

Socio-economic Rights



PROGRESSIVE REALISATION?



AMARIGHTZA

Socio-economic Rights: Progressive Realisation?

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ABOUT THE AUTHORS

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Acronyms and abbreviations

ACCESS	Alliance for Children's Entitlement to Social Security
ACHPR	African Charter on Human and Peoples' Rights
ADSL	asymmetric digital subscriber line
ANC	African National Congress
ARV	Anti-retroviral
ASIDI	Accelerated schools infrastructure delivery initiative
BCCSA	Broadcasting Complaints Commission of South Africa
BNG	Breaking New Ground
CALS	Centre for Applied Legal Studies
CCC	Complaints and Compliance Committee
CCL	Centre for Child Law
CDE	Centre for Development and Enterprise
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CESCR	(United Nations) Committee on Economic, Social and Cultural Rights
CFO	chief financial officer
CoGTA	Department of Co-operative Governance and Traditional Affairs (previously DPLG)
Comtask	Communications Task Group
COO	chief operating officer
COSATU	Congress of South African Trade Unions
CRC	Convention on the Rights of the Child
CSIR	Council for Scientific and Industrial Research
CSSR	Centre for Social Science Research
DA	Democratic Alliance
DBE	National Department of Basic Education
DHS	Department of Human Settlements (previously National Department of Housing or NDoH)
DMA	Disaster Management Act 57 of 2002
DMMA	Digital Media and Marketing Association
DORA	Division of Revenue Act (renewed annually)

SOCIO-ECONOMIC RIGHTS

DPLG	Department of Provincial and Local Government (now CoGTA)
DPME	Department of Planning, Monitoring and Evaluation
DWA	Department of Water Affairs (previously DWAF)
DWAF	Department of Water Affairs and Forestry (now DWA)
ECA	Electronic Communications Act
ECDoE	Eastern Cape Department of Education
ECS	electronic communications service
ECT	electronic communications and transactions
EEA	Employment of Educators Act 76 of 1998
EFF	Economic Freedom Fighters
EHP	Emergency Housing Programme
ES	equitable share
ESTA	Extension of Security of Tenure Act 62 of 1997
FBSan	free basic sanitation
FBW	free basic water
FICA	Financial Intelligence Centre Act 38 of 2001
FHR	Foundation for Human Rights
FLISP	Finance Linked Individual Subsidy Programme
FXI	Freedom of Expression Institute
GCEO	group chief executive officer
GCIS	Government Communication and Information System
GDE	Gauteng Department of Education
GEC	General Education Certificate
GG	Government Gazette
HDA	Housing Development Agency
HOD	head of department
HSDG	Human Settlements Development Grant
IBA	Independent Broadcasting Authority
ICASA	Independent Communications Authority of South Africa
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all forms of Racial Discrimination

ACRONYMS AND ABBREVIATIONS

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTs	information and communications technologies
IDP	Integrated Development Plan
IEC	Independent Electoral Commission
IP	Internet protocol
IPTV	Internet protocol television
IRDP	Integrated Residential Development Programme
ISP	Internet service provider
ISPA	Internet Service Providers' Association
LDoE	Limpopo Department of Education
LRC	Legal Resources Centre
LSM	Living Standards Measurement
LTSM	Learning and Teaching Support Materials
MAT	Media Appeals Tribunal
MDDA	Media Development and Diversity Agency
MEC	Member of the Executive Council (provincial 'cabinet minister')
MIG	Municipal Infrastructure Grant
NDoH	National Department of Housing (now called Department of Human Settlements or DHS)
NDP	National Development Plan
NERSA	National Energy Regulator of South Africa
NGO	non-governmental organisation
NHFC	National Housing Finance Corporation
NHSDB	National Housing Subsidy Database
NHSS	National Housing Subsidy Scheme
NIA	National Intelligence Agency
NPC	National Planning Commission
NSC	National Senior Certificate
Nurcha	National Urban Reconstruction and Housing Agency
NUSP	National Upgrading Support Programme
NWSRS	National Water Services Regulation Strategy
OBE	Outcomes Based Education

OECD	Organisation for Economic Co-operation and Development
PAJA	Promotion of Administrative Justice Act 3 of 2000
PCSA	Press Council of South Africa
PDMSA	Print and Digital Media South Africa
PDMTTT	Print and Digital Media Transformation Task Team
PED	Provincial Education Department
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
PMSA	Print Media South Africa
POCDATARA	Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004
R2K	Right to Know Campaign
RDP	Reconstruction and Development Programme
RGA	Regulation of Gatherings Act 205 of 1993
RHIG	Rural Household Infrastructure Grant
RHLF	Rural Housing Loan Fund
RICA	Regulation of Interception of Communications and Provision of Communications Related Information Act
SA	South Africa
Saarf	South African Advertising Research Foundation
SABC	South African Broadcasting Corporation
SACMEQ	Southern and Eastern Africa Consortium for Monitoring Educational Quality
SADF	South African Defence Force
SADTU	South African Democratic Teachers' Union
SAHRC	South African Human Rights Commission
SAICE	South African Institution of Civil Engineering
SANDU	South African National Defence Union
Sanef	South African National Editors' Forum
SAPS	South African Police Service
SASA	South African Schools Act 84 of 1996
SATRA	South African Telecommunications Regulatory Authority
SCA	Supreme Court of Appeal

ACRONYMS AND ABBREVIATIONS

SCOPA	Standing Committee on Public Accounts
SERI	Socio-Economic Rights Institute of South Africa
SERs	social and economic rights
SGB	school governing body
SHF	Social Housing Foundation
SHI	Social Housing Institution
SHP	Social Housing Programme
SHRA	Social Housing Regulatory Authority
SIU	Special Investigating Unit
SSA	State Security Agency
TIMSS	Trends in International Mathematics and Science Study
TRU	temporary residential unit
TV	television
UISP	Upgrading of Informal Settlements Programme
UKZN	University of KwaZulu-Natal
UN	United Nations
UPM	Unemployed Peoples' Movement
UPR	Universal Periodic Review
USAASA	Universal Service and Access Agency of South Africa
USDG	Urban Settlements Development Grant
VIP	ventilated improved pit latrine
Waspa	Wireless Applications Service Providers' Association
WSA	water services authority
WSDP	water services development plan
WSP	water services provider

Foreword

The Foundation for Human Rights was established by President Mandela's government and the European Union in 1996, the year that the South African Constitution was approved by our country's first democratic parliament, complete with its ground-breaking Bill of Rights and extensive provisions for securing the socioeconomic rights of citizens. The Foundation's mandate then was to contribute to addressing the legacy of apartheid and to help build a constitutional state.

In the years since then, the Foundation has pursued its mission as both a grant-maker and facilitator of programmes that promote and protect human rights. We work to address the legacy of apartheid, to promote social transformation and to build a human rights-based culture based on the Constitution. We do this through rights education, by supporting civil society organisations, and through programmes which empower vulnerable groups and build participatory democracy. The Foundation also supports programmes which bring government, chapter nines and civil society together to promote constitutional rights in order to build a capable state. Our mission has even expanded overseas, where we work to support the transitions of other countries to a human rights-based culture.

The FHR has a long-standing relationship with the Department of Justice and Constitutional Development (DOJ&CD) and is the department's implementing partner in the Socio-Economic Justice for All (SEJA) programme, intended to assist the most marginalised and vulnerable groups in the country. SEJA continues the work of the Access to Justice and Promotion of Constitutional Rights (AJPCR) programme (2011–2014).

One of the radical aims of the Constitution, stated in the Preamble, was that a new social order in South Africa should not only establish the right of citizens to live free from all forms of discrimination and abuses of power, but should also ‘improve the quality of life of all citizens and free the potential of each person’.

Since 1994, one of the aims of successive African National Congress governments has been to help secure the rights of ordinary people, particularly those disadvantaged by apartheid, to these new socioeconomic rights: to health, water, housing, food, education, a safe environment, and proper sanitation.

But to what extent have these rights actually been secured in the 20 years since the advent of a more democratic society in South Africa? To what extent has the quest to realise them been undermined by the lasting inequities bequeathed by apartheid, and a local and global economic environment that one way or another has come to be dominated by the tenets of neoliberalism? In 2014, the Foundation for Human Rights began to answer these questions by commissioning a series of papers by South African scholars and experts examining how far the realisation of socio-economic and political rights granted by the South African Constitution has advanced in practice. The papers cover the jurisprudence and practical application of the law in respect of the rights to housing, sanitation, health, education, water and social security. We are now publishing these papers, which were completed between 2014 and 2016. An overview of the Constitutional Court’s jurisprudence on socio-economic rights has been written by Khulekani Moyo.

Two additional papers on the development of political rights cover the issues of the rights to protest, and to freedom of expression. These political rights are profoundly linked to socio-economic rights, for without the right to protest and without public scrutiny of rights abuses, it can be extremely difficult, if not impossible, for individuals and communities to advance struggles for realising their socio-economic rights.

The collection is not comprehensive: it does not include dedicated chapters on the right to food, the rights of women and children, the rights to language and culture, or the right to a safe and secure environment, all of which are outlined in the Bill of Rights.

In some instances, it should be noted, law and jurisprudence have advanced further since these various individual papers were first commissioned.

For example, with respect to the right to education, the Limpopo Textbook appeal was decided by the Supreme Court of Appeal level at the end of 2015. The court ruled that the government had, in failing to provide sufficient textbooks on time, violated learners' rights to a basic education.¹ Faranaaz Veriava advises that there have also been significant developments in policy and case-law relating to scholar transport, and that the Legal Resources Centre has in 2016 been pursuing a class action over post-provisioning in the Eastern Cape.

Jackie Dugard points out that there have been few changes since 2014 in respect of the rights to water and sanitation, but there has significant movement on housing rights jurisprudence. For example, *Mchunu v Executive Mayor of eThekweni* (Mchunu) saw the Durban High Court holding that city's executive mayor, city manager and director of housing personally accountable, under threat of fines or imprisonment, for ensuring that 37 poor families who had been evicted were at last provided with permanent accommodation. A similar order from the South Gauteng High Court in the case of *Hlophe v City of Johannesburg* (Hlophe) was upheld by the Supreme Court, and by the Constitutional Court in July 2015. As a result, 'Municipal office bearers may now risk fines or imprisonment if they fail to implement court orders timeously. These judgments have therefore cemented the constitutionally secure position of unlawful occupiers that are faced with the threat of homelessness.'²

The SEJA programme was launched at the end of 2014, by which time some of the papers in this collection were already completed. Some of the papers look forward to South Africa's ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This ratification, in January 2015, entered into force on 12 April 2015.

In scrutinising the ways in which our courts have succeeded and failed in the struggle to advance the rights of all South Africans, the need for a broader culture of human and socio-economic rights becomes more apparent. The persistence of extreme poverty, inequality and other rights abuses in South Africa, not least on occasion by the organs of the state

itself, raises questions about progress made so far. It also raises questions about the possible limitations of a solely legalistic approach to the establishment of a rights-based culture. Education and legal action are essential pillars of such a culture, but are no substitute for that culture itself, which must reside in the hearts and minds of all citizens to become a real influence on social reality. It also raises the question of whether the courts themselves should decide on issues which may need negotiation, instead of sometimes engaging in what has come to be known as lawfare.

In its early days, the Constitutional Court tended to choose the most generous and progressive possible interpretations of the Bill of Rights. But, over the years, it has often endorsed the state's protests that the full realisation of individual rights is constrained by 'limited resources'. While this deference to apparently practical considerations may have made sense on a case-by-case basis, over time it is an approach that has perhaps itself become an impediment to the full realisation of socioeconomic rights that the drafters of the Constitution envisioned. Could it be that because South Africa has, with the support of the courts, consistently under-spent on human development that the economy now apparently does not allow for greater social spending, with the tragic consequence that more than 20 years after the establishment of a constitutional democracy with substantial socio-economic rights protections, a great many citizens have yet to truly 'free their potential'?

It is our hope that this collection of papers by some of South Africa's leading scholars on law and socioeconomic jurisprudence may point towards answers to these questions and provide something of a compass for the broad movement of civil society that will be necessary if progress towards the full realisation of socioeconomic rights in our society is to continue.

The FHR will continue to support that goal and vision, and we thank our various authors for their very important contributions to this project.

Yasmin Sooka
Executive director
Foundation for Human Rights
August 2016

Notes

1. Greg Nicolson 'Supreme Court of Appeal: Textbooks are a constitutional right' Daily Maverick (3 December 2015): <http://goo.gl/D9nG1M>.
2. Socio-Economic Rights Institute of South Africa 'Evictions and Alternative Accommodation in South Africa 2000–2016: An analysis of the jurisprudence and implications for local government' (SERI: February 2016), 20–22: <http://goo.gl/CwkXLm>. This paper provides a good overview of developments in housing jurisprudence up to 2016.

Introduction

ALBIE SACHS

Judge not, lest ye be judged

– MATT. 7:1

Introduction to the introduction

Judge not, lest ye be judged. I encountered these biblical words while deep in solitary confinement in an apartheid jail half a century ago. I never dreamt then that one day I myself would be a judge. Nor did I imagine that my judgments would in turn end up being judged. But that is how things in South Africa have come to pass. In this remarkably comprehensive and thoughtful book, judicial decisions from my fifteen-year term on the Constitutional Court, some of which I wrote myself, are now being placed under a sharp and relentless spotlight. The experience is exhilarating, and it is bruising. Scholars who are adept, knowledgeable and passionate, use forceful language to express their deep commitment to seeing social and economic rights (SERs) treated as fundamental human rights, enforceable by the courts. This is both what the Constitution demands, and what engaged scholarship should seek to achieve. Indeed, it is what we judges must learn to live with, to welcome and draw benefit from. The interaction between the judiciary and its critics should never cease: we pronounce judicially; activist academics then examine our decisions; we may or may not reflect upon their critiques but will

certainly make further pronouncements; the critics go on to advance further analyses, and so the dialogue continues. And, to add an interesting twist, the publishers of this volume have invited me to write an introduction to the critiques it contains. The interactive mirroring is endless – I am asked to be the judge judging the judges who are judging the judges, including myself!

In the circumstances I could ensure that the first words of the book become the last word on the subject. Yet, it would be unfair to the authors to use these opening pages to pre-emptively challenge the accuracy or aptness of their critiques. It would also be inconsistent with the institutional reticence required of a former judicial officer; in biblical language, I spake, and must forever hold my tongue. My observations should accordingly not serve to create a hindsight-induced patina to cover the past. Indeed, as we judges are wont to say, our decisions must continue to speak for themselves as they were written, even after we leave the Bench. At the same time, to be defunct as a judge doesn't mean to be extinct as a thinker. It would be unduly deferential and a disservice to both the writers and the readers, for me to balk at saying anything of consequence at all about exciting and important judicial processes in which I took part.

So, keeping up my judicial chin, I will restrict myself simply to offering a few signposts to the rich and intricate materials that follow. In doing so, I will identify some acute legal and strategic dilemmas raised by the writers. I will also add a few reflections of my own. It was a wonderful experience to be a judge on the Court where, with legal machetes in hand, we were called upon to beat the path to permit the enforcement of socio-economic rights.

Introduction

In the beginning there was nothing. True, the constitutional text radiated with a pristine eloquence. Yet sitting up on the Bench responding to actual cases required us to go beyond simply reciting beautiful texts in resonant voice. The more important our role and the greater our authority, the stronger the need for us to be careful while we were bold. It was

indeed a case of: *Hamba kahle umConstitutional Court*. We had to establish meanings that were principled, coherent, operational and sustainable. And there was no case law and there were no textbooks to guide us. International judicial experience on the enforcement of social and economic rights was virtually non-existent. The constitutions of Ireland and India both included social and economic rights, but in each case these rights were expressly declared to be non-enforceable in courts of law. The Canadian Charter that was giving rise to extremely helpful fundamental human rights jurisprudence from the Canadian Supreme Court, was completely silent on social and economic rights. The common law had nothing to say on the subject. The whole formalist and technicist mode of legal reasoning with which we were familiar was hostile to developing an appropriate form of legal discourse.

Indeed, the very notion of fundamental rights was new and startling to the established South African legal mind. A young reader today could hardly imagine how revolutionary the idea was of treating the rights to health, housing, education and water, as existing on a par with the rights to speak out freely and to vote in secret. We had grown up in a legal system that gave more weight to the Oxford English dictionary than to our country's history or its social cleavages. Moreover, the legal community of which we were a part had been so strongly imbued with notions of separation of powers that it could not even envisage judges naysaying Government on questions of state policy and public spending, let alone developing an actual methodology for doing so.

How different it is today. As Chief Justice Willy Mutunga of Kenya has pointed out, the world is increasingly accepting that just as having a Bill of Rights is meant to correct deficiencies in concepts of representative democracy, so enforcing social and economic rights is intended to fill in lacunas left by the market.

Looking back, it is a tribute to the comprehensiveness and vitality of the 1996 Constitution that the jurisprudential void that existed when the Constitution was being elaborated has now been filled. Indeed, the output of judicial decisions and commentaries has been so great that the Foundation for Human Rights (FHR) has seen fit to undertake a comprehensive study of the progress on the achievement of socio-economic

rights in South Africa, including the Government of South Africa's fulfilment of its obligations in terms of the socio-economic rights as set out in the Constitution. As the first step, the FHR commissioned a series of position papers that qualitatively analyse, from a human rights perspective, the current fault lines in relation to the realisation of each right.

The papers include a quantitative baseline survey of the extent of realisation across each right; in-depth policy evaluations in respect of government policies and programmes in relation to each right; and seek to develop a bottom-up monitoring and evaluation methodology to allow individuals and communities to hold power-holders accountable. The position papers are the first step of the broader process which the FHR views as the initial building block for the remainder of the project and, in particular, to set up the terms and scope for the policy evaluations.

Similarly, the Department of Justice and Constitutional Development has itself appointed the Human Sciences Research Council (HSRC) and the University of Fort Hare to assess the impact of the Constitutional Court (CC) and the Supreme Court of Appeal (SCA) on the lived experiences of all South Africans, particularly in respect of the adjudication and implementation of socio-economic rights within the context of a capable and developmental state. This layered and textured critique on social and economic rights has become possible, indeed required, by the rich national and international material that has emerged. The ambit of the FHR's study is wide, dealing with international law, including General Comments, if applicable, from the respective UN Committees, as well as Human Rights Council comments, work done by rapporteurs and the African Peer Review on Civil and Political Rights as well as regional bodies; South African law; jurisprudence from the South African Constitutional Court (or relevant higher court) on how the state has dealt with its obligations and its failures to address its obligations; as well as directives from the court to the state, relevant policies, and spheres of government responsibility at all levels.

Social and economic rights were not included in the Interim Constitution with which the Constitutional Court worked in its first years. Then, even after the final Constitution came into force, cases concerning SERs were slow in coming. It seemed that the legal profession was

bemused by their unfamiliarity with such rights. Suddenly the *Soobramoney* case arrived, and did so in precipitate, heart-wrenching fashion. Mr Soobramoney was dying of renal failure. After having been given emergency dialysis treatment at a state hospital, he had been informed that since his general medical condition made him a poor candidate for a renal transplant, the use of the expensive equipment would be reserved for patients whose prognoses placed them higher in line for such operations.

When family funds for private treatment dried up, he returned in desperation to the state hospital, only to receive the same disheartening response. Claiming that this was denying him his constitutional rights, he went to the High Court and then, on an expedited basis, to the Constitutional Court.

These were not ideal circumstances for developing a deeply thought-through approach to the enforcement of SERs. The conceptual terrain was completely unexplored. A human life literally turned on our decision. And though the oral argument in court was helpful, we had extremely limited time to do further research, engage in workshopping and write up our decision. A posthumously-delivered judgment, however well articulated, would have been absurd. I do not think any of us were indifferent to Mr Soobramoney's heart-rending situation. The agony of Mr Soobramoney's counsel during argument had been palpable, as if his client's life had depended upon his persuasiveness. Remembering my days at the Bar, I had felt it appropriate to congratulate him from the Bench on the dignity of his presentation, and to add that if resources had been co-existent with compassion, the case would have been easy to resolve.

In the event, the Court went on to hold unanimously that when it came to the use of hugely expensive medical treatment, it could not fault the decision of the medical authorities, using rational and fair medical criteria, to give preference to the best candidates for renal transplants.

Mr Soobramoney died two days after our judgment was delivered. I remember that one of our law clerks, who later went on to become a distinguished lecturer and advocate, stormed down the passage, muttering angrily: 'They could have found some money somewhere.' Sections of

the press were highly critical of the decision. The human rights community in general expressed concern that through tolling the bell of lack of resources the Court would empty SERs of any real meaning.

I mention these circumstances to highlight some of the dilemmas built into the very heart of establishing constitutional justice in relation to competing individual and social claims to have access to extremely costly resources.

How should judges respond to the pressures placed upon them by the emotional exigencies of matters they hear? On the one hand, judges should never become machines and lose their sense of empathy and compassion for the tragic circumstances of people who appear before them. On the other, judges must develop conceptually sustainable responses that are compatible with democratic and fair ways of allocating scarce public resources. It would be most unfortunate, for example, if persons with the best lawyers, the sharpest elbows, and the greatest contact with the media, were able to get privileged access to costly drugs and expensive medical procedures. These issues, I should add, are alive and the subject of hot debate in Latin America. In recent years courts all over that continent have intervened robustly and on a huge scale to order what they regard as just provision of medical care to litigants with persuasive claims.

Soobramoney indirectly placed on the agenda a theme which, I believe, calls for more serious reflection than it has so far received. It is a topic that human rights lawyers have regarded with alarm, not to say horror, namely the rationing of rights. At first sight, the idea of rationing rights seems to challenge the very notion of their being both fundamental and deserving of equal protection. Yet, it is one thing to accept that all people are born free and equal, and that all rights are indivisible, interrelated and interdependent. It is another to assume that all rights must be protected and enjoyed in the same way. Any rationing of civil and political rights would strike at the very core of the right to equal protection of the law. Thus, the fundamental principle of voting has to be 'one person, one vote'. Similarly, when it comes to freedom of speech, the more voices there are, the better. The same applies to the right to a fair trial, which should not be enjoyed in different measure according to who the parties happen to

be. In that sense, the quality of freedom, like the quality of mercy, is not strained. Of course, reasonable limitations can be placed on the enjoyment of these rights. But in our system the limitations must be imposed by a law of general application, which applies equally to all affected by it. In the result, access to enjoyment of the right may be limited but will not be rationed.

SERs, however, by their very nature require rationing, at least for the main part. Competition for resources is built into the DNA of SERs. They cannot be realised by applying the principle that unless everybody gets everything, no one should get anything. The jurisprudential issue is not whether the access to enjoyment should be rationed but how the rationing can and should be constitutionally controlled. This is implicit in the constitutional design structured around the notion of progressive realisation of rights within available resources.

If the circumstances in which we heard *Soobramoney* militated against an adequately theorised approach to the enforcement of SERs, the same could not be said about *Grootboom*. By the time this case came to be argued before us, we knew that it was the ONE. A challenge in the Constitutional Court to the inclusion of SERs in the final text of the Constitution on the grounds that this would violate the separation of powers, had long been rejected. There was accordingly no dispute that the courts were bound to uphold SERs. In purely textual terms they enjoyed a status equal to that of civil and political rights. The problem was not whether to enforce them judicially, but how to do so. And, as I have mentioned, we had nothing to guide us.

The facts in Mrs Grootboom's case are fully set out in this book. In essence, as the winter rains were approaching, Mrs Grootboom and her children and a thousand other homeless people moved their shacks from low-lying land to a well-drained nearby hillside. Only then did they discover that the hillside had been set aside for low-cost housing, and that they were very low down in the queue. After mediation attempts had failed, they were evicted in a rough manner, ending up on a dusty sports-ground with only plastic sheets to keep off the approaching rains. A local attorney, later supported by the Community Law Centre of the University of the Western Cape and the LRC, brought proceedings in the High

Court to secure their constitutional right to housing. The High Court put in place an immediate temporary order providing that shelter be made available to the applicants pending the final determination of the matter. This secured sufficient time for judicial deliberation without constant references to the weather forecasts. The High Court decision on the application and the basis of the appeal to the Constitutional Court are detailed in the book and need not be repeated here. Suffice to say that by the time the matter reached us, we had a voluminous record and a thoughtful judgment of the High Court before us.

I kept imagining Mrs Grootboom's existential moment, lying on the ground at night with the clouds scudding overhead and wondering: Why? Why? When my children and I have done nothing wrong and all we want is a decent place to lay our heads, why are we sleeping out in the open with the rain about to fall? And I, sitting in my robes on the Bench experienced my existential moment, wondering: How? How? How could we as judges respond to her situation in a manner that was principled, operational and sustainable, when armed only with the text of the Constitution?

We looked at the relevant words once, twice, twenty times:

26. Housing

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. 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.

How did they apply to Mrs Grootboom's situation? The practice of our Court was to workshop over and over again when issues of fundamental importance were being considered. At each session we would go round the table, ensuring that everybody was able to make their inputs, once, twice, even three times. We explored many options. On the one hand, institutional modesty and judicial prudence cautioned against asserting

an unduly aggressive and interventionist judicial posture. On the other hand, if the rights of access to adequate housing were to have any meaning at all, then surely there should be some judicial response to the indignities to which Mrs Grootboom and others were being exposed. The debates were lively. We all spoke and we all listened.

Archimedes is reputed to have said: Give me a lever and I can lift the world. Judges are constantly in search of jurisprudential equivalents. They seek organising principles which, faithful to the letter, purpose and spirit of the text, enable them to find coherent and effective ways to resolve the actual disputes before them.

In the end, we reached a broad consensus on what our approach should be and it was left to Justice Yacoob to put his decisive imprint on the judgment to be delivered. The key concept on which it relied was the duty on the state to take *reasonable* legislative and other measures to realise the right. Courts were used to dealing with the concept of what is reasonable. Thus the standard of reasonableness was used in evaluating the amount of force that could be employed in self-defence; the degree of care that a person should use when driving a motor car; and the degree of thoughtfulness required of someone fulfilling a function in public administration. By its very nature, reasonableness was situation-based, involving elements of context and proportionality. Furthermore, applying the test of reasonableness in scrutinising measures taken by the state, would meet separation of powers notions in two ways. Firstly, the Court could not be said to be trespassing unduly into the heartland of the legislative and the executive functions when it was fulfilling its constitutional duty to uphold express provisions in the Bill of Rights. Secondly, in deciding whether or not the measures were reasonable, the judiciary would accord an appropriate degree of institutional decision-making discretion to the state. Thus, it would not assert its own opinions as to what the best measures would or should be, but only scrutinise the measures actually adopted by the state to see if they fell within the broad parameters of reasonableness.

Turning to the facts of the case, the judgment found that by international standards the state had in fact been meeting its obligations by providing hundreds of thousands of homes free to persons living in shacks.

But meritorious though it might have been, the housing programme nevertheless failed the test of reasonableness in one significant respect: it made no provision for accommodating people living in situations of crisis and extreme desperation, such as victims of eviction, fire and flood.

In deciding *Grootboom* in this way, the Court laid the first conceptual foundation stone of SER jurisprudence, namely, evaluation of the reasonableness of the measures taken by the state to fulfil its SER obligations progressively within its available resources. Internationally this approach won over many persons who had doubted the feasibility or appropriateness of courts enforcing SERs. But large portions of South African academia remained unconvinced. Sandy Liebenberg, a pioneering thinker in this area, regretted the fact that the Court had failed to give any substantive normative content to the SERs in question. Allied to this critique was the contention of many writers that the Court should have adopted the 'minimum core' approach developed by the Committee on Economic, Social and Cultural Rights (CESCR) of the United Nations. They argued that evidence should have been sought to establish what the minimum core in relation to housing was. Once this had been done, then any person falling below that minimum core should have been entitled to go to court to ensure that their housing circumstances were ameliorated to reach the minimum level required. It should be mentioned that in *Grootboom* the Court did not completely close the door to the minimum core approach, but, in the SER matter to which I will refer, the *Treatment Action Campaign* case (*TAC*), it did. Readers of this series of papers will discover that a number of the writers argue forcefully in favour of reintroducing the minimum core approach.

The main issue in the *Treatment Action Campaign* case was whether, contrary to received judicial wisdom, the court could and should intrude on highly contentious issues of state policy. The Court grasped this nettle. At issue was a decision by the Department of Health to limit to two sites in each of the nine provinces the provision of the drug Nevirapine to pregnant women who, living with HIV, were about to give birth. The drug was safe, it was being provided free, and doctors and mothers-to-be were clamouring for its use. Counsel for the state argued that courts should respect the well-established legal principle of not interven-

ing in questions of state policy. More specifically, counsel contended that it was for the state medical authorities and not for judges to prescribe drugs. The Court rejected this argument. It declared in general terms that it was precisely the separation of powers in the new Constitution that obliged the judiciary to check on state policies to see if they departed from the state's obligations to take reasonable measures to realise SERs. More specifically, the Court held that restricting the provision of Nevirapine to only 18 sites in the country was unreasonable and represented an unconstitutional violation of the rights of women living with HIV who were about to give birth in the remainder of the country. Writers in this book observe that compliance with the Court's decision marked the beginning of a dramatic change in the governmental stance on the provision of anti-retrovirals (ARVs), so that today South Africa has the largest ARV programme in the world.

I remember the *TAC* case vividly at a purely personal level. The Court had been filled with people wearing T-shirts bearing the legend 'HIV positive'. Young, old, female, male, black, brown and white, they remained totally silent while Arthur Chaskalson delivered a synopsis of the judgment. Then, moments after we had retired to the passage behind the Court, cheering broke out. Tears welled up in my eyes, not just because of the impact of the pandemic in our country, but because of a surge of overwhelming emotion about what it meant to be part of a court upholding fundamental rights.

Feelings of a different sort seized me when I was asked to write the lead judgment in the *Port Elizabeth Municipality* case. About fifteen African families evicted from plots in another part of the city, put up their shacks on vacant land adjoining an upmarket suburb of Port Elizabeth. Under pressure from the well-housed homeowners in this suburb, the City Council obtained an order in the High Court for the fifteen families to be evicted. The eviction order was overturned in the Supreme Court of Appeal. The Council appealed to the Constitutional Court and I was asked to prepare the lead judgment. After reading the papers, I felt completely torn. The grounds on which the eviction order had been overturned appeared to be highly technical and not too persuasive. In these circumstances my judicial oath of office required me to uphold the law

without fear, favour or prejudice, and restore the order of eviction. At the same time I, as Albie, who had spent his whole life fighting against unjust dispossession and inequality, could not imagine myself signing an order compelling people rendered homeless by apartheid statutes, to give up their modest homes on vacant land owned by people who already had comfortable houses of their own. I thought to myself: if I cannot uphold my oath of office, the only course open to me is to resign. Fortunately, I was able to convert a purely personal crisis into an objective, constitutional tension. On the one hand, the Constitution required that the landowners should not be arbitrarily deprived of their property. On the other, it declared that no one should be evicted from their homes except by court order, taking account of all circumstances, with statute providing further that an eviction order should only be issued if it was just and equitable to do so.

Once more the Court workshopped the various dimensions of the issue. We decided that justice and equity would not be served simply by taking account of traditional land law concepts, but had also to pay regard to the history of dispossession and homelessness in South Africa. It became clear that the role of the Court went beyond merely deciding as a matter of law who was in the right and who in the wrong. As often happens in a pluralist constitutional democracy, the issue was not one of right versus wrong, but of right versus right. The Court's role was to preside over a complex and difficult social process. It was in these circumstances that we introduced a procedural element by holding that justice and equity required that there be engagement between the parties in the form of mediation.

Not too long afterwards, in *Olivia Mansions*, Justice Zak Yacoob took the principle a major step forward. The words 'meaningful engagement', which had appeared in passing in my judgment, were made central to the remedy he proposed. Since then, the concept of meaningful engagement has become well-established in cases dealing with evictions of the poor. And so, in the incremental way in which the Court's jurisprudence has evolved, *meaningful engagement* took its place alongside *reasonableness* as the second foundation stone of SER jurisprudence. In this volume, some of the authors make useful suggestions about extending the concept of

meaningful engagement to areas other than that of evictions.

I conclude this introduction with one final question: what are the factors that lead courts to become actively interventionist in social and economic matters? While writers in this volume who favour bolder interventions argue primarily within the framework of what they consider the intrinsic logic of SER realisation, my sense is that the primary determinant lies in factors outside that logic. In India, it was the last generation of young lawyers who had fought for Independence who re-imagined the role of the Supreme Court. Here in South Africa, we proactively embraced the promise that the Constitution held out to advance the rights of the poor and the marginalised. In Latin America, it has been judges who had cut their legal teeth in the fight against military dictatorship, who moved beyond the formalism of their predecessors on the Bench to focus on social justice as an integral element of meaningful constitutional freedom.

In both India and Latin America, there has been an interplay between legal doctrine on the one hand and perceived failures of representative democracy and the market on the other. Readers of this volume will make up their own minds as to whether South African courts have been too adventurous or too timid or have just about got it right when enforcing SERs. Before coming to any conclusion, they could do no better than to immerse themselves in this treasure house of information and ideas.

Albie Sachs

Cape Town, June 2014

Part 1

Socio-economic rights

The jurisprudence of the South African Constitutional Court on socio-economic rights

KHULEKANI MOYO

Introduction

This chapter analyses and reviews the jurisprudence of the South African Constitutional Court (Court) on the interpretation and enforcement of socio-economic rights since the enactment of the 1996 Constitution of the Republic of South Africa (Constitution). The various socio-economic rights in the Bill of Rights have presented South African courts with an opportunity to develop South Africa's legal system to be responsive to poverty in society.

The Constitution is one of the few national constitutions that expressly recognises socio-economic rights as justiciable rights. These rights include the rights to housing,¹ health care, food, water and social security,² children's socio-economic rights,³ education,⁴ and the socio-economic rights of persons deprived of their liberty.⁵ This chapter will investigate the role the Court has played in interpreting and enforcing these rights through a discussion and analysis of its case law. Additionally, it will highlight some of the key issues that have emerged from these cases.

The chapter is divided into three parts. The first part provides an overview of the key socio-economic rights jurisprudence of the Court since the coming into force of the Constitution. The second part identi-

fies and highlights the key issues emerging from the Court's socio-economic rights jurisprudence. The third part discusses the remedies that the Court has granted in socio-economic rights litigation. This part is followed by the conclusion and recommendations.

Part 1: The case law

The Court has delivered an increasing number of judgments interpreting and enforcing various socio-economic rights, including health care rights,⁶ housing rights,⁷ social assistance rights,⁸ water rights,⁹ electricity rights,¹⁰ sanitation rights,¹¹ and education.¹²

These judgements have dealt with two broad kinds of socio-economic rights claims. The first type relates to claims alleging failure by the State to formulate or implement a programme to give effect to socio-economic rights. The second type has concerned claims of unreasonable exclusion from an existing legislative or other programme giving effect to socio-economic rights.

This part of the chapter provides a broad overview of these judgements.

Standard of review: From rationality to reasonableness

Soobramoney was the first case in which the Court was asked to find a violation of socio-economic rights. The major question which the Court was called upon to decide was whether the health rights in section 27 of the Constitution entitled a chronically ill man in the final stages of renal failure to an order enjoining a public hospital to admit him to the renal dialysis programme of the hospital.

The applicant was denied access to dialysis because he suffered from chronic renal failure. He was not made a candidate for a kidney transplant as he would need kidney dialysis for the rest of his life, his condition being incurable. The KwaZulu-Natal Department of Health's policy limited access to dialysis to persons suffering from acute renal failure or chronic renal failure patients awaiting a kidney transplant. The policy was predicated on ensuring that those whose kidneys could be completely cured were given the best chance of eventually living without the need for dialysis.

The applicant claimed that the Department's decision amounted to a breach of his constitutionally protected right under section 27(3) of the Constitution not to be refused emergency medical treatment. The applicant further argued in the alternative that the policy breached his right of access to health care services guaranteed in section 27(1)(a) of the Constitution. The Court rejected the challenge based on section 27(3) because the applicant sought access to treatment of an ongoing, chronic condition, not of an emergency kind. The Court, instead, held that the applicant's claim fell to be adjudicated in terms of sections 27(1) and (2) of the Constitution. Those provisions entrench the qualified right of access to health care services.¹³

The Court had to address two critical issues in determining whether the refusal to admit the applicant to the dialysis treatment programme constituted an infringement of these provisions. The first issue to be determined was whether it was necessary to ration access to kidney dialysis treatment to patients such as the applicant. Secondly, if such rationing was necessary, did the policy adopted by the Department comply with the constitutional injunctions in sections 27(1) and (2) and, if so, were they applied fairly and rationally to the applicant's case.

The first issue concerns whether and under what conditions limited resources constitute a valid basis for limiting access to medical treatment for patients in the situation of the applicant. The Court noted that the scarcity of resources meant that the need for access to kidney dialysis treatment greatly exceeded the number of available dialysis machines. The Court further noted that this was a national problem extending to all renal clinics.¹⁴ According to the Court, the diversion of additional resources to the renal dialysis programme and related tertiary health care interventions from within the health budget would negatively impact on other important health programmes.¹⁵ Additionally, the Court pointed out that if the overall health budget was to be substantially increased to fund all health care programmes, this would diminish the resources available to the State to meet other socio-economic needs such as housing, food, water, employment opportunities, and social security.¹⁶

It is significant to note that the applicant had not suggested that the relevant guidelines established by the hospital were unreasonable. Nei-

ther did he argue that the guidelines were not applied fairly and rationally when the decision was taken that he did not qualify for dialysis treatment.¹⁷ Accordingly, the Court held that there was no breach of section 27(1)(a) read with (2).

This case established rationality as the standard by which the courts could measure State compliance with its positive obligations in relation to socio-economic rights. This standard was to be superseded by the reasonable standard in *Grootboom*, handed down almost three years later.

Grootboom concerned a group of adults and children who had moved onto private land from an informal settlement owing to the horrendous conditions in which they were living.¹⁸ Following their eviction from the private land, the claimants camped on a sports field in the area. The claimants found themselves in a precarious position where they had neither security of tenure, nor adequate shelter from the elements.¹⁹ The group launched an application to the Western Cape High Court on an urgent basis for an order against all three spheres of government, requiring them to provide temporary shelter or housing until they obtained permanent accommodation. The High Court held that there was no violation of section 26 (the right of everyone to have access to housing), but found a violation of section 28(1)(c), which protects the right of children to shelter. On appeal, the Court declared that the State's housing programme fell short of compliance with section 26(1) and (2) (the qualified right of everyone to have access to adequate housing). However, the Court found no violation of the right of children to shelter protected under section 28(1)(c) of the Constitution.

The Court rejected the contention that the right to housing provided for in section 26(1) of the Constitution had any interpretive content independently of the duty to take reasonable measures under section 26(2).²⁰ Notably, the Court rejected an interpretive approach urged by the *amicus curiae*, based on the idea that socio-economic rights had a minimum core content to which all rights bearers are entitled. This approach was based on the CESCR's General Comment 3 (1990) on the nature of States Parties' obligations, under the ICESCR.²¹ The Court rejected the minimum core approach on the basis that it had inadequate information before it to determine the minimum core of the right to adequate housing.

However, it held that the State's positive obligation under section 26 of the Constitution was primarily to adopt and implement a reasonable policy, within its available resources, which would ensure access to adequate housing over time. The bulk of *Grootboom* is devoted to defining the concept of reasonableness. The Court held that, to qualify as 'reasonable', State housing policy must:

- be comprehensive, coherent and effective;²²
- have sufficient regard for the social, economic and historical context of widespread deprivation;²³
- have sufficient regard for the availability of the State's resources;²⁴
- make short-, medium- and long-term provision for housing needs;²⁵
- give special attention to the needs of the poorest and most vulnerable;²⁶
- be aimed at lowering administrative, operational and financial barriers over time;²⁷
- allocate responsibilities and tasks clearly to all three spheres of government;²⁸
- be implemented reasonably, adequately resourced and free of bureaucratic inefficiency or onerous regulations;²⁹
- respond with care and concern to the needs of the most desperate;³⁰ and
- achieve more than a mere statistical advance in the numbers of people accessing housing, by demonstrating that the needs of the most vulnerable are catered for.³¹

In the end, the Court held that the State had a duty, within its available resources, to provide temporary shelter for those who have been evicted or face imminent eviction and cannot find alternative shelter with their own resources. Although the Court shied away from the idea that section 26 could give rise to a right to housing on demand, its focus on the need for the State to alleviate the plight of those in a desperate situation, according to Liebenberg, suggests that, in certain situations, section 26 of the Constitution could ground a fairly immediate claim for shelter.³² Liebenberg goes on to note that *Grootboom* is arguably the most far-reaching of the Court's socio-economic rights jurisprudence.³³ This is

because the decision resulted in the adoption of a national emergency housing policy.³⁴ *Grootboom* has also led to a line of decisions in which poor people have successfully resisted evictions potentially leading to their homelessness and consequently claimed alternative shelter from State organs.^[^35]

The reasonableness test adopted in *Grootboom* was confirmed in *TAC*, which was handed down almost two years later. This case involved a challenge to the limited nature of the measures introduced by the State to prevent mother-to-child transmission of HIV. The Court was asked to consider the reasonableness of government policy in facilitating access to antiretroviral treatment to prevent mother-to-child transmission of HIV. The applicants argued that the State unreasonably prohibited the administration of the antiretroviral drug, Nevirapine, at public hospitals and clinics outside a limited number of research and training sites.³⁵ This drug was of proven efficacy in reducing mother-to-child transmission of HIV. The applicants further argued that the State had failed to produce and implement a comprehensive national programme for the prevention of mother-to-child transmission of HIV. According to the applicants, the aforementioned conduct and omissions of the State constituted violations of the right of everyone to have access to health care services protected under section 27 of the Constitution, as well as children's right to have access to basic health care services, protected under section 28(1)(c).

The Court held that the State's programme to prevent mother-to-child transmission of HIV did not comply with its obligations in terms of sections 27(1) and (2) of the Constitution.³⁶ It also held that the decision to limit access to antiretroviral treatment to a few test sites was irrational because there was no compelling reason to not provide treatment where it was medically indicated outside a limited number of research and testing sites.

Beneficiaries of socio-economic rights

The cases discussed thus far dealt with claims submitted by South African nationals. *Khosa* involved an application for an order confirming the constitutional invalidity of certain provisions of the social assistance legislation that limited eligibility for non-contributory social assistance grants

to South African citizens. The applicants were a group of destitute South African permanent residents of Mozambican origin. This group was ineligible to access the various social assistance grants due to the citizenship requirement. The applicants argued that the relevant provisions in the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act 106 of 1997 infringed both the right of everyone to have access to social assistance provided for in 27(1)(c) read with (2) and the right against unfair discrimination provided in section 9(3).

The Court considered the reasonableness of the exclusion of permanent residents from the Social Assistance Act in terms of the right of access to social security entrenched under section 27(1)(c) read with (2) of the Constitution. The Court noted that the Constitution confers the right of access to social security on everyone.³⁷ The Court identified the following factors as being relevant to the assessment of the reasonableness of the exclusion:

- the purpose served by social security;
- the impact of the exclusion on permanent residents; and
- the relevance of the citizenship requirement to that purpose;³⁸
- the impact that this has on other intersecting rights – for example, the equality rights protected in section 9 of the Constitution.³⁹

After examining the claim through the lens of equality rights, the Court inquired whether the exclusion of permanent residents from social grants amounted to unfair discrimination in terms of section 9(3) of the constitutionally protected equality clause. The test for unfair discrimination involves the consideration of a number of factors, particularly its impact on the group discriminated against. The Court ruled the exclusion of South African permanent residents from state social assistance programmes as irrational.⁴⁰ The Court in that case was guided by the impact of the exclusion on the applicants' right to equality. The right to social security, the Court held, vests in everyone. According to the Court, the exclusion of permanent residents from the State's social security programme affected the applicants' rights to dignity and equality. The Court held that without sufficient reason being established to justify such an impairment of the applicants' equality rights, the exclusion was irrational

and unconstitutional. According to the Court, the purpose of the right of access to social assistance for those unable to support themselves and their dependants is to ensure that the basic necessities of life are accessible to all.⁴¹ Given these purposes and the *prima facie* entitlement of 'everyone' to have access to social security, the Court held that differentiating on the basis of citizenship in relation to social grants 'must not be arbitrary or irrational nor must it manifest a naked preference'.⁴² The Court held that a differentiating law which did not meet the basic requirement of rationality constituted a violation of both sections 9(1) and sections 27(2) of the Constitution.⁴³

The Court's assessment of the reasonableness of the exclusion of permanent residents in *Khosa* incorporates a proportionality analysis. There were other less drastic methods for reducing the risk of permanent residents becoming a burden to the fiscus than excluding them from gaining access to social assistance. Ultimately, the impact of the exclusion from social assistance on the life and dignity of permanent residents outweighed the financial and immigration considerations on which the State relied.⁴⁴ The stringent standard of review applied in this case should be understood in the context of the denial of a basic social benefit to a vulnerable group, and the intersecting breaches of a socio-economic right and the right against unfair discrimination.⁴⁵

Negative obligations implicit in socio-economic rights

The significance of *Jaftha* lies in the fact that it is the first case in which the Court elaborated on the meaning of negative duties in the context of section 26 (and, by implication, section 27) of the Constitution. The Court also adopted a distinctive approach to the determination of cases alleging violations of negative obligations relating to these rights.

Jaftha involved a challenge to the constitutionality of provisions of the Magistrates' Court Act 32 of 1944 that permitted the sale in execution of people's homes in order to satisfy sometimes very small debts. Such sales-in-execution would result in the eviction of the applicants from their State-subsidised homes. The applicants would have no suitable alternative accommodation should they be evicted, and would not be eligible again for a housing subsidy from the State.⁴⁶

The Court found that the impugned provisions of the Magistrates' Court Act constituted a negative violation of section 26(1) of the Constitution as they permitted a person to be deprived of existing access to adequate housing.⁴⁷ This negative duty, it was held, was not subject to the qualifications in subsection (2) relating to reasonableness, resource constraints and progressive realisation. According to the Court, deprivations of existing access to housing (and by implication, other socio-economic rights) can only be justified in terms of the stringent requirements of the general limitations clause in section 36 of the Constitution.

The Court, in carrying out the limitations analysis in terms of section 36 of the Constitution, closely scrutinised the purposes that the relevant provisions of the Act were designed to serve, and found them to be over-broad. It thus held that the relevant provisions were not justifiable.

Jaftha shows that, as is the case with civil and political rights, socio-economic rights impose negative obligations of the State, the breach of which can be the subject of litigation. Thus, where to the State through its conduct or legislation deprives people of their existing access to socio-economic rights, such conduct or legislation will be regarded as a *prima facie* breach of sections 26 and 27 of the Constitution. The burden then shifts to the State to justify such conduct or legislation according to the general limitations clause. This shows that a stronger model of review applies to negative duties.

The duty to assist people in crisis situations and facing mass evictions

In *Minister of Public Works v Kyalami Ridge Environmental Association (Kyalami)*,⁴⁸ the Ministry of Public Works relied on its constitutional obligation to assist people in crisis situations to defend its decision to establish a transit camp on State-owned land, which had previously been used as a prison, to temporarily house destitute flood victims from Alexandra Township who had been displaced by severe floods. This decision was challenged by a neighbouring residents' association on the grounds that there was no legislation authorising the government to establish the transit camp and that the decision was unlawful in that it contravened the town planning scheme and environmental legislation.

In a unanimous judgment, the Court first addressed the issue as to whether the government had power to establish a transit camp on a prison farm for the accommodation of flood victims. It held that none of the laws relied on by the applicant excluded or limited the government's common law power to make its land available to flood victims pursuant to its constitutional duty to provide them with access to housing. It further ruled that procedural fairness did not require government to do more in the circumstances than it had undertaken to do, namely to consult with the Kyalami residents in an endeavour to meet any legitimate concerns they might have as to the manner in which the development will take place. According to the Court:

To require more would in effect inhibit the government from taking a decision that had to be taken urgently. It would also impede the government from using its own land for a constitutionally mandated purpose, in circumstances where legislation designed to regulate land use places no such restriction on it.⁴⁹

The cases that would follow *Kyalami* would establish the State's duty to consult unlawful occupiers and the duty to provide alternative before an eviction order is made against them. In *Port Elizabeth Municipality*, an eviction application was brought in terms of section 6 of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) by the Port Elizabeth municipality against about 68 people who were occupying informal dwellings erected on privately owned land within the jurisdiction of the municipality. The municipality was responding to a neighbourhood petition in pursuing the eviction application.

The Court held that 'the normal ownership rights of possession, use and occupation' of property have to be balanced with 'a new and equally relevant right not to be arbitrarily deprived of a home'.⁵⁰ It explained the substantive interests that are threatened in an eviction context thus:

Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and

family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat.⁵¹

The Court further explained that the fact that people have housing rights which may conflict with property rights in an eviction application fundamentally changes the traditional approach of courts in eviction applications. It thus held that the availability to the unlawful occupier of suitable alternative accommodation was a relevant factor in determining whether it is just and equitable to grant an order for eviction in terms of section 6(3) of PIE. The Court further noted, though, that there is 'no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available'.⁵² Having said that, the Court stipulated that a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.⁵³

The significance of *Port Elizabeth Municipality* lies in its insistence that unlawful occupiers, who enjoyed minimal rights under the previous legislative and common-law regime, are now the bearers of constitutionally protected rights, specifically the housing rights in section 26 of the Constitution. This confers on them interrelated procedural and substantive protections in the context of legal steps to evict them from their homes.⁵⁴ The Court held further that it would not be just and equitable to evict a community without prior consultation with them and without at least considering the possibility that they could be provided with security of tenure on any relocation site.⁵⁵

*President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Modderklip)*⁵⁶ dealt with the State's duties in the context of a private landowner's unsuccessful efforts to execute an eviction order granted in terms of PIE against a community occupying his land. At the time of the landowner's attempted execution of the order, the community numbered

approximately 40 000 residents. The Court held that the State's failure to take steps to assist the landowner to recover his property and, at the same time, avoid the large-scale social disruption caused by the eviction of a large community with nowhere to go, was unreasonable. The Court further held that it was unreasonable for the State 'to stand by and do nothing in circumstances where it was impossible for *Modderklip* to evict the occupiers because of the sheer magnitude of the invasion and the particular circumstances of the occupiers'.⁵⁷ The Court ordered the State to compensate the landowner for the occupation of his property. Significantly, the Court order expressly declared that the residents were entitled to occupy the land until alternative land had been made available to them by the State or the provincial or local authority.⁵⁸

In *Abahlali*, the Court declared section 16 of the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 to be inconsistent with section 26(2) of the Constitution. Section 16 compelled owners of properties or municipalities to institute eviction proceedings against unlawful occupiers within a period determined by the responsible Member of the Executive Council (MEC) by notice in the *Gazette*. The applicants argued that section 16 of the Slums Act, read together with various other provisions of the Act, constituted a regressive measure which retarded access to adequate housing, contrary to section 26(2) of the Constitution. The Act allowed the MEC to set a deadline for the eviction of every single unlawful occupier in the province in one notice.

The Court agreed that section 16 of the Act was unconstitutional and held that section 26 of the Constitution, the PIE Act and the cases decided under these provisions had established a 'dignified framework for the eviction of unlawful occupiers' and that section 16 was, on its face, incapable of an interpretation consistent with the framework.⁵⁹ In reaching this conclusion, the Court suggested that eviction must normally be a measure of last resort after all reasonable alternatives have been explored through engagement.⁶⁰ It also suggested that where it is possible to upgrade an informal settlement in situ, this must be done.⁶¹ Yacoob J's dissenting judgment also affirmed that the obligation to meaningfully engage fell on private parties seeking eviction, and not just on the State, as had previously been thought.⁶²

While these principles were implicitly established by the jurisprudence on evictions before the *Abahlali* decision, their explicit articulation by the Court confirmed the entitlements for poor people seeking to affirm their housing rights. Thus, failure to consider an upgrade of an informal settlement (as opposed to an eviction or relocation) might render the decision to evict or relocate reviewable. Claimants will also be able to propose alternatives to their eviction if these exist. These alternatives must now be explored prior to the institution of eviction proceedings.

The duty to engage meaningfully

The duty to engage broached in *Port Elizabeth Municipality* was elucidated more fully in *Olivia Road*. The applicants approached the Court to set aside an order that authorised their eviction from certain buildings in the inner city of Johannesburg that the City of Johannesburg alleged were unfit for habitation. The occupiers conceded that the conditions in the buildings were far from safe, but held that the buildings presented their only alternative to homelessness. The City had refused to offer the occupiers any alternative accommodation. In those circumstances, the occupiers said, an order for their eviction should not have been granted by the Supreme Court of Appeal.⁶³ The occupiers also pointed out that the municipality's eviction proceedings against them were part of a broader strategy to evict an estimated 67 000 people from 235 allegedly unsafe properties in the inner city of Johannesburg. The City had no plan in place to find alternative accommodation for these people. The occupiers claimed that the absence of such a plan was a violation of section 26(2) of the Constitution and that the Court should declare this to be so. The occupiers further asked the Court to supervise the formulation of a reasonable housing policy by means of a structural interdict.

In its judgment, the Court affirmed the basic principle that in situations where people face homelessness due to an eviction, public authorities should generally engage seriously and in good faith with the affected occupiers with a view to finding humane and pragmatic solutions to their dilemma. It held that failure of a municipality to engage meaningfully, or an unreasonable response in the engagement process, 'would ordinarily

be a weighty consideration against the grant of an ejectment order'.⁶⁴ As the Court held:

Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away. It must make reasonable efforts to engage and it is only if these efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.⁶⁵

The Court explained that the objectives of such engagement are to ascertain what the consequences of an eviction might be, whether the City could help in alleviating those dire consequences, whether it is possible to render the buildings concerned relatively safe and conducive to health for an interim period, whether the City had any obligations to the occupiers in the prevailing circumstances, and when and how the City could or would fulfil these obligations.⁶⁶ The Court explicitly linked the objectives of meaningful engagement with the duty of municipalities to act reasonably in relation to people's housing needs in terms of section 26(2). According to the Court in *Olivia Road*, 'meaningful engagement' would accordingly apply whenever public authorities seek to evict people from their homes in circumstances that expose them to potential homelessness, regardless of the common law or legislative power to evict.

The notion of meaningful engagement was brought into sharp focus in *Joe Slovo* which dealt with the implications of section 26 of the Constitution in circumstances where the State seeks to evict and relocate a large, settled community from their homes in order to facilitate a major housing development. In that case, claimants numbering 20 000 people appealed to the Court to set aside an order for their eviction granted

by the Cape High Court. The eviction was sought to implement the N2 Gateway housing project. The project involved the development of formal housing for low-income families on the site of the Joe Slovo informal settlement in which the occupiers resided. Thubelisha Homes, the housing company engaged by the State to implement the project, applied for the occupiers' eviction in order to implement the project. It intended to provide temporary accommodation at a new housing development near Delft, some 15 kilometres away from the settlement, where the occupiers could live until they were provided with permanent housing.

The occupiers argued that they were not unlawful occupiers and could not therefore be lawfully evicted. They also argued that the eviction was being sought to avoid giving effect to their legitimate expectation that 70 per cent of the houses to be provided in the upgraded settlement at the N2 Gateway project would be allocated to them. Lastly, they argued that the eviction order would not be just and equitable because the eviction was sought without meaningful engagement between the affected people and government authorities and because the eviction would, in any event, cause considerable hardship to the affected people.

The Court was unanimous in holding that there were no grounds for reviewing the reasonableness of the N2 Gateway Project, that an in situ upgrade of the land on which the Joe Slovo community was situated was not possible. The Court therefore endorsed the decision to relocate the community to a temporary resettlement area. The Court held that it was appropriate to afford State authorities a generous margin of discretion in relation to the relevant policy choices.⁶⁷ Thus, the Court agreed with the High Court that an eviction order was just and equitable in the circumstances. However, the eviction order was made on condition that the applicants be relocated to temporary residential units situated in Delft 'or another appropriate location'. The order also required an ongoing process of engaging meaningfully with the affected residents concerning various aspects of the eviction and relocation process.⁶⁸

Liebenberg has argued that the transformative implications of *Joe Slovo* are undermined by the readiness of the Court to find that the inadequacies in the engagement process with the community facing eviction did not vitiate the ultimate decisions taken concerning the Joe Slovo

community.⁶⁹ The flawed nature of the engagement between the officials and community is described by the Court as follows:

There can be no doubt that there were major failures of communication on the part of the authorities. The evidence suggests the frequent employment of a top-down approach where the purpose of reporting back to the community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision-making itself.⁷⁰

Such a top-down form of engagement represents the very opposite of 'the need for structured, consistent and careful engagement' by 'competent sensitive council workers skilled in engagement' that was endorsed by the Court in *Olivia Road*.⁷¹ Despite the above anomalies, the Court was prepared to conclude that the greater good which the N2 Gateway project sought to achieve outweighed the defects in the engagement process.

Can the reasonableness standard be used to challenge the adequacy of socio-economic services or goods?

In *Mazibuko*,⁷² the Court was asked to determine whether the City of Johannesburg's policy with regard to the supply of free basic water of six kilolitres per household per month (Free Basic Water policy) was in conflict with the Water Services Act and the right of access to sufficient water in section 27 of the Constitution. The Court was also called upon to determine whether the installation of prepayment water meters in Phiri was lawful.

The applicants argued that the City's Free Basic Water (FBW) policy was unreasonable because it was insufficient to meet the basic needs of poor households. They further argued that the decision by Johannesburg Water (Pty) Ltd (Johannesburg Water) to install prepayment water meters in Phiri amounted to administrative action and, because it was taken without consultation, violated section 4(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Lastly, they further argued that the automatic disconnection of prepayment water meters violated section

4(3)(b) of the Water Services Act, which requires reasonable notice and an opportunity to make representations prior to the limitation or discontinuation of water services.

The Court rejected these claims. It held that the right of access to sufficient water does not require the State to provide sufficient water upon demand to every person. The right, according to the Court, only requires the State to take reasonable legislative and other measures progressively to realise the achievement of the right within available resources. The Court rejected the applicants' argument that the Court should adopt a quantified standard determining the content of the right, and not merely its minimum content.⁷³

On the question of the constitutionality of the prepayment water meters, the Court held (contrary to the findings of the High Court and the Supreme Court of Appeal) that national legislation and the city's own by-laws authorised the latter to introduce prepaid water meters.⁷⁴ According to the Court, the cessation in water supply caused by a prepayment meter stopping is better understood as a temporary suspension in supply, not a discontinuation in water supply. In the Court's view, the installation of prepaid meters was therefore not in violation of the constitutional provision.⁷⁵

Liebenberg has argued that the Court adopted a particularly narrow frame of reference in ascertaining the deleterious impact of the pre-payment meter system on impoverished communities.⁷⁶ This is particularly the case with poor households, who are only limited to the free basic provision of six kilolitres per household per month should they be unable to pay for additional water supplies. This has negative implications for the life, health and dignity of such communities. Additionally, the absence of procedural safeguards prior to the discontinuation of water supply services from a household should they fail to pay for additional water puts them at a further disadvantage.⁷⁷ The Court's failure to do so resulted in its inability to appreciate the impacts of a prepayment system in comparison to a credit metered water supply system taking into account the socio-economic background of the community in question.⁷⁸ This is because those households from the former white suburbs experiencing financial challenges in paying for their water consumption are afforded statutory procedural safeguards of notice. They are also entitled to make

representations and, if need be, enter into an arrangement with the water services supplier for a staggered payment of any arrears on their water bills. Such safeguards are not available to poor households such as those in Phiri.

Geo Quinot has pointed out the absence of any detailed reference by the Court to the perilous personal circumstances of many of the residents of Phiri and the effect of the limitation of water introduced by Operation Gcin'amanzi on their lives.⁷⁹

Unlike in *Mazibuko*, in *Joseph* the Court emphasised the duty of public service providers to comply with procedural fairness under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) before taking a decision to disconnect basic services. The applicants were lessees of a building who had paid the amounts owing for their monthly electricity bills to their landlord. The contract for purposes of providing electricity to residents was between the landlord and City Power (a public entity formed by the City of Johannesburg). The landlord bore responsibility for making payments for electricity consumption on the property. The property accumulated substantial arrears for unpaid electricity bills to City Power, which resulted in the disconnection of the electricity supply by City Power. The applicants were left without power supply, despite being up to date with their payments to the landlord for electricity supply.

The tenants argued that their electricity supply was unlawfully disconnected because the right of access to adequate housing implied a right to electricity in appropriate circumstances. Whatever those circumstances were, a disconnection of an existing electricity supply to a residential property affected their constitutional right of access to adequate housing. At the very least, they argued, they were entitled to procedural fairness before the decision to disconnect them was taken. This should include notice and a reasonable opportunity to make representations. City Power argued that the tenants had no right to electricity that was enforceable against it. While the owner of the property had a right to receive electricity in terms of his contract with City Power (and accordingly the right to notice prior to the disconnection of their supply), tenants had no such right in the absence of a direct contractual nexus between them and City Power.

According to the Court, '[t]he real issue is whether the broader constitutional relationship that exists between a public service provider and the members of the local community gives rise to rights that require the application of section 3 of PAJA.' The Court held that the local government is constitutionally obliged to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider. It held that City Power had a duty to comply with the requirements of procedural fairness provided for under PAJA before taking a decision to disconnect the applicants with their electricity supply. The Court did not decide whether the right to housing implied a right to electricity.

Part 2: Main issues arising from the Constitutional Court's jurisprudence

This section discusses some of the key areas of concern that have emerged from the jurisprudence discussed above.

Reasonableness approach

As noted in the first part of this chapter, the Court has held that the decision whether the measures the State has taken to implement socio-economic rights meet the standards envisaged by the Constitution depends on the reasonableness of those measures. This approach was developed as the Court simultaneously dismissed arguments submitted by *amici* in cases such as *Grootboom*, *TAC* and *Mazibuko* that each socio-economic right entailed a minimum core obligation.

In *Grootboom*, where the reasonableness standard was first articulated, the Court pointed out that in reviewing these positive duties, the key question that the Court asks is whether the means chosen are reasonably capable of facilitating the realisation of the socio-economic rights in question.⁸⁰ This approach, it was held, was designed to allow government a margin of discretion relating to the specific policy choices adopted to give effect to socio-economic rights. According to the Court,

a court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.⁸¹

Essentially, *Grootboom* superseded overruled *Soobramoney*, which had established rationality as the standard by which to scrutinise socio-economic rights claims. As noted earlier, *Grootboom* and *TAC* developed detailed criteria for assessing the reasonableness of the State's measures.

The reasonableness approach has been criticised for failing to engage in a sufficiently substantive analysis of the content of socio-economic rights and the obligations they impose.⁸² It has been argued that the vagueness and openness of the reasonableness inquiry allows courts to avoid giving clear normative content to socio-economic rights. In contrast, the minimum core obligations approach attempts to develop a clear normative content for socio-economic rights.⁸³ Because of the failure of the reasonableness approach to define the content of the relevant socio-economic rights, it has been questioned whether it is capable of protecting those who are experiencing severe deprivation of minimum essential levels of basic socio-economic goods and services.⁸⁴ This category of vulnerable groups is in danger of suffering irreparable harm to their lives, health and human dignity if they do not receive urgent assistance.

According to Woolman and Botha, constitution adjudication involves two stages.⁸⁵ The first stage is concerned with developing the content of the relevant right and evaluating whether the respondent's conduct or omissions infringes the right. The second stage entails an inquiry into the respondent's purposes for limiting the right and an inquiry into the proportionality of the means chosen to achieve this purpose, including a consideration of less restrictive means.⁸⁶

Liebenberg has pointed out that reasonableness review does not clearly distinguish between determining the scope of the right, whether

it has been breached, and justifications for possible infringements. For example, in *Grootboom*, the Court held that the overarching obligation of the State under section 26 was the adoption of a comprehensive, co-ordinated programme which must be capable of facilitating the realisation of the right.⁸⁷ No effort was made to define the right to housing. In *TAC*, there is even less engagement with the scope and content of the right of access to 'health care services, including reproductive health care', protected in section 27(1). Similarly, in *Khosa*, while the Court emphasises the significance of the values of human dignity and equality in evaluating the reasonableness of the exclusion of permanent residents from the social assistance legislation, it engages only very superficially with the content or scope of the social security and assistance rights in section 27(1)(c).⁸⁸ Bilchitz points out that until some understanding is developed of the content of socio-economic rights, the assessment of whether the measures adopted by the State are reasonably capable of facilitating the realisation of a particular socio-economic right takes place in a normative vacuum.⁸⁹

The reasonableness approach has also been criticised for creating only an indirect entitlement to the goods and services promised by socio-economic rights since, at the end of the day, the claimant is only entitled to a reasonable government programme. Individuals and groups cannot claim concrete resources and services from the State. For instance, in *Grootboom*, the Court asserted that '[n]either section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand'. According to the Court, the State's obligation imposed by section 26 was to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations. The Court proceeded in the case to grant an order declaring the State's obligation to devise and implement a reasonable housing programme, incorporating reasonable measures to provide relief for those in urgent housing need, and living in 'intolerable conditions or crisis situations'.

Progressive realisation

The Court has interpreted 'progressive realisation' to mean the dismantling of a range of legal, administrative, operational and financial obsta-

cles which impede access to the rights, and the expansion over time of such access, to a larger number and broader range of people.⁹⁰ The concept of progressive realisation is a reflection of the resource-dependent nature of State obligations in relation to socio-economic rights. It also reflects the complexity of access to socio-economic rights given the entrenched structural patterns of the economy and systematic disadvantage. South Africa is a case in point where, as a result of apartheid policies, the black majority was subjected to systemic deprivation and discrimination in accessing basic services such as water, health care, housing, food, education and social security.⁹¹ Article 2(1) of the ICESCR enjoins States to take the necessary steps towards ‘achieving progressively the full realisation of the rights recognised in [the ICESCR].’ The Committee on Economic, Social and Cultural Rights (CESCR) has pointed out that progressive realisation constitutes acknowledgement that the full enjoyment of socio-economic rights will generally not be able to be achieved in a short period of time.⁹²

The term ‘progressive realisation’ shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the State must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.⁹³

Full realisation of all human rights requires States to develop policies which progressively ensure the realisation of the relevant rights.⁹⁴ This does not imply that States have unfettered discretion to do as they please when it comes to the fulfilment of socio-economic rights under the ICESCR.⁹⁵ In *Grootboom*, for instance, the Court held that the notion of progressive realisation implies that the State has the duty to remove all the legal, administrative, operational and financial obstacles that impede access to these rights. In the context of the right to adequate housing, Bilchitz has defined progressive realisation thus:

Progressive realisation involves an improvement in the adequacy of housing for the meeting of human interests. It does not mean some receive housing now, and others receive it later; rather, it means that each is entitled as a matter of priority to basic housing provision, which the government is required to improve gradually over time.⁹⁶

Liebenberg further points out that in the case of pressing resource constraints in the provision of basic services such as water, it is important that the needs of marginalised and disadvantaged groups should receive particular attention.⁹⁷ Progressive realisation, according to Liebenberg, must be understood to entail the State's obligation to improve the nature and quality of the services to which people have access.⁹⁸ This means that the standard of socio-economic goods and services provided should be adequate, sufficient and acceptable.

Progressive realisation, it must be noted, can assist a claimant to establish the unreasonableness of a State's acts or omission where a State has not taken timely or effective steps in realising the right to water.⁹⁹ The concept of progressive realisation must therefore be read in light of the objective of the ICESCR, which is to establish clear obligations for States to take steps towards full realisation of socio-economic rights such as the right to water.¹⁰⁰ In this context, the Court also specifically endorsed the views of the CESCR in the *Grootboom* case that 'any deliberately 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.'¹⁰¹

Availability of resources

It must be noted that in contrast to the provisions entrenching civil and political rights, or even the general limitations clause in section 36, sections 26 and 27 of the Constitution expressly refer to the availability of the State's resources. However, as the Court itself has acknowledged, the enforcement of all rights has resource implications.

It is notable that, in contrast to civil and political rights, the distrib-

utive and resource implications of socio-economic rights are often given much more prominence in the debates concerning their justiciability. This serves to emphasise the point that socio-economic rights require a degree of intervention from the State that has significant implications for pre-existing policy and resource distributions. The Court has expressly pointed out that the availability of resources will be a factor in the assessment of the reasonableness of the State's conduct.¹⁰² The State is afforded the latitude to demonstrate that the measures it has adopted are reasonable, taking into account its resource and capacity constraints and the overall claims on its resources. The Court has said that although its orders in enforcing socio-economic rights claims may have budgetary implications, they are not 'in themselves directed at rearranging budgets'.¹⁰³

This raises the question as to whether a court is confined to scrutinising existing budgetary allocations for the relevant socio-economic right or whether it can scrutinise the State's budgetary or macro-economic policies more broadly. In a domestic constitutional context, this raises the question whether courts have the institutional capacity and capability to make such determinations.¹⁰⁴ The cases which will present particular challenges are those where the resource implications of the claim are extensive and provision has not been made for such expenditure within existing budgetary frameworks. The question then becomes, how should the courts fulfil their constitutional mandate to enforce these rights without usurping the role of the other branches and spheres of government to distribute resources equitably among various legitimate priorities? Undoubtedly, claims involving significant budgetary implications warrant a measure of respect by the judiciary for the resource allocation decisions of the other branches of government. The courts may not have the evidence before them to assess the impact of such a decision on other needs and priorities. The burden of adducing evidence regarding the availability of resources, distributive decisions, and the overall onus of proof in respect of the defence of resource constraints rests on the State, as is the case with all inquiries into the justifiability of a failure to implement a right or of a limitation on a right.

The Court acknowledged the significance of the availability of resources in *Grootboom*, explaining that 'both the content of the oblig-

ation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources'.¹⁰⁵ In this case, the Court held that the government's housing programme, though in other respects rational and comprehensive,¹⁰⁶ was inconsistent with section 26 of the Constitution. This is because such a programme failed 'to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations'.¹⁰⁷

In *TAC*, the Court scrutinised and ultimately rejected the State's arguments that it did not have sufficient resources to provide Nevirapine throughout the public health sector. The Government had defended its restrictive policy on mother-to-child transmission of HIV, raising concerns ranging from the efficacy and safety of Nevirapine to a lack of resources and capacity to roll out a comprehensive programme to prevent mother-to-child transmission of HIV throughout the public health sector. The State's resource constraints arguments were evaluated in relation to the two legs of the challenge mounted by the *TAC* to the programme. The first leg of the challenge concerned the restriction placed on doctors from prescribing Nevirapine in facilities where testing and counselling facilities already existed. The Court noted that the administration of the drug is a relatively simple procedure, and the manufacturers had made a free offer of the drug to the government for a period of five years. The Court held that such orders may or may not be accompanied by a reporting order or structural interdict through which judicial supervision over the engagement process is maintained.

The second leg of the challenge concerned the extension of testing, counselling and treatment facilities to clinics that currently lack these facilities.¹⁰⁸ After a close analysis, the Court concluded that the capacity and costs arguments did not have sufficient factual cogency to outweigh the impact on a particularly vulnerable group of the denial of a basic life-saving medical intervention.¹⁰⁹ The Court's jurisprudence, for instance, shows that orders with clear budgetary and resource implications will be made in situations where the State does not place sufficient evidence before the court demonstrating that it lacks available resources or has other competing urgent claims on its available resources.¹¹⁰

Minimum core obligations

The idea of minimum core obligations suggests that there are degrees of fulfilment of a right and that a certain minimum level of fulfilment takes priority over a more extensive realisation of the right.¹¹¹ Bilchitz conceives of minimum core obligations as arising from the very basic interest people have in survival and the socio-economic goods required to survive.¹¹² Bilchitz further points out that:

The recognition of a minimum core of social and economic rights that must be realised without delay attempts to take account of the fact that certain interests are of greater relative importance and require a higher degree of protection than other interests.¹¹³

Within the South African context, Bilchitz has persuasively argued for the adoption of the minimum core concept.¹¹⁴ Bilchitz has argued that an analysis of obligations imposed by socio-economic rights on the State should entail a minimum core obligation to realise, without delay, the most urgent survival interests.¹¹⁵ Bilchitz's position is that the recognition that the State has a minimum core obligation to realise essential levels of each right represents a viable and principled method of approaching the justiciability of socio-economic rights.¹¹⁶ Therefore, each substantive right imposes upon a State a variety of core obligations that the State is obliged to satisfy.

In *Grootboom*, *TAC* and *Mazibuko*, the Court rejected the concept of the minimum core in its definition of the positive obligations imposed by sections 26 and 27 of the Constitution. In *Grootboom*, for instance, it pointed out that the determination of the minimum core in the context of the right to have access to adequate housing presents difficulties because there are people who need land, others need both land and houses yet others need financial assistance.¹¹⁷ Furthermore, the Court said that, unlike the CECSR which developed the notion of the minimum core obligations based on its extensive experience in reviewing State reports under the ICESCR, it lacked adequate information on which the content of the minimum core obligations could be based.¹¹⁸

Part 3: Remedies

Since deprivations of socio-economic rights tend to be systemic and take place on a large scale, they cannot be remedied by a once-and-for-all court order sounding in money. Thus, the Court has emphasised the broader importance of developing effective and innovative remedies to redress any infringement of constitutional rights. This is particularly relevant in socio-economic rights cases, where impoverished communities often lack access to legal services, and cannot afford to engage in ongoing litigation to secure an effective remedy.

Prohibitory and mandatory orders and interdicts

The purpose of interdicts is to prevent or to compel certain conduct. In the context of socio-economic rights cases, a prohibitory interdict may be considered in situations where there is a threatened interference with people's existing access to socio-economic rights. Where the violation of a socio-economic right consists of a failure to take particular steps or adopt measures in order to give effect to a positive duty, a mandatory order may constitute appropriate relief. Such an order requires the respondent to act in the manner specified in the particular order.

Mandatory orders

Mandatory orders play a crucial role in providing effective remedial relief for violations of socio-economic rights. Orders to provide benefits or services to the applicants or a defined class of people are appropriate in circumstances where urgent and concrete forms of relief are urgently needed, and the nature of the benefits to be provided can be defined clearly and provided relatively expeditiously. The *TAC* judgment placed it beyond doubt that the courts are not confined to making general declaratory orders relating to the State's non-compliance with the constitutional duties imposed by socio-economic rights. Neither are courts limited to issuing general mandatory orders requiring the State to adopt a 'reasonable programme' to give effect to particular socio-economic rights. In appropriate circumstances, a mandatory order may be issued requiring the State to provide or extend the provision of socio-economic goods and

services to defined groups or classes of persons. The primary underlying concern with orders requiring concrete benefits to be provided to particular groups relates to the institutional capacity and legitimacy of the courts to make decisions which have direct policy, budgetary and distributional implications.

In *TAC*, the orders imposed by the Court enjoined the government to act ‘without delay’ to ‘remove the restrictions’ to the provision of Nevirapine in public hospitals and clinics; ‘permit and facilitate’ its use when medically indicated; ‘make provision’ for counsellors based at public hospitals and clinics to be trained for the counselling necessary for the use of Nevirapine to reduce the risk of mother-to-child transmission of HIV; and ‘[t]ake reasonable measures to extend the testing and counselling facilities’ at all public hospitals and clinics ‘to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV’.¹¹⁹

In *Joe Slovo*, the Court upheld the order of the Western Cape High Court requiring the residents to vacate the Joe Slovo informal settlement in order to facilitate the development and upgrading of the settlement as part of the N2 Gateway Project. It is noteworthy that the Court affirmed the residents’ right to adequate alternative accommodation during the upgrading process and set detailed substantive standards for the provision of the temporary residential accommodation at Delft, including the provision of services and facilities.¹²⁰ The respondents were furthermore directed to allocate 70 per cent of the low-cost housing to be built at the site of Joe Slovo to the residents.¹²¹ The parties were further directed to ‘engage meaningfully’ with each other concerning certain aspects of the order.

Orders of ‘meaningful engagement’ and mediation

In the context of eviction applications, the courts have frequently made mandatory orders requiring the parties to engage with each other with a view to exploring mutually acceptable solutions to the dispute, including the possibility of securing suitable alternative accommodation for the occupiers facing eviction. Such orders may or may not be accompanied by a reporting order or structural interdict through which judicial

supervision over the engagement process is maintained. Such meaningful engagement orders are an example of an innovative type of mandatory order which may be given by a court in socio- economic rights litigation.

Olivia Road is the leading case in which an order was made for the parties to 'engage meaningfully' with each other. The Court issued an interim order requiring the City of Johannesburg and the applicants 'to engage with each other meaningfully' in an effort to resolve the disputes between them 'in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned'.¹²² The parties were further enjoined to file affidavits before the Court within two months that would report on the results of this engagement between them. Such an approach illustrates how a mandatory order by a court for the parties to engage meaningfully with each other can stimulate a dialogue leading to the provision of concrete benefits to a particular group. The orders of meaningful engagement made by the Court in cases such as *Olivia Road* and, to a lesser degree, in *Joe Slovo* and various other cases discussed above, suggest that the Court may be becoming bolder in experimenting with innovative remedies of this nature.

Reporting orders and structural interdicts

A court may, in addition to granting mandatory relief, require the respondent to report back to it and the other parties to the litigation on the implementation of the order – a 'reporting order'. In the alternative, the court may require the parties to negotiate a plan which will give effect to the relevant rights and report back to it on a regular basis. Significantly, at each stage the court issues a set of directions regulating further engagement between the parties and the implementation of the plan. Such a process is continued until the court is satisfied that the constitutional infringement has been satisfactorily remedied. Notably, at both stages of the implementation of the plan, the applicants (and possibly other independent institutions and experts) are given an opportunity to comment through filing affidavits on the reports filed.

Constitutional damages

In *Modderklip*, the Court recognised that compensation would constitute appropriate relief for the infringement of the relevant constitutionally guaranteed rights. The Court held that the remedy of constitutional damages constituted the most effective and expeditious way of vindicating the rights of both the landowner and the occupiers in the circumstances of the case. The landowner was compensated by the State for having to bear the ongoing burden of the unlawful occupation of his property. The order entitling the residents to remain on the land until alternative land was made available to them ensured that their housing rights were protected.

New evictions paradigm – joinder of State organs

The evictions jurisprudence has shown that by virtue of its constitutional obligations, the State has a fundamental interest in all eviction applications which result in homelessness, regardless of whether the eviction is instituted by an organ of state or private entity. According to the Court, the State has a duty to protect the constitutional rights at stake in eviction applications and to facilitate dialogic and mediated solutions. The public dimensions of eviction applications have been developed further in cases such as *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*,¹²³ in which courts have ordered the joinder of the State as a party to eviction proceedings brought by private landowners. The purpose of such joinder is to permit an order to be made against the relevant local authorities to facilitate mediation between the parties and to provide information to the court relating to alternative accommodation for those facing eviction. Cases such as *Port Elizabeth Municipality* and *Olivia Road* have emphasised the importance of procedural fairness and the need for parties to seek dialogic solutions to eviction conflicts through mediation or meaningful engagement.

Conclusion

Although the Constitution entrenches socio-economic rights as justiciable rights, their adjudication and enforcement by the Court has to date

been a mixed bag. This is evident from the way the Court has defined the nature of the obligations these rights engender. Economic injustice and other forms of social injustice mutually reinforce each other. This is particularly evident in the case of South Africa, where race, class and gender divisions are deeply embedded in the fabric of society. Social and economic deprivation and discrimination have a direct effect on the key values of human rights law – human dignity, equality and freedom.

The transformative ethos of the Constitution will not be realised if the vast inequalities and deep poverty are not addressed. The Court acknowledged thus:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services.¹²⁴

It is worth noting that not much progress has been made in economic transformation since these words were uttered fifteen years ago, as South Africa is more unequal now than it was then.¹²⁵ Although a black middle class is emerging, the country's poor remain unemployed, and without access to basic goods and services such as adequate health care, water, education and housing.

This chapter has argued that one of the key weaknesses in the socio-economic rights jurisprudence thus far lies in the reasonableness review developed by the Court for adjudicating the positive duties imposed by socio-economic rights.¹²⁶ This standard focuses on the appropriateness of State action to give effect to socio-economic rights. It leaves out of consideration the objective norms promoted, or the specific goods and services protected by the rights themselves. In its application of the reasonableness approach, the Court has failed to develop the substantive purposes and values which these rights seek to protect by defining the scope and content of such rights. Consequently, State organs responsible for the implementation of such rights and litigants lack normative guidance on the kind of processes and outcomes which are consistent with these rights.

The Court's jurisprudence to date demonstrates a failure to engage substantively with these questions. This is illustrated in *Mazibuko* where the Court's assessment of the reasonableness of the City of Johannesburg's water policies took place in the absence of an attempt to define the normative content of the right of access to sufficient water entrenched in section 27(1)(b) of the Constitution and the interests that it seeks to protect. This case further illustrates how the flexibility of the reasonableness approach has allowed the Court to defer to the executive's socio-economic policy choices to a degree that appears to be inappropriate. *Mazibuko* contains overt statements of deference to the executive.¹²⁷

The concept of reasonableness has, moreover, become too flexible and has enabled the Court to defer too easily to the executive. The Court appears to regard socio-economic rights litigation on positive obligations as doing little more than presenting the State with an opportunity to reformulate its plans in a manner which the Court will find reasonable. This approach has also been extended to those socio-economic rights of children and prisoners which are formulated as direct basic entitlements without the internal qualifications contained in sections 26 and 27. *Nokotyana* also illustrates the Court's reluctance to exercise its power to evaluate State policies by reference to a *Grootboom*-type standard of substantive reasonableness.

By adopting the reasonableness approach, the Court opted for a flexible approach which would allow it to interpret positive obligations imposed on the State by the constitutionally-protected socio-economic rights cautiously and incrementally. The Court's cautious approach is illustrated in *TAC*, where it explained that a socio-economic right does not 'give rise to a self-standing and independent positive right' enforceable independently.¹²⁸ The result is that the prospects for an individual litigant approaching the court claiming specific benefits are particularly bleak and the incentive to litigate is relatively low as the reasonableness standard has often been applied to justify the Court's deference to the executive's socio-economic policy choices.

Recent socio-economic rights judgments of the Court have sought to encourage and enforce deliberative engagement between the parties in finding mutually satisfactory solutions to their disputes. This is a poten-

tially significant development for encouraging participatory, context-specific solutions to rights conflicts. The evictions jurisprudence discussed in this report point to some features of a transformative approach to the Court's adjudication of socio-economic rights. The Court has interpreted section 26 (3) of the Constitution to impose not only procedural guarantees but also a number of substantive rights on those facing the ignominy of eviction from their homes. The Court has opined that meaningful engagement is a constituent element of reasonableness and accordingly a procedural requirement imposed by section 26(2) of the Constitution. In *Olivia Road*, the Court held that, prior to seeking an eviction, an organ of State will normally be required to show that it has engaged 'individually and collectively' with the occupiers who may be rendered homeless by an eviction and to 'respond reasonably' to the needs and concerns articulated in the process. The Court was reluctant to define what a reasonable response to potential homelessness is, but stated that the range of reasonable responses stretched from providing permanent alternative housing to the occupiers to providing no alternative accommodation at all.¹²⁹

The problem with the 'meaningful engagement approach' is that without a sense of what the community engaged with can reasonably expect to receive from the State, engagement may often degenerate into the enforcement of a predetermined State policy which may be inappropriate to the needs of the community engaged with. In the absence of substantive guidance on the nature and purposes of socio-economic rights, such engagement occurs in a normative vacuum. Nevertheless, orders of meaningful engagement can be useful in the context of the structural, participatory remedies discussed above.

The Court has created new entitlements in the context of negative infringements of socio-economic rights as earlier demonstrated in *Khosa*. The Court's recognition of the right to electricity as an implied constitutional right in *Joseph* represents a transformative approach in the interpretation and enforcement of socio-economic rights. Furthermore, the principles articulated in *Abahlali* confirmed relatively novel entitlements for poor people seeking to enforce their housing rights. This case clearly demonstrated that marginalised and poor people will also be able to pro-

pose alternatives to their eviction if these exist and such alternatives must be explored prior to the institution of proceedings. The Court has thus developed, albeit incrementally, the scope and content of the right to housing.

Creating appropriate and effective remedies for the breach of socio-economic rights protected in the Constitution is a big challenge in rights adjudication.

The Court has, accordingly, been given wide remedial powers to grant appropriate and effective remedies in socio-economic rights cases. The Court may grant 'appropriate relief, including a declaration of rights' and when deciding a constitutional matter, 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency' and 'may make any order that is *just and equitable*'.

The transformative potential of the Court's remedial jurisprudence has been constrained by the Court's reticence to endorse structural mandatory relief in the context of socio-economic rights cases. Structural orders are the most effective remedial option for redressing violations of socio-economic rights which require a series of structural reforms to be adopted over a period of time. Although structural remedies will not constitute appropriate or effective relief in all socio-economic rights cases, they nevertheless constitute a valuable remedy for particular types of socio-economic rights violations and their use should not be discouraged on the basis of restrictive conceptions of the separation of powers doctrine and judicial competence.

There are certain contexts in which it is particularly appropriate to impose positive duties on private actors to protect or facilitate communities and individuals' access to socio-economic rights.¹³⁰ The express provision made in the Bill of Rights for the application of human rights norms in private relations challenges the public/private dichotomy in South Africa's legal culture and tradition. The classic liberalism is often premised on the need to preserve maximum freedom from interference in the private spheres of the family and marketplace. Thus, any potentially redistributive measures in favour of the poor are to emanate from State-provided benefits and services.¹³¹

The idea that some of the negative or positive duties imposed by

socio-economic rights may bind private parties poses a direct challenge to the myth of a private sphere free of State influence and a public sphere in which the role of a Bill of Rights is to restrain an over-zealous State.¹³² However, South African courts have not constructed a clear methodology to guide the application of the rights in the Bill of Rights to extend to private law. Civil society organisations and litigants thus have a role to play to ensure that the powerful hold which the liberal legal culture has in private relationships is loosened so as to ensure the application of the normative value system underpinning socio-economic rights in that realm. Civil society organisations and litigants should assist courts to develop strategies to ensure that in certain appropriate contexts, positive duties are imposed on private actors to protect or facilitate people's access to socio-economic rights.

The adjudication of socio-economic rights facilitates participation by civil society organisations, individuals and communities in the formulation and implementation of social programmes bearing on socio-economic rights protected in the Constitution. However, there are myriad factors, institutional and political, which determine whether courts can play a transformative role in the realisation of socio-economic rights. Civil society organisations and other actors in socio-economic rights litigation should be conscious of the institutional and capacity limits of courts in delivering socio-economic goods and consider that particular claims may be appropriately considered through advocacy and other allied strategies. This also avoids the danger of inappropriate resorting to litigation resulting in judgments such as *Mazibuko* that impede rather than aid realisation of socio-economic rights.

The Constitution provides for broad remedial powers for the courts to enforce socio-economic rights. Despite this broad remit, this is another area of its socio-economic rights jurisprudence where the Court has been more deferential and cautious. Civil society organisations and other actors should ensure that the remedies that they seek from the courts in respect of socio-economic rights are tailored to the circumstances of the cases in question. As noted by Liebenberg, compliance with constitutional rights will not necessarily be achieved 'through a once-off, final judicial decree but will require an ongoing engagement between

relevant organs of State, affected communities and civil society organisations.¹³³ It is in that respect that structural interdicts discussed in this report are particularly well suited to the progressive realisation of socio-economic rights, as guidance and regular supervision by courts will ensure that any engagement process is underpinned by the norms and values entrenched in the Bill of Rights.

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<i>Minister of Health and Others v Treatment Action Campaign and Others (No 2)</i>	2002 (5) SA 721 (CC)
<i>Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others</i>	2004 (6) SA 505 (CC)
<i>Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others</i>	2005 (2) SA 140 (CC)
<i>Port Elizabeth Municipality v Various Occupiers</i>	2005 (1) SA 217 (CC)
<i>Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)</i>	2001 (3) SA 1151 (CC)
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<i>Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and Others</i>	2010 (3) SA 454 (CC)
<i>Mazibuko and Others v City of Johannesburg and Others</i>	2010 (4) SA 1 (CC)
<i>Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others</i>	2008 (3) SA 208 (CC)
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<i>Nkotyana and Others v Ekurhuleni Metropolitan Municipality and Others</i>	2010 (4) BCLR 312 (CC)
<i>City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another</i>	2012 (2) SA 104 (CC)

Notes

1. See section 26 of the Constitution.
2. Section 27.
3. Section 28(1)(c).
4. Section 29.
5. Section 35(2)(e).
6. *Soobramoney v Minister of Health, Province of KwaZulu-Natal* 1998 (1) SA 765 (CC) (*Soobramoney*), and *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) (TAC).
7. *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom*), *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (*Port Elizabeth Municipality*), *Jaftha v Schoeman; Van Rooyen v Scholtz* 2005 (2) SA 140 (CC) (*Jaftha*), *Occupiers of 51 Olivia Road, Berea Township and Another v City of Johannesburg and Others* 2008 (3) SA 208 (CC) (*Olivia Road*), *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) (*Joe Slovo*) and *Abahlali baseMjondolo v Premier of KwaZulu-Natal Province and Others* 2010 (2) BCLR 99 (CC) (*Abahlali*).
8. *Khosa and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) (*Khosa*).
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11. *Nokotyana and Others v Ekurhuleni Municipality* 2010 (4) BCLR 312 (CC) (*Nokotyana*).
12. See *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo and Others* 2010 (2) SA 415 (CC).
13. *Soobramoney*, para. 22.
14. *Soobramoney*, para. 24.
15. *Soobramoney*, paras 27–28.
16. *Soobramoney*, para. 28.
17. *Soobramoney*, para. 25.
18. See *Government of the Republic of South Africa v Grootboom*, para. 3.

19. *Grootboom*, paras 9–11.
20. See paras 34–46.
21. Committee on Economic, Social and Cultural Rights, *General Comment No. 3 on the Nature of States Parties' Obligations* (Fifth Session, 1991), U.N. Doc E/1991/23. The Court considered and rejected the approach again in *TAC* at paras 26–39.
22. *Grootboom*, para. 40.
23. *Grootboom*, para. 43.
24. *Grootboom*, para. 46.
25. *Grootboom*, para. 43.
26. *Grootboom*, para. 42.
27. *Grootboom*, para. 45.
28. *Grootboom*, para. 39.
29. *Grootboom*, para. 42.
30. *Grootboom*, para. 44.
31. *Grootboom*, para. 44.
32. See Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 151–153.
33. Liebenberg, *Socio-Economic Rights* 171.
34. See Volume 4, part 2 of the South African National Housing Code (2009).
35. See *TAC*, paras 10–11.
36. The qualified right of everyone to have access to health care services.
37. Section 27(1). See *Khosa*, paras 53–57.
38. *Khosa*, para. 49.
39. *Khosa*, para. 45.
40. *Khosa*, paras 53 and 85.
41. *Khosa*, para. 52.
42. *Khosa*, para. 53.
43. *Khosa*, para. 53.
44. *Khosa*, para. 82.
45. *Khosa*, para. 44.
46. *Jaftha*, para. 12.
47. *Jaftha*, paras 31–34.
48. *Minister of Public Works v Kyalami Ridge Environmental Association* (Kyalami) 2001 (3) SA 1151 (CC).

49. *Kyalami*, para. 109.
50. *Port Elizabeth Municipality*, para. 23.
51. *Port Elizabeth Municipality*, para. 17.
52. *Port Elizabeth Municipality*, para. 28.
53. *Port Elizabeth Municipality*, para. 28.
54. Liebenberg, *Socio-Economic Rights* 277.
55. *Port Elizabeth Municipality*, para. 55.
56. President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Modderklip) 2005 (5) SA 3 (CC).
57. *Modderklip*, para. 48.
58. *Modderklip*, para. 68 Order 3 (c).
59. *Abahlali*, para. 122.
60. *Abahlali*, paras 113–115.
61. *Abahlali*, para. 114.
62. See para. 69 of Yacoob J's dissenting judgment.
63. See *City of Johannesburg v Rand Properties* 2007 (6) SA 417 SCA.
64. *Olivia Road*, para. 21.
65. *Olivia Road*, para. 15.
66. *Olivia Road*, para. 16.
67. See, for example, *Joe Slovo*, paras 115–116.
68. *Joe Slovo*, Order paras 5 and 11.
69. Liebenberg, *Socio-Economic Rights* 309–310.
70. *Joe Slovo*, para. 378.
71. *Olivia Road*, para. 19.
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74. *Mazibuko*, paras 157–158.
75. *Mazibuko*, paras 106–111 and 157–158.

