# JUDICIAL AND CIVIL SOCIETY INITIATIVES IN THE DEVELOPMENT OF ECONOMIC AND SOCIAL RIGHTS IN THE COMMONWEALTH[1]

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## TABLE OF CONTENTS



**List of abbreviations**:

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| ACHPR: | African Charter on Human and Peoples' Peoples,1981 |
| CESCR: | UN Committee on Economic, Social and Cultural Rights |
| ECHR: | European Convention on Human Rights, 1950 |
| ICESCR: | International Covenant on Economic, Social and Cultural Rights, 1966 |
| ICCPR: | International Covenant on Civil and Political Rights |
| UDHR: | Universal Declaration of Human Rights, 1948 |

**INTRODUCTION**

This article considers the various ways in which economic and social rights are protected in commonwealth countries against the backdrop of the international protection of these rights as fundamental human rights. Part 1 traces the protection of economic and social rights as human rights in international law. Part 2 examines three ways in which economic and social rights are protected through the constitutions of commonwealth countries: direct protection in a Bill of Rights, protection as directive principles of state policy, and indirect protection through civil and political rights. Part 3 focuses on how economic and social rights may be protected by the judiciary in commonwealth countries without entrenched and justiciable Bill of Rights. These are mainly through legislation and the development of the common law. Part 4 considers the various ways in which international human rights treaties protecting economic and social rights can be given domestic legal protection. The paper concludes with some general observations, and a set of recommendations on how the protection of economic and social rights in commonwealth countries may be improved. Case studies of various commonwealth countries are used to illustrate the different methods of protection. Examples of how civil society have used the courts and other fora to advance economic and social rights are highlighted.

## 1. ECONOMIC AND SOCIAL RIGHTS AS HUMAN RIGHTS IN INTERNATIONAL LAW

Respect for human rights is a condition of membership of the Commonwealth, and the Harare Declaration commits Commonwealth countries to respect for (international?) human rights [is this correct?]. It is thus important to consider the status economic and social rights as human rights in international law. Moreover, most Commonwealth countries are parties to one or more international treaties that protect economic and social rights, for example, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights. These international treaties have the potential to exert a powerful direct or indirect influence on the development of economic and social rights in Commonwealth countries. The different ways in which this can occur will be examined in greater detail in part 4 below.

Economic and social rights have always been an integral part of international human rights law. Rights such as the right to social security, to work, to an adequate standard of living, including food, clothing, housing, medical care and social services, as well as the right to education[2] are integrated along with traditional civil and political rights such as the right to life, freedom of expression, and a fair trial in the Universal Declaration of Human Rights of 1948. Both sets of rights were regarded as indispensable to the dignity of the human person, and, necessary to preserve national and international peace and stability.[3] Although the UDHR is not a legally binding document in its own right, some of the rights it contains have acquired the force of customary international law (for example, the

[2] See articles 22 - 26 of the UDHR.
[3] See the preamble.

rights against torture and racial discrimination). However, more importantly the UDHR is widely regarded as an authoritative guide produced by the General Assembly of the human rights commitments in the United Nations Charter.[4]

The holistic concept of human rights reflected in the UDHR was undermined to some extent by the separation in 1966 of civil and political rights on the one hand, and economic and social rights on the other into two separate Covenants: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, 1966. This was largely as a result of Cold War politics, and an oversimplified understanding of the nature of the two groups of human rights. However, both Covenants affirm the interdependence of civil, political, economic, social and cultural rights in their preambles, and their is a degree of overlap in the rights protected in both Covenants. For example, both Covenants have a common article on the rights of all peoples to self-determination, and both protect the right to equality and non-discrimination, labour rights, the right of children and families to expect special measures of protection and assistance from the State, and cultural rights.

The normative separation of the two groups of rights was reinforced by providing for different enforcement mechanisms. The argument that won the day at the time was that civil and political rights impose mainly negative duties of forbearance on states (for example, to refrain from torture). As such, they were fully justiciable and could thus be subject to an adjudicative procedure, whereas economic and social rights were not justiciable owing to the fact that they imposed positive duties on the State, demanding far-reaching resource-commitments. The result was that an independent, expert body was created under the ICCPR, the Human Rights Committee, to supervise States parties obligations under this Covenant. In addition to a periodic reporting procedure, an Optional Protocol was adopted to the ICCPR which allowed the HRC to consider communications by individuals claiming to be victims of the rights in the Covenant. The supervision of States parties obligations under the ICESCR was relegated to a Working Group appointed by the UN Economic and Social Council. This was done through a periodic reporting procedure with no comparable provision made for the receipt of individual complaints of violations of economic and social rights. As a result of this institutional differentiation between the two groups of rights, civil and political rights continued to benefit from the experience and evolving jurisprudence generated by an adjudicative procedure whereas the supervision system for economic and social rights was weak and ineffective. This fuelled the widespread misconception of economic and social rights as non-justiciable policy objectives.

However, recent developments have contributed to the development of more effective enforcement mechanisms for economic and social rights, and simultaneously raised their status as enforceable human rights. A number of NGO's and scholars have engaged in a more rigorous analysis of the nature of economic and social rights.

[4] Article 55. The preamble of the UDHR proclaims that "a common understanding" of the rights and freedoms in the UN Charter "is of the greatest importance for the full realisation of this pledge."

As a result of scholarly and lay publications and advocacy on economic and social rights, there is a greater awareness that both civil and political rights and economic and social rights impose varying combinations of negative and positive obligations on States parties. These can be understood in terms of the three-fold duty "to respect, protect and fulfil" human rights.[5] The duty to respect requires the State to refrain from certain conduct that would deprive people of their human rights. This duty has been most closely associated with civil and political rights, but also applies to economic and social rights, for example, the right not to be arbitrarily evicted from one's home. As is the case with civil and political rights, negative infringements of economic and social rights fit most comfortably within the traditional model of adjudication. The duty to protect imposes a duty on the State to protect vulnerable and disadvantaged groups against violations of their rights by more powerful social actors such as corporations, landlords, medical aid schemes. This requires the State to adopt and implement regulatory legislation in relation to private sector activity that may undermine people's economic and social rights, for example, environmental protection legislation. The duty to fulfil requires the State to take positive action to ensure that people who do not have access to human rights gain access to them, for example, establishing an electoral system to enable people to exercise their right to vote or a functioning health care system for people to enjoy access to health care services. It is important to recognise that these positive duties are not restricted to economic and social rights, but also apply to many civil and political rights especially in situations where the national infrastructure is inadequate due to civil war, a lack of resources or other reasons. This analysis of human rights obligations has contributed to breaking down misconceptions that there is an inherent difference between civil and political rights on one hand, and economic and social rights on the other. It has also facilitated a more productive debate on the question of the justiciability of economic and social rights (discussed in further detail in part 2.1 below).

At the level of enforcement a significant development was the establishment in 1985 (through a resolution of the UN Economic and Social Council) of the Committee on Economic, Social and Cultural Rights (CESCR). Comprised of 18 independent experts it was given the mandate to supervise States parties obligations under the ICESCR. Although the Committee is still restricted to the periodic reporting system, it has developed a number of innovative working methods which has greatly improved the supervisory system under the Covenant. These methods have included:

a) the adoption to date of 14 General Comments on various aspects of the Covenant which have contributed to the normative development of economic and social rights and the obligations they impose on States parties;
b) encouraging NGO-participation in the reporting process thereby providing the Committee with independent sources of information to assist it in assessing compliance by States parties with their obligations; and
c) a willingness on the part of the Committee, following a participatory process in which both the submissions of NGOs and those of the State are considered, to express a view in its concluding observations on whether the State is complying with its obligations, and to direct specific recommendations to it.

[5] Based on the analysis by Henry Shue of the obligations imposed on states by human rights: *Basic Rights, Subsistence, Affluence and U.S. Foreign Policy* (1980) 5.

These developments have resulted in the supervisory system under the Covenant acquiring a quasi-judicial character, and being described as an "unofficial petition procedure."[6]

***Canadian NGOs approach the UN Committee on Economic, Social and Cultural Rights on welfare cuts***

A coalition of anti-poverty NGOs in Canada submitted information in 1998 to the CESCR as part of the scheduled review of Canada' periodic report under the Covenant regarding the impact of the repeal of social security legislation on the right to adequate standard of living of vulnerable groups such as single mothers. After considering submissions by these NGOs and the responses of the Canadian Government, the Committee concluded that the repeal of the relevant legislation "entails a range of adverse consequences for the enjoyment of Covenant rights by disadvantaged groups in Canada." It went on to say that: "The Committee regrets that, by according virtually unfettered discretion to provincial governments in relation to social rights, the Government of Canada has created a situation in which Covenant standards can be undermined and effective accountability has been radically reduced."[7] It also criticised provincial governments in Canada for arguing in court cases that Canada's Charter of Rights and Freedoms should be interpreted in a way that denied legal remedies to those whose social and economic rights were violated, and urged that economic and social rights not be downgraded to "principles and objectives."[8]

In 1993, the World Conference on Human Rights affirmed that "all human rights are universal, indivisible and interdependent and interrelated." It called on the international community to "treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."[9] The Conference also encouraged continued examination of a possible optional protocol to the ICESCR providing for an individual petition procedure.[10] A draft Optional Protocol has been prepared and is in the process of being considered by the UN Commission for Human Rights. If ultimately adopted it will redress the imbalance that currently exists in the protection of economic, social and cultural rights, and will demonstrate a practical commitment to the principle of the indivisibility and interdependence of all human rights.

