right to identify oneself and be accepted as British or Irish or both. Unsurprisingly, the NIHRC has responded negatively to the NIO's response, Northern Ireland Human Rights Commission *A Bill of Rights for Northern Ireland: Next Steps Response to the Northern Ireland Office* February 2010, available at http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/71/Response_to_NIO_consultation_on_a_Bill_of_Rights_for_Northern_Ireland_(February_2010).pdf. (accessed on 21 August 2013).
The NIHRC is not the only body to reject the NIO's report as the majority of responses have been negative. See also the Bill of Rights special in *Just News,* CAJ, January 2010 and the Northern Ireland Assembly debate over proposals to amend the Government consultation on a Bill of Rights, 1 March 2010, available at http://www.niassembly.gov.uk/record/reports2009/100301.htm#6

[152] The NIO's 2009 response 19.

[153] Although Northern Ireland has its own parliament, the Northern Ireland Assembly (hereafter the Assembly) can enact laws, it is a devolved region and is part of the United Kingdom (there are three other devolved regions that make up the United Kingdom: Scotland, England and Wales. Scotland will hold a referendum in 2014 on whether Scotland should be an independent country). The Agreement and its legislative enactment, the Northern Ireland Act 1998 reaffirmed the status of quo of

However, we find this approach problematic for two reasons. Firstly, both debates have different political contexts and have different processes. Northern Ireland's Bill of Rights debate is rooted in the peace process as it is derived from the Agreement and has been on-going since March 1999. Inclusivity, openness, accessibility have underpinned the drafting process as the NIHRC from the outset embarked on a wide and public participative process.[154] In contrast, the origins of the UK Bill of Rights debate are remarkably different as it has been politically driven with a specific political agenda. This agenda has not been to strengthen but to weaken human rights protection. This political agenda culminated in the establishment of a UK Bill of Rights Commission (hereafter the UK Commission) in March 2011 by the Coalition government. [155] The UK Commission was tasked to 'investigate the creation of a UK Bill of Rights that incorporates and builds on all our [UK] obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law and protects and extend our liberties...'[156] The UK Commission had until December 2012 to report to the government which it duly did. Space militates against a detailed discussion on the report.[157] However, for the specific purpose of this paper, the majority opined in favour of a UK Bill of Rights but concluded that justiciable ESRs should not be included as these rights 'often involve very difficult choices over the allocation of scarce resources... and that such choices are better made by Parliaments rather than judges'.[158] In other words, the majority's findings are based on the separation of powers doctrine. This finding also reflects the previous Government's position which was clearly stated in a UK Bill of Rights and Responsibilities paper.[159] If we need any more convincing about the Government's ambivalence towards justiciable ESR, we can look at their refusal to ratify the Optional Protocol to the ICESCR.

As addressed earlier, there are weaknesses underpinning both the Governments' and the majority's findings in the UK Commission's position. Indeed, the minority in the UK Commission's report argued that such rights can be justiciable as other

---

Northern Ireland as part of the United Kingdom but also states that if the majority of the of the people of Northern Ireland votes in favour of a united Ireland, this will be approved by both the British and Irish governments (s1(1) and s 1(2).

[154] Smith A 'The Drafting Process of a Bill of Rights for Northern Ireland' [2004] *PL* 526; Harvey C & Schwartz A 'Designing a Bill of Rights for Northern Ireland (2009) 60(2) *NILQ* 181.

[155] Coalition government is comprised of Conservatives and the Liberal Democrats. The former want to repeal the Human Rights Act 1998 while the latter wants to defend the Act. Liberal Democrat Manifesto 2010 (London, 2010), Invitation to Join the Government of Britain, quoted by Elliott, M 'A damp squib in the long grass: the report of the Commission on a Bill of Rights' (2013) 2 *EHRLR* 137 138.

[156] Commission on a Bill of Rights *A UK Bill of Rights? The Choice Before Us* Volume 1 (2012) 5. The Commission was also asked to provide advice on reform of the European Court of Human Rights, (hereafter the 2012 Commission Report)

[157] Several commentators have been critical of the Commission's report, Elliott, M 'A damp squib in the long grass: the report of the Commission on a Bill of Rights' (2013) 2 *EHRLR* 137, Klug F & Williams A 'The Choice before us? The report of the Commission on a Bill of Rights' (2013) *PL* 459.

[158] The 2012 Commission Report 34 149.

[159] The Paper states that justiciable ESRs would impinge on the principle of 'democratic accountability' as well as the se¶tion of powers between the three branches of Government. Ministry of Justice, *Rights and Responsibilities: Developing Our Constitutional Framework* March 2009, 43, available at http://www.justice.gov.uk/publications/docs/rights-responsibilities.pdf' (accessed 21 August 2013).

jurisdictions have shown.[160] Another difference between the two processes is the drafting process. In contrast to the open and participative process in Northern Ireland, the process preceding the Commission's report was 'time-limited... involving mainly lawyers and with no broad public education function or capacity'.[161] Even the UK Commission in the midst of their 'limited, inchoate proposals',[162] both the majority and minority unequivocally agreed and 'recognise[d] the distinctive Northern Ireland Bill of Rights process and its importance to the peace process in Northern Ireland'.[163] The report continues to highlight that they 'do not wish to interfere in that process in any way nor for any of the conclusions that we reach to be interpreted or used in such a way as to interfere in, or delay, the Northern Ireland Bill of Rights processes.[164] Furthermore, even the UK's Green Paper in 2009 highlighted the need to keep the Northern Ireland Bill of Rights discussion/process separate from that of the UK debate: 'the Government does not wish the public debate about a UK instrument to detract from the process relating to a potential Bill relating to the particular circumstances of Northern Ireland'.[165] In that regard, it is incomprehensible to try and subjugate the Northern Ireland debate to a UK debate.