76. Liebenberg, *Socio-Economic Rights* 478.
77. Liebenberg, *Socio-Economic Rights* 478.
78. Liebenberg, *Socio-Economic Rights* 478.
79. G Quinot "Substantive Reasoning in Administrative-law Adjudication" (2010) 3 *Constitutional Court Review* 111 126.
80. See *Grootboom*, para. 41.
81. See *Grootboom*, para. 41.
82. D Brand "The proceduralisation of South African socio-economic rights Jurisprudence or 'What are socio-economic rights for?'" in H Botha, A J van der Walt and J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2004) 33–56.
83. Liebenberg, *Socio-Economic Rights* 173.
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85. S Woolman and H Botha 'Limitations' in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed. (Juta & Co., Original Service, 2006), chapter 34, 1–6; 16–29.
86. Section 36(1)(e) of the Constitution.
87. *Grootboom* (note 7 above) para. 41.
88. See the very brief treatment of the ambit of the right of access to social security in terms of section 27(1)(c) in *Khosa*, paras 46–47.
89. Bilchitz 'Towards a reasonable approach to the minimum core' 9–10.
90. *Grootboom*, para. 45.
91. See Liebenberg, *Socio-Economic Rights* xxi.
92. CESCR *General Comment 3* (1990) para. 9.
93. *Grootboom*, para. 45.
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100. General Comment No. 3 (1990) para. 9.
101. *Grootboom*, para. 45, citing CESCR General Comment No. 3 (1990) para. 9.
102. In *Grootboom*, para. 46, the Court held: 'There is a balance between goals and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.'
103. *Grootboom*, para. 38.
104. Liebenberg, *Socio-Economic Rights* 192.
105. *Grootboom*, para. 46.
106. *Grootboom*, paras 53–55 and 64.
107. *Grootboom*, para. 99.
108. *Grootboom*, para. 95.
109. *Grootboom*, paras 90–92, 115–120.
110. See also T Roux 'Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court' (2003) 10 *Democratisation* 92–111 for analysis of the South African Constitutional Court's approach to the issue of resource allocations.
111. Bilchitz, 'Reasonable Approach' 11.
112. Bilchitz, 'Reasonable Approach' 11.
113. Bilchitz, 'Reasonable Approach' 11.
114. In *TAC*, *Grootboom* and *Mazibuko* the Court rejected the minimum core concept in assessing the State's compliance with the positive obligations imposed by the economic, social and cultural rights in sections 26 and 27 of the Constitution. For a comprehensive analysis of the minimum core debate in South Africa's socio-economic rights jurisprudence, see Liebenberg, *Socio-Economic Rights* 148–151 and 163–173.
115. Bilchitz, 'Reasonable Approach' 2. For further discussion on the minimum core concept see also D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2002) 118 *South African Law Journal* 484–501.
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119. *TAC*, para. 135. Orders 3(a)–(d).
120. *TAC*, para. 7. See particularly the order para. 10.

121. *TAC*, order, para. 17.
122. See para. 3 of Constitutional Court interim order 30 August 2007, *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg*, CCT 24/07, available at: <http://www.constitutionalcourt.org.za> ('City of Johannesburg Interim Order')
123. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).
124. *Soobramoney*, para. 8.
125. Liebenberg, *Socio-Economic Rights* xxi.
126. The Court first adopted the reasonableness approach as a model of review in *Grootboom*.
127. *Mazibuko*, para. 61.
128. See *TAC*, para. 39.
129. See *Olivia Road*, para. 18.
130. Liebenberg, *Socio-Economic Rights* 330.
131. Liebenberg, *Socio-Economic Rights* 61.
132. Liebenberg, *Socio-Economic Rights* 61.
133. Liebenberg, *Socio-Economic Rights* 462.

Realising the right to basic education in South Africa

FARANAAZ VERIAVA

*Education is the most powerful weapon we can
use to change the world.*

– NELSON MANDELA, 2003

Introduction

The right to education is often described as an ‘empowerment’ right because it is perceived as a precondition for the exercise and enjoyment of other rights. This was recognised in the Constitutional Court case of *Governing Body of the Juma Musjid Primary School and Another v Ahmed Asruff Essay NO and Others (Juma Musjid)*. The court, quoting from General Comment 13 to the International Covenant on Economic, Social and Cultural Rights (ICESCR), stated:¹

Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their com-

munities. Education has a vital role in empowering women, safeguarding children from exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.

Under apartheid, 'Christian National Education' was premised on the notion of Afrikaner nationalism and separate and limited education for Africans so as to restrict African mobility in the labour market. This was characterised by gross inequality in the financing of education.²

There was a clear imperative to transform apartheid education at the dawn of democracy in 1994. The South African Constitution therefore included a Bill of Rights with an education clause. There was also a shift from Christian Nationalist and Bantu Education to an outcomes-based curriculum (OBE) that was conceptualised so as to facilitate more participative forms of learning and be infused with more human rights culture.³ A new legal framework for schooling was also established through the South African Schools Act of 1996 (SASA) and the National Education Policy Act of 1996.

The key features of this framework include: the desegregation of schools, nine years of compulsory schooling, a new system of funding for all schools, and the democratisation of the governance of schools through the establishment of school governing bodies (SGBs) that include parents and learners in school governance. In the recent case of *MEC for Education and Others v Governing Body of Rivonia Primary and Others (Rivonia)*, the Constitutional Court stated:⁴

The primary purpose of the Schools Act is to provide for the organisation, governance and funding of schools and to give effect to the constitutional right to education.

However, despite this transformative imperative inherent in the legal framework, the legacy of inequality in educational provisioning persists today. That is, historically advantaged schools (usually former white or 'model C' schools) have the advantage of decades of infrastructural investment and of being relatively well-resourced with access to qualified teachers. On the other hand, historically disadvantaged or African schools are characterised by high teacher-pupil ratios, unqualified and under-qualified teachers, lack of books, libraries and laboratories and other resources.

According to the 2011 Diagnostic Report of the National Planning Commission (NPC):⁵

Education is perhaps where the apartheid legacy casts the longest shadow, because the performance of schools and the quality of learning are influenced by several historical factors.

The Constitutional Court has on several occasions seized the opportunity to comment on the enduring impact of these historical disparities. In *Juma Musjid*, for example, the court noted:⁶

The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.

Since 1994 there have been several challenges from different sectors of South African society to the legal framework. These legal challenges have largely been grounded in education rights claims.

The first major wave of litigation was initiated early under the Constitution. It occurred between the state and SGBs of former 'model C' schools. Litigation in these cases has been driven by the Afrikaans community arguing for their right to Afrikaans single-medium public schools

or for a school with an Afrikaans ethos.⁷ This area of contestation has accrued a sizeable jurisprudence, culminating in the 2009 case of *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo (Ermelo)*.⁸

From about 2001 to 2007 a second wave of challenges to the legal framework emerged from within civil society. This related to the costs of schooling.⁹ Civil society organisations argued that the system of schools fees imposed by the new legal framework, together with secondary costs such as uniforms and transport posed barriers for poor learners attempting to access their right to a basic education.

In response to this mobilisation, the then Minister of Education (till 2004), Kader Asmal, a savvy politician and human rights lawyer himself, rather than face a court challenge¹⁰ under the apparently strong, unqualified right to basic education, initiated a review of the legal framework to the right to education. Pursuant to this review, significant policy reforms were introduced to the SASA and its subordinate legislation, and were implemented from 2006. The most significant reform was the introduction of free schooling in the poorest schools.¹¹

The review has apparently succeeded in averting any major constitutional challenges in respect of access costs, with the result that no significant jurisprudence has yet been developed on the right to basic education.¹² There remain, however, several concerns in respect of access costs despite the legal reforms. These are discussed later.

Since 2008, there has been a resurgence in civil society mobilisation for education reform. At the forefront of this renewed mobilisation have been non-governmental organisations (NGOs) such as Equal Education, the Legal Resources Centre (LRC), the Centre for Child Law (CCL) and Section27. This burgeoning 'quality education movement' has initiated a third wave of litigation which has questioned state provisioning or the quality of education, primarily in historically disadvantaged schools. These challenges have often been predicated on an underlying notion that the various manifestations of inadequate resources (that is, infrastructure, textbooks, teachers and furniture) at many historically disadvantaged schools amount to a violation of the right to a basic education under section 29(1)(a) of the South African Constitution Act 108 of 1996

(Constitution). As such, these cases have sought to determine the core components that constitute the right to basic education.

There is also currently a fourth wave of litigation underway. These cases, like the language cases, seek to define and determine the parameters of the powers and functions of SGBs and provincial governments. While the litigation in these cases have originated as disputes between SGBs and provincial departments of education (PEDS), *amicus curiae* interventions led by organisations such as Equal Education and CCL have sought to highlight the impact of these power struggles on learners' rights to a basic education.¹³

These legal challenges have impacted on the realisation of the right to basic education in different ways. An examination of their role is therefore integral to the analysis in this paper. Against this backdrop then, this paper is an examination of the extent to which the right to basic education in South Africa has been realised. The paper examines the meaning of the right to basic education in terms of section 29(1)(a) as it has evolved in South Africa's jurisprudence and within international and regional law. It then reviews the relevant law and policy and arrangements for basic education provisioning. The paper then undertakes a rights-based fault-line analysis of the systemic problems in basic education delivery in South Africa. Finally, the paper makes some recommendations for future interventions to promote basic education delivery.

International and regional law

The right to education is recognised in article 26 of the Universal Declaration of Human Rights (1948) (Universal Declaration) and articles 13 and 14 of the ICESCR(1966). The Committee on Economic, Social and Cultural Rights, created in terms of the ICESCR, has prime responsibility for monitoring socio-economic rights, including the right to education. The Committee has, to this end, issued a number of General Comments in which the rights enumerated in ICESCR are given content. The most relevant for the right to education are General Comments No. 3,¹⁴ No. 11¹⁵ and No. 13.¹⁶

The four 'A' scheme as elucidated in General Comment 13 provides one of the most useful foundations from which to begin to interpret, and to give substantive content to, the right to basic education. It states that, while the exact standard secured by the right to education may vary according to conditions within a particular state, education must exhibit the following features:

(a) *Availability* – functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers on domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer laboratory and information technology.

(b) *Accessibility* – educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:

Non-discrimination – education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds;

Physical accessibility – education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a 'distance learning' programme); and

Economic accessibility – education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13(2) in relation to primary, secondary and higher education: whereas primary education shall be available 'free to all', States Parties are required to progressively introduce free secondary and higher education.

(c) *Acceptability* – the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to educational objectives required by article 13(1) and such minimum educational standards as may be approved by the State.

(d) *Adaptability* – education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

At a regional level, the right to education is entrenched in article 17 of the African Charter on Human and Peoples' Rights (ACHPR). Article 11 of the African Charter on the Rights and Welfare of the Child (ACRWC)¹⁷ also provides for the right to education.

The right to education is also recognised in a number of international instruments dealing with the rights of specific vulnerable groups. The inclusion of the right to education into these instruments acknowledges the interdependence of this right with other rights.

Thus, articles 23(3) and (4), 28 and 29 of the United Nations Convention on the Rights of the Child (1989) (CRC) contain extensive provisions with regard to the progressive realisation of the right of the child to education and the aims of education. The Committee on the Rights of the Child has adopted a number of General Comments that are relevant from a human rights perspective.¹⁸

Article 10 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) requires that state parties eliminate barriers to education for women through various measures such as revisions to curricula to remove gender stereotypes and adopting measures to reduce female student drop-out rates. South Africa has also ratified the UNESCO Convention Against Discrimination in Education.

South Africa has signed, but has not [yet, in 2014] ratified the ICE-SCR.¹⁹ South Africa has, however, ratified both the CRC and CEDAW and the African instruments. The South African Human Rights Commission's (SAHRC) 'South African Human Rights Commission Charter of Children's Basic Education Rights' has relied on the four 'A' scheme

in developing its own tool of analysis for monitoring the South African State's compliance with its obligations in terms of the right to basic education guarantee.²⁰ While this Charter is not binding on the State, it is a useful tool in the SAHRC's monitoring function in terms of section 184(3) of the Constitution for determining whether or not the State is in compliance with its socio-economic rights obligations.

Finally, South Africa is a signatory to the UN Millenium Declaration. The millenium development goal (MDG) for education is the achievement of universal primary education by 2015. According to the South Africa Millenium Development Goal Country report:²¹

South Africa has achieved the goal of universal primary education before the year 2015, and its education system can now be recognised as having attained near universal access. However, if this achievement is to be translated into educational transformation in a *meaningful way*, serious interventions are needed to improve the *quality and functionality* of education. [own emphasis]

Domestic law and policy

The right to education in the South African Constitution is entrenched in Section 29:

- (1) Everyone has the right –
 - a. to a basic education, including adult basic education; and
 - b. to further education, which the state must take reasonable measures to make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –
 - a. equity;

- b. practicability; and
 - c. the need to redress the results of past racially discriminatory law and practice.
- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –
- a. do not discriminate on the basis of race;
 - b. are registered with the state; and
 - c. maintain standards that are not inferior to standards at comparable public educational institutions.
- (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

Unlike other socio-economic rights, this right is crafted as a hybrid right rather than a purely socio-economic right. Section 29 therefore provides that insofar as the right is a socio-economic right, the State has an obligation to provide education for all those entitled to it. But it is also a civil and political right as it contains freedom of choice guarantees, such as language choice in schools and the freedom to establish and maintain independent educational institutions: hence the freedom of individuals to choose between state-organised and private education.

The socio-economic entitlements under section 29 are also distinguishable from each other. Section 29(1)(a) is an ‘unqualified’ socio-economic right while section 29(1)(b) is a ‘qualified’ socio-economic right. The focus of this paper is the socio-economic obligations arising out of section 29(1)(a), and not the socio-economic obligations in sections 29(1)(b). This is based on the premise that the obligations that arise in respect of section 29(1)(a) are those which pertain to the schooling phase of education, while those in respect of section 29(1)(b) would pertain to education beyond the schooling phase.²² The restructuring of the erstwhile Department of Education in 2009 into two separate departments – basic education and higher education – makes sense within the context of this constitutional delineation.

Section 29(1)(a) states: ‘Everyone has the right to a basic education, including adult basic education.’

As noted, the right to basic education is often referred to as an unqualified socio-economic right since it is not subject to the qualifiers

(i.e., subject to progressive realisation within the State's available resources) that characterise the other socio-economic rights such as health, welfare and housing. To date, there have been no cases before the Constitutional Court dealing directly with the socio-economic right obligations imposed on the State by section 29(1)(a). The indications from existing jurisprudence, discussed below, suggest however that when the Constitutional Court is finally called upon to adjudicate a case which directly implicates the positive obligations in respect of section 29(1)(a), it may adopt a standard of review somewhat different, elevated or adapted, from the reasonableness test which is applied in respect of the qualified socio-economic rights cases.²³

Access to schools is regulated in SASA in the following manner. Section 3 makes schooling compulsory for learners from the age of seven to fifteen or grades one to nine, whichever comes first.²⁴ This phase of education is referred to as the General Education Certificate (GEC). Section 3 further requires that the relevant Member of the Executive Council (MEC) must ensure that there are sufficient places for all learners within this compulsory phase.²⁵ Thus the State must ensure that all learners who fall within the compulsory phase of school have access to a school.²⁶ Section 5 contains a non-discrimination provision that requires that all eligible learners be admitted to public schools without being discriminated against in any way.

In 2007, the previous Minister of Basic Education, Naledi Pandor, amended SASA in ways that can be viewed as a concerted effort to put in place mechanisms for establishing minimum standards to improve the quality of basic education. Section 5A requires that the Minister of Basic Education provide norms and standards for (a) school infrastructure; (b) capacity of a school in respect of the number of learners a school can admit; and (c) the provision of learning and teaching support materials. This would include textbooks and other learning materials such as workbooks. The amendments contained a further provision that requires that MEC's report annually to the Minister on measures taken by each of the provinces to comply with the various norms.²⁷ Until very recently, when the norms and standards for basic infrastructure were finalised, norms and standards had not been established in any of these areas of basic edu-

cation delivery. The impact of this omission is discussed in the section on the fault-line analysis.

SASA contains extensive provisions relating to the powers of SGBs. For the purposes of the analysis in this paper, what is most relevant is that SGBs have certain specific policy-making functions. These include, among others, the power to determine the language policy, admissions policy and the code of conduct of their individual schools.²⁸ SASA further provides for the withdrawal of SGB functions on 'reasonable grounds' and in accordance with its due process provisions.²⁹

The funding of basic education is rather complex. In the legal framework (predominantly SASA and its subsidiary legislation) provisioning is delineated into three main categories. These include: infrastructural provisioning, that is, the building of schools, classrooms and the provisioning of water, sewage and telephone services; personnel expenditure, that is educator salaries; and non-personnel recurrent expenditure, that is, capital equipment and consumables used inside schools for schools to function properly, such as textbooks, stationery, computers etc. Personnel expenditure constitutes the largest amount of state spending on schools (somewhere between 80 and 90 per cent). Once state funds are allocated to schools for either personnel or non-personnel expenditure, deficiencies in school budgets are made up through the charging of school fees or fund raising.³⁰ By way of explanation of the funding framework, the relevant laws and policies are discussed under different sub-headings.

School fees and other access costs

As noted, the 2005 reforms introduced free schooling by distinguishing between fee-paying and no-fee schools.³¹ Fee-paying schools are currently the schools located in wealthier communities. As such, these are generally former 'model C' schools, or schools located in the wealthier areas of South Africa's townships (these include historically Indian, coloured or African townships). SASA provides that a school that has not been declared a no-fee school can charge school fees when a majority of parents attending the annual budget meeting adopt a resolution to do so. It then provides that parents must, at such a meeting, determine the

amount of fees to be charged and the criteria to exempt those parents who are unable to pay fees.³²

Under the 2005 legal reforms, the mechanisms to alleviate the burden of school fees on poor parents, and to protect exempted learners from discrimination, have been improved. The Regulations for the Exemption of Parents from the Payment of School Fees ('Exemption Regulations') provide the parameters for determining eligibility for exemptions.³³ The Exemption Regulations also set out the procedures for applying for exemptions and for appealing exemption determinations of an SGB. SASA provides that where parents are not eligible for exemptions but fail to pay school fees, the school can sue the parents for outstanding school fees. However, while SASA provides that a school may sue a parent for outstanding school fees, it nevertheless attempts to protect parents and learners by:³⁴

- prohibiting a school from charging anything in excess of a single compulsory fee, subject to strict exemptions criteria. This outlaws, for example, registration fees;
- having in place a clear and unambiguous definition prohibiting the more pernicious forms of discrimination against children of non-fee paying parents;³⁵
- placing an onus on a school to prove that it has implemented the regulations and has ensured that a parent is not eligible for an exemption before taking legal action against a parent;
- prohibiting an SGB from attaching a parent's home unless alternative accommodation is made available to the parent;
- extending the scope of automatic exemptions to include not only orphans and learners in some form of foster care, but also to circumstances where the government pays a grant linked to a learner, such as a child support grant. In the past, the national department has advised parents to use their child support grants to pay for school fees; and
- improving the formula for determining exemptions.

In respect of other access costs, in 2006, the state developed its 'National Guidelines on School Uniforms'.³⁶ The Guidelines were developed for various reasons, including, to protect and regulate learner rights in

respect of freedom of expression and freedom of religion, and to ‘reduce the cost of school uniforms, especially for the poor, such that the obtaining of a uniform does not deter attendance or participation in school programmes.’ The Guidelines require that SGBs develop their uniform policy in accordance with the Guidelines. The Guidelines discourage schools from requiring more than one uniform for a school and makes recommendations so as to make uniforms more affordable. Moreover, the Guidelines prohibit schools from refusing admission to a learner from a school because of the inability to obtain or wear a uniform. SGBs are also required to assist learners who are unable to afford uniforms, through, for example, the establishment of second-hand shops. The Guidelines are, however, non-binding.³⁷

Infrastructure

The Norms and Standards for School Funding³⁸ require that each province budgets for this category of expenditure in terms of their overall budget. It must then target the neediest areas as determined, broadly, according to (a) the lack of schools and (b) the overcrowding of schools. Allocations should also prioritise the GEC phase of education.³⁹

In 2008, the Department of Education published ‘The Draft National Policy for an Equitable Provision of an Enabling School Physical and Teaching and Learning Environment’⁴⁰ (the National Policy) and ‘The Draft National Minimum Norms and Standards for School Infrastructure.’⁴¹ These two documents were to provide the blueprint to guide future infrastructural development in public schools in South Africa.

The National Policy document was finalised in 2010.⁴² The document acknowledges the link between poor infrastructural conditions and poor learner outcomes. It also acknowledges the problems that have occurred with the application of the criteria set out in the Norms and Standards for School Funding. In particular, it notes that the criteria have been applied in an ad hoc manner, with crisis often being the key determinant for how spending has occurred. Or, the criteria have been differently applied between provinces, so, for example, one province may prioritise the building of school toilets while another province will prioritise the provision of classrooms for ‘tree schools’ or over-crowded schools.

The National Policy therefore aimed to develop new criteria for infra-structural planning. It states that from 2008:

[N]orms and standards for the physical teaching and learning environment will be set at the national level by the Department of Education. National norms and standards will set and express in terms of minimum and optimum provision. Along this continuum, norms and standards for school safety, functionality, effectiveness and enrichment will be explicitly defined at a national level by the Department of Education. The DoE will also set clear target dates by which a set proportion of schools will meet each level of enablement in its environment. The DoE will also set a clear date by which all South Africa schools will meet norms and standards for effectiveness.

The Regulations Relating to Minimum Norms and Standards for Public School Infrastructure⁴³ were however not finalised until as recently as the end of November 2013 and as a direct result of a protracted legal battle between the National Department of Basic Education (DBE) and civil society, in particular Equal Education. These Regulations establish benchmarks in respect of provisioning for, among others: classrooms, electricity, water, sanitation, libraries, laboratories, electronic connectivity and perimeter security. It also sets incremental target dates for meeting specified goals. Thus, the eradication of mud and asbestos schools, and the provision of services to schools without any water, power or sanitation must be prioritised within three years. The norms and standards relating to the availability of classrooms, electricity, water, sanitation, electronic connectivity and perimeter security must be phased in over a seven-year period. The norms and standards relating to libraries and laboratories must be provided within ten years. All other norms and standards contained in the Regulations are to be phased in before the end of 2030. PEDs are also now required to develop school infrastructure plans within a year and to report annually to the Minister of DBE on progress in implementing the Regulations.

Absent from earlier drafts but now included in the finalised Regula-

tions are provisions for learners with special needs in both special and mainstream school environments. Thus, the Regulations require that all schools must adhere to the principles of universal design. In addition, schools for learners with special education needs, ‘must be fully accessible’. These schools must therefore contain, among other provisions, ramps, clear floor passages and walkways for wheelchairs, parking for persons with disabilities and visual aids for communication between educators and learners who are deaf and hearing impaired.⁴⁴ The time-frame for implementing these provisions appears however to be unduly long: that is, the deadline for compliance is 2030.

A discussion of the process culminating in the finalisation of these Regulations is discussed under the jurisprudence section, while the deficiencies and concerns with the finalised Regulations are discussed in the fault-line analysis.

Non-personnel provisioning

State provisioning for non-personnel expenditure for schools is also guided by the principles set out in the Norms and Standards for School Funding. State allocation for recurrent, non-personnel expenditure is made by ranking schools on a poverty index from the poorest quintile to the least poor quintile. Resource allocation is made according to the position of a school on the poverty index, and then 80 per cent of funds for non-personnel expenditure are directed to 60 per cent of the poorest schools. While this is seen as a progressive poverty targeting measure, it constitutes a relatively small part of state spending on education.

The Norms and Standards for School Funding prescribes as a policy target based on ‘local and international evidence’, that the personnel: non-personnel spending ratio should be in the order of 80:20. Yet, critics have suggested actual spending for non-personnel expenditure constitutes a significantly smaller portion of school budgets (about ten per cent), and therefore only a very small portion of education allocations are actually targeted towards redress.

Personnel provisioning

Education is regarded as a ‘personnel intensive sector’ as the bulk of

provincial spending is allocated to this line item.⁴⁵ Section 5 of the Employment of Educators Act 76 of 1998 (EEA) provides that the HOD determines the educator establishment in a province. In 2002, the Department of Education adopted the 'Post Provisioning Norms', which allocates educator posts according to a formula which weights certain specified factors such as class size, the range of subjects offered or the poverty of a particular community.⁴⁶ The higher the weighting of a school, the more likely the school will benefit in terms of the allocation of an educator post. These Norms also instruct provinces to set aside between two and five per cent of posts for allocation in favour of 'needy schools' as defined by a formula. However, many have argued that the Post Provisioning Norms are insufficiently geared towards historical redress since other weighted factors continue to favour the more advantaged schools.⁴⁷ That is, because educator salaries have been determined according to qualifications and experience, the funds directed in respect of this line item are said to continue to favour historically advantaged schools since, historically, these schools have had better qualified educators. Moreover since personnel costs constitute the lion's share of the education budget, despite pro-poor targeting for non-personnel expenditure, funding for schools remains eschewed in favour of historically advantaged schools.

Section 20(4) of SASA then provides that SGBs may establish posts for additional educators and appoint additional educators. As noted, financial resources for this are generated by school fees and other fund-raising initiatives.⁴⁸ Schools which cater for poor communities would therefore rarely benefit from this provision.

Finally, legislation for improving access to education for specific groups of learners is sparse. In relation to girl-learners, in 2007, the DBE developed guidelines on 'Measures for the Prevention and Management of Learner Pregnancy'. While the guidelines affirm the principle that pregnant learners cannot be expelled for pregnancy, the actual content of the guidelines is often ambiguous and does not reflect a rights-based approach to learner pregnancy.

For example, the guidelines set out a mechanism for the reporting of pregnancy to the school. This mechanism includes an obligation on a

third party to report a learner's pregnancy. This is intrusive and a violation of learner's privacy rights.

The guidelines then discourage a learner from continuing her education during her pregnancy. It also states that a learner should not return to school in the year that she gives birth. The effect of this would be to prohibit a learner from attending school for a significant period associated with her pregnancy, irrespective of her particular circumstances.

In 2008, the National Department of Education also published the 'National Guidelines for the Prevention and Management of Sexual Violence and Sexual Harassment in Public Schools'. The Guidelines define what constitutes acts of sexual violence and sexual harassment; they also seek to establish procedures that will allow an alleged victim to report incidents of abuse and harassment and to set up mechanisms for victim support. The Guidelines set out procedures for holding perpetrators, be they educators, other school employees, or learners, accountable. Depending on the seriousness of the offence, the Guidelines also make recommendations as to potential forms of discipline or sanction of the perpetrator. Finally, schools are required to report incidents to the Department so as to monitor the efficacy of the Guidelines.

South African jurisprudence

A rich and diverse jurisprudence is evolving in South African courts on education rights in general, and on the right to basic education in particular. This section discusses the most relevant case law that has a bearing (either directly or indirectly) on the realisation of the right. The section therefore first discusses the potential approach to determining the state's obligations in respect of the right. It then discusses case law relevant to the fault-line analysis undertaken in section three under specific sub-headings. The case law discusses the decisions of the Constitutional Court, but also those of the lower courts in instances where no jurisprudence at a Constitutional Court level has yet developed.

A substantive approach to interpreting the right to basic education

In the case of *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*,⁴⁹ the Constitutional Court confirmed that the right establishes not only a negative obligation on the part of the State not to interfere with an individual's enjoyment of the right, but also that the State is obliged to provide learners with basic education.

In the *Juma Musjid* case, a case where a private property owner successfully sought to evict a public school conducted on its property, the Court went beyond the strictures of that case, and indeed to some lengths, to comment on the State's obligations to protect the right to basic education. In a now often-quoted paragraph, the Court said:⁵⁰

It is important, for the purpose of this judgment, to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio-economic rights, this right is *immediately realisable*. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application, which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 21(1)(b). The State is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'. [own emphasis]

Thus, as some have previously speculated, it appears that the State is under a direct, or immediate, duty to provide a basic education and that an individual (having no direct claims on the qualified socio-economic rights) has a direct claim in respect of the right.⁵¹ At the same time, while the Court acknowledges the absence of internal qualifiers to the right to basic education, it states that the right remains subject to the limitation clause in terms of section 36.⁵²

The Court also went on to identify ‘access’ as one of the essential components of the right to basic education. It stated:⁵³

Basic education provides a foundation for a child’s lifetime learning and work opportunities. To this end, *access* to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right. [own emphasis]

The statements in *Juma Musjid* appear to indicate that when the Constitutional Court finally does have an opportunity to develop a standard of review in respect of the right to basic education, it may adopt a standard of review that seeks to define the substantive content of the right.⁵⁴ This is in contrast to the reasonableness review adopted by the Constitutional Court in respect of the qualified socio-economic rights.⁵⁵

In the High Court case of *Section 27 and Others v Minister of Education and Another*⁵⁶ (*Section 27 and Others* or more commonly referred to as the *Limpopo textbook* case that dealt with the failure of the government to deliver textbooks to schools in Limpopo), Judge Kollapen also adopts an approach to the right to basic education that seeks to give substantive content to it. He said:⁵⁷

In the context of this application one of those components is the provision of textbooks and while it may be said that no consensus exists broadly in the South African context, on the content of the right to basic education, even though there have been compelling arguments that it must and should, in order to be meaningful, include such issues as infrastructure, learner transport, security at schools, nutrition and such related matters. However, for the purposes of this application it is not necessary to determine those broader issues, or indeed to express the view on that matter, except to say that the arguments that the right must be broad and encompassing, appear to be compelling.

Within the context of the failure of government to deliver textbooks,

Judge Kollapen then goes on to state that textbooks are an ‘essential’ component of the right to a basic education.⁵⁸

[T]he provision of learner support material in the form of textbooks, as may be prescribed is an essential component of the right to basic education and its provision is inextricably linked to the fulfilment of the right. In fact, it is difficult to conceive, even with the best of intentions, how the right to basic education can be given effect to in the absence of textbooks.

The facts of the case are discussed in further detail below.

School governance

The school governance jurisprudence highlights the manner in which SGBs have attempted to utilise SGB policy-making functions to deliberately and unintentionally develop exclusionary policies. While many of these cases, specifically the language cases, have not explicitly implicated section 29(1)(a), the cases remain relevant because of the systemic impact of SGB policies in denying access to particular categories of learners from their schools.

The *Ermelo* case appears to have settled the law in a long line of cases dealing with attempts by SGBs to maintain single-medium Afrikaans schools, and thereby, in effect, exclude African learners.⁵⁹

In 2007, there was a shortage of space at English medium schools in the Ermelo area. Ermelo High School, an Afrikaans single-medium school operating under capacity, was asked to accommodate 113 English learners that could not be accommodated in English schools. When the school refused, the provincial HOD withdrew the SGB’s power to determine its school’s language policy and changed the school to a dual-medium school.

The Constitutional Court therefore had to decide whether or not an HOD had the power to override the SGB’s power to determine the language policy of its school. The court held that an HOD could only do this on ‘reasonable grounds and in order to pursue a legitimate purpose,’ and in observance of SASA’s due process provisions, which were not followed

in this instance. Despite this finding, the Court nevertheless directed the school to review its language policy to accommodate English-speaking learners that could not be accommodated elsewhere because other schools in the area were already full. Underpinning the Court's reasoning was the fact that SGBs ultimately manage a public resource and are therefore also obliged to consider the broader systemic community interests.

In the recent Constitutional Court case of *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School and Another (Free State Pregnancy Cases)*,⁶⁰ the Court addressed the legality of an instruction from the HOD of the Department of Education in the Free State to two school principals to ignore the pregnancy policies developed by their respective SGB's. The principals at both schools had in terms of their SGB policies prohibited two learners from returning to school in the year they had given birth. The HOD in both cases instructed the principals to readmit the learners immediately.

The Court held that SGBs have the power to develop pregnancy policies at their schools. This power is derived from Section 8 of SASA that requires that SGBs develop codes of conduct. The Court then went on to say that when SGBs adopt and enforce policies that undermine the rights of pregnant learners, an HOD couldn't just override these policies. Such conduct is 'unlawful', and constitutes a usurpation of the functions of the SGB. The HOD must follow the processes set out in SASA. The court nevertheless ordered the two schools implicated to review their respective pregnancy policies that were deemed by the Court to be 'constitutionally questionable'.

The most recent school governance case is the *Rivonia* judgment. Rivonia Primary is a former 'model C' school. As such, it is a highly sought-after public school because it has good school infrastructure and is well-resourced. As with many other former 'model C' schools, Rivonia Primary aims to have lower teacher-learner ratios so as to provide a more optimal teaching and learning environment.

The dispute between Rivonia Primary and the Gauteng Department of Education (GDE) arose in 2010 when a learner was refused a place in grade one at the school for the 2011 academic year. The school's reason

for its refusal was that it had reached its capacity of 120 learners per grade in terms of its admission policy determined by the SGB.

The mother of the learner lodged a complaint with the GDE. The HOD, in considering the matter, took the view that the school could accommodate this one additional learner into grade one. Factored into the HOD's reasoning was the fact that the school had already exceeded its 120 capacity by admitting 124 learners into grade one. The HOD therefore overturned the school's refusal of the application and issued an instruction to the principal to admit the learner.

The school thereafter approached the courts for a determination of whether the HOD had the power to override the SGB's admission policy, specifically, its capacity determination, and thereby direct the school to admit the learner to the school.

The Constitutional Court held that while SGBs do have the power to determine admission policy in terms of section 5(5) of SASA, that power is never final but is subject to provincial confirmation. Thus the Court said:⁶¹

[T]he general position is that admission policies must be applied in a flexible manner. The capacity determination as set out in Rivonia Primary's admission policy could not have inflexibly limited the discretion of the Gauteng HOD. If there were good reasons to depart from the policy, it was always open to the principal or the Gauteng HOD to do so.

The Constitutional Court, in adopting this stance, relied on a textual qualifier in section 5(5) relating to the SGB's power to make admission policies. That is, according to section 5(5), an SGB determines the admission policy of a public school subject to the broader provisions within SASA and any applicable provincial law.

The relevant Gauteng regulations provided that if a principal refused to admit a learner to a school, that principal had to provide reasons to the HOD. The HOD would then be required to either confirm or set aside the principal's decision. A dissatisfied parent or learner would still be entitled to appeal to the MEC for Education.

The *Rivonia* judgment also imported the doctrine of ‘meaningful engagement’ from the Constitutional Court’s housing evictions jurisprudence into its school governance jurisprudence.

In terms of which, in the context of admission policies, the judgment elaborated on the relationship of ‘co-operative governance’, in the three-tier structure of school governance as established in the previous school governance cases.

It noted that, at national level, the Minister of Basic Education may ‘prescribe uniform norms and standards for the “capacity of a school in respect of the number of learners a school can admit.”’ The Court then noted with regret the difficulties that have arisen in the *Rivonia* case because of the absence of these norms.

The judgment noted the systemic obligation of the PED in terms of section 3(3) of SASA to provide a basic education to all learners in a province. Finally, it noted the role of SGBs in developing admission policies at individual schools.

The Court then emphasised that in terms of this ‘partnership model’, PEDs and SGB are legally obliged to negotiate with each other in good faith and in the ‘best interests of the learners’ before resorting to litigation.

The difficulty with this approach is that the Court appears to have placed the onerous responsibility for solving vexed problems in education, such as systemic capacity concerns, squarely within the domain of the lower two tiers of school governance while national government appears to be absolved for its failings.

Educational quality

In the 2009 case of *Centre for Child Law and Seven Others v Government of the Eastern Cape Province and Others* (commonly referred to the *Mud schools* case),⁶² seven schools that had been battling for more than a decade with poor infrastructure requested the Eastern Cape Department of Education (ECDoE) to upgrade their schools. Their complaints included dilapidated mud structures, in some instances with roofs missing, no running water or sanitation. These conditions made teaching and learning impossible, especially on rainy days when learners could not sit

in the classroom. There were also high rates of absenteeism caused by sickness as a result of these poor schooling conditions.

In terms of a settlement agreement reached in 2011, government pledged a total of R8.2 billion over a three-year period, with specific amounts earmarked for the seven schools. The agreement also required the provision of interim structures at the seven schools.

In March 2012, Equal Education launched another infrastructural case requiring the upgrade of two schools in the Eastern Cape suffering similar conditions to those raised in the *Mud Schools* case. The case also sought to compel the Minister of Basic Education to finalise the norms and standards for basic infrastructure, almost four years after the draft was first introduced into the public domain.⁶³

The application provided an overview of the plight of under-resourced schools across South Africa, the systemic impact that poor infrastructure has on schools and the necessity for urgent and effective intervention. It listed the experiences of schools that are structurally unsafe. It highlighted the impact of severe overcrowding on teaching and learning in the classroom. It also highlighted the indignity of learners and teachers being left with no choice but to use open toilets or unhygienic pit latrines, and the vulnerability of schools environments to surrounding criminal elements where schools are not secured by fencing.

The DBE agreed to address the infrastructural needs of the two schools. The DBE however opposed the finalisation of norms and instead published non-binding infrastructural guidelines.⁶⁴ Under increasing pressure from Equal Education's relentless campaign for Norms and Standards and in the context of potential litigation under the strong right, in November 2012, a few days before the matter was to be heard, an out-of-court settlement was reached between Equal Education and the DBE. In terms of the settlement, the Minister agreed to publish draft regulations for public comment by 15 January 2013 and to finalise the norms by 15 May 2013.

In January 2013, as per agreement, a new set of draft regulations emerged. The content of this draft was met with widespread criticism. The draft was viewed as utterly lacking in content in terms of establishing the requisite minimum benchmarks for school infrastructure, mech-

anisms of accountability in the provinces and time frames for implementation.

In the face of this widespread rejection, the norms were not finalised by the 15 May deadline. In July 2013, in order to avoid a new round of litigation, Equal Education and the Minister agreed to new court-ordered time frames. In terms of these, new draft regulations were to be published by 12 September 2013 for public comment, and were to be finalised by 30 November 2013. The new draft once again met with criticism, in particular for its time frames, in terms of which it set target dates for two tiers of provisioning as being in 10 and 17 years respectively. The document was also riddled with terms such as ‘as far as reasonably practicable’, thereby seemingly pre-empting a limitations clause defence in the event of litigation for failure to deliver infrastructure

The finalised regulations emerged at the end of November 2013. The content of these regulations represent an improvement on the earlier drafts. That is, while the regulations retained the incrementalist stance of previous drafts for meeting specified goals, the time frames for meeting these goals have been significantly improved. These being three, seven and ten years respectively. Furthermore, the existence in the final document of clearly defined benchmarks in the various areas of infrastructural provisioning also provide a workable blueprint to assist provinces in the upgrade of schools. The finalised draft does however retain the qualified phraseology of terms such as ‘reasonably practicable’. It remains to be seen how this will be dealt with and interpreted in the context of disputes that lead to litigation.

In the *Limpopo textbook* case, in May 2012, almost halfway through the academic year, Section27 together with two co-applicants launched an urgent application to compel the State to deliver textbooks to schools in the Limpopo Province. This failure to deliver textbooks had a particularly detrimental effect on learners in the foundation phase (grades R, 1, 2 and 3) and grade 10 as these learners were being introduced to a new curriculum and therefore were not reliant on ‘top-ups’ textbooks from previous years but were being introduced to new approaches in teaching and hence new textbooks.

Judge Kollapen’s judgment acknowledged the fact that almost halfway

through the year schools in Limpopo did not have textbooks, which rendered the matter urgent. He went on to say that, '[a] week or even a day is material under the circumstances.'⁶⁵

He found that textbooks are an 'essential component of the right to basic education and its provision is inextricably linked to the fulfilment of the right'⁶⁶ He explored the particular challenges faced by the State and the measures taken by it to deliver textbooks and came to the conclusion that:⁶⁷

[T]he measures they took were not reasonable, having regard to the urgency of the situation and having regard to their own targets and indicators they had set in respect of delivery of textbooks.

On that basis he held that the Limpopo learners' rights to a basic education in Limpopo had been violated.

Judge Kollapen therefore ordered the DBE to deliver textbooks to learners in Grades R, 1, 2 and 3 and 10 on an urgent basis, commencing 31 May 2012 and concluding no later than 15 June 2012. He also awarded the innovative remedy requested by the applicants for a 'catch-up plan' for learners in grade 10. He found that the absence of textbooks for the first half of the year had an adverse effect on learners' rights that ought to be remedied. Thus if no attempt was made to remedy this *status quo*, 'it would render the vindication of rights hollow'.⁶⁸

Judge Kollapen's order also provided that the applicants be entitled to approach the court on the same papers, or supplemented as may be required for further relief. This entitlement to further relief proved, in hindsight, to be invaluable, as neither delivery nor the catch-up plan occurred as set out in a court order, compelling the applicants to return to court on two subsequent occasions, first in June 2012, then again in October 2012 – almost the end of the academic year.

On 14 December 2012, Section 27 issued a statement in which they stated that textbook delivery for the following 2013 academic year was more or less complete, even though there continued to be reports of non-delivery at some schools.⁶⁹

In August 2012, in the case of *Madzodzo obo Parents of learners at*

*Mpimbo Junior Secondary School and Others v Minister of Basic Education and Others*⁷⁰, the LRC and the CCL brought an urgent application against the ECDoE on behalf of parents of learners at three schools in the Eastern Cape where there were severe furniture shortages. In terms of a settlement agreement, which was made an order of court in November 2012, the ECDoE was to provide new furniture to the three schools. In addition, the ECDoE had to provide a comprehensive audit recording the furniture shortages of all schools in the Eastern Cape and then to deliver the furniture to those schools by 30 June 2013.

The ECDoE has delivered furniture to the three applicant schools. However the LRC and the CCL have returned to court on the basis that: (1) the audit is incomplete and that there are a number of schools that are in dire need of furniture who have been omitted from the audit; (2) where schools are included in the audit, furniture has not been delivered to those schools; and (3) while the audit conducted determined that R360 million was necessary to address the furniture needs of schools that are included in the audit, only ten per cent of this amount, that is, about R30 million, has been allocated for this line item in the ECDoE's 2013/2014 budget.⁷¹

The LRC and the CCL have therefore asked the court to declare that the ECDoE: (1) is in breach of the original settlement agreement; (2) deliver furniture to all schools identified in the audit within 90 days; (3) invite by advertisement other schools to report their furniture needs; (4) appoint an independent person to verify these needs; and (5) deliver all furniture to schools identified by the independent verification process.

In September 2013, a settlement agreement was reached which was again made an order of court and in terms of which almost 50 000 learners will receive furniture. It remains to be seen, however, whether or not the ECDoE will comply with the new order. Noteworthy too in terms of this case is that the parties have postponed legal argument on the issue of government's budgetary obligations until 30 January 2014, when there will be more clarity on the remaining furniture needs following the verification process. According to the LRC, determining whether 'budgetary constraints' constitutes a defence for failing to provide furniture will provide clarity on the State's obligations in terms of the unqualified right to education.⁷²

The post provisioning case of the *Centre for Child Law and Others v Minister of Basic Education and Others*⁷³ ('post provisioning' case) arose in 2012 in the context that in the Eastern Cape there were more than 4 000 vacant posts, as well as over 7 000 teachers.⁷⁴ Schools had therefore taken it upon themselves to appoint temporary educators without having the means to pay them. The consequence of this was that educators either went without pay or schools paid educator salaries with money needed for other schooling necessities. The LRC and the CCL therefore brought an urgent application compelling government to: (1) implement the 2012 educators post establishment as published; (2) declare the 2013 educator post establishment which should include non-teaching staff; (3) appoint temporary posts to all vacant posts by a specific date; (4) make all temporary appointments permanent by a specific date; (5) provide that all educators be paid from the date on which they assumed duty; and (6) reimburse SGBs that had been forced to pay the salaries of temporary teachers from their own budgets.

Again, a settlement agreement was reached that was made an order of court in August 2012. The only portion of the application that remained opposed was that in respect of non-educator posts, culminating in the judgment in the post provisioning case. Judge Plaskett found administrative non-education posts to be essential to the smooth functioning of a school. He stated:⁷⁵

[...SASA] requires both teacher and non-teacher establishments to be known by governing bodies before their budgets can be approved and to allow them to determine how many additional posts are needed at their schools. The only interpretation of the legislation that is consistent with the obligation on the respondents to respect, protect, promote and fulfil the fundamental right to basic education is that the MEC is empowered to and obliged to determine the establishment for both teaching staff and non-teaching staff at public schools in the province.

Government again failed to comply with these two court orders. This therefore resulted in a new round of litigation in which the LRC and the

CCL adopted a more nuanced approach to the court order they sought. That is, rather than asking the court for relief that would compel government to act, the relief sought asked for confirmation of the employment of a list of educators whose names were provided by the applicants. This order was again granted by agreement between the parties. However, the ECDoE has failed to meet the deadline for the payment of the remuneration of these educators. Steps have therefore been taken to attach state assets, which can be sold if the debt is not satisfied within the requisite time.⁷⁶

Learners with special needs

The case of the *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another*⁷⁷ (*Western Cape Forum for Intellectual Disability*) was brought by a coalition of NGOs that provide for profoundly and severely intellectually disabled children that would not otherwise have access to an education. These organisations care for about 1 000 children within their care centres. There are insufficient centres to care for all children with this level of disability.

The organisations alleged that state provisioning for profoundly and severely intellectually disabled children was less than that allocated to other children, including children with mild to moderate disabilities. An argument made by the State was that children with this category of severe disability would not benefit from an education. The Court, citing international evidence that education and training benefited children with severe intellectual disabilities, rejected this argument.

The State also made a resources allocation argument, contending that given the many competing demands in South Africa, it had to make difficult policy choices and was unable to afford further expenditure on education, and that its failure to provide for this particular category of children served a 'rational connection to a legitimate government purpose.' The Court rejected this and said:⁷⁸

A government purpose, which imposes a differential treatment on the affected children, cannot in my view said to be rational. It must be remembered that the applicants did not ask that the needs

of the affected children be met by the provision of extra funds. What they ask of the respondents is to spread the available funds fairly between all children. I am accordingly of the view that the appellant has established that the rights of the affected children to receive a basic education are being infringed.

The court therefore ordered the state to develop a plan of action to remedy this violation and to report to it within twelve months regarding implementation of the order.

Independent schools

In 2013, the Constitutional Court case of *KwaZulu Natal Joint Liaison Committee v MEC for Education, KwaZulu Natal and Others*⁷⁹ (*KwaZulu Natal Joint Liaison Committee*) dealt with the obligation of government to pay subsidies to independent schools. In 2008, the KwaZulu-Natal PED issued a notice to independent schools in the province setting out 'approximate' funding levels for 2009. An association of independent schools, relying on this notice, proceeded to develop their budgets for the academic year. In May 2009, after the first payment for the year became due, the PED issued a circular, indicating that budgetary constraints necessitated a subsidy cut. This cut was reflected in the subsidies eventually paid to the schools.

The association therefore took the PED to court demanding the original amount. The Constitutional Court found that a 'publicly promulgated promise' arose out of government's constitutional and statutory obligations in respect of the payment of subsidies to private schools. That is, the judgment found that the 'unqualified' right to basic education in terms of Section 29(1)(a) of the Constitution applies also to learners at independent schools. It also noted the legislative provisions dealing with the granting and termination of subsidies. The Court therefore ordered the PED to pay schools the 'approximate' amounts specified in the 2008 notice.

While the judgment recognises the right to basic education of learners at independent schools, a delineation of government's obligations in respect of public and independent schools is implicit in a reading of the judgment.⁸⁰

So while it is correct that the state is not obliged to pay subsidies to independent schools, when it does do so in terms of national and provincial legislation it is plainly acting in accordance with its duty under the Constitution in fulfilling the right to a basic education of the learners at school that benefit from the subsidy. And once government promises a subsidy, the negative rights of those learners – the right not to have their right to a basic education impaired – is implicated. As will emerge, once the due date for payment of a promised subsidy has passed, those rights are most acutely implicated.

Functional and financial arrangements

In the 2013/14 South African budget, R232.5 billion was allocated to education (up by 12.2 per cent in nominal terms from the R207.3 billion allocated in 2012/13). This is the largest slice of government spending.

R164 billion of the 2013/14 budget allocation was specifically for schooling, constituting 70.5 per cent of the overall education budget, increasing nominally by 7.8 per cent as compared to the previous year. Planned public expenditure on basic education in South Africa in 2013/14 amounts to about 14.3 per cent of the overall budget and amounts to 4.7 per cent of South Africa's GDP (or 6.6 per cent% of GDP if total spending on basic, tertiary and vocational education as well as education administration is taken into account).⁸¹

In terms of Part A of schedule 4 of the Constitution, education is a concurrent function. The establishment of SGBs by SASA creates a third tier of functionality. Thus, the national and provincial spheres, together with SGBs, are together referred to as a 'tripartite arrangement' of school governance. The powers of each tier of school governance have however been the subject of much litigation and as such the parameters of the powers of each tier has only become clearer as the jurisprudence on their respective functions evolves. In the *Ermelo* case, the functional arrangements for basic education were described in the following terms:⁸²

An overarching design of the Act (SASA) is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school.

Thus, the DBE is responsible for developing norms and standards, and also national plans and legal frameworks, as well as for monitoring delivery of the PEDs. The PEDs are responsible for direct delivery.

Every year allocations are made to the DBE and to the PEDs. The DBE also administers conditional grants earmarked for specific programmes such as infrastructure. The 'Accelerated schools infrastructure delivery initiative' (ASIDI) is an example of one such important conditional grant. This is discussed in detail later. Once PEDs receive their allocations, these PEDs then develop their budgets.

The public ordinary school education programme dominates provincial education expenditure. Spending in primary schools is marginally higher than in secondary schools.⁸³ As noted, spending for provisioning for public ordinary schooling is delineated into infrastructure, personnel and non-personnel expenditure. Other programmes managed by PEDs include subsidies to independent schools,⁸⁴ further education and training, adult basic education and training and early childhood development.

Systemic human rights-related problems

Access (non-discrimination, physical access and economic access)

The prohibition against discrimination is firmly entrenched in the legal framework for schooling and indeed in the broader South African legal framework.⁸⁵ Despite this, specific groups of learners can be denied access to schools in different and often subtle ways. Thus, for example, in a context where public schooling remains highly stratified with learners from households with relatively higher incomes having access to better-resourced schools because they can afford the school fees at those schools, poor, predominantly African learners are relegated to under-resourced schools. That the wealth of a family ultimately determines the quality of education that a child will be able to access has been aptly described as ‘incomes-based education’.⁸⁶

The jurisprudence on school governance also highlights the manner in which parent communities at individual schools have attempted to utilise SGB policy-making functions to either deliberately, or unintentionally (as in *Rivonia*), to develop exclusionary policies that exclude specific groups of learners. Thus, as evidenced from the jurisprudence on Afrikaans single-medium schools, SGB decisions on language policies have the potential to exclude non-Afrikaans, predominantly African learners from their schools. Similarly, as evidenced from the Free State pregnancy cases, the pregnancy policies of those schools had the effect of discriminating against pregnant girl-learners from schools.

Physical accessibility requires that schools are within a ‘safe physical reach’. In a South African context, learners, particularly in rural areas, must often walk extremely long distances to-and-from school in often unsafe conditions, vulnerable to road accidents, bad weather conditions and even sexual assault.⁸⁷

A glaring omission, therefore, from the recently finalised Infrastructural Regulations is the establishment of minimum norms and standards in respect of a reasonable distance for learners to walk to school. The original 2008 draft, which was never finalised, determined a catchment zone of a school as being within a three kilometre radius. Thus, where

learners walked longer distances, schools closer to home would have to be built or transport would have to be provided to learners. But often transport or transport subsidies are not provided, particularly in the provinces where they are needed the most, such as the largely rural provinces of Limpopo and the Eastern Cape.

Another factor limiting access to schools for learners in rural areas is the continuing insecurity of tenure of farm schools on private land. Historically, under apartheid these farm schools were established to keep children occupied by providing limited educational opportunities to them while their families served as labour on the farms. Many such schools continue to exist without lease agreements between the State and the farm owners, making these schools vulnerable to closure when farm-workers are evicted from farms. Research into farm schools records many instances of farmers obstructing access to the schools or suspending basic services at their schools.⁸⁸ A state solution for learners attending these schools must therefore be sought either through a law reform process that addresses the precarious legal status of farm schools, or by ensuring, 'the wholesale relocation of farm schools off farmland and on to state-owned land.' Adequate transport services should then be provided to these schools.⁸⁹ The viability of distance learning could also be explored. This would however be challenging, given the limited Internet connectivity in rural areas and families with limited education who would not necessarily be able to supervise their children's learning via such channels.

As noted, in recent years rights-based education debates have shifted almost entirely to quality, with many commentators suggesting that issues of economic access have now been dealt with, following the introduction of the reforms such as fee-free schools. The research, however, continues to indicate otherwise.

Measuring access

Internationally and in South Africa, enrolment is often used as an indicator for measuring access to education. Indeed, this is the indicator used in attaining the MDG in education. However, enrolment as an indicator of access on its own is flawed: learners may enrol at a school, but

many learners in South Africa may then drop out of school, or struggle to attend school on a daily basis for many reasons. In an access to education survey conducted by the Centre for Applied Legal Studies and Social Surveys Africa between 2007 and 2010, access was therefore conceptualised differently, taking other factors into account such as: the proportion of learners who are not starting school at the right age; enrolment rates; the proportion of learners leaving school before completing grade 12; the proportion of children who miss school temporarily for extended periods of time and the proportion of children who repeat a grade.⁹⁰

Within this wider definition, this research, together with other research into the implementation of the 2005 reforms, as well as data from the General Household Surveys suggest that costs are a continuing barrier for poor learners to schools.

Non-attendance

The South African government boasts of having achieved almost universal enrolment. It attributes this to making the GEC phase of education compulsory.⁹¹ However, net enrolment rates drop significantly after grade 3, suggesting that many learners are falling behind age-grade norms, and school enrolment figures decline markedly after grade 9 or age fifteen indicating high drop-out rates.⁹² This is also the end of the phase of compulsory education.

In the 2011 GHS, 73.6 per cent of persons aged seven to 24 were attending educational institutions.⁹³ In the 2012 GHS, 74.1 per cent of persons aged seven to 24 were attending educational institutions.⁹⁴ The main reason cited by those individuals aged seven to eighteen not studying was lack of funds for school fees.⁹⁵ In 2011, 35.9 per cent of individuals not attending an institution cited no money for fees as the main reason for non-attendance. In 2012, this was 25 per cent of individuals.⁹⁶ This drop has been attributed to the introduction of fee-free schooling. According to the GHS data, since 2007 there has been a dramatic increase in attendance at those schools that have been made fee-free. In 2012, 56.8 per cent of learners attended no-fee schools.⁹⁷ This is in line with international trends where there is a direct correlation between the introduction of free schooling and improved enrolments.⁹⁸

According to the CALS/Social Survey Study, poverty and poor socio-economic conditions have the greatest impact on learner retention at schools. Furthermore, a learner's chance of being out of school increases as the socio-economic status of the household decreases. Also, learners from informal settlements and from rural areas are more vulnerable to dropping out of school completely, missing school for more than a year or repeating a grade.

According to the survey, the manner in which poverty pushes learners out is complex. The survey reports that while less than one per cent of those learners participating in the survey reported being denied access because of non-payment of fees, the secondary costs such as uniforms and transport provided greater barriers. Stigmatisation and social exclusion for non-payment of school fees also appears to be a major reason for pushing learners out. That is, while learners were not excluded for non-payment of school fees, they were nevertheless treated differently as a result of such non-payment.⁹⁹

The non-implementation of the fee exemption policy

The 2011 GHS notes that only 5.9 per cent of learners benefited from an exemptions or partial exemptions at fee-paying schools in that year.¹⁰⁰ In 2012 this was 5.4 per cent.¹⁰¹ Fee-paying schools are currently the wealthier schools in quintiles four to six. The low percentage of learners benefiting from exemptions at these schools suggests that a very small percentage of learners at fee-paying schools are granted exemptions. This in turn indicates that poor learners who are unable to pay the fees charged at these schools are restricted to the no-fee or lower fee schools where the quality of an education is generally poorer. The non-implementation of the exemption policy by schools prior to the 2005 amendments is well documented and resulted in the attempts to tighten the policy. Post-2005 studies, however, continue to provide evidence of the non-implementation of the exemption system on the part of schooling authorities, despite efforts to tighten enforcement mechanisms in the 2005 reforms.¹⁰²

The summary of the findings of the study conducted by the Alliance for Children's Entitlement to Social Security (ACCESS) in 2009 in respect of exemptions is worth highlighting:¹⁰³

The research highlighted the fact that: few schools actively notify parents of their right to an exemption, schools seldom apply the formula when determining eligibility for exemptions, SGBs seldom play an active role in granting exemptions, schools do not actively investigate whether the parent qualifies for an exemption, and the exemption process in many schools is ad hoc and largely dependent on the personal views and expectations of the principal. Some schools admitted that they purposefully make it difficult and intimidating for parents to apply for exemptions. Not surprisingly, only a small proportion of parents seem to make use of the exemption process. For the most part, parents who do not pay fees simply default, and in some instances this results in legal action and/or intimidation and discrimination of learners.

Even when exemptions are granted, several schools noted that they never grant full exemptions (despite the fact that the regulations clearly lay out the circumstances under which a learner qualifies for a full exemption), and *none* of the schools were aware of the automatic exemption clause in Section 1 of the regulations. In direct violation of this clause (which expressly exempts caregivers who receive a social grant from having to pay fees), principals specifically mentioned the use of the CSG to cover school fees and the requirement that fees are paid before the school will provide documentation in support of a grant application. Monitoring of the implementation of the exemption policy is poor. Section 6 of the Regulations requires all school governing bodies to submit summaries of exemption information (numbers for applications, total exemptions, partial exemptions and exemptions not granted) to the HOD twice a year. It was clear from the research that the majority of schools failed to comply with this provision (and most had never even heard of it). This provision needs to be enforced in order to monitor implementation and impact of the exemption policy. It might also be useful to include a requirement that schools also report on the number of automatic exemptions granted and the number of fee defaulters. Poor implementation of the exemption policy is undoubtedly influenced by the fact that

most representatives from fee-paying schools held negative attitudes towards the policy.

The main reason attributed for the non-implementation of the exemption systems is the failure to compensate schools where schools do grant exemptions. In 2011, the Norms and Standards for School Funding were amended to enable schools to be compensated for fee exemptions, in terms of which schools are required to apply to their provincial departments on an annual basis to receive that compensation. Compensation is determined according to a formula that is subject to the allocation PEDs receive for this purpose. These compensation amounts do not cover the total costs of revenue lost by exemptions. No formal research has been done yet to assess impact of the new compensation regime. In my own discussions with members of SGBs from schools in both Gauteng and the Western Cape about whether their schools had benefited from the compensation regime, it appears that schools had either not received any compensation, or the amounts compensated were negligible when compared to the number of learners who were exempted at a particular school. More research in this area would be useful to determine the extent to which the compensation regime is functional.

Quintile rankings

Under the 2005 reforms, the ranking of a school is determined according to the level of poverty within an area. Research produced by CALS, Idasa and the ACCESS suggests that the system produces significant hardships for many schools and learners attending schools that have been inaccurately ranked. This has been attributed to the use of the national data sources used that are often 'not sensitive enough to recognise neighbourhoods of poverty within larger communities.'¹⁰⁴ Alternatively, determinations are made in an arbitrary manner without consultation with schools. This has resulted in different rankings of schools serving the same communities, creating antagonism and animosities between the schools.¹⁰⁵ The method of poverty ranking also does not take into account the demographics at a school. In fact, it largely ignores the current reality of post-apartheid schooling, which is that many learners

travel from poorer communities to attend schools in other areas with better learning facilities and teachers. There are also case studies showing that there are learners in informal settlements and townships who are inadequately catered for and therefore have no option but to travel to schools in other areas.

According to the ACCESS study, 'challenges with the implementation of the quintile system are evident in the fact that ten out of eleven participating schools in quintiles three to five raised concerns about their ranking, all calling for a review of their quintile status on the basis of their learner demographics.'¹⁰⁶

The norms and standards contains a provision enabling schools to dispute the correctness of a poverty score assigned to it through representations to the HOD.¹⁰⁷ According to the ACCESS study, some of the schools that participated in the research were unaware they could challenge their ranking. Even when schools did challenge their rankings, their poverty scores were not amended by the department.¹⁰⁸

Secondary costs of schooling

According to the CALS/Social Surveys study, transport and uniforms constitute the most significant secondary costs for learners.

In terms of transport, while 76 per cent of learners surveyed walked to schools, 50 per cent of households that paid for transport paid more than R250 per month.¹⁰⁹ In terms of the communities surveyed, these costs were high and constituted a significant portion of the household income. In certain instances, this was a reason for learners dropping out of school or leaving school for a while. For other families, uniforms provided the greatest financial burden and also impacted on the choice of schools.¹¹⁰

In December 2007, the ACCESS produced a report to assess the impact of the Guidelines on Uniform Policy on improving learners access to schools.¹¹¹ In particular, the report explored whether the Guidelines made school uniforms more affordable, and whether the Guidelines prevented learners from being barred from schools or from participating in school-related activities if they did not have uniforms.

The report found that the cost of uniforms varies from anything as low as R150 to R2000 and that in lower income households, uniforms

constitute up to ten per cent of household income. Essentially, the report found that the Guidelines were not being implemented at any level, and knowledge of the Guidelines at a school level was minimal. It also found that the responsibility of ensuring uniforms were cheaper was vested in the SGBs, but SGBs were largely ignoring the Guidelines, and instead continued to prescribe elaborate uniforms with 'distinctive badges and colours'. Moreover, it found that uniforms were compulsory and SGBs were draconian in enforcing their uniform policy, contrary to the prohibition of barring learners who could not afford uniforms.

Potential amendments to the legal framework

Recently, potential amendments to the framework have been canvassed. Within the context of schools now being divided between fee-paying and no-fee schools there has in the last year been discussions regarding the elimination of the quintile system, with some stating that this new system is already in place in practice. There do not, however, appear to be any clear policy changes confirming this.

More troubling are recent media reports concerning measures that are currently being canvassed by the Minister of Basic Education. She is quoted as stating that she has concerns with the current no-fee model and is therefore considering publishing guidelines establishing how parents could be asked to make 'contributions' at no-fee schools.¹¹² Such a development may constitute a retrogressive measure.¹¹³ Such a measure also potentially contradicts the meaning of 'free education' in international instruments such as the CRC and the ICESCR.¹¹⁴

Availability

Increasingly, research links poor teaching and learning conditions with poor academic performance.¹¹⁵ The DBE's Annual National Assessment (ANA) is a standardised assessment system for numeracy and literacy in grades one to six that in 2012 was extended to include grade nine. The results of the ANA illustrate that the average child struggles with numeracy and has failed to master reading and writing. The 2012 results show that learners receive an average of 36 per cent and 27 per cent in literacy and numeracy respectively for grade six learners. When these results

are disaggregated according to the wealth of a school, the link between poverty and poor educational outcomes is more evident. Quintile one schools are the poorest schools, while quintile five schools are the most affluent schools. The average mathematics result for a grade six learner in quintile one is 23.7 per cent, while for the quintile one learners it is 39.6 per cent. In grade nine pupils scored an average of 13 per cent in maths with only 2.3 per cent of learners across the country obtaining more than 50 per cent in maths.¹¹⁶

In terms of the National Senior Certificate (NSC) or 'matric' exam, every year the DBE boasts of a rise in the national pass rate. In 2011 this was 70.2 per cent, in 2012 this was 73.9 per cent and in 2013 this was 78.2 per cent. Commentators treat these 'improvements' with scepticism, arguing that these results mask many South African realities. Each year the credibility of the results is questioned, with some calling for an independent audit of the results. Others argue that the bar is set extremely low: 30 per cent is considered a pass. The national pass rate also does not take into account that, of the 73.9 per cent of matriculants who 'passed', only 26.6 per cent actually passed with an exemption enabling them to study at a tertiary institution.¹¹⁷ Moreover the results mask the fact that almost half of all learners who start grade one do not reach matric.

South Africa also fares badly in regional and international performance evaluations that test literacy and numeracy. These are: the Southern and Eastern African Consortium for Monitoring Education Quality (SACMEQ), the Trends in International Mathematics and Science Study (TIMSS) and the Progress in International Reading and Literacy Study (PIRLS). According to analysts, South Africa has the lowest average score of all low-income countries participating in the tests, and in the SACMEQ study, which is a sub-Saharan study, it performs worse than poorer countries such as Kenya, Swaziland and Tanzania.¹¹⁸

What is clear therefore is that the quality of education in South Africa, especially in the poorest schools, is highly inadequate and that South Africa is failing to realise the objectives to be achieved from an education. In particular we are failing to develop 'the child's personality, talents and mental and physical abilities to their fullest potential.'¹¹⁹ Each and every aspect of educational provisioning in South Africa ought to be improved.

These are discussed in turn below.

Infrastructure

The infrastructural backlogs in schools are enormous. In 2011, out of 24 793 schools, 3544 schools had no electricity supply, while 804 had an unreliable electricity supply; 2402 had no water supply, while 2611 had an unreliable water supply; 913 schools did not have any ablution facilities while 11 450 still used pit latrine toilets; 2703 had no fencing; 79 per cent were without any library and only seven per cent had stocked libraries; 85 per cent were without any laboratory and only five per cent had stocked laboratories; 77 per cent were without any computer centre and only ten per cent were stocked with computers.¹²⁰

Following the *Mud schools* case, the DBE issued the Accelerated Schools Infrastructure Delivery Initiative (ASIDI) as its implementation plan for infrastructure development. The original amount in terms of the settlement agreement also increased to R13 billion as a conditional grant. Through ASIDI, the DBE was meant to eradicate 496 mud schools and inappropriate structures, mainly in the Eastern Cape, and provide 1257 schools with water, 878 schools with electricity and 868 schools with sanitation in various provinces.¹²¹ The ASIDI project is in addition to the specific budgets of PEDs for infrastructure.

The DBE has, however, consistently failed to meet its own targets under ASIDI, particularly with regard to the eradication of mud schools.¹²² In terms of an expert report commissioned by the CCL following the case, the cause of non-delivery has not been attributed to funding but to the absence of norms and standards to guide budgeting, planning and spending and to the lack of reliable information on existing infrastructure.¹²³ This has resulted in significant underspending by the DBE in 2012, especially in the Eastern Cape where it is needed the most.¹²⁴

As noted, the Infrastructural Regulations that have for a long time been touted as the antidote to government's failure to address the infrastructural backlog have just been finalised. The commitment of government to their implementation can only be assessed over time. The substantive concerns with these Regulations have been discussed in the relevant areas

of the fault-line analysis. Other concerns that have been raised by education activists include the incremental time frames and the persistence from previous drafts of language that pre-empts a limitations argument in the event of challenges to the regulations. Whether or not the time frame of three years in respect of what has been identified by government as the most urgent infrastructural needs meet the requirement of 'immediate realisation,' will have to be assessed against the realities of planning, budgeting and spending. What does need to be interrogated further, however, is whether or not the norms and standards that need only be met in seven years time and in respect of learners with special needs by 2030, are indeed reasonable.

Teaching

Apart from personnel spending constituting the lion's share of the education budget for schooling, overspending and inefficiencies of this line item have largely contributed to the crisis in education, as spending in this area often depletes much-needed resources for other crucial components necessary for a basic education. This was noted by Judge Plaskett in the post provisioning case. He said:¹²⁵

At the heart of the problem lies the longstanding failure of the provincial Department of Basic Education to attend to post provisioning. This failure has endured over a decade. The result is that some schools have more teachers than necessary while others have too few teachers, with consequent prejudicial results on teaching and learning. As the provincial department failed to take steps to transfer surplus teachers to where they were required, the budget spiralled out of control because teachers at under-resourced schools were appointed to fill vacant posts on a temporary basis.

Outside of the irrationalities of post provisioning have been the many other problems related to the quality of teaching in South Africa. Some of this relates to teachers not having the content knowledge to teach the subjects that they are teaching.¹²⁶ Others relate to what has been termed as a 'lack of accountability' by teachers in schools, manifesting in high

rates of teacher absenteeism and non-performance in the classroom.¹²⁷ The failure of government to address the irrationalities in post provisioning and to discipline teachers who are failing to do their jobs has largely been attributed to the strength of the South African Democratic Teachers' Union (SADTU). SADTU, which some have described as the most powerful affiliate of the Congress of South African Trade Unions (COSATU), is part of a tripartite alliance with South Africa's ruling party, the African National Congress (ANC). As such the ANC draws much of its power base from SADTU. This has meant that historically SADTU has had significant political sway in negotiating with government and teachers' unions. According to Jonathan Jansen, fixing education in South Africa would require a government and presidency that is prepared to take political risks with SADTU to ensure.¹²⁸

[T]he non-interruption of teaching and learning under any circumstances, and the non-interference in the management and the administration of schools.

Learning and teaching support materials, and other non-personnel necessities

In 2012, the non-delivery of textbooks at schools in the Limpopo province captured the public spotlight. This dominance of the *Limpopo textbook* case in the public discourse was due to both the savvy media campaign run by Section27 as the case progressed, and the combination of extreme dysfunctionality and alleged irregularities in textbook procurement in the Limpopo Provincial Department of Education, culminating in the crisis that ensued in that province.¹²⁹ Studies, however, suggest that the lack of textbooks is not unique to the Limpopo province and that it is not unusual for learners elsewhere in the country to go without textbooks.

In the SACMEQ III study, textbooks are classified as an 'essential classroom resource' on the basis that effective teaching and learning cannot take place without them. The study found that, in 2007, the average South African grade six learner was in a school where only 45 per cent of learners have reading books and 36.4 per cent had mathematics textbooks.¹³⁰ This is

significantly different from South Africa's neighbours who, as noted, perform better in the SACMEQ performance assessments.¹³¹

The various investigations and reports that were initiated subsequent to the *Limpopo textbook* case, and as a direct result of the case, nevertheless highlighted some systemic concerns in textbook delivery nationally. These include the Metcalfe verification report, and the report of a Presidential Task Team to investigate the reasons for the delay in the delivery of textbooks. In 2012, the SAHRC also held a public hearing into the delivery of learning materials nationwide.

All of these investigations highlight the inefficiencies in the procurement and delivery of Learning and Teaching Support Materials (LTSM). A major concern is the absence of a standardised national system for LTSM. The Presidential Task Team in particular recommends that the DBE must develop a national policy for the standardisation of the procurement and distribution of LTSM. There have, however, been further developments in this regard.

In respect of non-personnel necessities in general, the main concern appears to be that there are insufficient funds for these necessities primarily because of overspending on personnel and general mismanagement of the education budget by PEDs. This means that schools often don't have funds for the essential items necessary to run the school. These include items such as paper, chalk to write on chalkboards, or stationery.¹³² Nor do they have the funds for utilities like electricity and water. But in the context of some schools being declared no-fee schools with no fee income, reliable non-personnel allocations are especially crucial.

The interim report of the SAHRC hearings on the delivery of learning materials notes that spending on personnel depletes spending necessary for learning materials, resulting in reduced budgets for this line item.¹³³

A recent LRC publication¹³⁴ on its legal interventions to improve basic education describes the effect of the learners not having sufficient desks and chairs:

[O]ne should go to the public schools in the former Black 'bantustans' in the Eastern Cape Province. There, almost twenty years after the advent of democracy and the dissolution of race-based

disparities in educational funding, thousands of schoolchildren still sit on the ground because their classrooms have no, or an insufficient number of, desks and chairs. They hunch over workbooks and crane their necks to see the blackboard. They often get sick from sitting for hours on cold, dirty floors. Those who do manage to get a seat still have to share a desk with several others. Discipline problems arise in the daily fight for desks and chairs. It cannot be said that these students are deriving the same teaching and learning benefits as their peers in adequately resourced schools.

Gender equality

Limited educational opportunities for girls makes them more vulnerable to child marriage, sexual violence and gender-based poverty. It is therefore essential to remove obstacles hindering the education of girls. In South Africa, there is little variation in the enrolment rates of girl- and boy-learners. This suggests that there are no formal barriers to a girl entering an education. Gender does, however, appear to be a determinant in the reasons why learners drop out of school.

According to the 2012 GHS, 13.5 per cent of learners leave school due to family commitments. Family commitments refer to caring for family members or working in, or managing the household. The survey notes a strong gender bias in this regard, in that 0.8 per cent of males cited family commitments as a reason for leaving school while 26.6 per cent of females cited family commitments as a reason for leaving school.¹³⁵ Thus, the tradition of expecting women to be caregivers and to work in the home impacts on their schooling.

The GHS notes further that 7.8 per cent of girls between seven and eighteen years who were not attending school blamed pregnancy as the reason for dropping out of school.¹³⁶ While the judgment in the Free State pregnancy cases addressed the discriminatory policies of the individual schools, it failed to provide a solution to the systemic exclusion of pregnant girl-learners from schools. The 2007 guidelines have also failed to address this problem. In fact, the two SGBs in the case alleged that they relied on the 2007 guidelines in formulating their own policies. The effect of this reliance was not sufficiently explored in the judgment.

The failure to curb discriminatory SGB policies can be attributed to ineffective policy at a national level protecting the rights of girl-learners. A binding, unambiguous policy that prevents discrimination on the grounds of pregnancy could properly guide SGBs and prevent them from developing exclusionary pregnancy policies.

Sexual violence against girls is also rife in schools. In 2001, a Human Rights Watch report looked at the impact of sexual harassment and sexual violence on learners in South Africa and found that it erected a 'discriminatory barrier for young women and girls seeking an education'. The report also found that there were ineffective mechanisms within schools and within the law to respond to the problem of harassment and violence against girl-learners.¹³⁷ The report illustrated that sexual abuse and harassment of girls was perpetrated by both teachers and other learners, and was extremely widespread. The report documented cases of rape, assault, coercion and sexual harassment of girls. Girls were raped in school toilets, in empty classrooms and hallways, and in hostels and dormitories. This impacted on the academic performance of girls in schools and was also a reason for girls dropping out of school.

Gender activists have therefore for a long time advocated for a more forceful policy response than the current guidelines. This entails a multi-pronged policy response with *mandatory* protocols for, among other things, the reporting of complaints; protecting the privacy of the alleged victim; the counselling of alleged victims; laying of charges against alleged perpetrators; the institutional discipline and sanction of alleged perpetrators together; and stringent punitive measures sanctioning schools who are failing in their duty to address complaints.¹³⁸

Appropriate legal and policy responses to facilitate broader structural change promoting gender equality is required in other areas of education as well, for example, that of infrastructure provisioning. The issues of learners having to walk long distances and hence being vulnerable to sexual assault has already been mentioned. Another is the impact of inadequate sanitation on gender equality. In the recent sanitation case dealt with by Section 27 in the Limpopo province, it was alleged that the lack of adequate sanitation facilities at many schools in the province has contributed to the absenteeism of teenage girls who stayed home from school for up to one

week every month because they cannot manage their periods effectively at school. Many girl-learners at Equal Education's public hearings into school infrastructure also highlighted their vulnerability to sexual assault at schools that did not have separate toilets for girls and boys.

Learners with special needs

The challenges of creating a single education system and addressing the inequalities in schooling has meant that adequate provisioning for learners with special needs has been largely neglected. This was acknowledged by government in the case of *Western Cape Forum for Intellectual Disability*.¹³⁹ Thus existing infrastructure for learners with special needs tends to exist mainly in historically advantaged areas and in those provinces that were better developed and resourced under apartheid. This has resulted in the Western Cape and Gauteng having a disproportionately higher number of learners and schools for special needs children than other provinces. Accordingly, many learners with special needs are not able to access an education.¹⁴⁰ In terms of the education white paper dealing with special needs education, only about 64 200 learners with disabilities or impairments are accommodated in about 380 schools, while 280 000 learners with disabilities or impairments are unaccounted for.¹⁴¹

As noted, the new Infrastructure Regulations provide detailed minimum norms and standards for the upgrade of schools for learners with special needs. The concern with the Regulations is that it sets the target date for compliance as 2030. Excluding learners with special needs from the protection of this right cannot be justifiable as the case of *Western Cape Forum for Intellectual Disability* suggests. As such, the constitutionality of the Regulations in this respect appears to be highly questionable and is potentially open to legal challenge.

Participation and information

The examples of the two most significant campaigns for reforms in the legal framework for schooling since 1994 suggest that there is a high level of community or rather, civil society participation, in education reform initiatives. These campaigns include the campaigns for school

fees reforms and for norms and standards for basic infrastructure. The role of Equal Education in advocating for the infrastructure regulations has already been discussed. The submissions of the disability lobby, together with the SAHRC submission emphasising the infrastructural concerns in respect of learners with special needs, also ensured that the interests of these learners were acknowledged by government through their inclusion in the final regulations, whether or not they were effectively addressed in the regulations. This has been discussed in more detail in the law and policy section above.

The relative successes of civil society advocacy in these reforms initiatives should, however, be attributed more to the unqualified nature of the right to basic education and the evolution of its meaning in our jurisprudence than to any deep and meaningful commitment to a participative democracy on the part of policy makers. That is, the threat of litigation in the context of a strong, unqualified socio-economic right has served as a stick in ensuring that government conceded to many of the concerns being raised by civil society via legal processes.

The SAHRC, which has focused on the right to basic education over the years by hosting several public hearings on various issues, has also enhanced the public participation on issues relating to the right to basic education.¹⁴²

Independent schools

Independent schooling in South Africa is diverse and these schools constitute about six per cent of all South African schools. These are either registered independent schools or unregistered independent schools. The latter are illegal in terms of SASA. They are either non-profit schools, which constitute the majority of independent schools, or they are part of a growing group of 'for-profit' schools. Non-profit schools can receive state-subsidies depending on their fee level.¹⁴³

Finally there are high-fee schools, mid-fee schools and low-fee schools. Low-fee schools are identified as a rapidly growing category of independent schools intended to compensate for the poor quality of public schooling. These schools include registered and unregistered schools, and are charging R7 500 a year or less.¹⁴⁴

The Norms and Standards for School Funding describes government's subsidy policy as being premised on fiscal and social grounds. It states that from a fiscal perspective, subsidies to registered independent schools cost the State less than if learners were enrolled at public schools. From a social perspective, the 'extreme backlogs in the provision of public education' necessitate that subsidies 'serve explicit social purposes'. Subsidies to independent schools must therefore show preference for schools that provide a good education, are well managed and that serve poor communities. The norms note further that pressure on non-personnel allocations in provincial budgets has led to cuts in independent schools subsidies.¹⁴⁵ Subsidies are therefore given only to low-fee independent schools that meet the criteria set out in the legal framework.

In the *KwaZulu-Natal Joint Liaison Committee* case,¹⁴⁶ while the Constitutional Court acknowledged the obligations of government to learners at these subsidised independent schools, it also noted a delineation of the obligations of government in respect of public and independent schools. Such a delineation of function is indeed necessary, given that the vast majority of South Africans remain unable to afford the fees at these schools and have no choice but to continue to attend public schools.¹⁴⁷ Government obligations and, flowing from that, provisioning and resourcing should therefore continue to prioritise public schooling.

It is worth noting that there currently appears to be an ideological campaign from think tanks like the Centre for Development and Enterprises (CDE), advocating for an increase in, and for greater de-regulation of, low-fee independent schools. Recently, they have also been making the case for 'contract schools'.¹⁴⁸ These options are proffered as solutions to the quality schooling conundrum in South Africa.¹⁴⁹ This campaign is occurring without sufficient response from those who are proposing a stronger developmental state. Such an analysis is beyond the scope of this paper, but it is an analysis that appears to be necessary.

Underlying determinants of the systemic problems

The systemic nature of the schooling crisis is the tale of two school systems in South Africa. The one servicing the majority of poor and African learners is an under-resourced, non-performing system, while the other

is a smaller, functional system that caters for the middle-class.

These disparities are most acutely felt in rural schools and schools that fell within the administration of erstwhile apartheid Bantustans. Thus, schools in the Eastern Cape, for example, often provide the most extreme examples of inadequacies in provisioning and of the widespread absence of learning and teaching. But under-resourced schools are a national problem and exist across the urban and rural divide.

Families therefore spend increasing amounts of their household income on school fees and transport, seeking improved educational opportunities for their children. A post-apartheid phenomenon of South African education is the migration of learners in search of a better education. Thus, learners move from township schools to model C schools, or to the better-resourced township schools located in historically Indian areas, as well as from the rural areas in provinces such as Limpopo and the Eastern Cape to the urban centres such as Gauteng and Cape Town. This in turn increases the pressure on these provinces and on model C schools, as evidenced by the *Rivonia* case, and produces an inevitable tension between PEDs grappling with systemic concerns and individual schools preoccupied with their immediate interests of maintaining the standards of quality at their schools.

Within this context, the creation of fee-free schooling will not remedy the deepset inequalities in South African society without concomitant improvements to the overall resourcing of historically disadvantaged schools.¹⁵⁰ What is required is for all schools to be effectively upgraded to lessen the demand on the fewer functional public schools.

Another systemic failure is discernible from some of the recent litigation. This is that much of the failure in education delivery appears to be about inefficiency, mismanagement and even corruption, rather than just about sufficiency of resources. In fact, the *Limpopo textbook* case and much of the education litigation in the Eastern Cape occurred while these provinces were under national administration in terms of section 100 of the Constitution because of maladministration and mismanagement.¹⁵¹

The inefficiencies and mismanagement are evident in, for example, the failures to meet ASIDI targets, in the tragedy of allocated but unspent

resources for school infrastructure, and in the irrationalities in post provisioning. The judgment in the *Limpopo textbook* case also referred to an ‘irregular tender’ of R320 million to EduSolutions, resulting in the failure to deliver textbooks in Limpopo. Ensuring education delivery therefore also requires addressing corruption and mismanagement in the education sector and government in general.

Conclusion and recommendations

What is evident from the discussion on the recent litigation and mobilisation that is occurring is that there is currently a heightened civil society response to government’s failure to act effectively on what has become widely referred to as a ‘crisis’ in education. This mobilisation is arguably reminiscent of the response to the Aids denialism of the previous decade.¹⁵² For civil society, in the context of the strong qualified right to basic education, there is an incentive to determine the extent of the State’s obligations in respect of the right so as to hold government accountable for delivery.

Government’s response to the many cases against it appears to be to settle matters before they are heard, but then to resist full compliance with the court orders. This is evident in the instances of Equal Education’s case for norms and standards and in the many cases in the Eastern Cape. It is also evident in the *Limpopo textbook* case, where two subsequent court orders for compliance were required after the first judgment. Civil society has therefore had to be increasingly innovative in its efforts to compel government to act. Government failure to comply with court orders has also required that civil society extend its role well beyond litigation by monitoring government delivery and returning to court more than once if required.

It is imperative therefore that the courts take note of government’s tendency to recalcitrance when crafting orders. In particular, it ought to be noted that supervisory orders such as that in the *Limpopo textbook* case facilitate expeditious access for applicants that find it necessary to return to court where the State fails to implement court orders. It also provides

judicial oversight in the monitoring of implementation of court orders.

Perhaps the greatest omission of government is the failure to develop law and policy in key areas of education delivery. This is evident in the failure of government to develop norms and standards geared towards improving educational equality in terms of Section 5A of SASA in respect of admissions, LTSM and until very recently, and in the face of a legal challenge, infrastructure. It is also evident in its failure to develop effective law and policy – as it is obliged to do in terms of CEDAW – to promote the education of girls and thereby reduce gender inequality.

The failure to develop law and policy to guide PEDs has largely contributed to inefficiencies in government delivery resulting in inability to spend funds specifically earmarked for much needed infrastructural improvements, and it has resulted in non-delivery of essential learning material. This failure has also failed to sufficiently provide clear guidance as to the delineation of powers and functions between PEDs and SGBs. If the national government provided clearer parameters for guiding school capacity, for example, the inherent tensions between PEDs and SGBs would be minimised. Instead, the delineation of such powers and functions has been left to the evolution of jurisprudence in courts.

The fault-line section of this paper has highlighted several areas where government appears to be failing to meet its obligations. What follows are recommendations in respect of potential future civil society interventions to promote basic education delivery. Future campaigns must target the development of law and policy in the key areas that have been identified in this paper.

The terms of reference of this paper, as well as length constraints, has meant that while many issues of concern in basic education have been raised, a fuller discussion of some of these issues has, in some instances not been possible. The paper in these instances identifies several areas where further research and debate is needed. This could perhaps occur through the commissioning of papers to be discussed at a conference on realising the right to basic education.

The paper has highlighted on-going concerns relating to physical access to schools. Further detailed research in this area is required.

The section analysing economic access to schools suggests that these

issues have yet to be completely eliminated. The debate on free schooling should perhaps be reopened. There also needs to be an analysis of whether the current system of school fees can be further reformed. This will require, for example, revisiting the quintile status or the fee status of many schools. It will also require ensuring the effective functioning of the compensation regime when exemptions are granted to facilitate access of poor learners to fee-paying schools. Civil society organisations must also be vigilant in respect of impending government initiatives to roll back hard-won gains in respect of fee-free schooling.

The continuing incongruity between the matric examination and other national, regional and international performance assessments suggests that many learners leave school without sufficient skills to enable them to realise their potential and to pursue decent job opportunities or a tertiary education. Many have suggested that a discussion of the matric pass rate must therefore also include a discussion of the quality of matric examination and the high drop-out rate from grade 10. A national dialogue should therefore cover (without being limited to) the following issues:

- Whether or not the matric examination is an accurate determinant of whether a learner has acquired the requisite skills necessary to complete school.
- Whether or not the matric pass requirement ought to be increased to 50 per cent.
- Whether or not there needs to be a standardised system of marking across the provinces to address discrepancies between the provinces.
- How best to increase the quality of schooling, in particular, how to target ‘underperforming schools’ to improve matric results in these schools.
- An analysis of the pass rate in terms of the quintile rankings.

Commentators have also suggested that any assessment of the pass rate must also include the number of learners who have never reached grade 12.

Improving educational quality requires a multi-faceted approach. Some of the measures required are already being addressed, such as the campaign for improved school infrastructure. But further strategic cam-

paigns are required in other areas relevant to educational quality. Suggestions have been made in respect of improving delivery of LTSM. A co-ordinated campaign to address the many issues relating to teachers is imperative. The main issues in this regard include addressing irrationalities in post provisioning, ensuring that government adopts a tough, yet fair stance towards teachers, and improved teacher content knowledge in the subjects that they are required to teach.

Progressive civil society organisations must also develop a response to the current initiatives from free-market lobbyists proffering privatised solutions to the quality schooling dilemma.

Finally, while the finalising of the Infrastructure Regulations is a great leap forward for improving the quality of schooling, its treatment of learners with special needs is an area of concern and potentially an area of legal challenge that ought to be interrogated further.

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<i>Centre for Child Law v Minister of Basic Education</i>	[2012] 4 All SA 35 (ECG)
<i>Equal Education and Others v Minister of Basic Education and Others</i> Eastern Cape High Court, Bhisho Case	Case No. 81/ 2012
<i>Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995</i>	1996 (4) BCLR 537(CC)
<i>Governing Body of the Juma Musjid Primary School v Ahmed Asruff Essay NO</i>	2011 (8) BCLR 761 (CC)
<i>Government of the Republic of South Africa and Others v Grootboom</i>	2001 (1) SA 46 (CC)
<i>Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School and Another</i>	2013 (9) BCLR 989 (CC)
<i>Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo</i>	2010 (2) SA 415 (CC)

CASE NAME	SALR
<i>KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others</i>	2013 (4) SA 262 (CC)
<i>Laerskool Middelburg v Departmentshoof, Mpumalanga Department van Onderwys</i>	2003 (4) SA 160 (T)
<i>Madzodzo obo Parents of learners at Mpimbo Junior Secondary School and Others v Minister of Basic Education and Others Eastern Cape High Court, Bhisho</i>	Case No. 2144/2012
<i>Matukane and Others v Laerskool Potgietersrus</i>	1996 (3) SA 223 (T)
<i>MEC for Education in Gauteng Province and Others v Governing Body of Rivonia and Others</i>	(CCT 135/12)[2013] ZACC 34 (3 October 2013)
<i>MEC for Education: KwaZulu-Natal v Pillay</i>	2008(1) SA 474 (CC)
<i>Section 27 v Minister of Education</i>	[2012] 3 All SA 579 (GNP)
<i>S v Makwanyane</i>	1995 (3) SA 391 (CC)
<i>Western Cape Department of Education and Others v The Governing Body of Mikro Primary School</i>	2006 (1) SA 1 (SCA)
<i>Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another</i>	2011 (5) SA 87 (WCC)

Policy and legislation

Constitution of the Republic of South Africa (1996)

Draft National Minimum Norms and Standards for School Infrastructure General Notice 1439 (GG 31616 of November 2008)

Education White Paper 6 Special Needs Education: Building an inclusive education and training system (2001)

Employment of Educators Act 76 of 1998

Exemption of Parents from the Payment of School Fee Regulations Government Notice 1293 (GG 19347 of October 1998)

- Measures for the Prevention and Management of Learner Pregnancy
(2007)
- National Education Policy Act 27 of 1996
- National Guidelines on School Uniforms Government Notice 173 (GG
28538 of February 2006)
- National Guidelines for the Prevention and Management of Sexual Violence and Sexual Harassment in Public Schools (May 2008)
- National Policy for an Equitable Provision of an Enabling School Physical and Teaching and Learning Environment (GG 33283 of June 2010)
- National Norms and Standards for School Funding General Notice 2362
(GG 19347 of October 1998)
- National Norms and Standards for School Funding General Notice 2362
(GG 29178 of August 2006)
- Guidelines relating to Planning for Public School Infrastructure (May 2012)
- Regulations for the Creation of Educator Posts in a Provincial Department of Education and the Distribution of Such Posts to the Educational Institutions Government Notice R1451 (GG Notice
R24077 of November 2002)
- Regulations for Exemption of Parents from the Payment of School Fees
Regulations General Notice 2362 (GG 29178 of August 2006)
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School Infrastructure Government Notice R920 (GG 37061 of
November 2013)
- South African Schools Act 84 of 1996

Press statements and media articles

- Bernstein A 'The rise of low-fee private schools can only benefit South Africa' *Business Day* (1 August 2013)
- Davie E 'A private education can be low cost' *The Star* (28 August 2013)
- Equal Education Press Statement 'DBE: "Tell no lies. Claim no easy victory"' (9 October 2013)
- Gustafsson M 'All textbooks deserve attention' *Mail & Guardian*

- (November 2012)
- Isaacs D 'SA's "incomes-based" education system perpetuates inequality' *Business Day* (6 January 2010)
- John V 'Improved annual national assessment results impossible, say academics' *Mail & Guardian* (December 2012)
- LRC press statement 'Off the Floor and ready to Learn: Department of Education ordered to provide school furniture within 90 days' (26 September 2013)
- Macfarlane D 'Now it's Asmal's Turn in Court' *Mail & Guardian* (May 2002)
- Macfarlane D 'Civil society exposes government's chronic denialism' *Mail & Guardian* (October 2012)
- Phakathi B 'Minister questions no-fee model' *Business Day* (19 September 2013)
- SAPA "Look at bigger picture" – education analyst' *Sowetan* (January 2013).
- Section27 press statement 'Update on Textbook delivery for 2013' (14 December 2012)
- Veriava F 'Progress betrayed by loopholes and double-digit deadlines' *Mail & Guardian* (September 2013)

Notes

1. Governing Body of the Juma Masjid Primary School and Another v Ahmed Asruff NO and Others (Juma Masjid) 2011(8) BCLR 761 (CC) para. 41.
2. Under apartheid there were a least 14 different education administrations. In 1994, state education expenditure per capita was as follows: R5 403 for white children; R4 687 for Indian children; R3 691 for coloured children; and an average of R1 715 for African children. S Wilson 'Taming the Constitution: Rights and Reform in the South African Education System' (2004) 20 *SAJHR* 419, 426.
3. See, for example, U Hoadley 'Knowledge, knowers and knowing – Curriculum reform in South Africa' in L Yates and M Grumet (eds) *Curriculum in*

- Today's World: configuring knowledge, identities, work and politics.* (2011) 139–154.
4. MEC for Education and Others v Governing Body of Rivonia Primary and Others (Rivonia) (CCT 135/12) [2013] ZACC 34 (3 October 2013) para. 35. See also *Head of Department, Mpumalanga Education Department and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) paras 55–57: that discusses the transformative purpose of SASA so as to give effect to the constitutional right to education.
 5. National Planning Commission Human Conditions Diagnostics Document (2011) 23.
 6. *Juma Musjid* (note 1 above) para. 42. Similarly in the case of *MEC for Education: KwaZulu-Natal v Pillay* 2008(1) SA 474 (CC) paras 121–124, O' Regan J acknowledges that the 'pattern of disadvantage engraved in a education system by apartheid has not been erased', and that this has largely reinforced race and class inequalities in schools. See also *Rivonia* (note 4 above) para. 2.
 7. *Matukane and Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T).
 8. *Head of Department, Mpumalanga Education Department and Another v Hoërskool Ermelo and Another* (Note 4 above). Earlier cases include: *Laerskool Middelburg v Departementshoof, Mpumalanga Department van Onderwys* 2003 (4) SA 160 (T); *Western Cape of Education and Others v The Governing Body of Mikro Primary School* 2006 1 SA 1 (SCA); In *Head of Department*. See also S Woolman, and B Fleish *The Constitution in the Classroom: Law and Education on South Africa* 1994–2008 (2009) 45–81.
 9. Some of the organisations included the Alliance for Children's Entitlement to Social Security (ACCESS), the Education Rights Project (ERP) which was based with the Education Policy Unit at Wits, the Global Campaign for Education, the Centre for Applied Legal Studies (CALS) and the South African Human Rights Commission (SAHRC).
 10. D Macfarlane 'Now it's Asmal's Turn in Court' *Mail & Guardian* (May 2002).
 11. For more in this regard, see F Veriava 'The amended legal framework: A boon or a barrier?' (2007) 23 *SAJHR* 180. Also see S Wilson (note 2 above); and D Roithmayr 'Access, adequacy and equality: The constitutionality of school fee financing in public education' (2003) 19 *SAJHR* 382.
 12. Cases such as the *Centre for Applied Legal Studies and Others v Hunt Secondary Schools and Others* (10091/2006) [2007] ZAKZHC (15 June 2007) in which the Centre for Applied Legal Studies (CALS) assisted parents who were being

- sued by the schools for outstanding school fees despite being legally entitled to exemptions were nevertheless useful in highlighting the plight of poor parents struggling to pay school fees.
13. *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC); *Rivonia* (note 6 above).
 14. General Comment No. 3 The nature of States Parties' obligations (article 2, para. 1 of the Covenant) (5th session, 1990) [UN Doc E/1991/23]. This General Comment explains terms such as 'to the maximum of available resources', 'achieving progressively the full realisation of the rights' and 'all appropriate means'.
 15. General Comment No. 11 Plans of action for primary education (21st session, 1999) [UN Doc E/C 12/1999/4]. This General Comment deals with the provisions in article 14.
 16. General Comment No. 13 The right to education (article 13 of the Covenant) (21st session, 1999) [UN Doc E/C 12/1999/10]. This General Comment deals with the provisions in article 13.
 17. Article 11 sets out the purposes of education and the duties of state parties with regard to achieving the full realisation of the child's right to education.
 18. General Comment No. 1 on the aims of education (article 29(1) of the Convention) [UN Doc CRC/GC/2001/1] and General Comment No. 8 on the rights of the child to protection from corporal punishment and other cruel or degrading forms of punishment (articles 19; 28, para. 2; and 37) [UN Doc CRC/C/GC/8].)
 19. The Constitutional Court has, however, held that the courts must take into account binding and non-binding international law. *S v Makwanyane* 1995 (3) SA 391 (CC) para. 35.
 20. South African Human Rights Commission 'SAHRC Charter of Children's Basic Education Rights' (2013).
 21. Government of the Republic of South Africa 'Millennium Development Goals: Country Report 2010' (2012) 47. The report acknowledges that while enrolment rates are high, class repetitions pose a greater threat to a completion of primary education. Thus, many children complete primary schooling at an older age than expected.