Economic and social rights have been subjected to complaints procedures in a number of other international instruments. These include:

- the adoption of an Additional Protocol to the European Social Charter in 1995, providing for a system of collective complaints which allows trade unions, employer's organisations and certain NGO's to refer alleged breaches of the Charter to the Committee of Independent Experts;
- an Optional Protocol to CEDAW adopted in 1999 incorporating both an individual communication and an inquiry procedure; and

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[6] M. Craven, 'Towards an unofficial petition procedure: A review on the role of the UN Committee on Economic, Social and Cultural Rights' in K. Drzewicki, C. Krause and A. Rosas, *Social Rights as Human Rights: A European Challenge,* Institute for Human Rights: Abo Akademie University, 1994, p. 91.

[7] E/C.12.1.Add 31,4 December 1998.

[8] See: B. Porter, 'Socio-Economic Advocacy - Using International Law: Notes from Canada' 2 (1), *ESR Review*, 1998, 1.

[9] The Vienna Declaration and Programme of Action, UN Doc. A/Conf. 157/23, Part I, para 5.

[10] Part II, para. 75.

- the adoption of an optional protocol to the African Charter on Human and Peoples' Rights in 1998, establishing the African Court on Human and Peoples' Rights which will have the power to enforce all the rights in the African Charter, including the social and economic rights.

These developments have reinforced the equal status of economic and social rights as human rights in international law. They also provide new opportunities to develop creative judicial and quasi-judicial remedies to prevent and redress violations of these rights.

## 2. THE PROTECTION OF ECONOMIC AND SOCIAL RIGHTS IN THE CONSTITUTIONS OF COMMONWEALTH COUNTRIES

The constitution of a country is generally considered to be its supreme law. The entrenchment of a chapter or Bill of fundamental rights in a constitution is particularly relevant for human rights protection. Civil and political rights have received extensive protection through their inclusion as justiciable rights in the constitutions of various countries. Individuals have generally been able to invoke these constitutional provisions to obtain relief from the courts when their civil and political rights are infringed or threatened by the state. The constitution may confer on certain courts the power to declare invalid legislation that is inconsistent with the rights guaranteed in the Bill of Rights. Commonwealth countries that have a system of constitutional supremacy combined with judicial review include the Canada, Botswana, South Africa, Ghana, and India. However, this model is by no means universal. Certain countries such as the United Kingdom (which has an unwritten constitution) have a system of parliamentary sovereignty which requires the courts to enforce all legislation passed by Parliament.[11]

The UN Committee on Economic, Social and Cultural Rights has emphasised the importance of judicial remedies for the protection of the rights recognised in the ICESCR.[12] The constitutional entrenchment of a set of justiciable human rights usually represent the highest ranking norms within the domestic legal order. Extensive power is vested in the courts to enforce human rights under a system of constitutional supremacy combined with judicial review. The inclusion of economic and social rights as justiciable rights in a country's constitution provides a great deal of scope for developing effective judicial remedies for these rights. However, even if economic and social rights are not directly entrenched in the constitution, they may nonetheless receive significant indirect protection through the interpretation and application of other constitutional rights. We proceed to examine the different ways in which economic and social rights may be directly or indirectly protected in Commonwealth constitutions.

### 2.1 The direct protection of economic and social rights in Bills of Rights

In comparative constitutional law it is still considered novel for economic and

[11] On the adoption of the Human Rights Act in the UK, see part 4 below.

[12] General Comment No. 9 (1998) on the domestic application of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/1999/22, para. 4.

social rights to be directly entrenched as justiciable rights in a country's constitution. The traditional liberal conception of a Bill of Rights is as a shield designed to protect individual liberties from arbitrary and excessive applications of state power. The United States' Bill of Rights is an example of this model. It contains a set of classic civil and political rights which operate primarily as 'negative' restraints on the powers of the states. As we have seen, economic and social rights also impose negative duties on the state such as the duty to refrain from unjustified forced evictions.[13] However, their full realisation requires positive state conduct aimed at ensuring universal access to socio-economic resources and services. The inclusion of economic and social rights in a Bill of Rights thus challenges the liberal theory of constitutional rights.

One of the major obstacles to the inclusion of economic and social rights as directly justiciable rights in a national constitution has been the argument that they will require the judiciary to stray into the terrain of the legislature and the executive thus breaching the doctrine of separation of powers. One of the primary reasons cited is that economic and social rights require the courts to order the state to undertake extensive positive conduct and resource commitments. According to traditional interpretations of the doctrine of separation of powers, social policy and budgetary allocations are the exclusive domain of the legislature which is directly accountable to the electorate. However, this represents a rigid, formalistic concept of the doctrine of separation of powers. Many civil and political rights such as the rights to vote, equality, freedom of speech and a fair trial also involve questions of social policy and have budgetary implications.[14] As the South African Constitutional Court pointed out in certifying the 1996 Constitution:

> "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 breach of separation of powers."[15]

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[13] See, e.g., General Comment No. 7 (1997) on the right to adequate housing (art. 11.1 of the Covenant):forced evictions, UN doc. E/1998/22.

[14] For example, a recent South African Constitutional Court judgment has affirmed the right of prisoners to vote in elections, and obliged the Independent Electoral Commission to make all reasonable arrangements necessary to enable them to exercise this right. *August and another v. Electoral Commission and others*, 1999 (4) BCLR 363 (CC).

[15] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa, 1996*, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), at paras. 76–78 (first certification judgment). Before the final Constitution (Act 108 of 1996) could come into effect, the Constitutional Court was required to certify that the text complied with a set of 34 'Constitutional Principles' appended to the interim Constitution (Schedule 4, Act 200 of 1993). These principles were wide-ranging and included a stipulation that the final Constitution protect 'all universally accepted fundamental rights, freedoms and civil liberties' by entrenched and justiciable provisions (Principle II). The Constitutional Court declined to certify the final Constitution in the first certification judgment. An amended text of the Constitution was certified on 4 December 1996. *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*, 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) (second certification judgment). The 1996 'final' Constitution came into force on 4 February 1997.

The UN Committee on Economic, Social and Cultural Rights has also commented as follows:

> "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."[16]

Scholars have emphasised the need to develop a more flexible, 'co-operative model' of the relations between the different branches of government. This model would require continual interaction between the branches of government in defining and redefining their respective roles and powers in different contexts.[17] The Canadian academics, Craig Scott and Jennifer Nedelsky refer to this process of mutual interaction as a 'constitutional dialogue' between the different branches.[18] The primary purpose of the doctrine of separation of powers is to prevent a concentration of power in any one branch of government. Within this model, the judiciary has a role to play in the enforcement of social and economic rights. For example, the courts may prod the legislature into action to realise the rights while at the same time respecting the legislature's choice of means as to the most appropriate methods to advance the rights.

Another objection that is frequently raised against the inclusion of economic and social rights as justiciable rights in a constitution is that the courts lack the institutional competence to enforce rights of this nature. Economic and social rights frequently involve complex policy choices with far-reaching socio-economic ramifications. For example, ordering the provision of expensive cardiac surgery is likely to affect not only other health-related expenditure (e.g. on primary health care), but also other portfolios in the national budget (e.g. housing).[19] Because judges are not economists or public policy experts, they are neither equipped to evaluate the most effective policy measures for realising the rights nor the impact of their decisions on other needs within a democratic society. Their task is made more difficult by the fact that the provisions protecting human rights are frequently formulated in a broad, open-ended way, leaving a large margin of interpretation to judges.

However, as we have noted above, all rights have social policy implications. Where a positive order in relation to any right may have far-reaching consequences, it is certainly appropriate for the judiciary to allow a margin of choice to the executive and legislature. However, this does not mean that the

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[16] General Comment No. 9 (1998) on the domestic application of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/1999/22 para. 10.

[17] M. Minow, *Making All the Difference: Inclusion, Exclusion and American Law*, 1990, pp. 361–362.

[18] C. Scott and J. Nedelsky, 'Constitutional Dialogue', in: J. Bakan and D. Schneiderman (eds.), *Social Justice and the Constitution: Perspectives on a Social Union for Canada*, 1992, p. 59.