The other reason why the two processes should be kept separate is legalistic. As the Agreement is an international treaty, both the British and Irish governments are under an international obligation to fulfil one of the outstanding pieces of the Agreement: a Bill of Rights reflecting, to quote the exact wording of the Agreement 'the particular circumstances of Northern Ireland'. [166] However, from the outset of the Bill of Rights debate, this phrase 'the particular circumstances of Northern Ireland' has been contentious due to the lack of agreement on its meaning. The most likely interpretation (and one favoured by the authors of this paper) is related to Northern Ireland's violent conflict and there is evidence that as a result of the conflict, people in Northern Ireland suffer from high levels of social deprivation, including poor health standards, life expectancy rates and high levels of unemployment.[167] Accordingly, any Bill of Rights should include ESRs. This is a view shared by some political parties such as Social Democratic Labour Party (SDLP) Sinn Féin, Green Party and Alliance[168]. To quote one political representative:

---

[160] Two out of eight commissioners Helena Kennedy and Philippe Sands dissented from the majority findings, 2012 Commission Report, 34, 149.

[161]Northern Ireland Human Rights Commission, *Is that right? Fact and Fiction on a Bill of Rights* September 2012 19.

[162] Elliott, M 'A damp squib in the long grass: the report of the Commission on a Bill of Rights' (2013) 2 *EHRLR* 137.

[163] 2012 Commission Report 28.

[164] 2012 Commission Report 28.

[165] Ministry of Justice, *Rights and Responsibilities: Developing Our Constitutional Framework* March 2009 para4.38 available at *http://www.justice.gov.uk/publications/docs/rights-responsibilities.pdf* (accessed 22 August 2013).

[166] For further information on the dangers of combining both debates see JUSTICE, *Devolution and Human Rights* February 2010 at 22, available at http://www.justice.org.uk/images/pdfs/Devolution%20and%20Human%20Rights.pdf; (accessed 22 August 2013); Northern Ireland Human Rights Commission, *Is that right? Fact and Fiction on a Bill of Rights* September 2012 19.

[167] Northern Ireland Human Rights Commission, *Making a Bill of Rights for Northern Ireland. A Consultation by the Northern Ireland Human Rights Commission* (2001) 84.

[168] This finding is confirmed in interviews with each political representative of these parties. Other political parties such as Progressive Unionist Party (PUP), the Traditional Unionist Voice (TUV) and the newly created party, NI21 (set up by two former Ulster Unionists). NGOs, community groups and trade unions also share this view.

> had we [Northern Ireland] had a [Bill of Rights] in the 1960s whenever people like Sheelagh Murnaghan were advocating a Bill of Rights, we might have avoided some of the issues that exploded into the civil rights campaign and in particular socio-economic rights,…one of the principle problems… was the allocation and distribution of housing and if we'd had them – [socio-economic rights] we might not have had that problem or we could have managed that problem differently… I said the same in relation to jobs .if we had a human rights charter in relation to the area of jobs and discrimination and fair opportunity / equal opportunity to jobs we could have perhaps avoided some of those problems because job discrimination was another aggregating factor that gave rise to the civil rights campaign and the Troubles ultimately .. [169]

As noted above, by including ESRs in their advice, the majority of the NIHRC share this view.[170] However, two of the commissioners did not agree with the NIHRC's approach and argued that by including ESRs the NIHRC went beyond their remit:

> If you look at the proposals around the socio-economic rights, the areas that those are addressing are by and large common societal problems right across the UK; if you look at housing, that is a problem right across the UK, it is not specific to Northern Ireland; ditto the environment, and rights to social security. So it seems to me to be rather difficult to come up with a proposal that there should be rights around these areas in Northern Ireland when there are not similar rights in the rest of the UK.[171]

Unionist parties also agree with the two dissenting commissioners: 'It [the NIHRC] was not mandated to devise a new bill of rights or to change our socio-economic context through the creation of numerous new rights...'[172] supporting this argument, another Unionist politician stated:

> some have used that phrase [the particular circumstances of Northern Ireland] to introduce socio-economic...rights to the fray. However, that interpretation is wrong.....The words [referring again to the particular circumstances of Northern Ireland] do not open the door to economic, social and cultural rights.[173]

[169] Interview with SDLP, 1 May 2013 Belfast.

[170] In their advice, the NIHRC gives a detailed explanation on the meaning of the term 'particular circumstances of Northern Ireland', NIHRC 2008 advice 179.

[171] Minutes of Evidence Taken before the NIAC, A Bill of Rights for Northern Ireland, House of Commons, Lady Trimble, available at http://www.publications.parliament.uk/pa/cm200809/cmselect/cmniaf/uc360-ii/uc36002.htm. The two Commissioners who dissented from the NIHRC's final advice represent the two main Unionist political parties: Lady Trimble (Ulster Unionist Party) and Jonathan Bell (Democratic Unionist Party).