22. For more discussion on the delineation of this, see C McConnachie and C McConnachie 'Concretising the Right to a Basic Education' *SALJ* (2012) 129(3) 565–569. See also F Veriava and F Coomans 'The right to education in D Brand and C Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 63.
23. The Constitutional Court's socio-economic rights jurisprudence has identified the essential elements that a state programme must exhibit for it to be considered 'reasonable'. That is, it must be capable of facilitating the realisation of the right. It must be comprehensive, coherent, co-ordinated. Appropriate financial and human resources must be made available for the programme. It must be balanced and flexible and make appropriate provision for short-, medium- and long-term needs. It must be reasonably conceived and implemented. It must be transparent and its contents must be made known effectively to the public. And, it must make short-term provision for those whose needs are urgent and who are living in intolerable conditions. See, for example, S Liebenberg *Socio-Economic Rights – adjudication under a transformative constitution* 1st edition (2010) 152–153.
24. Section 3(1).
25. Section 3(3).
26. The section could also be read to imply that the State must ensure that there is sufficient infrastructure to accommodate all learners within this phase of schooling. Indeed, this was one of the arguments made in *Equal Education's* case to compel the Minister of Basic Education to publish regulations for minimum standards for school infrastructure. This case is discussed in detail below.
27. Section 58C(3).
28. See, for example, SASA sections 5(5), 6, 8 and 20.
29. SASA, section 22.
30. SASA, section 36.
31. SASA, section 39(7).
32. SASA, section 39.
33. General Notice 2362 (GG 19347 of October 1998) and amended in terms of General Notice 2362 (GG 29178 of August 2006).
34. SASA, Section 41 read together with the Exemption Regulations.
35. In terms of the amendments, section 41(5) of SASA states that: 'a learner has the right to participate in the total school programme despite non-payment

of compulsory school fees by his or her parent and may not be victimised in any manner, including but not limited to (a) suspension from classes; (b) verbal or non verbal abuse; (c) denial of access to cultural, sporting or social activities of the school; or (d) denial of a school report or transfer certificates.’

36. Government Notice 173 (GG 28538 of February 2006).
37. See, for example, the *Pillay* case (note 6 above). This case dealt with a learner who sought an exemption from her school’s code of conduct which prohibited the wearing of nose rings on the basis that the wearing of the nose ring was part of the practice of her religion and culture as a Hindu girl. The Constitutional Court found that the prohibition unfairly discriminated against the learner on religious and cultural grounds. While this case was initiated prior to the publication of the Guidelines and was heard once the Guidelines were published, the Constitutional Court held that the issues in the case were not moot, as the Guidelines were not peremptory and binding on SGBs, and therefore the court’s finding would still have relevance.
38. General Notice 2362 (GG 19347 of October 1998) and amended in terms of General Notice 2362 (GG 29178 of August 2006).
39. See General Notice 2362 (GG 19347 of October 1998) and amended in terms of General Notice 2362 (GG 29178 of August 2006) sections 78–82.
40. General Notice 1438 (GG 31616 of November 2008).
41. General Notice 1439 (GG 31616 of November 2008).
42. GG 33283 of June 2010.
43. Government Notice R 929 (GG 37081 of November 2013).
44. See regulation (b)(i).
45. This compares favorably to other middle-income countries since it is higher than the six per cent benchmark that the Organisation for Economic Co-operation and Development (OECD) recommends for optimal growth and development. National Treasury ‘Budgets and Expenditure Review: 2005/06–2011/12’ (2009) 35.
46. Regulations for the Creation of Educator Posts in a Provincial Department of Education and the Distribution of Such Posts to the Educational Institutions Government Notice R1451 (GG Notice R24077 of November 2002).
47. According to Porteus for example, there are several curricular areas which enjoy added value according to the ‘weighted norms’, including agriculture,

- technology etc. These curricular areas are primarily offered in historically advantaged schools. Also, these schools enjoy educators with higher qualification. Thus in practice these schools enjoy higher per capita personnel expenditure than historically disadvantaged schools. K Porteus 'Education financing: Framing inclusion or exclusion' (2002) 9(4) *Quarterly Review of Education and Training in SA* 13, 14.
48. SASA, Section 35.
 49. *In re School Education Bill of 1995* (Gauteng) 1996 (4) BCLR 537 (CC) para. 9. The main issue in this case was whether the right to establish and maintain an independent institution in terms of section 29(3) included an obligation by the State to establish such institutions. The court held that the right did not entail this obligation.
 50. *Governing Body of the Juma Masjid Primary School and Others v Essay N.O. and Others* (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (11 April 2011) para. 37.
 51. S Liebenberg 'The Interpretation of Socio-economic rights' in S Woolman et al (eds) *Constitutional law of South Africa* 2ed OS (2003) 33-48-33-52. F Veriava and F Coomans (note 22 above) Chapter 2.
 52. For a fuller discussion of an approach to interpreting the right to basic education see C McConnachie and C McConnachie (note 22 above) 554-590.
 53. *Governing Body of the Juma Masjid Primary School and Others v Essay N.O. and Others* (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (11 April 2011) para. 43.
 54. See C McConnachie and C McConnachie (note 22 above) 565-569.
 55. See note 23 above.
 56. *Section 27 and Others v Minister of Education and Another* [2012] 3 All SA 579 (GNP).
 57. *Ibid*, para. 22.
 58. *Ibid*, para. 25.
 59. *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* (CCT40/09) [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (14 October 2009).
 60. *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC).

61. *Rivonia* (note 4 above) para. 54. The judgment in *Rivonia* is therefore distinguishable from other school governance cases where the court held that an HOD could not override the SGB policy-making functions in respect of language and pregnancy policy, without following certain strict criteria for the withdrawal of the functions of SGBs.
62. Eastern Cape High Court, *Bhisho Case*, Case No. 504/10 of 2011. For a detailed discussion on this case see A Skelton 'Leveraging funds for school infrastructure: The South African "mud schools" case study' *International Journal on Education* (forthcoming) copy on file with author.
63. *Equal Education and Others v Minister of Basic Education and Others* Eastern Cape High Court, *Bhisho Case*, Case No 81/2012.
64. Guidelines relating to Planning for Public School Infrastructure, May 2012.
65. *Section 27 and Others* (note 56 above) para. 20.
66. *Ibid*, para. 25.
67. *Ibid*, paras 28–32.
68. *Ibid*, para. 45.
69. Press Statement Section 27 'Update on Textbook delivery for 2013' (14 December 2012).
70. Eastern Cape High Court, *Bhisho Case*, Case No. 2144/2012.
71. *Madzodzo obo Parents of learners at Mpimbo Junior Secondary School and Others v Minister of Basic Education and Others* Supplementary Founding Affidavit Case No. 2144/2012 para. 12.
72. LRC press statement 'Off the Floor and ready to Learn: Department of Education ordered to provide school furniture within 90 days' (26 September 2013).
73. *Centre for Child Law and Others v Minister of Basic Education and Others* (1749/2012) [2012] ZAECGHC 60; [2012] 4 All SA 35 (ECG); 2013 (3) SA 183 (ECG) (3 July 2012).
74. Legal Resources Centre 'Ready to Learn? A Legal Resource for Realising the Right to Education' (2013) 65.
75. *Centre for Child Law and Others v Minister of Basic Education and Others* (1749/2012) [2012] ZAECGHC 60; [2012] 4 All SA 35 (ECG); 2013 (3) SA 183 (ECG) (3 July 2012) para. 32.
76. Legal Resources Centre 'Ready to Learn? A Legal Resource for Realising the Right to Education' (2013) 67–68.

77. *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another* 2011 (5) SA 87 (WCC).
78. *Ibid*, para. 26.
79. *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others* 2013 (4) SA 262 (CC).
80. *Ibid*, para. 45.
81. National Treasury (note 45 above) 23.
82. See note 4 above, para. 56.
83. National Treasury (note 45 above) 29.
84. See discussion below on independent schools.
85. See, for example, Section 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
86. D Isaacs 'SA's "incomes-based" education system perpetuates inequality' *Business Day* (6 January 2010).
87. Human Rights Watch 'Forgotten Schools: Right to Basic Education for Children on Farm in South' (2004) 16 No. 7(A) Human Rights Watch Reports 13–14.
88. *Ibid*.
89. See Centre for Applied Legal Studies "Almost a Boss-boy": Farm Schools, Farm life and Social Opportunity in South Africa' 43.
90. Social Surveys South Africa 'Access to Education in South Africa' Submission to the Portfolio Committee on Basic Education (2010) 2.
91. In 2007, the gross enrolment ratio was 98% for grades 1–7, suggesting near universal coverage, and 85% for grades 8–12. The gross enrolment ratio for the secondary phase shows that many learners drop out before completing grade 12. The overall gross enrolment ratio is 92%. National Planning Commission Human Conditions Diagnostics Document (note 5 above) 13.
92. Department of Education Monitoring and Evaluation 'Report on the Impact and Outcomes of the Education System on South Africa's Population: Evidence from Household Surveys' (2006) 20.
93. Statistics South Africa 'General Household Survey 2011' (2012) 7–8.
94. Statistics South Africa 'General Household Survey 2012' (2013) 8.
95. GHS (note 93 above) 9. GHS (note 94 above) 8.
96. Some of the other reasons cited included family reasons, illness and disability, poor academic performance, 'education is useless', working at home.

97. GHS (note 95 above) 9.
98. See, for example, K Tomasevski *Education denied* (2003) 138–140 where she cites the experiences of Uganda and Tanzania, where enrolment rates increased as school fees were abolished.
99. Social Surveys South Africa (note 91 above) 6. In term of the report: ‘A third of learners whose caregivers had indicated struggling to pay, or not being able to pay fees had had their report card or exam results withheld. Youth who participated in focus groups and in youth surveys pointed to their acute sense of difference as a result of not being able to afford the things that many of their classmates could afford. Other youth indicated that their decision to leave school was due to the embarrassment at not being able to afford basics like lunch, money for civvies day and so on.’
100. GHS (note 94 above) 9.
101. GHS (Note 95 above) 9.
102. See, for example, V Gullapalli, M Ngwenya and F Veriava ‘Implementation of the Schools Fees and Funding Framework: A study of three provinces’ (July 2006) Centre for Applied Legal Studies. See also S Giese et al ‘A study on the implementation and impact of the No-Fee and Exemption Policies.’ (2009) Alliance for Children’s Entitlement to Social Security.
103. S Giese et al (ibid) 15.
104. S Giese et al (note 103 above) 10. See also R Wildeman ‘Reviewing 8 years of the implementation of the school funding norms’ (2008) Idasa 39. He notes that the way targeting occurs (using census data) at ward level means that vastly different levels of incomes and educational levels are drawn into the same boundary that defines a ward.
105. S Giese et al (ibid) 10. V Gullapalli, M Ngwenya and F Veriava (note 103 above) 10–13.
106. S Giese et al (note 102 above) 35.
107. See note 38 above, para. 106.
108. S Giese et al (note 102 above) 39.
109. S Strassbourg, S Meny-Gilbert, B Russel ‘More than getting through the school gates: Barriers to participating in schools’. Access to Education Series, Vol. 3 Social Surveys Africa (2010) 20.
110. One learner interviewed described how her mother sent her to a night school that did not require a uniform. This enabled her mother, the sole

- breadwinner, to buy uniforms for the other children. Ibid, 20.
111. Alliance for Children's Access to Social Security 'National Guidelines on School Uniforms – An Assessment of the impact of the National Guidelines on School Uniforms Notice 173 of 2006 on making School Uniforms more affordable and improving access to schools' P Martin (ed) (2007).
 112. B Phakathi 'Minister questions no-fee model' *Business Day* (19 September 2013).
 113. This refers to laws or policies that have the effect of reducing the level of protection accorded by a particular right.
 114. See article 28(1) of the CRC. Also Paragraph 7 of General Comment No. 11 on the interpretation of the term 'free of charge' in article 14 of the ICESCR provides a definition of the the term 'free education'. That is: 'The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are often highly regressive in effect...'
 115. S van der Berg 'Poverty and educational outcomes in South Africa' (2008) Centre for European Governance and Economic Development Research. See also N Spaull 'Poverty and Privilege: Primary School Inequality in South Africa' (2012).
 116. Department of Basic Education 'Report on the Annual National Assessments' (2012). See also V John 'Improved annual national assessment results impossible, say academics' *Mail & Guardian* (December 2012).
 117. SAPA "Look at bigger picture" – education analysts' *Sowetan* (January 2013).
 118. See S van der Berg (note 116 above). See also N Spaull (note 116 above) 4.
 119. Article 29(1)(a) of the CRC.
 120. Department of Education National Education Infrastructure Management Report (NEIMS) (2011).
 121. Equal Education Press Statement 'DBE: "Tell no lies. Claim no easy victory"' (9 October 2013).
 122. Forty-nine of these schools were initially scheduled to be rebuilt by the end of March 2012, and a further 100 by the end of March 2013. No schools were rebuilt by the end of March 2011/2012. By March 2013, four schools were

complete and 10 had reached 'practical completion'. Ibid.

123. See note 63 above, 7–9.
124. See note 122 above. See also South African Human Rights Commission (note 20 above) 22.
125. See note 74 above, para. 12
126. JD Jansen 'South Africa's Education System' in Moeletsi Mbeki (ed) *Advocates for Change* (2011) 107–109.
127. Ibid 110–112.
128. Ibid 113.
129. For a discussion of the many facets of this case see F Veriava 'The 2012 Limpopo Textbook Crisis – A study in rights-based advocacy, the raising of rights' consciousness and governance' (2013) Section 27.
130. Department of Education and SACMEQ 'The SACMEQ III project in South Africa: A study of the conditions of schooling and the quality of education in South Africa country report.' (2010). See also M Gustafsson 'All textbooks deserve attention' *Mail & Guardian* (November 2012).
131. In Swaziland, 100 per cent of learners have their own mathematics textbook and 99 per cent have their own reading textbooks. Similarly, 62 per cent of learners in Botswana have their own mathematics textbooks and 63 per cent their own reading textbooks, and in Lesotho 56 per cent have their own mathematic textbooks and 56 per cent their own reading textbooks.
132. According to Nikki Stein, the attorney for Section 27, this is a common occurrence at many schools in the Limpopo province.
133. South African Human Rights Commission 'Interim report of the SAHRC Investigative Hearing: Monitoring and Investigating the Delivery of Primary Learning Materials in Schools Countrywide' (2013) 27.
134. Legal Resources Centre (note 75) 51.
135. GHS (note 95 above) 9.
136. Ibid 18.
137. Human Rights Watch 'Scared at School: "Sexual Violence Against Girls in South African Schools"' (2001).
138. For a discussion on what constitutes an appropriate policy response, see N Naylor 'Prohibiting the Ongoing Sexual Harassment of and Sexual Violence Against Learners' (2002) Education Rights Project. Currently, only the Western Cape has a policy in place for dealing with sexual violence and sex-

- ual harassment. See also F Veriava 'Gender Equality and Education in South Africa' in B Goldblatt and K McLean (eds) *Women's Social and Economic Rights* (2011) 224.
139. *Western Cape Forum for intellectual Disability v Government of the Republic of South Africa and Another* 2011 (5) SA 87 (WCC) [2010] ZAWCHC 544; 18678/2007 (11 November 2010).
 140. National Treasury (note 45 above) 31.
 141. Education White Paper 6 'Special Needs Education: Building an inclusive education and training system' (2001) 9.
 142. These have included, among others, hearings on the costs of schooling, school-based violence, LTSM and the development of a Charter on the right to basic education.
 143. Centre for Development and Enterprises 'Affordable Private Schools in South Africa' (2013) 5–6.
 144. *Ibid* 3.
 145. Paras 171–191.
 146. *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others* (CCT 60/12) [2013] ZACC 10; 2013 (6) BCLR 615 (CC); 2013 (4) SA 262 (CC) (25 April 2013).
 147. According to the CDE research, the low-fee independent schools are utilised not by very poor people, but by small business owners and working class parents.
 148. These are public funded schools that are privately managed.
 149. A Bernstein 'The rise of low-fee private schools can only benefit South Africa' *Business Day* (1 August 2013); Centre for Development and Enterprises *Promoting School Choice for the Poor* (2012); E Davie 'A private education can be low cost' *The Star* (28 August 2013).
 150. The World Bank 'Abolishing School Fees in Africa: Lessons from Ethiopia, Ghana, Kenya, Malawi, and Mozambique' (2009).
 151. Section 100 of the Constitution specifies that:

(1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including-

- (a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
- (b) assuming responsibility for the relevant obligation in that province to the extent necessary...

152. See D Macfarlane 'Civil society exposes government's chronic denialism' *Mail & Guardian* (October 2012), detailing the significant increase in litigation against the DBE.

The right to housing in South Africa

JACKIE DUGARD WITH MICHAEL CLARK, KATE TISSINGTON AND
STUART WILSON

Waiting for 'delivery' will not liberate us from our life sentence. Sometimes 'delivery' does not come. When 'delivery' does come it often makes things worse by forcing us into government shacks that are worse than the shacks that we have built ourselves and which are in human dumping grounds far outside of the cities. 'Delivery' can be a way of formalising our exclusion from society.

— ABAHLALI BASEMJONDOLO, THE SOUTH
AFRICAN SHACK-DWELLERS MOVEMENT,
2010.¹

Introduction

Under apartheid, access to land (and concomitantly housing) was racially determined. The minority white population owned and had access to the vast majority of the land while the black majority population was relegated to ethnically-based 'homelands' or dormitory townships on the outskirts of cities and towns. This spatial segregation was enforced

through a host of repressive legislation including the Natives Land Act 27 of 1913, Group Areas Act 41 of 1950 and the Prevention of Illegal Squatting Act 52 of 1951. Furthermore, the socio-economics of apartheid meant that, in general terms, white people lived in formal houses or flats, whereas black people lived in huts, shacks or rudimentary township houses. Apartheid land and planning legislation not only 'systematically deprived the African majority of the population of formal access to land and housing in urban areas, thereby entrenching socio-economic and spatial inequality and creating the conditions for the unlawful occupation of land and property', but the common law 'openly favoured strong property rights and allowed private landowners to vindicate their rights through eviction processes that were not balanced against considerations of occupiers' needs and circumstances'.²

The racialised nature of access to housing (and land) has been one of the most damaging legacies of apartheid and one that the post-apartheid government has most battled to overcome, giving rise to the fact that the right to housing has been litigated more than any other socio-economic right. Thus, despite internationally unparalleled progress in terms of providing the funding for approximately 1.4 million housing units since 1994,³ there are enduring human rights-related problems that are highlighted in this paper.

At the root of the housing-related systemic challenges is the government's preoccupation with a private title approach to social housing provision that has focused on rolling out 'RDP houses',⁴ often on the peripheries of urban areas and almost entirely to the exclusion of more appropriate alternatives. This approach has rendered housing provision highly bureaucratic, non-participatory and expensive, as well as a significant source of corruption and fraud. It has also had the unintended adverse consequence of stalling definitive action on upgrading informal settlements, which has meant that tens of thousands of households languish in housing- and service-related limbo for years and even decades on end; or have to relocate to even more unsatisfactory locations – usually with substantially worse services or a lack of access to services and work. And it is one of the factors behind the generalised failure by municipal government – despite a clear legal duty as underscored by the Constitu-

tional Court in the *Grootboom*⁵ case and as subsequently legislated in the National Housing Code – to provide emergency shelter for evictees that are likely to be rendered homeless by an eviction. Thus, housing ‘delivery’ has become a fraught and contested terrain. As described in the introductory quote from the shack-dwellers movement, Abahlali baseMjondolo, ‘delivery’ is often a disempowering experience that, instead of improving lives and livelihoods, further marginalises residents and communities.

These issues speak to how complex the right to housing is. This is not only because of the complicated public-private nexus, especially where the State is providing housing for private ownership and/or is evicting households from informal areas. Housing is a deeply emotive issue, given that all people have to live and construct their lives somewhere. Although often not viewed as being as essential to basic life as, for example, water, having secure access to a home is the basis for living as a human being. As recognised in a recent report, individuals and families attach much of their ‘emotional and economic well-being’ to having a secure home, meaning that ‘tensions around housing delivery processes are almost inevitable’.⁶ Indeed, the importance of housing, especially to those denied it, is highlighted by the fact that access to housing is the single most cited concern of protestors engaging in the mushrooming wave of local protests around the country since 2004.⁷

This paper provides a human rights analysis of the right to housing in South Africa, first reviewing the legal, policy and functional frameworks, before undertaking a rights-based fault-line analysis of the systemic problems. The paper focuses on urban and peri-urban areas because South Africa has a majority urbanised population (urbanisation is increasing with substantial internal migration to the main cities of Johannesburg, Durban/eThekweni and Cape Town) and urban areas are the site of the most conflict around realising the right to housing.

International and regional housing law

Article 11 of the main international convention governing socio-economic rights, the International Covenant on Economic, Social and Cul-

tural Rights (ICESCR, 1966), recognises a right of everyone to an adequate standard of living, including adequate housing. The right to adequate housing is also recognised in relation to membership of vulnerable identity groups including children,⁸ rural women,⁹ racialised groupings,¹⁰ people with disabilities¹¹ and migrants.¹² In addition, there have been two General Comments on housing from the United Nations Committee on Economic, Social and Cultural Rights (CESCR, the body that interprets the ICESCR and clarifies related obligations).

In 1991, CESCR adopted General Comment 4 on the right to adequate housing, in which the Committee set out a number of factors related to the meaning of 'adequacy', including security of tenure; access to services, materials, facilities and infrastructure; affordability; habitability; accessibility; being located close to opportunities; and being culturally adequate.¹³ And, in 1997, responding to the prevalence of evictions around the world, the CESCR adopted General Comment 7 on forced evictions. This General Comment established a general prohibition on forced evictions defined as the 'permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection'.¹⁴ General Comment 7 goes on to specify *inter alia* that states must enact legislation to protect security of tenure, and to take all appropriate measures to ensure adequate alternative housing to the maximum of available resources. States must also put in place procedural and due process protections regarding any planned evictions, including adequate notice, consultation prior to eviction, identification of possible alternative land or housing, provision of information regarding the eviction, and the provision of legal remedies and legal aid if possible.¹⁵

Moreover, CESCR General Comment 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights (2005) highlights that states parties are bound to 'provide victims of domestic violence, who are primarily female, with access to safe housing' and that the right to adequate housing requires that 'women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so'.¹⁶ And CESCR

General Comment 19 on the right to social security (2008) stresses that family and child benefits should be provided on a non-discriminatory basis and must be sufficient to cover housing.¹⁷ Finally, the recent CESCR General Comment 20 on non-discrimination in economic, social and cultural rights emphasises the importance of ensuring access to housing to all groups, particularly women and girl-children, noting that ‘ensuring that all individuals have equal access to housing ... will help overcome discrimination against women and girl children and persons living in informal settlements and rural areas’, and that access to basic services should not be made conditional on a person’s land tenure status.¹⁸

As with all international socio-economic rights, the international right to housing entails an obligation to immediately satisfy essential levels of the right (minimum core content), as well as a parallel and ongoing obligation to use the maximum available resources to achieving progressively the full realisation of the right.¹⁹ In terms of the international right to adequate housing, General Comment 4 of CESCR stipulates that the minimum core content to be immediately achieved by states (or to be justified in terms of insufficient resources) includes obligations to ensure effective monitoring of the situation regarding access to housing, putting into place ‘enabling strategies’ including laws, policies and budgets, along with the prohibition on forced evictions.²⁰ And CESCR General Comment 19 states that it is a core obligation that social security schemes provide a minimum essential level of benefits to all families and individuals that will enable them to acquire ‘at least ... basic shelter and housing’.²¹

South Africa has not ratified the ICESCR. However, as a signatory, it is bound to not undermine its provisions.²² Moreover, in its 1995 judgment on the death penalty, the South African Constitutional Court clarified that, in the context of interpreting the South African Bill of Rights, section 39(1) of the South African Constitution Act 108 of 1996 (Constitution) requires the courts to consider non-binding, as well as binding international law.²³ Nonetheless, given the non-ratification of the ICESCR, the South African Constitutional Court has taken the view that the South African Government is not obliged to pursue a minimum core content approach to socio-economic rights but rather that it must have a reasonable programme to progressively realise each right within available

resources.²⁴ It should be noted, in light of the government's (as yet unenacted) announcement in October 2012 that it would ratify the ICESCR, that if the ICESCR is ratified, South Africa will be bound to pursue the minimum core approach to socio-economic rights.

South Africa has ratified the African Charter on Human and People's Rights (ACHPR, 1981). Although the ACHPR does not contain an explicit right to housing, Article 24's right to 'a general satisfactory environment' favourable to development has been interpreted by the African Commission on Human and People's Rights to encompass a right to adequate housing.²⁵ South Africa has also ratified the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003), which, in Article 16, guarantees women's right to equal access to housing.

The legal obligations stemming from international and regional human rights instruments are compelling, but in practice the enforcement of the right to housing (as with all socio-economic rights) in South Africa occurs largely within domestic legal and policy frameworks.

South African housing law²⁶

Section 26(1) of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution), guarantees everyone's right of access to adequate housing. Section 26(2) establishes that the state must take reasonable legislative and other measures, within its available resources, to progressively realise this right.²⁷ Section 26(3) prohibits all arbitrary evictions and states that 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'. The meaning of section 26 – and particularly section 26(3) – has been clarified in the course of numerous court cases discussed below.²⁸

Part A of Schedule 4 in Chapter 14 of the Constitution lists housing, urban and rural development, and regional planning and development, as functional areas of concurrent national and provincial legislative competence. Part B lists building regulations, electricity and gas reticulation, water and sanitation services, and municipal planning as local government matters. Section 156(4) states that national government and provin-

cial governments must assign to a municipality the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if that matter would most effectively be administered locally and the municipality has the capacity to administer it (see section 2.3 below for a discussion on the accreditation of municipalities to take on the housing function).

Beyond the Constitution, since 1994 a raft of laws have been promulgated relating to housing, which attests to the broad and complex nature of the housing terrain in the country. The main housing-related laws are:

- the Housing Act 107 of 1997 (amended by Acts 28 and 60 of 1999; Act 4 of 2001) (Housing Act);
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE);
- Rental Housing Act 50 of 1999 (amended by Act 43 of 2007) (Rental Housing Act);
- National Norms and Standards for the Construction of Stand Alone Residential Dwellings Financed through National Housing Programmes (April 2007) (National Norms and Standards); and
- Social Housing Act 16 of 2008 (Social Housing Act).

The Housing Act is the primary piece of housing legislation in South Africa. However, while the Act contains the framework for housing development, it is the National Housing Code that contains the substance of housing development and implementation – national housing policy and programmes. The housing legislative and policy arrangement in South Africa has been deemed unusual in that it ‘expressly sanctions the inversion of the usual relationship between policy and legislation.’²⁹ According to McLean, ‘the typical, and desirable, relationship is that policy documents should state the overall objectives of government strategy, while the detailed rules are set out in primary or secondary legislation.’³⁰ In South Africa, however, the main principles, policy choices and implementation rules for housing are contained in the National Housing Code, which can be altered by the Minister. Therefore these key components of housing development are not deliberated upon in Parliament or legislated in statute.³¹ McLean argues that, while it is always open for

government departments to include a substantial portion of policy in regulations and pure 'policy documents', the more important aspects of policy should be contained in legislation. She further states that the situation in South Africa may arguably 'amount to the abdication of Parliament of its constitutionally mandated role, and may, in addition, violate the principle of legality and the rule of law.'³² The National Housing Code will be discussed below.

The Housing Act provides for a sustainable housing development process, laying down general principles for housing development in all spheres of government; it defines the functions of national, provincial and local governments in respect of housing development; and it lays the basis for financing national housing programmes.

In section 2(1) the Act states that all spheres of government must give priority to the needs of the poor in respect of housing development, and consult meaningfully with individuals and communities affected by housing development. They must ensure that housing development provides as wide a choice of housing and tenure options as is reasonably possible; is economically, fiscally, socially and financially affordable and sustainable; is based on integrated development planning; is administered in a transparent, accountable and equitable manner; and upholds the practice of good governance. Further, in section 2(1)(e) the Act states that all spheres of government must promote inter alia the following: a process of racial, social, economic and physical integration in urban and rural areas; measures to prohibit unfair discrimination on the ground of gender and other forms of unfair discrimination by all actors in the housing development process; higher density in respect of housing development to ensure the economical utilisation of land and services; the meeting of special housing needs including the needs of the disabled; the provision of community and recreational facilities in residential areas; the housing needs of marginalised women and other groups disadvantaged by unfair discrimination.

A number of amendments were made to the principal Act in 1999 and 2001 respectively. The amended Section 4 of the Housing Act requires the Minister to publish a Code which includes the national housing policy and procedural guidelines for the implementation of the policy.

The Housing Act, and later the National Housing Code (promulgated in 2000, pursuant to section 4 of the Housing Act), sets out the roles and responsibilities of the three tiers of government in respect to housing. These are as follows:

- *National government*: must establish and facilitate a sustainable national housing development process by formulating housing policy. It must also monitor implementation through the promulgation of the National Housing Code and the establishment and maintenance of a national housing data bank and information system.
- *Provincial government*: must act within the framework of national housing policy and create an enabling environment by doing everything in its power to promote and facilitate the provision of adequate housing in its province, including the allocation of housing subsidies to municipalities.
- *Local government*, i.e. municipalities: must take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that the constitutional right to housing is realised. It should do this by actively pursuing the development of housing, by addressing issues of land, services and infrastructure provision, and by creating an enabling environment for housing development in its area of jurisdiction.

Section 10 of the Act allows for the administration of national housing programmes by local government through the accreditation of municipalities by the provincial Member of the Executive Council (MEC).³³

According to section 10A of the Housing Act, an owner of a state-subsidised house or serviced site may not sell or ‘otherwise alienate’ the dwelling/site within a period of eight years from the date that the property was acquired.³⁴ Further, if the property is vacated, the relevant provincial housing authority is deemed the owner and no purchase price or other remuneration is paid to the original beneficiary. However, this beneficiary will be eligible for obtaining another state-subsidised house if they still meet the qualifying criteria. These conditionalities have been much criticised³⁵ and, regardless of the merits, have been largely ineffectual with many beneficiaries vacating their allocated homes and infor-

mally 'selling' them (see below). Indeed, in 2004, the Breaking New Ground policy document (outlined later) explained that the above prohibition on selling government-subsidised houses was added to protect subsidy beneficiaries from downward raiding, but had 'also had the unintended consequence of undermining beneficiary choice and housing mobility and has created a significant barrier to formal secondary transactions.'³⁶ Breaking New Ground sets out that an amendment to section 10A of the Housing Act is to be introduced to reduce the prohibition period following occupation to five years – this amendment (included in the Housing Amendment Bill of 2006) has yet to be enacted.³⁷

Rental housing and eviction

The most important piece of national legislation enacted to give effect to section 26(3) of the Constitution, which protects against evictions, is PIE. The PIE Act provides safeguards against the eviction of unlawful occupiers living on both privately- and publicly-owned land. It has been the subject of a number of high-profile Constitutional Court cases around evictions discussed below. The PIE Act covers all those not protected by other legislation which provides protection for specific individuals or communities facing eviction. These largely rurally focused pieces of legislation are not discussed here (they relate to rural, communal or non-proclaimed township areas) but include the:

- Land Reform (Labour Tenants) Act 3 of 1996 (Labour Tenants Act) – protects labour tenants;
- Interim Protection of Informal Land Rights Act 31 of 1996 – protects occupiers of communal, native trust or other indigenous land; and
- Extension of Security of Tenure Act 62 of 1997 (ESTA) – protects occupiers of farmland.³⁸

The PIE Act is applicable to everyone who occupies land or property without the express or tacit consent of the owner or the person in charge of the land or property. This includes those who occupied land lawfully at some point in the past but who no longer have the consent of the owner to occupy the land in question, as well as to those who took occupation of land unlawfully in the first place.

PIE also applies to ‘holders-on’: those who once occupied land lawfully, e.g., in terms of a lease but whose possession subsequently became unlawful, e.g., the lease was validly terminated. This was clarified in the 2002 case *Ndlovu v Ngobo; Bekker and Another v Jika*,³⁹ a consolidated decision by the Supreme Court of Appeal (SCA).

Previously, the common law understanding of granting an eviction order was that an owner simply needed to establish ownership of the property and the occupier consequently had no right to remain in possession of the property. The PIE Act interpretation of granting an eviction – where the court needs to determine whether the eviction is ‘just and equitable’, taking into account special circumstances – has changed this; however, common law principles still apply to affluent tenants. The only relevant circumstances in these latter cases would be that the landlord is the owner, that the lease has come to an end and that the lessee is holding over. While the procedural requirements of PIE still apply to affluent tenants, an eviction would most probably be granted quite easily by a judge given these circumstances.⁴⁰

Sections 4 and 6 of PIE stipulate a number of strict procedural requirements for evictions to be lawful, i.e. steps that must be taken in order to get an eviction order, which pertain to both private bodies and the state respectively.⁴¹ These requirements further allow courts to refuse to grant an eviction order where it would not be ‘just and equitable’ to do so, attaching special consideration to the personal circumstances of occupiers. The meaning of what is ‘just and equitable’ has been developed by the courts in case law analysed below.

The main defence available to unlawful occupiers under PIE is to demonstrate the personal or household circumstances of all unlawful occupiers of the property and the likelihood that homelessness will result if these occupiers are evicted. Sections 4(6) and 4(7) of PIE state that a court must consider the rights and needs of certain vulnerable groups of unlawful occupiers before granting an eviction, which include the elderly, children, female-headed households and the disabled. A court will be reluctant to grant an eviction order if it is satisfied that homelessness will result and that there is no alternative accommodation available. Indeed, Constitutional Court jurisprudence on evictions (such as *Olivia*

Road, Joe Slovo and Abahlali discussed below) has led to a situation where judges are hesitant to grant an eviction order in cases where homelessness may result, until and unless alternative accommodation is provided.

The fair administration of rentals

The Rental Housing Act is a piece of national legislation that regulates the relationship between landlords and tenants in all types of rental housing. Section 2(1)(a)(i) of the Act stipulates that it is the government's responsibility to 'promote a stable and growing market that progressively meets the latent demand for affordable rental housing among persons historically disadvantaged by unfair discrimination and poor persons, by the introduction of incentives, mechanisms and other measures that improve conditions in the rental housing market.'

Section 7 of the Rental Housing Act provides for the establishment of provincial Rental Housing Tribunals to resolve disputes between landlords and tenants concerning 'unfair practices', which are defined in section 1 of the Act as those acts or omissions by a landlord or tenant in contravention of the Act or practices prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord. According to section 15(1)(f), unfair practices can inter alia relate to: the changing of locks; deposits; damage to property; demolitions and conversions; forced entry and obstruction of entry; House Rules; intimidation; issuing of receipts; tenants committees; municipal services; nuisances; overcrowding and health matters; tenant activities; maintenance; reconstruction or refurbishment work etc.

Section 2(3) of the Rental Housing Act stipulates that national government *must* introduce a policy framework on rental housing that sets norms and standards intended to facilitate provincial and local government's efforts to promote rental housing. Further, section 3 of the Act empowers the Minister to introduce a rent subsidy programme to stimulate the supply of rental housing property for low-income persons. It is unclear if the DHS regards its current social/rental subsidy programmes as having fulfilled these obligations. This is important to ascertain, as section 13(4)(c)(iii) of the Act empowers the Tribunal to discontinue 'exploitative rentals' and section 13(5) empowers it to make rent

determinations having regard to prevailing economic conditions of supply and demand; the need for a realistic return on investment for investors in rental housing; and incentives, mechanisms, norms and standards and other measures introduced by the Minister in terms of the rental housing policy framework referred to in section 2(3).

Neither the Rental Housing Act nor Unfair Practices Regulations passed by provinces explicitly define exploitative rental as an unfair practice. The two sections of the Act dealing with exploitative rentals and rent determinations therefore tend to favour the landlord. In the absence of the third factor – prescribed ministerial norms and standards – the Tribunal, when determining a reasonable, non-exploitative rental, is at best restricted to considering whether a rental is so far in excess of an ordinary market-related rental as to be exploitative. In the *Maphango* case discussed below, the Constitutional Court ruled that if a landlord excessively increases rentals this might be construed as an unfair practice and should be determined by the Rental Housing Tribunal.

In 2013, a revised version of the Rental Housing Amendment Bill was published by the Minister, which seeks to amend sections 7 and 14(1) of the Rental Housing Act in order to render mandatory the establishment of Tribunals in every province and the establishment of Rental Housing Information Offices in every local authority.⁴²

Housing norms and standards

In 1999, the National Norms and Standards for the Construction of Stand Alone Residential Dwellings were introduced by the Minister of Housing in terms of section 3(2)(a) of the Housing Act. These provided minimum technical specifications including environmentally efficient design proposals. On 1 April 2007, these standards were revised in the National Norms and Standards in respect of Permanent Residential Structures (National Norms and Standards), which are contained in the 2009 National Housing Code. All stand-alone houses constructed through application of the National Housing Programmes must at least comply with these norms and standards. As stipulated, each house must have:

- minimum gross floor area of 40m²;
- two bedrooms;

- separate bathroom with a toilet, a shower and hand basin;
- combined living area and kitchen with wash basin; and
- ready board electrical installation, if electricity is available in the project area.⁴³

In 2013, the DHS finalised new Norms and Standards for energy efficient dwellings, to cater for full electrical installation for each house.⁴⁴ According to a decision by the Minister and Members of the Executive Council, as of 1 April 2014 the Norms and Standards will be substantially adjusted and each house will be internally plastered, externally rendered and fitted with a ceiling and insulation. This will mean a 40 per cent increase in subsidy and the cost of the top structure will be R110 000.⁴⁵

In 2008, the Social Housing Act 16 of 2008 (Social Housing Act) was passed in line with the 2005 Social Housing Policy (see below), providing the enabling legislation for the Social Housing Policy. The Act aims to establish and promote a sustainable social housing environment and defines the functions of national, provincial and local governments in respect of social housing, allows for the undertaking of approved projects by other delivery agents with the benefit of public money and gives statutory recognition to social housing institutions (SHIs). Further, it provides for the establishment of the Social Housing Regulatory Authority (SHRA) and defines its role as the regulator of all SHIs that have obtained, or are in the process of obtaining, public funds. In 2010, the SHRA was established and in 2012 the Minister of Human Settlements published Social Housing Regulations in terms of the Act, which focus on the accreditation and monitoring of SHIs.

South African housing policy and institutions⁴⁶

Housing has an extremely complex legal, policy and institutional framework. The plethora of policy documents, institutions and inter-governmental relations implications have in large part contributed to the challenges faced in addressing housing needs in the country.

There are three main national housing policy documents in South

Africa. They are the 1994 white paper: A New Housing Policy and Strategy for South Africa (White Paper on Housing); the 2004 update of the White Paper on Housing, Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements (Breaking New Ground or BNG); and the National Housing Code of 2000, as revised in 2009 (National Housing Code).

The White Paper on Housing is the principal, overarching national housing policy and Breaking New Ground is the first major policy amendment/refinement to the White Paper on Housing since 1994. The National Housing Code, first published in 2000 and revised in 2009, was published in accordance with the Housing Act and, falling somewhere between law and policy, is regarded as legally binding on provincial and local spheres of government.⁴⁷ It sets out the underlying policy principles, as well as guidelines and norms and standards that apply to all government housing programmes.

The White Paper on Housing provided the framework for the country's ambitious housing development target of building one million state-funded houses in the first five years of office, as set out in the now abandoned ANC Reconstruction and Development Programme (RDP). A cornerstone of this early policy was the National Housing Subsidy Scheme (NHSS), which, among other subsidy systems, provided capital subsidies for housing to qualifying beneficiary households to take full ownership. Later referred to as 'RDP housing', this was a developer-driven process, meaning projects were initiated, planned and built by private construction companies for the national and provincial government. The fundamental policy and development principles introduced by the White Paper on Housing continue to guide all developments in respect of housing policy and implementation.

In September 2004, Breaking New Ground was adopted by the Cabinet as a revised framework for the development of sustainable human settlements. BNG is based on the principles contained in the White Paper on Housing and outlines the strategies to be taken to achieve the government's overall housing aim. While not clearly introducing any new policy direction, the document outlines a comprehensive plan for the development of sustainable human settlements in the next five years.⁴⁸

The National Housing Code, first published in 2000 in accordance with the Housing Act, set out the underlying policy principles, guidelines, and norms and standards that apply to the National Housing Programmes. Some of these programmes have been updated or removed, and new programmes included, after the adoption of BNG in 2004. The Code is binding on provincial and local spheres of government. In 2009, a revised National Housing Code was published and contains the BNG-compliant National Housing Programmes, which are described as the 'building blocks in the provision of sustainable human settlements'.⁴⁹ The National Housing Programmes are categorised into different 'Intervention Categories'.⁵⁰

The revised National Housing Code outlines a General Framework applicable to certain National Housing Programmes that form part of the NHSS. This includes the Integrated Residential Development Programme (previously called the Project Linked Subsidy Programme), Individual Subsidies and various other subsidies discussed below. These programmes are administered through an operational and administrative tool called the Housing Subsidy System (HSS). All beneficiaries who have applied for or received housing subsidies are recorded on the National Housing Subsidy Database (NHSDB), which is managed by the DHS and used by provincial departments and accredited municipalities to administer housing projects and subsidy applications. These systems have been developed in line with section 6 of the Housing Act, which obliges the national department to 'establish and maintain a national housing data bank and a national housing information system.' Section 3 provides a rights-based critique of some of these programmes.

There is a set of generic qualifying criteria that must be fulfilled by those applying for state housing subsidies under the NHSS for the National Housing Programmes. The generic qualifying criteria, as outlined in the revised National Housing Code, are summarised as follows:

- *Citizenship*: applicant must be a citizen of the Republic of South Africa, or be in the possession of a Permanent Resident Permit;
- *Competent to contract*: applicant must be legally competent to contract (i.e. over eighteen years of age, or married or divorced, and of sound mind);

- *Not yet benefited from government funding:* the applicant or their spouse may not have received previous housing benefits from the government. In the event of a divorce involving a person who previously derived benefits, the terms of the divorce order will determine such person's eligibility for further benefits; and
- *First time property owner:* the applicant or their spouse may not have owned and/or currently own a residential property. Except for the following cases:
 - disabled persons;
 - persons who:
 - own a vacant stand that was obtained through the Land Restitution Programme;
 - have acquired a residential property for the first time without government assistance and the house/dwelling on the property, if any, does not comply with the National Norms and Standards in respect of permanent residential structures.

In addition to the above requirements, any applicant must also satisfy the following general criteria:

- *Married or financial dependants:* The applicant must be married or be constantly living together with a spouse. A single person with proven financial dependants (such as parents or parents-in-law, grandparents or grandparents-in-law, children, grandchildren, adopted children, foster children) may also apply;
- *Monthly household income:* The applicant's gross monthly household income must not exceed R3500. Adequate proof of income must be submitted;
- *Beneficiaries of the Land Restitution Programme:* Beneficiaries of the Land Restitution Programme, should they satisfy the other qualification criteria, may apply for housing subsidies;
- *Persons classified as military veterans as confirmed by the South African National Defence Force:* Military veterans who are single without financial dependants may also apply for housing subsidies;
- *Persons classified as aged:* Aged persons who are single without financial dependants may also apply for housing subsidies. Aged persons

are classified as male and female persons who have attained the minimum age applicable to Government's old age social grant scheme; and

- *Persons classified as disabled:* Persons who are classified as disabled, whether single, married or co-habiting or single with financial dependants, may apply for housing subsidies. If a person who has already received state funding for housing and/or who already owns or owned a house, is or becomes disabled, or if his or her dependent(s) is/are or become disabled, such a person may receive an additional variation on the subsidy amount to finance special additions to provide independent living conditions.

These do not apply to all of the programmes and subsidies, however, and there are some programme-specific criteria which supersede these.

There are a number of legislated housing institutions which undertake specific functions in the South African housing landscape. The National Housing Finance Corporation (NHFC),⁵¹ the National Urban Reconstruction and Housing Agency (Nurcha)⁵² and the Rural Housing Loan Fund (RHLF)⁵³ are financial institutions involved in housing development. Some other important institutions include the following:

- The Housing Development Agency (HDA) is a national public entity created by the Housing Development Agency Act 23 of 2008 in 2009. It is tasked with the acquisition, management and release of state- and privately-owned land for human settlements development, and with providing project delivery support services to enhance the capacity of municipalities and provinces to deliver integrated sustainable human settlements.⁵⁴
- The Social Housing Regulatory Authority (SHRA) is a national regulatory authority created by the Social Housing Act and launched in August 2010. The principal function of the SHRA is to increase the amount of rental accommodation available to people in low-income groups, particularly in urban areas. It facilitates and directs increased funding for social housing projects, helps to define norms and standards in order to stimulate the development of new social housing projects in urban areas, and oversees the accreditation of SHIs in terms of the Act and its regulations.

South African functional and financial arrangements for housing⁵⁵

The legal and constitutional framework related to the provision of housing is highly complex, providing a number of intersecting roles and responsibilities for the various spheres of government and creating multiple institutions to carry out specific housing-related programmes. Arguably this proliferation of arrangements and agencies has complicated the task of ensuring access to adequate housing, suggesting a need for further research into the efficacy of the housing-related functional and financial arrangements.

The Housing Act obliges national government to establish the national institutional and funding framework for the provision of housing, as well as develop national housing programmes by compiling the National Housing Code. In terms of the Housing Act, national government is also empowered to prescribe National Minimum Norms and Standards for housing development.⁵⁶ Recently, the DHS has also set certain developmental goals for the advancement of different housing models in terms of its Outcome 8 Delivery Agreement.⁵⁷

The legal and policy framework envisions that local government will progressively become primarily responsible for the implementation of housing developments. This is clear from the Housing Act,⁵⁸ read together with the Municipal Systems Act. Local government is obliged to plan for the progressive realisation of adequate housing within its jurisdiction through its integrated development planning, by including a housing chapter in the municipality's Integrated Development Plan (IDP).⁵⁹ Local government participates in National Housing Programmes by promoting or partnering with a developer, acting as a developer once accredited to do so, or disbursing subsidy allocation once accredited to do so.⁶⁰

However, in practice, the Provincial Housing departments have, until recently, been largely responsible for developing housing projects even though this role is increasingly being taken on by municipalities (if accredited to undertake a direct housing function and administer National Housing Programmes). The accreditation process is mandated

by section 156(4) of the Constitution which provides that national and provincial government should assign to municipalities the matters in Part A of Schedule 4 of the Constitution (housing is listed as such a matter). Section 156(4) is, however, circumscribed by two caveats, namely that the matter should be most effectively administered by local government and that the relevant local government should have the capacity necessary to administer the matter. Section 10 of the Housing Act therefore provides for an accreditation process to assess whether municipalities can satisfactorily indicate that they are capable of planning, implementing and maintaining projects and programmes that are integrated with their municipal IDPs.

Once it has been established that municipalities have the necessary capacity, the legislative scheme provides for the phased accreditation of municipalities to administer National Housing Programmes.⁶¹ In terms of this process, municipalities will gradually take on expanded functions in relation to the administration of national housing programmes until they are fully empowered to implement and oversee housing developments.

The accreditation system is structured into three phases: beneficiary management, subsidy budget planning and allocation, and priority programme management and administration (Level One); full programme management and administration of all national and provincial housing programmes (Level Two); and finally, full programme management and administration of all national and provincial housing programmes as well as responsibility of financial administration, including subsidy payment disbursements and financial reporting (Level Three).⁶²

The accreditation process has been slow. Although accreditation was provided for when the Housing Act first came into force, to date no municipality has received Level Three accreditation. The DHS has managed to accredit eight municipalities with Level One accreditation; and eight metropolitan municipalities and 12 local municipalities have received Level Two accreditation.⁶³ Implementation protocols have been signed with 24 municipalities. Recently, the DHS stated that it expected that six metros were to be assigned Level Three accreditation by July 2014, pending Cabinet approval.⁶⁴ The drawn-out accreditation process

has complicated the intergovernmental provision of housing. Moreover, it is as yet unclear precisely how funding will be allocated between accredited municipalities and provincial departments when Level Three accreditation occurs in 2014 and beyond.⁶⁵

Ultimately, as pointed out in a recent research report,

... a note of caution should be raised regarding the role of local government in taking on the full housing delivery mandate, not least because of the problems witnessed with the decentralised approach to basic services provision, where cost-recovery pressures have dominated delivery and had an often adverse effect on the poor. There is, furthermore, a crisis at local government level around both governance and technical capacity. The ... DHS has acknowledged the 'scant capacity and ability at local authority level in most towns to deliver, [which] continues to exacerbate the capability to meet our national targets.'⁶⁶

National and provincial government have the constitutional and legislative responsibility to support and strengthen the capacity of local government in the fulfilment of its functions. These spheres of government are also meant to regulate local government to ensure effective performance.

Funds for the provision of housing falls predominantly within the purview of national and provincial government, and are administered through various institutions. The main funding mechanism for the development of housing initiatives is the Human Settlements Development Grant (HSDG). The goal of the HSDG is to facilitate the creation of human settlements that enable an improved quality of household life. The subsidy is intricately linked to the various National Housing Programmes and is utilised to fund residential units delivered in terms of the various housing programmes, serviced sites delivered in terms of housing programmes, finance-linked subsidies approved and disbursed, households in informal settlements provided with household access to services or upgraded services, hectares of well-located land acquired and/or released for residential development, and work opportunities created through related programmes.⁶⁷

In 2011 the Urban Settlements Development Grant (USDG) was introduced by the National Treasury. The USDG is administered through the DHS and is aimed at assisting metropolitan municipalities (cities) to plan in a more integrated way with regard to the provision of infrastructure development and low-cost housing developments in well-located areas near social and economic facilities and opportunities. Due to the broad discretion granted to municipalities, the uses of the USDG have been varied, often prioritising infrastructure development rather than directly addressing the provision of housing. As the provision of access to essential services forms a crucial component of the provision of housing developments, there are also various financial mechanisms related to the provision of sanitation and water which may be relevant in a housing context. These mechanisms are, however, not discussed in this position paper.⁶⁸

There are a multitude of National Housing Programmes to ensure funding for various housing development needs. Of these, some of the more important national programmes include the Integrated Residential Development Programme (IRPD), the Social Housing Programme (SHP), the Emergency Housing Programme (EHP) and the Upgrading of Informal Settlements Programme (UISP).⁶⁹

The Integrated Residential Development Programme (IRDP) replaced the Project Linked Subsidy Programme in 2009.⁷⁰ The main objective of the IRDP is to shift the focus in housing development from one solely focused on the provision of subsidised housing to a more integrated phased approach to the planning and development of housing, which provides for the provision of a range of housing types and price categories, and includes social and commercial amenities.⁷¹ In terms of this programme, accredited municipalities take on the role of developers (in instances where municipalities lack the necessary financial, technical and managerial capacity, provincial departments can take up this role) and are responsible for all planning and project activities. Municipalities may appoint professionals to aid with technical assistance and contractor to construct housing and services.

The programme requires municipalities to apply for funding to the provincial MEC, who can assess and adjudicate various aspects of the

project, approve or reject project applications and distribute or reserve funds. The programme targets persons who qualify in terms of the NHSS. The qualifying criteria provides that beneficiaries should have South African citizenship, be married or have financial dependants, earn a household income of less than R3500 a month, should not previously have benefited from government funded housing and should not have owned property before.⁷²

The EHP provides for grants to municipalities, administered through the provincial housing department, to provide temporary relief to persons who find themselves in emergencies, including disasters, imminent disasters or evictions in circumstances where occupiers would be rendered homeless.⁷³ The EHP provides for the provision of temporary housing, possible funding for relocation and resettlement of people and funding for the provision of basic services, in certain circumstances.⁷⁴ The normal qualifying criteria do not apply in terms of the EHP, as the programme applies to persons in emergencies. As detailed below, implementation of the EHP has been problematic, due to the ad hoc basis on which it is implemented and the complicated inter-governmental relationships set up by the programme, which have meant that municipalities struggle to obtain funding from provincial government.⁷⁵

The delineation of responsibilities between various spheres of government in relation to the provision of emergency accommodation has also been subject to dispute. In the *Blue Moonlight* case,⁷⁶ the City of Johannesburg argued that local government's obligations in relation to the provision of temporary emergency accommodation were secondary to the other spheres of government and limited in scope. According to the City, its only obligation in the specific circumstances was to apply to provincial government for funding and assistance. Once this application was refused, the City argued that it had exhausted its responsibilities in relation to the occupiers who faced eviction.⁷⁷ The City thus asserted that it was not primarily responsible for the realisation of emergency housing, and was 'entirely dependent' on the policy framework and funding from the provincial and national spheres of government.⁷⁸ The Constitutional Court, however, held that the City has a fundamental role to play in the provision of housing.⁷⁹ It asserted that the division of responsibili-

ties between the different spheres should not be 'absolute or inflexible'.⁸⁰ The legislative framework does not require funding for housing developments and emergency accommodation to originate solely from provincial or national government.⁸¹ In particular, the Court emphasised that there may be a duty on local government to self-fund its housing development projects in certain instances.⁸² This is especially so in relation to emergency housing situations, where local government is best suited to 'react to, engage with and prospectively plan around the needs of local communities'.⁸³ *Blue Moonlight* therefore made provision for the fact that local government may be required to self-fund emergency accommodation in certain instances.

The Upgrading of Informal Settlements Programme (UISP) provides funding for a phased approach to the upgrading of existing informal settlements, with the view of creating serviced stands through in situ upgrading.⁸⁴

The UISP is not confined to the NHSS generic qualifying criteria and has a broader application, including for households who exceed the income threshold, are without dependants and potentially also non-South African citizens.⁸⁵ Although the programme has been emphasised as one of the most important housing programmes, implementation in real terms has been lacking as municipalities appear to be unwilling to implement the programme of their own volition.⁸⁶ This has led to a number of high-level governmental interventions at national level to try and prioritise informal settlement upgrading as a housing delivery mechanism. These interventions include the Outcome 8 Delivery Agreement aim to upgrade 400 000 households in well-located informal settlements by 2014 and the creation of the National Upgrading Support Programme (NUSP). NUSP is located in the DHS and is aimed at providing technical support to provincial housing departments and municipalities in developing and furthering the upgrading of informal settlements.

The Social Housing Programme (SHP) is aimed at developing 'rental or co-operation housing' for 'low-income persons' which are to be managed by accredited social housing institutions (SHIs) or through accredited social housing projects in designated restructuring zones (i.e. areas that have been flagged for targeted and focused development by local and

provincial governments).⁸⁷ The programme targets a spread of beneficiaries that earn between R1500 and R7500 with a stable income.

This highly complex machinery relates in part to the fact that housing is a difficult functional area, overlapping with many other rights and government functions including water, sanitation and electricity. It is also the most contested and politically charged socio-economic right, as evidenced by the high number of housing-related cases that have been litigated in South Africa.

South African housing jurisprudence⁸⁸

In South Africa, socio-economic rights are explicitly justiciable and twenty socio-economic rights-related cases have been decided by the Constitutional Court since its establishment in 1996. These include judgments on the rights of access to health care, social security, water, sanitation and electricity. However, the vast majority of socio-economic judgments from the Court relate to the right of access to adequate housing.

As mentioned above, the right of access to adequate housing enshrined in the Constitution consists of three interrelated subsections. Precisely how these subsections interact with one another is not entirely clear. However, what is clear is that the right places both positive and negative obligations on the state. The negative obligations, encapsulated in section 26(3) of the Constitution oblige the state and private parties to desist from preventing or impairing the right of access to adequate housing that persons have already realised for themselves.⁸⁹ The positive obligations are contained in section 26(1) and (2) and largely relate to what a 'reasonable' state response to the 'progressive realisation' of the right of access to housing 'within available resources' would entail.⁹⁰

Positive housing obligations⁹¹

The first time the Constitutional Court considered the impact of the right of access to adequate housing was the far-reaching socio-economic rights case of *Grootboom*,⁹² which was the Court's second socio-economic rights case. In this case, the Court set out to determine the state's obligations in terms of the right to housing contained in section 26 of the Constitution. Although *Grootboom* laid the foundation for the adoption of the

EHP (initially included as Chapter 12 in the 2000 National Housing Code) which prioritised those in desperate need, it has also led to a restrictive interpretation of the section 26(1) and 26(2) of the Constitution. This is due to the fact that the Court pursued an approach regarding the meaning of the section 26(1) right of everyone to have access to adequate housing as qualified by the section 26(2) caveat of the state's obligation to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'. This approach effectively means that neither the section 26(1) right nor the section 26(2) right exist as self-standing or stand-alone entitlements. Rather, 'in a somewhat inverted analysis', the content of each right rests on the reasonableness of the state's response to progressively realising that right'. So, determining the 'content of each right in the first place – that is, working out what the right entitles citizens to – is to proceed on the basis of a determination in the second place of what it would be reasonable for the state to provide, within available resources, in order to realise the right progressively'.⁹³

This approach by the Constitutional Court – of requiring the state only 'to take reasonable legislative and other measures progressively to realise the achievement of the right ... within available resources'⁹⁴ – has been criticised for reducing the content of the socio-economic right to being defined by the action that the government takes in advancing access to that good.⁹⁵ The Court in *Grootboom* specifically declined the opportunity to affirm that section 26 included a minimum core approach, which would allow citizens to claim certain minimum concrete entitlements or set standards against which government action could be tested.⁹⁶ Thus, the Court refused to 'prescribe the exact details of what the government must do or what individuals can claim from the government',⁹⁷ a significant departure from the approach of the CESR.

Instead, the Court's reasonableness standard obliges the state to take 'reasonable' measures to provide access to adequate housing. The core requirement for the fulfilment of the right to housing is thus that the state develops a reasonable housing policy or programme. When considering reasonableness, courts do not need to enquire 'whether other more desirable or favourable measures could have been adopted, or whether public

money could have been better spent'.⁹⁸ Reasonableness simply requires the courts to adopt a flexible approach, in terms of which a 'wide range of possible measures' could be adopted by the state in order to comply with its constitutional obligations.⁹⁹ The state thus has a relatively broad discretion in relation to the policy it adopts, provided that the policy 'falls within the bounds of reasonableness'.¹⁰⁰

Grootboom set out the parameters of a reasonable housing policy, which must be comprehensive, coherent, flexible and effective; have due regard for the socio-economic context of poverty and deprivation; take into account the availability of resources; take a phased approach, including making provision for short, medium and long-term needs; allocate responsibilities clearly to all three spheres of government; respond with care and concern to the needs of the most desperate; and be free of bureaucratic inefficiency or onerous regulations.¹⁰¹ Importantly, the Court stated that '[e]very step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing'.¹⁰²

In the end, the *Grootboom* case turned on the fact that the state's housing policy failed to provide for those in desperate and immediate need. The Court held that such a failure rendered the housing policy unreasonable and consequently unconstitutional. As the Court asserted, a reasonable programme must include 'relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations'.¹⁰³

Grootboom also interpreted 'progressive realisation' of housing to mean that the state should, over time, dismantle the range of legal, administrative, operational and financial obstacles which impede access to rights and proactively increase the access to housing to a larger and broader range of people.¹⁰⁴ But the Court did not expand any further on this notion, leaving the concept of progressive realisation largely undefined.

Negative housing obligations

The *Grootboom* case specifically recognises that 'at the very least', the right to housing places a negative obligation on the state.¹⁰⁵ This negative

obligation is contained in section 26(3) of the Constitution. Section 26(3) provides that no one will be evicted from their home or have their home demolished without a court order authorising such action, which would only be granted after having regard to all the relevant circumstances. In order to give effect to this subsection, the South African legislature passed PIE in 1998. This Act set out a more rigorous legal framework to govern evictions by requiring that a court could only authorise an eviction after it was satisfied that such eviction would be 'just and equitable' in the circumstances.

The courts have, over time, developed considerable jurisprudence on what would constitute a breach of the negative obligations in terms of section 26. Breaches have come to range from out-right evictions and relocations to disruption of use and stability of tenure security.

The first housing case that analysed an eviction and spelt out, in greater detail, the interaction between the constitutional provisions governing housing is *Modderklip*.¹⁰⁶ In this case, the Supreme Court of Appeal (SCA) considered the interaction between the right of access to adequate housing in section 26 of the Constitution and owners' property rights in section 25 of the Constitution. This judgment was later confirmed by the Constitutional Court.¹⁰⁷ In the *Modderklip* case, 400 people were evicted in May 2000 from the Chris Hani informal settlement that was situated on municipal-owned land in the jurisdiction of the Ekurhuleni Metropolitan Municipality (although owned by the Ekurhuleni Metropolitan Municipality, the land was administered by the Greater Benoni City Council). Having nowhere else to go, these persons moved onto a portion of a privately-owned farm known as Modderklip Boerdery. By October 2000 the settlement had swelled to include over 4,000 informal shelters inhabited by approximately 18,000 people. At this point, the owner approached the High Court seeking an eviction order against the occupiers. The eviction order was granted. However, by the time the order became executable, the settlement had grown significantly to roughly 40,000 occupiers. The massive size of the informal settlement meant that the cost of executing the eviction order would have been around R1.8 million, substantially more than the land itself was worth. The owner therefore brought a further application in the High

Court to compel the state to execute the eviction order on its behalf. The High Court granted this enforcement order, finding that the state was in breach of its constitutional obligation to protect property rights by failing to effectively execute the order. The High Court thus found that the continued unlawful occupation on the owner's land despite an eviction order was a serious deprivation of the private property owner's rights.

Both the eviction order and the enforcement order were appealed to the SCA. In that Court, Judge Harms held that the continued occupation by the unlawful occupiers in the face of an eviction order amounted to an infringement of the owner's property rights.¹⁰⁸ Moreover, the Court considered the eviction of the unlawful occupiers – in circumstances where they would effectively be rendered homeless – to constitute a breach of what 'limited' right of access to adequate housing they had realised for themselves.¹⁰⁹ Interestingly, the Court stated that the real issue in the case was the failure on the part of the state to take any steps to provide alternative accommodation to the unlawful occupiers who the Court considered to be 'in desperate need'.¹¹⁰

Referring to *Grootboom*, the Court stated that there was an unassailable obligation on the state to ensure that, at the very least, evictions are 'executed humanely'.¹¹¹ In the circumstances, it seemed painfully evident that the eviction could not be executed humanely without the state providing some form of alternative accommodation or land.¹¹² In fact, if the occupiers were evicted, they would have had nowhere else to go which would simply have resulted in them reoccupying the Modderklip land or occupying other vacant land, once again rendering them at risk of eviction. As a result, the Court held that the failure on the part of the state to fulfil its constitutional obligation to take pro-active steps to realise the right to housing of the occupiers 'leads ... to the conclusion that the state simultaneously breached its section 25(1) obligations towards Modderklip'.¹¹³

According to Judge Harms the only appropriate relief was to allow the occupiers to remain on the land until alternative land or accommodation was made available by the state¹¹⁴ and to require the state to pay constitutional damages to the property owner for the violation of property rights.¹¹⁵

Modderklip was thus crucial in a number of respects. Firstly, *Modderklip* emphasised the interconnected nature of the state's constitutional obligations, by emphatically recognising that the state's failure to provide adequate housing to the unlawful occupiers (a positive obligation on the state) also amounted to an infringement of the property owner's rights (a negative obligation on the state). Secondly, the case developed a novel way of balancing the conflicting rights and obligations that arise in eviction cases and affirmed the principle that an unreasonable state failure to give effect to the obligation to provide, at least, basic temporary alternative shelter for unlawful occupiers who face homelessness constitutes a breach of constitutional rights.

The Constitutional Court's next real engagement with eviction law came in the case known as *PE Municipality*.¹¹⁶ In that matter, the High Court ordered the eviction of a group of 68 people, including 29 children, from privately-owned land in Port Elizabeth. The municipality had sought the eviction after receiving a petition from 1600 residents of a neighbouring formal township, including the owner of the land. It had offered the occupiers alternative land in the nearby Walmer Township. But the occupiers refused to move because there was no guarantee that they would be given some measure of tenure security on the alternative land. The SCA set aside the eviction order on this basis, finding that the occupiers, many of whom had been evicted before, were entitled to expect that they would not be evicted again after their move to Walmer. The municipality then applied for leave to appeal to the Constitutional Court, seeking a ruling that it was not required to provide alternative accommodation as a matter of course when evicting unlawful occupiers. The basis of the application was somewhat curious, since, on the municipality's version, it had done exactly that, at least in this case.

In a wide-ranging and sensitive judgment, Justice Sachs reviewed the way in which the apartheid legal order – particularly through the Prevention of Illegal Squatting Act – deliberately sought to make eviction as easy as possible. The aim was to keep black people out of most urban areas, and to reduce them to the status of temporary guest workers in South African cities. He then characterised section 26(3) of the Constitution and PIE as an inversion of apartheid law, requiring unlawful occupiers to be

treated with 'dignity and respect',¹¹⁷ not as 'obnoxious social nuisances'.¹¹⁸ The Constitution has thus substantially altered the law relating to evictions by recognising that the 'normal ownership rights of possession, use and occupation' are now offset by 'a new and equally relevant right not arbitrarily to be deprived of a home'.¹¹⁹

Justice Sachs held that Section 26(3) of the Constitution 'evinces special constitutional regard for a person's place of abode', acknowledging that 'a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security'.¹²⁰ While the Constitution and PIE do not provide that under no circumstances should a home be destroyed, a court should be reluctant to conclude that an eviction would be just and equitable unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending access to permanent housing.¹²¹ Sachs held that it was not enough to show that a municipality has in place a programme designed to house the largest number of people over the shortest period of time in the most cost-effective way. In addition to being statistically successful, a municipality must show that its housing programme is sufficiently flexible to respond to immediate housing need. If that cannot be demonstrated through the ability to make land available to relatively settled occupiers facing eviction, then an eviction order can be refused.¹²² The municipality's application was accordingly dismissed.¹²³

The power of *PE Municipality* lay in its fusion of the conception of justice and equity under PIE, and the constitutional requirement of reasonableness set out in *Grootboom*. Whether it is just and equitable to order an eviction under PIE will normally depend on whether an occupier can find alternative accommodation and, if not, whether the state has taken reasonable measures to make accommodation available to occupiers who are unable to provide it for themselves. Although the implications of the judicial pronouncements made in the *PE Municipality* decision were still to be clarified in later cases, the state and private property owners were, or should have been, on notice that the days of quick and easy eviction orders were over.

The case of *Olivia Road*¹²⁴ was of particular importance to the development of eviction jurisprudence. The applicants in this matter were

several hundred occupiers of two buildings in the inner city of Johannesburg, which were earmarked for refurbishment by a property developer. The City issued a notice in terms of section 12(4)(b) of the National Building Standards and Building Regulations Act 103 of 1977, which enabled it to circumvent the supposedly onerous provision in PIE and applied to the High Court for an eviction order in order to give effect to the notice.

In the High Court, Judge J Jajbhay dismissed the application on the basis that the City had failed to adopt a policy through which the occupiers could access affordable alternative accommodation. The High Court declared the absence of such a policy to be in breach of the City's constitutional obligations, and interdicted the City from evicting the occupiers until alternative accommodation was made available to them.¹²⁵ On appeal to the SCA, Judge JA Harms set aside most of the High Court's order, holding that the City's right to seek the 'evacuation' of buildings it considered unsafe was not conditional on it being able to provide alternative accommodation. The eviction order was reinstated.¹²⁶ Nonetheless, Harms held, the City did have a constitutional obligation based on *Grootboom* to provide emergency shelter to all those who requested it on eviction. He accordingly directed the City to open a register upon which the occupiers could register themselves for the provision of emergency accommodation once they were evicted.¹²⁷

Fearing that they would be left homeless while the City compiled its register and identified emergency accommodation, the occupiers applied for leave to appeal to the Constitutional Court. There, the application turned on quite different considerations. Reluctant to delve into the deep questions of whether the City had an obligation to adopt a policy in terms of which the occupiers should be afforded alternative accommodation, the Court instead focused on the absence of 'meaningful engagement' with the occupiers prior to eviction. It directed the City and the occupiers to meaningfully engage with each other in order to resolve the issue. After two months of intensive negotiations, the matter was finally resolved with the occupiers being offered and accepting accommodation in a building yet to be refurbished nearby in the inner city.

In the Constitutional Court, Judge Yacoob held that the aspects of the dispute relating to the constitutionality of the City's housing policy and

eviction practices had become moot because of the agreement reached between the occupiers and the City. Nonetheless, the Court took the opportunity to develop and expand upon the concept of 'meaningful engagement' as constituent of reasonable state action required by section 26(2) of the Constitution. Most significant steps in the implementation of housing policy, Yacoob held, must be taken after meaningful engagement with the people affected by it.¹²⁸ Where the state intends to remove or displace people from their existing housing, engagement is normally a prerequisite to the institution of eviction proceedings.¹²⁹ Engagement must be individual and collective,¹³⁰ presumably meaning that affected communities must be engaged as a group in relation to the impending removal, as well as at an individual and household level, in order to ensure that all relevant personal circumstances are taken into account in the process. Engagement must be undertaken without secrecy, and should focus on meeting the reasonable needs of an affected community, and providing alternative accommodation where it is needed.¹³¹ Because no such engagement had been undertaken by the City in relation to the *Olivia Road* occupiers, Yacoob held that the eviction order issued by the SCA should be set aside.

The Court once again considered a large-scale eviction in *Joe Slovo*.¹³² The case concerned a mass relocation of a settled community of 4000 households from the Joe Slovo informal settlement to the peripheral town of Delft in order to facilitate the N2 Gateway housing project.¹³³ The application was brought by a housing parastatal which sought to relocate the occupiers to temporary alternative accommodation. Although the parastatal initially indicated that 70 per cent of those relocated from Joe Slovo informal settlement would be provided permanent housing in the new development, the occupiers doubted the credibility of these claims as both the parastatal and the state had breached various 'promises' made to the occupiers. The Cape High Court authorised the eviction of the occupiers according to a timetable prescribed by the Court subject to the state reporting back every two months on the implementation of the order and the provision of alternative accommodation. The occupiers therefore appealed directly to the Constitutional Court.

In the Constitutional Court there were two main issues: First, the

Court had to determine whether the respondents had made out a case for the eviction of the occupiers in terms of PIE. This meant that, at the time that the eviction proceedings were launched, the occupiers had to be 'unlawful occupiers' for the purposes of PIE. The occupiers thus argued that they had express or tacit consent to occupy the land and were therefore not 'unlawful occupiers'. The second issue for determination by the Court was whether the state had, for the purposes of section 26, acted reasonably in seeking the eviction of the occupiers. This question was integrally related to the Court's consideration of whether the eviction could be considered 'just and equitable' in terms of PIE.

The Court delivered five concurring judgments, which each dealt with these questions in different ways. Along with these judgments, the Court also wrote a joint judgment setting out an order. In relation to whether the occupiers were 'unlawful occupiers', and therefore fell under the purview of PIE, the judges agreed on differing grounds that, at the time of eviction, the occupiers were unlawful.¹³⁴ As to whether the eviction could be considered a reasonable measure in terms of section 26 of the Constitution, the judges each scrutinised the circumstances surrounding the relocation. While many laid significant emphasis on the long period of occupation and acknowledged that relocation is often traumatic and undesirable, generally the judges determined that the purpose for which the relocation was being pursued, namely the development of a housing project, rendered the relocation reasonable within the constitutional and legislative scheme.¹³⁵ In this regard, Judge Yacoob held that the 'eviction constitutes a measure to ensure the progressive realisation of the right to the meaning of section 26(2) of the Constitution'.¹³⁶

The Court in *Joe Slovo* exhibited a particularly deferential attitude to the state. On various occasions the judges indicated that the Court was an institutionally inappropriate forum to determine how the state should realise its section 26 obligations. This is particularly evident in the judgment of Justice CJ Ngcobo who states that 'it is not for the courts to tell the government how to upgrade an area. This is a matter for the government to decide'.¹³⁷ The case was widely criticised for this deferential approach and for the failure on the part of the Court to properly assess the reasonableness of the government's policy choices.¹³⁸

Ultimately, the Court authorised the eviction subject to a set of strict requirements in relation to the state's provision of alternative accommodation in Delft. In doing so, the Court endorsed relocating the residents to temporary residential units (TRUs), setting out the specifications and nature of temporary accommodation to be provided in future, as well as a detailed timetable for the relocation.¹³⁹ In ordering that all existing and future TRUs had to comply with the certain minimum specifications or be of superior quality, the Court effectively gave minimum content to alternative accommodation provided by the state. The Court prescribed that TRUs had to:

- be at least 24m² in size;
- be accessible by tarred road;
- be individually numbered for identification;
- have walls constructed of Nutec;
- have galvanised corrugated iron roofs;
- be supplied with electricity by a prepayment electricity meter;
- be located within reasonable proximity of communal ablution facilities;
- make reasonable provision for toilet facilities, which may be communal, with waterborne sewerage; and
- make reasonable provision for fresh water, which may be communal.¹⁴⁰

The Court further stated that the state and the occupiers had to engage meaningfully about a range of issues related to the time and consequences of the relocation. This, the Court held, should include consultations relating to individual relocations of households having due regard to their details and personal circumstances; the time, manner and conditions of the relocation; the provision of transport; and information about the current position of individual residents on the housing waiting list.¹⁴¹ Importantly, the Court also ordered that 70 per cent of the new homes that were to be built at Joe Slovo should be allocated to the former residents who were to be temporarily relocated to Delft.¹⁴²

Another important case that came before the Constitutional Court was *Abahlali*.¹⁴³ This case concerned a legal challenge to the KwaZulu-

Natal Elimination and Prevention of Re-Emergence of Slums Act 6 of 2007 (the Slums Act). Section 16 of the Slums Act empowered the MEC for Housing in KwaZulu-Natal to direct private owners of unlawfully occupied land to institute eviction proceedings within a certain period on notice in the provincial gazette. If owners were unwilling to do so, the municipality would be compelled to bring eviction proceedings on its own accord. There were also fines attached to a failure to institute eviction proceedings.

Abahlali baseMjondolo (Abahlali), a shackdwellers social movement based in Durban, was particularly worried about the potentially severe consequences that the Slums Act could hold for those without security of tenure living in informal settlements. These fears were based on the mass slum clearances undertaken in Durban over the years, all without court orders. The Act clearly had the potential to lead to mass homelessness. These reservations led Abahlali to approach the Constitutional Court in an attempt to have section 16 of the Act declared unconstitutional.

The Constitutional Court found section 16 of the Act to be inconsistent with the right of access to adequate housing on three grounds. First, the provision precluded meaningful engagement which is an essential component of the housing process and has been read into section 26 of the Constitution.¹⁴⁴ The Court determined that if engagement took place *after* a decision to evict or relocate had already been taken, such engagement would not be genuine.¹⁴⁵ This effectively means that the requirement to meaningfully engage is crucial in determining whether an eviction is just and equitable. Second, the Court found that the provision violated the principle that evictions or relocations should only be considered a measure of last resort. Effectively, this means that the possibility of in situ upgrading of the informal settlement must be considered before the state can resort to evictions or relocation.¹⁴⁶ The final ground on which section 16 was found to be constitutionally invalid was that it undermined security of tenure by allowing eviction proceedings to be instituted without the safeguards contained in PIE.¹⁴⁷

In *Blue Moonlight*,¹⁴⁸ the Court had to address more closely the concrete duties of a municipality where an ordinary common law eviction would result in homelessness. In this matter, 86 people faced eviction

from a disused set of factory buildings in Saratoga Avenue, Berea, Johannesburg. The owner brought an eviction application relying solely on the *rei vindicatio* (and elected not to utilise the procedures for eviction proceedings prescribed in the PIE Act).¹⁴⁹ The occupiers alleged and proved that an eviction would leave them homeless, and brought an application to join the City of Johannesburg to the proceedings, as a prelude to seeking an order that it provide them with alternative accommodation in the event of their eviction. The City, for its part, stated that it had, since the decision of the Court in *Olivia Road*, devised a policy to provide accommodation to people it removed from unsafe buildings from within its own resources, but denied any obligation to provide accommodation to occupiers facing eviction by a private landowner. The City stated that the obligation lay with provincial government, to which it had applied for funding in terms of the EHP, and been refused.

Taking their cue from *Grootboom* and *PE Municipality*, both the High Court¹⁵⁰ and the SCA¹⁵¹ judgments declared unconstitutional the City's differentiation between people it evicted from allegedly unsafe properties, and those evicted by private landowners. Both *Grootboom* and *PE Municipality* made it clear that the state had an obligation to respond to the needs of people facing housing emergencies. *PE Municipality* made clear that the primary duty to do so lay with a municipality, even where occupiers were sought to be evicted from privately-owned land.

The City then applied for leave to appeal to the Constitutional Court. In its judgment, Judge Van der Westhuizen confirmed the SCA's findings in all material respects.¹⁵² He found in particular that PIE limited the rights of owners to undisturbed use and enjoyment of their property.¹⁵³ If homelessness would otherwise result, section 26 of the Constitution and PIE require that an owner patiently wait to vindicate her property until the state has been given a reasonable opportunity to discharge its obligations, grounded in *Grootboom*, to provide alternative accommodation.¹⁵⁴

The Court further found that a municipality is not entitled to cast its obligations on national and provincial government. It has the obligation to plan and procure resources to meet emergency housing needs within its area of jurisdiction. It cannot rely on an absence of resources to do so if it has not at least acknowledged its obligations and attempted to

find resources to allocate to emergency housing projects.¹⁵⁵ This obligation becomes particularly apparent when one considers that municipalities are ideally suited to ‘react, engage and plan to fulfil the needs of local communities’.¹⁵⁶ Moreover, a municipality cannot pick and choose which housing crises it responds to. Instead, it must prioritise its response to emergency housing situations in a reasonable manner. To differentiate between emergency housing situations caused by eviction by reference to the identity and purposes of the evictor is unreasonable, since it matters little to a homeless person what the cause of her homelessness is. Her need is the same.¹⁵⁷

These principles were fleshed out in two decisions handed down just after *Blue Moonlight*. In *Skurweplaats*¹⁵⁸ and *Mooiplaats*¹⁵⁹ the Constitutional Court was dealing with two groups of people who had moved onto vacant land just outside Pretoria because they had been evicted or otherwise displaced from neighbouring informal settlements. Both groups of people had been resident on the land for very short periods of time (in contrast to the occupiers in *Blue Moonlight*, who had resided at Saratoga Avenue for periods of up to 30 years). The Court affirmed its decision in *Blue Moonlight* in all material respects, but added four important observations. First, the Court deplored the citation of the occupiers in both matters as ‘invaders’. This description, the Court held, was ‘emotive and judgmental’ and undermined the occupiers’ humanity.¹⁶⁰ Second, the Court took into account that, even though the occupation had only begun a relatively short period before eviction proceedings were instituted, the probability that an eviction would lead to homelessness meant that the provision of alternative accommodation or land was still required.¹⁶¹ To ensure that the occupiers were not rendered homeless prior to the provision of alternative accommodation, the Court also required a linkage between the date of eviction and the date upon which the municipality should provide alternative accommodation.¹⁶² Third, the Court took into account the owners’ failure to demonstrate that they had any urgent or compelling use for the land unlawfully occupied.¹⁶³ This militated against ordering a speedy eviction without the provision of alternatives. Finally, the Court emphasised that courts have the power and the duty to order municipalities to take steps to investigate and furnish information relat-

ing to their ability to provide alternative accommodation, in the event that it is found that a municipality's approach is unsatisfactory.¹⁶⁴ *Skurweplaas* and *Mooiplaats* finally spelt out in great detail the obligations on property owners and municipalities in relation to eviction proceedings.

In *Pheko*, the state sought to facilitate an eviction by utilising the Disaster Management Act 57 of 2002 (DMA).¹⁶⁵ In this case, the Ekurhuleni Metropolitan Municipality used the presence of dolomite beneath the Bapsfontein informal settlement as justification for the forcible relocation of a community. The municipality declared the area a 'local state of disaster' in terms of section 55(1) of the DMA, claiming that the dolomite instability posed an imminent threat to the lives of the community and therefore required their immediate relocation. The municipality's urgency seemed peculiar considering the fact that the dolomite had been discovered in the 1980s while the community had remained largely unaffected for the duration of occupation. Nonetheless, the municipality embarked on the relocation without a court order, founding the lawfulness of its action on the authority of the DMA. In response, the occupiers applied for an urgent interdict in the High Court to resist the removals. In the High Court, Judge Makgoba refused to grant the relief sought by the occupiers and justified the actions of the municipality by equating the situation of the community in Bapsfontein to the situation of a person 'burning in a fire and refusing to be rescued'.¹⁶⁶ The Court thus dismissed the application.

Left with no other recourse, the applicants appealed directly to the Constitutional Court. Here, the main question before the Court was whether the constitutional guarantee against eviction in section 26(3) of the Constitution permitted what would effectively amount to an eviction without a court order in instances where the state acted in terms of another legislative instrument. This issue arose from the municipality's argument. The municipality argued that the removal of the occupiers was lawful. In support of this assertion, the municipality stated that section 26(3) of the Constitution should be read disjunctively. If section 26(3) was read in this manner it would consist of two independent elements: a prohibition on evictions without court orders and a prohibition on legislation permitting arbitrary evictions.¹⁶⁷ The municipality further argued

that these two components could not be subordinated to one another, which meant that the constitutional provision permitted legislation to authorise evictions without court orders provided that such legislation did not permit arbitrary evictions.¹⁶⁸

The Constitutional Court critically rejected the municipality's approach to section 26(3), stating that this interpretation would have the effect of inverting the constitutional provision.¹⁶⁹ According to the Court, section 26(3) must be read as prohibiting evictions without court orders in all circumstances, even when authorised by statute.¹⁷⁰ The Court also stated that the DMA should be interpreted narrowly, as granting this legislative tool wide ambit could adversely affect the rights in section 26.¹⁷¹ This assertion arguably applies to other pieces of legislation that may negatively affect the right to housing.

A further point of contention for the Court was whether the removal of the occupiers amounted to an 'evacuation' for the purposes of the DMA. The Court considered the meaning of 'evacuation', finding that this implied a temporary relocation to a safe area after which residents would be allowed to return to their previous homes.¹⁷² This was clearly not the intention of the municipality in relation to the Bapsfontein residents as the intention of the relocation was to permanently relocate the residents. This was evident from the fact that the municipality had demolished the residents' informal dwellings so that they would not return to the area. The Court indicated its disapproval for the municipality's use of the DMA for purposes other than the legislation was intended for.¹⁷³ As the Court stated, 'the powers concerned may not be used for purposes other than evacuation'.¹⁷⁴ This dictum illustrates that courts would be hesitant to rubber stamp *de facto* evictions effected by manipulation of the legal mechanisms for relocations, removals and evictions. Courts should thus not allow the state to evade the substantive and procedural protections afforded to occupiers in terms of section 26(3) of the Constitution and PIE by employing alternate legislation not designed to facilitate evictions.

Finally, the Court asserted that the High Court had failed to have regard to the 'relevant circumstances' related to the relocation.¹⁷⁵ The Court set out a number of important factors which should have been

considered by the High Court in the circumstances, including whether the disaster was sudden and warranted urgent relocation; whether the areas could be rehabilitated; whether the state entity had developed and implemented disaster management plans; whether the disaster had led to a loss of life or an imminent threat to life; whether alternative land had been made available or could reasonably be made available; and whether the length of occupation.¹⁷⁶ Had the High Court had due regard to these factors, it would have been clear that the relocation and demolition of the occupiers' homes could not have been authorised by the DMA and amounted to an infringement of section 26(3) of the Constitution.¹⁷⁷ As a result the Court ordered the municipality to provide land 'in the immediate vicinity of Bapsfontein' for the resettlement of the community within one year.¹⁷⁸

The Constitutional Court again dealt with an eviction law in *Schubart Park*.¹⁷⁹ In this case, the Constitutional Court had to determine what could be considered an eviction for the purposes of section 26(3) of the Constitution. This case related to a state-subsidised residential complex in the centre of Pretoria, which was controlled by the City of Tshwane. During the late 1990s the City had continued to rent out units in the complex. But the City allowed the buildings to deteriorate and by September 2011 the City was largely unaware of who occupied the complex. On 21 September 2011, a number of residents embarked on a protest against the deplorable living conditions at the complex during which two localised fires broke out. As a result of the fires, a number of households were expelled from the building and denied further access to the complex. Over the week that followed, the other residents of the complex were also removed in a similar manner. By the end of September, between 3,000 and 5,000 individuals were effectively homeless.

After being removed, the residents immediately brought an urgent application before the North Gauteng High Court, seeking an order allowing them to re-occupy their homes. The Court refused to order such re-occupation, justifying this decision by relying on a conditional tender made by the City in terms of which residents who met certain criteria and agreed to certain terms were offered temporary accommodation.

The residents then directly appealed to the Constitutional Court.

In this Court, the residents argued (on the authority of *Pheko*) that the removal from their homes was unjustified and amounted to an unlawful eviction that did not comply with the requirements of section 26(3) of the Constitution, in that their removal had not been authorised by legislation or a court order made after considering all the relevant circumstances.¹⁸⁰ In acting in this manner, the City had disregarded various legislative instruments that provide for the removal, evacuation or eviction of persons living in unsafe buildings and had effectively circumvented the legal protections afforded to occupiers in terms of these instruments.¹⁸¹

The Court held that neither the conditional tender made by the City nor the High Court order amounted to justification for an eviction in terms of section 26(3).¹⁸² This was due to the fact that the conditional tender only provided for occupation of the property to the residents who could prove their rights to occupancy and accept the conditions of the municipal tender. Those who could not prove a right to occupy or refused to accept the tender were left without a remedy. However, the Court found that the removal of the occupiers did not amount to a permanent dispossession of their homes as the dispossession was foreseen to be temporary in nature.¹⁸³ As the City provided that it would restore the complex for re-occupation by the occupiers once the buildings were safe, the removal did not amount to an eviction. The Court recognised that this finding may leave room for abuse in eviction proceedings. It thus stated that in instances where urgency dictates that restoration or re-occupation should not be ordered in circumstances such as these, the relevant court should make clear that such order would not lay the foundation for a lawful eviction under section 26(3).¹⁸⁴ The order before the High Court thus fell short of the protection afforded by section 26(3).

The Court further criticised the City's inadequate engagement with the occupiers. In particular the Court asserted that the City's unilateral 'top-down' approach, by the imposition of a conditional tender, was an inappropriate basis for reasonable engagement.¹⁸⁵ According to the Court, this approach indicated that the City regarded the occupiers as 'obnoxious social nuisances', who contributed to 'crime, lawlessness and other social ills'.¹⁸⁶ Finally, the Court affirmed that meaningful engagement should take place at every stage of the removal and re-occupation process.¹⁸⁷

In *Motswagae*¹⁸⁸ the Constitutional Court was once again faced with interpreting the meaning of 'eviction' in relation to section 26(3) of the Constitution. This matter related to construction work, authorised by the Rustenburg Local Municipality, on property occupied by the fifteen applicants, which the applicants argued interfered with their right not to be disturbed in the peaceful occupation and possession of their homes without a court order.¹⁸⁹ The municipality sought to redevelop the provincially owned land occupied by the applicants for the purposes of a housing development and set out to engage with the applicants in an attempt to facilitate their relocation to alternative accommodation. At some point, negotiations between the parties broke down and no final consensus was reached in relation to the redevelopment. In spite of this, the municipality contracted with a construction organisation and proceeded to embark on construction work on the property. In particular, the contractor bought a bulldozer onto the property and excavated land directly adjacent to an outer wall of a house occupied by one of the applicants, thereby exposing the foundations of the house.