[19] These are what professor Lon Fuller describes as 'polycentric disputes'. L. Fuller, 'The Forms and Limits of Adjudication', *Harvard Law Review*, Vol. 92, No. 2 (1978), pp. 353–409.

courts must abdicate all responsibility for the enforcement of economic and social rights. The courts can place a burden on the executive and legislature to justify the reasonableness of their policy choices in the light of the constitutional commitment to economic and social rights.[20] Should they fail to discharge this burden of justification, a court may issue a declaratory order to this effect. This order can set the parameters for a constitutionally acceptable decision while still preserving sufficient 'space' for the exercise of a choice of means by the legislature.[21] Furthermore, the fact that the normative content of economic and social rights is less well-developed than civil and political rights is more a reflection of their historical exclusion from adjudication procedures than their inherent nature. The content of rights develop over time through on-going judicial interpretation of their meaning in the context of concrete cases. The scope and content of various economic and social rights will also become clearer once they are subjected to systematic judicial enforcement. According to the Committee on Economic, Social and Cultural Rights, 'there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions'.[22]

### *Case Study: The South African Constitution*

We turn now to consider practical ways in which these rights can be judicially enforced in a constitutional context. The 1996 South African Constitution will be used as a case study because it entrenches a comprehensive range of civil and political rights as well as economic and social rights as directly justiciable rights in its Bill of Rights. This represents a far-reaching commitment at the domestic level to the interdependence and indivisibility of all human rights. A number of commonwealth constitutions include at least one or two justiciable economic and social rights in their chapters on fundamental rights. Educational rights are are included, for example, in the Canadian Charter of Rights and Freedoms, the Namibian, Ghanaian and Ugandan Constitutions.[23]

***The campaign to include economic and social rights in the South African Constitution***

While drafting the 1996 Constitution, South Africa's Constitutional Assembly ran an extensive public participation programme aimed at given ordinary people a voice in the

[20] See E. Mureinik, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution', *South African Journal on Human Rights*, Vol. 8 (1992), pp. 464–474.

[21] C. Scott and P. Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution', *University of Pennsylvania Law Review*, Vol. 141, No. 1 (1992), pp. 1–148, at pp. 146–147.

[22] General Comment No. 9 (1998) on the domestic application of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/1999/22para. 10.

[23] Section 23 of the Canadian Charter of Rights and Freedoms (concerning minority language educational rights); Article 20 of the Namibian Constitution; Article 25 of the Constitution of the Republic of Ghana; Article 30 of the Constitution of the Republic of Uganda.

Constitution.[24] One of the major issues of debate was whether economic and social rights should be included in the Bill of Rights, along with civil and political rights, as justiciable rights. A coalition of civil society organisations, including human rights and development NGOs, church groups, civics and trade unions, campaigned for the full inclusion of socio-economic rights in the Bill of Rights. They argued that the struggle against apartheid was as much about access to social and economic rights such as the right to land, housing, education and health care as it was about a right to vote and other civil liberties. The inclusion of social and economic rights in the Bill of Rights would give disadvantaged communities tools to protect and advance their interests in the courts. They would also assist the new democratic government in realising its reconstruction and development programme.[25]

The economic and social rights included in the South African Constitution can be broadly divided into three main types. The first category entrenches a set of 'basic' rights consisting of: children's socio-economic rights;[26] the right of everyone to basic education, including adult basic education;[27] and the socio-economic rights of detained persons, including sentenced prisoners.[28] The obligation of the state in relation to these rights is not qualified by references to 'progressive realisation' and resource constraints. The second category entrenches the right of everyone to 'have access to' adequate housing, health care, food, water and social security.[29] The state's obligations in relation to these rights are expressly qualified by a second subsection: 'The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.[30] The third category of rights imposes some kind of prohibition on the state, and arguably also on private parties.[31] These include a prohibition on the eviction of people from their homes without an order of court made after considering all the "relevant circumstances", and on the refusal of emergency medical treatment.[32] The Bill of

[24] For more details on this programme, see Hassen Ebrahim, *Soul of the Nation: Constitution-making in South Africa* (Cape Town: Oxford University Press, 1998, chapter 13.

[25] Petition to the Constitutional Assembly by the Ad Hoc Committee for the Campaign for Social and Economic Rights, July 1995, reproduced in: S. Liebenberg and K. Pillays (eds), *Socio-Economic Rights in South Africa: A Resource Book* (Community Law Centre, University of the Western Cape, 2000), p. 19.

[26] The right to 'basic nutrition, shelter, basic health care services and social services' (s. 28(1)(c)). In addition, every child has the right 'to be protected from maltreatment, neglect, abuse or degradation' (s. 28(1)(d)), and 'to be protected from exploitative labour practices' (s. 28(1)(e)). A child is defined in section 28(3) as a person under the age of 18 years.

[27] Section 29(1)(a).

[28] The right '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' (s. 35(2)(e)).

[29] Sections 26(1) and 27(1).

[30] Sections 26(2) and 27(2). The drafting of these subsections was clearly influenced by Article 2(1) of the CESCR which sets out the nature of States' Parties obligations.

[31] The Constitution allows for a degree of horizontal application of the rights in the Bill of Rights (s. 8(2) and (3)).

[32] Sections 26(3) and 27(3).

Rights also includes labour, environmental, land, and cultural rights.[33] The Constitution places an overarching obligation on the State to "respect, protect, promote and fulfil the rights in the Bill of Rights."[34] As noted above these duties provide a useful analytic framework for developing an effective jurisprudence relating to economic and social rights.

All the rights in the Bill of Rights—civil, political, economic, social and cultural—are subject to a general limitations clause. Any limitation to a right must be in terms of law of general application and is only permissible "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[35] The initial burden falls on the applicant to prove a violation of the particular right. If successful, the burden shifts to the state to show the reasonableness and justifiability of any limitation to the right.[36]

The jurisprudence on these economic and social rights in the South African Bill of Rights is still in its infancy. However, there have now been a number of cases which illustrate the various ways in which these rights may be directly protected by the courts.

*Enforcing the duty to respect socio-economic rights*
The Constitutional Court has indicated that the negative duty to respect the economic and social rights in the Bill of Rights can be subject to judicial enforcement. In the first place, the negative prohibitions (the duty 'to respect')[37] inherent in all the economic and social rights can clearly be enforced by the courts. In dealing with an objection to the effect that socio-economic rights were not justiciable in the process of certifying the 1996 Constitution, the Court held that "at the very minimum, socio-economic rights can be negatively protected from improper invasion".[38] Thus, for example, the courts can grant appropriate remedies to prevent or redress the arbitrary eviction of people from their homes or the unjustified termination of social security benefits.

A recent decision handed down by the High Court (Cape Provincial Division) demonstrates how the prohibition against arbitrary evictions in section 26(3) of the Constitution can alter established common law principles and provide greater protection to vulnerable and disadvantaged groups.[39] The Court held that this

[33] Sections 23, 24, 25(5)–(9), 30 and 31.

[34] Section 7(2).

[35] Section 36. This clause is similar to the general limitations clause (s. 1) in the Canadian Charter of Rights and Freedoms.

[36] See *S v. Zuma & others*, 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), at para. 21; *S v. Makwanyane & another*, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), at paras. 100–102.

[37] See A. Eide, 'Economic, Social and Cultural Rights as Human Rights', Chapter 2 in this volume, at pp. 23–24.

[38] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa, 1996*, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), at para. 78.

[39] *V. Ross v. South Peninsula Municipality*, High Court (Cape of Good Hope Provincial Division), Case No. A 741/98, 3 September 1999 (unreported at the date of writing). Section 26(3) reads as

constitutional right changed the common law governing the onus of proof in eviction proceedings brought by a landlord against a tenant. It is no longer sufficient for the owner of the property simply to allege in pleadings that it is the owner of the property in question and that the defendant is in unlawful possession. The owner is now required to allege and prove the "relevant circumstances" that would justify an order for the eviction of the defendants from their home.[40] Although the court did not decide the exact nature of these relevant circumstances, it indicated that some guidance could be obtained from legislative provisions. The special protection to be accorded in the context of evictions to the elderly, children, persons with disabilities and households headed by women is particularly relevant.[41] Section 26(3) thus requires the courts to exercise a broad equitable jurisdiction in deciding whether to grant an order evicting people from their homes. This judgment gives tenants greater protection against unfair, arbitrary evictions.