[172] Northern Ireland Assembly, Mr Kennedy, Private Members' Business on the Northern Ireland Human Rights Commission, 3 November 2009 at 79, available at http://www.niassembly.gov.uk/record/reports2009/091103.pdf (accessed 22 August 2013). The two Commissioners who dissented from the NIHRC's final advice represent the two main Unionist political parties: Lady Trimble (the Ulster Unionist Party) and Jonathan Bell (the Democratic Unionist Party).

[173] Northern Ireland Assembly, Miss McIlveen, Private Members' Business on the Northern Ireland Human Rights Commission, 3 November 2009 at 82, available at http://www.niassembly.gov.uk/record/reports2009/091103.pdf (accessed 22 August 2013). A similar debate also occurred in the Bill of Rights Forum which comprised of civil society and political parties. The Forum was set up in December 2006 to assist the NIHRC in providing advice to the British government on a Bill of Rights for Northern Ireland. The Forum produced its report to the NIHRC in March 2008, *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a*

More recently, the Democratic Unionist Party (DUP) and the Ulster Unionists have reiterated their stance:

> I think in principle that the party has said we are willing to look at a Bill of Rights but it wouldn't be a very heavy socio-economic based Bill of Rights which is designed to bind expenditure in a very detailed way... I think something that binds hands to a certain extent where it would entirely eat up the entire of the budget in truth, in terms of certain things where certain socio-economic rights have to be satisfied then what is the point of having a democracy where's there's no discretion or capability of doing anything within that? Now that's an extreme position.[174]

> I've a difficultly with the sort of economic rights, the idea that everybody has a legal entitlement to a job, because we've over 60,000 unemployed and as critical as it might be in terms of economic policy ...I don't think anybody in a position of power, is deliberately creating a pool of unemployed people. So I can't get my head around the idea that you would have these enshrined in law, economic rights. [175]

The above arguments were once again raised in a recent debate on the Northern Ireland Bill of Rights in Westminster.[176] After commenting on the 'opposition to a wide-ranging Bill of Rights'[177] [referring to the NIHRC's advice] the Secretary of State for Northern Ireland, states:

> focus[ing] extensively on socio-economic rights, [is] very unlikely to gain cross-party approval in Northern Ireland. However, if that was the route that Northern Ireland wished to go down, the impact on the rest of the UK would also be a factor to consider. For example, there would be complex issues to resolve around the interaction of welfare-type human rights with the principles of parity that currently operate in relation to the benefit and welfare systems. Matters of cost would need to be carefully considered.[178]

This issue of additional rights for Northern Ireland and not for the rest of the United Kingdom has also been raised by the previous government. Such 'disparity of human rights across the United Kingdom'[179] to use the words of a politician, would either be 'unworkable in practice, or could give rise to unjustified inequalities across the UK'.[180] Respectfully this and the other arguments above are misleading and shows a misunderstanding of the nature and obligations of justiciable ESRs. Firstly, far from being an 'extreme position', the point about including ESRs is not about substituting judicial policy-making for governmental policy-making, rather 'it is to remedy

---

Bill of Rights for Northern Ireland (March 2008), available at http://www.billofrightsforum.org/bill_of_rights_final.pdf (accessed 22 August 2013). For the discussion around socio-economic rights see 78-102.

[174] Interview with the DUP May 2013 Belfast.

[175] Interview with the UUP 7 June 2013 Belfast.

[176] Bill of Rights (Northern Ireland) Column 169WH 16 July 2013, available at *http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130716/halltext/130716h0001.htm* (accessed 22 August 2013) (hereafter the 2013 Westminster debate)

[177] 2013 Westminster debate 194.

[178] Bill of Rights (Northern Ireland) Column 195 WH 16 July 2013, available at *http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130716/halltext/130716h0001.htm* (accessed 22 August 2013).

[179] Interview with the DUP May 2013 Belfast.

[180] NIOs' 2009 response 18.

violations of rights resulting from bad government policy-making.[181] In that respect, this leads to public power accountability as Government is 'being kept on its toes'.[182] Second, including ESRs such as the right to work, right to social security, right to food, education and health, does not mean a right to a particular job or the right to a particular food, or the right to be healthy. International mechanism shows that it is about the right to have access to these rights. For example, the CESCR has stated that the right to social security:

> encompasses the right to access and maintain benefits...without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.[183]

Regarding the so-called disparity of rights argument, at face value, it may seem odd and 'inherently undesirable'[184] to have more rights for one devolved region than another. However, a more informed view is that the experience in other jurisdictions such as Canada, Australia, Germany, Austria and Spain shows that it is possible to have different rights in different regions. Indeed, one of the members of the UK Bill of Rights Commission, Anthony Speaight QC, in an individual paper about devolution specifically focuses on Northern Ireland.[185] Speaight states that 'there has been explicit and formal recognition of the desirability of a distinct Northern Ireland Bill of Rights'[186] and cautions that if there was to be a UK Bill of Rights, devolved legislatures should be able to legislate for specific rights within their jurisdictions.[187] He continues: 'Consideration of future rights protection in the UK should take account of the reality that Northern Ireland, ...will.. have [their] own laws on rights and that these laws will not always match either each other or the laws at national level'.[188]