The applicants consequently approached the North West High Court for an urgent interdict to prohibit the municipality, through its construction company, from further unlawfully disturbing or interfering with the applicants' peaceful possession of their homes. The High Court dismissed the application holding that the applicants would not suffer irreparable harm as they retained their right to privacy and to remain in their homes.¹⁹⁰

After the High Court and SCA refused to grant the applicants leave to appeal, they appealed directly to the Constitutional Court. Here, the case turned on whether the guarantee against eviction enshrined in section 26(3) of the Constitution is 'sufficiently wide to ensure protection of the applicants in their occupation of their homes'.¹⁹¹ The Court thus had to determine whether the right not to be evicted from one's home without a court order could be read in a manner that would grant protection against other negative infringements of the right to housing. In this regard, the Court found that the provision did provide such protection. To hold otherwise would render the provision 'pointless and afford no protection at all'.¹⁹² The Court thus held that an 'eviction' in terms of sec-

tion 26(3) did not solely refer to the physical expulsion of someone from their home. Instead an 'eviction' also includes the infringement or obliteration of the 'incidents of occupation'.¹⁹³ In relation to the case before the Court, Judge Yacoob specifically stated that section 26(3) 'guarantees any occupier peaceful and undisturbed occupation of their homes unless a court order authorises interference'.¹⁹⁴

The Court further lambasted the unlawful conduct of the municipality.¹⁹⁵ The Court determined that the municipality's actions amounted to a 'significant' interference of the applicants' peaceful and undisturbed occupation, to the extent that the intrusion 'constituted a form of eviction'.¹⁹⁶ In fact, the Court went so far as to say that the actions of the municipality had been engineered to 'achieve the eviction of the applicants through the back door'.¹⁹⁷ Such conduct by an organ of state is impermissible, unreasonable and unconstitutional.¹⁹⁸

Motswagae is a relatively recent case, which has potentially far-reaching consequences. While the implications of *Motswagae* are still to be worked out, the case seems to have led to a progressively wide interpretation of section 26(3) by expanding the meaning of 'eviction' to include an infringement or obstruction of the composite elements of adequate housing. The case has consequently strengthened the protections afforded to home occupiers in relation to a broad range of negative obligations attached to the right to housing. Moreover, the case has also indirectly given substantive content to the right to housing in that it acknowledged that undisturbed and peaceful occupation was an essential component of the right to housing, thereby furthering an understanding of section 26(1) and (2).

Although the majority of housing cases before the Constitutional Court related to eviction law, the Court has also pronounced on actions which infringe the negative obligations contained in the right to housing in some other manner. Two cases in particular are important here. These relate to execution of debt against residential property.

The right to execute against property is fundamental to the operation of the credit and banking system. Yet, it is open to abuse.¹⁹⁹ It seems evident that the sale of a very poor person's home for a trifling amount is an abuse of the rules of court and the common law which permits exe-

cution against property to recover debt. In the South African context of deep poverty and gross structural inequality, execution against a person's home may have an impact disproportionate to the interest a creditor has in recovering a debt. Unless properly controlled, it is an additional mechanism through which poor people can be unfairly deprived of access to adequate housing and excluded from full urban citizenship.

In *Jaftha*²⁰⁰ the Constitutional Court was required to consider the appropriate constitutional response required to safeguard against the unjustified execution of debt against a person's home. The case concerned two sales in execution against immovable property that had been amalgamated into one. Ms Jaftha was an unemployed woman in ill health. She borrowed R250, repayable in instalments. When she fell behind with her instalments the debt was referred to an attorney, who obtained judgment against her for R632.45 plus interest and costs. Ms Jaftha had no moveables which could be executed against and as a result the execution was levied against her home, which had been acquired with a state subsidy. By the time of execution, the debt had ballooned to R7000.²⁰¹ Ms van Rooyen borrowed R190 to buy groceries. She was also poor and had acquired her home by inheritance. By the time her house was sold, her debt had ballooned to R1000.

By the time their case reached the Court, the sole issue remaining for determination was the constitutional validity of section 66(1)(a) of the Magistrates' Court Act 32 of 1994, which permitted an execution against a person's immovable property for the recovery of a debt if insufficient moveable property is found to satisfy a judgment debt. The High Court had found that section 66(1)(a) of the Act was not unconstitutional because, among other reasons, the right of access to adequate housing does not protect a person's ownership of a home. It only protects occupation, deprivation of which is regulated by PIE.²⁰²

Judge Mokgoro, in a unanimous judgment, held that security of tenure forms part of the negative aspect of the right of access to adequate housing.²⁰³ Although Mokgoro does not expressly say so, it is impossible to make sense of the scheme of the decision in *Jaftha* unless it is accepted that ownership of one's home forms part of the exercise of the right of access to adequate housing. As one of the strongest forms of security of

tenure, it must be understood as one of the range of interests protected by the right. As a consequence, a deprivation of ownership of one's home must be considered an interference with the negative aspect of the right of access to adequate housing. It is in this light that Mokgoro J's statement that 'any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in section 26(1)'. One of those rights, it must be accepted, includes the common law right of ownership.

Once this is accepted, the question becomes one of justification. Applying section 36 of the Constitution, Judge Mokgoro enquired into the circumstances in which it would be permissible to execute against a person's home to recover a debt. Mokgoro considered a wide range of circumstances which would be relevant to the question of justification. These include the availability of alternative mechanisms to satisfy the debt, the degree of proportionality between the interest of the creditor in obtaining payment of the debt and the interests of the debtor in retaining ownership of her home, the circumstances in which the debt arose, the nature and size of the debt, the efforts made by a debtor to pay the debt off and the availability of a source of income from which a debt may be paid off.

The open nature of the enquiry and the wide range of circumstances to be taken into account require that the decision of whether to authorise execution against residential property is properly one for a judicial officer. To the extent that section 66(1)(a) of the Act authorised execution without judicial oversight, it was unconstitutional. As the statute did permit execution to be authorised by a clerk of the court, and not a Magistrate, Mokgoro declared the provision unconstitutional, and read in a proviso requiring execution to be authorised by a court, after considering all the relevant circumstances.

The reach of the Court's decision in *Jaftha* was disputed for several years. While the execution of all debts against immovable property in the Magistrates' Courts had now to be subjected to the *Jaftha* enquiry, execution against immovable property in the High Court carried on more or less as before. Indeed, many debts which fell within the monetary jurisdiction of the Magistrates' Courts were enforced in the High

Courts, because there the Registrar was still empowered, in certain circumstances, to grant orders declaring immovable property executable.²⁰⁴ An early attempt to extend *Jaftha* principles to execution in the High Court failed.²⁰⁵ Finally, almost seven years later, the Court took up the issue again.

In *Gundwana*²⁰⁶ the Court had to consider whether the *Jaftha* principles applied to mortgage bond agreements, or merely to other debts which were not specifically secured against a person's home. Elsie Gundwana was the proud owner of the only black-owned bed and breakfast establishment in George.²⁰⁷ The establishment was housed in her extended home in Thembeletu Township. During 2003, she ran into difficulties repaying the bond she had taken out in order to extend the property. The bank called up the debt and obtained default judgment against her, together with an order declaring her home specifically executable in terms of the mortgage bond agreement. The order was obtained from the Registrar. The bank did not take further action in relation to execution for four years, during which time Gundwana restructured her payment plan with the bank and formed the impression that the bank's claim had been compromised and the default judgment had been abandoned. When she fell into difficulties again four years later, the bank executed upon the default judgment it had obtained in 2003 and sold her home to Steko Development.

When Gundwana's case reached the Court, the 'ultimate constitutional issue'²⁰⁸ was described as whether a High Court Registrar was empowered to grant an order declaring a person's home specifically executable. It was argued on behalf of the bank that because Gundwana voluntarily placed her home at risk by putting it up as security for a debt, she had accepted that she would lose her property if she did not comply with the terms of the bond agreement. Judge Froneman, for a unanimous Court, rejected this contention. He held that a debtor who places their home at risk does not thereby waive the right of access to adequate housing and the protections it affords, including the right to execution only under court sanction. Intriguingly, Froneman also held that a debtor does not agree that execution could be carried out 'in bad faith'.²⁰⁹ The suggestion that section 26 precludes the exercise of a contractual power to

cause execution against a person's home is entirely novel. It is nowhere to be found in *Jaftha* and it remains to be seen how, and if, this principle is developed in future cases.

In any event, we confine ourselves here to the observation that the waiver argument bears a striking resemblance to the reasoning of Brand JA in *Maphango*²¹⁰ – that, by entering into a contract a person limits her constitutional rights and subjects them to the strictures of the common law. But *Gundwana*, taken together with *Jaftha*, constitutes powerful authority for the opposite contention – that common law relationships will always be subject to constitutional control where they affect a person's ability to exercise a constitutional right. The question will always be whether the exercise of the right is reasonable and proportionate in the circumstances. In the case of execution against residential property, this determination will always have to be made by a judicial officer. The nature of the relationship between the debt and the property against which it is secured, together with the common law governing the arrangement, will always be important considerations in the decision-making process. They are not, however, determinative of whether execution should be permitted. Elise Gundwana's case was referred back to the High Court for it to balance these considerations out.

Gundwana emphasises that execution against a person's home must be a proportionate response to the failure to pay a debt, even if the debt is specifically secured on it. These decisions should, we consider, be seen as incidents of an evolving constitutional principle. This principle is that the exercise of private power which infringes on constitutional rights must have a legitimate purpose, and must be proportionate to that purpose.

Meaningful engagement

One of the most interesting developments in the housing and eviction jurisprudence in South Africa is the creation of the requirement of 'meaningful engagement', which was first flagged in the *PE Municipality* case.²¹¹ In this case, the Constitutional Court focused on the importance of engagement and mediation as important legal mechanisms in eviction proceedings, and housing policy more broadly.²¹² In underscoring the

usefulness of engagement and mediation, the Court stated that ‘the procedural and substantive aspects of justice cannot always be separated’²¹³ and that in exercising their managerial functions to ensure just and equitable evictions, courts may have to be more ‘innovative’ in sculpting their remedies.²¹⁴

The Court stated that an effective method of obtaining reconciliation between parties in a dispute would be to ‘encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions’.²¹⁵ Mediation and engagement encourage the humanisation of the other parties to a dispute, furthering an awareness of each as an individual bearer of rights and dignity.²¹⁶ Moreover, the special nature of the interests involved in eviction proceedings mean that it would generally not be just and equitable to order an eviction if ‘proper discussions and, where fitting, mediation were not attempted’.²¹⁷

In the *Olivia Road* case, the Constitutional Court expressly developed and gave content to the concept of meaningful engagement. In that case, the Court made an interim ruling in terms of which it ordered the parties to engage meaningfully with one another in an attempt to reach mutually acceptable solutions to the issues raised before the Court and ways to improve the safety of the building in the interim. On their return, the Court gave reasons for its decision to order meaningful engagement and elaborated on what this form of engagement would entail. The Court stated that the obligation to engage meaningfully flowed from section 26(2) of the Constitution.²¹⁸ Meaningful engagement is therefore an essential component of a reasonable state response to the housing programme.²¹⁹ According to the Court, when a municipality evicts occupiers and homelessness could ensue, meaningful engagement is a requirement.²²⁰ Courts are then empowered to endorse the agreements reached between the parties in instances where those agreements are reasonable, thereby exercising due vigilance.²²¹

Meaningful engagement means that the occupiers, owner and relevant municipality have to meaningfully engage on all aspects related to the eviction and the provision of temporary shelter to those who require it.²²² All the parties must set out to be genuine during the engagement process by acting reasonably and approaching the engagement in good faith.²²³ Par-

ties should engage about the consequences of a possible eviction, whether the municipality can alleviate some of the potentially dire consequences that result from eviction, the obligations of the municipality in relation to any possible eviction, and how and when the municipality should fulfil its obligations.²²⁴ Of particular importance in meaningful engagement is the need to address questions of homelessness that may ensue, potential temporary measures that may stave off homelessness (including sub-market leasing) while the state provides alternative accommodation, whether the owner's interests could be vindicated without an eviction order being granted, or whether the owner could contribute to the efforts of the state to provide an alternative.²²⁵ Engagement must be aimed at arriving at mutually acceptable solutions.

The various judgments in the *Joe Slovo* case underscored the importance of meaningful engagement to any housing project, especially when relocation or eviction is pursued to facilitate such a project. Most of the Court criticised the insufficient state engagement with the community.²²⁶ In particular, Judge Sachs denounced the 'top-down' approach to engagement adopted by the state, in terms of which state officials would unilaterally make decisions without consultation or inclusion of the community.²²⁷ This approach was in conflict to Judge Yacoob's more deferential approach. According to Yacoob, the state was only obliged to ensure that it reasonably engaged with the occupiers.²²⁸ This means that although individual and careful engagement with each person or household might be desirable, the engagement between the parties in eviction proceedings should not be devoid of 'realism and practicality'.²²⁹ Despite the Court's recognition that state engagement was insufficient, the Court allowed the eviction and insisted on the parties meaningfully engaging about the date and conditions under which the relocation would take place. It may be argued that this watered-down version of meaningful engagement sits in stark contrast to the Court's earlier pronouncements in *Olivia Road*.

The obligation to meaningfully engage provides potentially significant protections for unlawful occupiers facing evictions and has far-reaching consequences for state decision-making in eviction proceedings. Despite the potential benefits of this concept, there is a very real risk that mean-

ingful engagement could become ‘a purely procedural “box to tick”’, thereby circumventing the quality and purpose of engagement.²³⁰ This approach to engagement has been considered by the Constitutional Court on two occasions. In *Abahlali baseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal (Abahlali)*²³¹ the Court determined that if engagement took place *after* a decision to evict had already been taken, the engagement would not be genuine.²³² Moreover, proper engagement would include a comprehensive assessment of the needs of the affected community.²³³ In *Schubart Park Residents’ Association v City of Tshwane Metropolitan Municipality (Schubart Park)*²³⁴ the conditional tender made by the City of Tshwane in terms of which residents who met certain criteria and agreed to certain terms were offered temporary accommodation, was held to form an inadequate basis for proper engagement.²³⁵ Specifically, the Court criticised the ‘top-down’ premise from which the City proceeded, in terms of which the City had unilaterally predetermined all the conditions.²³⁶ The Court further affirmed the principle that engagement should take place at every stage of the eviction and housing process.²³⁷

The right to housing’s impact on private property owners

In *PE Municipality*, the Court alluded to the fact that an owner’s right to property could be limited in instances where evictions may lead to homelessness, by emphasising the fact that the constitutional rights require a balancing of the property rights in section 25 of the Constitution and the right of access to adequate housing in section 26 of the Constitution. This reinforced the notion that unlawful occupiers now have considerable protection afforded to them in terms of their section 26 rights.

This position was expressly confirmed in *Blue Moonlight*. In this case, the Court dealt with the rights of a private owner of property that is unlawfully occupied and the obligations of a municipality to provide alternative accommodation to occupiers if they were evicted. The court affirmed that the private owners’ property rights (protected in terms of section 25 of the Constitution) could, in circumstances where an eviction leads to homelessness, conflict with the occupiers’ right of access to adequate housing (as protected by section 26 of the Constitution).²³⁸ As a

result the protection against arbitrary deprivation of property in section 25 should be balanced by the protection against arbitrary eviction in section 26(3).²³⁹ The right of access to adequate housing may thus temporarily limit the right to private property.²⁴⁰

Unlawful occupation results in the deprivation of property in terms of section 25. But such deprivation may pass constitutional scrutiny if it is mandated by legislation and is not arbitrary.²⁴¹ In *Blue Moonlight*, the Court also addressed the question whether the eviction was just and equitable in terms of PIE. This suggests that if a court refused to authorise an eviction on the grounds that such eviction was not 'just and equitable' in the circumstances, such refusal would amount to a legitimate limitation of the right to property in terms of section 25 of the Constitution.²⁴²

The Court in *Blue Moonlight* considered an open list of factors to determine whether an eviction would be just and equitable given the circumstances. These factors include the length and duration of occupation by the occupiers (some of the occupiers had been in occupation for considerable periods of time), whether their occupation was once lawful, whether the owner was aware of the occupiers when purchasing the property, whether the eviction would lead to homelessness, and whether there is a competing risk of homelessness on the part of the private owner of the property.²⁴³ This led the Court to conclude that owners may have to be patient while their ownership rights are temporarily restricted by unlawful occupation in situations where evictions may lead to homelessness.²⁴⁴

This nuanced position was further etched out in *Skurweplaas*. In that case, the Court specified that it would not be just and equitable for a court to authorise an eviction without ensuring that such eviction would not lead to homelessness prior to the provision of alternative accommodation.²⁴⁵ The Court thus stated that it is necessary to require a linkage between the date of the eviction and the date upon which the municipality must provide alternative accommodation to ensure that vulnerable occupiers are not rendered homeless in the interim.²⁴⁶

In *Skurweplaas* and *Mooiplaats* the Court further confirmed the approach taken in *Blue Moonlight*, namely that the right to ownership

cannot be regarded as wholly unqualified.²⁴⁷ Instead the Court found that owners may have to be patient while their ownership rights are temporarily restricted until alternative accommodation could be provided.²⁴⁸ Finally, the Court also considered the fact that the owner of the property was not going to use the property 'gainfully in the foreseeable future'.²⁴⁹ This would act as a factor militating against a speedy eviction.²⁵⁰

These are not the only limitations on ownership that have been brought about by the right of access to adequate housing. In *Maphango*,²⁵¹ the Constitutional Court had to consider the impact of section 26 on the landlord-tenant relationship, specifically in relation to the unfettered right of landlords to terminate a lease on notice. The landlord in the present case terminated the leases of poor tenants and invited them to enter new leases, on the same terms, but at significantly increased rental (between 100 and 150 per cent increases). The tenants approached the Rental Housing Tribunal to have their lease terminations under these circumstances declared an 'unfair practice'. However, before the Rental Housing Tribunal could deliver its ruling, the landlord applied for the tenants' eviction. The Constitutional Court determined that the right of access to adequate housing has horizontal application between private persons, but on the facts this application is effected through the medium of the Rental Housing Act.²⁵² The Court thus focused on and applied the Act, despite the applicants not relying on the Act explicitly, as a vehicle to inform public policy. The Court stated that regardless of the manner the applicants relied on the Act, the case could not be decided without it.²⁵³ This is because the Court held that the Act 'superimposes' a comprehensive scheme of regulation on the landlord tenant relationship.²⁵⁴ The Act provides a 'complex, nuanced and potentially powerful system for managing disputes between landlords and tenants'.²⁵⁵

Crucial to the Court's reasoning was the concept of 'unfair practice'. The tenants relied on provisions in the Act prohibiting 'exploitative rentals' and provisions on the Unfair Practices Regulations²⁵⁶ prohibiting 'oppressive or unreasonable conduct'. The Court contended that the Act should be read to preclude unfair lease terminations.²⁵⁷ In deciding this, the Court held that the concept of unfair practice does not require incen-

sant or systemic conduct, but could include a single act such as a lease termination.²⁵⁸ *Maphango* therefore limits an owner's property rights to the extent that such owner is now obliged to act reasonably and fairly in a landlord-tenant relationship.

The limitation of ownership rights is not permanent or irreversible however. It is temporary in nature. Moreover, such limitation may, in cases where the state unreasonably fails or refuses to provide alternative shelter, entitle the owner to compensation from the state.²⁵⁹

The issue of executive non-compliance with court orders for alternative accommodation following the *Blue Moonlight* judgment

Following the *Blue Moonlight* judgment requiring the City of Johannesburg to provide alternative accommodation in the wake of an eviction by Blue Moonlight Properties, there has been a shocking failure on the part of the City of Johannesburg to uphold various court orders (that had stacked up while waiting for the *Blue Moonlight* judgment to be handed down by the Constitutional Court) for the provision of alternative accommodation pending eviction of low-income residents by private landlords. These cases include *Chung Hua Mansions*²⁶⁰ and *Hlophe*,²⁶¹ all cases currently being litigated by legal non-governmental organisations (NGOs) in order to get the City of Johannesburg to try to provide court-ordered alternative accommodation to desperately poor residents of Johannesburg's inner city being evicted by private landlords. In each case the City has delayed processes, missed court deadlines to file papers and manifestly failed to meaningfully engage with the residents to discuss the alternatives, admitting on record that it had no accommodation available.²⁶² This has necessitated lengthy and repeat litigation and has recently resulted in a new tactic among litigating NGOs, of holding municipal authorities directly responsible for the non-compliance with court orders.

Thus, in the case of *Hlophe*, an application for enforcement of the *Chung Hua Mansions* order to provide alternative accommodation, SERI has asked the court to declare the Executive Mayor, the City Manager and the Director of Housing of the City of Johannesburg, in their respec-

tive capacities, statutorily obliged to ensure that the City complies with the *Chung Hua Mansions* order granted on 14 June 2012 (in terms of which the City was meant to have provided alternative accommodation to the residents of Chung Hua Mansions as close as possible to their current location by no later than 30 January 2013, but has not). This litigation is ongoing but signals a worrying trend for the government to ignore court orders, significantly undermining the right of poor people to adequate housing. This trend also signals the need for human rights lawyers to move away from a largely reactive approach to housing litigation and to actively strategise around proactive legal options to ensure that the government complies with its housing-related positive obligations, particularly in the context of the alternative accommodation it offers to households facing evictions.

Systemic human rights-related problems

Undoubtedly, great advances have been made in line with the rights-based frameworks set out above to extend basic water services to poor households in South Africa. However, a number of systemic problems remain that compromise the enjoyment of the right of access to adequate housing, which are analysed here across human rights-related axes.

Housing availability

Despite the impressive delivery of over a million subsidised houses or housing units since 1994, there are still substantial housing-related backlogs which are, in fact, increasing rather than decreasing due to natural population increases as well as rural-urban migration.²⁶³

Beyond the backlog issue per se, housing delivery has been undermined by enduring quality-related issues (discussed below), as well as systemic problems with the approach and execution of housing programmes and practices. The three main availability-related challenges are dealt with here: evictions and the absence of emergency housing programmes to provide appropriate alternative accommodation; problems with the RDP house allocation process; and eradication of, or prohibition on the

establishment of new, informal settlements. These factors combine to undermine the provision of housing, meaning that there is a substantial unmet demand for low-cost housing that is not being addressed.

Regarding evictions and the failure to provide alternative accommodation, although this paper focuses on urban areas as the site of the main thrust of both population movement and public housing intervention, in the context of evictions it is worth noting that in the decade after 1994 over a million people were evicted from commercial farmlands.²⁶⁴ This process has undoubtedly added to 'the pace and scale of movement towards', as well as the pressure on South Africa's urban areas.²⁶⁵ There has not been a comprehensive study of the number of evictions in urban areas since 1994.²⁶⁶ However, it is evident (not least from the scale of litigation opposing proposed evictions) that up until – and indeed after – the landmark cases on evictions such as *PE Municipality*, *Olivia Road*, *Pheko*, *Blue Moonlight* and *Schubart Park*, that evictions from urban areas have continued to take place without the provision of alternative accommodation as now required by law and housing jurisprudence.

As pointed out in 2011, 'it has not been until relatively recently that Parliament and the courts have begun to share principles which aim to manage and control the practice of eviction' and 'the state, especially South Africa's municipalities, has been slow to reformulate policy and adapt practice to cater for these changes in law'.²⁶⁷ Indeed, over a decade after the *Grootboom* case and the National Housing Code made it compulsory to have emergency housing programmes catering for the most vulnerable groups, it is not clear how many of South Africa's municipalities have emergency housing programmes that provide temporary shelter for evicted people who would otherwise be homeless. At the heart of the evictions problem, according to Stuart Wilson, lies 'fundamental disagreement about what developmental role the state generally and planning law in particular is supposed to perform'. At the crux of the disagreement is the fact that, notwithstanding national policies and laws, traditionally, 'municipalities have conceived of their role as being merely to ensure that building regulations are complied with and health and safety by-laws are enforced' – in this scenario, eviction has 'often been a key means of enforcement'.²⁶⁸ This schizophrenia, particularly at the

local government level, raises concerns about the devolved local government accreditation scheme set out above.

That the government continues to use evictions (often without a court order) to pursue its own formal plans for cities regardless of the homes and lives of poorer residents is highlighted in the recent actions by eThekweni Municipality, which, during September 2013, began demolishing shacks and attempted to evict the residents of Cato Crest informal settlement with a bogus court order and in the face of numerous interdicts and court challenges.²⁶⁹

Like disconnections of water supply to households that cannot afford to pay water bills (as discussed in the FHR position paper on water by J Dugard), the enduring practice of evicting (whether by public or private landowners) poor households that cannot afford market rates for housing without government provision of alternative accommodation seriously compromises the national government's efforts to ensure housing for all, as well as affected households' rights to adequate housing. Further frustrating the mission to ensure adequate housing, and also indicative of the government's desire to privatise housing, is the emerging trend of governmental non-compliance with court orders for alternative (publicly provided and managed) accommodation as witnessed in the City of Johannesburg. As outlined above, NGOs have had to go back to the court several times to ensure compliance with orders for the government to provide alternative accommodation ahead of evictions by private landlords. Such failure by the executive to uphold court orders is a deeply worrying development.

Moreover, even where there are emergency housing programmes²⁷⁰ – often achieved as a result of repeat litigation such as by litigating NGOs in the City of Johannesburg – it is typically inadequate to meet the demand and in the City of Johannesburg comes with numerous rights-related problems including gender segregation and draconian rules, e.g., lockout during daylight hours (these aspects are discussed below). Thus, as highlighted in ongoing litigation, all emergency shelter rooms provided by the City of Johannesburg are currently occupied with no indication of when or if further emergency housing places will be provided.²⁷¹ It is also highlighted by litigation against eThekweni Municipality

regarding its policy of evicting people to transit camps and leaving them there for years on end.²⁷²

Beyond evictions and emergency housing (or the lack thereof), the two major availability-related fault lines relate to problems with the government's RDP housing programme and a failure to resolve the question of what to do about informal settlements. This has resulted in a trend towards attempting to prevent and eradicate informal settlements rather than to embark on in situ upgrading in concert with the residents.

The government's preoccupation with formality and ownership – as exemplified by the provision of low-density RDP houses – has meant that housing provision has been a very slow, expensive and highly bureaucratic process that has also suffered from corruption and, perhaps inevitably, failed to address housing needs. There are several reasons for this, all of which undermine the government's ability to deliver adequate housing on the scale required. One of the main challenges is that there is widespread misunderstanding – as exacerbated by the opacity of the processes and a paucity of information provided to hopeful beneficiaries, discussed below – about the various highly complicated housing allocation databases operated nationally, provincially and at the local level as discussed above. Confusion over the various systems for allocating houses has led to the popular perception that there is a 'housing queue' or 'waiting list' that operates in a straightforward manner, to allocate the first ten houses built to the first ten names on the list.

However, as highlighted in a recent report, such assumptions 'appear to be wrong and the housing "waiting list" does not exist or function in any way that it is understood to exist or function'.²⁷³ Rather than operating like a first-come first-served waiting list, allocation systems are highly idiosyncratic and discretionary, and utilise complicated criteria including location.²⁷⁴ They also engage sometimes contradictory processes. For example, in an effort to speed up delivery, since 2001 payment of subsidies to developers for houses has been de-linked from the beneficiary selection and approval processes, meaning that developers can be paid for building houses that are not yet allocated to beneficiaries – one of the consequences of this practice is that 'state-subsidised houses are built with no specific beneficiaries in mind',²⁷⁵ rendering the newly

built homes vulnerable to unauthorised occupation (so-called ‘queue-jumping’).

Discounting the inordinate amount of time potential housing recipients spend on housing demand databases, nuanced methods of allocation are not necessarily problematic. However, in the absence of transparency and information, they do lead to misunderstanding and frustration, and provide a cover for corrupt allocation practices. Indeed, given the opaque-ness of the systems and the large amounts of money involved in housing developments, there is much potential for graft and there has been a high degree of corruption and fraud experienced in the allocation of subsidised houses, as well as in the public tender processes for housing developments. In 2005, an Auditor-General’s audit report was tabled before the Minister of Housing that raised serious queries about the approval and allocation process of housing subsidies at provincial housing departments.²⁷⁶ The report identified a number of loopholes in the allocation of housing subsidies processes, especially regarding subsidy approvals to government employees earning in excess of the housing subsidy threshold. This was verified by comparing the housing applicant data on the HSS with the electronic government personnel salary database to identify instances of subsidy approvals to government employees who earned more than R42 000 per year.²⁷⁷ Other problems encountered included:

- subsidy approvals to applicants under the age of 21 years in contravention of the National Housing Code;
- subsidy approvals to applicants with invalid Identity Document numbers;
- duplicate subsidy approvals for a specific property;
- manual overrides of the HSS in the approval of housing subsidies (all users and administrators had the authority to override the provincial HSS); and
- approved housing subsidies not listed on the NHSDB.²⁷⁸

The findings were so serious that, in June 2006, a meeting was held with members of the Standing Committee on Public Accounts (SCOPA), members of the Parliamentary Portfolio Committee on Housing and officials from NDoH to discuss it further.²⁷⁹ And, on 25 April 2007, the President

mandated the Special Investigating Unit (SIU) to undertake an investigation into 'any fraud, corruption and maladministration in respect of the development and delivery of low-cost housing in South Africa through the national Department of Housing, the provincial departments of housing, the former housing development boards and corporations and local authorities and their appointed agents'.²⁸⁰ A five-year service level agreement was signed between the SIU and NDoH to cleanse the national housing database of disentitled housing subsidy beneficiaries, recover losses from fraudulent beneficiaries, identify weaknesses in the HSS and make recommendations on improving systemic deficiencies through tighter policies and better control mechanisms, as well as to institute corrective action including civil, criminal and disciplinary action.²⁸¹ According to the SIU's 2010/2011 Annual Report, such investigations had resulted in 1,291 acknowledgement of debt forms being signed and a total of 625 unlawful beneficiaries were arrested, and 528 beneficiaries were convicted.²⁸²

As a result of this process, the NDoH has made some improvements to the HSS including introducing the necessity for all applications to be authorised at a second level by a senior official to prevent fraudulent manual overrides of the system by junior officials, as well as instituting better verification processes.²⁸³ However, despite these reforms, problems with the subsidy and database systems persist. For example, in March 2012, gross irregularities in the Gauteng Department of Local Government and Housing emerged in a provincial SCOPA report in relation to the allocation of over R7 million that is 'related to housing subsidies paid to beneficiaries not appearing on the Housing Subsidy System'.²⁸⁴ The report indicates that in Gauteng fraud and corruption in relation to housing allocation is rife.²⁸⁵ In late-2013, responding to widespread problems with the allocation of subsidised houses, the Public Protector began a systemic investigation into the delivery of RDP houses across the country.

Corruption, maladministration and fraud not only siphon off funds meaning that there is less public money available to provide housing, but such activities also frustrate attempts to ensure rational allocation of houses to the most needy beneficiaries. They also contribute to a wide-

spread perception that the allocation process is political and that homes are allocated in return for political support. The bottom line is that, as a result of such activities, fewer homes can be provided for the same amount of funds.

It is also worth noting that despite the government's focus on formal title, the process of registering beneficiaries' titles has been extremely slow and ineffective, meaning that in many cases title has not been conferred as it should have been, leaving recipients in ownership limbo and vulnerable to having their home 'hijacked' or re-allocated. The murky world of RDP titles evidenced in the significant discrepancies between the number of subsidies granted and the number of formal titles received – the figures suggest that, 'potentially, over 1.5 million housing subsidy beneficiaries who received a state housing asset have not had the house registered in the Deeds Registry and do not have formal title'.²⁸⁶

Moreover, contrary to the policy that attempts to lock beneficiaries into not being able to sell their RDP house for eight years,²⁸⁷ it is clear that 'a very high percentage of people who actually receive state-subsidised houses engage in informal transfers, either renting or selling their houses for cash, and move back to shacks in backyards or informal settlements to be close to economic and social opportunities',²⁸⁸ a reality that attests to the complexities of the housing crisis, and calls into question the premise of the RDP programme. Ultimately, regardless of various efforts to reform the allocation process, households still wait many years and even decades to be allocated a home. Indeed, in a recent focus group, one participant said that registering one's name on a waiting list or demand database has become 'a rite of passage for people when they turn 18' but there is no sense of how long they will wait or what options might be available to them.²⁸⁹

Possibly because of the complexities and problems entailed in the RDP housing allocation process, and perhaps signalling a nascent shift in the focus on private title, from 2005 there has been a consistent decrease in the number of state-subsidised houses registered 'and this is continuing and becoming worse'.²⁹⁰ This, combined with evidence that the number of housing opportunities being created by government is declining and the achievement of targets is 'very low',²⁹¹ indicates that the govern-

ment might be shifting its focus away from the provision of RDP houses, suggesting the need to reassess needs and solutions in consultation with hopeful beneficiaries, social movements and housing-related civil society organisations.

Regarding the complexities of allocation processes per se, it is noteworthy that in 2002 eThekweni Municipality decided to scrap all existing housing waiting lists in favour of a project-based register developed for each new subsidised housing project of any kind (including informal settlement upgrading) and now operates a register specifically for each project and only for the duration of the project. The municipality considers this to be a fairer, more rational and more transparent way to allocate housing opportunities.²⁹²

Finally, turning to the practice regarding informal settlements, notwithstanding policy directives to the contrary, the government's focus on formal titling has also fostered a reluctance towards accepting the presence of informal settlements. This has resulted in a prohibition on new informal settlements, adding to housing-related pressure, as well as the relocation of informal settlement residents (such as those in the *Pheko* litigation) further away from urban centres, as discussed under physical accessibility below.

How to deal with informal settlements, in which a conservative estimate of 1.2 million households (or ten per cent of the population) live,²⁹³ has been an enduring challenge of the post-apartheid era. BNG recognises the need to shift the official policy response to informal settlements from one of 'conflict or neglect' to one of 'integration and co-operation, leading to the stabilisation and integration of these areas into the broader urban fabric',²⁹⁴ and this approach is consolidated in programmes such as NUSP and UISP. Yet, the reality is far from these prescriptions. Marie Huchzermeyer has pointed out that notwithstanding being formally in favour of in situ upgrading, the government's dominant approach remains to try to eradicate informal settlements.²⁹⁵ This has involved a prohibition on new informal settlements, forcing people into backyard shacks and the kinds of inner-city buildings that people are often evicted from – perpetuating a cycle of insecure tenure, as well as, ironically, entrenching informality. Huchzermeyer points out that 'active informal

settlement eradication coupled with land invasion control has repressed ordinary people's attempts to defy the exclusionary formal city' in South Africa but that, due to large unmet demand for well-located housing, these practices have not stamped out informality – because people have to live somewhere, the number of backyard shacks, especially in Johannesburg, is now more than double the number of shacks in informal settlements.²⁹⁶ To date, this mushrooming of often cramped and under-serviced backyard shacks has occurred under the government's radar. Yet, this phenomenon warrants further attention as it is unlikely that backyard shacks provide an optimal solution to South Africa's low-cost housing deficits.

Accessibility (physical and economic)

Despite the Constitutional Court's reference to the importance of location in housing cases such as *Blue Moonlight*, and notwithstanding both BNG's and the CESCR General Comment 4's emphasis on the location of housing initiatives, there is still insufficient attention to the issue of the location of housing in government practice.²⁹⁷ Thus, while the government acknowledges that the response to the crisis of housing 'must be innovative and diverse', and not focused on only 'the numbers that must be built',²⁹⁸ this target-driven approach, which has replicated the distorted apartheid geography, has dominated.

The overwhelming thrust of housing programmes – mostly unmediated by policies such as Breaking New Ground that emphasise unlocking well-located land – has been that of RDP housing, which is typically built in greenfield sites far away from urban centres, on the periphery where land is cheaper. And the government's focus on formalised private ownership with its concomitant reluctance to accept informal settlements has meant that – although BNG and other policies outlined earlier advocate in situ upgrading of informal settlements in desirable locations and only recognise relocation as a last resort – upgrading initiatives are often pursued through the relocation of vulnerable communities even further away from urban centres.²⁹⁹

As highlighted by the National Planning Commission, such practices have resoundingly failed to address the apartheid-inherited spatial

inequality in South Africa's towns and cities,³⁰⁰ reinforcing spatial segregation and the isolation of the poor from livelihood opportunities and social services.³⁰¹ Such practices also obviously fundamentally compromise the accessibility component of the right to housing. Indeed, South Africa's racialised spatial distribution remains largely the same – both in terms of the rural-urban divide but also in terms of location in and around urban areas.³⁰²

In May 2013, the revised Finance Linked Individual Subsidy Programme (FLISP) was launched by the DHS. The FLISP is designed to increase affordability levels to aspirant first-time homeowners who earn between R3500 and R15 000 per month and qualify for home loan finance from accredited banks. FLISP interventions either reduce the initial mortgage amount, making the monthly repayment to banks more affordable (FLISP used towards a deposit), or augment the shortfall between the qualifying amount and purchase price of the property (FLISP used as a top-up to a home loan). The maximum financed property price (for existing or new houses) under FLISP is R300 000 and it is available to first-time homeowners only.³⁰³ FLISP is implemented by the National Housing Finance Corporation (NHFC) and is meant to be rolled out in conjunction with government's Mortgage Default Insurance (MDI), which mitigates the risks taken on by the banks. Though introduced in 2010, the MDI has still not been implemented due to delays in the approval process.

In 2013/2014 the estimated number of FLISP units to be developed (or sourced from the open market) is 7900.³⁰⁴ As of August 2013, however, only 195 FLISP subsidies have been approved (138 of which were in Gauteng). The NHFC has identified the following challenges with the FLISP: delays in the conclusion of the Implementation Protocols with provinces; provinces do not have the capacity to manage and co-ordinate the programme; administration challenges given the different approach to processing applications and the slowness of the HSS; delays in concluding memoranda of understanding with the banks due to the sale restriction provision in terms of Section 10A and 10B of the Housing Act and the risk it places on banks; and, finally, the high levels of indebtedness, impaired credit records and inadequate disposable income of targeted

groups (public and civil servants being the main target group).³⁰⁵

Thus, regarding economic access, although there have been some attempts by the government to encourage banks to provide financial loans to lower income households, with an unemployment rate of above 30 per cent and a worrying practice of bank foreclosures on housing loans as illustrated in the *Gundwana* case outlined above, bank financing of private homes remains a largely elite preserve.

In terms of rental properties, in most urban areas, and particularly metropolitan municipalities, market-related rentals are unaffordable for low- or no-income households. This would seem to suggest a need for rent control. However, the Rental Housing Act repealed the Rent Control Act 80 of 1976, which means that rent control no longer exists. Instead, notwithstanding the recent limits placed on landlords' abilities to charge what they want to for rental housing as introduced following the *Maphango* litigation, for the most part the market determines rental housing prices. This means that to the extent that the government has intervened to subsidise rental housing – which, probably due to the focus until recently on the provision of RDP houses, is woefully inadequate to meet the demand,³⁰⁶ especially in the bigger cities such as Johannesburg – it has done so by attempting to provide subsidised rental housing through its social housing programmes, as managed through the SHRA. One of the main problems with the social housing programmes is that, on their own terms, the few social housing projects³⁰⁷ that exist (in cities such as Johannesburg) are aimed at the upper lower income market (households that earn between R3500 and R7500 per month) and are self-evidently unaffordable to the lowest income households.

Moreover, the rate of delivery of such rental housing has been dismal. According to the DHS, as of September 2013 it had provided a total number of 33 020 affordable rental units, representing 41.3 per cent of the total target of 80 000 units by 2014. According to the DHS, if the units built in terms of the USDG are counted, then the figure increases to 37 189 units (46.5 per cent of the 2014 target). If private rental units delivered during the period are counted (10 368 units) then the total number delivered is 47 557 units representing 59.4 per cent of the 2014 target. To date, the Gauteng province has delivered 10 678 units to date, which is 55.5 per cent of

its 2014 target. The inclusion of private sector rental housing has been questioned by Parliament in the past, as DHS does not have a national private sector strategy, despite being requested to present one. According to the DHS's 2012/2013 Annual Report, a national private sector strategy to guide the implementation of private rental housing was meant to be finalised and submitted for approval, however this has not occurred. The department has said that it does not have adequate budget to meet the target of 80 000 units, and would probably settle for 70 per cent of the target achieved.³⁰⁸

In the meantime, it is clear that the existing social housing projects are insufficient and too expensive to address the demand for low-income residents. So, while celebrating new initiatives – for example, on 12 November 2013 an inner-city development company (The Affordable Housing Company or Afhco) announced that, ‘in a first’ for Johannesburg, it was going to convert 470 units for earners of around R3750 per month who will be charged R1700 to live in rooms with communal bathrooms³⁰⁹ – it is important to highlight that there is still no formal accommodation available for the approximately 51 per cent of the City’s population with a household income of below R3200 per month. In recent court papers, the City of Johannesburg, as the largest metropolitan municipality in South Africa, acknowledges an ‘urgent need’ for a rental housing sector that caters for the rental range of between R300 and R600 per month.³¹⁰

Finally, regarding attempts to ensure that private landlords do not unilaterally dramatically escalate rentals such as in the *Maphango* case, it is worrying that there are not yet Rental Housing Tribunals in all the provinces – indicating a need for the Rental Housing Amendment Bill to be passed to ensure that there are Rental Housing Tribunals in all provinces. Further, there is a need for the Minister to develop a national policy framework and norms and standards, as mandated in section 2(3) of the Rental Housing Act, in order to guide Rental Housing Tribunals when making rulings on ‘exploitative rentals’. Rental Housing Tribunals currently struggle in this policy vacuum, particularly when it comes to ensuring the protection of poor and low-income households in an environment of high demand for rental accommodation.

Housing quality – acceptability, participation, information and gender dimensions

During his tenure as Minister of Human Settlements, Tokyo Sexwale highlighted, through a National Audit Task Team, the widespread problems of the poor quality and corruption associated with the building of BNG houses.³¹¹ According to the 2009 General Household Survey, across the country, 16.1 per cent of households living in RDP dwellings felt that the walls of their dwellings were weak or very weak, and 19.9 per cent felt that their roof was weak or very weak.³¹² And, towards the end of 2009, then Minister Sexwale identified nearly 3000 RDP houses in the Eastern Cape and KwaZulu-Natal that had to be demolished because of intolerably inferior quality.³¹³ During 2010, then Minister Sexwale announced that government would be using R1.3 billion, representing ten per cent of the department's annual budget, to demolish and rectify approximately 40 000 badly constructed houses.³¹⁴

It is by now apparent that the pressure to produce houses in a short-time frame – possibly complicated by the desire to include black economic empowerment housing companies in the construction of RDP housing – has resulted in sub-standard houses being built. More research is necessary to examine the quality of all houses rolled out as part of the RDP housing programme, as well as to understand why, notwithstanding the vast and complex housing-related machinery, there is ineffective monitoring and regulation of housing standards and quality.

Beyond the poor quality of RDP houses, as outlined above, one of the difficulties encountered with the government's housing allocation systems is that they are highly complex, not very transparent and are not publicised. Indeed, a recent access to information request by residents in Soweto for Gauteng's housing databases was denied by provincial government on the grounds that publicising the list would compromise public order.³¹⁵ Such opacity not only enables fraud and corruption, but also results in confusion and a lack of reliable information to beneficiaries. In recent focus groups, hopeful beneficiaries of housing programmes expressed frustration with the lack of information and explanation provided to those waiting for housing allocations, noting that they are not informed of processes or developments and are left in the dark for years

on end wondering what has happened to their application without any communication from the authorities.³¹⁶

Further contributing to the non-participatory approach of housing provision, the de-linking of RDP subsidies from beneficiary selection and approval processes (outlined above) is the fact that the 'de-linking of beneficiaries from the development and construction phase in order to speed up delivery ... severely limits the say beneficiaries have in projects'³¹⁷ and fundamentally restricts any potential participation in the process. Thus, a CSSR study concludes that South African housing policy 'does not leave much scope for personal choice' in terms of the form, location or any special needs.³¹⁸ Regarding the latter point, even though disabled persons and those with special needs are formally able to register for a special needs house, this fact is not widely known and usually persons and those with special needs are placed on the same registration-date-based system as everyone else and without linking their needs to specific requirements, meaning that when/if they are allocated a home, it might not satisfy their special needs.³¹⁹ This is clearly a violation of the rights of disabled persons.

Turning to the emergency or temporary housing programmes that do exist, there are human rights-related difficulties with these, too. For example, the temporary accommodation in Ekuthuleni shelter provided to the former occupiers in the *Blue Moonlight* case has come with a myriad rights-violating and unacceptable conditionalities, including the fact that residents are locked out of the shelter during the day, and have to live in gender-segregated units, thereby violating family rights.³²⁰ Transit camps – such as in Richmond Farm (Durban) and Blikkiesdorp (Cape Town) – too, come with gender-related problems in that they are on the whole not large enough to accommodate families.³²¹ Addressing these violations has necessitated ongoing litigation, which has not been concluded.

Emergency housing is not the only gendered aspect of housing. Homelessness and problems with housing provision have a disproportionate affect on women, as the main carers of children, the elderly and the sick, and the lowest earners in society.³²² Women face specific barriers in rural areas where farm owners or traditional authorities often do not allocate houses to single women. Moreover, low-income women do not 'have the same economic means, building skills or free time as men, in order to be

able to participate equally in the incremental housing process', meaning that where improvements are required, women are less likely than men to be able to undertake these.³²³ Finally, women are at risk from high levels of domestic abuse and violence, which, in the context of limited social housing, often forces them to make difficult choices between leaving their shared homes and staying in abusive relationships. Research indicates that even where choices exist – for example in the limited number of shelters often run by church organisations – 'there are constraints in exercising those choices' in that such shelters usually provide only temporary shelter and, again, lock out residents during the day.³²⁴

The underlying determinants of systemic housing problems

According to its public relations information website, the South African government's goal is to 'create sustainable housing developments whereby people own their properties'.³²⁵ However, it is clear – not least from the approximately 12 million South Africans who do not have access to adequate housing³²⁶ – that South Africa's focus 'on the delivery of ownership of houses at the expense of other forms of tenure and types of housing' has seriously limited the potential to holistically address access to housing deficits in a way that integrates housing into other livelihood and social networks.³²⁷

The initial idea behind RDP housing was that it would constitute a 'starter house' that beneficiaries could add to and consolidate over time. However, this has not happened in the main because beneficiaries were unable or unwilling to finance developments to houses located largely on the peripheries of housing markets.³²⁸ This has meant that there have not been any incremental advances or progressive realisation but, if anything, there has been a form of regression where residents have moved to unsafe and/or unsavoury accommodation closer to work opportunities. Indeed, over the years many RDP settlements have become 'residential dormitories' with many beneficiaries choosing 'to trade their houses and move back to informal settlements or other informal housing to be closer to

work'.³²⁹ According to research conducted by Urban LandMark in 2010, since 2005, approximately eleven per cent of all RDP houses were unofficially (and unlawfully) traded by owners who were barred from selling their houses due to the mandatory lock-in period of eight years.³³⁰ It might be argued that such trades at least provide RDP beneficiaries with cash, but over half of these transactions were for relatively small amounts of between R5750 and R17 000 per house.³³¹

This reality calls into question the efficacy of the lock-out clause and tends to suggest the need for reform as contemplated in the Housing Act Amendment Bill. However, any such reconsideration of the lock-in clause should start by determining the purpose of housing policy – and specifically the provision of RDP housing: is it to address housing backlogs or to confer an asset to an individual title-holder? The current policy, with its lock-in clause, seems to uncomfortably fall between both these objectives, providing private title and ownership of houses but not allowing owners to use their houses as assets. Arguably a better policy would provide public housing (not conferring title but ensuring security of tenure), but if the focus is to remain on private titling, then it would be useful to undertake a cost-benefit analysis of the lock-in clause.

Such issues, along with the quality- and corruption-related problems outlined above, suggest that, at the very least, it is necessary to re-evaluate the housing allocation and provision process, including the means of allocation perhaps using the eThekweni approach of instituting project-based registration for the duration of each project. The RDP house reality also indicates a need for greater national monitoring and regulation of all processes involved in the allocation and building of subsidised housing.

At the same time, the government's preoccupation with low-density ownership has been at the expense of expanding access to affordable rental accommodation, meaning that current social housing policy 'has made little impact on stimulating the supply of rental accommodation affordable to lower-income households' earning below R3500 per month.³³²

Meanwhile, the flipside of the focus on formality is a highly schizophrenic and antagonistic approach to informal settlements, which, languishing with inadequate services between limbo and threats of eviction

and relocation, are a time bomb waiting to explode. Of major concern is government's overwhelming disregard for policies and programmes that emphasise the need for in situ upgrading – 'the reality is that we have yet to see one successful and properly executed in situ upgrade of an informal settlement.'³³³ This non-compliance with policies and programme directives in respect of informal settlement, indicates a broader failure of national regulation that requires urgent attention.

Finally, as outlined in this paper, the way that policies and programmes – whether RDP allocation, social housing provision or resolution of the status of informal settlements – have been implemented has been overwhelmingly heavy-handed, autocratic and non-participatory. This is evidenced not only in the government's failure to consult with housing beneficiaries about their needs, and its dogged adherence to private titling and the eradication of informal settlements, but also in its continued eviction of low-income residents, and its non-compliance with court orders requiring the provision of alternative accommodation ahead of evictions. Ultimately, these dominant (and dominating) approaches have perpetuated the apartheid-inherited marginalisation of the poor and have meant that housing delivery has had only a limited impact on poverty alleviation.³³⁴

Conclusion

The right to housing is a nexus right, encompassing so much more than just bricks (or tin) and glass (or plastic). The provision of housing is 'very closely tied to the provision of basic services (water, electricity and sanitation)' and, most crucially, 'stripped of government targets', housing affects people on an emotional and psychological level in the most profound way'.³³⁵ Or, as argued by Ricardo Hausmann:

... people do not demand houses; they demand habitats. A house is an object; a habitat is a node in a multiplicity of overlapping networks – physical (power, water and sanitation, roads), economic (urban transport, labour markets, distribution and retail, enter-

tainment) and social (education, health, security, family, friends). The ability to connect to all of these makes a habitat valuable.³³⁶

For these reasons, it is one of the most complex rights to realise. As highlighted in this paper, despite commendable progress in terms of delivering housing units to poor households, as yet the government has not pursued the kind of holistic approach to housing that is required to entrench security and improve people's lives. Current housing options are insufficient and beset with problems that serve to undermine gains and violate human rights. Firstly, the focus on ownership of houses has not met the need for mass accommodation in well-located areas close to work opportunities. Beyond this, the costs of spending public funds on conferring private houses is prohibitive and probably unaffordable even for an upper middle income country like South Africa. The current housing deficit is estimated at two million units, at a cost of over R800 billion, and this number keeps growing rather than shrinking, leading the Financial and Fiscal Commission to call the current housing model 'unsustainable'.³³⁷ Therefore it is absurd that the government is focused on improving the housing product substantially, thereby increasing the subsidy and unit cost.

What is needed is 'a new public discourse on housing and a more complex and nuanced way of characterising the rational, appropriate and human responses to the broad range of housing needs in South Africa, which are not currently catered for by the market'.³³⁸ In the first instance, government needs to match practice with policies to genuinely unlock well-located housing in urban areas, and to do so in a participatory, consultative manner. Beyond this, given the failures of the focus on ownership, it is perhaps time to consider alternatives such as rent control and/or the provision of rooms with security of tenure. As proposed by Lone Poulsen, there is an urgent need for the government to provide access to low- or no-rental rooms in inner-city areas to satisfy the demand for well-located housing that is close to work opportunities.³³⁹ Such public housing projects would probably have to comprise communal living units with shared ablution and kitchen facilities, perhaps combining individual and shared family rooms, along the lines of

the housing arrangements provided to the residents in the *Olivia Road* litigation. However, as highlighted by Poulsen, this model requires careful design and constant on-site management, which has thus far been missing from any of the current projects.

At the same time, there is an urgent need for national government to monitor and regulate all housing-related processes, including to ascertain whether provinces and municipalities have EHPs and, if so, whether these comply with the corresponding laws. It should be noted that this paper's note of caution on the capacity of local government to take over housing-related functions appears to fly in the face of the National Planning Commission's recommendation that 'responsibility for housing should shift to the level at which planning is executed – the municipal level. Weak capacity in poorly resourced local authorities does not justify chaos. These problems must be fixed for effective urban development'.³⁴⁰ While we could not agree more that such problems need to be addressed, we do caution that municipal chaos is a very real impediment to housing development and suggest that the issue of municipal responsibility for the implementation of housing programmes requires further evaluation.

More generally, national government needs to ensure that the other spheres of government do not evict unlawfully, do required in situ upgrading of informal settlements, and that there is compliance with court orders, as well as quality-related criteria for public housing. In this regard, there is an urgent need to assess the efficacy of the current housing-related functional arrangements and, in particular, to evaluate the monitoring and regulatory functions of housing agencies and institutions.

Finally, in order to reverse apartheid's spatial segregation we agree wholeheartedly with the recommendations of the National Planning Commission that government must prioritise:

- upgrading informal settlements;
- increasing urban population density while improving the liveability of cities by providing parks and other open spaces, and ensuring safety;
- providing more reliable and affordable public transport with better coordination across municipalities and between different modes; and
- moving jobs and investment towards dense townships that are on the

margins of cities (and that the building of new settlements far from places of work should be discouraged through planning and zoning regulations).

On the basis of this paper's findings, we recommend further research, as follows:

- A comprehensive assessment and rethink of the private title bias of current housing policy, as informed by the needs of hopeful beneficiaries, as well as the realities and problems encountered in the RDP housing process to date.
- A thorough analysis of the current housing-related machinery with a view to rationalising the multiple agencies, institutions and arrangements and with a particular need to assess the viability of local government as the locus of housing delivery, as well as to evaluate the role of any monitoring and regulatory institutions, including provinces which are taking on this new role.
- Research into the options and possible consequences for recognition or voluntary relocation (to more advantageous sites) of backyard shacks.
- Research into alternative low-cost housing options in well-located city areas in light of rural-urban migration.
- An audit of all public housing-related tenders and allocations.

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<i>Blue Moonlight Properties v Occupiers of Saratoga Avenue</i>	2010 ZAGPJHC 3 (4 February 2010)
<i>City of Johannesburg v Blue Moonlight Properties</i>	2011 (4) SA 337 (SCA judgment)
<i>City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others</i>	2012 (6) SA 294 (SCA)
<i>City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another</i>	2012 (2) SA 104 (CC)

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CASE NAME	SALR
<i>City of Johannesburg v Rand Properties</i>	2007 (6) SA 417 (SCA) (SCA judgment)
<i>City of Johannesburg v Rand Properties</i>	2007 (1) SA 78 (W) (W judgment)
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<i>Hlophe and Others v City of Johannesburg Metropolitan Municipality and Others</i>	2013 (4) SA 212 (GSJ)
<i>Jafiha Schoeman; Van Rooyen v Stoltz</i>	2005 (2) SA 140 (CC)
<i>Maphango v Aengus Lifestyle Properties</i>	2012 (3) SA 531 (CC)
<i>Mchunu and Others v Executive Mayor, eThekweni Municipality and Others</i>	2013 (1) SA 555 (KZD)
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CASE NAME	SALR
<i>Pheko v Ekurhuleni Metropolitan Municipality</i>	2012 (2) SA 598 (CC)
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Notes

1. S Zikode and Z Nsibande 'Serving our life sentences in the shacks' (16 July 2010): www.abahlali.org/node/7187.
2. M Strauss and S Liebenberg 'Contested spaces: Housing rights and evictions law in post-apartheid South Africa' *Planning Theory* (2014) vol. 13 no. 4 428–448.
3. www.southafrica.info/about/social/govthousing.htm. It should be noted that there is disagreement about the total number of houses and housing units built and taken up, with differing figures provided by different government agencies. There are also discrepancies between the figures of subsidies provided to developers and the number of houses in which formal title has been transferred to the owner – this could be due to delays in conferring titles. See K Tissington, N Munshi, G Mirugi-Mukundi and E Durojaye "Jumping the Queue", Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa' (April 2013) Socio-Economic Rights Institute of South Africa (SERI) and Community Law Centre (CLC) Research Report 22–23: www.webcitation.org/6TXG9MrD2.
4. An RDP house is the name given to houses provided by the government – named after the African National Congress's first macro-economic policy,

- the Reconstruction and Development Programme, which promised houses for all. Although the RDP policies and practice regarding housing have been superseded by the Breaking New Ground policy, for the sake of consistency we use the term RDP houses throughout the paper (this is also how most beneficiaries refer to such houses).
5. *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (*Grootboom*).
 6. Centre for Social Science Research (CSSR) 'The Social Consequences of Establishing "Mixed" Neighbourhoods: Does the mechanism for selecting beneficiaries for low-income housing projects affect the quality of the ensuing "community" and the likelihood of violent conflict' (May 2010) CSSR Research Report, 36: www.cssr.uct.ac.za/publications/research-report/2010/social-consequences-establishing-mixed.
 7. H Jain 'Community protests in South Africa: Trends, analysis and explanations' (2010) Local Government Working Paper Series No. 1, Community Law Centre, University of the Western Cape, 29.
 8. Article 27(3) of the Convention on the Rights of the Child (CRC, 1989) obliges states parties to take appropriate measures to assist parents to ensure that children have adequate 'nutrition, clothing and housing'.
 9. Article 14(2)(h) of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW, 1979) provides that all states parties must take all the appropriate measures to eliminate discrimination against women in rural areas including to allow them 'to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply'.
 10. Article 5(e)(iii) of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD, 1965) requires states parties to eliminate racial discrimination in respect of the enjoyment of the right to housing.
 11. Article 9(1)(a) of the International Convention on the Rights of Persons with Disabilities (2007) compels states parties to ensure equal access by persons with disabilities to housing, and Article 28(1) reinforces the right of people living with disabilities to adequate housing, as well as states parties obligations to take appropriate steps to safeguard and promote the realisation of the right.

12. Article 43(1)(d) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) stresses that migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to 'access to housing, including social housing schemes, and protection against exploitation in respect of rents'.
13. United Nations CESCR General Comment 4 on the right to adequate housing (1991), para. 8: www.unhchr.ch/tbs/doc.nsf/o/469f4d91a9378221c12563edo053547e.
14. United Nations CESCR General Comment 7 on forced evictions (1997), para. 3: www.eschr-net.org/resources/general-comment-4.
15. United Nations CESCR General Comment 7 on forced evictions (1997), paras 10–21: www.eschr-net.org/resources/general-comment-7.
16. United Nations CESCR General Comment 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights (2005), paras 27 and 28: www2.ohchr.org/english/bodies/cescr/docs/CESCR-GC16-2005.pdf.
17. United Nations CESCR General Comment 19 on the right to social security (2008), para. 18: www.refworld.org/docid/47b17b5b39c.html.
18. United Nations CESCR General Comment 20 on non-discrimination in economic, social and cultural rights (2009), paras 8 and 25: tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en.
19. United Nations CESCR General Comment 3 on the nature of states parties obligations (1990): www.unhchr.ch/tbs/doc.nsf/o/94bdbaf59b43a424c12563edo052b664.
20. United Nations CESCR General Comment 4 on the right to adequate housing (1991), paras 13–18: www.unhchr.ch/tbs/doc.nsf/o/469f4d91a9378221c12563edo053547e.
21. United Nations CESCR General Comment 19 on the right to social security (2008), para. 59a: www.refworld.org/docid/47b17b5b39c.html.
22. In October 2012, the South African government publicly announced it was going to ratify the ICESCR. However, as of October 2013, when this paper was completed, such ratification had not yet occurred. Ratification was completed in January 2015, entering into force on 12 April 2015.
23. *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (*Makwanyane*), para. 35.

24. For the Constitutional Court's reasoning behind the apparent rejection of the minimum core obligations, see *Grootboom* paras 31–33; and *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA721 (CC) (*Treatment Action Campaign*), paras 26–29.
25. *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).
26. This section is an edited version of an in-depth overview of housing-related policy in K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide: www.webcitation.org/6TXG9MrD2.
27. The precise meaning of and interaction between the section 26(1) and section 26(2) provisions is as yet unclear. See also K McLean 'Housing' in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) (2nd ed. Original Service 2006) 55-9 – 55-12.
28. Other relevant constitutional rights are: section 9's equality clause, which requires that there be no unfair discrimination in the provision of services, section 10's right to human dignity, section 24's right to an environment that is not harmful to health or wellbeing and section 27(1)(b)'s right of access to sufficient water. Also relevant is section 33 on the right to just administrative action which, along with the Promotion of Administrative Justice Act 3 of 2000 (PAJA), creates the framework for procedural fairness (embracing the rights to reasonable notice of a decision and an opportunity to make representation regarding your circumstances before a decision affecting your rights is taken) in all administrative decisions including those related to the provision and allocation of subsidised and/or public housing. This means that public housing services must comply with administrative justice requirements, and if anyone's rights are adversely affected by an administrative action, such action can be brought under review.
29. Theunis Roux 'Background Report 2: Review of National Legislation Relevant to Informal Settlement Upgrading' Unpublished paper written for the National Department of Housing (2004) 1.
30. Kirsty McLean 'Housing' in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed (2006), 55-5.
31. Kirsty McLean 'Housing' in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed (2006), 55-5.

32. Kirsty McLean 'Housing' in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed (2006), 55-5.
33. For more on municipal accreditation, see below.
34. This does not appear to mean that owners of state-subsidised RDP or BNG houses cannot rent their properties if they so choose.
35. For example, Leon Louw of the Free Market Foundation was recently quoted as arguing to allow 'black people to sell their RDP houses the next day [after receiving them]' – in Louw's words, 'I don't see why, if the government wants to fund housing, it cannot trust people to be sensible' cited in O Molatlhwa 'Allow RDP owners to sell' *The Times* (12 September 2013): www.timeslive.co.za/thetimes/2013/09/12/allow-rdp-owners-to-sell.
36. NDoH 'Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements' (2004) section 2.4.
37. Housing Amendment Bill, 2006 Government Gazette Notice 1852 of 2006 (22 December 2006).
38. In 2013 the Minister for Rural Development and Land Reform published the Extension of Security of Tenure Amendment Bill, 2013. See www.ruraldevelopment.gov.za/legislation-and-policies/file/1957.
39. *Ndlovu v Ncgobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) (*Ndlovu*).
40. Centre for Applied Legal Studies (CALS) 'Comment on General Notice 1851 of 2006: Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill 2006' (20 February 2007) 10–11: abahlaliold.shackdwellers.org/files/PIE%20ACT%20AMENDMENTS%20SUBMISSION.pdf
41. If an eviction application is brought in the High Court, a notice of motion as per Rule 6 of the Uniform Rules of Court should be served in addition to notice served in terms of section 4(2) of PIE. A consolidated notice may be served when an eviction application is brought in the Magistrate's Court. For a step-by-step guide to the eviction process see Social Housing Foundation (SHF) & Urban LandMark 'Eviction Process Mapping Guide: A Manual for Rental Housing Managers & Tenants' (June 2010): www.shra.org.za/images/stories/2011/pdfs/Eviction_Guide.pdf.
42. Rental Housing Amendment Bill 2013: [http://www.parliament.gov.za/content/b 56 - 2013 \(rental housing\).pdf](http://www.parliament.gov.za/content/b%2056%20-%202013%20(rental%20housing).pdf).
43. DHS 'Technical and General Guidelines' Part A of Part 3 Vol. 2 of the National Housing Code (2009) 21. A ready board is a pre-manufactured elec-

- tricity distribution unit used in most township electrification projects. It is often installed together with a prepayment electricity meter (although these are not the same thing).
44. See DHS 'Unification of standards for construction, house sizes, electrification and energy efficient standards' Presentation to the Select Committee on Public Services (11 June 2013): www.pmg.org.za/report/20130611-new-housing-norms-and-standards-provincial-and-local-response-department-human-settlements-briefing.
 45. Louis van der Walt, DHS (21 January 2014).
 46. This section is an edited version of an in-depth overview of housing-related policy in K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide: www.webcitation.org/6TXG9MrD2.
 47. See K McLean 'Housing' in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) (2nd ed Original Service 2006) 55-9 – 55-12.
 48. S Charlton and C Kihato 'Reaching for the Poor? An Analysis of the Influences of the Evolution of South Africa's Housing Programme' in U Pillay, R Tomlinson and J Du Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006): 256.
 49. A useful summary of the national housing policy and subsidy programmes included in the revised Code is archived at www.webcitation.org/6TXFOqz18.
 50. These are highly detailed and complex. For further details, see K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide: www.seri-sa.org/images/stories/SERI_Housing_Resource_Guide_Feb11.pdf.
 51. The NHFC was established by the government to mobilise finance for housing from sources outside the state in partnership with the broadest range of organisations.
 52. Nurcha's mandate is to facilitate the flow of finance from financial institutions into low-income housing development. To this end, it issues guarantees for both bridging finance and end user finance loans, as well as administering the saving programme for housing.
 53. The RHLF focuses on its core business of providing loans, through interme-

- diaries, to low-income households for incremental housing purposes, i.e. as a people-driven process. Its mandate is to empower low-income families in rural areas to access credit that enables them to mobilise self-help and savings schemes to build and improve their shelter incrementally.
54. For more on the HDA, see: www.thehda.co.za
 55. This section was written by Michael Clark.
 56. The Minister of Housing published the National Minimum Norms and Standards in 1999. These Norms and Standards were later revised, with the revised norms and standards taking effect from 1 April 2007. See DHS 'Technical and General Guidelines' Part A of Part 3 Vol. 2 of the National Housing Code (2009).
 57. DHS 'Outcome 8 Delivery Agreement: Sustainable Human Settlements and an Improved Quality of Household Life' (2009) (Delivery Agreement). The Delivery Agreement aims to synchronise a more holistic development of different forms of human settlements and the housing market. The outputs in terms of the agreement are to upgrade 400 000 households in well-located informal settlements, to improve access to basic services, to facilitate the provision of 600 000 accommodation units within the so-called gap market (individuals earning between R3500 and R12800), and to ensure that the identification and development of well-located public land for low-income and affordable housing is prioritised.
 58. See specifically sections 9 and 10 of the Housing Act.
 59. An IDP is a single inclusive strategic plan for the development of a municipality that links, integrates and co-ordinates plans for the development of a municipality. See DHS 'Housing Chapters of Integrated Development Plans' Part 3 Vol. 3 of the National Housing Code (2009).
 60. Section 9(2) of the Housing Act.
 61. See section 10 of the Housing Act and DHS 'Accreditation of Municipalities' Part 3 Vol. 3 of the National Housing Code (2009) 9.
 62. DHS 'Outcome 8: Human Settlements Agreement: Progress Report' (5 November 2013), a presentation before the National Council of Provinces (NCOP) Select Committee on Public Services: www.webcitation.org/6TXFc-sII8.
 63. Information provided by DHS on municipal accreditation as per email to Kate Tissington, 4 February 2013. See also DHS 'Annual Report 2010/2011'

- (2011), 23: www.dhs.gov.za/uploads/DHS_Annual_Report_2010-2011_A.pdf.
64. DHS 'Outcome 8: Human Settlements Agreement: Progress Report' (5 November 2013), a presentation before the National Council of Provinces (NCOP) Select Committee on Public Services: www.pmg.org.za/report/20131105-outcome-8-human-settlements-progress-report-department-human-settlements.
 65. K Tissington, et al "Jumping the Queue", Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa' (April 2013) Socio-Economic Rights Institute of South Africa (SERI) Research Report, 78: www.webcitation.org/6TXG9MrD2.
 66. K Tissington 'A Resource Guide to Housing in South Africa, 1994-2010' (February 2011) SERI resource guide 11: www.webcitation.org/6TXG9MrD2 (accessed on 26 November 2013), citing NDoH 'Annual Report 2006-2007' (2007) 22.
 67. National Treasury and DHS 'Human Settlements Development Grant: First Quarter 2013 Spending' (13 September 2013), a presentation before the National Council of Provinces (NCOP) Select Committee on Appropriations: www.pmg.org.za/report/20130910-human-settlements-development-grant-1st-quarter-2013-spending-national-treasury-department-human-settlements.
 68. For more information on the funding mechanisms related to the provision of water and sanitation, see the FHR position papers on water and sanitation by J Dugard.
 69. There are many other national housing programmes, including the Individual Subsidy programme (ISP), the Enhanced Extended Discount Benefit Scheme (EEDBS), the Provision of Social and Economic Facilities Programme, the Operational Capital Budget Programme (OPS/CAP), the Rectification of Pre-1994 Residential Properties Programme, the Enhanced People's Housing Process (ePHP), the Community Residential Units Programme (CRU) and the Consolidated Subsidy Programme. See the National Housing Code. For further details, see K Tissington 'A Resource Guide to Housing in South Africa, 1994-2010' (February 2011) SERI resource guide 74-104: www.webcitation.org/6TXG9MrD2.
 70. See, generally, DHS 'Integrated Residential Development Programme' Part 3 Vol. 4 of the National Housing Code (2009).

71. DHS 'Integrated Residential Development Programme' Part 3 Vol. 4 of the National Housing Code (2009) 9.
72. In addition to these requirements, special provision is made for the elderly, disabled, military veterans and beneficiaries in terms of the Land Restitution Programme. See K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide 22–23: www.webcitation.org/6TXG9MrD2.
73. In 2004, to give expression to the *Grootboom* judgment, the state introduced the Housing Assistance in Emergency Housing Circumstances in the previous Housing Code. The Emergency Housing Programme is the revised version of this programme. See DHS 'Emergency Housing Programme' Part 3 Vol. 4 of the National Housing Code (2009) 9.
74. See K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide 94: www.webcitation.org/6TXG9MrD2.
75. See K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide 94: www.webcitation.org/6TXG9MrD2.
76. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) (*Blue Moonlight*).
77. *Blue Moonlight* paras 48–49.
78. *Blue Moonlight* para. 50.
79. *Blue Moonlight* para. 46.
80. *Blue Moonlight* para. 54.
81. *Blue Moonlight* para. 63.
82. *Blue Moonlight* para. 57.
83. *Blue Moonlight* para. 57.
84. In 2004, the UISP was contained in Chapter 13 of the National Housing Code. This programme has, however, been revised in the 2009 Code. See DHS 'Upgrading of Informal Settlements Programme' Part 3 Vol. 4 of the National Housing Code (2009).
85. K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide 86: www.webcitation.org/6TXG9MrD2.
86. K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide 85–92: www.webcitation.org/6TXG9MrD2 (accessed on 26 November 2013); M Huchzermeyer *Cities With 'Slums': From Slum Eradication to a Right to the City in Africa* (2011) 170–171.

87. DHS 'Social Housing Policy' Part 3 Vol. 6 of the National Housing Code (2009).
88. This section is written by Michael Clark and Stuart Wilson. We have written quite a lot for the jurisprudence section – this is because there have been many more housing rights cases than any other socio-economic right and, since some of the cases are fairly recent, they have not previously been as comprehensively reviewed as they are here.
89. *Grootboom* para. 34.
90. *Grootboom* paras 35–39.
91. It should be noted that, especially in respect of the right of access to adequate housing, there are not clear lines between negative and positive obligations. This is so because, as clarified by the courts, when an eviction would lead to homelessness, the state is required to provide alternative accommodation. For this reason, many of the positive obligations entailed in the right to housing have emerged from cases concerning evictions.
92. *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom*).
93. M Langford, R Stacey and D Chirwa 'Water' in S Woolman, et al (eds) *Constitutional Law of South Africa Vol. 4 2nd edition, revision service 5* (2013) 56B-i to 56B-79; 56B-i, 56B-24, 56B-25. Although Langford writes in the context of the right to water, the Constitutional Court has adopted the same approach in relation to all socio-economic rights. The principles are thus equally relevant. In the context of housing see, for example, S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 131–227; K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 172–180.
94. *City of Johannesburg and Others v Mazibuko and Others* 2010 (4) SA 1 (CC) (*Mazibuko*), para. 50.
95. See, for example, D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007).
96. *Grootboom* paras 29–33; D Bilchitz 'What is reasonable to the court is unfair to the poor' (16 March 2010) *Business Day*: www.bdlive.co.za/articles/2010/03/16/david-bilchitz-what-is-reasonable-to-the-court-is-unfair-to-the-poor.
97. D Bilchitz 'What is reasonable to the court is unfair to the poor' (16 March 2010) *Business Day*: www.bdlive.co.za/articles/2010/03/16/david-bilchitz-

what-is-reasonable-to-the-court-is-unfair-to-the-poor.

98. *Grootboom* para. 41.
99. *Grootboom* para. 41.
100. *Mazibuko* para. 9. As Bilchitz states: 'The emphasis is placed on whether ... government can provide an adequate justification for their policies and action in a particular area' (D Bilchitz 'What is reasonable to a court is unfair to the poor' (16 March 2010) *Business Day*: www.bdlive.co.za/articles/2010/03/16/david-bilchitz-what-is-reasonable-to-the-court-is-unfair-to-the-poor).
101. *Grootboom* paras 39, 42, 43, 44, 45, and 99; S Wilson 'Breaking the Tie: Evictions from Private Land, Homelessness and the New Normality' (2009) 126(2) *South African Law Journal* 270, 270–290.
102. *Grootboom* para. 82.
103. *Grootboom* para. 99.
104. *Grootboom* para. 45. See also K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide 27–28: www.webcitation.org/6TXG9MrD2.
105. *Grootboom* para. 34.
106. *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* 2004 (3) All SA 169 (SCA) (*Modderklip* SCA judgment).
107. See also *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) (*Modderklip* CC judgment).
108. *Modderklip* SCA judgment para. 21.
109. *Modderklip* SCA judgment para. 22.
110. *Modderklip* SCA judgment para. 22, referencing *Grootboom* para. 63.
111. *Modderklip* SCA judgment para. 26.
112. *Modderklip* SCA judgment para. 26.
113. *Modderklip* SCA judgment para. 28.
114. *Modderklip* SCA judgment para. 41.
115. *Modderklip* SCA judgment para. 43 and 44. The Court left open the question of the monetary value of such constitutional damages, but did state that damages would be based on either the value of the land and/or the length of occupation.
116. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA (CC) (*PE Municipality*).

117. *PE Municipality* para. 12.
118. *PE Municipality* para. 41.
119. *PE Municipality* para. 23. See also S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 274.
120. *PE Municipality* para. 17.
121. *PE Municipality* para. 28.
122. *PE Municipality* para. 29.
123. *PE Municipality* para. 61.
124. *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) 208 (CC) (*Olivia Road*).
125. *City of Johannesburg v Rand Properties* 2007 (1) SA 78 (W) (*Rand Properties W judgment*).
126. *City of Johannesburg v Rand Properties* 2007 (6) SA 417 (SCA) (*Rand Properties SCA judgment*).
127. *Rand Properties SCA judgment* para. 78.
128. *Olivia Road* para. 9ff.
129. *Olivia Road* para. 30.
130. *Olivia Road* para. 13.
131. *Olivia Road* paras 14, 18 and 21.
132. *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) (*Joe Slovo*).
133. The N2 Gateway housing project is one of the flagship pilot projects commissioned in terms of the Breaking New Ground plan.
134. *Joe Slovo* para. 4. Yacoob J found that the occupiers did not have consent to occupy the land at all, while Moseneke DCJ, Ngcobo J, O'Regan J and Sachs all held, for various reasons, that the occupiers initially had consent to occupy but that such consent was conditional and subsequently revoked.
135. *Joe Slovo* paras 5, 115 and 229.
136. *Joe Slovo* para. 115.
137. *Joe Slovo* para. 253.
138. See, for example, K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 152–159; K McLean 'Meaningful engagement: One step forward or two back? Some thoughts on Joe Slovo' (2010) 3 *Constitutional Court Review* 223, 223–242; L Chenwi 'Legislative and Judicial Responses to Informal Settlements in South Africa: A Silver Bullet?' (2012)

- 23(3) *Stellenbosch Law Review* 540, 540–563; and K Tissington ‘A Resource Guide to Housing in South Africa, 1994–2010’ (February 2011) SERI resource guide 48–52: www.webcitation.org/6TXG9MrD2.
139. *Joe Slovo* paras 5 and 7.
 140. *Joe Slovo* para. 7.
 141. *Joe Slovo* para. 7.
 142. *Joe Slovo* paras 5 and 7.
 143. *Abahlali baseMjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others* 2010 (2) BCLR 99 (CC) (*Abahlali*).
 144. *Abahlali* paras 113–115.
 145. *Abahlali* paras 69 and 120.
 146. *Abahlali* paras 114 and 126.
 147. *Abahlali* paras 102, 113, 114, 115 and 118.
 148. *Blue Moonlight*.
 149. The *rei vindicatio* is a common law remedy available to an owner to reclaim his or her property wherever it is found and from whomever is unlawfully holding it.
 150. *Blue Moonlight Properties v Occupiers of Saratoga Avenue* 2010 ZAGPJHC 3 (4 February 2010).
 151. *City of Johannesburg v Blue Moonlight Properties* 2011 (4) SA 337 (SCA judgment).
 152. *Blue Moonlight* para. 102.
 153. *Blue Moonlight* paras 37 and 40.
 154. *Blue Moonlight* para. 40.
 155. *Blue Moonlight* para. 74.
 156. *Blue Moonlight* paras 47 and 57.
 157. *Blue Moonlight* para. 95.
 158. *Occupiers of Skurweplaas v PPC Aggregate Quarries* 2012 (4) BCLR 382 (CC) (*Skurweplaas*).
 159. *Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread* 2012 (2) SA 337 (CC) (*Mooiplaats*).
 160. *Mooiplaats* para. 4; *Skurweplaas* para. 3.
 161. *Mooiplaats* para. 16; *Skurweplaas* para. 14.
 162. *Skurweplaas* para. 13.
 163. *Mooiplaats* para. 18; *Skurweplaas* para. 12.

164. *Mooiplaats* para. 13.
165. *Pheko v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) (*Pheko*).
166. *Pheko* para. 15.
167. *Pheko* para. 21.
168. *Pheko* para. 21.
169. *Pheko* para. 35.
170. *Pheko* para. 35.
171. *Pheko* para. 37.
172. *Pheko* para. 38–40.
173. *Pheko* para. 42.
174. *Pheko* para. 42.
175. *Pheko* para. 43.
176. *Pheko* para. 43.
177. *Pheko* paras 44 and 45.
178. *Pheko* para. 53.
179. *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) (*Schubart Park*).
180. *Schubart Park* para. 18.
181. The City had failed to act in terms of the National Building Regulations and Building Standards Act 103 of 1977, the DMA or PIE. The City later half-heartedly attempted to justify the removal of the occupiers in terms of the legal framework even though it was clear from the circumstances that the removal had not been executed lawfully in terms of any legislation. The Court found that the City's attempt at justifying its actions in this manner seemed to give credence to the residents' argument that the City had 'used the crisis as an excuse to evict the residents without complying with the law' (*Schubart Park* para. 39).
182. *Schubart Park* para. 30.
183. *Schubart Park* paras 36–37.
184. *Schubart Park* para. 38.
185. *Schubart Park* para. 50.
186. *Schubart Park* para. 50, quoting *PE Municipality* paras 45 and 46.
187. *Schubart Park* para. 51.
188. *Motswagae v Rustenburg Local Municipality (Rustenburg)* 2013 (2) SA 613 (CC) (*Motswagae*).

189. *Motswagae* para. 8.
190. *Motswagae* para. 5.
191. *Motswagae* para. 12.
192. *Motswagae* para. 12.
193. *Motswagae* para. 12.
194. *Motswagae* para. 12.
195. *Motswagae* paras 13–17.
196. *Motswagae* para. 13.
197. *Motswagae* para. 16.
198. *Motswagae* paras 16–17.
199. See *Absa Bank v Ntsane* 2007 (3) SA 554 (T), where a bond was called upon and sought to be executed upon for arrears of R18.46.
200. *Jaftha Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) (*Jaftha*).
201. *Jaftha* para. 4.
202. *Jaftha* para. 13.
203. *Jaftha* paras 25 and 29.
204. *Gundwana* para. 18.
205. *Standard Bank v Saunderson* 2006 (2) SA 264 (SCA).
206. *Gundwana*.
207. See Founding Affidavit of Elsie Gundwana, application for leave to appeal, on file with the Constitutional Court Registrar (*Gundwana*).
208. *Gundwana* para. 1.
209. *Gundwana* para. 44.
210. *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC).
211. See *PE Municipality* paras 39–47. See also K Tissington ‘A Resource Guide to Housing in South Africa, 1994–2010’ (February 2011) SERI resource guide 46: www.webcitation.org/6TXG9MrD2.
212. Some have argued that meaningful engagement should be distinguished from mediation, which is a more formal process, where a third party is appointed to help settle a dispute. See J van Wyk ‘The Role of Local Government in Evictions’ (2011) 14(3) *Potchefstroom Electronic Law Journal* 50, 65. However, at the core of these divergent processes lies the need to negotiate and engage. As a result, these processes may be grouped together here.
213. *PE Municipality* para. 39.

214. *PE Municipality* para. 39.
215. *PE Municipality* para. 39.
216. *PE Municipality* para. 41.
217. *PE Municipality* para. 43. The Court provided that this principle may only be departed from in 'special circumstances'.
218. *Olivia Road* paras. 17–18.
219. *Olivia Road* para. 17.
220. *Olivia Road* para. 18.
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The right to sanitation in South Africa

JACKIE DUGARD

Sanitation is more important than [political] independence.

— MAHATMA GANDHI (1925)

Introduction

In early June 2013, the residents of Khayelitsha informal settlement in Cape Town made the news when, as part of a sustained protest against inadequate sanitation in the informal settlement which had included two men dumping human waste on the steps of the Western Cape legislature, community members threw faeces at the bus that was carrying Western Cape premier, Helen Zille. Responding to these actions, a community member was quoted in the media as saying that this was ‘a warning’ of things to come, and ‘we will return with thousands of these bucket toilets next week and empty them around the legislature building’ – ‘we are ready to be arrested and will die for this.’¹

This event, as analysed in an opinion piece entitled ‘The Politics of Shit and Why it Should Be Part of public protest’,² highlights the anguish and anger of people without decent sanitation and underscores the mundane reality that improving access to sanitation is not always as priori-

tised as it should be. Indeed, despite the critical importance of sanitation to poverty alleviation, health care and human development (not to mention dignity) internationally, sanitation has traditionally been viewed as a lesser developmental priority and is somewhat the ugly step-sister to other rights or services. This is not only because in many places sanitation is a taboo subject, but also because there are difficulties with defining what sanitation is and who bears the responsibility for providing it (the state, individuals or communities).

Although perhaps not quite as much of a taboo as in other countries, in South Africa, too, sanitation has been relatively neglected in comparison with other rights and services. Thus, despite a raft of legislative and policy frameworks for basic sanitation services, including legislated basic standards for sanitation and a free basic sanitation policy, while approximately 95 per cent of households have basic access to water, almost twenty years after the advent of democracy, approximately 21 per cent of households still have inadequate access to basic sanitation.³

One of the reasons for the backlog is the apartheid legacy: in 1994, 52 per cent of households did not have access to adequate sanitation.⁴ Another reason is that, in its subsequent attempts to tackle this legacy, the post-apartheid government has seemingly struggled to decide on which forms of sanitation services should be adopted, especially for publicly-provided basic sanitation (usually communal toilets).⁵ It has only been in the past few years that the government has signalled a shift away from waterborne sanitation, indicating that waterborne sanitation will be pursued only in urban areas. This shift resulted, in May 2009, in sanitation services being moved from the Department of Water Affairs (DWA) to the Department of Human Settlements (DHS) (itself previously called the Department of Housing). However, as set out in this paper, this move has not been successful and has resulted in substantial fragmentation of the sanitation approach in South Africa. In addition, there is still a significant lack of clarity on what kind of sanitation services, if any, should be provided for the approximately four million people who live in informal settlements around the country,⁶ and it is also unclear the extent to which the government will subsidise rural on-site systems. In a context where little has changed in terms of residential geography, the fact

that the kind and level of sanitation services are wholly dependent on the kind of housing settlement means that, on the whole, poor people cannot expect much more than to achieve the basic regulated standards of sanitation (and water) services, effectively providing a structural constraint on any progressive realisation of access to sanitation services especially for people living in informal settlements.

Moreover, the implementation of sanitation-related laws and policies is patchy and, for the most part, left up to individual municipalities without national enforcement or regulation. Thus, despite making commendable inroads into eradicating the sanitation backlog, in 2010 the government acknowledged in its Millennium Development Goal Country Report that its erstwhile target of eliminating the full sanitation backlog by 2014 was ‘too ambitious’.⁷

Inadequate sanitation, heightened by a growing impatience on the part of poor communities in the face of rising socio-economic inequality, has in recent years given rise to discrete litigation and escalating community protest, including the throwing of shit at politicians as occurred in Cape Town in June 2013. But, even prior to this, it was clear that in the most recent local government elections, in May 2011, sanitation was one of the key issues and a pivotal electioneering point used by both major political parties against each other. This is largely because of the pre-elections coverage in the media of two ‘open toilet’ scandals – one in Khayelitsha in Cape Town, which gave rise to the *Beja* litigation described below, and one in Moqhaka Local Municipality in the Free State province – both relating to the roll-out in poor communities by the respective local governments of communal toilets without any walls, doors or any form of screens.

This paper examines the situation pertaining to basic sanitation services in South Africa, first reviewing the legal, policy and functional frameworks, before undertaking a rights-based fault-line analysis of the systemic problems.

Framework section

International and regional law

The main international convention governing socio-economic rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) does not contain an explicit reference to the right to sanitation. Historically, it has been most closely linked to the right to water but, until recently, the right to water itself was a tenuous right, linked to the right to an adequate standard of living in Article 11(1) of the ICESCR. However, the right to sanitation has always been explicitly recognised in relation to membership of a vulnerable identity group including children,⁸ rural women⁹ and prisoners of war.¹⁰

In 2010, the absence of an explicit self-standing right to sanitation was remedied when – guided by the United Nations Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation (this mandate was created in September 2008 and in March 2011 the mandate was reconstituted as the Special Rapporteur on the human right to safe drinking water and sanitation)¹¹ – on 28 July 2010, the United Nations General Assembly adopted a resolution recognising ‘the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human beings’.¹² Celebrating the move, Amnesty International notes that the resolution:

Effectively re-affirms that the rights to water and sanitation are implicitly contained in several human rights treaties, including the International Covenant on Economic, Social and Cultural Rights ... to which 160 States are party, and the UN Convention on the Rights of the Child ..., which has reached nearly universal ratification, and are therefore legally binding rights.

Further consolidating this move, on 15 September 2010, the United Nations Human Rights Council adopted a resolution affirming that the right to water and sanitation are part of international human rights law and are therefore legally binding.¹³ Yet some degree of confusion persists as to whether this right is a single right to water and sanitation or

whether it is two rights (one to water and a self-standing separate right to sanitation).¹⁴ Weighing into this debate on the side of there being two rights rather than one right,¹⁵ the Statement on the Human Right to Sanitation of the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR, the body that interprets the ICESCR and clarifies related obligations) at the time of the UN Human Rights Council resolution declared:

The Committee reaffirms that, since sanitation is fundamental for human survival and for leading a life in dignity, the right to sanitation is an essential component of the right to an adequate standard of living, enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights. The right to sanitation is also integrally related, among other Covenant rights, to the right to health, ... the right to housing, ... as well as the right to water, which the Committee recognized in its General Comment No. 15. It is significant, however, that sanitation has distinct features which warrant its separate treatment from water in some respects. Although much of the world relies on waterborne sanitation, increasingly sanitation solutions which do not use water are being promoted and encouraged.¹⁶

Fuelling debates about the nature of the right to sanitation is the issue of whether sanitation is a collective or individual right. As pointed out by Malcolm Langford et al, although 'international human rights treaty law is largely structured in individual terms and each right is usually premised on a direct connection with human dignity', tilting the scale in terms of sanitation also being regarded as a collective right are three public aspects with implied obligations on the state: first the need to provide collective education in respect of sanitation and hygiene; second the environmental component, particularly the role of the state regarding developing systems to deal with collective waste of human excreta; and third the public health care/developmental link by virtue that 'human excreta is the leading cause of water pollution and a major cause of preventable illnesses that lead to death'.¹⁷ As highlighted by Langford et al,

it is not entirely clear internationally whether this implies that we are all 'primarily concerned not with a personal right to sanitation but rather a right for *all* people to have sanitation, in order that *everyone* will be protected.'¹⁸ One way of reconciling the individual and collective components of the right to sanitation is to 'downplay the theoretical difficulties of recognising a human right with inherent individual and collective characteristics and acknowledge that a right with individual and collective dimensions is acceptable', as with other rights such as the right to form trade unions.¹⁹ Arguably, this fluid approach has been pursued both at the international level through the recognition of the right to sanitation, and also in South Africa, where (as outlined below), section 2 of the Water Services Act frames the right as the right to basic sanitation necessary to secure an environment not harmful to human health or well being.

Regarding the content of the right (however ambiguously framed), the CESCR has yet to develop a General Comment on the right to sanitation, meaning that the parameters of the right remain decidedly fuzzy.²⁰ However, the CESCR did recognise in General Comment 4 on the right to adequate housing that 'beneficiaries of the right to adequate housing should have sustainable access to ... sanitation and washing facilities ...',²¹ and in General Comment 15 on the right to water, the CESCR expressly included sanitation in the scope of the right to water and stressed that:

Ensuring that everyone has access to adequate sanitation is not only fundamental for human dignity and privacy, but is one of the principal mechanisms for protecting the quality of the drinking water supplies and resources. In accordance with the rights to health and adequate housing States parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children.²²

Further, General Comment 19 of the CESCR on the right to social security stipulates that child benefits should be sufficient to provide for sanitation, among other rights.²³ Finally, the recent General Comment 20 of

the CESCR on non-discrimination in economic, social and cultural rights emphasises the importance of ensuring access to sanitation to all groups, noting that 'ensuring that all individuals have equal access to housing, water and sanitation will help overcome discrimination against women and girl children and persons living in informal settlements and rural areas'.²⁴

As with all international socio-economic rights, the international right to sanitation entails an obligation to immediately satisfy essential levels of the right (minimum core content), as well as a parallel and ongoing obligation to use the maximum available resources to achieving progressively the full realisation of the right.²⁵ However, with no General Comment on sanitation, it is unclear what the minimum core content of the international right to sanitation is.

South Africa has not [yet, in 2014] ratified the ICESCR. However, as a signatory, it is bound to not undermine its provisions.²⁶ Moreover, in its 1995 judgment on the death penalty, the South African Constitutional Court clarified that, in the context of interpreting the South African Bill of Rights, section 39(1) of the South African Constitution Act 108 of 1996 (Constitution) requires the courts to consider non-binding as well as binding international law.²⁷ Nonetheless, given the non-ratification of the ICESCR, the South African Constitutional Court has taken the view that the South African Government is not obliged to pursue a minimum core content approach to socio-economic rights but rather that it must have a reasonable programme to progressively realise each right within available resources.²⁸ It should be noted, in light of the government's (as yet not acted on) announcement in October 2012 that it would ratify the ICESCR, that if the ICESCR is ratified, South Africa will be bound to pursue the minimum core approach to socio-economic rights.

South Africa has ratified the African Charter on Human and People's Rights (ACHPR, 1981). While this Charter contains no explicit right to sanitation (or water), Article 16 on the right to enjoy the best attainable state of health could be seen to encapsulate a right to sanitation. Notwithstanding the persuasiveness of, and any international law obligations related to, international and regional human rights instruments, in South Africa the enforcement of the right to sanitation (as with all socio-

economic rights) occurs largely within domestic legal and policy frameworks.

South African law

In recognition of the apartheid legacy of inadequate access to sanitation, post-apartheid legal (and policy) documents have sought to create a framework for the equitable provision of basic sanitation. These frameworks adopt a human rights approach to access to sanitation, establishing various state obligations in respect of the provision of basic sanitation to poor communities.

Although there is no explicit right to sanitation in the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution), it can be inferred from the right of access to housing in section 26 and the right to a healthy environment in section 24 of the Constitution. In relation to waterborne sanitation, the right of access to sufficient water is guaranteed in section 27(1)(b) of the Constitution. Other relevant constitutional rights are: section 10's right to human dignity, section 14's right to privacy, section 12(1)(e)'s right to freedom and security of the person, and section 9's equality clause, which requires that there be no unfair discrimination in the provision of services. Finally, Part B of Schedule 4 of the Constitution mandates local government as responsible for sanitation services, defined as 'domestic waste-water and sewage disposal', and section 153(a) of the Constitution provides that local government must 'structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community and to promote the social and economic development of the community'.

Beyond the Constitution, the Water Services Act 108 of 1997 (Water Services Act) is the primary national law relating to water and sanitation services. The linking of sanitation services to water is a hangover from when sanitation was located in DWAF and the Water Services Act, along with the National Water Act 36 of 1998 (which deals with the management and protection of water resources), is currently under review.²⁹

One of the main objects of the Water Services Act, as set out in section 2(a), is to provide for 'the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and

an environment not harmful to human health or well-being'. The Act defines basic sanitation as: 'the prescribed minimum standards of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste water and sewage from households, including informal households'. It acknowledges that, although municipalities have the responsibility to administer sanitation services, all spheres of government have a duty towards the goal of ensuring universal access to basic sanitation services. Section 3(2) of the Water Services Act establishes that 'every water services institution must take reasonable measures to realise these rights'. Section 5 of the Water Services Act stipulates that if the water services provider is unable to meet the requirements of all its existing consumers, 'it must give preference to the provision of basic water supply and basic sanitation'.