*Enforcing 'basic rights'*

The courts have also demonstrated that they are willing to enforce the positive duties imposed by the first category of 'basic' rights. Thus the Constitutional Court has affirmed that the right to basic education 'creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education'.[42]

In another case, the High Court (Cape Provincial Division), directed the Minister of Correctional Services and other respondents to supply two HIV-positive applicants with prescribed anti-viral medication (a combination of AZT and ddI) in fulfilment of their right to be provided with "adequate medical treatment" at state expense.[43] The positive order by the Court followed a finding that the Ministry had failed to make out a case that they could not afford the relevant treatment.[44]

In a recent groundbreaking judgment, the Constitutional Court held that that the State incurs an immediate obligation to provide shelter to those children who are removed from their families (as well as by implication the other socio-economic rights in section 28(1)(c). However, the primary duty to fulfil the children's socio-

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follows: "No-one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions".

[40] Since the Constitution only protects eviction from a 'home', the onus to allege and prove relevant circumstances would not apply in the case of eviction from, for example, business premises.

[41] The legislation referred to by the court in this regard is the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998.

[42] *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC), at para. 9.

[43] *B and others v. Minister of Correctional Services and Others*, 1997 (6) BCLR 789 (C), at paras. 61–66. Adequate medical treatment is one of the rights enjoyed by everyone who is detained, including every sentenced prisoner (s. 35(2)(e)).

[44] Paras. 56, 60.

economic rights in section 28(1)(c) rests on the parents or family and only, failing such care, on the State.[45] The applicants, which included a number of children, were squatters who had been evicted from private land which they were unlawfully occupying. Following the eviction, they camped on a sportsfield in the area. However, they could not erect adequate shelters as most of their building materials had been destroyed during the eviction. As the children in this case were under the care of their parents or families, the Constitutional Court did not grant any relief on the basis of section 28(1)(c), but granted an order in terms of section 26 (1) and (2).[46]

*Enforcing economic and social rights subject to the availability of resources and progressive realisation*

The first major Constitutional Court case to consider the enforceability of the category of socio-economic rights subject to the availability of resources and progressive realisation was *Soobramoney v. Minister of Health, KwaZulu-Natal*.[47] The applicant, an unemployed man in the final stages of chronic renal failure, sought a positive order from the courts directing a state hospital to provide him with on-going dialysis treatment, and interdicting the provincial Minister of Health from refusing him admission to the renal unit of the hospital. On appeal the Constitutional Court decided that the applicant's demand to receive renal dialysis treatment at a state hospital did not fall within the scope of the right to 'emergency medical treatment' protected in section 27(3) of the Constitution. Without this treatment the appellant would die, and he could not afford to obtain the treatment from a private clinic. The Court held that the right in section 27(3) is a negative right not to be refused remedial medical treatment that is necessary and available in the case of a sudden catastrophe.[48] It does not extend to the provision of ongoing treatment of chronic illnesses for the purpose of prolonging life. The Court drew support for this interpretation of emergency medical treatment from the judgment of the Indian Supreme Court in *Paschim Banga Khet Mazdoor Samity and Others v State of West Bengal and Another* which derived this right from the right to life protected in article 21 of the Indian Constitution.[49]

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[45] *The Government of the Republic of South Africa and Others v Grootboom and others*, CCT 11/00, 4 October 2000 (unreported at the date of writing), para. 77 (available on line at: http://www.law.wits.ac.za/). This case came on appeal to the Constitutional Court against the judgment of the High Court (Cape Provincial Division) which ruled that the appropriate organ or department of state was obliged in terms of section 28(1)(c) of the Constitution to provide shelter to homeless children. The High Court also declared that the parents were entitled to be accommodated with their children in the aforesaid shelter. Although the parents did not have an independent right to shelter, they enjoyed a derivative right based on the constitutional stipulation that a child's best interests are "of paramount importance in every matter concerning the child". It would not be in children's best interests to break up the family unit without justification: "This would penalise the children and indeed their parents who, to a considerable extent owing to the ravages of apartheid, are unable to provide adequate shelter for their own children" (*Grootboom v Oostenberg Municipality and Others* 2000(3) BCLR 277(C), 289 C - D). All three spheres of government (national, provincial and local) appealed to the Constitutional Court against this order of the High Court.

[46] See note...below and accompanying text.

[47] 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC).

[48] Para. 20.

[49] (1996) AIR SC 2426. *Soobramoney*, para. 18.

However, it should be noted that this judgment gave a more generous interpretation of the right to emergency medical treatment than the one advanced by the Constitutional Court to the effect that access to existing facilities should not be frustrated by bureaucratic and other formalities. For example, the Indian Supreme Court directed the State government to formulate a blue print for primary health care with particular reference to ensuring the timely treatment of patients during an emergency.

The Court then proceeded to consider Mr. Soobramoney's claim under section 27(1) (the right of access to health care services) read with section 27(2) (progressive realisation within available resources).[50] In considering this claim, the Court indicated that a large margin of discretion would be given to the setting of budgetary priorities by the provincial government, and the "difficult decisions" made by the hospital administrators in the context of limited resources: "A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibilities it is to deal with such matters".[51] The guidelines drawn up by the hospital authorities for determining which patients qualified for dialysis treatment were found to be reasonable, and there was no suggestion that they had not been applied "fairly and rationally" in the applicant's case.[52] The Court thus declined to order the provision of dialysis treatment.

This case suggests that the courts will allow a greater latitude to the political and administrative organs in relation to the positive dimensions of those socio-economic rights subject to progressive realisation and resource availability (the duty 'to fulfil').

In the *Grootboom* case referred to above[53], the primary issue considered by the Court was whether the State was obliged under section 26 (the right of access to adequate housing) to provide some form of relief for the applicants who were homeless. A human rights research institute based at the University of the Western Cape, the Community Law Centre and the South African Human Rights Commission intervened as *amici curiae* in the case. The Court acknowledged the valuable contribution of the *amici* in developing a creative approach to "the difficult and sensitive issues involved in the cases."[54]

The Court held that section 26(2) of the Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing. This programme must include measures that are 'reasonable' both in their conception and their implementation. In assessing the 'reasonableness' of the measures

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[50] Para. 22.

[51] Para. 29.

[52] Para. 25.

[53] See note...and accompanying text.

[54] *Grootboom*, note..., para. 17.

adopted by the State, the following would be taken into consideration:

> "In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long-term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefor the programme will require continuous review. Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at realisation of the right."[55]

The Court emphasised the constitutional duty on the State to take reasonable legislative *and* other measures to realise the right of everyone to have access to adequate housing. Legislation, without well-directed policies and programmes implemented by the executive, was not enough. These policies and programmes must be reasonable both in their conception and their implementation.[56] The Court also indicated that the availability of resources was an important factor in determining what whether the measures were reasonable in achieving the goal of full access to adequate housing expeditiously and effectively.[57]

The Court interpreted the phrase "progressive realisation" in section 26(2) to impose a duty on the state to progressively facilitate the accessibility of housing by examining legal, administrative, operational and financial hurdles and, where possible, lowering these over time. Housing should be made accessible "not only to a larger number of people but to a wider range of people as time progresses." The Court cited with approval the UN Committee on Economic, Social and Cultural Right's interpretation of the duty of "progressive realisation" in article 2 of the Covenant. In commenting on the concept of "progressive realisation" in Article 2(1) of the CESCR, the Committee on Economic, Social and Cultural Rights held that "...any deliberate retrogressive measures...would require the most careful consideration and would need to be *fully justified* by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources" [emphasis added].[58] According to the Court, this analysis was "in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived." [59]

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[55] Paras. 43 - 44.

[56] *Ibid*., para. 42.

[57] *Grootboom*, para. 46.

[58] General Comment No. 3 (1990) on the nature of States parties obligations (article 2(1) of the Covenant), UN doc. E/1991/21, para. 9.

[59] *Grootboom*, para. 45.The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights give as one of the examples of violations of economic and social rights through acts of commission: "the reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate

This paves the way for future challenges to the repeal of legislation or programmes that guarantee people's enjoyment of economic and social rights. It suggests that the state is under a duty to justify any retrogressive measures taken by it which undermine economic and social rights.

The Court concluded that the State housing programme was not reasonable "in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations."[60] In this The standard of review applied by the Constitutional Court in this case is more substantive and less deferential to the State than the 'rationality' standard adopted in the *Soobramoney* case.

The *Grootboom* case demonstrates how even the tertiary duty to fulfil those economic and social rights that are made subject to available resources and progressive realisation may be subjected to judicial scrutiny. Thus government legislation, policies and programmes may be reviewed for their reasonableness. In this case, the South African Constitutional Court has identified at least one situation where a State programme will be regarded as unreasonable - where it fails to establish a programme to meet the basic shelter needs of people in crises situations or living in intolerable conditions. It is possible that the South African courts may also be prepared to intervene in situations where the relevant allocation of resources is manifestly unreasonable or in bad faith. This may occur, for example, where resources are prioritised in favour of privileged groups at the expense of meeting the social needs of disadvantaged groups.[61]

*Possibilities for horizontal application of economic and social rights*.
The possibility also exists under the South African Constitution for the rights in the Bill of Rights, including economic and social rights, to apply in disputes between private parties (in other words, to have a horizontal application). The fact that the South African Constitution provides for the direct horizontal application of certain rights in the Bill of Rights is relatively novel in comparative constitutional law **[do we know or any other Commonwealth constitutions that have this possibility?]**.