Furthermore, the idea of additional rights for Northern Ireland is derived from the wording of the Agreement itself. While there have been 'exhaustive and (exhausting) debates'[189] about whether the NIHRC exceeded its remit by including ESRs, neglects a 'basic point':

> If an independent statutory Human Rights Commission - in the constitutional context of the Good Friday Agreement and the Northern Ireland Act 1998 – is asked to provide advice on a Bill of Rights for Northern Ireland is anyone genuinely surprised that it approaches its task purposively (with agreed principles and an agreed methodology) and seeks to offer sound human rights advice reflecting Northern Ireland's particular circumstances and anchored in international instruments and experience? Is anyone who is familiar with human rights law,

[181] Fabre C Social *Rights under the Constitution: Government and the Decent Life* (2000) 178.
[182] Asmal K *Designing a Bill of Rights for a Diverse Society* Speech to Chatham House, London, 26 September 2007, British Irish Rights Watch, available at *http://www.birw.org/BOR%2010.html*(accessed 22 August 2013);
[183] CESCR, *General Comment No 19: The right to social security (Art. 9)*, 4 February 2008 E/C.12/GC/19 ¶ 2.
[184] The 2012 Commission Report 244.
[185] *Devolution Options* The 2012 Commission Report, 243.
[186] The 2012 Commission Report 246.
[187] The 2012 Commission Report 247.
[188] The 2012 Commission Report 247-248.
[189] Harvey C Achieving Our Bill of Rights? Speech delivered at King's College London 22nd February 2010 3 available at: *http://ssrn.com/abstract=1590810* (accessed 21 August 2013).

> policy and practice honestly surprised by the interpretation of the remit and the final content of the Commission's advice?[190]

In light of some of the erroneous comments above, it is reasonable to assume that some politicians are not au fait with international law. Perhaps, it is advisable for them and others sceptical about jusiticiable ESRs to become more conversant with what it really means to have justiciable ESRs. Therefore it is about education and promoting awareness and understanding of ESRs and human rights generally. Perhaps then, they may be able to 'get [their [head[s] around the idea' of having ESRs 'enshrined in law'.

Conclusion

This paper began with asking the question should a Bill of Rights include justiciable ESRs. In South Africa and Zimbabwe the question was answered in the affirmative whilst in Northern Ireland, despite the NIHRC's recommendations, this is still very much an open question. Depending on who you ask, the answer will be different. As the above discussion demonstrates, the British government and Unionist politicians would answer no:

> ..they [the British government] have clearly stated to us that economic and social issues would not be part of any Bill of Rights in the UK and certainly not part of any Bill of Rights here[Northern Ireland]...[191]

On the other hand, nationalist parties supports the NIHRC's advice:

> we've[Sinn Fein] said all along...that the Bill should be fully inclusive of economic, social and political rights the particular circumstances extend beyond the very narrow view that British government have of the conflict here and the broader view needs to be included. That includes housing, employment includes inequalities.[192]

Furthermore, opinion polls have shown that the inclusion of ESRs in a Northern Ireland Bill of Rights enhances the ability of a Bill of Rights to reach across the community divide as there are high levels of support for such rights in Protestant and Catholic communities.[193] International bodies have also endorsed this view as they have strongly recommended the inclusion of such rights in a Bill of Rights 'without

[190] Harvey C ACHIEVING OUR BILL OF RIGHTS? Speech delivered at King's College London 22nd February 2010 Electronic copy available at: http://ssrn.com/abstract=1590810
[191] Interview with a Sinn Fein representative Belfast, 7 June 2013.
[192] Interview with a Sinn Fein representative Belfast, 7 June 2013.
[193] Livingstone S, Murray R, & Smith A *Evaluating the Effectiveness of National Human Rights Institutions: The Northern Ireland Human Rights Commission With Comparisons from South Africa* (unpublished, Queen's University Belfast and University of Bristol 2005) 110.

delay'.[194] Despite such calls, what is clear is that unlike South Africa and Zimbabwe, there is no political will at the highest level to address the current impasse on the whether ESRs should be included in a Bill of Rights for Northern. On the one hand, the British government has stated that responsibility lies with the local politicians and even suggested that the Northern Ireland Assembly should be 'empowered'[195] to take forward the Bill of Rights debate.[196] While on the other hand, some political parties and others, including the NIHRC, argue it is the British and Irish government's responsibility.[197] Generally, the Unionist parties do not want to see a separate Bill of Rights for Northern Ireland, let alone a Bill which would include ESRs.[198] The authors of this paper argue that as guarantors of an international treaty, (referring to the Agreement) both the British and Irish governments are under an international obligation to implement a Bill of Rights for Northern Ireland.[199] That said, the local parties also have a responsibility to listen to what their constituents are saying about the need for a Bill of Rights for Northern Ireland and to act accordingly.[200]

If Northern Ireland proceeds along the lines of South Africa and Zimbabwe and includes ESRs, a Northern Ireland Bill of Rights will be respecting and reflecting the internationally recognised principle of the indivisibility of rights and fulfilling their international obligations both under the ICESCR but also under the Agreement.