To further concretise the definition of basic sanitation, on 8 June 2011 the Regulations Relating to Compulsory National Standards and Measures to Conserve Water (Compulsory National Standards) were published in terms of section 9 of the Water Services Act. Regulation 2 provides that the minimum standard for basic sanitation is:

- a) The provision of appropriate education; and
- b) A toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against the weather, well-ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests.

And, on 11 June 2011, the Norms and Standards in Respect of Tariffs for Water Services (Norms and Standards) were published in terms of section 10(1) of the Water Services Act. The Norms and Standards require water services institutions to differentiate between sanitation services to households and discharge of industrial effluent to a sewage treatment plant (section 4(1)); and to consider the right of access to basic sanitation when determining which water services tariffs are to be subsidised (section 3(2)).

The Local Government: Municipal Systems Act 32 of 2000 (Municipal

Systems Act) governs the provision of water services at the local government level and reinforces the emphasis on equitable access to water-related services. Section 4(2)(f) stipulates that municipalities must 'give members of the local community equitable access to the municipal services to which they are entitled'. Section 73 states inter alia that a municipality must ensure that 'all members of the local community have access to at least the minimum level of basic municipal services'.³⁰ In relation to tariffs, section 74(2)(c) establishes that 'poor households must have access to at least basic services' through 'special' or 'lifeline' tariffs for 'low levels of use or consumption of services or for basic levels of service' and/or any other direct or indirect method of subsidisation of tariffs for poor households'. In the *Joseph* case, the Constitutional Court used section 73 of the Constitution's right to basic services to found a claim for a right to basic electricity services, despite electricity not being an explicitly recognised right,³¹ suggesting that a right to basic sanitation services might also be implied in section 73 of the Municipal Systems Act.

The protection of the right of access to sanitation is strengthened by section 33 of the Constitution, which provides for just administrative action that is lawful, reasonable and procedurally fair. The Promotion of Administrative Justice Act 3 of 2000 (PAJA), which was promulgated to give effect to section 33 of the Constitution, further strengthens the right. These administrative protections are important because water services (including waterborne sanitation), whether publicly or privately undertaken, are public services, falling within the definition of administrative action. This means that water services must comply with administrative justice requirements, and if anyone's rights are adversely affected by an administrative action, such action can be brought under review.

There is one further piece of relevant legislation – especially given the institutional move at the national level of sanitation away from DWAF to DHS, as well as the thorny issue of sanitation services in informal settlements – the Housing Act 107 of 1997. The Housing Act inter alia lays the basis for financing national housing projects to low-income groups, which includes the roll-out of sanitation infrastructure through the National Housing Subsidy Scheme. This scheme provides subsidies to developers to build low-income housing, which must meet minimum

standards regarding sanitation, for which the minimum level is in turn a ventilated improved pit latrine (VIP) or alternative system agreed to between the community, municipality and provincial government. Regarding informal settlements, the in situ upgrading of informal settlements is provided for in the Upgrading of Informal Settlements Programme (UISP), instituted in terms of section 3(4)(g) of the Housing Act and is contained in Part 3 Volume 4 of the National Housing Code.³²

According to the UISP, where interim municipal engineering services are to be provided, they should 'as far as possible be undertaken on the basis that such interim services constitute the first phase of permanent services'.³³ Finally, the Emergency Housing Programme (EHP), which is also located in Part 3 Volume 4 of the National Housing Code, establishes a framework for assistance for people who find themselves in emergency housing situations because of floods, landslides, evictions etc. It extends financial assistance, in the form of rapid grants, to municipalities to enable them to provide shelter and basic services (including sanitation) to households on a temporary basis. In respect of emergency basic sanitation, the EHP stipulates that, where possible, VIP toilets must be provided on the basis of one VIP per five families.³⁴ Such legal frameworks are supported by a range of sanitation-related policies.

South African policy³⁵

In November 1994, the newly created Department of Water Affairs and Forestry (DWA), which was subsequently re-named DWA, formulated a White Paper on Water Supply and Sanitation Policy, which set out the institutional framework for water and sanitation services, later legislated in the Water Services Act. The 1994 White Paper was supplemented in October 1996 by a National Sanitation Policy, which defined sanitation as 'the principles and practices relating to the collection, removal or disposal of human excreta, refuse and waste water, as they impact upon users, operators and the environment'.³⁶ It also listed as inadequate methods of sanitation such as traditional unimproved pits and bucket toilets, and commented that chemical toilets are inappropriate except in emergency situations due to the high running costs involved.³⁷

In September 2001, DWA published a White Paper on Basic House-

hold Sanitation, which focused on the provision of basic sanitation to communities in low- density rural areas and in informal settlements, which it identified as the areas with the greatest need;³⁸ and it established a National Sanitation Programme Unit within DWAF to co-ordinate government's efforts to advance access to basic sanitation. In August 2005, DWAF published a National Sanitation Strategy, which emphasised that 'informal settlements must not be treated as emergency situations for the purpose of this strategy but should be provided with viable and sustainable solutions. Solutions such as communal facilities and chemical toilets should not be used where the system is expected to have a duration of more than one month'.³⁹ In March 2011, the National Sanitation Programme Unit (now located in the DHS) published a draft conceptual framework for a new national sanitation policy, which proposed to revise the 2001 White Paper on Basic Household Sanitation. In this document, the Unit acknowledged implementation failures and proposed that 'municipalities need considerably more guidance and government needs a sanitation policy framework which allows for more effective regulation of the national interest'.⁴⁰ At the time of writing, this draft conceptual framework had not been finalised.

Finally, in March 2009, DWA published a Free Basic Sanitation Implementation Strategy (FBSan). This policy acknowledges that there is 'a right of access to a basic level of sanitation service', and that municipalities have an obligation to ensure that poor households are not denied access to basic services due to their inability to pay for such services.⁴¹ The FBSan policy is, however, deliberately vague, stating that free basic sanitation is a controversial issue over which there is no universal agreement and therefore it affords maximum discretion to municipalities in terms of deciding how and even whether to implement the strategy. Thus, beyond mentioning that sanitation is very context-specific and that a basic standard could mean a VIP or (usually in urban and well-established areas) waterborne sanitation, the strategy provides very little in the way of concrete recommendations, and it skirts the issues of appropriate forms of basic sanitation for informal settlements, as well as any attempt to quantify the maximum number of people to share communal sanitation facilities.

The strategy does, however, recommend that, in cases of waterborne sanitation, an additional amount of free basic water (between three and four additional kilolitres per household per month or 15 additional litres per person per day) should be allocated to poor households above the usual FBW amount (the nationally prescribed FBW standard is six kilolitres of water to be provided to poor households per month, which amounts to 25 litres per person per day in a household of eight), with an additional amount for households living with HIV and AIDs. And it clarifies that in so far as basic sanitation for poor households is concerned, the capital costs of sanitation infrastructure or rehabilitation of infrastructure will be provided by the state, but that households are responsible for the operating costs of the on-site component of the sanitation service (e.g. the toilet itself) – although exceptions may be made for sludge and compost handling and the emptying of VIPs.⁴²

Functional and financial arrangements

As mandated by Part B of Schedule 4 of the Constitution, along with the Water Services Act and the Municipal Systems Act, the primary responsibility for providing sanitation (and water) services lies with local government, which, when acting in terms of authority to undertake water services, is referred to as a Water Services Authority (WSA).⁴³ The Water Services Act requires that every WSA must draft a Water Services Development Plan (WSDP) for its area of jurisdiction and part of this plan is to secure Water Services Providers (WSPs) to assume operational responsibility for providing water services to end users. A WSA may perform the function of a WSP directly or may enter into a contract with a WSP (often a municipal entity such as Johannesburg Water (Pty) Ltd in Johannesburg). A WSA may only enter into a contract with a private sector WSP after considering all public sector WSPs that are willing and able to perform the relevant functions in that area.⁴⁴

Provincial government, together with national government, has the constitutional responsibility to support and strengthen the capacity of local government in the fulfilment of its functions. It is also meant to regulate local government to ensure effective performance. Provincial government departments, such as Public Works, can undertake or oversee

the construction of water and sanitation infrastructure, and provincial departments of health care and education are involved in setting design standards for water and sanitation facilities at schools, hospitals and clinics. Provincial housing departments have until recently been largely responsible for developing housing projects, but this role is increasingly being taken on by municipalities if accredited to undertake a direct housing function and administer National Housing Programmes in terms of section 10 of the Housing Act.

The DWA – formerly the DWAF – is the water and sanitation sector leader in South Africa. DWA is the custodian of South Africa's water resources (via the National Water Act) and water services (via the Water Services Act). Until 2009, DWAF was responsible for co-ordinating the involvement of national government in the sanitation sector, and the National Sanitation Programme Unit was situated within the department. This function has since been moved to the DHS, along with the concomitant officials and funds.

Notwithstanding this move – which as detailed below has not been very successful – the machinery and laws for regulating sanitation services (including the Water Services Act and its Norms and Standards and Regulations) remain largely in DWA. Thus, according to section 155(7) of the Constitution and section 62(1) of the Water Services Act, DWA has the mandate to monitor the performance of all water services institutions, including municipalities that perform the function of WSAs. This disjuncture between legal and functional realms, along with the disruption of moving human and financial resources to a new department, has significantly undermined efforts to ensure full access to sanitation.

Currently, it appears that the DHS is responsible for household sanitation infrastructure, while the DWA is responsible for bulk reticulation and all water and waterborne sanitation services regulation. Since January 2010, in terms of the National Water Services Regulation Strategy (NWSRS), the DWA is also responsible for being the national water services regulator. Prior to this, there was no national water services regulator.⁴⁵ Although it was a welcome move to have a national water services regulator, civil society had hoped for an independent regulator, and there are ongoing concerns about DWA's willingness to regulate, especially

given that it is both the main ‘player’ and only ‘referee’ in the water services sector. Regarding sanitation services, the NWSRS defines various DWA regulatory functions including the monitoring of applications for sanitation-related Municipal Infrastructure Grants (MIG – see below) and the status of operations and maintenance of sanitation-related infrastructure as well as the maintenance of on-site sanitation. However, DWA admits that it has not been able to effectively carry out all its monitoring and regulation functions.⁴⁶ In addition, some of its regulatory powers are circumscribed (for example, while DWA can reject MIG applications that do not comply with policy requirements, it has no power of sanction if project execution is flawed), further undermining its regulatory potential.⁴⁷

The DHS is the custodian of the national Housing Act and the National Housing Programmes contained in the National Housing Code. In May 2009, the sanitation line function (along with the National Sanitation Programme Unit) was moved from DWA to DHS, and the DHS now has the mandate to deliver on the National Sanitation Programme. DHS also oversees the new Rural Household Infrastructure Grant (RHIG – see below), as well as the new Urban Settlements Development Grant (USDG). A recent report by the national Department of Planning, Monitoring and Evaluation (DPME), DWA and DHS, which found the migration of the National Sanitation Programme Unit and sanitation functions from DWA to DHS to have seriously compromised progress on eradicating sanitation backlogs, recommended that sanitation be returned as a DWA function.⁴⁸ In contrast, however, the Ministerial Sanitation Task Team appointed by the Minister of Human Settlements in September 2011 recommended that all sanitation functions and legislation be consolidated under DHS.⁴⁹ For the moment, therefore, the unsatisfactorily fragmented approach between DWA and DHS persists. There are two further national departments with some direct involvement in sanitation functions – the Department of Co-operative Governance and Traditional Affairs (CoGTA), which is the custodian of the Municipal Systems Act and is responsible for ensuring the maximal functioning of municipalities, and the Department of Health, which has a role in developing educational material and programmes in relation to hygiene and sanitation.

Previously, there were three main sources for the provision of basic sanitation in South Africa: the MIG for capital costs of infrastructure development,⁵⁰ the Equitable Share (ES) for operations and maintenance-related costs,⁵¹ as well as internal revenue generated by municipalities through services charges and rates. Recently the National Treasury announced two new grants to be administered through the DHS – the Urban Settlements Development Grant (USDG), which has replaced the MIG grant in metropolitan municipalities, and the RHIG. The USDG is aimed at assisting metropolitan municipalities (cities) to plan in a more integrated way with regard to the provision of bulk water and sanitation services to low-cost housing developments in well-located areas near social and economic facilities and opportunities. As it was only introduced in March 2011, it is too soon to assess the efficacy of this grant in alleviating sanitation access-related problems, however, MIG funds have historically been under- and/or misspent by most municipalities.⁵² The RHIG, also introduced in March 2011, aims to address backlogs in water supply and sanitation in rural areas by providing funding for the provision of on-site sanitation and water facilities. There have been initial problems around allocating this grant due to the ongoing confusion caused by sanitation's move from DWA to DHS.⁵³

Regarding the ES, there are debates as to whether it is sufficient to cover the costs of free basic service provision (including waterborne sanitation), particularly in poor municipalities that are not able to recoup much revenue through charging for services.⁵⁴ Beyond this, the ES is an unconditional grant, meaning that municipalities have full autonomy to spend these funds as they see fit – and there is mounting evidence that municipalities do not spend ES grants as they should, on basic services including sanitation.⁵⁵

This highly complex machinery relates in part to the fact that sanitation is a difficult functional area, overlapping with so many other rights and government functions including water, housing, health care and education. It is also the socio-economic right that most clearly falls between public and private responsibility since toilets tend to be regarded as a private matter (unless they are communal and/or located on contested terrains such as informal settlements), but infrastructure especially for

waterborne sanitation is a public matter. In between lies a grey area where issues of maintenance for chemical toilets, pit latrines and septic tanks are less clearly defined. The complexity of sanitation provision (exacerbated by the transfer of functions from DWA to DHS in 2009) has undoubtedly contributed to the human rights-related fault lines examined below.

South African jurisprudence

In South Africa, socio-economic rights are explicitly judiciable, and to date 20 socio-economic rights-related cases have been decided by the Constitutional Court since its establishment in 1996. These include judgments on the rights of access to housing, water, social security and electricity. And, on 19 November 2009, the South African Constitutional Court handed down judgment in its first and only sanitation-related case to date in the matter of *Johnson Matotoba Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others (Nokotyana)*.⁵⁶

The *Nokotyana* case was an application by the residents of Harry Gwala informal settlement in Ekurhuleni Municipality (close to Johannesburg) for an order against the municipality to install inter alia temporary basic sanitation facilities pending a decision by the local government on whether the settlement would be upgraded to a formal township.⁵⁷ Many of the residents had been living in the settlement since 1993 and had been attempting since then to get the municipality to pursue an in situ upgrading of the settlement. In the meantime, they were living in squalid conditions with only six communal taps for the entire settlement of approximately 1500 households, no electric lighting or refuse collection, and only rudimentary communal pit latrines without adequate privacy built by the residents.

In August 2006, following years of fraught engagement with the municipality, including the municipality's attempt to evict the residents unlawfully without a court order, the Ekurhuleni Municipality had finally submitted a proposal on upgrading to the relevant provincial government official, the Member of the Executive Council (MEC) for Local Government and Housing, Gauteng. However, three years later no decision had been taken, prompting the residents to take the matter to court.

In the Constitutional Court, the applicants based their claim for sanitation services primarily on section 26 of the Constitution's right of access to adequate housing (arguing that sanitation was a component of the right to adequate housing), the constitutional right to human dignity,⁵⁸ and the EHP and UISP of the National Housing Code. In April 2009, in the run-up to the Constitutional Court hearing, the municipality adopted a policy in terms of which it offered the residents of Harry Gwala informal settlement one chemical toilet per ten families. The residents rejected this offer, arguing for one VIP per household. Ultimately – despite ordering the MEC to take a final decision on Ekurhuleni Municipality's application in terms of chapter 13 of the National Housing Code to upgrade the status of Harry Gwala settlement within fourteen months of the Court order – the Court dismissed the appeal, rejecting the applicants' request for temporary sanitation (and lighting) on the grounds that neither the EHP nor UISP applied to informal settlements where no decision on upgrading had been taken, meaning that the residents were living in limbo until a decision on upgrading was taken and therefore were effectively excluded from access to basic sanitation.⁵⁹

The *Nokotyana* judgment has been criticised for being overly formalistic and deferential to the government, and for not giving due weight to the multiple violations of rights (including dignity) entailed in living for years on end in an informal settlement without adequate service, as well as for failing to develop the normative right of access to housing to include a right to sanitation.⁶⁰ It has also been criticised for misinterpreting the National Housing Code – particularly the UISP – so as to exclude an obligation to provide interim services in informal settlements where no decision has yet been taken regarding upgrading.⁶¹ The Constitutional Court's approach and order in *Nokotyana* stands in sharp contrast with a subsequent case on access to basic sanitation services in an informal settlement heard by the Cape High Court – *Ntombentsha Beja and Others v Premier of the Western Cape and Others (Beja)*⁶² – which deserves to be highlighted for its sensitive approach to the issue of sanitation and for its recognition of the link between adequate sanitation and especially the right to dignity.

In April 2011, the Western Cape High Court delivered its decision

in the *Beja* case, which was an application by the residents of Makhaza informal settlement in Khayelitsha, Cape Town, to declare unconstitutional the 1316 *unenclosed* waterborne toilets that the municipality had constructed as part of an upgrading project undertaken in terms of Chapter 13 of the National Housing Code (now the UISP). The municipality referred to these toilets as 'loos with a view' and argued that the toilets had been constructed pursuant to an agreement with the community in terms of which the municipality would provide one toilet per household and residents would provide an enclosure for each toilet, rather than the ratio the municipality argued it was obliged to provide, of one toilet per five households. The community (supported by the local African National Congress Youth League branch⁶³) complained about the toilets to the South African Human Rights Commission, which investigated the complaint and released a report in June 2010, finding that the municipality had violated the residents' right to human dignity.⁶⁴ On the basis of this finding, the residents went to court, filing an application in the Western Cape High Court in September 2010.

On 29 November 2010, following an inspection of the site, Judge Erasmus made an interim order for the municipality to enclose the toilets. Final judgment was handed down on 29 April 2011, finding in favour of the applicants and providing detailed commentary regarding the level of agreement/consultation with the community regarding providing unenclosed toilets, the veracity of the municipality's argument that it was only obliged to provide toilets in the ratio of one toilet per five households, and whether or not the provision of unenclosed toilets violated constitutional rights.

Regarding the so-called consultation with the community, the Court found that the municipality could not prove that any agreement existed and that, more generally, the consultation process was highly flawed. For example, the sanitation situation was only discussed at one meeting, for which the municipality provided four days notice and the circulated agenda contained no item on sanitation.⁶⁵ Moreover, the minutes of the meeting record that only 60 people out of a community of approximately 6000 people attended the meeting and, as it turned out, the toilets were only constructed two years after the meeting.⁶⁶

More substantively, the judgment found that the municipality had failed to take into account people with disabilities, as well as the safety and security of vulnerable members of the community, including women, who were exposed to the potential risk of gender-based violence. Pointing out that, in arguing that it had an obligation to provide only one toilet per five households, the municipality had wrongly conflated the EHP with non-emergency housing as provided by the municipality in the UISP project in Makhaza, the judge denounced the toilets as not meeting the required standards and noted that, in any event, none of the toilets was in working order. For these reasons, the judge ruled that there was a violation in terms of sections 10 (human dignity), 12 (freedom and security of the person), 14 (privacy), 24 (environment), 26 (housing) and 27 (health care) of the Constitution.⁶⁷ He further held that the provision of unenclosed toilets is inconsistent with Regulation 2 of the Compulsory National Standards.⁶⁸ He therefore declared the municipality's conduct to be in violation of the residents' constitutional rights and ordered the municipality to enclose all 1316 toilets.

South Africa follows a system of judicial hierarchy and precedent in terms of which all lower courts are bound by the rulings of all higher courts. But because the Constitutional Court essentially opted to avoid any specific pronouncements on sanitation-related rights in the *Nkotyana* case, until another sanitation-related case comes before the Constitutional Court *Beja* stands as the strongest legal authority on local government human rights-related obligations in respect of sanitation.

Systemic human-rights related problems in sanitation

Undoubtedly, great advances have been made in line with the rights-based frameworks set out above to extend basic sanitation services to poor households in rural and informal settlement areas. However, a number of systemic problems remain that compromise the enjoyment of the right to basic sanitation. This next section examines the problems across human rights-related axes, and the following section provides a tentative analysis of the underlying determinants of those problems.

Availability of sanitation

Historically, sanitation services (along with all other services) were skewed in favour of the white minority, meaning that waterborne sanitation was provided to the middle and upper class white suburbs of cities and towns while the bucket system predominated in black townships and black rural areas. On coming to power in 1994, the new government acknowledged the lack of basic sanitation as a key indicator of the underdevelopment of the black population. It sought to remedy this and particularly to eradicate the bucket system, as an unacceptable and degrading form of sanitation.⁶⁹ To this end, in 1994, the government adopted the Water Supply and Sanitation White Paper and thereafter began to develop the raft of policies and laws outlined in section 2 and, subsequently, it has been able to halve the number of households living without sanitation services (although it has had to several times push back the target year for universal access to sanitation, with the latest postponement – from 2014 to 2016 – being announced in October 2013).

Notwithstanding the statistical advances regarding the roll-out of sanitation services since 1994, there are still significant backlogs in basic sanitation service delivery. According to a March 2012 inter-governmental report on the status of sanitation services in South Africa, approximately eleven per cent of households in South Africa still have to be provided with sanitation services and 26 per cent (or 3.2 million households) are 'at risk of service failure and/or are experiencing service delivery breakdowns'.⁷⁰ According to the 2011 Census, 57 per cent of households have access to a flush toilet connected to a sewerage system; 3.1 per cent have access to a flush toilet connected to a septic tank; 8.8 per cent have access to a VIP; 19 per cent have access to a pit latrine without any ventilation or improvement; 2.5 per cent have access to a chemical toilet; 2.1 per cent use a bucket; 2.1 per cent use 'other' forms of toilets; and 5.2 per cent have no access to any formal form of sanitation.⁷¹

While rural areas remain an ongoing concern – with many households still using rudimentary bucket systems or practicing open defecation⁷² – underscoring the need for clear policy and practice regarding rural sanitation options, one of the greatest challenges facing South Africa is the provision of basic sanitation to informal settlements where

in many cases authorities do not want to provide bulk infrastructure because they would like to relocate the residents. However, as highlighted in the *Nokotyana* litigation described above, such proposed relocations are often contested by the informal settlement communities and can take many years to be resolved. As acknowledged by the government, 64 per cent of informal settlement households (584 378 households, representing approximately two million people) are having to make do with interim services that are 'at risk of service failure and/or are experiencing service delivery breakdowns', indicating that the 'provision of adequate services to dwellings in (transient) informal settlements requires a strategy that takes into consideration permanency and land use objectives together with other considerations of topography, geo-hydrology, proximity to bulk services, etc.'⁷³ Of particular concern is the fact that there is not a clear regulated standard for the number of households that must share government-provided communal toilet facilities in informal settlements.

Beyond informal settlements, aggregated statistics on the roll-out of sanitation across the country obscure both the quality of the services (as discussed below), as well as the problem of geographic areas with unusually low access to basic sanitation such as the former homeland areas. Thus, the March 2012 DPME, DWA and DHS report on sanitation found that the majority of households without adequate sanitation services are in KwaZulu-Natal, North West and the Eastern Cape.⁷⁴ A 2009 submission to the South African Human Rights Commission on access to water and sanitation highlighted that (based on 2001 census data) the 30 worst performing municipalities in terms of inadequate access to sanitation (and water) were in KwaZulu-Natal and the Eastern Cape and that, if you look at the 60 worst performing municipalities, these are all also in KwaZulu-Natal and the Eastern Cape, plus Limpopo.⁷⁵ The submission noted the striking coincidence between the worst performing municipalities and the geographic areas of the former independent homelands (especially the Transkei), indicating the continuation of apartheid-inherited patterns of underdevelopment.⁷⁶

Another dimension of the (in) availability of sanitation facilities that is sometimes overlooked in the general statistics is the issue of toilet facilities at schools, which is dealt with in the FHR paper on education by

F Veriava. The chronic under-provision of adequate toilet facilities at schools – currently being addressed through the litigation mounted by the campaigning NGO Equal Education that in November 2013 secured a commitment by the national Department of Education to finally adopt Minimum Norms and Standards for school facilities including toilets⁷⁷ – is a serious issue. It fundamentally compromises the rights of children, particularly disabled persons who are less able to make alternative arrangements, and girl-children, many of whom are forced by the unavailability of toilets to drop out of school or stay at home, especially during their menstrual cycles.

In respect of households with waterborne sanitation services, there have not been any studies examining the sufficiency of the recommended FBSan allocation (15 litres per person per day over and above the FBW allocation) or the extent to which municipalities are pursuing this allocation, which is not considered to be a legal requirement. This impacts economic access because, obviously, where the FBSan amount is insufficient, e.g. in multi-dwelling households, households have to use some of the FBW allocation for waterborne sanitation and/or pay for additional water, according to the rising block tariffs in the relevant municipality, which may or may not be appropriately pro-poor.⁷⁸

One further specific problem impeding access to waterborne sanitation services by many of the poorest households is the common practice by municipalities of targeting Free Basic Services (including FBSan) through the municipal indigency policy.⁷⁹ Again, there are generalised problems related to municipal indigency policies, which serve to exclude the most vulnerable and poor households from any potential benefits including FBSan. Chief among these problems are an ad hoc definition of poverty for the purposes of qualifying for benefits – e.g. some municipalities use a level of income equivalent to or just less than two state pensions, while others use property/land value to determine whether a household qualifies. Still others use seemingly random income thresholds; and the process around registering for benefits is typically very onerous, requiring numerous documents, and is perceived by potential recipients as stigmatising.⁸⁰ This means that FBSan is not being accessed by those in most need, a fact highlighted in a recent report, which found

that: 'FBSan services were benefiting the "haves" while the "have-nots" continued to live in squalid conditions with poor or no access to adequate sanitation services'.⁸¹

Physical and economic access to sanitation; gender and disability dimensions

Physical access to sanitation facilities remains a problem both in rural and informal settlement areas where people often have to walk long distances to relieve themselves. Inadequate physical access has both a gender and disability dimension as having to walk distances to sanitation facilities exposes women to safety concerns, making them vulnerable to attack by wild animals and people. Disabled persons also suffer when sanitation facilities are not conveniently located or are in other ways physically inaccessible to disabled persons. Critically, unlike with water services where minimum basic standards include being located within 200 metres of a water supply, there are no standards for the proximity of sanitation facilities (nor for the number of households that have to share communal sanitation facilities) and no reliable figures for people's physical access to sanitation.

Economic access is equally difficult to assess. This is because there are no in-depth studies on what poor households spend on sanitation services. In part, this is because many poor households rely on government-provided sanitation services for which there is no household cost, or households dig latrines which represent a once-off cost in terms mainly of household labour. What is apparent from litigation such as *Nokotyana* is that where informal settlements have to rely on chemical toilets (which are at best meant to be temporary measures but often are left as semi-permanent facilities), the chemicals are relatively expensive and unaffordable for the majority of households.

Quality, sustainability and acceptability including participation and information dimensions

Over the past decade, there has been an almost slavish focus in South Africa on constructing toilets and meeting the political and Millennium Development Goal-driven imperative to meet targets, regardless of the

acceptability, quality, suitability or outcomes of the projects. Moreover, the target-driven approach has meant that the roll-out of basic sanitation has often occurred with insufficient or no community participation, as evident in the sanitation projects around the country that have resulted in unenclosed toilets (such as in Makhaza) that no one can use. More research is necessary to understand how sanitation projects could be more genuinely participatory but in the meantime it is clear that, as acknowledged by the government, 'the continuous chasing of targets (however noble)' has come at 'a price of a lack of focus on the far more challenging requirements of the ongoing sustainable operation and maintenance of services'.⁸²

These unintended negative consequences have been confirmed by numerous reports. According to the 2009 Water Dialogues-South Africa report, the preoccupation with numbers and targets has meant that there is insufficient focus on the quality, maintenance and sustainability of the services.⁸³ The South African Institution of Civil Engineering (SAICE) notes that users are 'often not receiving the full benefit because of high failure rates'.⁸⁴ A 2004/2005 DWAF sanitation sustainability audit commissioned to assess the quality and sustainability of sanitation infrastructure found that 28 per cent of toilets that had been rolled out by government were 'already dysfunctional or had a high sustainability risk indicating a high probability of failure within the short to medium term'.⁸⁵ And a 2007 report by the Council for Scientific and Industrial Research (CSIR) (commissioned by DWAF), which involved an audit of 2410 sanitation projects in the MIG database that had moved beyond the planning phase, found the following:

- Up to 25 per cent of on-site toilets were inadequately designed for ventilation;
- Up to 68 per cent of on-site top structures were constructed such that they could not be moved when the pits are full;
- Up to 28 per cent of the facilities had doors that could not close or lock;
- Some flush toilets did not have cisterns (23 per cent) or pedestals (18 per cent);
- Up to 61 per cent had no hand-washing facility near the toilet; and
- On 60 per cent of the facilities, municipalities were only doing reactive

maintenance and no proactive maintenance; while 40 per cent of municipalities were found not to have adequate maintenance capacity.⁸⁶

An equally damning 2009 Water Research Commission⁸⁷ report by Still and others on basic sanitation services highlighted that across South Africa 'there is no single type of sanitation that fared uniformly well'.⁸⁸ Common problems cited by the report include:

- Generally, sanitation facilities are not compliant with appropriate technical design standards and are built in a manner susceptible to quick failure and extreme maintenance difficulties;⁸⁹
- Insufficient attention to safety and access-related issues results in facilities not being used;⁹⁰ and
- Municipalities are not paying sufficient attention to the maintenance of existing infrastructure, which is becoming degraded.⁹¹

Regarding maintenance specifically, during the 2012 survey of sanitation services undertaken by the Ministerial Sanitation Task Team, members noted that around the country municipalities were not emptying VIPs, resulting in unhealthy and unhygienic conditions for the users.⁹² In some rural areas the failure to empty pits relates to municipalities chasing targets through funds that are specifically for the construction of new toilets but not for the emptying of them, resulting in many poor households that have several toilet structures on their properties, including ones with full pits that need to be emptied.⁹³ Additional problems occur wherever there is waterborne sanitation, in that almost all waste water treatment infrastructure, especially municipal treatment plants, has been poorly maintained and is in 'urgent need of maintenance and replacement', with much verging on being dysfunctional.⁹⁴ According to DWA's Green Drop assessment report on the performance of waste water treatment and management, of the 821 systems assessed in 2011, only 40 received Green Drop certification⁹⁵ from DWA, and 317 waste water treatment plants required urgent attention, with a further 143 being categorised as having a high risk of failure.⁹⁶

The target-driven approach to sanitation also blinds implementers to relevant social issues and human rights-related determinants of sanitation.

tion, such as access for people with disabilities, people living with HIV and AIDs, women, girls attending school, and cultural and religious practices etc. It also results in unsustainable and/or unsuitable systems being rolled out. For example, in the Free State province, the government's push to eradicate the bucket system throughout the province was 'remedied' through the installation of waterborne systems, even in relatively isolated and marginalised communities that had no or limited bulk sewer networks or waste water treatment works. This resulted in 'the provision of sanitation infrastructure that, in some cases, was not the optimal technical solution' and meant extreme pressure on existing waste water treatment works and negative consequences 'in respect of long-term service affordability, functionality and sustainability'.⁹⁷ Elsewhere across the country municipalities have provided flush toilets 'where there were inadequate water supplies for flushing'.⁹⁸

Finally, the focus on targets has resulted in poor consultation with local communities over sanitation options. This oversight has been compounded by a widespread failure to provide appropriate hygiene- and sanitation-related education and readily available information, including on cleaning and emptying facilities. This has resulted in widespread misuse and neglect of facilities by communities,⁹⁹ which undermines the quality and long-term sustainability of services. The top-down approach has also led to unacceptable options being foisted on communities. This is apparent, for example, in the outcry over unenclosed toilets in Cape Town and the Free State, and the unpopularity of dry sanitation systems¹⁰⁰ in some provinces, including the Free State.¹⁰¹ It is also apparent from the rejection by poor communities in Cape Town of the 'porta-flush toilet', a portable hand-worked toilet that has a seat, a container for waste and a chemical flushing system. Households do not like these toilets as they often leak, are not emptied regularly enough by the municipality and smell bad,¹⁰² effectively making them function as 'little more than fancy bucket toilets'.¹⁰³ As recognised by the Ministerial Sanitation Task Team, to ensure the quality, acceptability and sustainability of sanitation services, it is necessary for households and communities to be centrally involved in sanitation planning and implementation.¹⁰⁴

Underlying determinants of these systemic problems

In South Africa, which is classified by the World Bank as an upper middle-income country, it is hard to say that the problems¹⁰⁵ identified above relate primarily to inadequate finances – as evidenced by the fact that most municipalities regularly are unable to spend their budgets.¹⁰⁶ Indeed, according to the March 2012 status report on sanitation undertaken by the DPME, DWA and DHS, it is estimated that (according to 2011 prices) the cost of satisfactorily addressing sanitation-related deficits is R50 306 billion and that, if municipalities spent a substantial proportion of the R90.8 billion they received in conditional grants (MIG, USDG and RHIG)¹⁰⁷ for the 2011/2012, 2012/2013 and 2013/2014 financial years, ‘with the right institutional mechanism to drive planning and implementation, the water and sanitation backlog could potentially be wiped out over this period’.¹⁰⁸ This leads the authors of the report to conclude that ‘while resource limits is a valid proposition, it is our contention that given the existing funding envelope it is within the means of the state to meet everyone’s needs with respect to water and sanitation. However, this funding prioritisation will have to go hand in hand with a nationwide effort to put in place appropriate organisational infrastructure to manage the implementation of the programme’.¹⁰⁹ In a similar vein, several reports by the Auditor-General and Fiscal and Financial Commission have found that the failure to eradicate sanitation backlogs is largely due to poor planning and under-spending.¹¹⁰

This is not to suggest that financing is not an issue, but rather to point to the institutional and political problems that overlay any financial issues. While more research is necessary to examine the financial aspect, it is clear that a major underlying determinant of the problems in the sanitation sector relates to institutional challenges, as acknowledged in the reference above from the March 2012 DPME, DWA and DHS Report on the Status of Sanitation Services in South Africa.

One of the reasons for the focus on targets, as opposed to sustainable and life-improving outcomes, is that the institutional structure for sanitation services is fractured. Whereas in many countries sanitation is viewed as a health care-related issue, in South Africa it was initially housed in the DWA and was then moved in 2009 to the DHS. This shift

indicates an institutional discomfort about where to locate sanitation services, which has clearly undermined the coherence of the National Sanitation Programme. This means that there is practically no regulation of sanitation at the national level, not least because the regulatory legislation including the Water Services Act are located in the DWA. As a consequence, it remains unclear which functions DWA retains and how the two national departments co-ordinate their sanitation programmes.¹¹¹ For the most part, the departments have sought to avoid taking responsibility for the National Sanitation Programme.

Such problems have been acknowledged by the DHS, which, in August 2010, reported a lack of personnel, office space and budget in relation to sanitation. It commented that 'the movement [from DWA to DHS] posed serious challenges to the functioning of the National Sanitation Programme as neither the Department of Water Affairs nor Department of Human Settlements was willing to accept responsibility for the National Sanitation Programme ...'.¹¹² DHS also warned that it was difficult for the DHS, as a policy-oriented department, to take responsibility for the National Sanitation Programme, which is an implementation programme; and that the programme's implementation had been seriously 'slowed down'.¹¹³ Similarly, in August 2011, the National Sanitation Programme Unit identified 'ineffective collaboration at all government levels' as a serious problem.¹¹⁴ Compounding these problems, in recent years the roll-out of sanitation has been institutionally and financially linked (via complex housing subsidy arrangements) to the national housing delivery programme, which itself is beset by problems and delays.¹¹⁵

Further exacerbating the institutional turmoil is a chronic capacity problem at all functional levels, but particularly at the local level, where there is a serious under-capacity to be 'able to plan, implement and manage infrastructure effectively'.¹¹⁶ It is clear that local government, which is responsible for the delivery of basic services including sanitation, suffers from a myriad problems that impact negatively on the delivery of sanitation services. These include the failure of many municipalities to implement national FBW and FBSan policies;¹¹⁷ lack of strong leadership and management, as well as a shortage of critical skills and competencies in most municipalities (particularly rural municipalities); and the dete-

rioration of financial viability due to poor revenue collection and management coupled with the inability of households living in poverty to pay for services.¹¹⁸ Such management and governance-related problems have recently resulted in the Auditor General giving clean audit reports to only seven out of 237 municipalities across the country.¹¹⁹ These problems have also led to chronic under-spending by municipalities on sanitation-related budgets – e.g. collectively municipalities were only able to spend approximately 30 per cent of their 2011/2012 capital budget from National Treasury as at 31 December 2011.¹²⁰

As recognised by the National Planning Commission (NPC) in the National Development Plan (NDP), this systemic municipal under-spending has in effect meant that South Africa has ‘missed a generation of capital investment’ in sanitation (along with other municipal services such as water).¹²¹ The serious issue of municipal under-spending requires urgent attention and further study to determine the extent to which this relates to lack of capacity, including requisite staffing (many municipal positions remain unfilled) and the extent to which it relates to poor performance more generally, as well as how to remedy this problem. A related issue that requires further research is the role of the Treasury in ensuring proper spending of allocated budgets, as well as the efficacy (or not) and consequences of placing municipalities under provincial or national administration.

One of the consequences of the institutional weaknesses outlined above is that there is widespread confusion over, and inadequate regulation of, standards and priorities by various government agencies.¹²² As identified in the March 2012 DPME, DWA and DHS report, ‘historically, government has tended to predominantly only monitor financial spending and other quantitative outputs, which generally disregard the qualitative, outcome measures. Questions have never been asked to ascertain simultaneously what services have been completed and to what service standard (quality).’¹²³ Furthermore, the report notes that the inability of the current systems to flag and/or redress the issues that prompted the SAHRC sanitation investigation into unenclosed toilets in Cape Town and the Free State is indicative of inadequate monitoring and regulation.¹²⁴ The role and efficacy of various national departments including

DWA, DHS, CoGTA and the DPME in monitoring and regulating sanitation services at the municipal level should be comprehensively evaluated.

The lack of functional coherence within institutions of policy oversight and delivery, along with serious governance and management-related deficits, has also undermined the capacity of government (at all levels) to pursue appropriate technology choices and integrated and sustainable infrastructural programmes for, as well as to ensure a coherent strategy for the roll-out of, basic sanitation services. Collectively, these problems significantly undermine access to satisfactory sanitation services. This is particularly the case for rural areas, where it is still unclear what form of sanitation should be utilised (and how the state should subsidise this). It is also the case regarding informal settlements, which have been left in limbo often without even rudimentary sanitation services. Where basic sanitation has been provided, the failure of a comprehensive policy and plan regarding informal settlements means that residents are left with only the most basic level of access without any prospect for progressive realisation of their sanitation-related rights. There is an urgent need for government to resolve rural- and informal settlement-related sanitation issues and to prioritise the roll-out of appropriate basic sanitation to all such households.

Conclusion and recommendations

As recognised by the Court in the *Beja* case, sanitation is intimately connected with a range of other rights such as privacy, dignity, freedom and security of the person, environment, health care and housing. Moreover, access to adequate sanitation is fundamental to any efforts to reduce poverty, eradicate gender inequality and to promote economic and human development, as well as environmental sustainability.

Responding to the desire to improve their lives and living conditions, protests such as the one in Khayelitsha involving the throwing of faeces at politicians, along with highly publicised court cases such as *Beja*, have drawn attention to the enduring problem of inadequate toilets and lack of basic sanitation across the country. This has not only had an empower-

ing and mobilising impact vis-à-vis disadvantaged communities, as evidenced by communities becoming increasingly vocal and assertive in their demands for basic sanitation, but it has also begun to have an effect on government. In July 2011, the DHS announced that rising dissatisfaction with sanitation provision represents ‘a renewed community interest and participation in the politics of development as opposed to the politics of politics’, requiring ‘a comprehensive solution’.¹²⁵

It must be regarded as a shameful fact that, by all accounts, resources are not the root cause of the failure to come up with a comprehensive solution but that, rather, it is failures of co-ordination, planning and capacity that explain South Africa’s continued sanitation backlogs. Yet, as shameful as this might seem, it does offer a glimmer of hope that, with political will, a comprehensive solution may be designed and implemented to ensure that everyone has access to adequate sanitation. Any such solution will need to take into account the failures of the previous approaches, particularly the pitfalls of chasing targets and of not pursuing genuinely participatory approaches that take into consideration the needs of vulnerable groups such as women, school-girls and disabled persons.

This paper recommends further investigation into the following aspects regarding sanitation *policy*:

- The full extent of the gender dimension of sanitation, including how to best ensure that accessing sanitation does not expose women and girl-children to additional vulnerabilities and rights-related violations.
- Best practice and appropriate forms of sanitation for rural and informal settlement areas.

This paper recommends further investigation into the following aspects regarding sanitation *practice*:

- The extent to which all households are able to access adequate sanitation, bearing in mind especially gender, disability and religious/cultural parameters.
- Best practice regarding the institutional home for sanitation. This should include the pros and cons of various models, bearing in mind the problem of fragmentation on the one hand (where, as in South

Africa, sanitation is assigned to one specific department thereby severing its relationship with other related departments and services), but also the need to ensure on the other hand that sanitation is not so ‘integrated’ into multiple departments that it falls through the cracks, becoming no department’s responsibility.

- Best practice in terms of the maximum number of households to share communal toilet facilities, what kinds of toilets work best in shared arrangements and what roles such models imply for government.
- A thorough audit of whether each municipality has sufficient funding, and that it’s properly allocated and spent, for the sanitation-related needs of its households.
- Ways of improving financial monitoring and regulation, including the role of Treasury regarding budgets and the impact of placing errant municipalities under national/provincial administration, as well as looking at how to ensure that the ES is allocated to basic services such as sanitation.
- The role and efficacy of monitoring and regulation by DWA (particularly in its role as National Water Services Regulator), DHS, CoGTA and DPME.
- Ways of improving community participation in sanitation-related projects, including budgeting.

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- Norms and Standards in Respect of Tariffs for Water Services, 11 June 2001 (Norms and Standards)
- Regulations Relating to Compulsory National Standards and Measures to Conserve Water, 8 June 2001 (Compulsory National Standards)
- Promotion of Administrative Justice Act 3 of 2000 (PAJA)
- Water Services Act 108 of 1997 (Water Services Act)

Policies

- DHS 'Revision of the 2001 White Paper on Basic Household Sanitation, 2001: National Sanitation Policy Conceptual Framework, Draft Version' (March 2011): www.wisa.org.za/Show_document.aspx?Docid=146 (accessed on 4 September 2013)
- DHS 'Upgrading of Informal Settlements Programme' (2009a) 4(3)
National Housing Code: www.nwpg.gov.za/HumanSettlements/HousingCode.asp (accessed on 5 September 2013)
- DHS 'Emergency Housing Programme' (2009b) 4(3) of the National Housing Code: www.nwpg.gov.za/HumanSettlements/HousingCode.asp (accessed on 4 September 2013)
- DWA 'National Water Services Regulation Strategy' (January 2010): www.dwa.gov.za/dir_ws/dwqr/Default.asp?Pageid=6&SearchString=Strategy Document (accessed on 23 December 2013)
- DWAF 'White Paper on Water Supply and Sanitation Policy' (November 1994): www.dwaf.gov.za/Documents/Policies/WSSP.pdf (accessed on 4 September 2013)
- DWAF 'National Sanitation Policy' (October 1996): www.dwaf.gov.za/

- Documents/Policies/National Sanitation Policy.pdf (accessed on 4 September 2013)
- DWAF 'White Paper on Basic Household Sanitation' (September 2001): www.dwaf.gov.za/Documents/Policies/SanitationReview-Policy.pdf (accessed on 4 September 2013).
- DWAF 'National Sanitation Strategy' (August 2005): africasanitation.softpagecms.com/files/802976930/library/National_SANPOLICY_Aug2005.pdf (accessed on 4 September 2013)
- DWAF 'Free Basic Sanitation Implementation Strategy' (April 2009): www.dwaf.gov.za/dir_ws/wspd/policyinfo.aspx?file=556 (accessed on 5 September 2013)
- National Department of Housing 'National Housing Code' (2000 revised in 2009): www.nwpg.gov.za/HumanSettlements/Housing-Code.asp (accessed on 5 September 2013)
- National Planning Commission (NPC) 'National Development Plan: Vision for 2030' (15 August 2013): www.info.gov.za/issues/national-development-plan/ (accessed on 23 December 2013)

Table of cases

CASE NAME	SALR
<i>Government of the Republic of South Africa and Others v Grootboom and Others</i>	2001 (1) SA 46 (CC)
<i>Johnson Matotoba Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others</i>	2010 (4) BCLR 312 (CC)
<i>Joseph and Others v City of Johannesburg and Others</i>	2010 (4) SA 55 (CC)
<i>Minister of Health and Others v Treatment Action Campaign and Others (2)</i>	2002 (5) SA721 (CC)
<i>Ntombentsha Beja and Others v Premier of the Western Cape and Others</i>	2011 (10) BCLR 1077 (WCC)
<i>S v Makwanyane and Another</i>	1995 (3) SA 391 (CC)

Notes

1. Sapa 'Faeces thrown at Helen Zille's bus' (4 June 2013) *City Press*: www.citypress.co.za/politics/faeces-thrown-at-helen-zilles-bus/ (accessed on 4 September 2013).
2. S Schutte 'The Politics of Shit and Why It Should Be Part of Public Protest' (12 June 2013) *The South African Civil Society Information Service*: sacsis.org.za/site/article/1691.
3. Government of the Republic of South Africa 'Millennium Development Goals: Country Report 2010' (2010) 94: www.info.gov.za/view/DownloadFileAction?id=132022.
4. Government of the Republic of South Africa 'Millennium Development Goals: Country Report 2010' (2010) 94: www.info.gov.za/view/DownloadFileAction?id=132022.
5. In South Africa, as in many other countries, sanitation has a public and a private component. In South Africa this is exacerbated by the apartheid legacy of non-provision of sanitation services to the largely rural African population, meaning that there is a significant backlog in rural areas, as well as the mushrooming informal settlements around urban centres. In urban areas, household toilets (usually waterborne systems) are typically private, while bulk waste water reticulation and treatment of sewage is public. In rural and informal areas, toilets are often communal – sometimes provided by the state (in the form of either chemical toilets or ventilated improved pit latrines) but are often constructed by the community (crude 'bucket' systems or rudimentary pit latrines) – or there are no toilets at all and people practice open defecation, although this is not very common.
6. South Africa's total population is around 50 million people.
7. Government of the Republic of South Africa 'Millennium Development Goals: Country Report 2010' (2010) 94: www.info.gov.za/view/DownloadFileAction?id=132022.
8. Article 24(2)(e) of the Convention on the Rights of the Child (CRC, 1989) obliges States parties to take appropriate measures to ensure that 'all segments of society, in particular parents and children ... [are supported in respect of] the advantages of ... hygiene and environmental sanitation ...'.

9. Article 14(2)(h) of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW, 1979) provides that all states parties must take all the appropriate measures to eliminate discrimination against women in rural areas including to allow them 'to enjoy adequate living conditions, particularly in relation to housing, sanitation, ...'.
10. Articles 29 and 85 of the Geneva Convention III of 1949 stipulate that prisoners of war and other detainees must be provided with shower and bath facilities and water, soap and other facilities for their daily personal toilet and washing requirements: www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf.
11. For further information on the mandate see: www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/Overview.aspx.
12. United Nations General Resolution GA/RES/64/292 on the human right to water and sanitation (3 August 2010): daccess-dds-ny.un.org/doc/UNDOC/GEN/No9/479/35/PDF/No947935.pdf.
13. United Nations Human Rights Council Resolution HRC/RES/15/9 on human rights and access to safe drinking water and sanitation (6 October 2010): daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/166/33/PDF/G1016633.pdf.
14. As explored in this paper, the question of whether sanitation forms a distinct right or whether it is attached primarily to the right to water has dogged the South African context, too. Whereas there seems to be an emerging self-standing right to sanitation in litigation, the relevant legislation is still located in the Water Services Act 108 of 1997 (Water Services Act), which draws no distinction between water and sanitation supply, and there is confusion at the institutional level about whether sanitation should be dealt with by the DWA (as primarily water-related) or the Department of Human Settlements (as primarily housing-related).
15. It should be noted, in line with the CESCR's pronouncement that the right to sanitation should be viewed as a self-standing right not least due to the fact that many households use dry forms of sanitation, that some environmentalists have expressed concern over too close a link between water and sanitation as promoting an environmentally unsustainable focus on waterborne sanitation (for more on this debate, including the environmental rights angle see, for example, M Langford, R Stacey and D Chirwa 'Water' in S Woolman

- et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-i, 56B-69).
16. CESCR Statement on the Human Right to Sanitation, U.N. Doc E/C.12/45/CRP.1 (12 November 2010): www.waterlex.org/attachments/File/state-ment_CESCR.pdf.
 17. M Langford, R Stacey and D Chirwa 'Water' in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-i, 56B-70.
 18. M Langford, R Stacey and D Chirwa 'Water' in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-i, 56B-70.
 19. M Langford, R Stacey and D Chirwa 'Water' in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-i, 56B-71.
 20. Although not law per se, in terms of persuasive international frameworks it is worth noting that among the objectives of Millennium Development Goal 7 (to ensure environmental sustainability) is improved access to water sources and sanitation facilities. Internationally the progress in terms of improved access to sanitation facilities has been slow and certainly in the South African context has generated criticism regarding how the focus on chasing quantitative targets has often been to the detriment of other more qualitative content-related aspects of the right.
 21. United Nations CESCR General Comment 4 on the right to adequate housing (1991) para. 8(b): www.unhchr.ch/tbs/doc.nsf/o/469f4d91a9378221c12563e0053547e.
 22. United Nations Committee on Economic Social and Cultural Rights General Comment 15 on the right to water (2002) para. 29: daccess-dds-ny.un.org/doc/UNDOC/GEN/Go3/402/29/PDF/Go340229.pdf.
 23. United Nations CESCR General Comment 19 on the right to social security (2008) para. 18: www.refworld.org/docid/47b17b5b39c.html.
 24. United Nations CESCR General Comment 20 on non-discrimination in economic, social and cultural rights (2009) para. 8: tinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en.
 25. United Nations CESCR General Comment 3 on the nature of States parties

- obligations (1990): www.unhchr.ch/tbs/doc.nsf/o/94bdbaf59b43a424c12563ed0052b664 (accessed on 25 October 2013).
26. In October 2012, the South African Government publicly announced it was going to ratify the ICESCR. However, as of October 2013, such ratification had not yet occurred. [It did occur in 2015, entering into force on 12 April 2015.]
27. *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para. 35.
28. For the Constitutional Court's reasoning behind the apparent rejection of the minimum core obligations see *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) paras 31–33; and *Minister of Health and Others v Treatment Action Campaign and Others* (2) 2002 (5) SA 721 (CC) paras 26–29.
29. In September 2013, the Minister of Water Affairs announced that there were plans to merge the Water Services Act and the National Water Act.
30. Section 73(1)(c) of the Municipal Systems Act.
31. *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) para. 38.
32. National Department of Housing 'National Housing Code' (2000 revised in 2009): www.nwpg.gov.za/HumanSettlements/HousingCode.asp.
33. DHS 'Upgrading of Informal Settlements Programme' (2009a) 4(3) National Housing Code 37: www.nwpg.gov.za/HumanSettlements/HousingCode.asp.
34. DHS 'Emergency Housing Programme' (2009b) 4(3) of the National Housing Code 38: www.nwpg.gov.za/HumanSettlements/HousingCode.asp.
35. For a comprehensive analysis of all sanitation-related policies, see K Tissington 'Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice' (July 2011) Socio-Economic Rights Institute of South Africa (SERI) Resource Guide: www.seri-sa.org/images/stories/SERI_Guide_to_Basic_Sanitation_Jul11.pdf.
36. DWAF 'National Sanitation Policy' (October 1996) 3: www.dwaf.gov.za/Documents/Policies/NationalSanitationPolicy.pdf.
37. DWAF 'National Sanitation Policy' (October 1996) 3: www.dwaf.gov.za/Documents/Policies/NationalSanitationPolicy.pdf.
38. DWAF 'White Paper on Basic Household Sanitation' (September 2001) 5: www.dwaf.gov.za/Documents/Policies/SanitationReviewPolicy.pdf.
39. DWAF 'National Sanitation Strategy' (August 2005) 56: africasanitation.softp

- agecms.com/files/802976930/library/National_SANPOLICY_Aug2005.pdf.
40. DHS 'Revision of the 2001 White Paper on Basic Household Sanitation, 2001: National Sanitation Policy Conceptual Framework, Draft Version' (March 2011) 3: www.wisa.org.za/Show_document.aspx?Docid=146 (accessed on 4 September 2013).
41. DWAF 'Free Basic Sanitation Implementation Strategy' (April 2009) i: www.dwaf.gov.za/dir_ws/wspd/policyinfo.aspx?filen=556.
42. DWAF 'Free Basic Sanitation Implementation Strategy' (April 2009) ii: www.dwaf.gov.za/dir_ws/wspd/policyinfo.aspx?filen=556.
43. There are 169 WSAs in South Africa including metropolitan, district and local municipalities, as well as water boards and municipal companies.
44. Thus, although in many areas water is delivered by corporatised municipal entities such as Johannesburg Water (Pty) Ltd, which is a 100 per cent state-owned company, there is little to no outright water privatisation in South Africa. It should also be noted, however, that even private water companies, because of rendering a public service, would be bound to comply with the same administrative justice-related obligations to provide fair and just services as a public entity would be.
45. DWA 'National Water Services Regulation Strategy' (January 2010) 89: www.dwa.gov.za/dir_ws/dwqr/Default.asp?Pageid=6&SearchString=Strategy%20Document.
46. DWA 'National Water Services Regulation Strategy' (January 2010) 89: www.dwa.gov.za/dir_ws/dwqr/Default.asp?Pageid=6&SearchString=Strategy%20Document.
47. K Tissington 'Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice' (July 2011) Socio-Economic Rights Institute of South Africa (SERI) Resource Guide 59: www.seri-sa.org/images/stories/SERI_Guide_to_Basic_Sanitation_Jul11.pdf.
48. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012): www.info.gov.za/view/DownloadFileAction?id=178724.
49. DHS Ministerial Sanitation Task Team Report (July 2012): www.dhs.gov.za/uploads/reports/Sanitation_Task_Team_Report_July2012.pdf.
50. The MIG grant was first introduced in the 2005/2006 financial year, and each year the Division of Revenue Act sets out the allocation of MIG funds

- from the National Treasury per municipality. For the formula used to calculate the MIG, see D Still, N Walker and D Hazelton 'Basic Sanitation Services in South Africa – Learning from the past, planning for the future' (2009) Water Research Commission Research Report: www.wrc.org.za/Pages/DisplayItem.aspx?ItemID=8632&FromURL=%2FPages%2FAllKH.aspx%3F.
51. For the formula used to allocate National Treasury ES funds to municipalities, see *ibid* (Still et al) 112.
 52. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012): www.info.gov.za/view/DownloadFileAction?id=178724.
 53. K Tissington 'Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice' (July 2011) Socio-Economic Rights Institute of South Africa (SERI) Resource Guide 58: www.seri-sa.org/images/stories/SERI_Guide_to_Basic_Sanitation_Jul11.pdf.
 54. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 20: www.info.gov.za/view/DownloadFileAction?id=178724.
 55. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 20: www.info.gov.za/view/DownloadFileAction?id=178724.
 56. 2010 (4) BCLR 312 (CC).
 57. The Constitutional Court hearing was an appeal against a judgment of the South Gauteng High Court, which dismissed the application for the government to provide temporary sanitation services and high-mast lighting but did order the provision of refuse collection and communal taps for the settlement.
 58. Section 10 of the Constitution provides that everyone has the right to have their dignity respected and protected.
 59. The Court also rejected the applicants' attempt to rely on the rights to housing and dignity in the Constitution.
 60. D Bilchitz 'Is the Constitutional Court Wasting Away the Rights of the Poor?' *Nokotyana v Ekurhuleni Metropolitan Municipality*' (2010) 127(3) *South African Law Journal* 597–615.
 61. M Huchzermeyer 'A challenge to the state's avoidance to upgrade the Harry Gwala informal settlement' in *Cities with Slums: From Informal Settlement*

- Eradication to a Right to the City* (2011) Cape Town: Juta/UCT Press: chapter 9.
62. 2011 (10) BCLR 1077 (WCC).
 63. In Cape Town, the African National Congress is not the ruling party, i.e. it is an opposition party in the municipality.
 64. South African Human Rights Commission 'Report on the matter of African National Congress Youth League Dullah Omar Region o.bo. Ward 95 Makhaza Residents and City of Cape Town' (June 2010) case reference no: WC/2010/0029.
 65. *Beja* para. 80.
 66. *Beja* paras 81 and 83.
 67. *Beja* para. 149.
 68. *Beja* para. 150.
 69. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 7: www.info.gov.za/view/DownloadFileAction?id=178724.
 70. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 2: www.info.gov.za/view/DownloadFileAction?id=178724.
 71. Statistics South Africa 'Census 2011: Methodology and Highlights of Key Results' (2011) 13: www.statssa.gov.za/Census2011/Products/Census_2011_Methodology_and_Highlights_of_key_results.pdf.
 72. DHS Ministerial Sanitation Task Team Report (July 2012) 10: www.dhs.gov.za/uploads/reports/Sanitation_Task_Team_Report_July2012.pdf.
 73. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 15–16: www.info.gov.za/view/DownloadFileAction?id=178724.
 74. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 17: www.info.gov.za/view/DownloadFileAction?id=178724.
 75. K Tissington et al 'Submission on Access to Water and Sanitation in South Africa' (9 February 2009) Centre for Applied Legal Studies (CALS) 5–6.
 76. K Tissington et al 'Submission on Access to Water and Sanitation in South Africa' (9 February 2009) Centre for Applied Legal Studies (CALS) 6.
 77. For further details on the campaign see Equal Education link: www.equal-education.org.za/campaigns/minimum-norms-and-standards.

78. See, in this series, the paper on water by J Dugard for a discussion of water tariffs.
79. In order to satisfy the legislative and policy imperatives to provide access to basic services for poor communities, most municipalities in South Africa pursue targeted indigency policies with varying qualifying criteria and free basic services-related benefits. A few of the bigger metropolitan municipalities pursue universal access to basic levels of free basic services alongside a targeted programme for additional benefits for qualifying poorer households. Indigency policy targeting has been criticised for differing vastly and irrationally across municipalities and in general for being very onerous, and discouraging registration especially by the poorest and most vulnerable households, including child-headed households. See, for example, Centre for Applied Legal Studies, Centre on Housing Rights and Evictions and Norwegian Centre for Human Rights 'Water Services Fault Lines: An Assessment of South Africa's Water and Sanitation Provision across 15 Municipalities' (2008) CALS, COHRE & NCHR 34-40: www.wits.ac.za/files/resf5179ffe9b24ecfa4110e1ee24cbb20.pdf (accessed on 30 September 2011); and K Tissington 'Targeting the Poor': An Analysis of Free Basic Services (FBS) and Municipal Indigent Policies in South Africa' (November 2013) Socio-Economic Rights Institute of South Africa (SERI): www.seri-sa.org/images/Targeting_the_Poor_Nov13.pdf. The issue of indigency policies is pursued in further detail in the paper in this series on water by J Dugard.
80. K Tissington 'Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice' (July 2011) Socio-Economic Rights Institute of South Africa (SERI) Resource Guide 65: www.seri-sa.org/images/stories/SERI_Guide_to_Basic_Sanitation_Jul11.pdf (accessed on 18 October 2013).
81. N Mjoli, G Sykes and T Jooste 'Towards the Realization of Free Basic Sanitation: Evaluation, Review and Recommendations' (November 2009) Water Research Commission Research Report vii: www.wrc.org.za/Knowledge_Hub/Documents/Research_Reports/TT_422-09_Water_Policy.pdf (accessed on 30 September 2013).
82. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012): www.info.gov.za/view/DownloadFileAction?id=178724 (accessed on 23 October 2013).

83. Water Dialogues-South Africa 'Straight Talk to Strengthen Delivery in the Water Services Sector' (August 2009) Water Dialogues-South Africa Synthesis Report 2.
84. SAICE 'Infrastructure Report Card for South Africa 2011' (May 2011) 19(4) *Civil Engineering* 16: www.saice.org.za/downloads/monthly_publications/2011/2011-Civil-Engineering-may.pdf (accessed on 30 September 2013).
85. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 9: www.info.gov.za/view/DownloadFileAction?id=178724 (accessed on 23 October 2013)
86. Cited in DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 10: www.info.gov.za/view/DownloadFileAction?id=178724 (accessed on 23 October 2013).
87. The Water Research Commission is a semi-autonomous research institution established in terms of legislation from 1971, to provide strategic research related to water resource and services management in South Africa: www.wrc.org.za/Pages/default.aspx (accessed on 30 September 2013).
88. D Still, N Walker and D Hazelton 'Basic Sanitation Services in South Africa – Learning from the past, planning for the future' (2009) Water Research Commission Research Report v: www.wrc.org.za/Pages/DisplayItem.aspx?ItemID=8632&FromURL=%2FPages%2FAllKH.aspx%3F (accessed on 30 September 2013).
89. SAICE 'Infrastructure Report Card for South Africa 2011' (May 2011) 19(4) *Civil Engineering* 16: www.saice.org.za/downloads/monthly_publications/2011/2011-Civil-Engineering-may.pdf (accessed on 30 September 2013).
90. K Tissington 'Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice' (July 2011) Socio-Economic Rights Institute of South Africa (SERI) Resource Guide 64: www.seri-sa.org/images/stories/SERI_Guide_to_Basic_Sanitation_Jul11.pdf (accessed on 18 October 2013).
91. K Tissington 'Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice' (July 2011) Socio-Economic Rights Institute of South Africa (SERI) Resource Guide 64: www.seri-sa.org/images/stories/SERI_Guide_to_Basic_Sanitation_Jul11.pdf (accessed on 18 October 2013).
92. DHS Ministerial Sanitation Task Team Report (July 2012) 16: www.dhs.gov.z

- a/uploads/reports/Sanitation_Task_Team_Report_July2012.pdf (accessed on 9 October 2013).
93. C Paton 'It's still the pits' (19 August 2010) *Financial Mail*: www.bdlive.co.za/articles/2012/04/10/perverse-effect-of-rural-pit-toilet-grant;jsessionid=3ADE8586F804B559FoA1539E8716DDoD.present1.bdfm (accessed on 29 September 2013).
 94. SAICE 'Infrastructure Report Card for South Africa 2011' (May 2011) 19(4) *Civil Engineering* 16: www.saice.org.za/downloads/monthly_publications/2011/2011-Civil-Engineering-may.pdf (accessed on 30 September 2013).
 95. The Green Drop system certifies that waste water systems and processes are operating well: www.dwa.gov.za/Dir_WS/GDS/ (accessed on 30 September 2013).
 96. DWA 'Statement by the Minister of Water and Environmental Affairs Mrs Edna Molewa at the release of the Blue Drop and Green Drop assessment reports' (30 June 2013): www.dwaf.gov.za/Communications/PressReleases/2011/BlueDropGreenDropAssRep.pdf (accessed on 30 September 2013).
 97. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 9: www.info.gov.za/view/DownloadFileAction?id=178724 (accessed on 23 October 2013).
 98. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 26: www.info.gov.za/view/DownloadFileAction?id=178724 (accessed on 23 October 2013).
 99. SAICE 'Infrastructure Report Card for South Africa 2011' (May 2011) 19(4) *Civil Engineering* 16: www.saice.org.za/downloads/monthly_publications/2011/2011-Civil-Engineering-may.pdf (accessed on 30 September 2013).
 100. There is some debate as to whether dry sanitation options are suitable for all areas, especially the more humid climate of KwaZulu-Natal. Beyond this, some of the dry toilets that have been implemented are not appropriate for women as they attempt to separate into two different compartments the faecal matter and urine, which is not possible with women's physiology.
 101. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 9: www.info.gov.za/view/DownloadFileAction?id=178724 (accessed on 23 October 2013).

102. M Gontsana 'Portable flush toilets: What are they and why the fuss' (12 June 2013): groundup.org.za/content/portable-flush-toilets-what-are-they-and-why-fuss (accessed on 23 October 2013).
103. Africa Check 'Claim that no-one in Cape Town has to use "bucket toilets" is wrong' (7 June 2013): www.africacheck.org/reports/claim-that-no-one-in-cape-town-has-to-use-bucket-toilets-is-wrong/ (accessed on 23 October 2013).
104. DHS Ministerial Sanitation Task Team Report (July 2012) 69: www.dhs.gov.za/uploads/reports/Sanitation_Task_Team_Report_July2012.pdf (accessed on 9 October 2013).
105. Further research is necessary to delve more deeply into the policy- and institutional competency-related questions raised here.
106. DHS Ministerial Sanitation Task Team Report (July 2012) 16: www.dhs.gov.za/uploads/reports/Sanitation_Task_Team_Report_July2012.pdf (accessed on 9 October 2013).
107. This amount excludes any additional amounts derived from unconditional grants such as the ES (a substantial amount in any municipality), as well as municipal revenue.
108. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 3: www.info.gov.za/view/DownloadFileAction?id=178724 (accessed on 23 October 2013).
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110. S Mokgalapa 'South Africa: Human Settlements Shifts Goal Posts for Sanitation Backlog Deadline, Again' (13 October 2013) Democratic Party Press Release: allafrica.com/stories/201310130112.html (accessed on 23 October 2013).
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112. DHS 'National Sanitation Programme: Presentation to Parliamentary Port-

- folio Committee on Human Settlements' (11 August 2010) DHS: Pretoria.
113. DHS 'National Sanitation Programme: Presentation to Parliamentary Portfolio Committee on Human Settlements' (11 August 2010) DHS: Pretoria.
114. DHS 'Annexure A: Programme Delivery and Actions by the National Sanitation Programme Unit' (11 August 2011) 19 Briefing document presented to the Parliamentary Portfolio Committee on Human Settlements, DHS: Pretoria.
115. K Tissington 'Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice' (July 2011) Socio-Economic Rights Institute of South Africa (SERI) Resource Guide 66: www.seri-sa.org/images/stories/SERI_Guide_to_Basic_Sanitation_Jul11.pdf (accessed on 18 October 2013).
116. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 18: www.info.gov.za/view/DownloadFileAction?id=178724 (accessed on 23 October 2013).
117. Across the country, FBW and especially FBSan policies are implemented in an ad hoc manner with widely varying compliance and differing criteria and benefits and with little to no national regulation. In violation of law and policy, some municipalities do not supply free basic services at all, while others supply only FBW and no FBSan (Centre for Applied Legal Studies, Centre on Housing Rights and Evictions and Norwegian Centre for Human Rights 'Water Services Fault Lines: An Assessment of South Africa's Water and Sanitation Provision across 15 Municipalities' (2008) CALS, COHRE and NCHR 31–4).
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125. DHS 'Media statement issued by Department of Human Settlements 14 July 2011 on the toilet saga' (14 July 2011): www.iol.co.za/news/south-africa/sexwale-says-team-will-probe-toilet-saga-1.1099488 (accessed on 28 September 2013).

The right to water in South Africa

JACKIE DUGARD

We want the water of this country to flow out into a network – reaching every individual – saying: here is this water, for you. Take it; cherish it as affirming your human dignity; nourish your humanity...Water – gathered and stored since the beginning of time in layers of granite and rock, in the embrace of dams, the ribbons of rivers – will one day, unheralded, modestly, easily, simply flow out to every South African who turns a tap. That is my dream.

– ANTJIE KROG¹

Introduction

On 13 April 2011, during a protest about inadequate water services in Maqheleng township (Setsoto municipality, Ficksburg, Free State), community leader Andries Tatane was shot dead by police while attempting to shield elderly residents from a police water cannon. Commenting in the aftermath of the protest – which was organised by Maqheleng Concerned Citizens (a local community organisation) – Maqheleng Con-

cerned Citizens' chairperson Sam Motseare poignantly lamented the death of his colleague, as well as the circumstances that led to the tragedy:

Tatane sacrificed his life to free us from the shackles of the Setsoto municipality. If our rights for clean water had been respected, we wouldn't be here. If our rights for a clean environment that is free of stinking sewage had been respected, we wouldn't be here. When will this sub-standard life come to an end, just when? Maybe the day Tatane died marked a turning point in the history of Ficksburg, Maqheleng.²

Although the death of Andries Tatane did not put an end to the water services-related problems of the residents of Maqheleng, it did mark a turning point in raising public awareness about inadequate access to water in South Africa and the rising levels of frustration at the grassroots level around this issue. As highlighted in a recent research report, the single most cited concern of local protestors after housing (36.33 per cent), is access to water (18.36 per cent).³ The failure to advance adequate access to water services to all residents – illustrated by rising protest, as well as litigation such as the *Mazibuko* case against prepayment water meters in Phiri, Soweto (outlined below) – is all the more striking given the post-apartheid government's focus on ensuring equitable access to water.

When the African National Congress (ANC)-led government was elected to power by the vast majority of South Africans in April 1994, one of the historical wrongs expected to be addressed was the inequitable distribution of water services. As recognised by then Minister of Water and Forestry Affairs, Kader Asmal, in the introduction to the 1997 White Paper on a National Water Policy for South Africa:

South Africa's water law comes out of a history of conquest and expansion. The colonial law-makers tried to use the rules of the well-watered colonising countries of Europe in the dry and variable climate of Southern Africa. They harnessed the law, and the water, in the interests of a dominant class and group which had privileged access to land and economic power. It is for this reason

that the new Government has been confronted with a situation in which not only have the majority of South Africa's people been excluded from the land, but they have been denied either direct access to water for productive use or access to the benefits from the use of the nation's water. The victory of our democracy now demands that national water use policy and the water law be reviewed. Our Constitution demands this review, on the basis of fairness and equity, values which are enshrined as cornerstones of our new society.⁴

In April 1994 an estimated twelve million people or 30 per cent of the population did not have access to piped water.⁵ In many respects the advances made in connecting previously unconnected households to the water supply grid are one of the success stories of South Africa – according to the 2011 national census, approximately 91.3 per cent of households now have access to piped water.⁶ Nevertheless, despite this commendable progress, systemic problems remain in the qualitative aspects of access to water services, particularly by poor households such as those situated in Maqheleng and Phiri. In general terms, the main underlying reason for continuing problems is the absence of an effective and/or independent national water regulator to ensure that the raft of progressive laws and policies outlined below are appropriately complied with by local government.

This paper examines the situation pertaining to basic water services in South Africa, first reviewing the legal, policy and functional frameworks, before undertaking a rights-based fault-line analysis of the systemic problems.

Legal, policy and functional frameworks

International and regional law

The main international convention governing socio-economic rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) does not contain an explicit reference to the right to water.

However, historically, the right to water was viewed as an indirect right linked to *inter alia* the right to an adequate standard of living in Article 11(1) of the ICESR.⁷ It was also explicitly recognised in relation to membership of vulnerable identity groups including children,⁸ rural women,⁹ people with disabilities¹⁰ and prisoners of war.¹¹ And, in 2002, the United Nations Committee on Economic, Social and Cultural Rights (CESCR – the body that interprets the ICESCR and clarifies related obligations) adopted General Comment 15 on the right to water (General Comment 15), which states:

Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realisation of other human rights ... The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related diseases and to provide for consumption, cooking, personal and domestic hygienic requirements.¹²

While recognising that some of the contours of the right to water are context-dependent, General Comment 15 provides generally applicable parameters of the normative content regarding availability, quality, accessibility (physical, economic, non-discrimination and information dimensions). Possibly the most contentious parameter – particularly in the South African context where the sufficiency of the government's Free Basic Water (FBW) policy was challenged in the Constitutional Court in the *Mazibuko* case (see below) – is that on availability.

According to General Comment 15, the supply for each person should be sufficient and continuous for personal and domestic uses including drinking, personal sanitation, washing of clothes, food preparation and personal and household hygiene. The General Comment does not stipulate a specific amount of water to be provided for these purposes, but it notes that the amount available to every person should correspond

with the World Health Organisation (WHO) guidelines. In this respect, two WHO sources are footnoted.¹³ First, a 2002 study by Guy Howard and Jamie Bartram (published in 2003), which establishes that at a service level allowing for between five and twenty litres of water per person per day carries a very high level of health concern, a service level allowing for between twenty and 50 litres of water per person per day carries a high level of health concern, while a service level allowing for 100 litres of water per person per day and above is optimal.¹⁴ Second, a 1996 study by Peter Gleick (who was a deponent in the *Mazibuko* water rights case), which highlights that to meet basic needs and lead a healthy and dignified life, humans require at least 50 litres of water per person per day, broken down into basic functions:

- Drinking water: five litres per person per day;
- Sanitation: twenty litres per person per day;¹⁵
- Bathing: fifteen litres per person per day; and
- Cooking and kitchen: ten litres per person per day.¹⁶

Regarding quality, General Comment 15 states: ‘The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person’s health’ and it should be an acceptable colour, odour and taste.¹⁷ For accessibility, General Comment 15 stresses the obligations to ensure that water services and facilities are within safe *physical* reach of all sections of the population *without discrimination* on any prohibited grounds, are *affordable* for all, and that there is sufficient readily available *information* about all water services.¹⁸

The absence of an explicit self-standing right to sanitation was remedied in 2010 when – guided by the United Nations Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation (this mandate was created in September 2008 and in March 2011 the mandate was reconstituted as the Special Rapporteur on the human right to safe drinking water and sanitation)¹⁹ – on 28 July 2010, the United Nations General Assembly adopted a resolution recognising ‘the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human

beings'.²⁰ Celebrating the move, Amnesty International notes that the resolution:

Effectively re-affirms that the rights to water and sanitation are implicitly contained in several human rights treaties, including the International Covenant on Economic, Social and Cultural Rights ... to which 160 States are party, and the UN Convention on the Rights of the Child ..., which has reached nearly universal ratification, and are therefore legally binding rights.

Further consolidating this move, on 15 September 2010, the United Nations Human Rights Council adopted a resolution affirming that the right to water and sanitation are part of international human rights law and are therefore legally binding.²¹ The CESCR's General Comment 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights (2005) emphasises the need to address the ways in which gender roles affect access to determinants of health, including water.²² General Comment 19 on the right to social security stresses that all social security schemes, including family and child benefits, should 'ordinarily' enable the recipients to access minimum essential levels of *inter alia* water.²³ Finally, the recent General Comment 20 on non-discrimination in economic, social and cultural rights emphasises the importance of ensuring access to water to all groups, particularly women and girl-children, noting that 'ensuring that all individuals have equal access to housing, water and sanitation will help overcome discrimination against women and girl-children and persons living in informal settlements and rural areas', and that access to water services should not be made conditional on a person's land tenure status.²⁴

As with all international socio-economic rights, the international right to water entails an obligation to immediately satisfy essential levels of the right (minimum core content), as well as a parallel and ongoing obligation to use the maximum available resources to achieving progressively the full realisation of the right.²⁵ In terms of the international right to water, General Comment 15 stipulates that the minimum core content to be immediately achieved by states (or to be justified in terms of insuffi-

cient resources) includes an obligation to ensure everyone's equitable and safe physical and economic access, on a non-discrimination basis, to the minimum essential amount of water required for personal and domestic use, and to adopt a national water strategy and plan of action setting out how the right is to be realised and prioritising the most disadvantaged and marginalised groups.²⁶

South Africa has not ratified the ICESCR. However, as a signatory, it is bound to not undermine its provisions.²⁷ Moreover, in its 1995 judgment on the death penalty, the South African Constitutional Court clarified that, in the context of interpreting the South African Bill of Rights, section 39(1) of the South African Constitution Act 108 of 1996 (Constitution) requires the courts to consider non-binding as well as binding international law.²⁸ Nonetheless, given the non-ratification of the ICESCR, the South African Constitutional Court has taken the view that the South African Government is not obliged to pursue a minimum core content approach to socio-economic rights but rather that it must have a reasonable programme to progressively realise each right within available resources.²⁹ It should be noted, in light of the government's announcement in October 2012 that it would ratify the ICESCR, that if the ICESCR is ratified [as it indeed was in 2015], South Africa will be bound to pursue the minimum core approach to socio-economic rights.

South Africa has ratified the African Charter on Human and People's Rights (ACHPR, 1981). While this Charter contains no explicit right to water, Article 16 on the right to enjoy the best attainable state of health could be seen to encapsulate a right to water, as confirmed by the African Commission on Human and People's Rights, which, in the complaint of *Free Legal Assistance Group v Zaire*, held that 'the failure of the [now Democratic Republic of Congo] government to provide basic services such as safe drinking water ... constitutes a violation of Article 16'.³⁰ And in *Centre on Housing Rights and Evictions (COHRE) v Sudan*, the ACHPR found that the failure of the Sudanese government to stop inter alia the poisoning of water sources including wells by the *janjaweed* militia in the Darfur region amounted to a violation of Article 16.³¹

South Africa has also ratified the African Charter on the Rights and Welfare of the Child (1990), which provides in Article 14(2)(c) that States

parties have an obligation to ensure the provision to children of 'adequate nutrition and safe drinking water'. In addition, South Africa has ratified the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003), which stresses in Article 15(a) states' obligations to provide women with access to clean drinking water.

Notwithstanding the persuasiveness of, and any international law obligations related to, international and regional human rights instruments, in South Africa the enforcement of the right to water (as with all socio-economic rights) occurs largely within domestic legal and policy frameworks.

South African law

In recognition of the apartheid legacy of inadequate access to water, post-apartheid legal (and policy) documents have sought to create a framework for the equitable provision of water. These frameworks establish various state obligations in respect of the provision of basic water supply to poor communities.

Section 27(1)(b) of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution) guarantees everyone's right of access to sufficient water. Other relevant constitutional rights are: section 9's equality clause, which requires that there be no unfair discrimination in the provision of services, section 10's right to human dignity, section 24's right to an environment that is not harmful to health or wellbeing, section 26's right to housing and section 27's health care-related rights.

Also relevant is section 33 on the right to just administrative action which, along with the Promotion of Administrative Justice Act 3 of 2000 (PAJA), creates the framework for procedural fairness (embracing the rights to reasonable notice of a decision and an opportunity to make representation regarding your circumstances before a decision affecting your rights is taken) in all administrative decisions including those to disconnect water services. These administrative protections are important because water services (including waterborne sanitation), whether publicly or privately undertaken, are public services, falling within the definition of administrative action. This means that water services must comply with administrative justice requirements, and if anyone's rights

are adversely affected by an administrative action, such action can be brought under review.

Finally, Part B of Schedule 4 of the Constitution mandates local government as responsible for potable water supply and domestic waste water and sewage disposal services, and section 153(a) of the Constitution provides that local government must 'structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community and to promote the social and economic development of the community'.

Beyond the Constitution, the Water Services Act 108 of 1997 (Water Services Act) is the primary national law relating to water (and sanitation) services. The other main piece of legislation governing water is the National Water Act 36 of 1998 (National Water Act), which deals with the management and protection of water resources in the country. Although until now water services and water resources have been managed under separate mandates and two different acts, there is currently a government-initiated water sector review underway that seeks to merge the Water Services Act and the National Water Act.³²

One of the main objectives of the Water Services Act, as set out in section 2(a), is to provide for 'the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well being'. The Water Services Act defines basic water services as 'the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene'.³³ It acknowledges that, although municipalities have the responsibility to administer water services, all spheres of government have a duty towards the goal of ensuring universal access to basic water services.

Section 3(2) of the Water Services Act establishes that 'every water services institution must take reasonable measures to realise these rights'. Echoing the procedural requirements for administrative action under PAJA, Section 4(3) of the Water Services Act states that procedures for the limitation and discontinuation of water must be 'fair and equitable' and 'provide for reasonable notice of intention to limit or discontinue water

services and for an opportunity to make representations'. Section 5 of the Water Services Act stipulates that if the water services provider is unable to meet the requirements of all its existing consumers, 'it must give preference to the provision of basic water supply and basic sanitation'.

To further concretise the definition of basic water supply, on 8 June 2011 the Regulations Relating to Compulsory National Standards and Measures to Conserve Water (Compulsory National Standards) were published in terms of section 9 of the Water Services Act. Regulation 3 provides that the minimum standard for basic water supply services is:

- a) The provision of appropriate education; and
- b) A minimum quantity of potable water of 25 litres per person per day or six kilolitres per household per month³⁴ –
 - (i) At a minimum flow rate of not less than 10 litres per minute;
 - (ii) Within 200 metres of a household; and
 - (iii) With an effectiveness such that no consumer is without a supply for more than seven full days in any year.

On 11 June 2011, the Norms and Standards in Respect of Tariffs for Water Services (Norms and Standards) were published in terms of section 10(1) of the Water Services Act, containing a number of important provisions relating to tariffs and cross-subsidies for water services. Section 3(2) of the Norms and Standards requires that water services institutions must consider the right of access to basic water supply when determining which water services tariffs are to be subsidised. Section 6(2) of the Norms and Standards stipulate that all domestic water supply tariffs must have a rising block tariff structure that includes at least three rising blocks with the tariff increasing for higher consumption blocks (i.e. luxury water users pay more per kilolitre than basic users pay) and the first tariff block should be 'set at the lowest amount, including a zero amount'.³⁵

The Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act) governs the provision of water services at the local government level and reinforces the emphasis on equitable access to water-related services. Section 4(2)(f) stipulates that municipalities must 'give members of the local community equitable access to the municipal services to which they are entitled'. Section 73 states *inter alia* that a munic-

ipality must ensure that 'all members of the local community have access to at least the minimum level of basic municipal services'.³⁶ In relation to tariffs, section 74(2)(c) establishes that 'poor households must have access to at least basic services' through 'special' or 'lifeline' tariffs for 'low levels of use or consumption of services or for basic levels of service' and/or any other direct or indirect method of subsidisation of tariffs for poor households'.

South African policy³⁷

In November 1994, the newly created Department of Water Affairs and Forestry (DWAF) (which was subsequently renamed Department of Water Affairs or DWA), formulated a 'White Paper on Water Supply and Sanitation Policy'.³⁸ The paper set out the institutional framework for water and sanitation services, which was later legislated in the Water Services Act. The 1994 White Paper was supplemented in 1997 by a 'White Paper on a National Water Policy for South Africa'³⁹ and in 2002 by a 'White Paper on Water Services'.⁴⁰ These policies amplified the equity-driven provisions of the Water Services Act and other water-related legislation, and culminated in the adoption of an FBW policy in 2001, which was concretised in the 'Free Basic Water Implementation Strategy' of August 2002.⁴¹ In terms of the FBW policy, poor households should be allocated a free basic quantity of potable water, with a six kilolitre per household per month minimum threshold, and with encouragement to provide additional free basic water if a municipality can afford it. Although this flexibility is arguably a pragmatic response by national government to the issue of municipal autonomy, as well as the differing levels of financial bases across municipalities, in practice it has resulted in a patchwork approach to the provision of FBW, which has been exacerbated by the fact that the policy also allows maximum flexibility in terms of how municipalities target FBW allocation (see below). FBW is financed through two main sources – the cross-subsidies afforded through municipal rising block water tariffs (whereby the free first block is financed through the higher tariffs at the top end of consumption), and the Equitable Share Allocation to municipalities from National Treasury (see below).

Of direct relevance to FBW provision are the means-tested indigency policies that municipalities use to allocate FBW to beneficiaries. Section 104(1)(a) of the Municipal Systems Act provides that the Minister may make regulations or issue guidelines to provide for or regulate the development and implementation of an indigent policy. To this end, in 2005 the Department of Provincial and Local Government (DPLG) (now called the Department of Co-operative Governance and Traditional Affairs or CoGTA) published a 'National Framework for a Municipal Indigent Policy',⁴² as well as the 'Guidelines for the Implementation of the National Indigent Policy by Municipalities'.⁴³ Within such frameworks, municipalities must decide how they are going to implement an indigency policy and particularly how they aim to target beneficiaries. This is an under-researched area but recently there is increasing acknowledgment that there are widespread problems with the implementation of indigency policies that result *inter alia* in very low registration and uptake of benefits by formally-qualifying households.⁴⁴

Functional and financial arrangements

As mandated by Part B of Schedule 4 of the Constitution, along with the Water Services Act and the Municipal Systems Act, the primary responsibility for providing water services lies with local government, which, when acting in terms of authority to undertake water services, is referred to as a Water Services Authority (WSA).⁴⁵ The Water Services Act requires that every WSA must draft a Water Services Development Plan (WSDP) for its area of jurisdiction and part of this plan is to secure Water Services Providers (WSPs) to assume operational responsibility for providing water services to end users. A WSA may perform the function of a WSP directly or may enter into a contract with a WSP (often a municipal entity such as Johannesburg Water (Pty) Ltd in Johannesburg). A WSA may only enter into a contract with a private sector WSP after considering all public sector WSPs that are willing and able to perform the relevant functions in that area,⁴⁶ and private water contracts can be challenged if the terms become too onerous.⁴⁷ These onerous conditions have led experts to conclude that it is unlikely that private water contracts – such as were initially awarded to BiWater and SAUR International in the

Dolphin Coast – will be awarded in South Africa in future.⁴⁸

Provincial government, together with national government, has the constitutional responsibility to support and strengthen the capacity of local government in the fulfilment of its functions. It is also meant to regulate local government to ensure effective performance. Provincial government departments such as Public Works can undertake or oversee the construction of water (and sanitation) infrastructure, and provincial departments of Healthcare and Education are involved in setting design standards for water (and sanitation) facilities as schools, hospitals and clinics.

The DWA – formerly the DWAF – is the water and sanitation sector leader in South Africa. DWA is the custodian of South Africa's water resources (via the National Water Act) and water services (via the Water Services Act). Thus DWA is responsible for bulk reticulation and all water services regulation. Since January 2010, in terms of the National Water Services Regulation Strategy (NWSRS), DWA is also responsible for being the national water services regulator – prior to this there was no national water services regulator. Although it was a welcome move to have a national water services regulator, civil society had hoped for an independent regulator, and there are ongoing concerns about DWA's willingness to regulate especially given that it is both the main 'player' and only 'referee' in the water services sector. Also, as highlighted below, it is as yet unclear how effective DWA has been in this role, an issue that requires further investigation.

Under the NWSRS, DWA operates a Compliance, Monitoring and Enforcement Directorate, which is mandated to enforce compliance with water-related legislation and regulation. Where there is non-compliance, the Directorate issues pre-directive notices and injunction directives and then can take cases forward in the water tribunal or bring criminal prosecutions in the normal courts. To date, the Directorate has focused mostly on water resources-related issues rather than water services-related issues. In respect of water services, the NWSRS defines various DWA regulatory functions, including the monitoring of applications for water services-related Municipal Infrastructure Grants (MIG – see below) and the status of operations and maintenance of water services-related infrastructure, as well as the maintenance of on-site sanitation. However,

DWA admits that it has not been able to effectively carry out all its monitoring and regulation functions.⁴⁹ In addition, some of its regulatory powers are circumscribed (for example, while DWA can reject MIG applications that do not comply with policy requirements, it has no power of sanction if project execution is flawed), further undermining its regulatory potential.⁵⁰

It is envisaged that DWA has the power to reassign water services functions to other institutions of government if intractable water services problems arise⁵¹ but to date DWA has hardly, if at all, exercised this authority. Rather, where municipalities have become dysfunctional, there is a national government process in terms of section 139 of the Constitution, which allows provincial government to place municipalities under provincial administration.⁵² It is usually the case that where there are serious problems with water services functions, other municipal functions are also in trouble, and the precise delineation between DWA regulation and provincial government regulation in respect of addressing failing water services is not clear. More generally, there is scant information regarding the impact of placing a municipality under administration and whether this improves service delivery or simply results in further disconnections and cutbacks to save money – this is a subject that requires investigation.

Previously there were three main sources for the provision of basic water services in South Africa: the MIG for capital costs of infrastructure development,⁵³ the Equitable Share (ES) for operations and maintenance-related costs,⁵⁴ as well as internal revenue generated by municipalities through services charges and rates. Recently the National Treasury announced two new grants to be administered through the DHS – the Urban Settlements Development Grant (USDG) (which has replaced the MIG in metropolitan municipalities) and the Rural Households Infrastructure Grant (RHIG). The USDG is aimed at assisting metropolitan municipalities (cities) to plan in a more integrated way with regard to the provision of bulk water and sanitation services to low-cost housing developments in well-located areas near social and economic facilities and opportunities. As it was only introduced in March 2011, it is too soon to assess the efficacy of this grant in alleviating water services access-

related problems. However, MIG funds have historically been under- and/or misspent by most municipalities.⁵⁵ The RHIG, also introduced in March 2011, aims to address backlogs in water supply and sanitation in rural areas by providing funding for the provision of on-site sanitation and water facilities. There have been initial problems around allocating this grant due to the ongoing confusion caused by the move in 2009 of sanitation away from DWA and to DHS (see FHR paper on sanitation by J Dugard).⁵⁶

Regarding the ES, there are debates as to whether it is sufficient to cover the costs of free basic service provision, particularly in poor municipalities that are not able to recoup much revenue through charging for services.⁵⁷ Beyond this, the ES is an unconditional grant, meaning that municipalities have full autonomy to spend these funds as they see fit. There is mounting evidence that municipalities do not spend ES grants as they should – on basic services including water services,⁵⁸ prompting suggestions that ways should be found to ensure more accountability regarding ES funds to municipalities.

South African jurisprudence

In South Africa, socio-economic rights are explicitly judiciable and twenty socio-economic rights-related cases have been decided by the Constitutional Court since its establishment in 1996. These include judgments on the rights of access to housing, social security, sanitation and electricity. And, on 8 October 2009, the South African Constitutional Court handed down judgment in its first and only water rights case to date in the matter of *City of Johannesburg and Others v Mazibuko and Others (Mazibuko)*,⁵⁹ which concerned two main issues related to the City of Johannesburg's water services policy and provision: the reasonableness and sufficiency of the City's FBW allocation of six kilolitres per household per month, and the lawfulness of the City's imposition of prepayment water meters on poverty-stricken households in Phiri, Soweto.

In 2001, the City of Johannesburg formulated a project to limit unpaid-for water consumption in Soweto by means of the mass installation of prepayment water meters. Called Operation Gcin'amanzi (meaning 'to conserve water' in isiZulu), the project started with a pilot in Phiri,

one of the poorest suburbs of Soweto. As an apparent sweetener to the Phiri residents, at the time of installing prepayment water meters the City of Johannesburg also introduced the FBW allocation of six kilolitres per household per month that was already available to most other middle- and upper-income areas of Johannesburg. Indeed, when first introduced, the City referred to prepayment water meters as Free-pay water meters, referring to the FBW component for the first six kilolitres. However, unlike the conventional meters available throughout Johannesburg's richer suburbs, which provide water on credit with numerous protections against unfair disconnections, prepayment water meters automatically disconnect once the FBW supply is exhausted, unless additional water credit is purchased and loaded, thus leaving poor households without water for days on end each month.

Determined to push for at least 50 litres of FBW per person per day (as per the expert advice of Peter Gleick and according with his recommendations referenced in General Comment 15 of the CESCR) and to not accept prepayment water meters, on 12 July 2006 the residents of Phiri launched a legal challenge in the Johannesburg High Court, where the case was heard between 3 and 5 December 2007. The ruling of 30 April 2008 found in the applicants' favour on all grounds, declaring prepayment water meters unlawful and unconstitutional, declaring the City's FBW policy to be unreasonable and ordering the City to provide the applicants and all similarly-situated residents with 50 litres of FBW per person per day.⁶⁰ However, the judgment was appealed to the Supreme Court of Appeal, where the judgment of 25 March 2009 upheld the appeal but ruled in the applicants' favour on both substantive grounds, again declaring prepayment water meters unlawful and the City's FBW policy unreasonable.