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measures to ensure minimum subsistence rights for everyone" (para. 14(g)). *Human Rights Quarterly*, Vol. 20 (1998), pp. 691–705. Also see the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, at para. 72. UN doc. E/CN.4/1987/17; reproduced in: *Human Rights Quarterly*, Vol. 9 (1987), pp. 122–135.

[60] *Ibid*., para. 99. Although, the Court did not adopt the concept of a 'minimum core obligation' elaborated by the UN Committee on Economic, Social and Cultural Rights in General Comment No. 3, (note...), the priority concern accorded by it to the needs of groups in particularly vulnerable and disadvantaged circumstances is in harmony with the Committee's approach developed in the General Comments and its review of State reports.

[61] The UN Committee on Economic, Social and Cultural Rights has commented that: "States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others". General Comment No. 4 (1991) on the right to adequate housing (article 11(1) of the Covenant), UN doc. E/1992/23, para. 11.

The Constitution provides that the Bill of Rights applies to all law and binds all organs of state (vertical application)[62] A provision of the Bill of Rights also binds a natural or juristic (legal) person "if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right" (horizontal application)[63] Private parties should at least be under a duty to respect people's social and economic rights. For example, landlords should refrain from evicting people arbitrarily from their homes, insurance companies and private health care institutions should not discriminate unfairly against people in their access to insurance or health care services,[64] and industries should not create an environment that is harmful to people's health.[65] In order to provide an effective remedy against private violations of economic and social rights, the courts "must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right".[66] It remains to be seen to what extent the South African Constitutional Court will develop the horizontal potential of the economic and social rights entrenched in the Bill of Rights. At the very least the State should be under a duty to protect the economic and social rights in the Bill of Rights by enacting and enforcing appropriate regulatory legislation.

The horizontal application of socio-economic rights is significant in a global context where powerful private entities are increasingly controlling access to essential social services and resources.[67]

*Standing and Remedies*

The accessibility and efficacy of constitutional rights depends on having generous provisions relating to the legal standing to enforce these rights in the courts as well as the power of the courts to grant speedy and effective remedies. The South African Constitution has generous provisions on legal standing, allowing a broad range of individuals and groups to enforce the rights in the Bill of Rights. For example, it expressly confers standing on anyone acting as a member of, or in the interest of, a group or class of persons as well as anyone acting in the public interest.[68]

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[62] Section 8(1).

[63] Section 8(2).

[64] In addition to prohibiting unfair discrimination by the state (s. 9(3)), the South African Constitution expressly provides that "no person may unfairly discriminate directly or indirectly against anyone" on a range of grounds such as race, gender, sexual orientation, disability and language (s. 9(4)).

[65] Section 24(a) of the Constitution gives everyone the right "to an environment that is not harmful to their health or well-being".

[66] Section 8(3). On the development of common law remedies to give effect to socio-economic rights, see P. De Vos, 'Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution', *South African Journal on Human Rights*, Vol. 13 (1997), pp. 67–101, at pp. 100–101.

[67] See C. Scott, 'Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights', Chapter 32 in this volume.

[68] Section 38. For a discussion of public interest litigation in the Indian context, see part 2.2.

Furthermore, the courts are given broad remedial powers. Legislation or conduct that is inconsistent with the Constitution must be declared invalid to the extent of its inconsistency. In addition, the courts may make any order that is "just and equitable", including an order suspending a declaration of invalidity on any conditions to allow the competent authority to correct the defect.[69] The power of the courts to grant any order that is "just and equitable" creates the opportunity for the courts to develop a number of creative remedies to redress violations of economic and social rights. [70]

These include, for example, an award of preventive damages against the state made in favour of an independent state institution (e.g. a Human Rights Commission) or non-governmental organisation with the necessary skills and programmes aimed at preventing future violations of the right in question.

Violations of socio-economic rights often cannot be remedied by 'once and for all' court orders as they may require a number of complex legal and administrative measures taken over a period of time to remedy the structural problems giving rise to the violation. The South African courts could derive useful insights from the remedy of structural interdicts which has been common in public interest litigation under the Indian Constitution in redressing violations of this nature. These have been given, for example, in relation to putting an end to bonded labour[71] as well as environmental damage[72]. In terms of these orders, the respondent is usually ordered to present a plan of action to remedy the violation and to report back to the court on its implementation at regular intervals. An order of this nature was given by the Cape High Court in granting relief under the section 28(1)(c) enshrining the right of every child to shelter in the *Grootboom* case discussed above.[73] However, the Constitutional Court confined itself to a declaratory order in granting relief in terms of section 26 of the Constitution.[74] Orders of this nature entail on-going judicial supervision to ensure that they are properly implemented, and the involvement of experts to assist the court in assessing compliance with it orders. As Judge Krishna Iyer has observed: "Negative bans without supportive schemes can be a remedy aggravating the malady...Judicial engineering towards this goal is better social justice than dehumanised adjudication on the vires of legislation."[75]

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[69] Section 172(1) of the 1996 Constitution. See S. Liebenberg, 'Socio-Economic Rights', in: M. Chaskalson et al. (eds.), *Constitutional Law of South Africa*, Revision Service 3, 1998, Chapter 41, pp. 1–56, at pp. 52–55.

[70] For a more detailed discussion of these novel remedies in the field of socio-economic rights, see W. Trengove, 'Judicial Remedies for Violations of Socio-Economic Rights', 1 (4) *ESR Review: Economic and Social Rights in South Africa,* 1999, pp. 8–11.

[71] *Bandhua Mukti Morcha v Union of India* (1984) 2 SCR 67.

[72] *Rural Land and Entitlement Kendra, Dehradun v State of Uttar Pradesh* AIR 1985 SC 652.

[73] See note...

[74] See note...and accompanying text.

[75] *Azad Rickshaw Pullers Union v Punjab* 1981 1 SCR 366. The case concerned the constitutionality of a licensing scheme for rickshaw cycle drivers:

## 2.2 Economic and social rights as directive principles of state policy

In Commonwealth countries with entrenched Bills of Rights, the most common method of recognising economic and social rights is through Directive Principles of State Policy. These are usually contained in a separate chapter of the constitution from the one protecting "fundamental" rights. The latter chapter mostly protects civil and political rights, although it may include one or two socio-economic rights such as the right to education, labour rights, and the right of children to be protected from exploitation. Examples of Commonwealth countries with directive principles of state policy are: India, Namibia **[double-check if Nambia is a Commonwealth country]**, Ghana, Nigeria, and Sri Lanka. These directives are usually expressly declared to be unenforceable by the judiciary. They are intended to guide the government in making and applying laws, and in some constitutions, the courts are entitled to have regard to the said principles in interpreting any laws based on them.[76] The Ghanaian Constitutions expressly provides that the directive principles of state policy in chapter six of the constitution may guide the judiciary and other bodies in "applying and interpreting" the Constitution. A duty is also place on the President to report annually to Parliament on all the steps taken to ensure the realisation of the policy objectives, "and, in particular, the realisation of basic human rights, a healthy economy, the right to work, the right to good health care and the right to education."[77]

### *Case Study: The Indian Constitution*

We will consider India as a case study of how economic and social rights incorporated as directive principles in a constitution can receive far-reaching protection by the courts.

The use of the directive principles by the courts to develop an advanced jurisprudence on social justice and socio-economic rights is inextricably connected to the rise of the public-interest litigation (PIL) movement in India. This occurred largely in response to the crisis of legitimacy facing the judiciary following the widespread violation of human rights during the internal emergency that was in force between 1975 and 1977. This development is described as follows by S. Muralidhar:

> "The lifting of the emergency and the realignment of political forces had not resulted in any dramatic change in the social imbalances or executive excesses that had by then become endemic. The post-emergency period then provided the right environment for the judiciary to redeem itself as a protector and enforcer of the rule of law. Judges woke up to this need and PIL was the tool the judiciary shaped to achieve this end. PIL was entirely a judge-led and judge-dominated movement.
> What made PIL unique was it acknowledged that a majority of the population on account of their social, economic and other disabilities, were unable to access the justice system. The insurmountable walls of procedure were dismantled and suddenly the doors of the Supreme

[76] See, for example, article 101 of the Constitution of the Republic of Namibia, 1990.

[77] See article 34 of the Constitution of the Republic of Ghana, 1993.