[194] E/C.12/GBR/CO/ 5 22 May 2009 (Concluding Observations) ¶graph 10. See also the Committee's previous UK Concluding Observations wherein the Committee stated 'The Committee strongly recommends the inclusion of effective protection for economic, social and cultural rights, consistent with the provisions of the Covenant, in any bill of rights enacted for Northern Ireland. See E/C.12/1/Add. 795 June 2002 (Concluding Observations) ¶graphs 18, 29 and 37. Similarly, the Council of Europe Experts also recommends the inclusion of socio-economic rights recognising that 'economic and social rights assist in promoting social cohesion and stability'. Comments by the Council of Europe Experts on certain aspects of a future Bill of Rights for Northern Ireland, Strasbourg: 2004) ¶graphs 34, 27 and 33, quoted by Daniel Holder, 'Why a Bill of Rights for Northern Ireland should include economic and social rights' *NIHRC Review,* Issue 8 summer 2009 at 13.

[195] Letter from Minister of State to Anne Smith and Monica McWilliams, 24 May 2013. In this letter, the Minister notes that the parties 'did not express an interest in pursuing' the idea of the Assembly having the power to lead on the Bill of Rights.

[196] Due to the wording of the Agreement, a Bill of Rights for Northern Ireland will have to be passed by Westminster.

[197] '.... [T]he impasse, in terms of [un]blocking [the Bill of Rights] need[s] to be [with] the British government..They couldn't pass off opposition from Unionism as an excuse not to implement the Bill of Rights – it was their job to convince Unionism, that's the party's position, it [is] their job to implement the Bills of Rights. Interview with a Sinn Fein representative Belfast, 7 June 2013.

[198] 'I feel that Northern Ireland doesn't need a separate Bill of Rights**',** Interview with the UUP 2 May 2013 Belfast.

[199] This opinion is also reflected in the Committee on the Administration of Justice's (hereafter CAJ) submission to the United Nations Committee Against Torture (hereafter CAT) on the UK's 5th Periodic Report under the Convention Against Torture, CAJ's submission no. S407, April 2013, 14.

[200] In the CAJ's submission to CAT, they note that A Market Research Northern Ireland opinion survey published by the Northern Ireland Human Rights Commission in 2004 found that a large majority of respondents (87 per cent) would support a proposed Bill of Rights. Both, Protestants (87 per cent) and Catholics (85 per cent) were in agreement with the concept of having a Bill of Rights that reflects the particular circumstances of Northern Ireland (Progressing a Bill of Rights for Northern Ireland: An Update, Belfast: 2004); in July 2011 a poll of 1000 persons conducted by Ipsos MORI found 80%+ of respondents thought a Bill of Rights for Northern Ireland was important among supporters of all the main political parties (SF 88%, SDLP 86%, DUP 84%, UUP 83%, Alliance 81%) (in Human Rights Consortium 'Bill of Rights for Northern Ireland, Overdue' Belfast, 2011, page 3). CAJ's submission to United Nations Committee Against Torture (hereafter CAT) on the UK's 5th Periodic Report under the Convention Against Torture, CAJ's submission no. S407, April 2013, 14.

However, Northern Ireland can take a further lesson on the dangers of entrusting an important process such as constitution making to politicians from the Zimbabwean experience. As the latter case study has demonstrated party political interests may lead to the inclusion of such rights as a cosmetic exercise and not meaningful guarantors of individual's highest attainable standard of living. The major pitfalls of the Zimbabwean approach of including ESRs as "national objectives" rather than justiciable rights is that it perpetuates an illusion of state benevolence thus disguising the state's obligation to *respect, protect and fulfil* ESRs.

Further, in common with Zimbabwe under the Lancaster house Constitutional regime, Northern Ireland has the advantage of relevant pre-existing legislation. It may be useful therefore to upgrade these rights to constitutional instead of legislative rights. Such a Bill will also respect and not undermine the separation of powers doctrine which calls for a careful equilibrium where the courts 'must be conscious of the vital limits on judicial authority [and] leave certain matters to other branches of government..'[201]However, when parliament is exercising its legislative authority, 'they too must observe the constitutional limits of their authority'.[202] South African courts have already demonstrated competence and alacrity in this regard.

As the South African and the Zimbabwean experience has aptly illustrated, coming to an agreed answer to the question posed by this paper is a challenge. However, as this paper has shown, it is one that is surmountable. Fortunately Northern Ireland and other societies can now at least draw on the South African, Zimbabwean and other experiences and select what best fits their specific context. It is hoped that this article has made a small contribution to these current debates on the inclusion of justiciable ESRs in Bills of Rights.

[201] *Doctors for Life International v Speaker of the National Assembly,* para37 Ngcobo J
[202] *Doctors for Life International v Speaker of the National Assembly,* ¶s 37-8 Ngcobo J

PLEASE DO NOT CITE WITHOUT AUTHORS' PERMISSION.

Bibliography

Books and Journal Articles

Amao O, 'The African Regional Human Rights System', in Baderin, MA. and Ssenyonjo, M, (ed).) *International Human Rights Law: Six Decades after the UDHR and Beyond*. (2010) Aldershot: Ashgate.