Due to perceived problems with the order of invalidity regarding prepayment water meters, the applicants decided to appeal the decision to the Constitutional Court.⁶¹ The Constitutional Court's judgment of 8 October 2009 took the applicants and many commentators by surprise because it ruled against the applicants on all grounds,⁶² including finding prepayment water meters to be lawful on the grounds *inter alia* that they 'suspend' the water supply rather than discontinue it and, sidestepping

the question of limitation, therefore do not violate the section 4(3) of the Water Services Act protections against unprocedural disconnection.⁶³

Elsewhere I have written about the positive socio-political (and material) consequences of the litigation, notwithstanding the judgment.⁶⁴ However, for the purposes of establishing jurisprudence on the right to water in South Africa and particularly given that this is the first and only water-related case to have been heard by the Constitutional Court to date, the judgment provides almost nothing to go on in terms of informing the content and interpretation of the right.

The little guidance that can be extracted from the judgment relates to the Court's reasoning around the finding that the City's FBW policy was reasonable. Here – following its housing-related analysis of sections 26(1) and 26(2) in *Grootboom*,⁶⁵ and health-related analysis of sections 27(1)(a) and 27(2) in *Treatment Action Campaign*⁶⁶ – the Court pursued its prevailing approach regarding the meaning of the section 27(1)(b) right of everyone to have access to sufficient water as being qualified by the section 27(2) caveat of the state's obligation to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'. This means that in the Court's view neither the section 27(1)(b) right nor the section 27(2) right exists as a self-standing or stand-alone entitlement. Rather, 'in a somewhat inverted analysis', the content of each right rests on the reasonableness of the state's response to progressively realising that right, i.e. determining the 'content of each right in the first place – that is, working out what the right entitles citizens to – is to proceed on the basis of a determination in the second place of what it would be reasonable for the state to provide, within available resources, in order to realise the right progressively'.⁶⁷

This approach by the Constitutional Court – of requiring the state only 'to take reasonable legislative and other measures progressively to realise the achievement of the right ... within available resources'⁶⁸ – has been criticised for reducing the content of the socio-economic right to being defined by the action that the government takes in advancing access to that good.⁶⁹ Regardless of any criticism, Langford et al point out that this trajectory is consistent with the Court's apparent rejection of the minimum core content approach and its dismissal of the notion

that socio-economic rights entail some kind of minimum core content enforceable against the state in all circumstances, thus significantly departing from the approach of the CESR.⁷⁰ However, before turning to the Court's specific finding in relation to the reasonableness of the City of Johannesburg's FBW policy in *Mazibuko*, it is worth noting that the Regulation 3(b) requirement of a minimum basic water supply of 25 litres per person per day or six kilolitres per household per month is, in effect, a minimum core approach as pursued by the legislature to ensure that all households have a minimum basic level of water.⁷¹ Whether or not this basic 'minimum core' amount is sufficient was part of the *Mazibuko* litigation but has not, to date, been conclusively answered by the Court in the *Mazibuko* or any other context.

In the Constitutional Court, the *Mazibuko* applicants argued that the FBW was unreasonable because it was insufficient to meet basic needs in the context of multi-dwelling households, extreme poverty and water-borne sanitation, which meant that water supplies were exhausted midway through each month and households were left without their water connection for days and even weeks at a time. Largely ignoring the common cause fact of households being left without access to water, the Court disagreed with the applicants' contention that the City's FBW policy was unreasonable, holding that the policy 'falls within the bounds of reasonableness and therefore is not in conflict with either section 27 of the Constitution or with the national legislation regulating water services'.⁷² The Court's rationale for finding the policy reasonable has nothing to do with an inquiry into the needs of the applicants or the resources available to the City. Rather, the Court found the policy to be reasonable mainly because it had changed over time in response to the litigation in the sense that when the applicants first went to court, the policy provided a maximum of six kilolitres of FBW per household per month and, by the time the matter was heard in the Constitutional Court, the City had instituted a new policy in terms of which qualifying households could register for substantially more FBW.⁷³

Beyond confirming in *Mazibuko* its previous finding (in *Grootboom* and *Treatment Action Campaign*), that one of the parameters of a reasonable policy is that it must be flexible, the Constitutional Court has

to date not provided much clarity on what obligations, if any, the state has regarding the duty to progressively realise the right to water, other than to note that the government's water policies must be flexible and change over time. We are therefore none the wiser as to how or in what ways the policies should change. Indeed, it is not even clear from the *Mazibuko* decision whether the Court holds there to be an obligation to provide the regulated minimum amounts of water *for free*.⁷⁴ However, two High Court cases appear to have established that, where there are no water connections at all, the government has an obligation to ensure access to the minimum regulated amount and that, where this is in the context of an informal settlement, such connections (which are usually in the form of communal taps) are invariably undertaken at the government's expense. Thus, following the initial hearing in the *Nokotyana* case in the High Court (see FHR position paper on sanitation by J Dugard),⁷⁵ Ekurhuleni Municipality agreed to provide communal taps to the residents of Harry Gwala informal settlement in compliance with Regulation 3(b). And in *Mtungwa*,⁷⁶ the South Gauteng High Court presided over a court-ordered settlement in which Ekurhuleni agreed to provide sufficient communal taps to the residents of Langaville informal settlement in order to satisfy Regulation 3(b).

Regardless of any grey areas around the state's positive obligations to fulfil the right of access to sufficient water, there is a bit more clarity regarding the state's obligation to refrain from interfering with existing access to water (the negative duty to protect), albeit not from the Constitutional Court but rather from the High Court decision of *Bon Vista Mansions*.⁷⁷ In this case, which concerned an interim order in connection with a municipality summarily disconnecting the water supply to a block of flats, the High Court ruled that a disconnection of a pre-existing water supply is a *prima facie* breach of the section 27(1) right of access to sufficient water that must be justified by the municipality in order to be lawful.⁷⁸ Taking into consideration both the Constitutional Court judgment in *Mazibuko* and the other water-related cases outlined above, it seems that, for the moment, legal tactics should focus on litigation to ensure that government minimum standards are met and that there are no non-procedural disconnections of water supply.

An analysis of systemic human rights-related problems

Undoubtedly, great advances have been made in line with the rights-based frameworks set out above to extend basic water services to poor households in South Africa. However, a number of systemic problems remain that compromise the enjoyment of the right of access to sufficient water, which are analysed here across human rights-related axes. The next section examines the problems across human rights-related axes and the following provides a tentative analysis of the underlying determinant of these problems.

Availability of water

There is some debate over the extent to which South Africa is a water-scarce country.⁷⁹ What is clear, however, is that as with many countries in the world, the issue is more about distribution than scarcity per se.⁸⁰ Thus, 'South Africa has enough water to meet everyone's needs until 2025 and beyond' and 'present problems and future challenges' are related mainly to financial and institutional capacities as well as political choices.⁸¹ Another factor impacting the availability of water is the water use pattern – in South Africa agriculture uses approximately 52 per cent of all water resources, while domestic water use is estimated at only 10 per cent, meaning that (at least from a water resources perspective) discussions about how much water can be made available to poor households should be contextualised in light of the relatively small amount of water consumed by the domestic sphere and the relatively large amount of water used by the agricultural sector.⁸²

In terms of aggregate numbers, according to the 2011 Census, 73.4 per cent of households have access to piped water in their dwelling or yard; 17.9 per cent have access to piped water outside their yard (this includes those with access to piped water within 200 metres of their dwelling and those whose access is further than 200 metres); and 8.8 per cent of households have no access to piped water.⁸³ However, these otherwise impressive connection figures obscure several problems experienced with access to water services, especially by poor households. The more qualitative aspects are discussed later, while here the availability-

related dynamics are detailed.

First, at a very basic level, the statistics on connections do not take into account households that have been connected to a water infrastructure grid but where the infrastructure does not function to deliver water because of pipes and taps that do not work. Nor do the statistics reflect the degree to which, in respect of each formal connection, there is ever any progress in moving the water connection closer into the home. That is, there is no dedicated monitoring of the obligation to progressively realise the right of access to water by, for example, moving communal taps into yards or yard taps into houses. This touches on the physical access issue outlined below and has particular relevance for women and disabled persons.

Second, such statistics usually do not reflect the scale of the problem of land-use areas with insufficient access – informal settlements and rural areas around the country. Rural areas generally are the worst affected by non-connection to piped water. For example, one study found that in Amatole District Municipality, a deep rural jurisdiction in the Eastern Cape province, approximately 32 per cent of the population still do not have access to piped water.⁸⁴ Regarding informal settlements, houses and shacks typically do not have in-house connections (nor access to hot water even if they have electricity), so most households have to rely on water tankers or communal taps. There are problems with unreliable water tanker services.

Communal taps are often inadequate to supply multitudes of households and/or are not properly maintained. For example, until a settlement was reached in the wake of the *Mtungwa* litigation discussed above, Langaville informal settlement Extension 3, with 184 shacks, was served by one communal tap; Extension 6, with 1016 shacks, was served by only one continually working communal tap (one other communal tap was regularly dysfunctional); and Extension 18, with 108 shacks, had no water taps. In total, approximately 4735 people had to share two communal taps.⁸⁵ As with sanitation services in informal settlements (discussed in the FHR position paper on sanitation by J Dugard), the failure of a comprehensive policy and plan regarding informal settlements means that residents are often at best left with only the most basic level of access

to water (effectively the minimum regulated ‘floor’ becomes a ‘ceiling’), without any prospect of progressive realisation of their water-related rights.

Third, aggregated statistics on the roll-out of water services across the country mask the problem of geographic areas (often encompassing rural areas and informal settlements) with unusually low access to basic water services such as the former homeland areas (the provinces of KwaZulu-Natal and Eastern Cape), which continue to have extremely low levels of access to adequate water provision. As was highlighted in a 2009 submission to the South African Human Rights Commission on access to water and sanitation, the 30 worst performing municipalities in terms of inadequate access to water (and sanitation) were in KwaZulu-Natal and the Eastern Cape. According to the 2011 census, 22.2 per cent of households in KwaZulu-Natal and 14.1 per cent of households in the Eastern Cape do not have access to piped water.⁸⁶ The 60 worst performing municipalities are also all in KwaZulu-Natal and the Eastern Cape, plus Limpopo.⁸⁷ The submission noted the striking coincidence between the worst performing municipalities and the geographic areas of the former independent homelands (especially the Transkei), indicating the continuation of apartheid-inherited patterns of underdevelopment.⁸⁸

Fourth, quantitative figures on numbers of households having been connected to water services since 1994 do not capture all the households that have subsequently been disconnected due to being unable to afford water services (the matter of economic access – affordability – per se is examined below). Statistics on disconnections of water services are not readily provided by municipalities, nor are the reasons for non-payment recorded or examined, so the true scale of disconnections is not known and there is no way to ascertain how many disconnections are due to a genuine inability to pay for water.

Despite such difficulties, some authors have managed to track water disconnections for specific periods. For example, a 2006 study of the Cape Town and Tygerberg administrations indicated 159 886 households had their water disconnected due to non-payment between 1999 and 2001, and that most of these households were in poor areas where people struggle to pay water bills.⁸⁹ A 2003 study found that there were approx-

imately 800–1000 water disconnections per day in Durban, affecting about 25 000 people per week.⁹⁰ And, using national household data and data collected in a 2001 national survey, a 2002 survey estimated that between the years 2000 and 2001, 7.5 million people experienced both water and electricity disconnections.⁹¹ These figures were contested by the Minister of Water Affairs and Forestry, who argued that the population disconnected in that time period was much lower. However, the minister's then director general, Mike Muller, subsequently acknowledged that, in 2003 alone, 275,000 households had their water supply disconnected at least once due to inability to pay (amounting to approximately 1.5 million people or more).⁹²

Furthermore, where disconnection has occurred via a prepayment water meter, there is no process of administrative justice governing or recording such disconnections, which are colloquially referred to as 'silent disconnections'.⁹³ The City of Johannesburg was one of the first municipalities to impose prepayment water meters on poor communities, and resistance to this imposition gave rise to the *Mazibuko* litigation outlined above. Following the judicial defeat in *Mazibuko* it seems that prepayment water meters are considered lawful, so this kind of silent disconnection can continue beyond the realm of government administration.

From the perspective of many municipalities, prepayment water meters are a welcome technology that maximise cost recovery and minimise the transaction costs associated with delivering water services to poor households, including the onerous usual notification and disconnections procedures. However, from the perspective of end-users, prepayment meters 'transfer the social and administrative costs to households'.⁹⁴ These costs include the inconvenience of purchasing water credit tokens at outlets that are often far away and not open at night – but the main cost of prepayment meters lies in the automatic disconnection if there is no money to purchase additional credit, or the threat of such disconnection, which forces people to 'live according to how much they can afford, rather than how much they need'.⁹⁵

Typically, the problems associated with prepayment water meters affect women more adversely than they affect men.⁹⁶ A survey in the

informal settlement of Stretford Extension 4, Orange Farm, where prepayment water meters were first piloted in Johannesburg, found that in 52 per cent of households surveyed women were responsible for buying the water tokens. Men were responsible in only 27 per cent of households, and in 16 per cent this was a shared responsibility.⁹⁷ Responsibility for purchasing tokens can lead to conflict where money is in short supply, and in households with prepayment water meters, women's attempts to secure the necessary cash for water tokens has led to increased tensions and domestic violence.⁹⁸ Moreover, women have to shoulder most of the burden of managing the threat of silent disconnections, making difficult choices between going for days without water or conserving water in ways that compromise health and dignity, such as mothers forgoing bathing in favour of their children, carers not washing soiled sheets and female members of households not washing their hands or flushing the toilet regularly enough.⁹⁹ In her founding affidavit, Lindiwe Mazibuko, lead applicant in the *Mazibuko* case, outlined the hardships imposed on her multi-dwelling, female-headed household by a prepayment water meter:

We use very little water to bath with. We are now forced to do our laundry at my sister's house in Protea South, approximately 4 kilometres from our house. Sometimes I do not drink sufficient water. This weakens my health. We often do not flush our toilets ... I used to have a small food garden but I abandoned it Now I have to buy vegetables that I used to plant in my garden.¹⁰⁰

The other *Mazibuko* applicants (all women, bar one) suffered similarly under prepayment water meters. Jennifer Makoatsane was not able to properly wash her elderly father's infected leg and he died as a result of septicaemia. In addition, Ms Makoatsane was not able to honour her cultural traditions regarding funerals as there was insufficient water to invite guests to the house to observe the burial ceremony. And Vusimuzi Paki (the only male applicant in the *Mazibuko* case) recounted the tragedy of how one of the backyard shacks on his property burnt to the ground, killing two small children, because he and his neighbours did not have

sufficient water credit to put out the fire – the children were left in the shack overnight while their single mother went to work.¹⁰¹ Further empirical research is required to delve into the extent of imposition and the impact of prepayment water meters on households.¹⁰²

To add insult to injury, at the same time as municipalities are imposing harsh credit control measures on low-income residents, there appears to be a trend to be more lenient in respect of businesses and especially government institutions that fail to pay their municipal accounts.¹⁰³ Investigations of the source of municipal debt have revealed that a major portion of debt owed to municipalities for municipal services derives from non-payment by government departments, yet (understandably given their public function) these are rarely disconnected.¹⁰⁴

Fifth, the quantitative connection figures do not factor in the question of whether the amount of basic water provided through the FBW allocations reaches the intended beneficiaries or is sufficient to meet their needs. This fault line has two dimensions – the low level of registration by formally qualifying households for the FBW (and other) benefits via the municipal indigency register; and the sufficiency of the FBW allocation itself, which is allocated per stand (which might have a number of households living on it with a main household and backyard shacks etc.) rather than per household or individual.

Regarding the issue of uptake of FBW, almost all municipalities target Free Basic Services (including FBW) through the municipal indigency policy.¹⁰⁵ However, there are endemic problems related to municipal indigency policies, which serve to exclude the most vulnerable and poor households from any potential benefits, including FBW. Chief among these problems are an ad hoc definition of poverty for the purposes of qualifying for benefits. For example, some municipalities use a level of income equivalent to or just less than two state pensions, while others use property/land value to determine whether a household qualifies, and still others use seemingly random income thresholds.¹⁰⁶ The process around registering for benefits is typically very onerous, requiring numerous documents, and is perceived by potential recipients as stigmatising. The most vulnerable societal groupings, including women, child-headed households and the unemployed, are often not aware of the policy or

do not register for fear of attracting adverse official attention.¹⁰⁷ The net result is that registration for municipal indigency benefits, including FBW, is relatively low across the country, raising questions about whether indigency policies, with their invariably complex administration and registration systems, are effective means of allocating crucial benefits to households or whether alternative means of assistance should be investigated.

Finally on the FBW point, there are questions about whether the amount of water provided is sufficient to meet basic needs. According to the FBW national policy, as set out in the FBW Implementation Strategy, the target FBW amount is 6000 litres (six kilolitres) per household per month, which converts to 25 litres per person per day in a household of eight persons. However, as noted above, while the policy refers to 'households', the allocation is actually per stand, meaning that it sometimes has to be shared by multiple households and individuals. As raised in the *Mazibuko* case, the current formulation is problematic in multi-dwelling contexts such as township areas with backyard shacks, where many more than eight people have to share one FBW allocation. In the case of Lindiwe Mazibuko, twenty people had to share the initial six kilolitre monthly allocation, meaning each person could only use approximately ten litres of water per day in a context where one toilet flush consumes thirteen litres.

Beyond this issue, even if calculated as an individual allocation, international experts, including the CESCR,¹⁰⁸ as well as DWA itself (while DWAF),¹⁰⁹ suggest that this amount is insufficient and have indicated that 50 litres per person per day is the minimum amount of water required to sustain a healthy and dignified life. In its 2003 policy document entitled 'Strategic Framework for Water Services: Water is life, sanitation is dignity', DWAF highlighted that:

In time, the definition of what constitutes a basic water service will be revised by national government ... Where sustainable, water services authorities should give consideration to increasing the basic quantity of water provided free of charge (25 litres per person per day), aiming for the free provision of at least 50 litres

per person per day to poor households... The existing norms and standards will be revised and updated to be consistent with the policies in this Strategic Framework.¹¹⁰

Yet, while the policy recommends that municipalities move away from this very minimal amount of water towards a higher allocation as soon as possible, all national funding is still based on achieving only the minimal six kilolitre amount and there has been no revision of the applicable norms and standards to signal the need to move to a higher FBW amount. Some of the bigger metropolitan municipalities have raised the amount of available FBW – e.g. in Cape Town, indigent households qualify for ten kilolitres per household per month and in Johannesburg, following the *Mazibuko* case, indigent households can qualify for up to fifteen kilolitres per household per month. But in the vast majority of municipalities (85 per cent), the FBW amount remains six kilolitres (and some municipalities still have not adopted FBW policies at all).¹¹¹

Physical and economic accessibility, and the influence of gender and disability

Physical access to water services facilities remains a problem both in rural and informal settlement areas where, notwithstanding regulations governing minimum distances from a piped water source, people often have to walk long distances to fetch water (whether from a river or communal tap). Inadequate physical access has both a gender and disability dimension, as having to walk distances to water points exposes women and disabled people to safety concerns, making them vulnerable to attack by wild animals and people. More generally, wherever there is inadequate access to water services, this has a disproportionately negative effect on women. This is because there is a gendered division of labour within most households, meaning that women are ‘often singly responsible for child-care, cleaning the house, fetching and heating water, washing and ironing, [grocery] shopping, collecting firewood, cooking and washing dishes’.¹¹² This means that where there is inadequate physical access to water services, women (and girl-children) bear the brunt of walking to and collecting water, compromising their ability to secure paid work and

exacerbating their dependence on men within the household.¹¹³ Disabled persons also suffer when taps are not conveniently located or are in other ways physically inaccessible to disabled persons.

Regarding economic access, there are baseline standards that municipalities are meant to comply with regarding the setting of water tariffs, e.g., that there must be at least three rising blocks. However, as autonomous spheres of government, municipalities enjoy a relatively wide discretion to establish water tariffs and the evidence is that 'municipalities tend to use full cost recovery as the overriding yardstick in setting tariffs',¹¹⁴ often functioning as corporatised and/or commercialised water services providers even if not actually privatised. As a consequence, a patchwork of different water tariffs exists across South Africa's municipalities, and not all tariffs are as optimally effective or pro-poor as they could be, resulting in water tariffs remaining too expensive for low-income households (beyond the FBW allocation). In this respect, a 2008 study found that, beyond physically restricting the amount of water poor people can access by means such as prepayment water meters, the way that municipalities achieve full cost recovery is often through setting a high price for the second tariff block (i.e. the block after the zero-rated FBW block) and relatively high prices for the blocks thereafter.¹¹⁵

For example, in 2000 the City of Johannesburg commercialised its water services, establishing a fully state-owned but corporate entity called Johannesburg Water (Pty) Ltd And, in 2003, the Johannesburg Water (Pty) Ltd. adopted a relatively steep-rising tariff structure for water such that:

... the second tier of the [rising] block tariff (7–10kl/household/month) was raised by 32 per cent, while the third tier (11–15kl/household/month) was lowered by two per cent (during a period of roughly ten per cent inflation, which was the amount by which higher tier tariffs increased). The dramatic increase in their per-unit charges in the second block meant that there was no meaningful difference to their average monthly bills even after the first free 6000 litres.¹¹⁶

This practice, of having sharply rising blocks in the lower levels of per unit consumption, contradicts the optimal pricing structure for achieving the three objectives of social equity, revenue and water conservation, which is a structure in which there are relatively gradual price increases per unit of consumption at lower consumption levels, with the tariff becoming steeper and steeper at higher consumption levels, until the final block places a very high price on luxury consumption (which serves the twin purposes of promoting water conservation and securing revenue from luxury consumers in order to cross-subsidise the FBW allocation and cheaper priced blocks).¹¹⁷

Thus, while there is scant research on the actual cost burden of water services to low-income households, it is clear that, in the absence of standardised tariff structures, the cost of water services in poor households can differ substantially (and unfairly) depending on which municipality you live in. Typically, low-income households in richer metropolitan municipalities fare the best. For example, an indigent household that uses twelve kilolitres of water per month will get this for free in Cape Town where the FBW policy in effect provides thirteen kilolitres of water. But an indigent household using the same amount of water in Msunduzi Municipality will pay in the region of R54.24 per month.¹¹⁸

As alluded to above, where households cannot afford water services and difficult trade-offs must be made, it is usually women who 'find ways of making the household cope' by going without other essentials such as food or facing the potential of violent household conflict when they fail to secure daily resources, including water.¹¹⁹

Although further research into prices, costs and affordability of domestic water is necessary, it is evident that the structure of water distribution and consumption in South Africa – with agriculture and industry using the bulk of water and often receiving preferential tariffs – together with the fact that water services make up one of the main sources of revenue for municipalities (along with electricity services), places pressure on municipalities to view water as a revenue stream rather than a public service.

Exacerbating this perverse schema is the fragmentation of the functions and budgets between municipal and provincial government. While

one of the major sources of illness in South Africa (as in any developing country) relates to waterborne disease and inadequate access to water, which could be addressed relatively cheaply in health care terms by ensuring adequate access to water, health care is a provincial concern, whereas water services (including sanitation) are a municipal concern. This means that, whereas health departments have the incentive to spend more on water services, they do not have the power to do so, and whereas municipalities have the power to do so, they do not have the incentive to spend more than they have to on water services (in fact they have quite a disincentive as they have to ensure cost recovery and balanced books). Thus the horizontal fragmentation of functions creates a disjuncture between inputs and outputs in developmental terms, suggesting the need to better integrate health care and water services-related functions across the various government spheres and departments.

Water quality, acceptability, participation and information

At various points since around 2008, fears have been publicly expressed about a looming water quality crisis. There have been some outbreaks of cholera and deaths of babies due to waterborne diseases but, for the most part, the quality of South Africa's piped water remains good, although there are some concerns that the Blue Drop certification process (in terms of which municipalities are given certificates according to levels of water quality, including Red Drop status for non-complying municipalities) tends to 'do little more than provide financial reward to those municipalities that are already performing well, quell the fears of rich water consumers, and embarrass those municipalities that are not complying with water quality standards, which could be for a myriad structural reasons'.¹²⁰

In addition, there are inconsistencies around which municipal institutions and departments monitor water quality standards and how regularly. Better-resourced municipalities have their own water quality laboratories with skilled technicians, while other municipalities outsource this function and use private laboratories and consultants to test water quality. There are also differences in the frequency of water quality testing.¹²¹ It is also worth noting that in some countries water quality is man-

aged by health department structures rather than water. In South Africa, there has been a rather unsatisfactory division of responsibility for water quality between health and water departments, evidenced in the fact that whenever there is a cholera or waterborne disease scare, the advice from clinics and hospitals is to boil or wash food and to regularly wash hands, but this is not always possible in contexts of insufficient access to water.

As referenced in the FHR position paper on sanitation by J Dugard, additional problems exist in relation to waterborne sanitation, in that almost all waste water treatment infrastructure, especially municipal treatment plans, have been poorly maintained and are in 'urgent need of maintenance and replacement', with many verging on being dysfunctional.¹²² According to DWA's Green Drop assessment report on the performance of waste water treatment and management, of the 821 systems assessed in 2011, only 40 received Green Drop certification¹²³ from DWA, 317 waste water treatment plants required urgent attention, with a further 143 being categorised as having a high risk of failure.¹²⁴

Arguably of more concern than water quality per se are the more qualitative dimensions of participation and information, as well as the acceptability of water service options provided especially to poor households, which are all adversely impacted by the Millennium Development Goal influenced target-chasing approach of tracking how many households have been connected to water services.¹²⁵ Regarding the acceptability of water services, it is clear from the *Mazibuko* case that poor people are often not consulted about water services options. Indeed, in *Mazibuko*, households were initially not given any choice when the City of Johannesburg took the decision to change their water supply from a deemed consumption system (where households were charged a flat-rate for water) to a prepayment water meter system. It was only after the commencement of litigation that the City began to provide the alternative option of a yard tap for those households that did not 'choose' a prepayment meter. Although largely glossed over by the Constitutional Court, this autocratic and non-consultative way of operating was highly criticised by the High Court judge, Moroa Tsoka, who lambasted the City of Johannesburg for its failure to consult communities over the decision to install prepayment water meters:

The respondents [the City of Johannesburg, Johannesburg Water and DWAF] recognised that the community should broadly be consulted before the introduction of the prepayment water meters... Despite this awareness, the first applicant [Lindiwe Mazibuko] was given wrong information regarding prepayment meters ... [and there was] no consultation with her. No proper notice was given to her. She was not advised of her rights to object to the introduction as well as the remedies available should she wish to challenge the introduction. She was also not informed that she has the right to request reasons for the decision and that she has a right to either review or appeal the decision.¹²⁶

From the contents of the various notices sent to the residents of Phiri, including the applicants, it is obvious that the prepayment metering systems were approved for and not by the residents of Phiri. The terms of the notices do convey the prepayment metering systems as a *fait accompli*. The purpose of the notices was merely to sell an accomplished fact to the residents of Phiri. It is on this basis that I understand Mr Trengove [counsel for the applicants]'s argument that the actions of the respondents were not consultative but a publicity drive for the prepayment metering systems.¹²⁷

Although an under-researched issue, anecdotal evidence suggests that, in general terms, there is insufficient participation around water services, with municipalities adopting overly technocratic and alienating approaches to water provision, such as the imposition of water management devices in poor communities. In addition, where households have prepayment water meters, this diminishes their participation in public administration, as all processes are internalised within the home. These kinds of top-down approaches undermine trust and sentiments of 'citizenship' among residents, and give rise to escalating frustration, which has begun to spill out on the streets in the form of protest, as witnessed across the country over the past few years, including in Maqheleng.

Regarding information in the form of education, especially about water conservation, this is usually ad hoc and almost always targeted at poor households rather than the rich households that consume the high-



Graffiti on a Johannesburg Water (JW) Operation Gcin'amanzi water conservation message in Phiri, Soweto.

est amounts of water and, arguably, should be educated about conserving water. In poor communities, especially those with prepayment water meters and the like, there is commonly quite a lot of information available – including large billboards – about saving water. Understandably, given the absence of such information in rich areas, poor households find this a cynical kind of education, as illustrated by graffiti on a Johannesburg Water (JW) Operation Gcin'amanzi water conservation message in Phiri, Soweto.¹²⁸

Without the deliberate involvement of communities in the planning, provision and distribution of water services, the advances made through providing taps and connecting households to water grids will continue to be undermined.

Underlying determinant of the systemic problems¹²⁹

A clear problem with the water services sector in South Africa is the ineffective regulation, which means that there is no watchdog to ensure com-

pliance with the minimum standards set out in the laws and policies outlined earlier, let alone to push public authorities to progressively realise the right of access to water, to bring more water closer to more households in increasingly participatory ways. The failure of regulation is evident in the vastly differing approaches and adherence by municipalities around the country to minimum standards such as minimum FBW allocations, requirements regarding maximum distance from a piped water source, policies on disconnection, and the like.

It is tempting to expect that with all the outlined laws and policies in place the debate by now would have shifted to one about how best to progressively realise access to water – yet, despite these being legislated, South Africa has not yet achieved compliance with the basic minimum standards, clearly signalling a serious regulation failure.

Indeed, there are two striking facts regarding water regulation. The first is that, notwithstanding having a national electricity regulator since 2003 (the National Energy Regulator of South Africa, NERSA), there was no national water regulator in South Africa until 2010. The second is that, despite abundant evidence of municipal non-compliance with minimum standards, there has been no in-depth evaluation of water services regulation since the establishment of DWA as national water services regulator.¹³⁰ Such an evaluation is critical to understanding the complexities and obstacles to effective water regulation, as well as to re-ignite debates around whether South Africa should have an independent water regulator.

The issue of national regulation of water services is all the more pressing given the generalised failures of governance and delivery at the municipal level across the country. As set out also in the FHR position paper on sanitation by J Dugard, local government, which is responsible for the delivery of basic services, including water, suffers from a myriad problems that impact negatively on the delivery of water services. These include a lack of strong leadership and management, as well as a shortage of critical skills and competencies in most municipalities (particularly rural municipalities); and the deterioration of financial viability due to poor revenue collection and management coupled with the inability of households living in poverty to pay for services.¹³¹ Such management and governance-related problems have recently resulted in the Auditor Gen-

eral giving clean audit reports to only seven out of 237 municipalities across the country.¹³²

These problems have also led to a chronic under-spending by municipalities on water-related budgets – for example, collectively municipalities were only able to spend approximately 30 per cent of their 2011/2012 capital budget from National Treasury as at 31 December 2011.¹³³ As recognised by the National Planning Commission (NPC) in the National Development Plan (NDP), this systemic municipal under-spending has in effect meant that South Africa has ‘missed a generation of capital investment’ in water services (along with other municipal services such as sanitation).¹³⁴ The serious issue of municipal under-spending requires urgent attention and further study to determine the extent to which this relates to lack of capacity, including requisite staffing (many municipal positions remain un-filled), and the extent to which it relates to poor performance more generally, as well as how to remedy this problem. A related issue that requires further research is the role of the Treasury in ensuring proper spending of allocated budgets, as well as the efficacy (or not) and consequences of placing under-performing municipalities under provincial or national administration.

Conclusion

South Africa has made great advances in connecting a large number of previously disadvantaged households to the water grid. However, rising protest over inadequate water services, along with litigation such as the *Mazibuko* case, have highlighted systemic problems. On the whole, the problems outlined in this paper do not relate to policy or legislation but rather to non-compliance with such, in part due to the failure to regulate water services. This suggests an urgent need to examine the performance of national regulation and the reasons for any regulation failures, as well as to evaluate the decentralised model of water services delivery. National government must hold municipalities more accountable, but the full effects of placing under-performing municipalities under administration, as sometimes happens, need to be explored.

Beyond this, there is a need for human rights-oriented research to evaluate the qualitative needs and concerns of households receiving basic levels of piped water or not receiving piped water at all. In particular, the gender dimensions of water supply and access need to be better understood, along with the nature of delivery, including levels of participation and consultation, and the amount of household income poor people have to spend on water services to ensure adequate supply. If South Africa hopes to move away from basic targets for connecting households to taps, to progressively realise adequate and equitable access much more must be done to understand and plan around people's lived realities and the role that water plays or could play in improving living conditions and livelihoods.

This paper recommends further investigation into the following aspects regarding water services *policy*:

- Whether indigency registers, with all their complexities and high administrative costs on the one hand and the relatively low registration on the other hand, are the best way to assist poor households with their living costs or whether, for example, direct cash transfers might not be a better approach.

This paper recommends further investigation into the following aspects regarding water services *practice*:

- Evaluating qualitatively whether water services are meeting needs and human rights obligations, especially in poor households, and taking into account the gender dimension, including the cost to households of accessing water, as well as the impact of any water restriction devices such as prepayment water meters.
- Examining whether each municipality has sufficient funding, and that it's properly allocated and spent, for the water-related needs of its households.
- Ways of improving financial monitoring and regulation, including the role of Treasury regarding budgets and the impact of placing errant municipalities under national/provincial administration, as well as looking at how to ensure that the ES is allocated to basic services such as water.

- The role and efficacy of monitoring and regulation by DWA (particularly in its role as National Water Services Regulator), CoGTA and DPME.
- Ways of improving community participation in water-related projects, including budgeting.

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<i>City of Johannesburg and Others v Mazibuko and Others</i>	2010 (4) SA 1 (CC)
<i>City of Johannesburg and Others v Mazibuko and Others</i>	(2008) 4 All SA 471 (Mazibuko South Gauteng High Court Decision)
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Notes

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7. The right to water was also viewed as linked to the right to enjoy the highest attainable standard of health (Article 12 of the ICESCR) and the right to adequate housing and adequate food (Article 11 of the ICESCR).
8. Article 24(2)(c) of the Convention on the Rights of the Child (CRC, 1989) obliges states parties to take appropriate measures to ensure that children receive the 'provision of adequate nutritious foods and clean drinking-water ...'.
9. Article 14(2)(h) of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW, 1979) provides that all states parties must take all the appropriate measures to eliminate discrimination against women in rural areas, including to allow them 'to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply...'.
10. Article 28 of the International Convention on the Rights of Persons with Disabilities (2007) compels states parties to ensure equal access by persons

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11. Article 29 of the Geneva Convention III of 1949 stipulates that prisoners of war and other detainees must be provided with shower and bath facilities and water, soap and other facilities for their daily personal toilet and washing requirements: www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf
 12. United Nations CESCR General Comment 15 on the right to water (2002), paras. 1–2: daccess-dds-ny.un.org/doc/UNDOC/GEN/Go3/402/29/PDF/Go340229.pdf.
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 15. The twenty litre amount is acknowledged by the author probably to be insufficient, particularly for waterborne sanitation, which might require up to 75 litres per person per day.
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27. In October 2012, the South African Government publicly announced it was going to ratify the ICESCR, which it did, in January 2015, taking force on 12 April 2015.
28. *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para. 35.
29. For the Constitutional Court's reasoning behind the apparent rejection of the minimum core obligations see *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom*) paras. 31–33; and *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA721 (CC) (*Treatment Action Campaign*) paras. 26–29.
30. Communication nos 25/89, 47/90, 56/91, 100/93 (ACHPR 1995) para. 47 (English version).
31. Communication no 296/2005 (ACHPR 2009).
32. In September 2013, the Minister of Water Affairs announced that there were plans to merge the Water Services Act and the National Water Act. The proposal is under review and there is much debate about this proposed move. See, for example, the editorial 'New water law won't help much' (5 September 2013), *Business Day*. There have been indications that the review will be

concluded in early 2014.

33. Section 1(iii) of the Water Services Act.
34. These legislated minimum amounts coincide precisely with the national Free Basic Water policy (see later discussion), which was announced around the time of the promulgation of the Compulsory National Standards and subsequently concretised in the Free Basic Water Implementation Strategy of August 2002, effectively meaning that there is a legal obligation to provide (to poor households) at least six kilolitres of water each month for free.
35. Most municipalities provide the first block (whether six kilolitres per household per month or more) of water to indigent households for free, with this becoming the Free Basic Water policy and/or part of the municipal indigency policy packing (see later discussion of Free Basic Water policy).
36. Section 73(1)(c) of the Municipal Systems Act.
37. For an analysis of the evolution of water-related policy see, for example, C de Coning and T Sherwill 'An Assessment of the Water Policy Process in South Africa (1994 to 2003)', Water Research Commission Report No. TT232/04 (June 2004): <http://www.wrc.org.za/Other%20Documents/Software/pre-publication%20TT232-04%20final.pdf>.
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45. There are 169 WSAs in South Africa including metropolitan, district and local municipalities, as well as water boards and municipal companies.
46. Thus, although in many areas water is delivered by corporatised municipal entities such as Johannesburg Water (Pty) Ltd, which is a 100 per cent state-owned company, there is little to no outright water privatisation in South Africa (see discussion on accessibility in section 3 for a critique of the cost-recovery oriented model of corporatised water service provision). It should also be noted, however, that even private water companies, because of rendering a public service, would be bound to comply with the same administrative justice-related obligations to provide the same fair and just services as a public entity. For a discussion of the corporatised/cost-recovery model of water services, see the section on water tariffs below.
47. In *Nkonkobe Municipality v Water Services South Africa (Pty) Ltd. and others* unreported Eastern Cape Division High Court case No. 177/2001 (14 December 2001), the municipality brought an application to rescind a private water services management contract because it could not afford the high management fees. The Court nullified the contract, albeit on the basis that the municipality had not complied with the public participation requirements. See M Langford, 'Privatisation and the Right to Water' in M Langford and A Russell (eds) *The Right to Water and Sanitation in Theory and Practice: Drawing from a Deeper Well?* (forthcoming 2014).
48. M Langford et al 'Water' in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-55.
49. DWA 'National Water Services Regulation Strategy' (January 2010) 89: http://www.dwa.gov.za/dir_ws/dwqr/Default.asp?Pageid=6&SearchString=Strategy Document.
50. K Tissington 'Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice', Socio-Economic Rights Institute of South Africa (SERI) Resource Guide (July 2011) 59: http://www.seri-sa.org/images/stories/SERI_Guide_to_Basic_Sanitation_Jul11.pdf.
51. M Langford et al 'Water' in S Woolman et al (eds) *Constitutional Law of South*

- Africa Volume 4 2nd edition, revision service 5* (2013) 56B-44.
52. Section 139(7) of the Constitution provides that if a provincial government is unable to or chooses not to intervene to rectify local government problems then national government has the power to intervene.
 53. The MIG was first introduced in the 2005/2006 financial year, and each year the Division of Revenue Act (DORA) sets out the allocation of MIG funds from the National Treasury per municipality. For the formula used to calculate the MIG, see Still et al (2009) 'Basic Sanitation Services in South Africa – Learning from the past, planning for the future', Water Research Commission Research Report, p. 110: <http://www.wrc.org.za/Pages/DisplayItem.aspx?ItemID=8632&FromURL=%2FPages%2FAllKH.aspx%3F>.
 54. For the formula used to allocate National Treasury ES funds to municipalities, see *ibid*, p. 112. (Still et al).
 55. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 20: www.info.gov.za/view/DownloadFileAction?id=178724.
 56. K Tissington 'Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice' (July 2011) Socio-Economic Rights Institute of South Africa (SERI) Resource Guide, 58: http://www.seri-sa.org/images/stories/SERI_Guide_to_Basic_Sanitation_Jul11.pdf.
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 58. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012), 20: www.info.gov.za/view/DownloadFileAction?id=178724.
 59. *City of Johannesburg and Others v Mazibuko and Others* 2010 (4) SA 1 (CC) (*Mazibuko*).
 60. *City of Johannesburg and Others v Mazibuko and Others* (2008) 4 All SA 471 (*Mazibuko* South Gauteng High Court decision).
 61. The Supreme Court of Appeal suspended the order of invalidity, giving the City of Johannesburg two years in which to remedy the legal defects of prepayment water meters.
 62. The *Mazibuko* judgment has been heavily criticised for being overly-deferential and normatively thin, as well as for its characterisation that prepayment

- water meters do not violate entrenched procedural protections. See, for example, S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 466–480.
63. *City of Johannesburg and Others v Mazibuko and Others* 2010 (4) SA 1 (CC) (*Mazibuko*) paras 118–124.
 64. See, for example, J Dugard ‘Urban Basic Services: Rights, Reality and Resistance’ in M Langford et al (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2013); and, J Dugard and M Langford ‘Art or Science: Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism’ (2011) 27(3) *South African Journal on Human Rights* 39–64.
 65. *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom*).
 66. *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) (*Treatment Action Campaign*).
 67. M Langford et al ‘Water’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-i, 56B-24, 56-B-25.
 68. *City of Johannesburg and Others v Mazibuko and Others* 2010 (4) SA 1 (CC) para 50.
 69. See, for example, D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007).
 70. Langford et al ‘Water’ in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-25.
 71. Langford et al ‘Water’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-29.
 72. *City of Johannesburg and Others v Mazibuko and Others* 2010 (4) SA 1 (CC) para 9.
 73. *City of Johannesburg and Others v Mazibuko and Others* 2010 (4) SA 1 (CC) paras 90–97.
 74. Langford et al ‘Water’ in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-60.
 75. *Nokotyana and Others v Ekurhuleni Metropolitan Municipality*, unreported South Gauteng High Court case no: 08/17815 (24 March 2009): <http://www.saflii.org/za/cases/ZAGPJHC/2009/14.html>.

76. *Mtungwa and Others v Ekurhuleni Municipality*, unreported South Gauteng High Court case no: 34426/11 (6 December 2011) (*Mtungwa*): <http://www.seri-sa.org/index.php/litigation-9/cases/12-litigation/cases/92-mtungwa-and-others-v-ekurhuleni-metropolitan-municipality-langaville> (accessed on 6 November 2013).
77. *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) (*Bon Vista Mansions*).
78. *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) (*Bon Vista Mansions*) para 20.
79. See, for example, M Muller et al 'Water Security in South Africa' (2009) Development Bank of Southern Africa Working Paper Series No. 12: www.dbsa.org/EN/About-Us/Publications/Documents/DPD%20No12.%20Water%20security%20in%20South%20Africa.pdf.
80. See the 2006 United Nations Human Development Report, entitled 'Beyond Scarcity: Power, Poverty and the Global Water Crisis': <http://hdr.undp.org/en/reports/global/hdr2006/>.
81. M Muller et al 'Water Security in South Africa' (2009) Development Bank of Southern Africa Working Paper Series No. 12, 5: www.dbsa.org/EN/About-Us/Publications/Documents/DPD%20No12.%20Water%20security%20in%20South%20Africa.pdf.
82. This is not to suggest that it is not important to ensure sufficient water to the agricultural sector, but rather to indicate that discussions about water efficiency and savings need also to engage with bulk water users such as agriculture.
83. Statistics South Africa 'Census 2011: Methodology and Highlights of Key Results' (2011) 12: http://www.statssa.gov.za/Census2011/Products/Census_2011_Methodology_and_Highlights_of_key_results.pdf.
84. J Dugard, M Langford and E Anderson 'Determining Progress on Access to Water and Sanitation: Law and Political Economy in South Africa' in M Langford and A Russell (eds) *The Right to Water and Sanitation in Theory and Practice: Drawing from a Deeper Well?* (forthcoming 2014) 21.
85. See documentation related to *Mtungwa and Others v Ekurhuleni Municipality* unreported South Gauteng High Court case no: 34426/11 (6 December 2011) (*Mtungwa*): <http://www.seri-sa.org/index.php/litigation-9/cases/12-litigation/cases/92-mtungwa-and-others-v-ekurhuleni-metropolitan-municipal>

- ity-langaville.
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87. K Tissington et al 'Submission on Access to Water and Sanitation in South Africa' (9 February 2009) Centre for Applied Legal Studies (CALS) 5–6.
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89. L Smith 'The Murky Waters of Second Wave Neoliberalism: Corporatisation as a Service Delivery Model in Cape Town' in D McDonald and G Ruiters (eds) *The Age of Commodity: Water Privatization in Southern Africa* (2005) 168, 180.
90. A Loftus "Free Water" as Commodity: The Paradox of Durban's Water Service Transformations' in D McDonald and G Ruiters (eds) *The Age of Commodity: Water Privatization in Southern Africa* (2005) 189, 194.
91. D McDonald 'The Bell Tolls for Thee: Cost Recovery, Cutoffs and the Affordability of Municipal Services in South Africa' in D McDonald and J Pape (eds) *Cost Recovery and the Crisis of Service Delivery in South Africa* (2002) 170.
92. M Muller 'Turning on the Taps' *Mail & Guardian* (24 June 2004).
93. Coalition Against Water Privatisation 'The Struggle Against Silent Disconnections: Prepaid Meters and the Struggle for Life in Phiri, Soweto' (July 2004): http://apf.org.za/IMG/pdf/phiri_report.pdf (accessed on 7 November 2013).
94. J Dugard and N Mohlakoana 'More Work for Women: A Rights-Based Analysis of Women's Access to Basic Services in South Africa' (2009) 25(3) *South African Journal on Human Rights* 546, 564.
95. Public Citizen, Anti Privatisation Forum and Coalition Against Water Privatisation 'Nothing for Mahala: The Forced Installation of Prepaid Water Meters in Stretford, Extension 4, Orange Farm, Johannesburg, South Africa' (2004) 22: http://apf.org.za/IMG/pdf/nothing_for_mahala.pdf.
96. J Dugard and N Mohlakoana 'More Work for Women: A Rights-Based Analysis of Women's Access to Basic Services in South Africa' (2009) 25(3) *South African Journal on Human Rights* 546, 564–565.
97. Orange Farm Water Crisis Committee, Anti Privatisation Forum and Coali-

- tion Against Water Privatisation 'Destroy the Meter/Enjoy Free Water' (2004) 27: http://apf.org.za/IMG/pdf/orange_farm_prepaid_booklet.pdf.
98. Public Citizen, Anti Privatisation Forum and Coalition Against Water Privatisation 'Nothing for *Mahala*: The Forced Installation of Prepaid Water Meters in Stretford, Extension 4, Orange Farm, Johannesburg, South Africa' (2004) 24: http://apf.org.za/IMG/pdf/nothing_for_mahala.pdf.
99. J Dugard and N Mohlakoana 'More Work for Women: A Rights-Based Analysis of Women's Access to Basic Services in South Africa' (2009) 25(3) *South African Journal on Human Rights* 546, 564–565.
100. Lindiwe Mazibuko suffered from severe diabetes, which was exacerbated by insufficient access to water. She died at the age of 41, shortly after the *Mazibuko* High Court victory. Her affidavit is on file with the author.
101. J Dugard and N Mohlakoana 'More Work for Women: A Rights-Based Analysis of Women's Access to Basic Services in South Africa' (2009) 25(3) *South African Journal on Human Rights* 546, 565.
102. In 2013 the Water Research Commission published a study on user perceptions and levels of satisfaction regarding water management devices in Cape Town and Ethekwini (L Thompson, T Masiya and P Tsolekile De Wet 'User Perceptions and Levels of Satisfaction of Water Management Devices in Cape Town and Ethekwini' WRC Report No. 2089/1/13 (October 2013)). This study indicates that, although there was insufficient participation regarding the installation of the meters, on the whole households were satisfied with the service. However Cape Town and eThekweni's water management devices operate differently from the kind of prepayment water meters used by the City of Johannesburg and further research is necessary to investigate the different technologies utilised around the country and how these impact households.
103. K Tissington, P Berkowitz and J Dugard 'Submission on Access to Water and Sanitation in South Africa' (9 February 2009) Centre for Applied Legal Studies (CALS) 13–14.
104. J Wicks 'State still to pay Durban's municipal bills' (11 August 2008) *IOL News*: <http://www.iol.co.za/news/south-africa/state-still-to-pay-durban-s-municipal-bills-1.411904>.
105. In order to satisfy the legislative and policy imperatives to provide access to basic services for poor communities, most municipalities in South Africa

- pursue targeted indigency policies with varying qualifying criteria and free basic services-related benefits. A few of the bigger metropolitan municipalities (Johannesburg and Cape Town included) pursue universal access to basic levels of free basic services alongside a targeted programme for additional benefits for qualifying poorer households. Indigency policy targeting has been criticised for differing vastly and irrationally across municipalities and in general for being very onerous and discouraging registration, especially by the poorest and most vulnerable households, including child-headed households. See, for example, Centre for Applied Legal Studies (CALS), Centre on Housing Rights and Evictions (COHRE) and Norwegian Centre for Human Rights (NCHR) 'Water Services Fault Lines: An Assessment of South Africa's Water and Sanitation Provision across 15 Municipalities' (2008) CALS, COHRE and NCHR: <http://www.wits.ac.za/files/resfd5179ffe9b24ecfa4110e1ee24cbb20.pdf> (accessed on 30 September 2011) 34–40; and K Tissington 'Targeting the Poor': An Analysis of Free Basic Services (FBS) and Municipal Indigent Policies in South Africa' (November 2013) Socio-Economic Rights Institute of South Africa (SERI): www.seri-sa.org/images/Targeting_the_Poor_Nov13.pdf.
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 108. United Nations CESCR General Comment 15 on the right to water (2002), para. 12(a): daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf (accessed on 25 October 2013); P Gleick 'Basic Water Requirements for Human Activities: Meeting Basic Needs' (1996) 21 *Water International* 83, 88: http://www.pacinst.org/wp-content/uploads/2012/10/basic_water_requirements-1996.pdf (accessed on 25 October 2013); and G Howard and J Bartram 'Domestic Water Quantity, Service Level and Health' (2003) World Health Organisation, i: http://www.who.int/water_sanitation_health/diseases/WSHo302.pdf.

109. DWAF 'Strategic Framework for Water Services: Water is life, sanitation is dignity' (September 2003): <http://www.info.gov.za/view/DownloadFileAction?id=70217>.
110. DWAF 'Strategic Framework for Water Services: Water is life, sanitation is dignity' (September 2003) 27, 29, 49: <http://www.info.gov.za/view/DownloadFileAction?id=70217>.
111. K Tissington "'Targeting the Poor": An Analysis of Free Basic Services (FBS) and Municipal Indigent Policies in South Africa' (November 2013) Socio-Economic Rights Institute of South Africa (SERI): https://www.academia.edu/13483940/Targeting_the_Poor_An_Analysis_of_Basic_Services_FBS_and_Municipal_Indigent_Policies_in_South_Africa.
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- on Housing Rights and Evictions (COHRE) and Norwegian Centre for Human Rights (NCHR) 'Water Services Fault Lines: An Assessment of South Africa's Water and Sanitation Provision across 15 Municipalities' (2008) CALS, COHRE and NCHR, 45–49: <http://www.wits.ac.za/files/resfd5179ffe9b24ecfa4110e1ee24cbb20.pdf>.
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121. K Tissington, P Berkowitz and J Dugard 'Submission on Access to Water and Sanitation in South Africa' (9 February 2009) Centre for Applied Legal Studies (CALS) 14–15.
122. SAICE 'Infrastructure Report Card for South Africa 2011' (May 2011) *Civil Engineering*, vol. 19(4), 16: http://www.saice.org.za/downloads/monthly_publications/2011/2011-Civil-Engineering-may.pdf.
123. The Green Drop system certifies that waste water systems and processes are operating well: http://www.dwa.gov.za/Dir_WS/GDS/.
124. DWA 'Statement by the Minister of Water and Environmental Affairs Mrs Edna Molewa at the release of the Blue Drop and Green Drop assessment reports' (30 June 2013): <http://www.dwaf.gov.za/Communications/PressReleases/2011/BlueDropGreenDropAssRep.pdf>.
125. Millennium Development Goal 7c, which the South African government has formally fulfilled (albeit with the distribution- and quality-related problems outlined in this paper), is to halve by 2015 the number of households without sustainable access to safe drinking water: <http://www.un.org/millennium-goals/envIRON.shtml>.

126. Paragraph 106, *City of Johannesburg and Others v Mazibuko and Others* (2008) 4 All SA 471 (Mazibuko South Gauteng High Court Decision).
127. Paragraph 122, *City of Johannesburg and Others v Mazibuko and Others* (2008) 4 All SA 471 (Mazibuko South Gauteng High Court Decision).
128. Photo of Phiri graffiti by Antina von Schnitzler (used with permission).
129. Further research is necessary to delve more deeply into the policy- and institutional competency-related questions raised here.
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Realising the right to health in South Africa

KHULEKANI MOYO¹

1. Introduction

The movement towards defining health as a social issue led to the founding of the World Health Organisation (WHO) in 1946.² With the emergence of health as a public issue, the conception of health changed. WHO developed and promulgated the understanding of health as 'a state of complete physical, mental and social well being and not merely the absence of disease or infirmity.'³ It defined an integrated approach linking together all the factors related to human well being, including physical and social surroundings conducive to good health.

The preamble to South Africa's 1996 Constitution explicitly provides for the constitutional imperative to improve the quality of life for all citizens and to free the potential of each person.⁴ The preamble to the Constitution specifically stipulates that it seeks to 'heal the divisions of the past', 'establish a society based on democratic values, social justice and fundamental human rights' and 'improve the quality of life for all citizens and free the potential of each person.'⁵

Section 7(1) of the Constitution affirms that it is 'a cornerstone of democracy in South Africa and emphasises the democratic values of human dignity, equality and freedom.' The Constitution places an overarching set of obligations on the State to 'respect, protect, promote and

fulfil the rights in the Bill of Rights'.⁶ Furthermore, section 39(2) enjoins every court, tribunal or forum to 'promote the spirit, purport and objects of the Bill of Rights' when developing the common law or customary law. The Constitution thus creates various mechanisms for holding the State and private actors accountable for violations of socio-economic rights. An example is the South African Human Rights Commission which has a specific constitutional mandate to monitor socio-economic rights. In that regard, section 184(3) of the Constitution provides that:

Each year, the South African Human Rights Commission must require relevant organs of State to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.⁷

Section 27 of the Constitution affirms the right of everyone to have access to health care services, including reproductive health care. Section 27, as will be fully discussed below, places an obligation on the State to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right.⁸ In 2004, the National Health Act⁹ was promulgated to provide a framework for a structured and uniform health system that took into account the obligations imposed on the State by the Constitution. The National Health Act, in its preamble, acknowledges the socio-economic injustices and inequities of health services of the past, the need to establish a society based on social justice and fundamental human rights, and the need to improve the quality of life for all in the country as the background context for its enactment.¹⁰

In this chapter, I discuss the right of access to health care services binding on South Africa with particular focus on select international law provisions, the relevant constitutional provisions, and the relevant laws, regulations and policies adopted to operationalise the right. I also discuss the various spheres of government responsible for the implementation of the right at all levels and analyse the systemic fault lines across all of the

human rights dimensions that affect the realisation of the right of access to health care services.

The chapter is divided into three parts. The first part gives an overview of the health care system in South Africa, including a discussion of the impact of apartheid on access to health care services in the country. The second part analyses the legal and policy framework relating to the right of access to health care services as well as a discussion, select jurisprudence emanating from the courts relating to the right. The final part discusses the systemic fault lines across all human rights dimensions that affect the realisation of the right of access to health care services in South Africa. It is not, however, a comprehensive technical analysis of the efficacy of the laws, regulations and policies or programmes that have been adopted to operationalise the right of access to health care services. Nor is it an exhaustive discussion of the entire international legal framework, laws, policies, regulations and jurisprudence germane to the right of access to health in South Africa.

2. Health care in South Africa

Access to health care services in South Africa has historically been skewed in terms of race, gender, socio-economic status and a number of other arbitrary grounds. This division reflects the socio-economic fragmentation in the health delivery system where a relatively wealthy minority, usually covered by private health insurance, has access to private health care facilities. On the other hand, the majority of the population is mostly dependent on overburdened, under-resourced and tax-funded public health facilities for hospital-based and inpatient care.¹¹ The result is that despite increased budgetary allocations in the health sector and improved social policies, South Africa has not adequately addressed health disparities in the country.¹² This is because of a health-care system ill-prepared to address the changing trend of burden of disease, poor management, inadequate human-resource capacity and a poor surveillance system.¹³ Kahn has pointed out that South Africa has a complex burden of disease, with a well-documented coexistence of infectious dis-

eases/nutritional deficiencies, and chronic degenerative diseases.¹⁴ The country has experienced a complex health transition in the past two decades.¹⁵ Mortality worsened between 1990 and 2005, in all age groups, largely because of HIV and AIDS prevalence.¹⁶ South Africa's disease burden is characterised by both communicable and non-communicable diseases and, according to Chopra et al, the latter contributes substantially to rural and urban ill health.¹⁷

However, in the past few years, significant strides have been made mainly by the government to tackle these formidable health challenges at policy and health system levels.¹⁸ Commentators and health observers have noted that the government response to the HIV and tuberculosis epidemics has changed greatly since 2009.¹⁹ This has resulted in government increasing budgetary allocations over the years for the expansion of antiretroviral therapy, increased impetus on the prevention of mother-to-child transmission programmes, promotion of HIV and tuberculosis treatment integration, and increased investments in HIV prevention.²⁰ Mayosi et al have pointed out that the change in the leadership at the Department of Health has seen some advances in addressing the historical injustices in the health sector.²¹ It is particularly noteworthy that 'policy and programme changes are evident for all four of the so-called colliding epidemics: HIV and tuberculosis; chronic illness and mental health; injury and violence; and maternal, neonatal, and child health.'²²

A range of successes have been recorded in the past couple of years and the most important have been the increase in life expectancy and the decreases in child mortality from 56 to 40 per 1000 children and in infant mortality from 40 to 30 per 1000 infants.²³ South Africa now has the world's largest programme of antiretroviral therapy, and some advances have been made in implementation of new tuberculosis diagnostics and treatment. Expansion of access to treatment has started to affect AIDS mortality, with the proportion of overall deaths that are related to AIDS decreasing between 2006 and 2011.²⁴ Significantly, HIV prevention has received increased attention and child mortality has benefited from progress in addressing HIV.²⁵ South Africa has adopted a strategy which aims to eliminate malaria in the country by 2018.²⁶ Malaria, a major cause of morbidity and mortality in southern Africa, has

largely been contained and restricted in South Africa to the areas bordering Mozambique.²⁷

Mayosi et al have, however, pointed out that the new momentum is inhibited by stasis within the health management bureaucracy.²⁸ It must be noted that although progress has been made in access to basic education, electricity, potable water, and social protection, large racial inequities still exist in the social determinants of health, especially housing and sanitation for the poor and inequity between men and women.²⁹ It has also been pointed out that the integration of the private and public sectors, and of services for HIV, tuberculosis, and non-communicable diseases needs to improve so as to improve the health delivery system.³⁰

The significance of socio-economic determinants of health such as poverty, lack of access to basic social goods such as potable water, adequate sanitation and shelter, and social exclusion and marginalisation as drivers of an inequitable society have been extensively highlighted in South Africa, where for decades state-engineered social inequities were and continue to be systemic.³¹ The inequities in access to health care are worsening. In the past decade, private hospital and specialist costs have increased to more than the consumer price index, and distribution of specific skilled human resources is skewed to the advantage of the private sector.³² The private sector is run largely on commercial lines and caters for middle and high-income earners who tend to be members of medical schemes. Significantly, there has been a migration of health practitioners from the public sector to the private sector. This has heralded a two-tiered system which is inequitable and inaccessible to a large portion of the population. While access to health care has generally improved in South Africa, the quality of health care has plummeted. Public health institutions in the public sector have suffered poor management, underfunding and deteriorating infrastructure.³³ The situation is compounded by public health challenges, including the burden of diseases such as HIV and tuberculosis, and a shortage of key medical personnel.³⁴ On the other hand, in the past decade, private hospital and specialist costs have increased faster than the consumer price index, and distribution of specific skilled human resources is skewed to the advantage of the private sector.³⁵ Over the past decade, private hospital costs have increased by

121 per cent whilst over the same period specialist costs have increased by 120 per cent.³⁶ Contribution rates per medical scheme beneficiary have doubled over a seven-year period. This has not been proportionate with increased access to services because of the limited access to needed health service coverage due to the design of the medical scheme benefit options, or the early exhaustion of benefits.³⁷

3. Impact of apartheid on access to health

South Africa is regarded as a middle-income country with a Gross Domestic Product (GDP) of \$277 billion.³⁸ However, it is worth noting that access to health care services in South Africa has historically been skewed in terms of race, gender, socio-economic status and a number of other arbitrary grounds. As noted by Coovadia et al, 'the history of South Africa has had a pronounced effect on the health of its people and the health policy and services of the present day.'³⁹ Coovadia et al have comprehensively chronicled the historical roots of the determinants of health in South Africa and the development of the health system through colonialism and apartheid to the current post-apartheid period.⁴⁰ The institutional mechanisms established to deliver health care services have historically reflected and continue to reflect a disproportionate bias in favour of dominant groupings in society. There are marked differences in rates of disease and mortality between races in South Africa and these reflect racial differences in the access to basic household living conditions and other determinants of health.⁴¹ For example, the national prevalence estimates for HIV or rates of infant mortality are higher in black populations than in white populations.⁴²

At the advent of democracy in 1994, the health system was extremely fragmented and reflected broader societal inequalities. Health policy in the apartheid era, like all government action, was dominated by the objective of maintaining economic and political power, and a higher quality of life for the white population with scant regard to the plight of the black majority.⁴³ Prior to 1994, the health system was fragmented and designed along racial lines. On the one hand was a highly resourced

system that benefited the white minority. The other was systematically under-resourced and reserved for the black majority.⁴⁴ This resulted in rigid segregation of health facilities and grossly disproportionate spending on the health of whites as compared to blacks, with the latter relegated to overcrowded and filthy facilities characterised by inadequate staff, funds and other resources.⁴⁵ The result were public health policies that ignored diseases primarily affecting black people and the denial of basic sanitation, clean water supply and other components of public health to homelands and townships.⁴⁶ Attempts to deal with these disparities and to integrate the fragmented services that resulted from fourteen health departments (serving the four race groups and various bantustans) did not fully address the inequities. Problems linked to health financing that are biased towards the privileged few have also not been adequately addressed.⁴⁷

Another key feature of the health sector by 1994 was that it was very biased towards hospital-based, curative care. South Africa had considerable hospital capacity, but this was heavily concentrated in urban areas and at the higher levels of care. Its district hospital capacity was poor and primary care services had been systematically neglected. The adoption of the 1996 Constitution resulted in the creation of nine provinces which integrated the former provinces and 'homelands'. A quasi-federal structure was adopted whereby considerable responsibility was given to each province. The public health system was streamlined into a single Department of Health at the national level and one in each of the nine provinces. Some local governments also had health departments, but for many years their role in the overall health system was legislatively unclear.

The national level is largely responsible for providing overall strategic direction for the health system, ensuring that health policy is translated into legislation, monitoring the implementation of national policy. The national department is also responsible for developing norms and standards to ensure that all South Africans, irrespective of the province within which they live, enjoy access to comparable health services.⁴⁸ The provincial level is directly responsible for certain services, such as specialist hospital services and ambulance services and for overseeing all health services within that province. The local government level is only

directly responsible for ‘municipal’ health services, which largely relate to environmental health services.⁴⁹

4. Legal, policy and functional frameworks

4.1 The protection of the right to health under international human rights law

A significant number of international and regional human rights instruments provide for the right to health. The content of the obligations imposed by the right to health have been elaborated by the United Nations (UN) and regional treaty monitoring bodies. With the establishment of WHO, for the first time the right to health was recognised internationally. The WHO Constitution affirms the enjoyment of the highest attainable standard of health ‘as one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.’⁵⁰ Significantly, this recognition was reiterated in a wide range of international and regional human rights instruments, which include the Universal Declaration of Human Rights (UDHR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW); the Convention on the Rights of the Child (CRC); the American Declaration on the Rights and Duties of Man; the European Social Charter (ESC); the African Charter on Human and Peoples’ Rights (African Charter); the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa and the African Charter on the Rights and Welfare of the Child, among others.

Universal recognition of the right to health was further buttressed in the 1978 Declaration of Alma-Ata on Primary Health Care (Alma-Ata Declaration), in which states pledged to progressively develop comprehensive health care systems to ensure effective and equitable distribution of resources for maintaining health.⁵¹ The Alma-Ata Declaration proclaims that the attainment of the highest possible level of health is a ‘most important worldwide social goal’.⁵² Signatory states undertook to

provide adequate health care and social measures for their populations.⁵³ The Alma-Ata Declaration develops the bases for implementing primary health care systems, which have implications for the observance of the right to health. Although the Alma-Ata Declaration is not binding, it represents a further commitment on the part of states to respect the right to health, and establishes the framework for an integrated policy aimed at securing its enjoyment. The following section discusses the protection of the right to health under international human rights law in detail.

The UDHR provides for the right of everyone to the adequate standard of health.⁵⁴ As a General Assembly resolution, the UDHR is not binding as such.⁵⁵ However, its most fundamental provisions are generally thought either to have crystallised into customary international law or to constitute an authoritative interpretation of the UN Charter obligations.⁵⁶ Significantly, the broad human rights provisions contained in the UDHR have since been incorporated in legally binding form in many international human rights instruments.⁵⁷

The ICESCR provides for the right to health in article 12 by enjoining states to recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.⁵⁸ The steps to be taken by the states to achieve the full realisation of the right to health should include those necessary for the reduction of the stillbirth rate, of infant mortality and for the healthy development of the child; the improvement of all aspects of environmental and industrial hygiene; the prevention, treatment and control of epidemic, endemic, occupational and other diseases; and the creation of conditions which would assure to all medical service and medical attention in the event of sickness.⁵⁹

CEDAW also provides for the right to health. Article 12 of CEDAW enjoins states parties to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. Additionally, states are compelled to ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation. The CEDAW also provides for the particular problems faced

by rural women. Article 4(2)(b) provides that states parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right to have access to adequate health care facilities, including information, counselling and services in family planning.’

The CRC also contains a comprehensive provision on the right to health.⁶⁰ The CRC enjoins states parties to strive to ensure that no child is deprived of his or her right of access to such health care services. Article 24 of the CRC emphasises that state parties should pursue full implementation of the right and to take measures to diminish infant and child mortality, and to ensure the provision of necessary medical assistance and health care to all children, with emphasis on the development of primary health care. Additionally, states parties are enjoined to combat disease and malnutrition, including within the framework of primary health care, through the application of readily available technology and the provision of adequate nutritious foods and clean drinking water; appropriate pre-natal and post-natal health care for mothers; and to take all effective and appropriate measures to abolish traditional practices prejudicial to the health of children.

The African Charter recognises that individuals within the states’ respective jurisdictions have the right to enjoy the best attainable state of physical and mental health. Consequently states must undertake to adopt measures necessary to protect such individuals’ health by ensuring ‘that they receive medical attention when they are sick.’⁶¹ The fulfilment of the right to health is, furthermore, linked to the protection and implementation of other provisions in the African Charter which may have direct or indirect implications on a person’s enjoyment of the right to health.

In the case of *Purohit and Moore v The Gambia (Purohit)*, the African Commission on Human and Peoples’ Rights (African Commission), the monitoring organ under the African Charter, has held that states have an obligation to ensure that health care facilities and commodities, including medicines, are made available to citizens.⁶² The African Commission further stated that the enjoyment of the right to health is crucial to the

realisation of other fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind.⁶³ The African Commission reiterated that mental health patients should be accorded special treatment to enable them to attain and sustain their optimum level of independence and performance.⁶⁴

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women Protocol)⁶⁵ became the first international treaty to provide for binding obligations on the right to health, which specifically mentions HIV and AIDS. Article 14(1) of the African Women Protocol provides that states parties shall ensure that the right to health of women, including sexual and reproductive health, is respected and promoted. In that regard states are enjoined to respect and promote the right of women to control their fertility; to decide whether to have children, the number of children and the spacing of children; to choose any method of contraception; the right to self-protection and to be protected against sexually transmitted infections, including HIV and AIDS; family planning education as well as adequate, affordable and accessible health services, including information, education and communication programmes to women, especially those in rural areas.

The African Charter on the Rights and Welfare of the Child (African Children's Charter) provides for the right of every child to enjoy the best attainable state of physical, mental and spiritual health.⁶⁶ The African Children's Charter enjoins states to reduce infant and child mortality rate; ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; ensure the provision of adequate nutrition and safe drinking water; combat disease and malnutrition within the framework of primary health care through the application of appropriate technology; and ensure appropriate health care for expectant and nursing mothers. It further imposes obligations on states to develop preventative health care and family life education and provision of service; integrate basic health service programmes in national development plans; ensure that all sectors of the society, in particular parents, children, community leaders and community workers, are informed and supported in the use of basic

knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of domestic and other accidents.⁶⁷

Article XI of the American Declaration on the Rights and Duties of Man establishes the right to the preservation of health through sanitary and social measures (food, clothing, housing and medical care), while it conditions its implementation on the availability of public and community resources. Significantly, article 34 of the Organisation of American States' Charter stipulates, as among the goals for contributing to the integral development of the person, access to knowledge of modern medical science and to adequate urban conditions. The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights provides for the right to health for all individuals in article 10 and the right to a healthy environment in article 11.

The European Social Charter (ESC) complements the European Convention on Human Rights in the field of economic and social rights. Article 11 of the ESC provides for the right to health, the attainment of which it enjoins states to engage in promotion, education and disease prevention activities. The ESC has several provisions which guarantee, expressly or implicitly, the right to health. Article 11 covers numerous issues relating to public health, such as food safety, protection of the environment, vaccination programmes and alcoholism. Article 3 concerns health and safety at work. The health and wellbeing of children and young persons are protected in articles 7 and 17. The health of pregnant women is guaranteed under articles 8 and 17. The health of elderly persons is protected under article 23 of the ESC.

In addition to human rights instruments, there are soft law mechanisms such as the MDGs which have helped to put the issue of access to health care on the global agenda.⁶⁸ The MDGs, derived from the Millennium Declaration of 2000, consist of eight goals which all member states of the UN have pledged to achieve by 2015.⁶⁹ Of the MDGs, four are directly related to health, namely (i) to reduce child mortality; (ii) to improve maternal health; (iii) to combat HIV and AIDS, malaria and other diseases; and (iv) to eradicate poverty. Each of the MDGs has time-bound and quantifiable targets measurable by specific indicators

and such targets and indicators are designed to assess country progress towards realisation of the goals highlighted above.

4.2 Protection of the right of access under South Africa's constitutional and legislative framework

4.2.1 *The South African Constitution*

The right of access to health care is provided for in three sections of the Constitution. These provide for access to health care services, including reproductive health, basic health care for children, and emergency services and medical services for detained persons and prisoners.⁷⁰ Universal access is provided for in section 27 (1)(a) which states that 'Everyone has the right to have access to health care services, including reproductive health care.' Section 27 (1)(b) provides for the state to 'take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of the right.' Section 27(3) states that no one can be denied emergency medical treatment. Section 28(1)(c) provides for the right to basic health care services for children, whereas section 35(2)(e) protects the right to adequate medical treatment at state expense for detained persons. Other health-related constitutional provisions include section 24(a), which protects the right to an environment that is not harmful to one's health or well being. Section 12(2) protects the right to bodily and psychological integrity, including the right to make decisions on reproduction; to security in and control over one's body; and the right not to be subjected to medical or scientific experiments without one's informed consent.

4.2.2 *Normative content on the right to health*

The Committee on Economic, Social and Cultural Rights (CESCR), in its General Comment No. 14, has elaborated on the normative content of the right to health, stating that the right to health facilities, goods and services should be understood as:

The creation of conditions which would assure to all medical service and medical attention in the event of sickness ... both phys-

ical and mental, includes the provision of equal and timely access to basic preventative, curative, rehabilitative health services, and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries and disabilities, preferably at community level; the provision of essential drugs; and appropriate mental health treatment and care. A further important aspect is the improvement and furtherance of participation of the population in the provision of preventative and curative health services, such as the organisation of the health sector, the insurance system and, in particular, participation in political decisions relating to the right to health taken at both the community and national levels.⁷¹

The CESCR, in its General Comment No. 14, has elaborated on the normative content of the right to health by recognising the right to health to include equal access for all, on the principle of non-discrimination, to health care facilities, goods and services. These have to be available in sufficient quantity; must be physically and economically accessible to everyone; must be ethically and culturally acceptable; and must be of a medically appropriate quality. These four principles are discussed in more detail below.

4.2.2.1 Availability

Functioning public health and health care facilities, goods and services, as well as programmes, have to be available in sufficient quantity.⁷² These include the underlying determinants of health, such as safe and potable drinking water and sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by WHO's Action Programme on Essential Drugs.⁷³

4.2.2.2 Accessibility

Health facilities, goods and services have to be accessible to everyone within the jurisdiction of a state without discrimination.⁷⁴ Accessibility has four overlapping dimensions. These include non-discrimination:

health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalised, in law and in fact, without discrimination on any of the prohibited grounds. Physical accessibility entails that health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalised groups.⁷⁵ Accessibility further includes adequate access to buildings for persons with disabilities. Among such groups it includes ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons living with HIV and AIDS.

Economic accessibility (affordability) entails that health facilities, goods and services must be affordable for all.⁷⁶ It expressly stipulates that payment for health care services must be based on the principle of equity, ensuring that these services, whether publicly or privately provided, are affordable for all, including socially disadvantaged groups. Payment for health care services must be based on the principle of equity. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.

Information accessibility includes the right to seek, receive and impart information and ideas concerning health issues.⁷⁷ However, accessibility of information should not impair the right to have personal health data treated with confidentiality. Access is therefore the opportunity and freedom to use services, and encompasses the circumstances that allow for appropriate service utilisation, plus a sufficiently informed individual or household (demand-side) empowered to exercise choice within the health system (supply-side). The 'degree of fit' between demand- and supply-sides, rather than each in isolation, determines the degree of access achieved.⁷⁸

4.2.2.3 Acceptability

Acceptability is a poorly conceptualised dimension of access to health care. Studies have shown that if a health system cannot be trusted to guarantee a threshold level of quality, it will remain under-utilised.⁷⁹ Gibson has pointed out that perceptions of whether patients are treated respectfully and with dignity are also important for understanding the

acceptability of health care and its representation.⁸⁰ In relation to general views on the public sector, just over half of respondents in a South African Costs and Benefit Incidence Analysis study by McIntyre et al showed that patients at public hospitals are rarely treated with respect and dignity.⁸¹

The CESCR has elaborated in General Comment 14 that all health facilities, goods and services must be respectful of medical ethics and culturally appropriate, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.⁸² It is therefore significant to take into account the various perceptions as to the acceptability of health care services that people hold of public and private hospitals and to understand these in light of contemporary health system reforms in South Africa.⁸³

4.2.2.4 Quality

In the South African Costs and Benefit Incidence Analysis study by McIntyre et al highlighted above, the findings of the study provided insights into the dissatisfaction among health care users in South Africa with both the private and the public health care providers.⁸⁴ Concerns about public sector health care providers primarily related to patient-provider engagements, cleanliness of facilities and drug availability.⁸⁵ Concerns with private health care providers related to the high cost of medical schemes and the underlying profit motive.⁸⁶

The CESCR has explained in General Comment 14 that health facilities, goods and services must be scientifically and medically appropriate and of good quality. This requires skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.⁸⁷

In addition to these four principles, General Comment No. 3 of the CESCR enjoins states parties to ensure the satisfaction of minimum essential levels of all the rights enunciated in the ICESCR. For example, a state in which any significant number of individuals is deprived of essential primary health care is failing to discharge its obligations under the ICESCR⁸⁸ and constitutes a violation of the right. In the CESCR's view, the minimum core standards for the right to health include at least the

following, and are non-derogable.⁸⁹ The state is obliged to:

- ensure essential primary health care;
- to ensure the right of access to health care facilities, goods and services on a non-discriminatory basis, especially for vulnerable and marginalised groups;
- ensure equitable distribution of all health facilities, goods and services;⁹⁰
- provide essential drugs as defined by WHO's Programme on Essential Drugs;⁹¹ and
- adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population which shall be devised and periodically reviewed.

4.2.3 Legislation

4.2.3.1 National Health Act

The National Health Act 61 of 2003 (National Health Act) came into force in May 2005 and is the most important piece of legislation implementing the constitutional rights on health. Although other laws deal with specific aspects of health rights, the National Health Act is the main law that gives overall direction on health rights in South Africa. The National Health Act provides a framework for a single health system for South Africa. Furthermore, it provides for a number of basic health care rights, including the right to emergency treatment⁹² and the right to participate in decisions regarding one's health.⁹³ Some of the aims of the National Health Act are to make effective health services available to the population equitably and efficiently; to protect, promote, respect and fulfil the rights of South Africans to progressively realise the constitutional right to health; and to establish a national health system that will provide people with the best possible health services that available resources can afford.⁹⁴ The National Health Act also gives special protection to people needing emergency medical treatment by stipulating that a public or private health care provider, health worker or health establishment may not refuse anyone emergency medical treatment.⁹⁵

The National Health Act similarly calls for ‘a spirit of co-operation and shared responsibility among public and private health professionals and providers’.⁹⁶ However, no framework is provided on how interaction between the public and private health sectors will occur. Developing a framework for both the public and private health sectors on their interactions is important. Additionally, the National Health Act pays particular attention to the need to ‘provide uniformity in respect of health services across the nation’.⁹⁷ This concern has arisen since the establishment of a quasi-federal constitutional structure in 1996, where provincial governments, which have the main responsibility for health care provision, have considerable autonomy in funding, planning and implementing health and other social services. Consequently, the National Department of Health has an important role to play in ensuring the provision of essential services, which all public sector health departments must equitably provide, within the limits of available resources.⁹⁸

4.2.3.2 The Mental Health Care Act

The Mental Health Care Act 17 of 2002 (Mental Health Act) recognises that health is a state of physical, mental and social wellbeing, and that mental health care services must be provided at all levels of the health system. The Mental Health Act aims to regulate the mental health care environment in a way that allows the best possible mental health care, treatment and rehabilitation that available resources can afford;⁹⁹ sets out the rights and duties of the mental health care user, and the duties of mental health care providers;¹⁰⁰ and respect for the human dignity and privacy of every mental health care user.¹⁰¹ This means that mental health care users must receive treatment and rehabilitation services that would enable their mental capacity to develop to their full potential and to facilitate their integration into community life.

4.2.3.3 The Sterilisation Act

The Sterilisation Act 12 of 1998 (Sterilisation Act) provides for a right to sterilisation and sets out the circumstances when a sterilisation can be performed. Sterilisation is a surgical operation to make a woman incapable of falling pregnant. The Sterilisation Act also deals with the sterilisation

of people with severe mental disabilities. The Sterilisation Act elaborates what 'severe mental disability' means and who needs to consent when a person has a severe mental disability, and wants or needs to be sterilised.

4.2.3.4 The Choice on Termination of Pregnancy Act

The Choice on Termination of Pregnancy Act 92 of 1996 gives every woman the freedom to choose whether to have an early, safe and legal termination of pregnancy, according to her beliefs. The Choice on Termination of Pregnancy Act provides for a pregnant woman to choose to have her pregnancy terminated on request during the first twelve weeks of pregnancy. All that the law requires is informed consent.

4.2.3.5 The Tobacco Products Control Amendment Act

The Tobacco Products Control Amendment Act 12 of 1999 was introduced to deal with the harmful effects of tobacco on the health of people. It prohibits the advertising and promotion of tobacco, the free distribution of tobacco products and the smoking of tobacco products, in any public place or workplace. Additionally, the [Tobacco Products Control Amendment Act 23 of 2007 prohibits smoking in public places, creates public awareness of the health risks of tobacco by requiring certain information on packaging, and prohibits the sale of tobacco products to any person under the age of eighteen.

4.2.3.6 The Medical Schemes Act

The Medical Schemes Act 131 of 1998 (Medical Schemes Act) attempts to enable access to affordable health care services by setting out guidelines on the terms and conditions for membership to medical schemes. The Medical Schemes Act requires that contributions to medical schemes be made only on the basis of income or number of dependants, or both income and dependants. The Medical Schemes Act explicitly prohibits contributions being determined on the basis of past or present state of health or the frequency of using health care services.¹⁰² By limiting the basis on which contributions are made, the Medical Schemes Act effectively disallows the 'loading' of premiums on the basis of health status. This in turn makes health care services more affordable to those who

need them. The Medical Schemes Act also limits cancellation or suspension of membership to instances of failure to comply with the rules, fraudulent activities and non-disclosure of material information.¹⁰³

4.2.3.7 The Medicines and Related Substances Control Amendment Act

The Medicines and Related Substances Control Amendment Act 90 of 1997 controls the manufacture, sale and distribution of medicines. One of its important functions is to set out steps to ensure the supply of affordable medicines. Section 15(c) of the Act allows the Minister of Health to lay down conditions for the supply of more affordable medicines in some circumstances to protect public health. This includes provisions that enable the lowering of the cost of prescription drugs purchased at pharmacies. Additionally, the Medicines and Related Substances Amendment Act 59 of 2002 aims to make drugs more affordable and provides for transparency in the pricing of medicines.

4.2.3.8 The Correctional Services Act

The Correctional Services Act 111 of 1998 (Correctional Services Act) places a duty on the Department of Correctional Services to provide all prisoners with adequate health care services. Adequate health care is based on the principles of primary health care in order to allow every prisoner to lead a healthy life. The Correctional Services Act explicitly provides that every prisoner has the right to adequate medical treatment, but that no prisoner has a right to cosmetic medical treatment, such as the removal of tattoos or implants of breasts at state expense. The Correctional Services Act further provides that every prisoner has the right, at his/her own expense, to be visited and examined by a medical practitioner of his/her choice and may be treated by this practitioner as long as the Head of Prison has given permission. The Correctional Services Act prohibits anyone from forcing a prisoner to undergo medical examination, intervention or treatment without informed consent, unless this will be a threat to the health of other prisoners. However, consent to surgery is not needed if a medical doctor decides that it is in the interests of the prisoner's health, and the prisoner is unable to give consent because he/she is unconscious.

4.2.3.9 The Children's Act

The Children's Act¹⁰⁴ aims to protect children living with disabilities or chronic illnesses. Section 11(3) of the Children's Act provides that a child with a disability or chronic illness has the right not to be subjected to medical, social, cultural or religious practices that are detrimental to his/her health, wellbeing or dignity. The Children's Act also restricts virginity testing and outlaws female genital mutilation or circumcision. Section 12(8) of the Children's Act prohibits circumcision of male children under the age of sixteen, except when circumcision is performed for religious purposes in accordance with the practices of a specific religion, or where circumcision is performed for medical reasons on the recommendation of a medical practitioner. The Children's Act further restricts the circumcision of male children older than sixteen in that the child must give consent after proper counselling. This entails that any male child has the right to refuse circumcision, taking into account the child's age, maturity and stage of development.

4.2.3.10 Other health-related legislation

Other important pieces of legislation include the Nursing Act 33 of 2005, which provides for the introduction of mandatory community service for nurses. The Pharmacy Amendment Act 1 of 2000 permits non-pharmacists to own pharmacies, with the aim of improving access to medicines. The Health Professions Act 56 of 1974 provides for the regulation of health professions, in particular medical practitioners, dentists, psychologists and other related health professions. The Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 and the Foodstuffs, Cosmetics and Disinfectants Amendment Act 39 of 2007 provide for the regulation of foodstuffs, cosmetics and disinfectants, in particular, by setting quality and safety standards for the sale, manufacturing and importation of such commodities. This legislation also places restrictions on the manufacture, importation and marketing of articles that are harmful or injurious to human health or that contain a prohibited substance. The legislation also prohibits the false description and labelling of foodstuffs; defines the liability of an importer, a manufacturer or a packer; and provides for the analysis of foodstuffs and the examination, control and disposal of

certain imported articles, among others. The Occupational Diseases in Mines and Works Act 78 of 1973 provides for medical examinations on persons suspected of having contracted occupational diseases, especially in mines, and for compensation in respect of those diseases; and the Academic Health Centres Act 86 of 1993 provides for the establishment, management and operation of academic health centres. The Human Tissue Act 65 of 1983 provides for the administration of matters pertaining to human tissue.

4.2.3.11 White Paper for the Transformation of the Health System (1997)

The White Paper for the Transformation of the Health System (White Paper),¹⁰⁵ released in 1997, sets out key health policy issues. The White Paper aimed to unify the national health system to address the effects of apartheid on health, reorganise the health service to give priority to primary health care through the district health system, where certain aspects of health service delivery take place at district (instead of national or provincial) level.¹⁰⁶ Additionally, the White Paper emphasised the need to decentralise management of health services, establish the District Health System to facilitate implementation of primary health care, increase access to services for citizens, and ensure the availability of good quality essential drugs in health facilities.¹⁰⁷ The White Paper also emphasised the need to strengthen disease prevention and health promotion in areas such as HIV and AIDS, and maternal, child and women's health; implement the Integrated Nutrition Programme to focus more on sustainable food security for the needy; and rationalise health financing through budget reprioritisation.¹⁰⁸ The White Paper further gave special attention to health services reaching people most in need of these services – the poor, the underserved, the elderly, women and children – and the need to promote the participation of community structures in health care delivery.¹⁰⁹ The White Paper also sought to unite the public and private health sectors to promote common goals, providing that: "The activities of the public and private health sectors should be integrated in a manner that makes optimal use of all available health care resources."¹¹⁰

4.2.3.12 National Patients' Rights Charter

The South African Patients' Rights Charter (Charter), launched in 1997, provides in its preamble that it seeks a common standard for achieving the right to health services guaranteed in the Constitution, in contrast to the denial or violation of human rights experienced by the vast majority for many decades. The Charter was developed by the Department of Health in consultation with various other bodies. The Charter aims to improve the quality of health care by defining twelve core health rights for those who use health care facilities. Although the success of the Charter is largely dependent on the extent to which users have knowledge of it and are willing to assert their rights, the adoption of the Charter nevertheless represents a commitment to ensuring the provision of appropriate, good quality and human-rights sensitive health care services. However, a significant problem is that the Charter refers to 'consumer rights', which accordingly offers little recourse to people who are unable to gain access to health care services in the first place. A further concern is that the Charter is heavily weighted in favour of curative care with little attention to promotive or preventative care.¹¹¹

The Charter provides that every patient has the right to a healthy and safe environment; access to safe health care; emergency care in life-threatening situations; confidentiality and privacy; to be treated with courtesy and consideration by all staff and to be informed about his/her illness/condition and treatment, so as to be in a position to give informed consent. The Charter also provides for every patient's right to exercise choice in health care services, to participate in decision-making that affects his/her health; to be referred for a second opinion; to continuity of care; to complain about health services; to be treated by a named healthcare provider; and to refuse treatment or information about his/her illness.¹¹² Significantly, the Charter recognises that patients have certain responsibilities. These are the responsibility to advise the health care provider on his or her wishes with regard to his or her death; to comply with the prescribed treatment or rehabilitation procedures; to enquire about the related costs of treatment and/or rehabilitation and to arrange for payment. It also enjoins a patient to take care of health records in his or her possession; to take care of his or her health; to care for and pro-

tect the environment; to respect the rights of other patients and health providers; to utilise the health care system properly and not abuse it; to know his or her local health services and what they offer; and to provide health care providers with relevant and accurate information for diagnostic, treatment, rehabilitation or counselling purposes.¹¹³

4.2.3.13 National Drug Policy

The National Drug Policy (NDP) was launched in 1996, and heralded great changes in the area of drug management in South Africa.¹¹⁴ The cost of drugs is a critical element in determining access to health care services. In South Africa, drug costs are second only to personnel costs in the health sector. The goal of the NDP is to ensure an adequate and reliable supply of safe, cost-effective drugs of acceptable quality to all citizens of South Africa and the rational use of drugs by prescribers, dispensers and consumers.¹¹⁵ According to the NDP, the pharmaceutical sector, as a component of the health sector, reflected its deficiencies, most notably the lack of equity in access to essential drugs, with a consequent impact on quality of health care. Furthermore, rising drug prices, already extremely high in international terms, gave increasing cause for concern, as did evidence of irrational use of drugs, losses through malpractice and poor security, and cost-ineffective procurement and logistic practices.¹¹⁶

Among the priority issues it outlined were strengthening the Medicines Control Council, rationalising drug registration, controlling the registration of health practitioners and the licensing of premises, enhancing the inspectorate and laboratory functions and promoting other quality assurance measures. With regard to ensuring the availability of safe and effective drugs at the lowest possible cost, the NDP established a pricing committee, promoted the use of generic drugs and suggested the possibility of engaging in parallel importing and international tendering.