Court were open to people and issues that had never reached there before. By relaxing the rules of standing and procedure to the point where even a postcard could be treated as a writ petition, the judiciary ushered in a new phase of activism where litigants were freed from the stranglehold of formal law and lawyering."[78]

This development made it possible for cases of social and economic exploitation of vulnerable and disadvantaged groups to come before the courts. The Directive Principles of State Policy in part IV of the constitution are of direct relevance to the social justice issues that these cases raised - access to the means of livelihood, education, public health care, and decent working conditions. However, these directives are expressly declared to be not enforceable by any court.[79] In a series of cases, the Indian Supreme Court established the jurisprudence that the directive principles and the (enforceable) "fundamental" rights in part III of the Constitution must be harmonised, and that that the directive principles could inform the interpretation of the content and scope of the fundamental rights.[80]

The directive principles have been relied on to uphold the constitutional validity of legislation against challenges alleging that it restricts fundamental rights (such as freedom of expression, association, and to carry on a business, trade or profession) provided that the relevant legislation has been enacted to achieve the social justice objectives enshrined in the directives.[81]

The Supreme Court has also enlarged the scope of fundamental rights, particularly the right not to be deprived of life in article 21, to include various economic and social rights such as the right to a livelihood,[82] the basic necessities of life such as adequate nutrition, clothing, reading facilities,[83] and the rights to shelter,[84] health[85] and education.[86] This has not generally meant that the

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[78] S. Muralidhar, 'Justiciability of Economic, Social and Cultural Rights - the Indian Experience' in *Circle of Rights: Economic, Social and Cultural Rights Activism: A Training Resource*, International Human Rights Internship Program and Asian Forum for Human Rights and Development, 2000, pp. 436 - 437.

[79] Article 37 of the Indian Constitution.

[80] *Keshavananda Bharati v State of Kerala* (1973) 4 SCC 255; *Maneka Gandhi v Union of India* AIR (1978) 1 SCC 248.

[81] For example, the directive principle aimed at securing living wages and decent conditions of work (article 43) was relied on to uphold the reasonableness of the restrictions imposed by the Minimum Wages Act, 1948: *Chandra Bhavan v State of Mysore* (1970) 2 SCR 600.

[82] *Tellis & other v. Bombay Municipal Corporation and others*, (1987) LRC (Const) 351 (the so-called 'pavement-dwellers' case). Articles 39(a) and 41 oblige the state to direct its policy towards securing the right to an adequate means of livelihood and the right to work.

[83] *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*, (1981) 2 SCR 516 at 529.

[84] *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan & others*, (1997) AIR SC 152.

[85] *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) AIR SC 2426 (right to emergency medical treatment).

[86] *Jain v. State of Karnataka*, (1992) 3 SCC 666; *Krishnan v. State of Andhra Pradesh & other*, (1993) 4 LRC 234.

state can be positively compelled to provide an adequate means of livelihood or work to its citizens. Instead it has created a basis for protecting people against threats to their livelihoods or the deprivation of socio-economic benefits without a reasonable, fair and just procedure established by law (substantive due process). Thus in the *Tellis* case,[87] the Court held that the pavement-dwellers had to be afforded a hearing before they were evicted from the pavements they were occupying. The rules of natural justice had to be respected in circumstances where the eviction of the pavement-dwellers would have the effect of depriving them of their livelihoods thereby threatening their lives.

The Directive Principles have furthermore been invoked by the courts to order the proper implementation of legislation enacted to give effect to constitutional values. These orders of the court have included giving detailed directions to state officials to take positive steps to monitor and enforce social justice legislation.[88]

Finally, the fundamental rights in conjunction with the Directive Principles have been interpreted so as to impose a duty on the state to regulate the activities of private institutions involved in the spheres of the Directive Principles such as education and the environment.[89] Thus, for example, state governments were obliged to pass laws regulating the fee structure of private educational colleges so as to ensure that they were fair and did not lead to the total exclusion of poor students.[90]

In the course of these judgments, the courts have frequently made far-reaching positive orders, and been forced to develop innovative remedies (see part...above). For example, in *M.C. Mehta v State of Tamil Nadu*, the Supreme Court grappled with the persistence of child labour despite a host of legislation and policies aimed at eradicating this form of exploitation of children. It recognised the value of education in preventing and combating economic exploitation, but realised that that unless an alternative income was found for the family, economic necessity would keep children out of school. It ruled that each employer in breach of the relevant statute had to pay 20 000 rupees to a fund which was specially created by the Court called the Child Rehabilitation-cum-Welfare Fund. The Court also recognised that this income would be insufficient to dissuade families from seeking employment of children. The Supreme Court therefore also requested the State Government to try and find employment for an adult family member whose child was in employment in a factory or a mine or in other hazardous work. Where the State was unable to secure such employment, it would have to contribute 5000 rupees to the new fund.[91]

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[87] *Tellis*, note...

[88] See, for example, *Bandhua Mukti Morcha v. Union of India and others*, (1984) 2 SCR 67 (concerning the working conditions of bonded labourers). In *Sheela Barse v. Union of India and others*, 1986 (3) SCR 443, the Supreme Court ordered the state governments to bring into force and 'implement vigorously' juvenile justice legislation which had been enacted, but was not yet in operation.

[89] Articles 41 and 45 (education); Article 48A (environmental protection).

[90] The cases cited in note.... In the sphere of environmental protection, see, for example, *M. C. Metha v. Union of India*, AIR 1997 SC 965.

[91] (1996) 6 SCC 772, para. 31.

The Indian jurisprudence has fundamentally challenged traditional notions of the separation of powers doctrine. The Supreme Court perceives its role to be one of prodding and prompting the legislature and the executive to fulfil the social justice mandates enshrined in the directive principles. This jurisprudence provides a vivid practical illustration of the process of constitutional dialogue between the various branches of government which has been advocated by certain Canadian scholars.[92] In contrast to the adversarial model of separation of powers doctrine, public interest litigation in India has been characterised by the Supreme Court as "a co-operative or collaborative effort on the part of the petitioner, the state or public authority, and the court to secure observance of the constitutional or legal rights, benefits or privileges conferred upon vulnerable sections of the community and to reach social justice to them."[93]

Despite some of the practical difficulties that PIL has entailed for the courts, the procedural and substantive jurisprudence developed by the Indian courts has arguably gone further than any other commonwealth country in protecting the social and economic rights of marginalised groups.

### 2.3. Indirectly protecting economic and social rights through civil and political rights

Economic and social rights may also receive indirect protection in a constitutional context through interpreting and applying certain civil and political rights such as the right to just administrative action (fair process), and the right to equality and non-discrimination. For example, the South African courts have used the right to just administrative action protected in s. 33 of the Constitution to protect welfare recipients from the arbitrary cancellation of their social security rights such as disability grants.[94]

#### 2.3.1 *Case study of the Canadian Constitution*

The Canadian Supreme Court has applied section 15 of the Canadian Charter of Rights and Freedoms (the right to equal protection and benefit of the law without discrimination) to welfare and other social benefits even though the Constitution does not include socio-economic rights.[95] The recent Supreme Court case of *Eldridge v. British Columbia (Attorney General)* [96] concerned the failure of the Medical Services Commission and hospitals of British Columbia to provide sign

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[92] Discussed at page...above

[93] *People's Union for Democratic Rights and others v Union of India* (1983) 1 SCR 456.

[94] See, for example, *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2000 (7) BCLR 728 (E).

[95] See, for example, *Tetrault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22; *Schachter v. Canada*, (1991) 43 DLR (4th) 1, [1992] 2 SCR 679.

[96] (1997) 151 DLR (4th) 577 (SCC).

language interpretation for deaf patients as part of the publicly funded scheme for the provision of medical care. It was argued that this failure violated section 15(1) of the Charter. The Supreme Court affirmed that "discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public".[97] According to the Court, the argument that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of these benefits 'bespeaks a thin and impoverished version of s 15(1)'.[98] The failure to provide interpretation services deprived deaf patients of equal benefit of health care services thereby violating section 15(1). This failure could not be justified as a reasonable limitation of the equality right in terms of section 1 of the Charter, the general limitations clause applicable to all rights in the Charter. The respondents had presented no evidence that the type of accommodation sought by the deaf patients in health services would "unduly strain the fiscal resources of the state".[99]

The Canadian Supreme Court is due to consider a case which raises the question whether the right to a level of social assistance necessary for personal security and dignity falls within the scope of interests protected by s. 7 of the Charter (the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice). It will also consider whether the provision of a manifestly inadequate amount of social assistance to people under 30 years violates their equality rights under s. 15 of the Charter.[100] A number of Canadian NGOs, including the Charter Committee on Poverty Issues (CCPI), have applied for leave to intervene in the appeal and present written and oral arguments before the Supreme Court.

### 3. COMMONWEALTH COUNTRIES WITHOUT ENTRENCHED BILLS OF RIGHTS

In Commonwealth countries without entrenched, justiciable Bills of Rights such as the United Kingdom, New Zealand and Australia, economic and social rights may be protected through legislation, the development of the common law, and giving domestic effect to international human rights treaties.