Bell C, Campbell C and Ni Aolain F 'Justice Discourses in Transition' (2004) 13(3) *Social and Legal Studies* 305--328

Beatty D *The Ultimate Rule of Law* (2004) Oxford University Press

Bickel A *The Least Dangerous Branch: The Supreme Court at the Bar of American Politics* (1986) Yale University Press

Bilchitz, D. *Poverty reduction and fundamental rights: The justification and enforcement of socio-economic rights* (2008) Oxford University Press

Brand D 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand D & Heyns C (eds) *Socio-Economic Rights in South Africa* (2006) Pretoria University Law Press

Boon, KE ,'Coining a New Jurisdiction: The Security Council as Economic Peacekeeper,'(2008) 41 46 VAND. J. TRANSNAT'L L. 991.

Cerna CM, 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts,' (1994) 16 Hum. Rts. Q. 740.
;
Chaskalson A From wickedness to equality: The moral transformation of South African law (2003) 1(4) *IJCL* 590-609

Chapman A 'Conceptualizing the Right to Health: A Violations Approach' (1998) 65 *Tennessee Law Review* 389-418

Cobbah J A M, 'African Values and the Human Rights Debate: An African Perspective' *9(3) HRQ 309-331*

Cockrell A 'The South African Bill of Rights and the 'Duck/Rabbit' (1997) 60 *MLR* 513-537

Corder H & L du. Plessis du L *Understanding South Africa's Transitional Bill of Rights* (1994) Kenwyn: Juta

Corder H et al. *A Charter for Social Justice: A Contribution to the South African Bill of Rights Debate* (1992) Capetown: University of Capetown

Cottrell J 'Making ESC Real in a Constitution: People, Politicians and Pedants' in Heymann J & Cassola A (eds) *Making Equal Rights Real Taking Effective Action to Overcome Global Challenges* (2012) Cambridge University Press

Davis D 'The Case Against the Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *SAJHR* 475, 484-490

PLEASE DO NOT CITE WITHOUT AUTHORS' PERMISSION.

De Villiers B 'Directive Principles of State Policy and Fundamental Rights: The Indian Experience' (1992) 8 *SAJHR* 29-49

De Villiers B. 'Land Reform: Issues and Challenges' A Com¶tive overview of experiences in Zimbabwe, Namibia, South Africa and Australia, (2003), Johannesburg: Konrad-Adenauer- Stiftung.

Dickson B 'The Protection of human rights-lessons from Northern Ireland' [2000] 3 *EHRLR* 213-226

Dzinesa GA, 'Zimbabwe's Constitutional Reform Process: Challenges and Prospects' (2012) Institute for Justice and Reconciliation(IJR), available at http://ijr.org.za/publications/ijrop5.php (accessed 29 August 2013

Ebrahim H *The Soul of a nation: constitution-making in South Africa* (1998) Cape Town: Oxford University Press

Elliott, M 'A damp squib in the long grass: the report of the Commission on a Bill of Rights' (2013) 2 *EHRLR* 137-151

Fabre C *Social Rights Under the Constitution - Government and the Decent Life* (2000) Oxford University Press

Friedman B 'A History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy' (1998) 73 *NYULR* 333-433

Gardbaum S 'The New Commonwealth Model of Constitutionalism' (2001) 49 *AJCIL* 707-760

Ginsburg T *Judicial Review in New Democracies Constitutional Courts in Asian Cases* (2003) Cambridge University Press

Gloppen S *South Africa: The Battle over the Constitution* (1997) Ashgate Darmouth

Go J, 'A Globalizing Constitutionalism? Views from the Postcolony,1945-2000,('2003)*18(1) International Sociology 71-95*.

Goldstone R 'The South African Bill of Rights' (1997) 32 *Texas International Law Journal* 451-469

Gumbo, J. 'Enhancing protection of Economic, Social and Cultural Rights in Zimbabwe'. (2010) Masters Thesis, University of Oslo.

Hart V 'The Contagion of Rights: Constitutions as Carriers' in Hanafin P and Williams M (eds) *Identity, Rights and Constitutional Transformation* (1999) Ashgate

Harvey C & Schwartz A 'Designing a Bill of Rights for Northern Ireland (2009) 60(2) *NILQ* 181-199

Hatchard J, 'Some Lessons on Constitution-making from Zimbabwe', (*2001) 54(2) Journal of Afr L* .

Haysom N 'Constitutionalism, Majoritarian Democracy and Socio-Economic Rights' (1992) 8 *SAJHR* 451-46

Hirschl R,*Towards Juristocracy The Origins and consequences of the new constitutionalism* (2004) Harvard University Press

Hughes K , 'Operation Drive out the Trash": The case for imposing targeted United Nations Sanctions Against Zimbabwean Officials,' *(2007) 76 Fordham L. Rev* October 323

Hunt M 'Reshaping Constitutionalism' in Morison J, McEvoy K & Anthony G (eds) *Judges, Transition and Human Rights Cultures* (2007) Oxford University Press

Go J, 'A Globalizing Constitutionalism? Views from the Postcolony,1945-2000,('2003)18(1) International Sociology 71-95.

Klein A, 'Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights', (2007-2008) *39 Colum. Hum. Rts. L. Rev. 351.*

Klug F & Williams A 'The Choice before us? The report of the Commission on a Bill of Rights' (2013) *PL* 459-468

Liebenberg S 'The interpretation of socio-economic rights' in S. Woolman et al (eds.), *Constitutional Law of South Africa* (2006) Juta.