4.2.3.14 National Department of Health Strategic Plan 2010/11–2012/13

The Strategic Plan for 2010/11–2012/13 (Strategic Plan) states that the department's vision is to ensure 'an accessible, caring and high quality health system'.¹¹⁷ Its mission is 'to improve health status through the prevention of illnesses and the promotion of healthy lifestyles and to con-

sistently improve the health care delivery system by focusing on access, equity, efficiency, quality and sustainability'.¹¹⁸ The Strategic Plan provides that the health sector must produce twenty deliverables over the next five years. These are increased life expectancy at birth; reduced child mortality; decreased maternal mortality ratio; managing HIV prevalence; reduced HIV incidence; expanded access to the Prevention of Mother to Child Transmission (PMTCT) programme; improved TB case finding; improved TB outcomes; improved access to antiretroviral treatment for HIV-TB co-infected patients; decreased prevalence of drug resistant TB; and revitalisation of primary health care. Other key deliverables include improved physical infrastructure for health care delivery; improved patient care and satisfaction; accreditation of health facilities for quality; enhanced operational management of health facilities; improved access to human resources for health; improved health care financing; strengthened health information systems; improved health services for the youth, and expanded access to home-based care and community health workers.¹¹⁹

4.2.3.15 National Core Standards

In recent years there has been increasing public sector attention on improving quality of care and on the setting of standards of health care. The National Health Act provides that health care services must have due regard to the principles laid down in the Constitution, particularly sections 27 and 195 with regard to quality, effectiveness and efficiency. In 2008, the Office of Standards Compliance (OSC) within the National Department of Health developed and piloted a set of National Core Standards (NCS) which form the basic requirements for quality and safe health care.¹²⁰ The NCS set the benchmark for quality improvement in public health establishments' standards, defined as 'an expected level of performance'. The main purposes of the NCS are to develop a common definition of quality of care which should be found in all South African health establishments as a guide to the public and to managers and staff at all levels; establish a benchmark against which public health establishments can be assessed, gaps identified and strengths appraised; and provide a framework for national certification of public health establishments.¹²¹

The NCS are structured in seven cross-cutting domains, and defined as areas where quality or safety might be at risk. These include patient rights, safety, clinical governance and care. Clinical support services represent the core business of the health system of delivering quality health care to users. The other focus areas are public health, leadership and corporate governance, operational management, and facilities and infrastructure support systems for health care delivery.¹²²

4.2.3.16 National Health System (NHS) Priorities For 2009–2014 (The Ten Point Plan)

As part of its Medium Term Strategic Framework, the National Department of Health released its priorities for the period 2009 to 2014.¹²³ Also known as the Ten Point Plan, the priorities are intended to assist the country in meeting the MDGs and monitoring improvements in the health delivery system. The Ten Point Plan includes the following priority: provision of strategic leadership and creation of a social compact for better health outcomes.¹²⁴ The objective of this priority is to ensure unified action across the health sector. The Ten Point Plan provides for a Ministerial Advisory Committee on Health whose responsibility is to oversee various aspects of health sector improvement, including human resources for health, information, medical products, finance, leadership and governance, service delivery, technology and infrastructure.¹²⁵ The Ten Point Plan provides for the implementation of National Health Insurance (NHI). Improving the quality of care delivered at health facilities is an important aspect of the Ten Point Plan.¹²⁶ As part of the programme to escalate good service at facility level, all primary health care facilities will be visited by a supervisor at least once a month and an Ombuds Office will be established, which will receive and investigate all complaints relating to quality of health care services.¹²⁷ The Ten Point Plan also focuses on overhauling the health care system and improving its management and in that regard it envisages the putting in place of robust financial management systems in order to improve audit outcomes.¹²⁸ Additionally, the Ten Point Plan puts emphasis on the planning, management and development of Human Resources for Health (HRH). This includes ensuring that all provinces have developed and begin to imple-

ment human resource plans which are consistent with service delivery objectives. As part of a detailed planning and forecasting process for various categories of HRH for the next five years, the re-opening of nursing colleges in order to ensure the accelerated production of nurses will also be given due attention.¹²⁹

The Ten Point Plan also puts emphasis on the revitalisation of infrastructure. In that regard, the plan envisages the establishment of public–private partnerships to facilitate the construction and refurbishment of health to revitalise primary-level care facilities in order to improve quality of service.¹³⁰ A national audit of all primary health care infrastructure and services will be conducted. Accelerated implementation of the HIV and AIDS and STI National Strategic Plan 2007–2011, and increased focus on TB and other communicable diseases is also envisaged.¹³¹ The objective of this target is to ensure the implementation of the various existing treatment guidelines and to strengthen prevention interventions. The other targets include mass mobilisation for better health for the population through a ‘Healthy Lifestyle Strategy’ focusing on nutrition, physical activity, tobacco control, alcohol and substance abuse control and safer sexual practices; review of the National Drug Policy; and the need to strengthen research and development of research studies and surveys to generate key reliable information for health planning, service delivery and monitoring.¹³²

4.2.3.17 National Health Insurance

Previous attempts to introduce a health scheme with progressive features in South Africa began with the Commission on Old Age Pension and National Insurance in 1928, which was followed by different committees and commissions, as well as a Ministerial Advisory Committee on national health insurance, which was introduced in 2009.¹³³ While the possibility of introducing mandatory health insurance in South Africa was first raised by academics in the early 1990s, the first time it was incorporated into a formal policy-related document was in the African National Congress’s (ANC)’s 1994 National Health Plan.¹³⁴ The ANC National Health Plan recommended the introduction of compulsory contributions by all formal sector employees and their employers, which

would be used to cover primary health care services as well as hospital care for contributors and their dependants. The ANC National Health Plan further stated that medical schemes, or other forms of private health insurance, would have a role in offering additional cover for services not included in the benefit package.¹³⁵

In 2001, the government set up a Committee of Inquiry into a Comprehensive System of Social Security for South Africa, chaired by Professor Vivienne Taylor (Taylor Committee). The Taylor Committee was mandated to conduct research and to advise government on a social security policy reform process.¹³⁶ This involved, among other things, examining the poverty problem in South Africa; looking at the current social security system, including existing social grants; and making recommendations for reform. In May 2002, the Taylor Committee released its consolidated report (Taylor Report), in which the critical role of the right of access to social security and assistance for reducing poverty was highlighted. The Taylor Report was the first set of policy proposals on mandatory health insurance to explicitly call for an NHI, albeit to be achieved only in the long term. The Taylor Committee proposed that a comprehensive package of services be covered and that 'South Africa move ultimately towards an NHI system over time that integrates the public sector and private medical schemes within the context of a universal contributory system'.¹³⁷ The objectives that underlay the Taylor Committee's proposals on NHI included increased risk pooling by instituting mandatory contributions; drawing tax resources into a common pool with insurance contributions and ensuring risk-equalisation within the public and private sectors; and universal cover for a minimum level of essential benefits, whether provided through the public or private sectors.¹³⁸

A Green Paper on the Policy on National Health Insurance in South Africa was released in August 2011 (NHI Policy Paper).¹³⁹ According to the NHI Policy Paper, the NHI, which will be phased over a fourteen-year period, will ensure that everyone has access to appropriate, efficient and quality health services. This will entail major changes in the service delivery structures, administrative and management systems.¹⁴⁰ The NHI Policy Paper points out that a large part of the financial and human resources for health is located in the private health sector serving a

minority of the population. On the other hand, the public sector is under-resourced relative to the size of the population that it serves and the burden of disease. The public sector has disproportionately less human resources than the private sector, yet it has to manage significantly higher patient numbers.¹⁴¹

The NHI Policy Paper's emphasis is on improved access to quality health services for all South Africans irrespective of whether they are employed or not, and to pool risks and funds so that equity and social solidarity will be achieved through the creation of a single fund. The NHI Policy Paper also emphasises the need to procure services on behalf of the entire population and efficiently mobilise and control key financial resources, as this will obviate the weak purchasing power that has been demonstrated to have been a major limitation of some of the medical schemes, resulting in spiralling costs; and to strengthen the under-resourced and strained public sector so as to improve health systems performance.¹⁴²

The NHI Policy Paper further provides that in order to successfully implement a health care financing mechanism that covers the whole population, such as the NHI, four key interventions need to be implemented. These include; a complete transformation of health care service provision and delivery; the total overhaul of the entire health care system; the radical change of administration and management; and the provision of a comprehensive package of care underpinned by a re-engineered primary health care system.¹⁴³ This is because a two-tiered system of health-care does not embrace the principles of equity and access and the current health financing model does not facilitate sustainable access to health.¹⁴⁴ The government's view is that the two-tier healthcare system in South Africa is unsustainable, destructive, very costly and highly curative and hospicentric.

The NHI Policy Paper identifies certain principles that underlie the need for an NHI for South Africa. The first principle is the right to access health care as prescribed under section 27 of the Constitution. Accordingly, the reform of health care is an important step towards the realisation of these rights and the key is that access to health services must be free at the point of use and that people will benefit according to their

health profile.¹⁴⁵ The second principle is that of social solidarity. This entails the creation of financial risk protection for the entire population that ensures sufficient cross-subsidisation between the rich and the poor, and the healthy and sick.¹⁴⁶ Such a system allows for the spreading of health costs over a person's lifecycle – paying contributions when one is young and healthy and drawing on them in the event of illness later in life. The third principle is of effectiveness – and this will be achieved through evidence-based interventions, strengthened management systems and better performance of the health care system that will contribute to positive health outcomes and overall improved life expectancy for the entire population.¹⁴⁷ The fourth principle is of appropriateness – and this refers to the adoption of new and innovative health service delivery models that take account of the local context and acceptability and are tailored to respond to local needs.¹⁴⁸ According to the NHI Policy Paper, the health services delivery model will be based on a properly structured referral system rendered via a re-engineered primary health care model.¹⁴⁹ The fifth principle is equity – the health system must ensure that those with the greatest health need are provided with timely access to health services. It should be free from any barriers and any inequalities in the system should be minimised. Significantly, equity in the health system should lead to expansion of access to quality health services by vulnerable groups and in underserved areas.

The principle of affordability of health services is particularly emphasised in the NHI Policy Paper. Affordability entails that services will be procured at reasonable costs that recognise health as not just an ordinary commodity of trade but as a public good and a human right.¹⁵⁰ The NHI Policy Paper also emphasises the need for efficiency, and this will be ensured through creating administrative structures that minimise or eliminate duplication across the national, provincial and district spheres.¹⁵¹

According to the 2014 Budget Speech by Minister of Finance Pravin Gordhan on 26 February 2014, The Department of Health's White Paper on NHI and a financing paper by the National Treasury have been completed and will be tabled in Cabinet shortly.¹⁵² Additionally, the NHI pilot districts have been established in every province, supported by funding

for NHI as a conditional grant. In addition to hospital and clinic building and refurbishment programmes, R1.2 billion has been allocated for piloting general practitioners' contracts. An Office of Health Standards Compliance (OHSC) has been established to ensure that public health care provision meets the required standards. Additionally, a new funding framework for the National Health Laboratory Services and associated research activities has been agreed.¹⁵³ Government spending on health care is expected to exceed R492 billion over the next three years as South Africa strengthens its health care system in preparation for the implementation of an NHI scheme. The roll-out of the NHI is currently being financed by two conditional grants: the nationally managed national health grant, and the national health insurance grant managed by the provinces. More than R221 million will be made available in the 2014 Budget for the NHI grant in order to strengthen national district health structures.¹⁵⁴

4.3 Jurisprudence on the right to health

Since 1994 there have been several court cases that have served to add to the normative content of the right to health care. These have thrown light on the concepts of 'available resources' and 'reasonable measures' in terms of section 27(1)(b) of the Constitution. The following section discusses the jurisprudence on the right to health from South African courts.

4.3.1 *Soobramoney v Minister of Health (Kwazulu-Natal)*

The *Soobramoney*¹⁵⁵ case was the first major decision in which the Constitutional Court (Court) adjudicated over the socio-economic rights enshrined in the Constitution. In that case, the Court had to consider health care rationing. The major question which the Court was called upon to decide was whether the health rights in section 27 of the Constitution entitled a chronically ill man in the final stages of renal failure to an order enjoining a public hospital to admit him to the renal dialysis programme of the hospital.

The applicant was denied access to dialysis because he suffered from chronic renal failure and was not a candidate for a kidney transplant because he would need kidney dialysis for the rest of his life as his con-

dition was incurable. The KwaZulu-Natal Department of Health's policy was to limit access to dialysis to persons suffering from acute renal failure or chronic renal failure patients awaiting a kidney transplant. The policy was predicated on ensuring that those whose kidneys could be completely cured were given the best chance of eventually living without the need for dialysis.

The applicant claimed that the Department's decision amounted to a breach of his constitutionally protected right under section 27(3) of the Constitution not to be refused emergency medical treatment. The applicant further argued in the alternative that the policy breached his right of access to health care services guaranteed in section 27(1)(a) of the Constitution. The Court rejected the challenge based on section 27(3) because the applicant sought access to treatment of an ongoing, chronic condition. The Court held that section 27(3) was intended primarily to ensure that 'a person who suffers a sudden catastrophe which calls for immediate medical attention' is not denied ambulance services or access to hospitals which are, in principle, able to provide the necessary treatment.¹⁵⁶

It is important to note that what the applicant claimed was, in essence, the lifting of the exclusion from state renal dialysis facilities of persons with chronic renal failure who do not qualify for a transplant in terms of the Department's policy. The implication was to enjoin the State to re-allocate resources to meet the cost of doing so, or to ration existing resources in a manner which would prejudice those to whom renal dialysis was not merely palliative, but potentially curative. The Court ruled that the decision to limit access to dialysis in these circumstances was rational and that 'a court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters'.¹⁵⁷ The Court further ruled that the applicant had no cause of action in terms of either section 11 or section 27(3) of the Constitution. The Court, instead, held that the applicant's claim fell to be determined in terms of sections 27(1) and (2) of the Constitution – the qualified right of access to health care services.¹⁵⁸

The Court had to address two critical issues in determining whether the refusal of Addington Hospital to admit the applicant to the dialysis treatment programme constituted an infringement of these provisions.

The first issue to be determined was whether it was necessary to ration access to kidney dialysis treatment to patients such as the applicant. Secondly, if such rationing was necessary, whether the policy adopted by the Department complied with the constitutional injunctions in sections 27(1) and (2) and, if so, whether they were applied 'fairly and rationally' to the applicant's case.

The first issue concerns whether and under what conditions limited resources constitute a valid basis for limiting access to medical treatment for patients in the situation of the applicant. The Court alluded to the budgetary constraints facing provincial health departments. The Court noted that the scarcity of resources meant that the need for access to kidney dialysis treatment greatly exceeded the number of available dialysis machines. The Court further noted that this was a national problem extending to all renal clinics.¹⁵⁹ According to the Court, the diversion of additional resources to the renal dialysis programme and related tertiary health care interventions from within the health budget would prejudice other important health programmes.¹⁶⁰ Additionally, the Court pointed out that if the overall health budget was to be substantially increased to fund all health care programmes, this would diminish the resources available to the State to meet other socio-economic needs such as housing, food, water, employment opportunities and social security.¹⁶¹

The Court was not persuaded that it was reasonable to require the State to divert additional resources to the renal dialysis programme in order to cater for all patients in his situation. This inevitably implied that it was necessary for health authorities to ration access to certain forms of medical treatments. It is significant to note that the applicant had not suggested that the relevant guidelines established by the hospital were unreasonable. Neither did he argue that the guidelines were not applied 'fairly and rationally' when the decision was taken that he did not qualify for dialysis treatment.¹⁶² Accordingly, the Court held that there was no breach of section 27(1)(a) read with (2).

One of the criticisms of the judgment from the view of developing a substantive interpretation of socio-economic rights is the lack of engagement with the purposes and values protected by the right to access to health services in section 27(1)(a) of the Constitution.¹⁶³ Liebenberg

argues that the failure to develop the normative content of health care rights, including its relationship with other rights such as the right to life, results in a disproportionate focus on the State's justificatory arguments. The assessment of such arguments also occurs in the absence of a normative framework which should have been supplied by an analysis of the content and scope of the right to access to health care services.¹⁶⁴ This limited approach has led to the position that legislators, state officials and medical personnel would be hesitant to look at the *Soobramoney* decision as an inspiration.

The principle that emerges from the *Soobramoney* decision, apart from the positive obligation placed on the state to realise access to health services for all South Africans, is that the state is also obliged to ensure that reasonable policies exist to facilitate access to health services. By means of the application of a reasonable policy, which must be applied universally to all, the state does advance materially its obligation to provide access to health services. In this regard, the Court held that:

The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.¹⁶⁵

Therefore, the particular combination that is required constitutionally, in respect of the provision of health care services by the State, is rational decisions at a political level balanced with those at a functional level. The 'functionality' of health care services, while not explained by the Court in the *Soobramoney* matter, may refer to those decisions to be taken that are medical decisions or informed by such decisions that must be made in relation to the type, standard and location of the provision of care.

4.3.2 *Minister of Health and Other v Treatment Action Campaign*

The case of *Minister of Health and Other v Treatment Action Campaign (Treatment Action Campaign)*¹⁶⁶ arose from a constitutional challenge to restrictions on the provision of antiretroviral drugs to HIV-positive pregnant women, resulting in tens of thousands of unnecessary infections and deaths. The case alleged violation of the right to health care services protected under sections 27(1) and 28(1)(c) of the Constitution.

The State's policy towards the prevention of mother-to-child transmission was confusing and uncertain. The policy established eighteen 'research sites' – two in each province – where the antiretroviral drug, Nevirapine, would be provided to HIV-positive pregnant mothers at childbirth.¹⁶⁷ Further, the policy placed a ban on health care professionals in state health care facilities other than the eighteen pilot sites from administering Nevirapine to HIV positive pregnant mothers.¹⁶⁸ This meant that mothers and their babies who could not afford private health care and did not have access to one of the pilot sites, could not access antiretroviral treatment.¹⁶⁹ The Court was therefore asked to consider the reasonableness of government policy in facilitating access to antiretroviral treatment to prevent mother-to-child transmission of HIV. The applicants argued that the state unreasonably prohibited the administration of Nevirapine at public hospitals and clinics outside a limited number of research and training sites.¹⁷⁰ This drug was of proven efficacy in reducing mother-to-child transmission of HIV. The applicants further argued that the state had failed to produce and implement a comprehensive national programme for the prevention of mother-to-child transmission of HIV. According to the applicants, the aforementioned conduct and omissions of the state constituted violations of the right of everyone to have access to health care services protected under section 27 of the Constitution, as well as children's right to have access to basic health care services protected under section 28(1)(c).

The Court found the policy of confining Nevirapine to research and training sites to be unconstitutional and stated that the policy failed to address the needs of mothers and their newborn children who do not have access to these sites. The policy failed to distinguish between the evaluation of programmes for reducing mother-to-child transmission

and the need to provide access to health care services required by those who do not have access to the sites.¹⁷¹ The Court found government policy on the provision of mother-to-child transmission unreasonable and unconstitutional because it excluded a significant segment of society.¹⁷² The programme had failed to address the needs of mothers.¹⁷³ Hence, impeding access to other essential health services like sexual and reproductive services, which are key to women's health in the context of HIV and AIDS, would amount to a violation.

The Court also found the policy to be unreasonable because the cost of administering Nevirapine was negligible, its safety and efficacy was proven beyond question, the procedure for administering it was simple, and funds to expand its provision outside designated sites were available.¹⁷⁴ The Court ordered the state to make Nevirapine available, to provide counsellors, and to take reasonable measures to extend the testing and counselling facilities throughout the public health sector.¹⁷⁵ The Court rejected the argument advanced by one of the amici for a distinction between a minimum core content of the right to health care and the obligations imposed on the state in section 27(2) that are subject to progressive realisation and available resources.¹⁷⁶

The decision establishes a conceptual and remedial framework for judicial review and enforcement of the obligation to ensure access to health care, and provides a model for integrating political and legal action.¹⁷⁷ Importantly, the case brought to the fore some of the major health issues confronting South Africans: access to HIV and AIDS-related treatment. Therefore, the Court's approach in this case was proactive to the degree that it compelled the state to provide treatment that enables women affected by HIV and AIDS to have healthy babies.

The case remains instructive in influencing government action through the judicial system. Liebenberg has pointed out that the *Treatment Action Campaign* judgment placed it beyond doubt that the courts are not confined to making general declaratory orders relating to the state's non-compliance with the constitutional duties imposed by socio-economic rights.¹⁷⁸ However, there are concerns around declaratory orders requiring benefits to particular groups. These concerns relate to the institutional capacity and legitimacy of the courts to make decisions

with policy direct implications. However, the decision in *Treatment Action Campaign* represents a transformative step in the direction of improving the health of the South African masses. The important principles enunciated by the Court in the *Treatment Action Campaign* case are that with regard to the fulfilment of the constitutionally protected right to health, there must be a comprehensive programme, which may include national framework legislation that can facilitate the right of access to health care services; and there must be a coherent health programme directed at the progressive realisation of the right within its available resources. The essential elements of the definition of health care services must be considered in assessing whether the programme constitutes a coherent one. Significantly, the legislative measures must be supported by appropriate, well-directed policies and programmes, and the programme must respond to the needs of the most desperate.

4.3.3 Pharmaceutical Manufacturers' Association v President of the Republic of South Africa

In February 1998, the South African Pharmaceutical Manufacturers Association and 40 Others (later 39, as a result of a merger),¹⁷⁹ mostly multinational pharmaceutical manufacturers, brought a claim against the Government of South Africa, alleging that the Medicines and Related Substances Control Amendment Act No. 90 of 1997 (Amended Medicines Act) violated TRIPS and the South African Constitution.

South Africa had in place the Medicines and Related Substances Control Act (Medicines Act). In 1997, Parliament passed the Amended Medicines Act. The Amended Medicines Act, among other things, gives the government a legal framework to compel pharmacists to prescribe cheaper generic substitutes of medicines no longer under patent (generic substitution). The amendment allowed for cheaper importation of brand-name medicines from countries where the product is sold for less (parallel importing). Furthermore, it allowed for the issuance of compulsory licences, under certain conditions, to local companies to produce generics of patented medicines (compulsory licensing). The law also allowed for a transparent pricing mechanism to make pharmaceutical companies justify the prices they charge. It therefore allowed the government to

manufacture generic medicines and make medicines more affordable and accessible.

The Pharmaceuticals Manufacturers Association (PMA) challenged the provisions of the Medicines Act in the case *Pharmaceutical Manufacturers' Association v President of the Republic of South Africa* (PMA case).¹⁸⁰ Initially the PMA suit contended that the Medicines Act authorising parallel imports or compulsory licensing to obtain affordable generic drugs violated the sanctity of patent rights inscribed in the TRIPS Agreement. The PMA instituted litigation, claiming that the relevant provisions violated the rights of its members to intellectual property under the Constitution, to freedom of trade, occupation and profession and to freedom of expression (in that it compelled pharmacists to inform customers of cheaper generic alternatives to prescribed medicines). Due to a global outcry from humanitarian NGOs such as MSF and Oxfam, PMA dropped the claim. The case, however, demonstrated the government and civil society's vigilance against private actors seeking to diminish access to essential medicines. Hence, this was a commendable step to improve access to affordable medicines by the South African government and all the stakeholders who were involved. The case also highlights the impact of intellectual property rights and the State drug policies' impact on access to health.

4.3.4 *New Clicks South Africa v Minister of Health and Another*

Retail pharmacy chains and the South African Pharmaceutical Society were to later challenge price control regulations that were promulgated pursuant to section 22G of the Medicines Act, in terms of which limits are set on the profit margins of retail pharmacists in relation to prescribed medicines in *Pharmaceutical Society of South Africa v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* (*New Clicks South Africa v Minister of Health*).¹⁸¹ The applicants applied for leave to appeal. At issue was the validity of the 'Regulations relating to a Transparent Pricing System for Medicines and Scheduled Substances'. The regulations were promulgated on 30 April 2004 by the Minister of Health in terms of section 22G of the Medicines Act. The regulations under attack provided for a pricing system that defines and

controls the single exit price for manufacturers and importers and for a dispensing fee, which, for pharmacists, amounted to either 16 per cent of the exit price (if it is less than R100) or R16 (if more than R100) without a medical prescription. In the case of a prescription, the figures are 26 per cent (if it is less than R100) and R26 (if more than R100). The major issues were whether these fees were 'appropriate' and whether the regulation of the single exit price was legal. There were two applications. In one, the first applicant was the Pharmaceutical Society of South Africa, joined by six other entities that own pharmacies. The other was by New Clicks SA (Pty) Ltd, the owner of 86 pharmacies (at the time). In dismissing a variety of the challenges to the validity of the regulations, the Cape High Court affirmed the legitimacy of the purpose of the regulations, which it regarded as being aimed at complying with the state's obligations to increase access to medicines through assuring their affordability in terms of section 27(2). The regulations were subsequently invalidated by the Supreme Court of Appeal (SCA) for not having adhered to the legality principle and for not having prescribed an 'appropriate' fee for pharmaceutical products. The SCA remarked:¹⁸²

The Act must be read in the light of section 27(1) of the Bill of Rights, which provides that everyone has the right to have access to health care services, including reproductive health care and that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. One has to agree that the right of access to health care includes the right of access to medicines although this right is not without limitations... It is also correct that the prohibitive pricing of medicines may be tantamount to a denial of the right of access to health care. All that is really common cause. What is not, is how parliament has sought to achieve the progressive realisation of this right through the provisions of the Act.

The SCA further held that in determining what is appropriate one must consider the conflicting interests of all those involved and affected. On the one hand there is the public, which is entitled to access to health

care including affordable medicines.¹⁸³ On the other hand, and within the context of access to medicines, the advocates for a proper balance between public health and profit-making for pharmaceutical businesses.

4.3.5 *Minister of Health and Another v New Clicks South Africa*

In the case of *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*,¹⁸⁴ the Constitutional Court was faced with a dispute between pharmacists and the Department of Health concerning the reasonableness of dispensing fees introduced as part of the single exit price legislation for medicines pursuant to section 22G of the Medicines Act. In its decision, the Court examined the nature of the services provided by pharmacists to the public in both the public and private health care sectors. The imposition of price control over medicines and the provision of pharmacy services was fundamentally endorsed by the Court as a process that complies with the provisions of the Constitution. Therefore, the Court did not oppose the creation of a single exit pricing system for medicines or controlling the dispensing fees of pharmacists, but was concerned with how these processes are conducted. Therefore, the imposition of price control as such on health care is not necessarily out of step with the constitutional prerogatives ensuring access to health care services. In this regard, the Court held that:

The scheme is criticised by the Pharmacies on the ground that regulation of prices is less effective than market forces. The choice of price regulation, if not consistent with the Medicines Act, was a policy decision within the domain of the legislature and the executive with which this Court will not interfere. This Court is concerned with whether the scheme meets the requirements of the Medicines Act and was adopted in accordance with the provisions of the Constitution and PAJA, and not with whether there may be better ways of achieving the same purpose.¹⁸⁵

In relation to the application of a dispensing fee for pharmacists, the Court accepted that the imposition of a particular fee on a particular health care profession, in this instance pharmacies, must be sufficient to

enable that profession to operate viably and to make a reasonable profit. Therefore, the imposition of any capped or fixed fee in respect of the provision of health care services must allow for health care professionals to operate reasonably and to make a living from their profession.

The manner in which the Pricing Committee set about determining the single exit pricing for medicines was criticised by the Court. The Court set out the process that would need to be followed in order for such a pricing system to be implemented lawfully. The Clicks decision provides a clear indication that additional economic controls over any aspect of the delivery of health care services constitutes an important part of the assessment of the manner in which access is exercised by members of the public to such a system, and the participation in providing such access by health care providers. The government is required to balance carefully the interests of those providing medical or health care service with the interests of the public and access by members of the public to such health care services. Unreasonable or irrational control of pricing systems in respect of healthcare services is not permitted in terms of South African law, insofar as the rights of health care providers to ensure that they are regulated reasonably and transparently in terms of the Constitution are unfairly limited.

The Court's approach in *Minister of Health and Another v New Clicks South Africa* provides a fair balance between profit-making for pharmacies and the affordability of medicines. The Court's reference to section 27 of the Constitution affirmed the importance of the right of access to health within the context of access to affordable medicines. In this way, the Court endorsed an interpretation that would not leave the marginalised vulnerable. Hence, the decision provides a position that enables poor people to access life-saving drugs. The is mostly illustrious under administrative law as it highlighted the applicability of administrative justice principles to the making of subordinate legislation, or administrative rule making, and its wide ranging analysis of the state of administrative law in South Africa.

4.3.6 *Hospital Association of SA Ltd v Minister of Health and Another*

The case of *Hospital Association of SA Ltd v Minister of Health and*

*Another*¹⁸⁶ concerned the imposition of a proposed national health reference pricelist on health care providers. In this decision, the North Gauteng High Court (High Court) was required to consider the reasonableness of the imposition of a proposed national health reference pricelist for the provision of health care services in terms of provisions of the National Health Act No. 61 of 2003. Extensive representations had been made by the stakeholders to the Department of Health that the introduction of a national health reference pricelist, on the basis proposed by the Department, would severely compromise the ability of the medical fraternity, in various disciplines, to provide health care services to members of the public.

The High Court found that the imposition of such a national health reference pricelist, as an administrative system, was compromised and overturned the system. The court argued that regulating the pricing of health care services in the manner proposed by the Health Department might lead to a decline in the availability of health care providers and the quality of service they provide. The High Court stated that ‘there was the real risk that the effect of the RPL Decision would play out on patients who may face the burden of a declining number of doctors within the country, and who may be confronted with general and specialist practitioners who, in an attempt to make ends meet, would be forced to focus on high volume turnover of patients at the expense of quality provision of medical services.’¹⁸⁷ The court was in favour of the introduction of regulated pricing, provided that the pricing in question could be rationally connected to the purposes to be achieved by such pricing.

4.3.7 *Van Biljon and Others v Minister of Correctional Services*

In the case of *Van Biljon and Others v Minister of Correctional Services*,¹⁸⁸ the Court ordered the Department of Correctional Services to provide antiretroviral therapy to two prisoners. The Department of Correctional Services had maintained that prisoners did not have greater rights than patients at state hospitals, who were at that stage not receiving this treatment, and that the drugs were far too expensive.¹⁸⁹

The Court held that the Constitution did not give prisoners the right to the best medical treatment, but only to ‘adequate’ treatment and

explained that a prisoner's right to medical treatment depends on an examination of circumstances, such as prison conditions, to decide what is adequate. Accordingly, the meaning of adequate medical treatment has to be linked to what the state can afford. As a doctor had prescribed the two prisoners ARV treatment, this was considered 'adequate medical treatment' for their condition and circumstances. This decision, however, did not mean that all prisoners with HIV should receive expensive drugs.¹⁹⁰ The Court summarised its approach by stating that:

Even if it is accepted as a general principle that prisoners are entitled to no better medical treatment than that which is provided by the State for patients outside, this principle can, in my view, not apply to HIV-infected prisoners. Since the State is keeping these prisoners in conditions where they are more vulnerable to opportunistic infections than HIV patients outside, the adequate medical treatment with which the State must provide them must be treatment which is better able to improve their immune systems than that which the State provides for HIV patients outside.¹⁹¹

4.3.8 *Lee v Minister of Correctional Services*

The applicant was detained at Pollsmoor Maximum Security Prison from 1999 to 2004.¹⁹² The applicant contracted tuberculosis (TB) while in prison. He sued the Minister for damages on the basis that the poor prison health management resulted in his becoming infected.¹⁹³ The High Court upheld the claim on the basis that the prison authorities had failed to take reasonable steps to prevent the applicant from contracting TB.¹⁹⁴ On appeal, the SCA found that, while the prison authorities were negligent in their failure to maintain reasonably adequate systems to manage the disease, the Minister was not liable. It found that the applicant had not proved that the presence of reasonable, precautionary measures would have completely eliminated his risk of contracting TB.

In the Court, the majority held that the SCA, in applying the test for factual causation, adopted a rigid and deductive logic which necessitated the conclusion that because the applicant did not know the exact source of his infection, his claim had to fail.¹⁹⁵ It held that our law has

always recognised that the test for factual causation should not be applied inflexibly as was done by the SCA. The majority held further that on the approach adopted by the SCA it is unlikely that any inmate will ever be able to overcome the hurdle of causation and further that no effective alternate remedy will be available to a person in the position of the applicant.¹⁹⁶

The majority noted that there is a legal duty on the responsible authorities to provide adequate health care services as part of the constitutional right of all prisoners to conditions of detention that are consistent with human dignity. In upholding the applicant's claim, the majority held that there is a probable chain of causation between the negligent omissions by the responsible authorities and the applicant's infection with TB.¹⁹⁷

4.3.9 *Cipla Medpro (Pty) Ltd v Aventis Pharma SA*

In the case of *Cipla Medpro (Pty) Ltd v Aventis Pharma SA*,¹⁹⁸ the SCA was tasked with adjudicating in appeal proceedings pertaining to a South African patent which was registered in the name of Aventis. Aventis sought an interim interdict to prevent Cipla from infringing its patent, for an oncology product by the brand name of Taxotere (docetaxel), by selling Cipla Docetaxel. Cipla in turn applied for the setting aside of an earlier amendment of the patent. Both applications failed at first instance before the Court of the Commissioner of Patents, and both parties appealed to the SCA. The Treatment Action Campaign, a group lobbying for cheaper medicines, was admitted as *amicus curiae* only at the SCA stage of the matter.

The TAC opposed the interdict sought by Aventis and based its first argument against an interdict on section 27(1) of the Constitution. The TAC argued that the Patents Act must be construed 'through the prism of the Constitution' and in a way that appropriately balances the rights of a patentee against the constitutional rights of others. The Court noted that:

What we are to make of viewing the legislation through the prism of the Constitution was not developed by the TAC. Section 39(2) indeed calls upon a court to 'promote the spirit, purport and

objects of the Bill of Rights' when interpreting legislation, as pointed out by the TAC, but that does not open the door to changing the clear meaning of a statute ... On the assumption that the patent is not revocable for want of an inventive step I cannot see how section 39(2) or the prism of the Constitution comes into play so as to deny Aventis its right to enforce its patent.¹⁹⁹

However, the SCA indicated that TAC was on stronger ground with its further submission that the broader public interest, and not only the interests of the litigating parties, must be placed in the scales when weighing where the balance of convenience lies. The SCA dealt in some detail with a number of cases decided in the US where injunctions against patent infringement have been refused on the ground of public interest.²⁰⁰ The SCA decided in favour of Aventis due to the public interest not being materially affected. One of the reasons for this finding was that Aventis itself intended to launch a significantly cheaper generic version of Taxotere, namely Docetere, which was to be only marginally more expensive than Cipla Docetaxel.²⁰¹ The court held in its judgment that:

Where the public is denied access to a generic during the lifetime of a patent that is the ordinary consequence of patent protection and it applies as much in all cases. To refuse an interdict only so as to frustrate the patentee's lawful monopoly seems to me to be an abuse of the discretionary powers of a court. But in any event there will be no material prejudice of that kind on the facts of this case.²⁰²

The SCA ruled that the broader public interest must be considered when weighing up the commercial interests of companies involved in patent disputes. The decision represents an important element of the transformation of the health sector because it compels the courts to consider patients' access to medicines when pharmaceutical companies battle over patents.²⁰³

4.3.10 *EN and Others v The Government of South Africa and Others*

In *EN and Others v The Government of South Africa and Others*²⁰⁴ case, prisoners living with HIV in the Westville Correctional Centre chal-

lenged the slow implementation of the government's plan to provide ARVs to prisoners needing them. The Durban High Court agreed that this was a matter of life and death, and said that the prison officials had not shown an appreciation for the seriousness and urgency of the situation. Relying on the judgment in the *Grootboom* case, the Court held that the Westville Correctional Centre's implementation of the relevant laws and policies in this case was unreasonable because it was inflexible, and characterised by unexplained and unjustified delays and irrationality. The court also hinted that the Government's Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa is faulty itself because it did not properly consider the special vulnerability of prisoners to HIV and AIDS. The Court ordered the Westville Correctional Centre to immediately remove all restrictions that prevented prisoners needing ARVs from accessing them; to immediately provide all the applicants in the court case with access to ARVs; and to submit a plan to the Court to explain how they plan to comply with the orders made by the Court.²⁰⁵

The state appealed against this judgment to a full bench of the KwaZulu-Natal High Court. On 28 August 2006, the full bench dismissed the state's case and found it to be in contempt of the court order. The High Court ordered the state to implement without delay the original court orders unless and until another court sets aside these orders on further appeal.

The following section discusses some barriers and fault-lines impacting on the provision of health care services in light of the constitutional provisions providing for a right of access to health care services.²⁰⁶

4.4 Barriers to health care provision

The South African health system performs poorly when its impact on the health status of the nation is compared to countries with a similar or poorer per capita Gross Domestic Product (GDP).²⁰⁷ Although large budgets are allocated by government towards health care and the provision of health services, access to health care services in the public health care system and the quality of care provided are of great concern, in spite of existing policy and legislation governing this sector. Although South

Africa spends more on health than any other African country, South Africa is one of only twelve countries in which maternal mortality and mortality for children younger than five years have actually increased since 1990.²⁰⁸

The national health system has a myriad challenges, among these being the worsening quadruple burden of disease and shortage of key human resources. Available information points to the lamentable state of many public health facilities in the country, the shortage of trained health care workers, lack of drugs in clinics, long waiting periods for treatment, poor infrastructure, disregard for patients' rights, the shortage of ambulance services and poor hospital management, underfunding, and deteriorating infrastructure.²⁰⁹ The following section discusses in detail some of the challenges confronting the health delivery system despite the plethora of legislative and policy interventions discussed above.

4.4.1 Cost of services

Although the Constitution guarantees freedom and equality for all,²¹⁰ there are still many barriers that people face in getting access to health care services. Health care services are often expensive and most people do not have access to private medical aid to pay for expensive treatment. Poor people face the high costs of transport, buying medicines, and follow-up visits to a doctor. Similarly to the public health system, the private sector also has its own problems, albeit relating to the costs, pricing and utilisation of services. It has been suggested that over-servicing practices in the private sector need to be governed to protect the public.²¹¹ Furthermore, mechanisms will have to be designed and implemented to bind the private provider sector into the national health system without reducing its equally important role in the health delivery system in South Africa.²¹² According to the Department of Health's NHI Policy Paper, the high costs are linked to high service tariffs, provider-induced utilisation of services and the continued over-servicing of patients on a fee-for-service basis.²¹³ Accordingly, the private health sector may not be sustainable over the medium to long term.²¹⁴

The WHO recommends that countries spend at least five per cent of their GDP on health care. South Africa already spends 8.5 per cent

(in 2010) of its GDP on health, way above what WHO recommends. Despite this high expenditure, health outcomes remain poor when compared to similar middle-income countries. This poor performance has been attributed mainly to the inequities between the public and private sector spending on health services.²¹⁵ The 8.5 per cent of GDP spent on health is split as 4.1 per cent in the private sector and 4.2 % in the public sector. The 4.1% spent in the private sector covers 16.2 per cent of the population (8.2 million people), who are largely on medical schemes. The remaining 4.2 per cent is spent on 84 per cent of the population (42 million people), who mainly utilise the public health care sector.²¹⁶

Over the past decade, private hospital costs have increased by 121 per cent whilst over the same period specialist costs have increased by 120 per cent.²¹⁷ Contribution rates per medical scheme beneficiary have doubled over a seven-year period. This has not been proportionate with increased access to services because of the limited access to needed health service coverage due to the design of the medical scheme benefit options, or the early exhaustion of benefits.²¹⁸ According to the NHI Policy Paper, per capita annual expenditure for the medical aid group is estimated at R11 150, in contrast to the public sector dependant population where the per capita annual health expenditure is estimated at R2 766. Accordingly, 'the amount spent in the private health sector relative to the total number of people covered is not justifiable and defeats the principles of social justice and equity...[and therefore] not an efficient way of financing health care.'²¹⁹

While the South African drug policy and the relevant legislation aimed at making access to medication more affordable are welcomed, their effectiveness is questionable. Currently, public sector drug costs are extremely high. Bronwyn Harris et al have pointed out that pharmaceutical profits are substantial in this country and the amount spent on medicine is nearly double to triple that of other major countries.²²⁰

4.4.2 Personnel disparity between public and private health providers

There is a general shortage of doctors in South Africa relative to the country's population, resulting in the available doctors and nurses being overworked. As noted by McIntyre, compared to 1997, the South African

health delivery system needs an additional 80 000 staff in the public sector in order to address the increase in population size and the greater burden of disease from HIV and AIDS.²²¹ Some health practitioners have left the country for better salaries overseas. Because of the HIV and AIDS crisis, many hospitals and clinics face a huge increase in patients, but there has not been an increase in the doctors and nurses available to care for all the new patients. There is a serious lack of managerial capacity in the health system.²²² The biggest challenge to efficient management of the health system is training managers to implement effective systems in running clinics and hospitals where many problems have been identified. Problems include insufficient cleaning staff, nurses, doctors, dentists, pharmacists, psychologists and specialists. These problems place an enormous pressure on existing staff.²²³ New staff members are often unhappy with their working conditions, leading to some of them resigning. Many opt for better remuneration and working conditions in the private health care sector or go abroad.²²⁴

Engelbrecht and Crisp have pointed out that ‘the private provider sector uses disproportionately more of the available human resources in comparison to the service that it provides.’²²⁵ The private sector has further been accused of ‘clinical care practices with costs disproportionate to quality adjusted life years added.’²²⁶ The recent estimates show that the ratio of patients to health professionals (specialists, general practitioners, pharmacists) is lower in the private sector than in the public sector. There are also massive disparities in human resources between the two sectors, with one specialist doctor serving less than 500 people on average in the private sector but nearly 11,000 people in the public sector.²²⁷ The public–private mix is undoubtedly the greatest equity challenge facing the South African health system.²²⁸

4.4.3 Quality of health care services and poor management

Although significant improvements have been recorded in health services coverage and access since 1994, there are still notable quality problems. In many areas access has increased in the public sector, but the quality of health care services has deteriorated or remained poor. Many people do not have access to clean water, sanitation, nutrition and electricity,

and this is a catalyst for poor health. Among the commonly cited challenges experienced by the public are cleanliness, safety and security of staff and patients, long waiting times, staff attitudes, poor staff productivity, corruption among senior managers, poor infection control and drug stock-outs.²²⁹ Health care facilities often do not have enough staff or medicines to provide proper health care services. The public health sector will have to be significantly changed so as to shed the image of poor quality services that has been scientifically shown to be a major barrier to access.²³⁰ In the South African Costs and Benefit Incidence Analysis study by McIntyre et al highlighted above, the findings are that there is dissatisfaction among health care users about the quality of health care provision in South Africa – with both private and public health care providers.²³¹ Concerns about public sector health care providers are primarily related to patient-provider engagements, cleanliness of facilities and drug availability.²³² Concerns with private health care providers are related to the high cost of medical schemes and the underlying profit motive.²³³

Harrison has argued that success in South Africa's public health delivery system has been 'hamstrung by the failure to devolve authority fully, and by the erosion of efficiencies through lack of leadership and low staff morale' and 'generally weak health systems management' resulting in poor health outcomes relative to total health expenditure.²³⁴ Engelbrecht and Crisp have also weighed in, pointing out that management capacity of hospital managers has been identified as a major concern, primarily 'due to the size of the budgets managed in hospitals and the complexity of the environment.'²³⁵ Emphasising the importance of management, Sewankambo and Katamba noted that, with reference to policy makers and managers, 'their lack of stewardship and leadership has been evident in the highly variable quality of care delivered within the public health sector. For example, the Western Cape province had a TB cure rate of around 80% in 2007 whereas, for most of the districts in KwaZulu-Natal, the cure rates were between 40 per cent and 60 per cent.'²³⁶ It has been noted, for example, that provincial departments of health collectively overspent their budgets by more than R7.5 billion in 2009/10.²³⁷ Although this might on the face of it signal the urgent need for increased

funding, it is, however, clear from the Auditor-General's findings that poor financial management pervades all the provincial departments.²³⁸ Furthermore, initiatives at the national level to develop effective management training programmes for hospital managers have largely failed.²³⁹ In that regard, Engelbrecht and Crisp have suggested the decentralisation of the management of large hospitals and their conversion into semi-autonomous structures with performance-linked funding.²⁴⁰ The two authors have argued that 'management competence is strengthened by giving managers authority, decentralising decision-making and making them accountable.'²⁴¹

4.4.4 Lack of implementation of policies

The government has developed legislative and other measures to comply with its constitutional duties under the Constitution. However, despite national policies and programmes that mostly follow international standards and targets, the health care system has not been able to successfully deliver quality health care on an equitable basis in all the provinces. Provinces do not spend the same amount for each person on health care delivery, with rich provinces like Gauteng and the Western Cape far exceeding the amount spent by poor provinces such as Limpopo, Mpumalanga and the Eastern Cape.²⁴²

Engelbrecht and Crisp have pointed out that health authorities need to ensure that there is appropriate targeting of upstream factors that impact on health status and that intersectoral activities are included in the delivery plans of the responsible sectors, such as housing, sanitation and water quality.²⁴³ Mayosi has pointed out that the incidence of rheumatic heart disease for those aged fourteen years and more in Soweto was 23.5 cases/100 000 per annum, which puts this urban community among the high incidence communities of the world.²⁴⁴ Mayosi attributes the prevalence of such a preventable condition to 'inadequate implementation of the guideline for the prevention of rheumatic fever in South Africa. A recent study showed that very few paediatricians were aware that rheumatic fever is a notifiable condition, and that the national notification system administered by the Department of Health was dysfunctional.'²⁴⁵ Engelbrecht and Crisp have also pointed out that inade-

quate implementation and policy co-ordination is 'but one indicator of a dysfunctional system that comprises islands of independent services rather than a coherent, co-operative approach to delivering health care services in the country. Improvements are also needed in drug availability, health technology and infrastructure.'²⁴⁶

4.4.5 The burden of disease

South Africa is plagued by four clear health problems described as the quadruple burden of disease.²⁴⁷ These are HIV and AIDS and TB; maternal, infant and child mortality; non-communicable diseases; and injury and violence.²⁴⁸ Despite South Africa only having 0.7 per cent of the world population, it is home to 17 per cent of all HIV-infected people in the world.²⁴⁹ The HIV prevalence is 23 times the global average, while the TB infection rate is among the highest in the world. Moreover, the TB and HIV and AIDS co-infection rate is one of the highest in the world at 73 per cent. As a result life expectancy in South Africa has declined over a number of years. HIV and AIDS has also contributed significantly to high maternal and child mortality rates. According to the NHI Policy Paper, failure to intervene may reverse 50 years of health gains.²⁵⁰

4.4.6 Inequalities in access to health services

In South Africa, health care access for all is constitutionally enshrined yet considerable inequities remain, largely due to distortions in resource allocation.²⁵¹ In spite of increased budgetary allocations in the health sector and improved social policies, South Africa has not adequately addressed health disparities in society.²⁵² This is because of an ill-prepared health care system to address the changing trend of burden of disease, poor leadership and management, inadequate human-resource capacity and a poor surveillance system.²⁵³ Access barriers also include vast distances and high travel costs, especially in rural areas, high out-of-pocket (OOP) payments for care, long queues, and disempowered patients.²⁵⁴ South Africa's apartheid past still shapes health, service and resource inequities. Racial, socio-economic and rural-urban differentials in health outcomes, and between the public and private health sectors, remain challenging. In 2005, spending per private medical scheme mem-

ber was nine-fold higher than public sector expenditure, and one specialist doctor served fewer than 500 people in the private sector but around 11 000 in the public sector.²⁵⁵ This burden on the poor bears vivid testimony to the country's distinctive private–public sector split, which severely limits cross-subsidisation from the wealthy to the poor, and from the healthy to the sick.²⁵⁶ Costs of accessing services can be crippling for poor households.²⁵⁷

Transportation costs and travel distance are key access barriers, especially for black Africans, the poor, and rural residents. Although the Clinic Upgrading and Building Programme has improved service availability, the research by Harris et al found that access barriers relate to the geographic inaccessibility of health facilities, particularly in largely rural and poorly resourced provinces.²⁵⁸ However, within the same geographical setting, different households cope differently with illness. This suggests a need for holistic and inter-sectoral approaches to support worse-off households, including mobile services, grants and user fee exemptions.²⁵⁹ The research also found that a considerable portion of the groups exempted from user fees still pay for services. This undermines the equity-objectives of the government's exemption policies and risks undoing this important financial protection for poor households and vulnerable groups. It also illustrates the 'discretionary power' of providers and bureaucrats who determine who ultimately qualifies for exemption.²⁶⁰

The principles underpinning the national health policy, such as those of non-discrimination and equality, serve to facilitate increased access to health care services. Attempts have been made at ensuring physical accessibility through the adoption of the District Health System. However, in spite of certain positive measures, health care services still remain highly inaccessible in some respects. The issue of language barriers in the health system and the absence of comprehensive policies in respect of interpreter and translation services is but one example of a health care system that is extremely inaccessible to the majority of its users.²⁶¹ Language barriers between patients and health care workers mean that many people may not be able to fully understand their treatment because the health care worker does not speak the patient's language.

Population growth appears to have outstripped the availability of health facilities in South Africa. For instance, the country's population per clinic is 13 718, which is inconsistent with the WHO norm of 10 000 people per clinic.²⁶² However, this analysis cannot be conclusive without reviewing the utilisation rate of public health facilities. By the end of 2008/09, the primary health care utilisation rate in the country was 2.5 visits per person. The usable bed occupancy rates of hospitals were 65.2 per cent at district hospitals; 77.1 per cent at regional hospitals; 71.5 per cent at tertiary hospitals and 69.2 per cent at central hospitals. Except for regional hospitals, these utilisation rates were inconsistent with national targets.²⁶³

Distribution of Public Health Facilities in South Africa, 2009

	Number of facilities	Population per facility
Clinic	3595	13 718
Community Health Centre	332	148 553
District Hospital	264	186 817
National Central Hospital	9	5 479 966
Provincial Tertiary Hospital	14	3 522 835
Regional Hospital	53	930 560
Specialised Psychiatric Hospital	25	1 972 788
Specialised TB Hospital	41	1 202 919
Grand Total	4333	

Sources: Statistics South Africa (StatsSA), Statistical Release P0302, Mid-Year Population Estimates, 2009 and District Health Information System (DHIS)

South Africa is regarded as a middle-income country with a GDP of \$277 billion. However, South Africa's health outcomes are not always commensurate with this ranking. In 2008, South Africa's GDP per capita was five times higher than that of India. However, the average life expectancy in India was much higher (64 years) than that of South Africa (53.5 years for males and 57.2 for females).²⁶⁴

Three important reports from Ministerial Committees relating to health were submitted to the Minister of Health during 2009/10. These were: (i) 'Saving Mothers 2005–2007: Fourth Report on Confidential Enquiries into Maternal Deaths in South Africa', produced by the National Committee on Confidential Enquiries into Maternal Deaths (NCCEMD); (ii) the First Report of the Committee on Morbidity and Mortality in Children under 5 Years (CoMMiC); and (iii) the National Perinatal Morbidity and Mortality Committee Report 2008.²⁶⁵

The Saving Mothers Report indicated that the five major causes of maternal death had remained the same during 2005–2007 and 2003–2005, and that these were non-pregnancy related infections – mainly HIV (43.7 per cent), complications of hypertension (15.7 per cent), obstetric haemorrhage (antepartum and postpartum haemorrhage; 12.4 per cent), pregnancy related sepsis (9.0 per cent) and pre-existing maternal disease (6.0 per cent). The Saving Mothers Report also stated that 38.4 per cent of the 4 077 maternal deaths reviewed were avoidable within the health care system. Key administrative weaknesses identified included poor transport facilities, lack of health care facilities and lack of appropriately trained staff. Avoidable factors associated with health care providers included failure to follow standard protocols and poor problem recognition and initial assessment.²⁶⁶

The CoMMiC Report estimated over 60 000 South African children between the ages of one month and five years die each year. This translated into an under-five mortality rate for South Africa of between 57.6 and 94.7 deaths per 1 000 live births and an infant mortality rate of between 42.5 and 59.1 deaths per 1 000 live births. The CoMMiC indicated that these rates were highest in the Eastern Cape, KwaZulu-Natal and Free State provinces, and lowest in the Western Cape, Gauteng and Northern Cape provinces. According to the CoMMiC, the major causes of childhood deaths were diarrhoeal disease, lower respiratory tract infections and perinatal conditions, with HIV and AIDS and malnutrition contributing as both primary and underlying causes of child mortality.²⁶⁷

Another factor impacting on access to health care services is stigma. There is a lot of prejudice and ignorance in some communities about HIV and AIDS. Some people living with HIV and AIDS fear that the commu-

nity will reject them if they get tested and people find out that they are HIV positive and are taking ARVs.

4.4.7 Primary health care or tertiary health care?

An issue often facing the delivery of health care services at different levels is the allocation of resources and their impact. For instance, South Africa's tertiary health care services were historically well-funded, but basic, essential health care services were said to be deficient for the poorer two-thirds of the population. South African health policy has accordingly recognised the need to redistribute resources from tertiary level care to primary level care. It recognises the latter to be most effective and most cost-effective as the means to achieve better health.²⁶⁸ However, health policy recognises that such allocation of resources is often contrary to popular demand for high technology hospitals providing curative care. Hence, it should be acknowledged that while there is both national and international consensus on the value of primary level care, in practice different levels of care often compete for limited resources.²⁶⁹

4.4.8 No clear allocation of responsibilities and tasks to the different spheres of government

Certain key provisions of the Constitution inform the roles and functions of different spheres of government. For instance, section 27(2) obliges the state to take measures to realise health care rights. An 'organ of state' is defined in section 239 of the Constitution as including national, provincial and local spheres of government. Schedule 4, Part A of the Constitution enlists health care services as an area of concurrent national and provincial legislative competency, while Part B of the same Schedule enlists municipal health services as a local government competency. Although the National Health Act attempts to allocate responsibilities and tasks to all spheres of government,²⁷⁰ in practice the issue of which sphere of government is ultimately responsible for the delivery of a particular health service often remains difficult to settle.²⁷¹ For instance, it is still unclear what are 'municipal health services' and what the distinction is between them and 'health care services' as referred to in Part A of

Schedule 4. This lack of clarity has impeded the realisation of the right at different levels.²⁷² In its judgment in the *Grootboom* case, the Court explained that a reasonable government programme should ‘clearly allocate responsibilities and tasks to different spheres of government and ensure that the appropriate financial and human resources are available.’²⁷³

Some of the challenges confronting the health system include the fragmentation of the health system between the private, public and non-governmental sectors. According to Engelbrecht and Crisp, ‘the challenge is that these sectors currently do not share a single set of values, a common vision or a joint strategy for the health of the country as a whole.’²⁷⁴ Engelbrecht and Crisp have further pointed out that ‘[t]he public sector, comprising nine provinces, a national Department of Health (NDoH) and several municipalities, is also not united. The country, therefore, has a system of fragmented pieces in competition with each other.’

4.4.9 Social determinants and access to health

It has been noted that there has been a surge in attempts to address the social determinants of health (SDH).²⁷⁵ This is a result of a number of factors, including the imperative need to address the entrenched health inequities within the country and inadequate or poorly performing health systems and changing disease profiles.²⁷⁶ SDH have been defined as ‘the social and economic factors that influence health, and include income, education, social safety networks, employment and working conditions, unemployment and job security, early childhood development, gender, race, food insecurity, housing, social exclusion, access to health services, and disability’.²⁷⁷

In South Africa, apartheid represented not only the disenfranchisement of the black population, but also an institutionalised system which maintained white domination and privilege in the political, economic, social and cultural spheres.²⁷⁸ Blacks were denied access to land, subjected to underdevelopment in economically marginal reserves and ‘homelands’, and were systemically discriminated against in their access to a range of social services and resources.²⁷⁹ The result is that race and class intersected, and racial discrimination deepened the class divisions

in South African society. The effect of these deep class divisions was that the attempt at deracialisation of public policy in the post-apartheid era has had a limited impact on inequality.²⁸⁰

The result is that, in South Africa, gender, race and geographical location remain the key markers of social and economic inequities and of poor health outcomes.²⁸¹ These inequities are exacerbated by the challenges of a quadruple burden of disease and the sub-optimal performance of the health system highlighted above.

Indicators show that health and wealth are mutually reinforcing and that pro-poor policies also contribute to health, and improved health outcomes contribute to economic development.²⁸² Poverty, unemployment, and socio-economic inequity are some of the major reasons why South Africa has not achieved social and economic development in the past two decades of democratic rule.²⁸³ Mayosi et al have argued that these factors are the core elements for much of the deprivation and ill health in the country.²⁸⁴ Although substantial progress has been made in access to basic goods such as education, electricity, sanitation and potable water, the socio-economic needs of the poor in South Africa remain largely unmet. These include improving the quality of education, improved sanitation, and access to housing. Although the implementation of the social grant system, such as child-support grants, foster-care grants and care-dependency, has resulted in the reduction of poverty and improvement of health, especially in children, wealth inequalities have been growing, thereby impacting access to health.²⁸⁵

The Minister of Health signed the Negotiated Service Delivery Agreement (NSDA) for the Health Sector in October 2010, thereby signalling the importance of mainstreaming SDH in health policy.²⁸⁶ The NSDA provides for four strategic outputs for the health sector and these are: increasing life expectancy, decreasing maternal and child mortality, combating HIV and AIDS and decreasing the burden of disease from tuberculosis (TB), and strengthening health system effectiveness.²⁸⁷ It has been pointed out that a more critical SDH discourse that interrogates and addresses the structural determinants of health inequities as well as the unequal power relationships that exacerbate such inequities is needed.²⁸⁸

5. Conclusion

Universal access to health care is provided for in the South African Constitution, which states that everyone has the right of access to health care services, including reproductive health care. South Africa is regarded as a middle-income country with a GDP of \$277 billion and spends considerable amounts on health care – 8.5% of its GDP, way above the WHO recommendation of five per cent of GDP. However, South Africa's health outcomes are not always commensurate with this ranking. Despite this high expenditure, the health outcomes remain poor when compared to similar middle-income countries. Although large budgets are allocated by government towards health care and the provision of health services, access to health care services in both the public and private sectors, and the quality of care provided, especially in the public sector, are of great concern. The national health system has a myriad challenges, among which are the worsening burden of disease, shortage of key human resources and mismanagement and corruption by senior managers. Available information points to the lamentable state of many public health facilities in the country, the shortage of trained health care workers, lack of drugs in clinics, long waiting periods for treatment, poor infrastructure, disregard for patients' rights, the shortage of ambulance services and poor hospital management, underfunding, and deteriorating infrastructure.

South Africa's apartheid past still shapes health, service, and resource inequities. Racial, socio-economic, and rural–urban differentials in health outcomes, and between the public and private health sectors remain challenging. Access barriers also include vast distances and high travel costs, especially in rural areas; high OOP payments for care; long queues; the unacceptability of health care services, especially in the public sector; and disempowered patients.

The biggest challenge facing the efficient running of the health system is training managers to implement efficient systems in running clinics and hospitals where many problems have been identified. Problems include insufficient cleaning staff, nurses, doctors, dentists, pharmacists, psychologists and specialists. These problems place an enormous pressure on existing staff.

Another related challenge is that a large part of the financial and human resources for health is located in the private health sector serving a minority of the population. On the other hand, the public sector is under-resourced relative to the size of the population that it serves and the burden of disease. The public sector has disproportionately less human resources than the private sector, yet it has to manage significantly higher patient numbers.

Although significant improvements have been recorded in health services coverage and access since 1994, there are still notable quality problems. In many areas access has increased in the public sector, but the quality of health care services has plummeted or remained poor. Many people do not have access to clean water, sanitation, nutrition and electricity, and this is a catalyst for poor health. Among the commonly cited challenges experienced by the public are cleanliness, safety and security of staff and patients, long waiting times, staff attitudes, infection control and drug stock-outs.

A plethora of legislative, policy and administrative frameworks has been adopted to entrench and implement the right of access to health care services. However, despite national policies and programmes that mostly follow international standards and targets, the health care system has not been able to successfully deliver quality health care on an equitable basis in all the provinces. South Africa is plagued by four clear health problems described as the quadruple burden of disease. These are HIV and AIDS and TB; maternal, infant and child mortality; non-communicable diseases; and injury and violence. As a result, life expectancy in South Africa has declined over the years. It is therefore important that major changes in the service delivery structures, administrative and management systems be adopted and implemented to ensure that everyone has access to appropriate, efficient and quality health services.

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<i>Soobramoney v Minister of Health (KwaZulu-Natal)</i>	1998 1 SA 765 (CC)
<i>Minister of Health and Other v Treatment Action Campaign (Treatment Action Campaign)</i>	2002 (5) SA 721 (CC)
<i>Pharmaceutical Manufacturers' Association and 40 Others v President of the Republic of South Africa</i>	2000 (2) SA 674
<i>Pharmaceutical Society of South Africa v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another</i>	2005 (3) SA 238 (SCA)
<i>Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others</i>	2006 (2) SA 311 (CC)
<i>Hospital Association of SA Ltd v Minister of Health and Another; ER24 EMS (Pty) Ltd and Another v Minister of Health and Another; SA Private Practitioners Forum and Others v Director-General of Health and Others</i>	2010 (10) BCLR 1047

CASE NAME	SALR
<i>Van Biljon and Others v Minister of Correctional Services</i>	1997 (4) SA 441 (C)
<i>Lee v Minister of Correctional Services</i>	2013 (2) BCLR 129 (CC)
<i>Cipla Medpro (Pty) Limited v Aventis Pharma SA</i>	[2012] ZASCA 108
<i>EN and Others v The Government of South Africa and Others</i>	2007(1) BCLR 84 (D)

Notes

1. This paper was produced in July 2014 with the financial support of the Foundation for Human Rights. The contents of this paper are the sole responsibility of the author and can under no circumstances be regarded as reflecting the position of the Foundation for Human Rights.
2. The origins of WHO go back to the various international health conferences held in the nineteenth century.
3. See Constitution of the World Health Organisation, *Basic Documents*, Official Document No. 240 (Washington, 1991) available at www.who.int/governance/eb/who_constitution_en.pdf. The Constitution of WHO was adopted at the International Health Conference held in 1946 in New York, where it was signed by the representatives of 61 states.
4. See preamble to the Constitution of the Republic of South Africa, 1996.
5. See preamble to the Constitution.
6. See section 7(2) of the Constitution.
7. See Section 184(3) of the Constitution.
8. See section 27 of the Constitution.
9. The National Health Act No. 61 of 2003.
10. See preamble to the National Health Act.

11. HM Coovadia et al 'The Health And Health System of South Africa: Historical Roots of Current Public Health Challenges' 2009 (374) *The Lancet* 817; JE Ataguba and D McIntyre 'Paying for and Receiving Benefits from Health Services in South Africa: Is the Health System Equitable?' (2012) 27 *Health Policy and Planning* 135–145 and D McIntyre and L Gilson 'Putting Equity in Health Back onto the Social Policy Agenda: Experience from South Africa' (2000) 54 *Social Science and Medicine* 1637–56.
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20. Mayosi et al 'Health in South Africa' 6.
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23. D Bradshaw, RE Dorrington and R Laubscher *Rapid mortality surveillance report 2011*. Cape Town: South African Medical Research Council, 2012. Available at www.mrc.ac.za/bod/RapidMortality2011.pdf.
24. Mayosi et al 'Health in South Africa' 8.
25. Mayosi et al 'Health in South Africa' 5. See also A Motsoaledi 'Progress and Changes in the South African Health Sector' *The Lancet*, 30 November, 2012.
26. See Department of Health *Malaria Elimination Monitoring and Evaluation Plan 2012–2018* (2012).

27. Mayosi et al 'Health in South Africa' 8.
28. Mayosi et al 'Health in South Africa' 5.
29. Mayosi et al 'Healthcare in South Africa' 5.
30. Mayosi et al 'Health in South Africa' 5.
31. Coovadia et al 'The Health and Health System of South Africa' 817–34; L Rispel and S Nieuwoudt 'Mainstreaming the Social Determinants of Health in South Africa: Rhetoric or Reality?' In A Padarah and R English (eds) *South African Health Review* (2012/13) 90.
32. B Harris et al 'Inequities in access to health care in South Africa' (2011) 32 *Journal of Public Health Policy* 23.
33. See www.southafrica.info/about/health/health.htm.
34. See www.southafrica.info/about/health/health.htm.
35. NHI Policy Paper, para. 1.
36. See Council for Medical Schemes *Annual Report* 2008–2009 available at www.link2media.co.za/index.php?option=com_content&task=view&id=5442&Itemid=12.
37. Department of Health *National Health Insurance in South Africa Policy Paper* (2011) para. 27.
38. See Department of Health *National Department of Health Strategic Plan 2010/11–2012/13*, 16.
39. Coovadia et al 'The Health and Health System of South' 817.
40. Coovadia et al 'The Health and Health System of South Africa' 834.
41. Coovadia et al 'The Health and Health System of South Africa' 824.
42. Coovadia et al 'The Health and Health System of South Africa' 824.
43. See *Shield Work Package 1 Report: A Critical Analysis Of The Current South African Health System* 10.
44. See National Health Insurance In South Africa: *Policy Paper* (2011) para. 7. www.gov.za/documents/download.php?f=148470.
45. See K Pillay 'Tracking South Africa's Progress on Health Care Rights: Are we any Closer to Achieving the Goal?' (2003) 7 *Law, Democracy and Development* 55, 56.
46. See D Werner 'Key note address at the international conference: 'The New World Order – A Challenge to Health for All by the Year 2000' in *International People's Health Council, National Progressive Primary Health Care Network and the South African Health and Social Services Organisation Lighten the*

- burden of third world health* Cape Town (1997) 7.
47. Department of Health *National Health Insurance in South Africa Policy Paper* para. 8.
 48. D McIntyre et al *Shield Work Package 1 Report: A Critical Analysis of the Current South African Health System* (2007) Health Economics Unit (University of Cape Town) and Centre for Health Policy (University of the Witwatersrand) 11. Available at web.uct.ac.za/depts/heu/SHIELD/reports/SouthAfrica1.pdf.
 49. D McIntyre et al *Shield Work Package 1 Report: A Critical Analysis Of The Current South African Health System* 12.
 50. See para. 3 of the Preamble to the WHO Constitution.
 51. The Declaration was adopted at the International Conference on Primary Health Care, held in Alma-Ata, USSR (6–12 September 1978). In September 1978, the World Health Organisation organised an international conference on ‘Primary Health Care’ in Alma Ata (Kazakhstan, then the USSR). Representatives from almost all UN member states gathered with main international organisations to define a framework for promoting ‘Health for all’, with special emphasis on poor communities in developing countries. The conference resulted in the adoption of the Alma-Ata Declaration, which called for ‘a publicly funded, comprehensive system approach to ensure the right of health for all.’
 52. See para. I. The Declaration was adopted at the International Conference on Primary Health Care, held in Alma-Ata, USSR (6–12 September 1978).
 53. WHO, Declaration of Alma-Ata, International Conference on Primary Health Care, Alma-Ata, USSR, 6–12 September 1978.
 54. See article 25 of UDHR.
 55. See HJ Steiner and P Alston *International Human Rights in Context* (2000) 143.
 56. SC McCaffrey SC ‘A Human Right to Water: Domestic and International Implications’ (1992) 5 *Georgetown International Environmental Law Review* 1, 8.
 57. McCaffrey *Georgetown International Environmental Law Review* 8.
 58. See Article 12 of ICESCR.
 59. See Article 12 of ICESCR.
 60. See article 24 of the Convention on the Rights of the Child (1989) UN Doc A/44/49. The CRC was adopted by the UN General Assembly on 20 November 1989. It entered into force on 2 September 1990.
 61. See article 16 of the African Charter on Human and Peoples’ Rights (1981)

- OAU Doc CAB/LEG/67/rev.5. The African Charter was adopted by the OAU in Nairobi, Kenya, in June 1981 and entered into force in October 1986.
62. See *Purohit and Moore v The Gambia*, Communication 241/2001 (2003) AHRLR 96 (ACHPR 2003).
 63. See *Purohit and Moore v The Gambia* para. 80.
 64. See *Purohit and Moore v The Gambia* para. 81.
 65. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2000) CAB/LEG/66.6.
 66. See article 14 of the African Charter on the Rights and Welfare of the Child (1989) UN Doc A/44/49.
 67. See article 14(2)(a)–(j) of the African Children's Charter.
 68. Millennium Development Goal 6 aims to halt and begin reversing 'the spread of HIV/AIDS' by 2015. Although the Millennium Development Goals are not contained in a binding treaty format, it is argued that at least some of them – including goal 6 – have attained the status of customary international law.
 69. See GA Res 55/2, UN GAOR, 55th sess, Agenda Item 60(b), UN Doc A/RES/55/2 (2000).
 70. Sections 27(1)(a), (b) and (c); Section 28(1)(c) and Section 35(2)(e) of the Constitution of the Republic of South Africa, 1996.
 71. Committee on Economic, Social and Cultural Rights *General Comment No. 14 – The Right to the Highest Attainable Standard of Health* (2000) UN Doc E/C.12/2000/4 para. 17.
 72. Para. 12(a).
 73. Para. 12(a).
 74. Para. 12(b).
 75. These would include ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV and AIDS, including people living in rural areas.
 76. Payment for health care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all.
 77. Para. 12(b).
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The right to social security in South Africa

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1. Introduction

The Foundation for Human Rights (FHR) has commissioned a series of studies assessing the progress on the achievement of socio-economic rights in South Africa, and in particular the Government of South Africa's fulfilment of its obligations in terms of the socio-economic rights as set out in the Constitution. The study is intended to provide an update on South Africa's achievements since its transition to democracy. This paper analyses, from a human rights perspective, the current fault lines in relation to the realisation of the right to social security.

Social security policy in South Africa developed in a context of human rights violation and systemic inequality, before the political transition to democracy in 1994. Twenty years on, after the dismantling of the apartheid regime, South Africa reaps the benefits of a rights-based social security system, which charted a ground-breaking new path as an essential component in the rebuilding of the country on values of justice and freedom.¹ Internationally, South Africa is particularly recognised as having a progressive and far-reaching social assistance programme for a middle-income developing country.² Yet human rights challenges in the field of social security still remain.

Social security is defined as the provision of minimum income secu-

rity and support in kind via contributory social insurance schemes and non-contributory social assistance programmes.³ We start the paper by discussing, in Section 2, the legislative and policy framework that underpins the delivery of social security in South Africa. The section provides a brief overview of international and regional human rights laws relevant to social security, and then moves on to the South African context to discuss domestic law, South African jurisprudence, and finally South African policy and spheres of government responsibility with regard to social security.

Following the overview of the social security legislative framework, Section 3 provides an analysis of the systemic fault lines across the human rights dimensions. We show that South Africa has achieved a remarkably large and efficient social assistance programme for children, the elderly and persons with disabilities. There are moderately effective social insurance programmes for the unemployed who were employed and for those exposed to occupational injuries and diseases in the formal employment sector, as well as for those exposed to traffic injuries. Yet these provisions fall short of the comprehensive developmental approach to social security (and social welfare) outlined in the White Paper (1997) and reiterated in the National Development Plan (NDP)(2013). The majority of the structurally unemployed and informal worker population remain marginalised from social assistance and social insurance schemes.⁴ Rigid divisions between social assistance and social insurance do not favour the development of an integrated approach to social and economic development.⁵

In conclusion, we argue that South Africa's social security system has continued to build on a foundation of human rights, but that a number of challenges remain in continuing this journey.

2. Legislative and policy framework

2.1 International and regional law

The right to social security is laid down in key international human rights documents. Thus, social security is recognised as a human right in the

Universal Declaration of Human Rights of 1948 and the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR). The Human Rights Declaration asserts that ‘Everyone, as a member of society, has the right to social security’ (article 22) and that everyone has the ‘right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control’ (article 25(1)).⁶ Equally, the ICESCR states in article 9: ‘The states parties to the present Covenant recognise the right of everyone to social security, including social insurance.’ Article 11 further declares: ‘The states parties [...] recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.’⁷

The right to social security is also incorporated in a range of international human rights instruments,⁸ most notably and in further detail in ILO Convention 102 on Minimum Standards of Social Security (1952)⁹, and the ILO Recommendation No. 202 on National Floors of Social Protection (2012)¹⁰

From a regional perspective, the member states of the African Union recognised, in 2004, the centrality of social protection for social policy,¹¹ which was subsequently followed by the Social Policy Framework for Africa in 2008.¹² The Framework is not legally binding and member states are merely ‘encouraged to choose the coverage extension strategy and combination of tools most appropriate to their circumstances’.¹³ However, with wordings akin to the Social Protection Floor (which we discuss in more detail below), the Framework also declares that ‘[t]here is an emerging consensus that a minimum package of essential social protection should cover: essential health care, and benefits for children, informal workers, the unemployed, older persons, and persons with disabilities. This minimum package provides the platform for broadening and extending social protection as more fiscal space is created’.¹⁴

A draft Declaration on Employment, Poverty Eradication and Inclusive Development in Africa has been developed (known as Ouagadougou+10 and intended to replace the 2004 Declaration). It was adopted by the Ministers of Labour and Social Affairs (LSAC) in Wind-

hoek in April 2014, and was supposed to be adopted by an Extraordinary Summit of African Union (AU) Heads of State and Government in September 2014, however, adoption had to be postponed due to the Ebola crisis. Another key African Union instrument which relates to social security is the 'Social protection plan for the informal economy and rural workers 2011–2015' (SPIREWORK), in which a strategy towards social security for the informal economy and rural workers is formulated.¹⁵

The Southern African Development Community (SADC) has committed member states to social security provision as a human right. Hence, article 19 in the *Charter of Fundamental Social Rights in SADC* (2003) states that:

1. Member States shall create an enabling environment so that every worker in the Region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits.
2. Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be entitled to receive sufficient resources and social assistance.¹⁶

The SADC Code on Social Security (2007) reiterates that '[e]veryone in SADC has the right to social security',¹⁷ and then further provides details on different types of policy options and security provision for different groups in society, such as the elderly, children, the unemployed etc. The SADC also recently adopted the Protocol on Employment and Labour.¹⁸ Although not yet in force, this important document contains comprehensive provisions on and reference to social security, explicitly stating that both decent employment and social security need to be 'at the centre of macro-economic and sectoral policies at global, regional and national levels' (p. 3). The document declares the aim of achieving regional integration through the harmonisation and co-ordination of labour and social security legislation.

Although the older documents grant a vital basis for the provision of social security as a human right, the newer documents, particularly the CESC and the ILO Recommendations 202, provide a fundamental

framework for the future expansion of social security.¹⁹ The recent documents reflect a growing realisation that social security needs in developing countries are different to the industrialised world. At the International Labour Conference in 2001, where representatives affirmed that social security 'is a basic human right and a fundamental means for creating social cohesion',²⁰ it was recognised that the implicit assumption 'that past economic and social development patterns of the industrialised countries would replicate themselves in other regions', has proved to be incorrect.²¹ Consequently, acknowledging that large segments of the populations in developing countries work outside the formal sector, social assistance has become a primary tool to alleviate poverty and provide basic income security in developing countries,²² while ways are being sought to expand social insurance beyond the traditional formal sectors.²³

It has been argued that the National Social Protection Floors Recommendation [202] 'identifies, for the first time, a comprehensive set of principles for national social security systems' with principles such as 'the universality of protection, the adequacy of protection, the obligation to define benefits in the law, non-discrimination, progressivity of implementation' among others.²⁴ The objectives of the Recommendation are to provide guidance to members to:

- (a) establish and maintain, as applicable, social protection floors as a fundamental element of their national social security systems; and
- (b) implement social protection floors within strategies for the extension of social security that progressively ensure higher levels of social security to as many people as possible, guided by ILO social security standards.²⁵

The following social security guarantees are recommended for national Social Protection Floors:

- (a) access to a nationally defined set of goods and services, constituting essential health care, including maternity care, that meets

- the criteria of availability, accessibility, acceptability and quality;
- (b) basic income security for children, at least at a nationally defined minimum level, providing access to nutrition, education, care and any other necessary goods and services;
- (c) basic income security, at least at a nationally defined minimum level, for persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability; and
- (d) basic income security, at least at a nationally defined minimum level, for older persons.²⁶

Although advocating an initial basic minimum of income security, the Recommendation envisages the progressive realisation²⁷ of a comprehensive social security framework²⁸ with universal access, under the primary responsibility of the state.²⁹ In reference to progressive realisation of the right to social security, the Recommendation explicitly links to various earlier documents. Article 2(1) in ICESCR thus declares that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.³⁰

The ICESCR confirms the legal obligation (rather than policy option) of states, under intentional human rights law, to 'ensur[e], at the very least, minimum essential levels of non-contributory social protection'.³¹ Furthermore, the ICESCR also asserts the obligation of progressive realisation of the right to social security; in fact, even though there may be significant financial implications, the state 'must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, these minimum obligations'.³²

Another important and influential international document in the

social protection floor debate is the Bachelet report (2011).³³ The report links the social protection floor to principles of social justice and the universal right to social security. The core idea is that no one should live below a certain income level and that everyone should at least have access to basic social services. The social protection floor is also strongly linked to the decent work agenda, and the need to strengthen labour institutions and to support macro-economic environments that promote employment. It is envisaged that each country develops its own social protection floor strategy, in line with national priorities and resources, for the extension of social security, comprising a basic set of social guarantees for all (horizontal dimension), and the gradual implementation of higher standards (vertical dimension).

There is thus ample support in international and (AU and SADC) regional documents for the right to social security (now also often referred to as social protection).³⁴ Accepting, at least initially, a minimum set of social security provisions, the vision is clearly for states to progressively expand their framework to provide comprehensive social security for all.

2.2 South African law

A core aspect of the human rights approach is that social protection programmes must be enshrined and defined in national legal frameworks, and supported by a national strategy and plan of action. The most successful experiences of social protection systems are those grounded in legal instruments that create an entitlement to social protection benefits, ensure the permanence of these initiatives, and give rights-holders the legal ability to invoke their rights. The success of systems in countries such as Brazil and South Africa is due in part to the existence of specific legal provisions ensuring the individual's right to social protection and defining the standards which regulate the involvement of all stakeholders.³⁵

As we shall see in the following discussion, South Africa has a constitutional foundation ensuring individuals' right to access to social secu-

rity.³⁶ Nevertheless, international human rights law must also be taken into account as 'South Africa has indicated its intention to become a party to and to be legally bound by the obligations imposed by relevant international treaties.'³⁷ In particular, South Africa is bound by international agreements that it has ratified: 'An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)'.³⁸ South Africa has signed, and now also ratified, the ICESCR. Furthermore, section 39(1)(b) of the Constitution compels courts and tribunals to consider international law when interpreting the Bill of Rights, even if South Africa is not legally bound by obligations under a treaty.³⁹ In addition, the international approach of the Constitution should determine the interpretation of legal provisions (also in relation to social security): 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'⁴⁰

Arguably, it can be inferred from the Constitution that South Africa is a social state and that the cornerstone of a social state is a comprehensive social security system. This conclusion is drawn⁴¹ from the preamble in the Constitution, which states that the aim is to '[h]eal divisions of the past and establish a society based on democratic values, social justice and fundamental human right; [...and] [i]mprove the quality of life of all citizens and free the potential of each person'.⁴²

With reference to social security, the Constitution states:

Everyone has the right to have access to [...] social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.⁴³

The state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of these rights.⁴⁴

It follows from these sections that the right to access to social security is protected by the Constitution. It is further suggested that, while the

state may not deny anyone access to social security benefits, it does not ensue that everyone has the right to social security because its accessibility depends on the state's availability of resources.⁴⁵ However, the state is obliged to take reasonable measures to achieve the progressive realisation of the right to access to social security (see the same section 27(2)). Also, considerations of deprivation and vulnerability could play an important, if not decisive, role in at least prioritising the entitlement of certain categories (for example, the elderly, children and people with disability) to access social security, which means that the plight of the (most) vulnerable may not be neglected. In sections 2.3 and 3.2 we discuss in more detail how the developing jurisprudence interprets the constitutional provisions to social security, as well as that of the more specific social security laws.

South African laws regulate the administration of social assistance and social insurance separately.⁴⁶ Concerning social assistance, the Social Assistance Act (2004),⁴⁷ as amended,⁴⁸ provides for the rendering of social assistance to eligible persons. The South African Social Security Agency Act (2004) provides for the establishment of an agency (SASSA) to 'ensure efficient and effective management, administration and payment of social assistance'.⁴⁹ As will become clear in sections 2.3 and 3, these Acts, as amended, in conjunction with and in response to court cases and civil society actions, have been instrumental in expanding the coverage of social assistance in South Africa. Nevertheless, the Social Assistance Act, through its definitions of eligible persons and the eligibility criteria for access to different grant types, effectively excludes all poor and able-bodied adults between eighteen and 59 years from accessing social assistance, although many in this age group are in income-insecure positions.⁵⁰

Social insurance schemes are contributory in nature and can be divided into mandatory social insurance and voluntary social insurance funds. There are Acts providing for the regulation of voluntary social insurance schemes, such as the Pension Funds Act (1956) as amended, and the Medical Schemes Act (1998). As voluntary insurance falls within the realm of the private sector, we focus in this paper primarily on compulsory social insurance. Arguably, South Africa has a minimal formal social insurance system, as there is no direct legal obligation of employees to

contribute to medical aid schemes and retirement funds.⁵¹ There is thus an absence of compulsory social insurance in the areas of pension and medical benefits, which causes significant exclusion of a large number of people from accessing social security. The main laws providing for social insurance on a compulsory basis are limited to the Unemployment Insurance Act (2001), which provides for the payment of unemployment, illness, maternity, adoption and dependants' benefits.⁵² The Compensation for Occupational Injuries and Diseases Act (1993) provides for compensation for disablement caused by occupational injuries or diseases sustained in the course of employment, or for death resulting from such injuries or diseases.⁵³ And the Road Accident Fund Act (1996) provides for the payment of compensation for loss or damage wrongfully caused by the driving of motor vehicles.⁵⁴

2.3 South African jurisprudence

The Constitutional Court has stressed that the socio-economic rights contained in the Constitution are justiciable, and that their inclusion in the Constitution has direct financial and budgetary implications.⁵⁵ Further, in cases where statutory entitlements to social assistance grants and social insurance benefits have not been adhered to, the courts have not hesitated to intervene.⁵⁶ Court cases (at both the Constitutional Court and lower court levels) have in particular been prevalent with respect to social assistance and have extensively applied administrative justice principles.⁵⁷ In many instances, decisions by the courts have led to amendments of social security laws and policies; for example, the extension of social assistance to refugees and permanent residents. Arguably then, due to the pressure to justify which persons are eligible (or not) for social security, the South African state has moved towards a more explicit interpretation of its social security framework.⁵⁸ In this section, we focus specifically on how the developing jurisprudence interprets the principles of social security in South Africa. In section 3.2, we will discuss in more detail the implication of court cases (and subsequent changes to laws and policies) on issues regarding administrative justice and rules of eligibility for social security.

At the most fundamental level, the Constitutional Court has reiter-

ated the value of social security:

[T]he right of access to social security, including social assistance, for those unable to support themselves and their dependants is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.⁵⁹

Moreover, the Constitutional Court has affirmed the intimate interrelationship between social security as a fundamental right and other fundamental rights.⁶⁰ All rights contained in the Constitution are then seen as interrelated, indivisible and mutually supporting.⁶¹ Particularly in the area of social assistance, it has been noted that the provision made to give effect to one right may have an impact on the extent to which it might be required of the State to take measures to give effect to other rights. Thus, in *Grootboom*, the Court noted that: 'If [...] the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the state's obligations in respect of other socio-economic rights.'⁶²

While the right to social security appears firmly entrenched, the availability of resources is still an important consideration when determining the obligation of the state.⁶³ However, the availability of resources has to be balanced against the state's obligation to take reasonable measures to achieve the progressive realisation of the right to access to social security, as well as to consider the deprivation and vulnerability of affected persons.⁶⁴ Following the constitutional emphasis on redressing imbalances of the past and on empowering the historically disadvantaged and the vulnerable, there has been particular constitutional focus on addressing the plight of the most vulnerable and poor in society.⁶⁵ In both *Grootboom* and *Treatment Action Campaign*, the Court emphasised that '[t]hose 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 achieving

realisation of rights'.⁶⁶

The Constitutional Court has thus been willing to intervene in cases affecting communities historically marginalised, excluded or appearing particularly vulnerable.⁶⁷ Along with this principle of addressing the needs of the most vulnerable first, retrogressive measures as regards social security provisioning are regarded as incompatible with the state's obligation to progressively realise the right to access to social security.⁶⁸

Summing up, the jurisprudence has confirmed the intrinsic value of social security and its interconnectedness and indivisibility with other fundamental rights. While the availability of resources constitutes a legitimate restriction on the provision of social security, as the courts have affirmed the need to focus on the poorest and most vulnerable, the principle of progressive realisation is also affirmed and with that the inadvisability of retrogressive measures.

2.4 South African policy

The White Paper for Social Welfare (1997) constitutes the key policy framework for restructuring social security in the post-apartheid era.⁶⁹ The policy framework is premised on a rights-based approach to social welfare⁷⁰ and it committed the government to ensure the progressive realisation of social security for all.⁷¹ It adopts a holistic approach to social welfare premised on key themes such as the interrelations between social and economic development, democracy and participation, and social welfare pluralism referring to the involvement of both state and civil society actors.⁷² Furthermore, the need for a comprehensive social security system is emphasised:

Social welfare refers to an integrated and comprehensive system of social services, facilities, programmes and social security to promote social development, social justice and the social functioning of people.⁷³

In lieu of the challenges for the post-apartheid government in streamlining legislation and administration fitting a new democratic system, the short-term priority was to amend legislation to align with the Constitu-

tion and the new policy directions of the government, and to improve administration through the creation of one single national welfare department, the Department for Social Welfare.⁷⁴

Following these first steps, the medium- to longer-term plan was to develop comprehensive legislation for social security⁷⁵ that would in time ensure income security for all. The policy framework thus states:

Policies and programmes will be developed to ensure that every member of society can realise his or her dignity, safety and creativity. Every member of society who finds him or herself in need of care will have access to support. Social welfare policies and legislation will facilitate universal access to social welfare services and social security benefits in an enabling environment.⁷⁶

There have been a number of efforts to move towards comprehensive social security systems through commissioned reports. In 2000, the South African Government appointed a Committee of Inquiry into a Comprehensive System of Social Security for South Africa, termed the Taylor Committee.⁷⁷ The Committee was tasked with investigating policy options for comprehensive social security. The Committee reported in 2002 and in its report identified some critical gaps in the nature of social security in South Africa, for example regarding the lack of income security for the working-age population largely due to structural unemployment: 'Not only do children, retirees and the disabled need social protection – millions of potential workers are vulnerable to unemployment and resulting impoverishment.'⁷⁸

The Taylor Committee provided a range of recommendations for improving access to and efficiency of social assistance programmes and social insurance schemes, covering key areas such as unemployment, retirement, health, children, and disability. Furthermore, to address the gap noted above and the immense challenges of poverty, the Committee suggested the introduction – over time – of a Basic Income Grant (BIG) payable to all South Africans at a modest level of R100 per person per month.⁷⁹ The suggestion of a Basic Income Grant was controversial and the government largely responded negatively and stalled the proposal.⁸⁰

In 2007, the Inter-Departmental Task Team (IDTT) on Social Security and Retirement Reform was established, comprising various key departments including National Treasury, the Department of Social Development and the Department of Labour, supported by the work done and reports prepared by National Treasury and the Department of Social Development. The aim of the IDTT was to develop a comprehensive social security framework for the country, including non-contributory social assistance, contributory social insurance, institutional design, financing and retirement fund reform. With regard to retirement, cost effective options were proposed to provide adequate coverage to a greater proportion of the population, also raising equity issues, for example regarding large tax subsidies to high-income earners.⁸¹

As already discussed, social assistance and social insurance legislation is still not integrated into a comprehensive framework and, arguably, although there are improvements in coverage and administration, social security continues to be implemented in a piecemeal and non-integrated fashion.⁸² The NDP is a multi-faceted report that attempts to build a coherent plan for socio-economic development in SA. The NDP was accepted by Parliament in 2013.⁸³ The NDP reflected that: 'The country has built an advanced and comprehensive social protection system with wide reach and coverage, but the system is still fragmented, plagued by administrative bottlenecks and implementation inefficiencies.'⁸⁴ The NDP expresses a continuing commitment to the provision of social protection, including social security. The chapter on social security similarly to previous reports identifies gaps in provision, and makes recommendations that can be combined to extend assistance and insurance across the population.

To sum up, even though both the legislation and policy documents strongly commit the government to building a comprehensive social security framework for all South Africans, and although coverage has expanded particularly with regard to social assistance (see section 3), there are still notable challenges in building an integrated framework. This is also evident in how policy is administered by different parts of government as explained in the following part.

2.5 Spheres of government responsibility

Fragmentation of social security programmes, and a lack of co-ordination between actors and across the levels of government institutions implementing policy, increase the possibility that social security provisions are ineffective, which consequently negatively infringes on the right of people to social security.⁸⁵ Since 1994, the government has reformed the functional and financial arrangements of its administration in order to realign budgets and improve co-operation between different spheres of government; this was a matter of urgency as the social service delivery in the apartheid system was ethnically differentiated and implementation very uneven across provinces.⁸⁶

Based on the South African Social Security Agency Act of 2004, the government set up SASSA (the South African Social Security Agency) in 2006 under the then Department of Social Welfare.⁸⁷ With the establishment of SASSA, social assistance became the responsibility of one specialised institution responsible for the management, administration and payment of grants; the administration and delivery system has become standardised and uniform, which has resulted in improvements in the provision of social assistance grants.⁸⁸

Although, as mentioned earlier, the South African Social Security Agency Act does make provision for SASSA to also regulate social insurance schemes, social insurance programmes are spread out across different implementing agencies. Hence, unemployment insurance is implemented by the Unemployment Insurance Fund under the Department of Labour; the Road Accident Fund under the Department of Transport is responsible for compensation for road accidents; and compensation for occupational injuries and diseases is administered by the Compensation Fund in the Department of Labour, although certain diseases in the mining industry are under the auspices of the Department of Health.⁸⁹ To the extent that government entities are involved in voluntary social insurance schemes, the Department of Health oversees health insurance schemes, whereas the National Treasury has oversight over the Financial Services Board, which regulates retirement funds.⁹⁰

3. Analysis of systemic fault lines across all of the human rights dimensions

In this section, we assess both achievements and challenges related to relevant systemic fault lines, namely access to social security, government compliance with legislation, participation, quality and gendered dimensions.

3.1 Access

Social assistance: overview

Today, the South African Government distributes more than sixteen million social grants, reaching roughly a third of the South African population.⁹¹ There are seven different social grants: Old Age Pension (OAP), Disability Grant (DG), Child Support Grant (CSG), Foster Child Grant, Care Dependency Grant (CDG), Grant in Aid, and War Veteran's Grant. In addition, the Social Assistance Act of 2004 makes provision for the social relief of distress as a temporary assistance measure. In this report, we focus mainly on the CSG, the OAP and the DG, as they are the most extensive social grants both in terms of coverage and costs. Together, these three social grants reach 95.5 per cent of the total number of grant recipients (see Table 1). When comparing numbers of grant beneficiaries to the latest census from 2011, coverage per population age group can be estimated as follows: grants for children (CSG, Foster Child Grant and CDG) reach 60 per cent of all children under eighteen years of age.⁹² Four per cent of the population between 18 and 59 receive the DG (the only grant for this age group),⁹³ while over 70 per cent of the population aged 60 and above are in receipt of the OAP.⁹⁴

Table 1: Social grants, target group, amount and number of beneficiaries in South Africa (June–September 2015)

GRANT TYPE	TARGET GROUP	AMOUNT OF GRANT PER MONTH	NUMBER OF GRANT BENEFICIARIES	SHARE OF TOTAL BENEFICIARIES
Old Age Pension	Persons over the age of 60 years	R1 410 ⁹⁵	3 114 729	18.6%
Disability Grant	Persons medically diagnosed disabled over 18 years	R1 410	1 106 425	6.6%
Child Support Grant	Paid to primary caregiver of a child up to 18 years	R330	11 792 596	70.3%
Foster Child Grant	Foster families of children under 18 years	R860	519 031	3.1%
Care Dependency Grant	Parents, primary caregiver or foster parent of a disabled child who requires permanent care or support at home by another person	R1 410	127 869	0.7%
Grant in Aid	A person with a physical or mental condition requiring regular attention by another person	R330	119 541	0.7%

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GRANT TYPE	TARGET GROUP	AMOUNT		
		OF GRANT PER MONTH	NUMBER OF GRANT BENEFICIARIES	SHARE OF TOTAL BENEFICIARIES
War Veteran's Grant	Veterans of the two world wars, Zulu uprising and the Korean war	R1 430	297	<0.1%
Total			16 780 488	100.0%

Source: SASSA (2015),⁹⁶ South African Government,⁹⁷ authors' calculations

With the expansion of social assistance, the composition and profile of beneficiaries has changed in line with the post-apartheid transformation of the social welfare system in response to racial and socio-economic disparities.⁹⁸ Recipients are predominantly African, and have lower levels of education and access to employment than non-recipients.⁹⁹ Distributions by gender are presented in Section 3.5.

Social assistance: practicalities of access

Practically and administratively a number of changes have been made to facilitate access to social assistance grants. Based on the South African Social Security Agency Act (2004), the South African Social Security Agency (SASSA) was established in 2006 to improve system effectiveness and efficiency and to ensure access to social assistance for all eligible beneficiaries. SASSA replaced the previous independent provincial administrative systems with a mandate to centrally administer social assistance programmes at national level.¹⁰⁰ SASSA has access points throughout the country, with a total of 335 local offices, 917 service delivery points and 9937 pay points. In addition to these service delivery points, the Integrated Community Registration Outreach Programme (ICROP) uses mobile offices to reach under-served areas, with facilities to handle new applications, reviews, enquiries and enrolments for the SASSA card.¹⁰¹

A campaign to re-register all current social grant beneficiaries onto a new biometric system was undertaken in 2012/13. The new payment sys-

tem aims to ensure that social grant payments are channelled through one system (previously, different contractors handled payments in each province). This enables beneficiaries to access grants anywhere in the country at any time, greatly increasing convenience.