## 3.1. Legislation

Article 2(1) of the ICESCR places particular emphasis on the adoption of legislative measures to achieve the realisation of the rights recognised in the Covenant. The Committee on Economic, Social and Cultural Rights recognises that "in many instances legislation is highly desirable and in some cases may even be indispensable".[101] A sound legislative foundation is critical for the effective implementation and enforcement of economic and social rights within

[97] Para. 78.

[98] Paras. 72–73.

[99] Para. 92.

[100] The appeal of *Gosselin v Quebec*.

[101] General Comment No. 3, note... para. 3.

national jurisdictions.[102] The advantage of legislation is that it is usually more detailed and specific than open-textured constitutional norms. Courts tend to be more receptive to the enforcement of concrete legislative rights and duties than broadly framed constitutional or international law norms.

However, without an entrenched and justiciable Bill of Rights, the role of the judiciary in reviewing whether existing legislation, or the failure to adopt legislation, violates economic and social rights is limited. The adoption of legislation protecting and advancing economic and social rights is thus largely dependant on the political will of the legislature.[103] Such legislation can also be repealed at will. A further disadvantage is that legislation may fail to guarantee economic and social rights as directly enforceable subjective rights thus precluding individuals from protecting these rights through the courts.

In commonwealth countries without a justiciable Bill of Rights, human rights and anti-discrimination legislation represent important vehicles through which economic and social rights can be protected.

***Case study: Australia***

The Australian Human Rights and Equal Opportunity Act, 1984 established The Australian Human Rights and Equal Opportunity Commission for the protection of human rights in Australia. The Commission is given functions with reference to a number of important international human rights instruments, many of which include economic and social rights: for example, the Convention on the Rights of the Child and the Declaration on the Rights of Disabled Persons. The Commission also has the power to receive complaints and conduct inquiries into unlawful discrimination under the Racial Discrimination Act, 1975, the Sex Discrimination Act, 1984 and the Disability Discrimination Act, 1992. These pieces of legislation expressly prohibit discrimination sectors critical to the realisation of economic and social rights such as accommodation, land, employment, education, and the provision of goods, services and facilities. It attempts to resolve cases of discrimination through conciliation. Where conciliation is unsuccessful or inappropriate, complaints alleging race, sex or disability discrimination may be terminated by the Commission. The complainants in these cases may then apply to the Federal Court to have their complaint heard. The Commission also has the broad power to inquire into "any act or practice that may be inconsistent with or contrary to any human right."[104] Based on these inquiries the Commission may make recommendations and these to the Attorney-General. The reports must be tabled in Parliament. Although the recommendations of the Commission are not enforceable, they may serve to

[102] On the range of legislation for protecting housing rights in the United Kingdom, see N. Nicol, 'The Implementation of the Right to Housing in United Kingdom Law', in: R. Burchill et al.(eds.), *Economic, Social and Cultural Rights: Their Implementation in United Kingdom Law*, 1999, pp. 57–65.

[103] See, for example, the critique of Australia's protection of the right to adequate housing: A. Devereux, 'Australia and the Right to Adequate Housing' 20 *Federal Law Review* (1991) 223.

[104] Section 11(1)(f), Human Rights and Equal Opportunity Commission Act.

generate public debate on the state of human rights protection in the country.

The Aboriginal and Torres Strait Islander Social Justice Commissioner is charged with promoting the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples in Australia. The Social Justice Commissioner must have regard to a number of international instruments in performing his/her functions, including the ICESCR. The Commissioner has conducted a number of inquiries and compiled reports on issues affecting the economic, social and cultural rights of Aboriginal and Torres Strait Islander communities. A National Inquiry was conducted on the separation of Aboriginal and Torres Strait Islander children from their families thereby violating their right to a family life as well as their religious and cultural rights. The Report of this Inquiry entitled, *Bringing Them Home* (May 1997) provoked wide-ranging political, media and public responses but was not well-received by the government.

The Human Rights Commissioner recently initiated and conducted a National Inquiry into Rural and Remote Education involving widespread public participation, particularly by NGOs and communities concerned with the right to education in Australia. Clear criteria were developed for assessing the realisation of the right to education in rural and remote areas based largely on the general comments issued by the UN CESCR under the ICESCR. Over 70 well-researched recommendations were formulated following this inquiry, and the challenge currently facing the Commission and civil society is to advocate for the acceptance and implementation of these recommendations.

### 3.2. The common law

Courts in commonwealth countries may also develop the common law to protect economic and social rights. International law protecting economic and social rights could provide a valuable point of reference in voiding discriminatory contracts and developing new causes of action. For example, the concept of 'reasonableness' in administrative review could be developed to incorporate human rights considerations such as the impact of administrative action on the right to health of individuals. However, the experience in England has been that those litigants who have challenged decisions to refuse to expend health care resources in the court through judicial review applications have achieved only limited success.[105]

There have recently been positive developments in commonwealth countries in the field of negligence claims against multinational enterprises impacting on people's health and environmental rights. The plaintiffs living in Papua New Guinea instituted action in Australia based on alleged harms arising from the toxic pollution of a river and a flood plain by a copper mine run by Australian mining corporation and its subsidiary. [106] The corporations applied to dismiss the actions

[105] J. McHale, 'Enforcing Health Care Rights in the English Courts' in R. Burchill, D. Harris and A. Owers, *Economic, Social and Cultural Rights: Their Implementation in United Kingdom Law*, University of Nottingham Human Rights Law Centre, 1999, 66.

[106] *Dagi; Shackles; Ambetu; Mann and Others v. The Broken Hill Proprietary Company Ltd. and Ok Tedi Mining Limited (No. 2),* [1997] 1 Victoria Reports [V.R.] 428, at 441 and 439.

brought in Australia for want of jurisdiction over the subject matter of the claims. The judge in one of the cases held that he did have jurisdiction over certain causes of action relating to the negligence alleged on the basis that "it is not improbable to suppose that the law imposes a duty of care in favour of persons who may use the water downstream as a food source or for a livelihood."[107] In the words of Craig Scott:

> "Expressed in these terms, the Australian judge has formulated the interests that are protected from negligent harm in a way that clearly involves the same interests as are protected by economic, social and cultural rights. In the process, he has helped show how basic common law tort categories can be understood in terms of remedies for human rights violations without necessarily the need to develop specific 'human rights' civil causes of action." [108]

The recent House of Lords judgment in *Lubbe and 4 others v Cape Plc. and Related appeals* affirmed the principle of effective access to justice in accepting jurisdiction in damages cases launched again multinational parent companies based in England for harms (mainly to the plaintiffs' health) allegedly caused by their subsidiaries' operations in foreign countries.[109] The case concerned a class (group) action brought by over 3000 South African citizens in the English courts for personal injuries (and in some cases death) allegedly suffered as a result of exposure to asbestos and its related products in South Africa by subsidiaries of the defendant company which is incorporated in England. The claim was brought against the parent company on the basis that, knowing that exposure to asbestos was gravely injurious to health, it failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed throughout the group. In this way, it is alleged, that the defendant breached a duty of care which it owed to those working for its subsidiaries in South Africa or living in the area of their operations. In dismissing the defendant company's application to stay the proceedings brought in England on the ground of the doctrine of *forum non conveniens* (the inconvenient jurisdiction for the action), the House of Lords accepted that substantial justice would not be done in the more appropriate South African forum. The plaintiffs (who were all black persons of modest means) had succeeded in showing that inadequate funding and legal representation would be available to them in South Africa to litigate their cases. (for example, legal aid funding had been withdrawn in South Africa for personal injury claims). This case demonstrates how the courts can interpret common law doctrines to ensure that disadvantaged litigants have effective access to a fair trial (including legal representation) in order to protect their economic and social rights.

## 4. GIVING DOMESTIC EFFECT TO INTERNATIONAL LAW PROTECTING ECONOMIC AND SOCIAL RIGHTS

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[107] *Ok Tedi*, note..., at 456 - 457.

[108] C. Scott, 'Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights' forthcoming in C. Krause and others (eds), *Economic, Social and Cultural Rights: A Textbook*, Martinus Nijhoff Publishers, 2001.

[109] Judgment delivered on 20 July 2000 (published?); Also see *Connelly v RTZ Corp Plc.* [1997] 4 All ER 335 (H.L.).

International law can play an important role in expanding the domestic protection given to economic and social rights in commonwealth countries, whether they have a Bill of Rights or not.