Liebenberg S 'South Africa: Adjudicating Social Rights Under a Transformative Constitution' in Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) Cambridge University

Mayer-Schönberger, V. 'Into the Heart of the State: Intervention Through Constitution-Making'. (*1994) Temp Int'l & Comp LJ 8.*

Moyo K, 'Minorities in Postcolonial Transitions:The Ndebele in Zimbabwe',*(2011) 4(2) AJLS 149-185.*

Mowbray AR, The European Convention on Human Rights , in Baderin, Mashood A. and Ssenyonjo, Manisuli, eds. (2010) *International Human Rights Law: Six Decades after the UDHR and Beyond*. (2010) Aldershot: Ashgate.

Murombo T, 'Regulating Mining in South Africa and Zimbabwe: Communities, the Environment and Perpetual Exploitation', 9/1 Law, Environment and Development Journal (2013), p. 31, available at http://www.lead-journal.org/content/13031.pdf (accessed 29 August 2013).

Mureinik E 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *SAJHR* 464-474

Ndulo M, 'Zimbabwe's Unfulfilled Struggle for a Legitimate Constitutional Order', in Miller LE (ed)*Framing the State in Times of Transition: Case Studies in Constitution Making*, (2010) (Washington, DC: United States Institute of Peace Press)

Neuborne B 'Judicial Review and Separation of Powers in France and the United States' (1982) 57 *NYULR* 363-442

O'Connell P *Vindicating Socio-Economic Rights International Standards and Comparative Experiences* (2012) Routledge

O'Leary B & McGarry J *The Politics of Antagonism, Understanding Northern Ireland* (1986) The Athlone Press, London and Atlantic Highlands

Pieterse M 'Possibilities in the Domestic Enforcement of Social Rights: Contemplating the South African Experience' (2004) 26(4) *Human Rights Quarterly* 882-905

Sachs A Social and Economic Rights: Can They Be Made Justiciable? (2000) 53 *Southern Methodist University School of L.Rev 1381-1391*

Sachs A 'Towards a Bill of Rights for a Democratic South Africa' (1989) 12 *Hastings and International and Comparative Law Review* 289-324

Sachs A 'A Bill of Rights for South Africa: Areas of Agreement and Disagreement' (1989-1990) 21 *Columbia Human Rights Law Review* 13-44

Sachs A *Protecting Human Rights in a New South Africa* (1990) Oxford University Press

Shahnawaz HMD , ' Human Security in Asia: by Universal Human Right or Cultural Relativism? Available at: http://humansecurityconf.polsci.chula.ac.th/Documents/Presentations/Shanawez.pdf((accessed 20 August 2013)

Ssenyonjo, M, 'Economic, social and cultural rights' in Baderin, MA. and Ssenyonjo, M. (ed). *International Human Rights Law: Six Decades After the UDHR and Beyond*. Aldershot : Ashgate Publishing

Smith A 'Internationalisation and Constitutional Borrowing in Drafting Bills of Rights' (2011) 60 *ICLQ* 867-893

Smith A 'The Drafting Process of a Bill of Rights for Northern Ireland' [2004] *PL* 526-536

Smith DJ & Chambers G *Inequality in Northern Ireland* (Clarendon Press: London, 1991); Whyte J 'How much discrimination was there under the Unionist regime, 1921-68?' in T Gallagher and J O'Connell (eds) *Contemporary Irish Studies* (Manchester University Press, 1983)

Spitz R and Chaskalson M *The Politics of Transition A Hidden History of South Africa's Negotiated Settlement* (2002) Hart

Stiftung, F-E (2009), Constitution in Transition: Academic Inputs for a New Constitution in Zimbabwe, Conference "Constitution in transition--academic inputs for a new constitution in Zimbabwe" Available at http://library.fes.de/pdf-files/bueros/simbabwe/07322.pdf (accessed 29 August 2013).

Sunstein C *Designing Democracy: What Constitutions Do* (2001) Oxford University Press

Tapscott R 'Maximizing Achievements in Human Rights Development: Arguments for a Rights-Based Approach to Land Tenure Reform' (2012) XXVII *The Fletcher Journal of Human Security* 26-46

van Dijk P et al, Theory and Practice of the European Convention on Human Rights. 4th edn (2006) Antwerp: Intersentia

Vile MJC *Constitutionalism and the Separation of Powers* 2 ed (1998) Indianapolis: Liberty Fund Inc

Waldron J 'A Right-Based Critique of Constitutional Rights' (1993) 13 (1) *OJLS* 18-51

Wesson, M. 2004. *Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court 20(2) *SAJHR* 284-308

Whelan D J, 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight(*2007) 29 (4)HRQ 908-949.*

Whyte J 'How much discrimination was there under the Unionist regime, 1921-68?' in T Gallagher and J O'Connell (eds) *Contemporary Irish Studies* (1983) Manchester University Press

Zimbabwe Lawyers for Human Rights et al, (2009) "Economic, social and cultural rights in Zimbabwe: options for constitutional protections" available at http://hrp.law.harvard.edu/ (Accessed 29 August 2013)

Cases

Ex parte Chairperson of the Constitutional Assembly of the Republic of South Africa 1996 (4) SA 744 (CC)

Second Certification case, 1997 (12) BCLR 1653; 1998 (1) SA 655

TAC (Treatment Action Campaign) v. *Ministers of Health* 2002 (10) BCLR 1033 (CC)
Doctors for Life International v Speaker of the National Assembly (CCT12/05) [*2006]* ZACC 11; 2006 (12) BCLR 1399(CC) *2006*

Non-statutory publications

Gormally B 'Human Rights and social justice' *Just News* (2013) June/July 2013
Just News, CAJ, January 2010

Committee on the Administration of Justice's submission to the United Nations Committee Against Torture on the UK's 5th Periodic Report under the Convention Against Torture, CAJ's submission no. S407, April 2013

PLEASE DO NOT CITE WITHOUT AUTHORS' PERMISSION.