In jurisdictions such as Canada and South Africa with an entrenched and justiciable Bill of Rights, the ICESCR and other international treaties protecting economic and social rights can be an important source of interpretation for the rights protected in the Constitution. International treaties such as the ICESCR and the Convention on the Rights of the Child strongly influenced the drafting of the socio-economic rights provisions in the South African Bill of Rights.[110] The South African Constitution expressly provides that when interpreting the Bill of Rights, a court, tribunal or forum "must consider" international law, and "may consider" foreign law.[111] The drafting of the relevant provisions in the South African Bill of Rights relating to economic and social rights were substantially influenced by the provisions of the ICESCR. The interpretation of the Covenant by the Committee on Economic, Social and Cultural Rights through its general comments and review of state reports is thus an influential source for interpreting the economic and social rights in the Bill of Rights.

The Canadian Supreme Court has held that international conventions are "relevant and persuasive sources for interpretation of the Charter's provisions".[112] In the case of *Slaight Communications Inc. v. Davidson*, the Canadian Supreme Court referred to the right to work in Article 6 of the CESCR in finding that the imposition of a gag order on an employer in an unfair dismissal case was reasonably justifiable.[113] International standards relating to economic and social rights can also be used to advance a more substantive interpretation of civil and political rights in a constitution such as the right to security of the person. For example, the Canadian Supreme Court has indicated that it would be premature to exclude economic and social rights from the scope of the right to security of the person under section 7 of the Canadian Charter of Rights and Freedoms.[114] Much depends on whether the judiciary is prepared to use internationally recognised economic and social rights as a relevant source for interpreting constitutional rights.

International treaties protecting economic and social rights may also be incorporated or transformed into domestic law through national legislation in countries following a dualist system, or they be automatically adopted into domestic law in countries that have a monist system [are there any commonwealth countries were this applies?]. In the case of incorporation, the treaty as a whole becomes part of domestic law through a specific statute. A

[110] See, for example, the similarities between sections 26(2) and 27(2) of the SA Bill of Rights, and article 2 of the ICESCR.

[111] Section 39(1)(b) and (c).

[112] *In Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, at 348–350.

[113] [1989] 1 SCR 1038.

[114] *Irwin Toy Ltd. v. A.G. Quebec*, [1989] 1 SCR 927, at 1003–1004.

treaty is transformed into domestic law by amending or supplementing legislation without any specific reference to the treaty provisions. A number of countries, such as Canada and the United Kingdom have 'transformed' the ICESCR by amending legislation or adopting additional legislation before ratification.

In 1998, the British Parliament approved the Human Rights Act[115] which incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) into domestic law. This Act permits the higher courts to make a declaration to the effect that they find legislation to be incompatible with the ECHR (s. 4). Such a declaration does not affect the continued validity of the relevant provision, but the Act provides for remedial orders to be made, amending the legislation in question as necessary (s. 10 and Schedule 2). Although the ECHR contains predominantly civil and political rights, economic and social rights may nonetheless receive some measure of indirect protection through the application of these rights. For example, the right to a fair hearing in article 6 of the ECHR may be applied to guarantee procedural fairness in relation to social security benefits.[116] The European Court of Human Rights has also held that a failure by a State to regulate industrial pollution undermined individuals' well-being and enjoyment of their homes, and constituted a violation of the right to respect for private and family protected in article 8 of the Convention.[117]

Nigeria has incorporated the African Charter on Human and Peoples' Rights into its domestic legal system. The African Charter includes a number of economic and social rights such as the right to work (art. 15), the right to health (art. 16), the right to education (art. 17), and the protection of the family (art.18). The incorporation of the African Charter as a statute in Nigeria creates the possibility for residents to seek remedies for violations of these economic and social rights.[118]

BOX:

**Nigerian NGO uses international law to seek redress for violations of economic and social rights in the courts[119]**

In 1990 the military government of Nigeria evicted the 300 000 residents of the Maroka community in Lagos, providing resettlement for only 3 %. The government subsequently

[115] The Act entered fully into force on 2 October 2000. Statutory Instrument 2000 No. 1851 (C.47) of 12 July 2000.

[116] See, e.g., *Deumeland v Federal Republic of Germany*, judgment of 29 May 1986, European Court of Human Rights, Series A., No. 100; *Schuler-Zgraggen v Switzerland*, judgment of 24 June 1993, European Court of Human Rights, Series A., No. 263.

[117] *Lopez Ostra v Spain,* judgment of 9 December 1994, Series A, No. 303-C.

[118] There have been some Superior Court decisions encouraging the enforcement of the African Charter in Nigeria: *Ogugu and 4 others v The* States (1994) 9 NWLR (Pt. 366) 1; Gani *Fawehini v General Sani Abacha* (1996) 7 NWLR (Pt. 475) 710.

[119] Case study taken from: F. Morka, 'Module 13: The Right to Adequate Housing' in *Circle of Rights: Economic, Social and Cultural Rights Activism: A Training Resource*, International Human Rights Internship Program and Asian Forum for Human Rights and Development, 2000, p. 247.

provided no alternative schooling opportunities for the children of Maroka, whose education was abruptly cut off by the forced eviction.

The Social and Economic Rights Action Centre (SERAC) in Lagos has developed a line of cases designed to challenge in the courts violations of the economic and social rights if the people of Maroko. In one of those cases, *Akilla v Lagos State Government and Others*, SERAC is challenging the denial of the right to primary education to over 9000 pupils of the eleven Maroko schools demolished along with the community. The suit seeks to compel the Lagos state government to institute a remedial education programme to address the needs of the displaced students. It hinges on the government's obligation to provide free and compulsory primary education as guaranteed under the ICESCR, the African Charter on Human and Peoples' Rights and other human rights instruments ratified by Nigeria.

Even if an international treaty does not have direct validity in a domestic legal system (e.g. through incorporation), it may nonetheless have an indirect effect. It may be used by the courts to interpret domestic legislation or to develop the common law. In the United Kingdom the courts apply the presumption that Parliament intended to legislate in conformity with the UK's international obligations. However, they will only have recourse to the particular treaty if the relevant legislation is ambiguous.[120] The UK Human Rights Act, 1998 requires the courts "so far as it is possible to do so" to interpret and give effect to primary and subordinate legislation in a way which is compatible with the rights in the European Convention for the Protection of Human Rights and Fundamental Freedoms.[121] The South African Constitution requires every court to "prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".[122] The scope of this provision is broader than in the United Kingdom as it is not restricted to cases of ambiguity in legislation.

## 5. CONCLUSIONS AND RECOMMENDATIONS

The above paper illustrates the variety of ways in which economic and social rights can be protected by the judiciary in commonwealth countries. However, economic and social rights still face an uphill battle to be recognised as fundamental human rights in the legal systems of most countries. There is also still a long road to travel in the development of effective judicial remedies for redressing and preventing violations of these rights. A positive development has been an upsurge of interest in the area of economic and social rights by civil society organisations and scholars. Many NGOs are now conducting advocacy campaigns to advance people's economic and social rights, and there is an increase of academic scholarship on the topic. Litigants are increasingly asserting these rights in the courts, often relying on international human rights instruments.

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[120] See *R v. Secretary of State for the Home Department, ex Parte Brind*, [1991] 1 AC 696, at 747– 748. M. Craven, *loc. cit.* (note 59), pp. 396–397. A similar position applies in India. See Article 51 and the commentary thereon by H. M. Seervai, *Constitutional Law of India*, Vol. 2, 1993, at p. 2017.

[121] Section 3.

[122] Section 233.

In this way the judiciary is being forced to consider their applicability in the domestic legal system.

While their is clearly range of ways in which economic and social rights can be protected in domestic legal systems, the strongest form of protection is to include economic and social rights as entrenched and justiciable rights in the constitution of a country. In order to be effective these constitutional rights must be underpinned by positive judicial attitudes to their enforcement, particularly the development of rules of standing and access to court that encourage claims by disadvantaged litigants. They must also be complemented by a range of policies and legislation that allocate adequate resources and provide a coherent framework and set of institutions to facilitate their implementation. Other national institutions such as human rights commissions and public protectors should also be given the express mandate to monitor and investigate economic and social rights.

I conclude with the following recommendations to strengthen the judicial protection in commonwealth countries:

1. Wherever possible, economic and social rights should be included as entrenched and justiciable provisions in the constitution of the country.
2. The judiciary should interpret the civil and political rights contained in the constitution expansively to include the protection of internationally recognised economic and social rights.
3. International human rights treaties protecting economic and social rights should be ratified and incorporated into domestic legal systems. The judiciary should be receptive to arguments based on these treaties, and rely on their provisions to interpret constitutional provisions, legislation and to develop the common law.
4. Facilitating access to courts by disadvantaged litigants should be a joint commitment on the part of the judiciary and the government. A*micus-curiae* interventions by civil society organisations should also be encouraged in public interest litigation;
5. Appropriate modules on economic and social rights as human rights should be an integral part of judicial education programmes, and include international and comparative examples of how they may be enforced in practice; Attention should also be paid to the development of appropriate and innovative remedies to prevent and redress violations of economic and social rights.

**Draft of 16 January 2001**