Conference/seminar papers/speeches

Govender K *Attempting to achieve substantive equality in one of the most unequal societies in the world:-The South African Experience*, paper presented at NICEM's Annual Human Rights and Equality Conference, Belfast, October 2005

Asmal K *Designing a Bill of Rights for a Diverse Society* Speech to Chatham House, London, 26 September 2007, British Irish Rights Watch

Harvey C Achieving Our Bill of Rights? Speech delivered at King's College London 22nd February 2010 3

Reports, papers, consultations and working papers in progress

Bill of Rights Forum, *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland* (March 2008)

Centre on Housing Rights and Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, Challenged and Strategies* Geneva, 2003

Commission on a Bill of Rights *A UK Bill of Rights? The Choice Before Us* Volume 1 (2012)

Holder D 'Why a Bill of Rights for Northern Ireland should include economic and social rights' *NIHRC Review,* Issue 8 summer 2009

Honermann B & Heywood M 'South Africa: Ten Years Since the TAC Case - a Judgment That Saved a Million Lives', 5 July 2012

Kapindu RE *From the global to the local The role of international law in the enforcement of socio-economic rights in South Africa* (2009) Socio-Economic Rights Project Community Law Centre University of the Western Cape 4

Livingstone S, Murray R, & Smith A *Evaluating the Effectiveness of National Human Rights Institutions: The Northern Ireland Human Rights Commission With Comparisons from South Africa* (unpublished, Queen's University Belfast and University of Bristol 2005)

Mbazira, C 'You are the "weakest link" in realising socio-economic rights: Goodbye – Strategies for effective implementation of court orders in South Africa', (2008) Research Series 3 Community Law Centre, University of the Western Cape

Ministry of Justice, *Rights and Responsibilities: Developing Our Constitutional Framework* March 2009

Moyo K, 'The Multitudinous Complexities of Transitional Justice in Postcolonial Societies: A Zimbabwean Case Study', *Unpublished Doctorate Thesis, University of Ulster, 2009.*

Nolan A, Porter B & Langford M *The Justiciability of Social and Economic Rights: An Updated Appraisal* Prepared for the Human Rights Consortium, Belfast November 2005

Northern Ireland Office, Consultation Paper, *A Bill of Rights for Northern Ireland: Next Steps* November 2009

Northern Ireland Human Rights Commission, *Making a Bill of Rights for Northern Ireland. A Consultation by the Northern Ireland Human Rights Commission* (2001)

Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* 10 December 2008

Northern Ireland Human Rights Commission *A Bill of Rights for Northern Ireland: Next Steps Response to the Northern Ireland Office* February 2010

Northern Ireland Human Rights Commission, *Is that right? Fact and Fiction on a Bill of Rights* September 2012

Smith A *A Dialogical Approach to Constitutionalising Equality: Lessons from South Africa and Canada for Northern Ireland* (unpublished PhD thesis, University of Ulster, 2007)

Standing Advisory Commission on Human Rights *The Protection of Human Rights by Law in Northern Ireland* (1977), Cmnd 7009

Commission on a Bill of Rights *A UK Bill of Rights? The Choice Before Us* Volume 1 (2012)

Tibaijuka A K, 'Report of the Fact Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina' by the UN Special Envoy on Human Settlements Issues in Zimbabwe, 18 July 2005 pages 14-16, available at: http://ww2.unhabitat.org/documents/ZimbabweReport.pdf (Accessed 29 August 2013).

Vollan K, (2013) 'The Constitutional History and the 2013 Referendum of Zimbabwe, Special Report, Oslo: Norwegian Centre for Human Rights.

Parliamentary Debates

Northern Ireland Assembly, Mr Kennedy, Private Members' Business on the Northern Ireland Human Rights Commission, 3 November 2009 at 79, available at http://www.niassembly.gov.uk/record/reports2009/091103.pdf

Bill of Rights (Northern Ireland) Column 169WH 16 July 2013, available at *http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130716/halltext/130716h0001.htm*

Peace Agreements

Agreement between the Zimbabwe National Union Patriotic Front(ZANU –PF) and the two Movement for Democratic Change (MDC) Formations, on Resolving the Challenges Facing Zimbabwe, Done in Harare on the 15th of September 2008, Available at: http://www.copac.org.zw/index.php?option=com_phocadownload&view=category&id=7:government-of-national-unity&Itemid=60 (Accessed 29 August 2013).

Agreement Reached in the Multi-Party Negotiations (Cm 3883, 1998); 37 ILM (1998).