Social assistance: remaining barriers to access

While many barriers have been overcome with regard to access, a number of challenges still remain. Broadly, the main challenges concern documentation, the addition of informal conditions by administrative officials, lack of public awareness regarding new regulations, physical access constraints and lack of integration with other services.¹⁰²

Despite the extensive reach of the CSG, the Children's Institute estimates that approximately 2.35 million children remain excluded from access (this has dropped from an estimated 3.8 million in 2008). Often these children are those most vulnerable and in need of assistance. Children under the age of one, children of young mothers, children living in rural areas, orphans, children in child-headed households, adolescents who have dropped out of school, children with non-South African caregivers, and refugee children are over-represented among those who do not access the grants.¹⁰³ Inconsistency in the definition and assessment of disability (for example AIDS-related disability) has led to disjointed administration of the disability grant, with a high risk of excluding eligible beneficiaries.¹⁰⁴ The strict medical-based criteria which are necessary to qualify for the disability grant are often not met by the chronically ill.¹⁰⁵

Lack of documents is a major reason for exclusion. The administrative requirements, particularly the need for identity documents issued by the Department of Home Affairs, can be burdensome.¹⁰⁶ Lack of identity documents, birth certificates and death certificates are cited as major barriers to accessing the grants for many of the vulnerable groups listed earlier. Amendments made in 2008 to the Social Assistance Act (Regulation 11(1))¹⁰⁷ that seek to overcome this barrier, by making provision for alternative documentation, have been brought into effect. Yet lack of awareness by the public of these provisions has led to a lack of demand for taking advantage of the alternative documentation allowance.¹⁰⁸

Access is also constrained by the widespread practice of officials imposing informal conditions to official criteria for social grant eligibility.¹⁰⁹ For example, demands for proof of school enrolment or for affidavits attesting to the applicant's unemployment reflect a misrepresentation of the necessary requirements for grant application. In the case of the CSG, the enforcement of school attendance by SASSA officials as a mandatory condition for eligibility, has resulted in the exclusion of eligible adolescents. This 'soft conditionality' was not intended as a criterion for exclusion but as a way of identifying those not attending school, in order to support their return to education.¹¹⁰ Misinterpretation of the means test is another reason for lack of access. Due to a common perception that grants are only for those who are unemployed, in some instances eligible applicants have been discouraged from applying because of their working status.¹¹¹

Practicalities such as the cost of transport to administrative offices, illiteracy (particularly in rural areas) and safety concerns at pay points can also be limiting factors to access.¹¹² Lack of integration across service providers and data management systems has left certain vulnerable groups particularly exposed. Since CSG applications are not automatically embedded into infant and maternal services, delays in children under the age of one accessing grants is exacerbated.¹¹³ Similarly, a lack of coherence between policies and services available for disability adds unnecessary barriers to access to social assistance.¹¹⁴

Social insurance

A second pillar of social security in South Africa is social insurance. Before 1994, access to unemployment insurance excluded all African workers, informal sector workers, agricultural labourers, seasonal workers, domestic workers and government employees. Following the adoption of the Unemployment Insurance Act (2001), access is now available more broadly to all employees except for, among others: employees in national or provincial governments and employees who are employed for less than 24 hours a month with a particular employer.¹¹⁵ In 2003, access to the national Unemployment Insurance Fund (UIF) was extended to include domestic workers and seasonal workers.¹¹⁶ The UIF assists those

who lose their jobs, in addition to those who stop receiving a salary for a period of time due to maternity leave, illness or taking care of an adopted child (under the age of two). Relatives left behind by a deceased worker can also be assisted by the fund.¹¹⁷

The first Quarterly Labour Force Survey of 2014 estimated 8 027 000 employees registered with the UIF, representing 53 per cent of the employed labour force and 40 per cent of the total labour force (see Table 2).¹¹⁸

Table 2: Employment in South Africa, first quarter 2014

	JAN – MAR 2014 ¹¹⁹	% OF WORKING AGE POPULATION
Population aged 15–64 years	35 177 000	100%
Labour force	20 122 000	57%
Employed	15 055 000	43%
Formal sector (non-agricultural)	10 780 000	31%
Informal sector (non-agricultural)	2 336 000	7%
Agriculture	709 000	2%
Private households (including domestic workers)	1 231 000	3%
Unemployed ¹²⁰	5 067 000	14% (25% of labour force)
Not economically active	15 055 000	43%
Discouraged job-seekers	2 355 000	7%
Other (not economically active)	12 700 000	36%

Source: (SSA 2014b)¹²¹

Most importantly, in relation to access, as in many developing countries, a large section of South Africa's labour force remains systematically excluded, including some of the most vulnerable unemployed labour market participants.¹²² Informal sector workers, public servants and, those who have never worked before or those who work less than 24 hours per month are excluded from being contributors and, subsequently

from receiving unemployment benefits.¹²² Contract workers and immigrants are also excluded. As Table 2 shows, this is of importance in South Africa where the official unemployment rate is 25 per cent. By comparing the number of claims for unemployment benefits (next paragraph) with the figures for unemployment in Table 2, it can be estimated that less than five per cent of the labour force and less than fifteen per cent of the unemployed (or less than five per cent of the unemployed if one includes those not economically active) receive benefits, since the majority of the unemployed have never worked, and many who do have previous work experience are long-term unemployed and would have exhausted their benefits if they were ever eligible for them.¹²³

With regard to claims from contributors, in the year 2011/12 the UIF paid out R5.6 billion in benefits in response to 705 854 claims.¹²⁴ In an analysis of claims and claimants, Bhorat et al.¹²⁵ observe that for those who can access the UIF, it does provide essential support in times of social and economic shocks. Since the income replacement rate is higher for low-income workers, the UIF does provide relatively better support to more vulnerable workers. Yet, because the system provides fewer days of benefits for those with shorter employment spells prior to unemployment compared to those with longer employment histories, from this perspective the UIF provides less support in terms of days of benefits to those in more vulnerable employment. Data also suggests that the proportion of poorer claimants has declined in the period 2005–2011, compared to their wealthier counterparts. Women, youth (15–24 year olds) and those with lower educational levels are under-represented in the UIF claimant data compared to their representation among potential UIF contributors. This may well be attributed to the vulnerability of these groups in the labour market, for example, their shorter prior work histories.

In terms of access to UIF, a study commissioned by the Department of Social Development in 2008 found that children of previously employed contributors' can struggle to access their insurance benefits, particularly as a result of lack of documents such as birth certificates, parental identity documents and death certificates.¹²⁶ Women are also under-represented as claimants, possibly due to location or due to other responsibilities.¹²⁷

The Road Accident Fund (RAF) provides compensation to victims (including their dependants) who have suffered loss or damage as a result of motor vehicle accidents, which are a major cause of mortality and disability in South Africa.¹²⁸ Access to the RAF requires an intense and expensive bureaucratic process, and for claimants to prove that they were not at fault. The RAF has been criticised for poor administration, for the length of time it takes to compensate victims and the limited payments received that are insufficient to cover the medical expenses of those affected.¹²⁹

Through the Compensation for Occupational Injuries and Diseases Act (COIDA), the Compensation Fund was established to compensate workers who are injured while on duty or who contracted an occupational disease. The COIDA makes provision for no-fault compensation of such employees who are injured in accidents, or contracted a disease which arise out of and in the course of their duties. The Fund is effectively limited to the formal sector.¹³⁰ Domestic workers, those employed in the informal sector and self-employed contractors are currently excluded from access to COIDA. Mineworkers are covered under a separate law, the Occupational Diseases in Mines and Works Act (ODMWA).¹³¹

While the government does not play a direct role in the funding and provision of voluntary contributory social insurance (e.g. private health insurance and retirement funds), its role in regulating and facilitating participation, and in the provision of tax concessions and/or deductions, is of importance for social security provision as a whole. Private sector pension and provident funds pay out in benefits each year about five per cent of GDP, equivalent to almost double what the state pays out through its social assistance programmes. These funds provide major retirement benefits to those formal sector employees who reach retirement age without having had to withdraw their benefits prematurely. Describing these funds as 'private sector' funds obscures two respects in which the state is very involved.

Pensions for government employees are managed through a specific scheme, the million-member Government Employees' Pension Fund, funded largely by the state. Secondly, membership of pension and prov-

ident funds is mandatory for employees in many sectors or industries, because the state extends across entire industries or sectors the agreements reached between employers and trade unions through collective bargaining. Many employees in the mining industry, for example, are required to be members of either the old Mine Employees Pension Fund or the newer Mineworkers Provident Fund. South Africa thus has a substantial system of ‘semi-social’ insurance, which provides a range of benefits to formal sector employees.¹³²

The interdependent relationship between private and public sectors in the provision of insurance is essential to consider. For example, with regard to pensions, if one considers the proportion of the formally employed population that earn enough to contribute to voluntary social insurance schemes, and the small proportion of these that preserve their retirement funds and can therefore maintain pre-retirement level of consumption on retirement, it can be estimated that over 80 per cent of those currently employed in the formal and informal sectors will be reliant on the state old age grant in retirement.¹³³ With regard to medical insurance it is estimated that only sixteen per cent access voluntary medical insurance schemes.¹³⁴

3.2 Compliance by Government at different spheres

In relation to social security, the government treads a thin line between its mandate to provide social security for all, and the constitutionally recognised reality that this right should be expanded progressively.¹³⁵ With this tension in mind, we here review the major steps that have characterised government action over the past twenty years.

A budgetary overview provides a helpful way of assessing government commitment to social security. Social welfare¹³⁶ spending increased significantly in the early 1990s to address racial disparities in social grants. It has continued to grow with the expansion of social grants. Social grants in South Africa are fully publicly funded. Expenditure on social grants increased from R20 billion in 2001/02, to R113 billion in 2012/13, with an expected increase to R149 billion in budget year 2017/18, which is mostly

due to growth in number of beneficiaries and adjustment to the value of grants.¹³⁷ Cash transfer programmes now amount to 3.1 per cent of GDP (this is a decline from 3.4 per cent in the past few years, which is largely a reflection of economic growth outpacing growth in recipients¹³⁸), 10.5 per cent of total government expenditures, and 84% of total spending on social assistance and welfare services.¹³⁹

Table 3: Expenditure on social assistance and welfare services, budget year 2014/15

	EXPENDITURE (BILLION RAND)	SHARE OF TOTAL SA EXPENDITURE
Old Age Pension	49.4	34.8%
Disability Grant	19.0	13.4%
Child Support Grant	43.4	30.6%
Other grants	8.1	6.0%
Provincial welfare services	15.3	10.8%
Policy oversight, grants and benefits administration	6.7	4.7%
Total social assistance and welfare services (SA)	141.9	

Source: (RSA 2015) and authors' own calculations

In monetary terms, the OAP, DG and CSG carry the most weight; costs for the other grants cover only six per cent of total social protection expenditure (Table 3). Although the CSG of R330 is small compared to the OAP and DG of R1410, the expenditure for the CSG is almost as high as for the OAP (R43.4 billion and R49.1 billion respectively), reflecting the large number of CSG recipients.

Numerically, as well as financially, there has been tremendous growth in the social assistance sphere. In terms of both expenditure and coverage, South Africa has one of the most extensive cash transfer programmes in the developing world.¹⁴⁰ The number of grant holders increased from

2.4 million in 1998 to 10.2 million in 2006 and to 16.8 million in 2015.¹⁴¹ Growth in grants has been primarily driven by the expansion of CSGs which increased from 150 366 recipients in 1999/2000 to almost 11.8 million in 2015.¹⁴² These figures provide strong evidence of progressive realisation of the right to social security in the field of social assistance.

The expansion of social insurance has followed a more conservative trajectory, reaching only a fraction of the population in comparison with social assistance funds relative to expenditure. Between 2009/2010 and 2011/2012, combined expenditure on the UIF, the RAF and Compensation Fund increased from R22.7 billion to R23.9 billion. However, large increases are projected for the next three years, up to R42.9 billion in 2015/2016, thus increasing expenditure of the large surplus accumulated in these contributory funds.¹⁴³

Over the past twenty years, the South African Social Security system has undergone a number of policy reviews and revisions, often resulting from court cases and developing jurisprudence, as well as in response to advocacy and litigation by civil society.

A number of major milestones are significant in tracking the government's commitment to realising the constitutional right to social security:

Administrative justice

According to M. Olivier '[a]dministrative law requirements [...] have perhaps played the most profound role as far as jurisprudential intervention is concerned.'¹⁴⁴ The Social Assistance Act and the South African Social Security Agency Act, both of 2004, were introduced to reduce administrative barriers while still aiming to limit opportunities for fraud. The establishment of SASSA as a specialised social assistance delivery institution, under the leadership of the national Department of Social Development, aimed to standardise and strengthen the administration and delivery of social assistance transfers, thus overcoming provincial inequity in funding, access and implementation.¹⁴⁵ The subsequent development of national data and management systems, including the recent shift to a biometric system of registration, has increased efficiency and reduced opportunities for fraud.¹⁴⁶

In many cases, the courts have held that delays in processing grants have been unreasonable,¹⁴⁷ or emphasised that the unilateral withdrawal or suspension of grants is unlawful.¹⁴⁸ In 2008, following litigation by the Alliance for Children's Entitlement to Social Security (ACCESS), the High Court ordered the Department of Social Development to allow alternative forms of identification, in the absence of documentation.¹⁴⁹ However, implementation of the ruling has been limited, with only 11 184 children in the time period 2009–2013 referring to Regulation 11(1) of the Social Assistance Act, a small number compared to those who are still unable to access the CSG.¹⁵⁰

Right of appeal

Court cases have also been instrumental in improving the processes of appeal when grant applications have been declined. Thus, courts have held that written reasons have to be given in cases where it has been decided to suspend or cancel a grant; the reasons given must be adequate and objectively sufficient; grant beneficiaries must be granted the opportunity to make representation before a grant is suspended; and affected persons should be informed about their right to appeal.¹⁵¹ As from September 2010, both applicants and beneficiaries are entitled to access the internal reconsideration and appeal mechanisms if they were aggrieved by a decision taken by SASSA. Following the internal appeal, if the applicant disagrees with the outcome of the internal appeal, they may make an external appeal through the Independent Tribunal for Social Assistance Appeals (ITSAA).¹⁵²

The phasing out of the State Maintenance Grant and the introduction of the Child Support Grant

This major policy shift responded to the recommendations of the Lund Commission and established a non-racial grant available to all eligible South Africans. It also signalled the government's commitment to children living in poverty, and to poor households (rural households in particular) who had been previously excluded from access to social security. It communicated an understanding of the realities of the South African context, in which significant numbers of children are raised in extended

family circumstances, or even with caregivers who are not related to them.¹⁵³

The age-extension of the Child Support Grant

Initially only children under the age of seven were eligible for the CSG. Coverage of this grant has gradually been extended to children in older years, reaching children under the age of fourteen in 2005, and with a further extension to 15–17 year olds in 2010. This effectively extended the Child Support Grant to all children under the age of eighteen years.¹⁵⁴ These extensions suggest a commitment to an important human rights concern, namely that the methods of targeting must be implemented with the intention of progressively providing universal coverage.¹⁵⁵

From 1 January 2010, soft conditionalities for the Child Support Grant were introduced. This meant that primary caregivers had to ensure that a child, aged 7–18 years of age, had to be enrolled at or attend school. However, the legislation did not introduce punitive consequences for non-compliance with this requirement.¹⁵⁶

Changes to means tests

The original CSG means-test thresholds were unrevised until 2008, so in real terms the income thresholds declined and eligibility criteria became stricter. This weakness has since been rectified, and the rural bias in means tests has been removed, even increasing the amount above inflation.¹⁵⁷ On 1 April 2011, the means test thresholds for the adult grants (older persons, war veteran's and disability grants) were increased through a change in the formula that was applied. This meant that subsequent increases in the grant values would automatically increase the thresholds.

Age equalisation of OAP

In 2006, four men aged between 62 and 64 challenged the constitutionality of the eligibility to OAP, which at the time provided old age pension to women at the age of 60 and men at the age of 65.¹⁵⁸ The Social Assistance Amendment Act (2008) amended the eligibility criteria so that as from 2010 both men and women can receive the OAP at 60 years of

age (provided that they also meet the means test requirements). Further, with regard to the OAP, in the Budget Speech 2013, the Finance Minister proposed that the old age grant means test should be phased out by 2016, effectively universalising the state old age pension.¹⁵⁹ However there have not been any follow-up statements substantiating the change.

Changes to DG eligibility criteria

In 2004 and 2008, the amendments to the Social Assistance Act were intended to move the DG eligibility requirements away from a medical model which focused on severe need, to a social model based on a human rights perspective on disability, which encouraged full and equal participation.¹⁶⁰ However, in practice the implementation has not supported these amendments.¹⁶¹

Extension of social assistance to permanent residents and refugees

Initially, with some limited exception, social assistance was available to South African citizens only. However, in the *Khosa and Others v The Minister of Social Development and Others* case,¹⁶² the Constitutional Court interpreted the constitutional right to social assistance for 'all people in our country'¹⁶³ as inclusive of permanent residents (but not temporary residents).¹⁶⁴ Again, in *Scalabrini Centre of Cape Town and Others v Minister of Social Development and Others*,¹⁶⁵ the High Court held that refugees may also apply for disability grants and social relief of distress.¹⁶⁶ As from 1 April 2012 refugees could access all the social grants, with the exception of the War Veteran's Grant.

Changes in the social insurance environment

Extensions in the social insurance realm have been more modest. Unlike in the case of social assistance, the Constitutional Court has been more reluctant to interfere with the financial affairs of social insurance schemes.¹⁶⁷ Nevertheless, in 2003, the government extended its social security framework by making provision for domestic workers under the unemployment insurance scheme. Subsequently, because of two Sectoral Determinations covering the taxi and hospitality sector, the Unemployment Insurance Act framework was extended to include these two indus-

tries.¹⁶⁸ Both the UIF and the COIDA funds currently have a growing surplus.¹⁶⁹ During the 2013/14 financial year, the UIF accumulated a surplus of R72.3 billion.¹⁷⁰ In view of the growing surplus and the persistent unemployment problem, the Department of Labour is considering proposals to utilise more funds in order to provide better protection for the unemployed, including, for example, the options of extending the period of benefit payments or increasing the amount of the benefits.¹⁷¹ While the government considers long-term reforms, the National Treasury proposed a once-off relief for UIF contributors (employers and employees in 2015/16).¹⁷²

Proposals are also underway to update the COIDA and extend its coverage to include domestic workers. In 2013, the Minister of Transport published the Draft Road Accident Benefit Scheme Bill for comment, to replace the existing Road Accident Fund Act, in order to address some of the limitations noted earlier, for example to provide benefits on a no-fault basis.¹⁷³

As has been intimated, while much progress has been made in the realms of social assistance and some in the area of social insurance, the greatest gap in the realisation of the right to social security remains the achievement of an overarching comprehensive social security system in order to account for the needs of the population as a whole. A critical gap in the social security system is its lack of coverage of the unemployed and a lack of social insurance coverage for people employed in the informal sector, independent contractors and those who are self-employed. If anything, the remaining rigid divisions between social assistance and social insurance have reinforced the disparities between those with access to unemployment benefits and those who remain marginalised from it. For example, those in formal employment and eligible for unemployment benefits are also often in a position to supplement their insurance with private coverage against the risk of sickness, disability and old age.¹⁷⁴

Steps have undoubtedly been taken towards this ambitious goal of comprehensive social security, yet its realisation remains elusive. In recognition of these shortfalls, in 2000 the Taylor Committee was established to make proposals for a comprehensive social security system (as discussed in Section 2.4).¹⁷⁵ The Committee defined a broader agenda

for reform, and outlined the need for comprehensive social protection based on the need to address the multiple dimensions of poverty such as income, asset, and capability poverty. The Taylor Committee recommended a greater co-ordination between social assistance and social insurance, recognising the need for integration between social and economic policy. The recommendation to expand benefits to all children under the CSG has been approved and implemented as explained earlier. In an effort to link social security and labour policies, the expansion of public works programmes and small business development was also approved in 2004. A further recommendation of the Taylor Committee was for a Basic Income Grant, as a way of accelerating the realisation of the right to social security for all, while eliminating the administratively laborious means test, investing in human capital and indirectly stimulating the economy. While this policy recommendation is still supported by a national coalition of civil society organisations, it was rejected by the government on the basis of fiscal unsustainability.¹⁷⁶ A further issue which still requires much progress to be made, is the lack of synergy between social insurance and social assistance provisions.

3.3 Participation and information

Foundationally, social welfare provision in South Africa is rooted in deeply held values of partnership between four parties: government, the voluntary sector (civil society organisations), informal networks (e.g. support by family, friendship and other social networks) and the commercial sector (profit-oriented firms that are involved in social welfare) – through which social provision could be financed and delivered.¹⁷⁷ The realisation of socio-economic rights requires ‘a collaborative and interactive process involving the legislature, the executive, the courts, the South African Human Rights Commission, NGOs, CBOs and ordinary people in South Africa’.¹⁷⁸ These entities together are essential to the enforcement and monitoring of the right to social security.

Each year the relevant organs of state are required, for example, to provide the Human Rights Commission with information regarding the measures they have taken towards the realisation of different rights for which they are responsible.¹⁷⁹ In contrast with social services and service

delivery, in which the voluntary sector plays a much more active role, the state is the principal actor and direct financier in the provision of social assistance through grants. Non-profit organisations, however, have by no means been absent from shaping and development of social security. Consistent pressure from dedicated civil society organisations and movements has resulted in a number of the changes elaborated earlier. Advocacy through collegial and adversarial channels has been very influential in providing active monitoring of the implementation of existing policies, and in redirecting policy in line with constitutional entitlements, contributing to the progressive realisation of the right to social security. Major advocacy organisations have played a key role in the social security environment. They include Lawyers for Human Rights (LHR), the Legal Resources Centre (LRC), the Child Law Centre, University of Pretoria and several refugee institutions/groups. They have worked through dissemination of information, engagement with state entities around social security issues and through court action where necessary.

ACCESS was formed as an alliance of around 400 organisations working to secure children's rights to a better life through a comprehensive social security system. ACCESS campaigned to raise the age limit on the CSG and initiated a number of court cases to facilitate other changes. For example, in response to an ACCESS-initiated court case, a court order was given that SASSA should give grants to children (and their caregivers) that do not have birth certificates or identity documents while they are still waiting for their documents from Home Affairs.¹⁸⁰ Black Sash is another non-profit organisation with a long history of advocacy in social security, and a strong record of monitoring the state's track record in the realisation of the right to social security and of assisting individuals with para-legal support to secure social security benefits to which they are eligible.¹⁸¹ Civil society has also engaged with the recent re-registration process, while embracing the aim to reduce wastage and increase efficiency, focusing attention to monitoring that no eligible person in need should be disadvantaged by the process.¹⁸²

3.4 Quality: Impacts of the grants and linkages with other human rights

We here review some of the impacts of social security measures in South Africa. The impact of social grants in particular has been extensively researched in South Africa, and demonstrates strong linkages between the right to social security and the achievement of other human rights. The following provides a brief overview of some of the main findings as regards the effect of grants on poverty, wellbeing and livelihoods strategies.

There is a consensus in the literature that social grants have had a considerable impact on poverty.¹⁸³ Samson and colleagues concluded that, while the magnitude of poverty alleviation effects are sensitive to methodological issues (whether the poverty line is absolute or relative, whether it is scaled for household composition, and whether it measures income or expenditure), South Africa's system of social security has substantially reduced deprivation.¹⁸⁴ More recently, similar conclusions were reached by Woolard et al, who found that the social grants system has had significant and substantial impacts on poverty.¹⁸⁵ Improvements in material living standards are recorded for the OAP, the CSG and the DG respectively.¹⁸⁶ Bhorat emphasises the inequality-reducing effects of the social grants system, by observing that, in the absence of grants, income inequality as measured by the Gini coefficient would have measured 0.74 instead of 0.69, a very significant difference.¹⁸⁷

In many countries, including South Africa, growing evidence indicates that social transfers can help households improve livelihoods by investing some of the transfers they receive.¹⁸⁸ The regularity of payments facilitates access to credit and avoidance of inefficient insurance mechanisms. Particularly in rural contexts, beneficiaries strategise to use grant income to secure credit, hire equipment and buy agricultural inputs. There is evidence of similar economic synergies in urban contexts, though these are more complex and less easy to capture.¹⁸⁹ Other evidence from South Africa shows how savings from the state pension allows people to buy consumer durables and invest in productive assets.¹⁹⁰

Even though the CSG is significantly smaller than the OAP, research shows evidence of savings and investment. CSG recipients (predominantly female) are more likely to have bank accounts and some form of

savings than those who are eligible but non-receiving.¹⁹¹ Focus group data suggests that while savings levels are low, the CSG does enable recipients to participate in stokvels (informal mutual savings schemes).¹⁹²

There is general consensus that pension receipt enables households to overcome both financial and child care constraints to job-seeking¹⁹³ and provides some opportunity for younger individuals to convert grant income into secondary income through entrepreneurial activities.¹⁹⁴ The presence of recipient (female) pensioners enables working-age mothers to afford the costs associated with urban migration and active job search, and makes it possible for grandmothers to support and look after grandchildren.¹⁹⁵

While the relatively smaller CSG, primarily received by working-age women, is clearly not intended as an employment support scheme, a number of studies have examined its impact on labour market participation as an ancillary outcome.¹⁹⁶ Available evidence provides strong confirmation that social grants do not create dependency and that any potential disincentives coexist with stronger positive effects,¹⁹⁷ where grant recipients actually have higher probability of being employed.¹⁹⁸

A social grant provides a reliable and predictable source of income which can increase the capacity of households to invest in human capital and help break the intergenerational cycle of poverty.¹⁹⁹ Thus, studies show that social grants have positive health and nutrient benefits for children,²⁰⁰ as well as positive effects on school enrolment, attendance and schooling outcomes.²⁰¹ In this context, however, it is important to note that the remarkable positive impacts achieved by the CSG (much smaller than other grants) in particular are limited from reaching their full potential by the low monetary value compared to poverty lines and the costs of feeding a child.²⁰²

In South Africa, the belief that grants incentivise childbirth is often expressed, mostly in relation to the CSG. Other concerns often cited are lack of responsibility among young mothers for their children, and inappropriate use of the grants for personal consumption.²⁰³ However, there is now a well-established and convincing body of evidence that refutes these claims.²⁰⁴ The reality is that the vast majority of grant recipients spend the monies well to the benefit of their own livelihoods and the wellbeing of their household members.

With regard to social insurance, human rights impacts are limited by their restricted accessibility to the majority of those living in poverty. Yet even so it is important to note the important supportive role that the UIF, for example, played during the global financial crisis.²⁰⁵

3.5 Gendered dimension

In South Africa, expectations of gender equality are established in the Constitution. Yet their realisation in the context of social assistance policy has perhaps been accorded secondary importance in comparison with critical priorities such as racial and socio-economic inequalities. However, while social assistance programmes are 'gender-neutral', they have demonstrated considerable sensitivity to the disproportionate vulnerability experienced by women in South Africa.

Women are typically poorer than men, more vulnerable and at higher risk of domestic violence and abuse. They generally work more for less pay in both the formal economy and informal spheres.²⁰⁶ Given their responsibilities for the welfare and health of (extended) family members, women often struggle to access the labour market and maintain their position therein.²⁰⁷

Reflecting women's greater vulnerability, Table 4 shows how social grants in South Africa reach more women than men (with the exception of the War Veteran's Grant). The majority (98.1 per cent) of CSG recipients are women, although it should be noted that in terms of child beneficiaries, the numbers are evenly split between girls and boys.²⁰⁸ In the past, the OAP favoured women, since the age-eligibility criterion was 60 years for women and 65 for men. To align these criteria with gender equality dimensions, this was changed to 60 years for all in 2010. Even with this change, more women than men receive the OAP (66 per cent of OAP recipients are women) because women tend to live longer than men and also because women are more likely to pass the means test.²⁰⁹ Women also benefit more from the DG and the OAP, though for different reasons. The DG is gender-neutral as receipt is dependent on a medical condition. However, in recent years there has been a huge increase in the take-up rate, specifically by women, which can partly be explained by the fact that more women than men are infected with HIV in South Africa.²¹⁰

Table 4: Grant recipients, by gender

	MALE	FEMALE
Old Age Pension	34.0%	66.0%
Disability Grant	45.4%	54.6%
Child Support Grant	1.9%	98.1%
Foster Child Grant	6.0%	94.0%
Care Dependency Grant	3.2%	96.8%
Combination ²¹¹	2.9%	97.1%
War Veterans' Grant	79.2%	20.8%
Total	15.4%	84.6%

Source: as informed by SASSA official Dianne Dunkerley, 11–12 June 2013

The CSG comprises interesting design features in the South African context: the concepts of ‘follow the child’ and ‘primary caregiver’. The idea is that the grant follows the child in that the child is the immediate beneficiary, yet the recipient of the CSG is the primary caregiver, who is defined as the person who takes primary responsibility for the child. This design accounts for the complex household structures in poorer households in South Africa where mothers are not always able to live with the child (for instance due to the need to migrate for work).²¹² While the provisions allow for a wide range of caregivers to be assisted, biological mothers continue to comprise the overwhelming majority of CSG applicants.²¹³ In cases where a CSG recipient is not the biological mother, they are often the grandmother, aunt or other female relative of the child.²¹⁴

Grants are not intended to support the wellbeing and empowerment of women, yet it is assumed that women generally spend grants altruistically for the benefit of the family and that grant receipt is empowering for women.²¹⁵ Yet there has been an increasing recognition that such expectations place heavy burdens on women, with little support in the area of employment or social services. This can have the effect of reinforcing traditional gender norms and weakening women’s position in the labour market.²¹⁶

Social grant income has been important in reducing the extent and

depth of poverty for female-headed households – more so than for male-headed households. Grant receipt reduced poverty in female-headed households by 16% compared to eight per cent in male-headed households in 2006.²¹⁷ However, despite the mitigating effect of social assistance, the gender gap has widened. In 1997 the difference in poverty rates between males and females was 4.7 percentage points (61.8 per cent of females lived in poor households compared 57.1 per cent of males), while the gap expanded to 7.3 per cent by 2006 (59.6 per cent for females and 52.3 per cent for males). There is moderate evidence that grants assist women in gaining some power in household decisions, in accessing the labour market and in providing options for income-generating activities. Yet these should not be exaggerated in the light of the small amounts represented by the grants (in particular the CSG), the lack of compensation for women of their caring roles, and the broad distribution of benefits to the household as a whole (rather than to women specifically).²¹⁸

With regard to social insurance claims between 2005 and 2011, there were fewer female claimants compared to their male counterparts. Female claimants were under-represented in the UIF system compared to their representation in the contributor sample. The fact that the representation ratio is less than one throughout the period may point to the vulnerability of females in formal non-government employment. Female contributors may, on average, have less stable employment and thus less credit days with which to claim unemployment insurance, with the result that they claim less often than males. Alternatively, females may find it more difficult than males to access the UIF system, due perhaps to location or other responsibilities, with the result that they claim less often.²¹⁹ Lastly, the retirement fund environment is not structured in a way that recognises the fact that women often temporarily or permanently exit the labour market due to family responsibilities.

Conclusion

The report has provided an overview of social security in South Africa through a human rights lens. The international and regional legal frame-

work, as well as national law, jurisprudence, policy and spheres of government responsibility, have been outlined. This was followed by a review of the current status of social security through the analysis of systemic fault lines.

Taking a bird's-eye view of social assistance and social insurance, we have compared the broad right to access social security in South Africa with the reality of who benefits. Almost one-third of the population are accessing social assistance benefits. Social insurance schemes, most notably unemployment insurance, have provided essential income support to many, particularly during times of economic recession. Furthermore, through the combined efforts of civil society, the South African courts and the state, the overall trajectory of social security over the past twenty years has moved in the direction of the progressive realisation of the right to social security, in line with national, regional and international human rights legislation. Yet social security remains compartmentalised to narrow categories, such as children, the elderly, the disabled and those in formal employment. Fragmentation in the social security systems limits integration between social assistance and social insurance schemes.

Vast sections of the population, including parts of the urban poor and the rural poor, the structurally unemployed and those working in the informal economy, remain unable to access social security benefits, notably under the UIF and the Compensation Fund, as they are bound to a narrow definition of employment that does not reflect the South African reality. Thus, we conclude that the legislative foundations for a comprehensive social security system are in place, but that while considerable progress has been made towards the goal of realising social security for all, many challenges still remain for the full realisation of that right.

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<i>Bacela v MEC for Welfare (Eastern Cape Provincial Government)</i>	1998 1 All SA 525 (E)
<i>Bushula v Permanent Secretary, Department of Welfare, Eastern Cape</i>	2000 7 BCLR 728 (E)
<i>Government of the RSA v Grootboom</i>	2000 11 BCLR 1169 (CC)

THE RIGHT TO SOCIAL SECURITY

CASE NAME	SALR
<i>Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)</i>	1999 2 BCLR 139 (CC)
<i>Kebogile Lobisa Ngamole v South African Social Security Agency</i>	Case Nos 1033/08, 1025/08, 1024/08, 1038/08 and 1039/08
<i>Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others</i>	2004 (6) BCLR 569 (CC)
<i>Mahlangu v Minister of Social Development and Minister of Finance</i>	Case No 25754/05
<i>Mashavha v President of the RSA</i>	2004 12 BCLR 1243 (CC)
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<i>Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another</i>	2000 12 BCLR 1322 (E)
<i>Njongi v MEC, Department of Welfare Eastern Cape</i>	2008 6 BCLR 571 (CC); 2008 4 SA 237 (CC)
<i>Nomala v Permanent Secretary, Department of Welfare</i>	2001 8 BCLR 844 (E)
<i>Rangani v Superintendent-General, Department of Health and Welfare, Northern Province [1999] JOL 5494 (T)</i>	
<i>Roberts and Others v Minister for Social Development and Others</i>	Case No: 32838/05
<i>Treatment Action Campaign v Minister of Health</i>	2002 4 BCLR 356 (T)
<i>Tsotetsi v Mutual and Federal Insurance Co Ltd</i>	1996 11 BCLR 1439 (CC); 1997 1 SA 585 (CC)
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 8. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), article 5(e)(iv); Convention on the Elimination of all forms of Discrimination against Women (CEDAW), articles 11, para. 1(e) and 14, para. 2(c); Convention on the Rights of the Child (CRC), article 26; and the International Convention for the Protection of Migrant Workers and their Families (CMW), article 27.
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26. Ibid., para. 5.
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 42. Constitution, Preamble.
 43. Constitution, section 27(1)(c).
 44. Constitution, section 27(2).
 45. Olivier and Van Rensburg (note 36 above), p. 95.
 46. Although the South African Social Security Agency Act, (2004, section 2(3)(b)) does provide for 'the prospective administration and payment of social security' by SASSA (that currently administers the payment of social assistance), where social security is understood to include both social assistance and social insurance.
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category.

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58. Seekings (note 51 above), 36.
59. *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) para. 40; see also Olivier 2013 (note 50 above) para. 178.
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61. *Government of the Republic of South Africa v Grootboom* para. 53; *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others* para. 40.
62. *Government of the Republic of South Africa v Grootboom* para. 36.
63. Olivier and Van Rensburg (note 36 above), 92.
64. Ibid.; *Khosa and Others v The Minister of Social Development and Others*.
65. Olivier 2013 (note 50 above) para. 178.
66. *Government of the Republic of South Africa v Grootboom* para. 44; *Treatment Action Campaign v Minister of Health* 2002 4 BCLR 356 (T) par 66, quoting from *Grootboom*.
67. Olivier 2012 (note 37 above) para. 64.
68. Ibid., para. 65.
69. Social welfare includes not only social security, but also the provision of welfare services.
70. Patel, L. (forthcoming), *Social Welfare and Social Development in South Africa* (2nd ed.). Cape Town: Oxford University Press Southern Africa.
71. ‘The Government will take steps to ensure the progressive achievement of social security for all including appropriate social assistance for those unable

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72. Patel forthcoming (note 70 above).
73. *White Paper for Social Welfare*, 1997, chapter 2, para. 3.
74. Patel forthcoming (note 70 above).
75. Ibid.
76. *The White Paper for Social Welfare*, 1997, Chapter 2, para. 26.
77. Called the Taylor Committee after its chairperson, Vivienne Taylor; *Transforming the Present. Protecting the Future*; Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa, 2002.
78. Taylor 2002 (note 77) 60.
79. Ibid.
80. Seekings (note 51 above), 36.
81. Kruger J. (2013) Social protection in South Africa – recent achievements and future prospects. In: J. Midgley and D. Piachaud (eds) *Social protection, economic growth and social change*. Cheltenham, UK: Edward Elgar.
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83. Ibid.
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85. Sepúlveda and Nyst (note 29 above), 30.
86. Patel, forthcoming (note 70 above).
87. Brockerhoff, S. 2010. *Monitoring the Progressive Realisation of Socio-Economic Rights: a Review of the Development of Social Security Policy in South Africa* Johannesburg, Studies in Poverty and Inequality Institute (SPII).
88. See Section 3.1; Devereux, S., Adato, M., Sabates-Wheeler, R., Mcconnell, J. and Becker, E. 2011. *Child Support Grant Evaluation 2010: Qualitative Research Report*, Pretoria, South Africa, Department of Social Development.
89. Thebeeapelo, G., Moloko, M., John Tebeila, J. and Mlate, S. 2010. *An Overview of South Africa's Social Security System*, Department of Social Development, Pretoria; ODMWA, Act 78 of 1973 (see footnote 53).
90. Ibid.
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92. From the 2011 census data that is available it is unfortunately not possible to obtain the number of South Africans aged between 0 and 18 years (the data divide at 15–19 and 20–24 years of age). The share of child grants (11 044 494)

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93. The share of grant recipients to the whole population aged between 19 and 60 is 4.1 per cent.
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 101. UNICEF/SASSA 2013. Preventing Exclusion from the Child Support Grant: a study of exclusion errors in accessing the CSG benefits, Pretoria, UNICEF South Africa.
 102. Mirugi-Mukundi (note 57 above).
 103. UNICEF/SASSA (note 101 above).
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117. NPC (note 4 above).
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127. Bhorat, Goga and Tseng (note 115 above).
128. Patel 2005 (note 1 above).

129. Ibid.
130. NPC (note 4 above).
131. Act 78 of 1973 as amended.
132. Seekings, J. 2008 (note 51 above), 34
133. NPC (note 4 above).
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141. SSA 2014a. Poverty trends in South Africa. An examination of absolute poverty between 2006 and 2011, Pretoria, Statistics South Africa. See also Table 1.
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 147. Mirugi-Mikundi (note 57 above). Examples include *Vumazonka and Others v MEC for Social Development and Welfare for Eastern Cape* 2005 (6) SA 229, in which the High Court found the delay in dealing with a disability grant application to be unreasonable. In the case of *Kebogile Lobisa Ngamole v South African Social Security Agency* Case Nos 1033/08, 1025/08, 1024/08, 1038/08 and 1039/08, the High Court noted that applications should have been timeously communicated by SASSA to avoid unreasonable delays.
 148. *Bacela v MEC for Welfare* (Eastern Cape Provincial Government) 1998 1 All SA 525 (E); *Ngxuza and others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2000 12 BCLR 1322 (E).
 149. *Alliance for Children's Entitlement to Social Security v Minister of Social Development*. Case no. 5251/2005.
 150. Martin, Lane, Ngobane and Voko (note 108 above); Proudlock (note 106 above).
 151. Olivier 2013 (note 50 above), refers to the following cases: *Rangani v Superintendent-General, Department of Health and Welfare, Northern Province* [1999] JOL 5494 (T); *Mpofu v MEC for the Department of Welfare and Population Development in Gauteng Provincial Government* (unreported WLD case no 2848/99 of 18 February 2000); *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape* 2000 7 BCLR 728 (E); *Njongi v MEC, Department of Welfare Eastern Cape* 2008 6 BCLR 571 (CC); 2008 4 SA 237 (CC); *Nomala v Permanent Secretary, Department of Welfare* 2001 8 BCLR 844 (E).
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167. Olivier 2012 (note 37 above), para. 52; cases such as: *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 2 BCLR 139 (CC); *Tsotetsi v Mutual and Federal Insurance Co Ltd* 1996 11 BCLR 1439 (CC); 1997 1 SA 585 (CC).
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Part 2

Complementary political rights

The right to freedom of expression in South Africa

JANE DUNCAN

1. Introduction

South Africa comes from a sorry history of censorship and repression. Literature and films that were critical of the regime were routinely banned, and the media were subjected to tough restrictions. Art that offended Christian Nationalist ideology was also dealt with harshly. The apartheid regime kept the then-state broadcaster, the South African Broadcasting Corporation (SABC) on a tight leash, and controlled the licensing of other broadcasters to ensure that the SABC dominated the airwaves relatively unchallenged. The regime also developed and implemented a complex web of censorship laws in an attempt to keep South Africans in the dark about what was happening in their own country, and when these were not enough to contain dissent, used harsh State of Emergency regulations. The regime stretched the concept of national security to the point where any opposition could be put down on the basis that it threatened national security. The security cluster became increasingly influential under the PW Botha regime from the late 1970s to the late 1980s, which elevated the State Security Council to a level where it became the main policy-making instrument on security matters, and even overrode politicians on key decisions affecting the direction of the

country. Staffed by high-ranking military personnel and using the 'total strategy' doctrine, it ensured that all levels of the state responded in an integrated fashion to rising opposition against apartheid and capitalism, both internally and externally.

In recognition of the need to break with this censorious past, democratic South Africa made freedom of expression a fundamental right in the South African Constitution to ensure that such abuses would not occur again. Parliamentary supremacy was replaced by Constitutional supremacy and many of the apartheid-era censorship laws were repealed or amended to bring them in line with the new Constitutional guarantee of freedom of expression. The SABC was transformed from a state broadcaster into a public broadcaster with a legislated mandate to serve the universal interest, and not just a sectional interest. A new independent regulator for broadcasting was also set up, which liberalised the airwaves and presided over the creation of a whole new tier of broadcasting – community broadcasting. Freedom of expression-friendly policies were developed through consultative public processes. These are no small achievements for a democracy that is twenty years young.

Yet there are signs of trouble, too, with respect to freedom of expression. At the onset of democracy, international press freedom organisation Reporters Without Borders ranked South Africa 26th in the world (in 2002), but since then it has dropped to 42nd in the world overall.¹ Several non-governmental organisations (NGOs) inside the country have also raised concerns about the extent of media freedom specifically and freedom of expression more generally, although to different extents.²

This paper analyses the state of freedom of expression in South Africa twenty years into democracy. It reviews the legal and policy framework underpinning the right, and then uses a rights-based analysis to identify fault lines in its conceptualisation and implementation. It adopts a broad approach to freedom of expression, as covering media freedom (including Internet freedom), as well as other forms of expressive conduct. It analyses the right as both a negative as well as a positive right: that is, the extent of freedom from censorship and other forms of official restraint, as well as the extent to which government and other power-holders contribute to ensuring access to the means of communication.

2. Legal, policy and functional frameworks

2.1 International and regional law

The United Nations (UN) Universal Declaration of Human Rights guarantees freedom of expression under Article 19, which states that:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.³

South Africa is an active participant in the UN system. There are two international covenants that impact on freedom of expression, the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), which require hate speech and racism to be prohibited by law. South Africa signed the ICCPR and ICERD in October 1994, shortly after the country's first democratic elections in April, but only ratified them in 1998.⁴ Article 20(2) of the ICCPR declares that:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence should be prohibited by law.⁵

Furthermore the ICCPR lays down conditions that any restriction on freedom of expression must meet, including that these restrictions must be provided by law and be necessary for the respect of rights of reputations of others, for the protection of national security or for public order, health or morals.⁶ These provisions have been controversial on freedom of expression grounds, as freedom of expression advocates consider them to be over-broad and liable to be abused to unduly restrict freedom of expression.⁷

ICERD has also been criticised for over-broad formulations that compromise freedom of expression unduly. It places an obligation to create offences for dissemination of ideas based on racial superiority and

hatred, incitement to racial discrimination, acts of racially motivated violence and incitement to such acts, and the provision of assistance, including of a financial nature, to racist activities.⁸

As a result, several countries have entered reservations to the clauses, which have led to their own norms and standards applying to these issues, but South Africa did not do so, which means that the provisions of these conventions apply.

Over the course of time, a three-part test has been developed in civil society organisations such as Article 19, and by legal professionals, and has come to be accepted as providing the basis for legitimate restrictions of freedom of expression, which is as follows:

- The restriction must be provided for in law, and the law is accessible and formulated with sufficient precision to enable a citizen to hold a government to account for its conduct;
- The restriction must pursue a legitimate aim;
- The restriction must be necessary to secure one of these legitimate aims. In other words, there must be a pressing social need for the restriction. The reasons given by the state must be sufficient to justify the restriction and the restriction must be proportionate to the aim pursued.⁹

The UN system also includes a Universal Periodic Review (UPR), and South Africa has presented two reports so far on the Review, one in 2008 and one in 2012. At the presentation of its 2012 report, South Africa was questioned about its lack of progress in implementing measures to counter racism, racial discrimination and xenophobia, as well as the extent of its commitment to freedom of expression, given that the government had introduced a highly controversial Protection of State Information Bill, which appeared to threaten freedom of expression. Parties present at the Working Group meeting of the UPR called on South Africa to implement measures to counter racism, while at the same time ensure that the Bill incorporated human rights principles and introduce further measures to enhance freedom of expression and freedom of the press.¹⁰

The South African apartheid state signed the African Charter on Human and Peoples' Rights as far back as 1986, the year it was entered

into force, but only ratified it in June 1996.¹¹ The Charter is upheld by the African Commission on Human and Peoples' Rights, which has a Special Rapporteur on Freedom of Expression and Access to Information, a South African, Pansy Tlakula, who was also the chief executive officer of the Independent Electoral Commission (IEC). The Charter is enforced by a special court, which has only begun operating and which heard its first freedom of expression case in March 2014, involving an alleged violation of the right in Burkina Faso.¹² The Charter states that: 'Every individual shall have the right to express and disseminate his opinions within the law'.¹³

2.2. South African law

The Constitution of the Republic of South Africa (1996) includes an express guarantee of the right to freedom of expression, which is as follows:

16. (1) Everyone has the right to freedom of expression, which includes –
 - a. freedom of the press and other media;
 - b. freedom to receive or impart information or ideas;
 - c. freedom of artistic creativity; and
 - d. academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to –
 - a. propaganda for war;
 - b. incitement of imminent violence; or
 - c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

It should be noted that, unlike the United States' First Amendment, the right protects expression and not just speech. This means that a broader range of expressive activity receives protection under the right, which potentially includes actions that have expressive content. Mandla Seleokane has argued that this means that the right is more likely to be limited. If speech only was protected, then it would be easier to adopt a 'practically anything goes' approach, but this argument is possible only if

a strict separation is kept between words and deeds, as the latter are more likely to be injurious than the former, and therefore in greater need of limitation.¹⁴

There has been considerable debate about the significance of the fact that this section makes express mention of four specific forms of freedom of expression. It would appear that the intention of the drafters was to ensure that legislators and the courts appreciated that these activities relied heavily on freedom of expression for their existence, which means that their protection should lie at the core of the right. As a result, legislators should be the least hasty about limiting these forms of expression. Furthermore, if these rights are limited, then the expressive rights of the community as a whole stand to be limited, as artists, journalists, academics and scientists often disseminate information, not just for themselves, but to give a voice to more general community concerns.¹⁵

Controversially, the Constitutional Assembly decided to include an internal qualifier in the right, which means that the right to freedom of expression does not protect the forms of expression listed in section 16(2). This decision was controversial because the right is already subjected to a general limitations clause that needs to be reasonable and justifiable and may only be made with good cause. In addition, legislators need to take into account the nature of the right, the importance of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and whether there are less restrictive means to achieve this purpose. It is not entirely clear why the Assembly chose to include the internal qualifier when the right can already be limited using the general limitations clause.

It is not clear whether the right includes a proactive element which places an obligation on the government not only to refrain from censorship, but to provide access to the means of communications. In a country with an apartheid legacy of skewed media and communications networks, it makes sense for the broader approach to apply, otherwise freedom of expression risks becoming a freedom that is practised largely by the owners of the means of media production rather than the broader citizenry, who themselves may want to start their own media but may face prohibitive barriers to entry. To this end, legislators passed the Media

Development and Diversity Agency (MDDA) Act, which established the MDDA, a statutory body with a mandate to create an enabling environment for media development and diversity in South Africa.¹⁶ The MDDA has since been shifted from the presidency to the Ministry of Communications.

Although South Africa has not adopted a law that criminalises hate speech in line with ICERD, the Promotion of Equality Act and Prevention of Unfair Discrimination Act does prevent and prohibit hate speech.¹⁷ The Act defines hate speech as words ‘that could reasonably be construed to demonstrate a clear intention to be hurtful, cause harm or promote hatred on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth’. This definition is broader than the definition provided for in the Constitution in that it includes both hurtful and harmful speech, as well as speech that could have this intention, introducing a speculative element to the definition.¹⁸ This element could well be used to limit freedom of expression in dangerously broad ways, and even to shield whites from criticism about the continued existence of racism and inequality in South Africa. A case in point was the-then ANC Youth League leader Julius Malema being found guilty of hate speech for having chanted the struggle song *Shoot the Boer*. The South Gauteng High Court found the chant, in certain contexts, to be hate speech and also interdicted Malema and the ANC from singing it in public or, bizarrely, even in private meetings. According to Judge Colin Lamont, it was necessary to shield racial ‘minorities’ from being hurt by such speech and feeling fearful.¹⁹

South Africa does not have a press law similar to that of Sweden, as the press is self-regulating. However, broadcasting and telecommunications are regulated by law. The Constitution provides for the establishment of an independent regulator for (communications) broadcasting (and postal services), the Independent Communications Authority of South Africa (Icasa), which is meant to regulate the sector for fairness, freedom of expression and a diversity of views. The rationales for regulating the broadcasting media but not the press is that the former are more pervasive than the latter and they make use of a finite, public

resource (the frequency spectrum) to purvey their message, whereas the latter do not.

Various laws govern the broadcasting and telecommunications landscape, and these are in the process of being reviewed in the context of an Information and Communications Technology (ICT) policy review, which intends to promote convergence between the two sectors. The Broadcasting Act sets out a charter for the public broadcaster, the SABC, grants it creative, programming and journalistic independence and sets out its powers and functions. The legal framework for broadcasting also makes provision for three tiers of broadcasting: public, commercial and community, and limits cross-media ownership and foreign ownership of broadcasting. On the telecommunications side, the legal framework makes provision for universal service and access to telecommunications and fair competition in the sector.

The Film and Publications Act of 1996 established the Film and Publications Board, a statutory body falling under the Ministry of Home Affairs. Internet content falls within the regulatory framework of the Film and Publications Board, which was set up to replace the apartheid-era Publications Control Board. The Board is a portfolio organisation of the Ministry of Home Affairs. The essential difference between the old Board and the new one is that while the old Board acted as a censorship board, particularly of political content that challenged the legitimacy of the apartheid regime, the new Board is meant to confine its role to content classification, with a very narrow range of content being restricted or even prohibited. Suggestions have been made on various regulatory platforms of all media regulatory institutions developing a common code for all media content, given the realities of convergence, but these discussions are at an early stage.

Communications services are regulated by Icasa. Icasa has been set up according to section 192 of the Constitution, which states:

National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

The founding statute for Icasa is the Icasa Act (2000). The Act provided for the merger of the then regulators for broadcasting, the Independent Broadcasting Authority, and telecommunications, the South African Telecommunications Regulatory Authority (SATRA), into a single converged communications regulator. The Act also set out the powers and functions of the regulator, procedures for the appointment and removal of councillors and matters relating to the financing of Icasa. There has been some confusion about whether the Constitutional provision applies only to the broadcasting aspects of Icasa or the regulator as a whole, but given the realities of convergence of broadcasting and telecommunications, it has become increasingly difficult to separate the two. In time, a Constitutional amendment may be needed to clarify that communications independence is protected, not just broadcasting independence.

Icasa regulates the communications sector according to the Electronic Communications Act (ECA), which was promulgated in 2005 to facilitate convergence. The ECA incorporates a semi-layered approach to licensing, with three layers having been identified: Electronic Communications Services (ECS), Electronic Communication Network Services (ECNS) and broadcasting. The Act also draws a distinction between individual and class licences, where the former are considered to have a significant socio-economic impact on the country and are therefore regulated more heavily than those services that do not. Class licences are generic licences that are given to a particular category of broadcasting, such as community radio stations, and that do not include individually-tailored conditions of broadcast. The Act envisages ECNS providing any communications service, including Internet, phone or broadcasting, facilitated by the use of a common platform, Internet protocol (IP).²⁰ Internet Service Providers (ISPs) are classified as ECSs and therefore require a licence from Icasa; however the Act does not give Icasa jurisdiction over the content of ECSs.

Electronic transactions are regulated according to a separate Act, the Electronic Communications and Transactions (ECT) Act of 2002. It requires the Minister of Communications to develop a national e-strategy, an electronic transactions policy, gives legal recognition to data messages and electronic signatures, encryption of information, consumer

protection online, limitation of liability of service providers, protection of critical databases, the establishment and ownership of the .za domain name, and other matters relating to electronic transactions. Importantly for ISPs, the Act provides for the limitation of liability for service providers, providing they are members of an industry representative body recognised by the Department of Communications.²¹

The Act also criminalises a range of online crimes (such as hacking and spamming and email bombing) and creates cyber-policing in the form of cyber-inspectors, employed by the Department of Communications, who are given wide-ranging powers to monitor and inspect any website or information system and search premises for evidence of cyber-crime on reasonable cause shown, provided they are in possession of a warrant. Their powers have been criticised as over-broad, creating potential for infringements of the right to privacy, and the system remains open to abuse particularly because South Africa lacks a dedicated law on privacy.²²

South Africa does not have a law protecting journalistic sources. However, section 205 of the Criminal Procedures Act does require a person who has been subpoenaed to give evidence in a criminal case to give evidence, and section 189 makes it a criminal offence not to do so, unless s/he can show just cause as to why s/he should not. It has been argued that this can be used by journalists to argue that revealing their confidential sources of journalistic information may compromise their freedom of expression, as the public will come to see them as extensions of the police. Furthermore, journalists are ethically obliged to protect their confidential sources.²³

South Africa also has a number of apartheid-era laws that remain on the statute books, which impinge on freedom of expression and which have been invoked on occasion. The most notable is the National Key Points Act of 1980, which allows installations that the government considers to be important to the maintenance of national security to be declared national key points. This status requires these key points to secure their premises and maintain the highest levels of secrecy about them. The Act was used under apartheid to protect key installations from attacks by the armed wings of the liberation movement, and is there-

fore geared towards excessive secrecy. The Police Act has also been used on occasion to prevent photographs being taken of police actions. These Acts need to be amended.

Most cases involving the right to reputation are dealt with through the common law. The current position in the common law is that defamation can be shown if a statement is published that would make a reasonable person of ordinary intelligence think less of the person referred to in the statement, there was an intention to injure the person's reputation and the publication of the statement was unlawful. However, the person making the defamatory statement, including the media, have access to defences if they can show that the statement was true, in the public interest, was not intended to defame, was fair comment in the case of commentary and was reasonable.²⁴ Criminal defamation charges, however, have also been invoked against people, including journalists.²⁵

South Africa also has a number of laws that limit various rights on the grounds of national security, including freedom of expression. National security is well recognised internationally as a legitimate basis for limiting derogable rights. In the wake of the September 11 terrorist attacks on the United States in 2001, the South African Government introduced a package of laws designed to contribute to the global fight against terrorism. These included the Regulation of Interception of Communications and Provision of Communications Related Information Act (RICA), the Protection of Constitutional Democracy against Terrorist and Related Activities Act (POCDATARA) and the Financial Intelligence Centre Act (FICA). All these Acts were controversial at deliberation stage in Parliament, on the grounds that they threatened the rights to privacy and freedom of expression, and while many controversial clauses were amended, they were not completely cured of deficiencies.

2.3 South African policy

There is no explicit national policy on freedom of expression; however, there are several policies that implicate the right. The MDDA was established after the Government Communication and Information System (GCIS) developed a policy on media development and diversity, which set out the framework for the MDDA's founding Act. It conceptualised

the MDDA as a partnership between the government, the private sector and civil society to support community media through subsidies, with the first two funding the development of the sector.²⁶ The MDDA was meant to be reviewed, but this review has still to take place. The government has indicated that it is considering a Green Paper on media development and diversity, which presumably will include this review, as well as a broader analysis of the extent of media diversity in South Africa.²⁷ Community media have complained about not receiving much government advertising, especially at provincial and local levels where such advertising could make the difference between survival and closure. In response, the MDDA and GCIS have engaged in discussions to consider allocating a percentage of government advertising to community media; at the time of writing, these discussions had not been concluded.²⁸

The White Paper on Broadcasting Policy was released in 1998 following a public consultation process, and sets out the basic principles for the post-apartheid broadcasting sector.²⁹ It called for corrective measures to address what it characterised as the 'two worlds of broadcasting', the one mainly white and wealthy, and the other mainly poor and black, and recognised the need for three tiers of broadcasting (public, private and commercial). The paper stated that the SABC should be governed by a statutory charter, setting out the mandate of the broadcaster; the White Paper also required the SABC to become financially self-sufficient, with the public commercial services cross-subsidising the public services, thereby freeing the government from the obligation of having to fund the broadcaster into perpetuity. While commercial broadcasters are to be subjected to less regulation, they are nevertheless required to contribute to public interest content. They are also subjected to limitations on foreign ownership, as well as cross-media ownership. While community radio is meant to provide a distinct service focusing on community issues, the White Paper recognised the fact that they should derive income from a variety of sources, including advertising. The White Paper also came out against the then broadcasting regulator, the IBA, retaining the powers to make policy, as it was not considered best practice for a regulator to make policy and regulate at the same time; as a result, the Paper made it clear that the Department of Communications was responsible for policy-making.³⁰

Telecommunications also has a policy governing the activities of the sector in the form of a White Paper on Telecommunications Policy. The policy aimed to balance the need for universal service in telecommunications with the establishment of high-speed, globally competitive networks. Universality of communications has continued to be a central feature of communications policy, law and regulation, and as a result universal service and access obligations have been placed on electronic communications network operators in the form of meeting roll-out targets as well as contributing financially to universality. A separate agency was established in terms of the 1996 Telecommunications Act, and subsequently the ECA, to promote universal service and access to ICTs in South Africa, called the Universal Service and Access Agency of South Africa (USAASA). The Agency manages the Universal Service and Access Fund, which is funded from a levy on licensees, and is meant to provide subsidies for needy people to assist them to access ICTs, finance construction of electronic communications networks in under-served areas, and facilitate access of ICTs by schools and other public centres.³¹

The Act also makes provision for the licensing of under-served area licensees to promote access to information and communication technologies (ICTs) in areas with a teledensity of five per cent or less. The Act also prescribed the establishment of an independent regulator for the sector, Satra. The White Paper also required the fixed-line incumbent, Telkom, to be protected from competition and to be given a period of exclusivity to roll out the fixed-line network to under-served areas. At the time of writing, both the broadcasting and the telecommunications policies were being reviewed in the context of the ICT Policy Review, and they will be replaced by a converged ICT policy in 2015.³²

Currently, there is no policy that relates to the press. The press is self-regulating, and in fact the press undertook a series of reforms to the system of self-regulation, embodied in the Press Council of South Africa (PCSA), to strengthen it in the wake of criticism by the ruling African National Congress (ANC). The ANC argued that the system was self-serving, inherently biased towards the press and deprived the public of access to justice as complainants were required to sign a waiver stating that they waived their right to take their complaint to court if they were

unhappy with the PCSA's ruling. The party advocated for the establishment of an independent statutory Media Appeals Tribunal (MAT) to hear complaints from the ombudsman's office: a proposal that was opposed vigorously by the press and civil society on the grounds that it threatened press freedom.³³ The PCSA defended its track record vigorously, arguing that its judgments, including on ANC complaints, demonstrated its independence.

However, the PCSA did initiate its own investigation into its structures and code in 2010, which was followed by an investigation by an industry-initiated body, the Press Freedom Commission (PFC). These investigations led to numerous changes to the system. The level of press representation relative to public representation was changed, giving the public slightly greater representation, and effectively turning the system into one of press–public co-representation. Furthermore, the PCSA now accepts limited third party complaints as a matter of course, which was not the case in the past. The range of sanctions has also been broadened to include space fines for errant newspapers, and even expulsion for repeat offenders. Complainants are also not required to sign a waiver any longer.³⁴ The ANC has expressed satisfaction with these reforms,³⁵ and appears to have backed off from its initial proposal of a Media Tribunal, but this is likely to be settled in an upcoming Parliamentary hearing into the adequacy of the reforms to the system of press regulation.

2.4 South African functional and financial arrangements

As mentioned above, the Constitutional right to freedom of expression is enacted by several institutions, and these institutions need to be mindful of the right and its limitation. While the lawfulness of media content is obviously adjudicated by the courts, the appropriateness of media content is also adjudicated by various administrative bodies. It is not unusual for the media to set codes of conduct that restrict freedom of expression more tightly than the Constitution, as they reason that they need to set themselves high standards of media conduct: higher than even the Constitution allows for. A case in point is the Press Code, which cautions the press against using discriminatory or denigratory references to race, gender or other characteristics, except where it is strictly relevant to a matter

reported on;³⁶ yet ordinarily, such speech would receive constitutional protection.

In the case of the press, complaints about press content are adjudicated according to a Press Code, and the ultimate custodian of this code is the PCSA. Various media institutions may also have their own codes for various ethical matters, such as for accepting gifts. Furthermore, media institutions may handle complaints internally in the first instance, and if a complaint is considered to have merit, then a correction and even an apology may be published. The *Mail & Guardian* has its own public ombudsman, who represents the interests of the public. However, these institutional arrangements do not undercut the power of the Press Council to decide on ethical breaches, but complements its work by making it possible to settle complaints even before they are escalated to the level of the Press Council. The press themselves pay for the Press Council through an annual financial contribution made by the industry representative body, Print and Digital Media South Africa.

In the case of broadcasting, broadcasters have an option to subscribe to the code of the voluntary Broadcasting Complaints Commission of South Africa (BCCSA). If they do not, then they automatically fall under the jurisdiction of Icasa and its complaints body, the Complaints and Compliance Committee (CCC). Icasa is funded from the fiscus through a budget vote of the Department of Communications, while the funding for the BCCSA comes from the industry representative body for broadcasting, the National Association of Broadcasters (NAB).

Internet content is dealt with on a self-regulatory basis. The Internet Service Providers' Association (ISPA) is the industry representative body for ISPs recognised by the Department of Communications as such in terms of the ECT Act. This means that ISPA members have the right to self-regulate, according to a code of conduct adopted in 2008. ISPA makes representations on behalf of its members, and provides advice and support. It also enforces a Code of Conduct, which requires members to meet certain standards in terms of privacy, consumer protection, spam and the protection of minors.³⁷ In order to qualify for immunity from liability in terms of the ECT Act, ISPs that are members of an industry representative body must include a process for handling take-down notifi-

cations of content that violates the code. According to the code, members must respect the constitutional right to freedom of expression, as well as the privacy of their communications.³⁸ However, Internet users can send a take-down notice to ISPA, requesting that material users considered unlawful to be removed. If the user requesting a take-down knowingly misrepresents the facts then s/he is liable for damages for wrongful take-down.³⁹ The Wireless Applications Service Providers' Association (WASPA) is the industry body for mobile based value-added service providers. It too has a code of conduct which provides a framework for adult content, and sets in place procedures to protect children from harmful content.⁴⁰ The Digital Media and Marketing Association (DMMA) is the industry body for digital publishers, and also has a code of conduct that sets the expected standards of professional practice of its members.⁴¹

2.5 South African jurisprudence

The law of defamation has changed considerably since the apartheid era, when the onus to prove that a statement was not defamatory rested with the defendant; this made it extremely easy for litigants to win defamation cases and constrain freedom of expression in the process. However, since then, several cases have been heard by the courts that have developed defamation law in a direction more friendly to freedom of expression. While the fact that the government cannot sue for defamation had been established as far back as 1945, it remained clear that individual government officials could still do so. But it was only in 1996 that Cameron J established a new defence, whereby a defamatory statement which relates to 'free and fair political activity' is constitutionally protected, even if false, unless the plaintiff can show that the publisher acted unreasonably.⁴²

After that, defamation law in South Africa took a more conservative turn. A 1998 judgment (*Bogoshi v National Media Limited and Others*) contradicted the findings of Cameron J by finding that the right to reputation takes precedence over the right to freedom of expression, and this contradiction resulted in an uncomfortable compromise made by Hefer J, when he stated that the publication of false defamatory facts in the media would not be unlawful, even if they were false, provided it could

be proved that publication of these facts were reasonable. However, on the question of fault, the media would be held liable unless they were not negligent, but the burden of proving reasonableness or absence of negligence would lay with the defendant.⁴³ Then in a Constitutional Court appeal in the case *Khumalo v Holomisa*,⁴⁴ O'Regan J, in a unanimous judgment, rejected the argument that the plaintiff should prove falsity, which meant that the defendant still needed to prove truthfulness, but O'Regan reasoned that this burden was lessened by the fact that defendants now had access to the defence of reasonableness if their statements turned out to be false.⁴⁵

The question of whether political figures should be able to sue for defamation has also been the source of judicial disagreement. Initially, in *Sanki Mthembi-Mahanyele v Mail & Guardian*,⁴⁶ Joffe J found that a cabinet minister cannot sue for defamation when the statement at issue related to the performance of his or her work. However, this approach was overturned on appeal by Lewis AJA, who argued that freedom of expression should not be elevated above dignity, and that they are entitled to reasonable and justifiable treatment by the media too. Then the *Ritchie* case established in 2005 that the government can fund defamation cases: a decision that has been criticised as counter-productive for freedom of expression involving criticisms of government.⁴⁷ These decisions gradually whittled down the categorical defence of freedom of expression articulated by Cameron J, and saw South African jurisprudence veering away from US jurisprudence, which has made it practically impossible for a public figure to sue for defamation, except if actual malice on the part of the defendant can be proved, and the plaintiff needs to prove actual damage to his or her reputation. It also created more space for politicians to use the courts to threaten critics.

Criminal defamation has also reared its head in post-apartheid South Africa. In 2008, a researcher for the Eastern Cape legislature, Luzuko Kerr Hoho, published a series of pamphlets in which he defamed various political leaders, and was sentenced to three years imprisonment, suspended for five years, and to three years correctional supervision. On hearing his appeal, the Supreme Court of Appeal declared defamation, both criminal and civil, to be justifiable limitations on the right to free-

dom of expression.⁴⁸ This ruling failed to recognise the potentially chilling effect of sentencing a person to prison for something that they said, as this could deter others from engaging in robust speech out of fear of being imprisoned. There are sufficient remedies on civil law to make criminal defamation an overzealous and entirely unwarranted limitation on freedom of expression. However, in 2013, a *Sowetan* journalist, Cecil Motsepe, was found guilty of this crime, for an article alleging racist conduct by a magistrate, but which was based on inaccurate information. He was sentenced to a fine of R10 000 or ten months' imprisonment, suspended for five years.⁴⁹ On appeal, the Pretoria Division High Court found criminal defamation to be constitutional, which set the struggle to decriminalise freedom of expression back even further, and may well see a Constitutional Court case to settle the matter once and for all.⁵⁰

The courts have also recognised other limitations on freedom of expression, such as with regards to child pornography, which is defined in the Film and Publications Act. A Constitutional Court case, *De Reuck v Director of Public Prosecutions*,⁵¹ considered the case of an independent film-maker, Tascoe de Reuck, who was arrested for possession of child pornography, which he claimed he had for documentary purposes. Free speech advocates were unable to win a blanket exemption for art in relation to child pornography in the De Reuck case; so the compromise that was arrived at was that journalists and documentary film-makers who needed to possess child porn on public interest grounds, would have to apply to the Board for an exemption to do so: a difficult compromise as it amounts to a form of prior restraint. But in spite of this difficulty, the Court actually dealt with the collision between artistic freedom on the one hand and the need to prevent child abuse on the other, very cleverly. In considering whether a particular form of expression was child pornography, it first considered whether it was pornography at all. In this regard, it introduced a distinction between forms of expression that arouse aesthetic feelings and those that arouse erotic feelings: while it acknowledged that the line between the two was often grey, if the expression veered towards the former, it was not even considered to be pornography at all. This distinction meant that the Court introduced an artistic exemption from child pornography by sleight of hand.

Hate speech has proved to be a controversial area of jurisprudence. The Constitutional Court has considered a case involving a community radio station, Radio 786, which was accused of hate speech when it broadcast an interview with Yakub Zaki, a holocaust denialist. The South African Jewish Board of Deputies then took the case to the IBA on the basis that the broadcast constituted hate speech against Jews. The case was adjudicated on the basis of the IBA's code of conduct, which still contained formulations that were not in step with the new constitutional order; one of these was a section that prohibited broadcasts that 'are likely to prejudice relations between sections of the population'. Before the IBA could deal with the complaint, the Islamic Unity Convention, which owns Radio 786, approached the High Court to challenge the validity of holding the hearing, and the constitutionality of the above section on the basis that it violated freedom of expression. The High Court declined to consider the constitutional issue, which was then dealt with by the Constitutional Court, and the Court declared the section constitutionally invalid.⁵² Sixteen years on, in April 2014, the case was finally settled between the opposing parties, who agreed to put it behind them. Icasa has since adopted a code of conduct for broadcasters that is much more in keeping with the Constitution.

Another significant judgment for freedom of expression involved the collision between satire and commercial speech. This case involved Laugh it Off Productions, which produced a satirical T-shirt based on the logo of the SA Breweries beer Carling Black Label, which read 'Black Labour, White Guilt'. SA Breweries sued for trademark dilution, using section 34(1)(c) of the Trade Marks Act. The Supreme Court of Appeal held Laugh it Off responsible for tarnishing the liquor company's trade mark, but this decision was overturned by the Constitutional Court, which held in *Laugh it Off Promotions CC v South African Breweries International (Finance) b.v. t/a Sabmark International*⁵³ that this section of the Act did not deprive Laugh it Off of the right to lampoon any trade mark and associated brand, as this would stifle the free flow of ideas, and that freedom of expression extended to expressive acts in public.

The tension between privacy and freedom of expression has also been tested in court. In *Sandi Majali and Imvume Management Pty (Ltd) v Mail*

*& Guardian Media Ltd, the Mail & Guardian*⁵⁴, a case was heard involving a report where the paper alleged that Imvume had diverted state oil finds to the ANC to boost its election drive ahead of the 2004 elections, and that Majali's Iraqi oil business was partly meant to fund the ANC. The newspaper pursued the story by accessing Majali's bank accounts, which prompted a complaint that his privacy had been violated. Soni J granted an interim order restraining publication of information, arguing that ordinary citizens cannot have their dignity and privacy violated in this way, and condemned the paper's conduct.⁵⁵

Since then, the lawfulness of pre-publication interdicts has also been entertained by the courts in other cases. In *Midi Television Pty (Ltd) t/a e.tv v Director of Public Prosecutions*,⁵⁶ the Supreme Court of Appeal set out a strict test for prior restraint, namely that the prejudice the publication might cause must be demonstrable and substantial, and there will be a real risk of the prejudice occurring if the publication went ahead. Furthermore, the disadvantages of curtailing freedom of expression must clearly outweigh the advantages. This decision effectively closed the door on the kind of pre-publication interdict that was instituted against the Danish cartoons by Jajbhay J in *Jumiat al-Ulama of the Transvaal v Johnnic Media Investment Limited and Others*, when the judge granted an interdict because the cartoons were demeaning and advocated hatred and stereotyping of Muslims.⁵⁷

The Constitutional Court has also not been partial to legislative prior restraints. A 2009 amendment to the Film and Publications Act allowed anyone to request classification of a publication and also required any publication, with the exception of broadcasters or newspaper publishers recognised by the Press Ombudsman's office, to submit for classification publications if they contained the following material: sexual conduct which violates or shows disrespect for the right to human dignity of any person, degrades a person or constitutes incitement to cause harm; advocates propaganda for war; incites violence; or advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm.⁵⁸ Failure to comply with this section would have attracted criminal penalties of a fine or up to five years' imprisonment, or both. In the case of hate speech and sexual conduct, the provisions were broader

than the Constitutional limitations on freedom of expression, which made them unjustifiably censorious. The section of the Act that dealt with sexual content was challenged in the Constitutional Court by Print Media South Africa (PMSA, to become Print and Digital Media South Africa) and the South African National Editors' Forum (Sanef), and was struck down as being unconstitutional on the basis that prior restraint violated the right to freedom of expression.⁵⁹

The law has also been developed in relation to the broadcasting of judicial and quasi-judicial proceedings, with recent jurisprudence leaning towards open courts where media coverage is allowed. The courts have largely recognised that open justice is in the best interests of the public, where the public have access to court proceedings through the media, and thereby gain a better understanding of how court decisions are taken. Broadcast coverage of trials and inquiries has often been controversial because the broadcast media are generally considered to be more invasive, which may alter witness behaviour and, as a result, interfere with court proceedings.

While the right of broadcasters to broadcast proceedings via radio have been recognised, television has been a slightly different matter, given the more intrusive nature of the medium and the temptation of individuals in court proceedings to 'play to the camera'. In 2002, the SABC and e.tv failed to have overturned a decision disallowing them from providing radio and television coverage of an inquiry into allegations of impropriety in the controversial arms procurement package, concluded in the late 1990s. E.tv's attempt to televise the trial of President Jacob Zuma's former financial advisor, Schabir Shaik, for corruption in the arms deal also failed. However, a later case involving the trial of Mark Thatcher made it clear that if broadcasters sought to televise prosecution and defence statements, as well as the judgment, the case for broadcast was stronger than when they sought to broadcast witness testimony. However, on the broader issues, the Constitutional Court has failed to provide direction, although in a dissenting judgment on a decision taken by the Supreme Court of Appeal on such a matter,⁶⁰ Moseneke J affirmed the right of the public to be informed by the most popular and accessible forms of media in the country, and that speculative infringement of the

right to a fair trial was not sufficient grounds to limit the public's right to know.⁶¹

Then, in 2009, an attempt by the Judicial Services Commission to hold a preliminary hearing into allegations of misconduct by Western Cape Judge President John Hlophe behind closed doors, was defeated in the South Gauteng High Court.⁶² More recently, Mlambo J granted permission to the media to broadcast live the trial of athlete Oscar Pistorius, who at the time of writing was accused of murdering his girlfriend, Reeva Steenkamp. However, the judge ruled that the defendant's and his witnesses' testimony could not be shown, but could be transmitted by radio, and restrictions could be placed on other witness testimonies if needs be.⁶³ In making this ruling, Mlambo J reaffirmed the principle of open justice.

Freedom of expression has also received attention when it has come into conflict with national security-related matters. Possibly the most significant case in this regard involved Independent Newspapers,⁶⁴ which sought to gain access to the written argument lodged by the parties in a Constitutional Court hearing on the dismissal of the head of the civilian intelligence service, the National Intelligence Agency (NIA), Billy Masetlha, as well as to certain documents in the record of proceedings which had been removed from the Court's website on this case by the Registrar on the instruction of the judges. The Minister of Intelligence Services joined the proceedings and opposed the release of the in-camera affidavit provided by Masetlha, including a report compiled by the Inspector General of Intelligence on the legality of a certain surveillance operation conducted by NIA agents. The case affirmed the ability of the courts to review classifications decisions by the executive, while preferring to adopt a balancing of rights in cases involving requests to publish classified documents, rather than requiring the court to apply a limitations analysis, including government having to justify restrictions on the right to publish.⁶⁵

Freedom of expression in the military has also been affirmed, in one of the first judgments by the Constitutional Court. On the eve of democracy, in 1993, the old South African Defence Force (SADF) rushed through amendments to the Defence Act to forbid unions in the military,

but downsizing coupled with discontent with declining working conditions forced the issue back onto the table, leading to the South African National Defence Union (SANDU), which was already in existence, petitioning the Constitutional Court in 1999 to have that section of the Act declared unconstitutional. SANDU won the case, and with it recognition that military personnel have a right to organise into trade unions, and engage in acts of public protest. According to Constitutional Court Judge Albie Sachs's, '...[a blindly] obedient soldier represents a greater threat to the Constitutional order and the peace of the realm, than one who regards him or herself as a citizen in uniform, sensitive to his or her responsibilities and rights under the Constitution. [Important] though a communal *esprit de corps* may be for the armed forces, the mystique that any military force requires cannot take away the need for soldiers to be able to speak in their own distinctive voices on mundane but meaningful questions of service'.⁶⁶

The freedom of whistle-blowers to speak to the media has also received judicial scrutiny. In 2003, Mike Tshishonga blew the whistle on what he maintained was a corrupt relationship between the then Minister of Justice Penuell Maduna and the liquidator Enver Motala (or Dawood), and Tshishonga went public on the accusations. Tshishonga was employed in the Department and was suspended for his disclosure. He won several times, including in the Labour Court, which ordered his reinstatement. In this case involving the Protected Disclosures Act – which provides legislative protections (albeit inadequate) for whistle-blowing – the Labour Court provided guidelines to be followed before a disclosure to the media would be protected. These include that the disclosure is made in good faith, that the person who made the disclosure should have a reasonable belief that the disclosure was substantially true, and that it may not result in personal gain. The disclosure must meet one of the conditions of the Act, it must have been reasonable to have made the disclosure and in the public interest, and it will only be protected if prior disclosure to another body tasked with investigating the allegations failed to do so.⁶⁷

3 Human rights-related analysis

3.1 Systemic human rights-related problems

3.1.1 Media and ICT access, participation and information

Arguably, given the historical disparities in access to the means of communication in South Africa, the right to freedom of expression should be read as protecting and promoting both negative and positive freedom. So while the right clearly places an obligation on the state to stop censorship, positive obligations must be put on the state to level the playing field when it comes to access to the means of communication.

There are indications that the government does take the right of access to the means of communication seriously; as mentioned earlier, it has required the telecommunications sector to achieve universality of communications, and in the case of broadcasting, the regulator Icasa is also required to achieve universality and diversity of broadcasting, with the SABC being a particularly important player in achieving these objectives, while the MDDA has been established to promote media diversity, especially the sustainability of community and small commercial media.

The still fairly elite nature of the public sphere that the media constitute, constrains their ability to play a public service role and to act as widely accessible platforms for freedom of expression: while television reached 91.7 per cent of the population and, according to the 2011 census, 75 per cent of households had access to a television set and 68 per cent to a radio set,⁶⁸ only about 50 per cent of the country's population are newspaper readers, and newspaper circulation is declining after a period of sustained growth in the 2000s.⁶⁹ Internet penetration has increased markedly in the past few years, but still has some way to go before it could be considered an accessible medium: according to the census, 35.2 per cent of South Africans had access to the Internet.⁷⁰

While the South African media could be said to have moderate pluralism of media outlets, this has not necessarily translated into a diversity of content, as many media groups offer 'more of the same' rather than genuine alternatives to the dominant sources of information, news and entertainment. However, a greater diversity of news and information

sources is also becoming apparent in the online media space, with initiatives such as *Groundup*, *Africa is a Country* and the *South African Civil Society Information Service* providing more grassroots-orientated news and analysis, although much of their content still remains metropolitan-focused, which means that the rural poor still lack significant platforms for expression. Upper income audiences are well served by a plurality of media, while lower income earners still remain poorly served by the media. All income groups lack a truly diverse media.

According to the South African Advertising Research Authority's (Saarf) Living Standards Measurement (LSM), LSM 1 and 2 – which according to the SA Advertising Research Foundation comprise 9.3 per cent of the population – rely largely on SABC radio. LSM 3 and 4, which comprise 21.7 per cent of the population, rely on SABC radio and television, with some relying on the private television station e.tv (although e.tv's target market is LSM 5.5). It is only LSM 5 and 6, which comprise 36.1 per cent of the population, that begin to enjoy a range of media products, including SABC, e.tv, daily and weekly newspapers, magazines and outdoor media. LSM 7 and above, which comprise 27.5 per cent of the population, command the lion's share of media. In fact, most commercial media (including the tabloids) tend not to identify LSM 4 and below, or 36.4 per cent of the population, as being part of their target audiences. While radio tends to have the largest penetration, television and print media (including the tabloids) tend to prioritise LSM 5 and above, which together account for 69.1 per cent of the population.⁷¹

It should be noted that the number of people in the lowest LSMs has diminished over time, partly as a result of social grants. However, it should be noted that Saarf's estimation of media access is probably overstated, as the LSM is a consumption-based measurement of wealth and poverty, and given that such definitions also include credit-funded consumption, it is likely that the migration of South Africans towards the higher LSM's has been overestimated. This means that the distribution of media goods is biased towards upper-income earners, which skews South Africa's public sphere towards elite world views, reproducing and reinforcing the society's key race, class and gender fault lines, and undermining the ability of many poor and working class South Africans to make

themselves heard in the public sphere.

The MDDA's impact on the extent of media diversity has not been assessed. However, it should be noted that the eventual mandate of the MDDA was reduced from what was originally envisaged at the outset of discussions about the body. The community media sector argued that what was then called the Media Development Agency (MDA) should have regulatory powers to intervene to break up media monopolies, contain monopolistic tendencies, and remove obstacles to diversity. The sector also argued for a statutory levy on corporate media to subsidise community media through the MDDA. These proposals were dismissed by the GCIS, which was tasked with bringing the body into being. The MDDA was also under-resourced. At the outset, the GCIS estimated that R500 million would be needed to make a substantial difference to the media landscape. However, the funding proposal was revised downwards to R256 million over five years.⁷² This means that the body that was eventually established was a shadow of what was initially envisaged, and so was unlikely to make a truly significant difference to the media diversity landscape. In addition to MDDA support, the Department of Communications has also provided infrastructure support for community broadcasters, but the impact of this support remains unclear as it has not been evaluated. Signs have emerged, though, of the Department systematically underspending its budget and lacking systems in the allocation of funds. These problems have made the allocation of infrastructure support susceptible to political manipulation, which is hardly surprising as funding is allocated directly from a government department and not through an independent agency.⁷³

Community radio is meant to serve as local-level media for South Africans, thereby providing popular and accessible platforms for local debates. Certainly the sector has grown in leaps and bounds: in fact, community radio listenership has doubled since 2004. Community television has also grown, after an initial slow start. While the community radio sector has, to an extent, enjoyed the protection of Icasa, the community and small commercial print sector have struggled to remain sustainable in the face of competitive pressures from the corporate press. Unlike the community radio sector, which received some attention in the White

Paper on Broadcasting Policy of 1997, and various policy documents of Icasa, the community print sector has not received nearly as much attention. In fact, it seems fair to say that the government has adopted a hands-off approach towards the sector, promoted a policy environment that focuses on subsidy as the main method of achieving diversity, while leaving the basic market structure intact. This approach has also assumed that anti-competitive practices will be checked by the competition authorities (that is, the Competition Commission, which investigates complaints, and the Competition Tribunal, which hears complaints).

The sector's growth could also be attributed to a legislative change in the ECA, which redefined community broadcasting licences as class licences rather than individual licences: this meant that they could be offered much more quickly as they did not involve a time-consuming 'beauty contest' like individual licences did. This change allowed Icasa to clear the licensing backlogs in the sector; but they also led to stations being licensed on a first-come, first-serve basis, which gave more well-resourced and organised communities a greater advantage. Icasa maintains that it does not have the legislative mandate to turn down applications, which has increased the problem.⁷⁴ As a result, the sector has come to be skewed towards wealthier communities, and particularly in the case of community television, stations that are really commercial in nature have been licensed as community stations, which has defeated a key policy objective of the sector, namely to provide an accessible voice for the voiceless.

The SABC has a legislative mandate to reflect a diversity of views in South Africa. However, the extent to which it does so is open to question. The broadcaster relies overwhelmingly on commercial sources of funding, notably advertising, which tends to skew its programming towards upper-income brackets. English, and to a lesser extent Afrikaans, remain dominant on SABC television, as advertisers consider them to be the languages of economic power. However, the SABC has also introduced news and current affairs programmes in African languages. Recent financial crises have led to a massive scaling back of commissioned programmes, and an increase in reliance on repeats of old material, making much of the broadcaster's programming stale, though local and foreign soaps remain a staple.

Since the advent of democracy, the South African local content industry has experienced major growth, and South Africans have developed a strong appetite for local content. The success of many locally produced educational, drama programmes and soaps such as *Generations*, *Muvhango*, *Sevende Laan* and *Yizo*, as well as the growth of the local music industry, have demonstrated that these quotas have been successful in stimulating demand for local content, and furthermore that South Africans are passionate about watching and listening to their own stories. However, as argued in the ANC's discussion document on communications, compared to other countries such as Canada, Australia and Nigeria, South Africa has one of the lowest local content quotas in the world. Furthermore, a number of the most popular soaps have adopted more commercial formats, shifting over time to position themselves for more middle class audiences, leading to some of the grittier themes that characterised much of the early local content being downplayed. In an attempt to boost ratings, and to increase competition with e.tv, the broadcaster has also phased out older actors and populated soaps with more 'eye candy', leading to these soaps becoming more about consumerist aspirations and less about the stories of ordinary South Africans.⁷⁵

From 2005, when a consumer boom drove the growth of the middle class, the four largest press groups (Media24, Caxton, Independent Newspapers and Times Media Limited) became more aggressive about establishing their presence in the community newspaper market. Realising that national newspapers would struggle for advertising in future, and that the shift globally towards hyperlocal media could be capitalised on in South Africa, they began establishing new 'community' newspapers or revamping existing newspapers in small towns and townships with a sufficiently large advertising base. Caxton and Media24 were particularly aggressive in this regard, although the former had been active in the community newspaper market for many years, leading to local-level wars between these groups and small commercial and community newspapers.⁷⁶ The community press have alleged anti-competitive practices by the larger companies, including buying out competitors in the community press, and if they do not relent, dropping advertising prices below cost to drive their competitors out of business.

The Competition Commission and Tribunal are acting on allegations of anti-competitive behaviour in the press. Between 2004 and 2012, the Commission initiated thirteen investigations into the media sector, involving six cartels and seven abuses of dominance cases,⁷⁷ but has declined to refer most of the cases to the Tribunal for a hearing after screening. Possibly the most significant case that was under consideration by the Tribunal, at the time of writing, involved a Free State-based community newspaper, *Gold-Net News*. The paper alleged that Media24 engaged in predatory pricing, making it impossible for the former to survive.⁷⁸ The Commission has also identified behaviour by the large press groups that concerns them, including exclusionary behaviour through the abuse of dominance, predatory pricing, exclusions of the community press from using the mainstream group's presses during the 'golden hour', and bundling of products, making it more difficult for independent community press groups to operate. The Commission has expressed concern that the concentration and conglomeration of the sector creates barriers for new entrants and the expansion of emerging enterprises. However, much of this concentration happens, not through large buy-outs of one press group by another, but through creeping acquisitions which usually fall below the Competition authorities' threshold for notifiable acquisitions.⁷⁹ This creeping concentration raises barriers to entry for independent newspapers, making it harder to survive and threatening the diversity of print offerings, especially outside the major metropolitan areas.

However, competition law has been criticised in media policy circles for not being effective in addressing social concerns about media concentration, such as the negative effects of a group being able to dominate public opinion and the adverse impact on the democratic process;⁸⁰ this is because competition rules apply economic criteria in the main to assessing the negative effects of dominance, rather than social criteria.⁸¹ Edwin Baker has critiqued the relevance of the underlying assumptions of competition policy for the media, and the ways in which it tends to equate media diversity with efficient competition. He has argued strongly for a media-specific anti-concentration law, which aims to promote a democratic communications order. The development of such a law, though, is not without its challenges, as it would need to define what

constitutes unacceptably high levels of concentration in the media, to the point where source and viewpoint diversity are undermined. This law should move beyond traditional antitrust concerns with companies raising prices above competitive levels, but should speak to democratic concerns, such as the question of how media ownership should be structured to distribute speech opportunities more fairly and how communicative power should be redistributed to further a democratic society.⁸²

The press is not the only media sector to experience transformation challenges, including creeping concentration and conglomeration. According to OMD South Africa, the number of television stations has increased from seven to 100 between 1991 and 2010, and the number of radio stations from 34 to 138. However, reflecting global trends, the number of daily newspapers has declined from 22 to 21 and the number of major weeklies has increased from 25 to 26.⁸³ Owing to the relatively cheap nature of the medium, diversification efforts in radio have been more successful than in television. While the broadcasting sector recognises three tiers of broadcasting in policy, in reality in the television sector, the commercial tier dominates and the two other tiers remain subsidiary elements of the sector. Inadequate funding for the two lesser tiers is the main problem: the SABC has received scant public funding, leading to it becoming dependent mainly on commercial sources of revenue for its income. The community television sector faces similar challenges, although it has access to some MDDA funding.

The most significant transformation efforts in broadcasting took place in the first decade of democracy. However, since then, growth in the free to air commercial television sector has stalled since the licensing of Mide TV, which established e.tv, the SABC has reverted to elements of a state broadcaster (to be dealt with in more detail below), and the community broadcasting sector remains vulnerable to political and commercial control. The subscription television market has also lacked viable competition, leading to the dominance of the Naspers-controlled Multichoice/DSTV dominating the market. This dominance has been possible, in part, due to the fact that Icasa has not been willing to apply cross-media restrictions to subscription broadcasters, allowing Naspers to retain its dominance both of the subscription television market and

the newspaper market. Icasa has also been relatively ineffective in monitoring compliance with broadcasting regulations, especially local content and independent production quotas. While competition has been introduced in the regional commercial radio market, a national commercial radio station still has not been licensed. All these problems have stymied broadcasting transformation in the second decade of democracy, which has also limited the ability of the most popular and accessible medium in the country to provide platforms for mass participation.⁸⁴

With respect to telecommunications access, South Africa has achieved near universal service for mobile coverage; however, fixed-line coverage has shrunk. In fact, when Telkom was partly privatised in the late 1990s, the company rolled out many lines to under-serviced areas, but many of these were disconnected as people could not afford the service as costs increased. From 1999 to 2002, the cost of local calls, which the poor used more, increased by 35 per cent.⁸⁵ Forty per cent of the new phone lines that Telkom delivered from 1997 to 2001 were subsequently disconnected,⁸⁶ largely because of the profit-taking of the foreign investors, who sold off their shares in the early 2000s after having extracted massive profits. Since then, the fixed-line market has not really recovered, and mobile coverage has taken over as the most popular form of connectivity. This model of achieving universality in telecommunications has implications for Internet access, as most users are forced to access the Internet through 2G/3G connections, which are unstable and which lead to spectrum congestion. However, the cost of 3G-enabled smartphones still remains prohibitively expensive, which limits the ability of many South Africans to access mobile broadband services. Broadband ADSL connections, using fibre connections linked to the fixed-line backbone network, on the other hand, offer faster and more stable Internet connections, but few users can access such connections and they are also expensive (though less expensive than mobile Internet). By 2011, South Africa's fixed broadband penetration rate was a mere 1.5 per cent: significantly lower than the Organisation for Economic Co-operation and Development (OECD)'s average broadband penetration rate compared with OECD countries.⁸⁷ Many areas of the country receive the 2G signal, and according to USAASA, commercial operators should be able to reach

a large number of the areas that do not receive the signal yet. 3G coverage is also improving; however, public broadband access to the Internet remains a significant gap that needs to be addressed.⁸⁸

Affordability remains a significant barrier to telecommunications access, both to voice and data services. The Parliamentary Portfolio Committee on Communications has attributed the high costs in the mobile market to excessive profit-taking by the cellphone companies, reflected in the excessively high mobile termination (or interconnection) rate. In the initial interconnection agreement between the two largest mobile network operators, Vodacom and MTN, the rate was set at 20 cents per minute. When the third cellular network Cell C was introduced in 2001, both cellphone companies increased the interconnection rate by 500 per cent to R1.23 (a 515 per cent increase since 1994), which effectively secured Vodacom and MTN's dominance as a duopoly (the two largest cellphone companies).⁸⁹ The three smaller companies, Cell C, Telkom Mobile and Virgin Mobile, have not been particularly effective in pressurising the larger companies to drop their prices significantly, although there are signs that MTN is responding with price reductions after considerable public and governmental pressure. Data bundle prices have also been the source of considerable controversy in South Africa.

Poor subscribers are the worst affected by the excessively high prices of prepaid or pay-as-you-go rates, including out-of-bundle costs, as the poor were more likely to access the Internet on an out-of bundle basis. It is expected that data prices will drop by between ten and twenty per cent in the next few years, given that new undersea cables are landing on the African continent, but these reductions will still place South Africa's broadband costs among the highest in the world. The launching of the Seacom cable led to a 700 per cent increase in bandwidth supply according to the company, which had exercised downward pressure on prices, but opinion is divided on whether the landing of other cables on South Africa's shores will lead to further decreases.⁹⁰

There are several factors that have led to the access problems described above. The Department of Communications has attempted to balance the conflicting policy objectives of universality of communications with private sector-led communications expansion, but this

framework has allowed excessive profit-taking at the expense of universal service. In the case of Telkom, the Department of Communications, which is also the custodian of Telkom's shares, has protected the parastatal from competition to enable it to meet universal service targets. However, largely it failed to meet these targets because the company sought to extend the network on commercial principles, which led to massive churn as users could not afford the rising costs of the service. Cellphone network operators have been largely unregulated by policy, which has allowed them to entrench their dominance relatively unchallenged. Furthermore, Icasa has been weakened by the Department of Communications through a variety of measures, including underfunding and an erosion of its administrative and institutional independence. The regulator's weakness has meant that it cannot hold the network operators to account sufficiently, which has exacerbated the problems mentioned above. USAASA has also lacked independence and has been plagued by ineffective management. The Universal Service and Access Fund has also been massively underutilised, and the performance of the telecentres it has funded has been largely suboptimal.⁹¹

Policy processes in relation to media and ICTs are generally consultative. The White Papers on Broadcasting and Telecommunications followed extensive consultative processes, including a Green Paper/White Paper process. Both processes became controversial, however, for canvassing opinions on issues when decisions had already been taken, such as the decision to merge the IBA and SATRA into Icasa. These problems raised questions about the depth of consultation. Ensuing legislation also went through consultative processes through the Parliamentary Portfolio Committee on Communications. Icasa also engages in consultation about its policy documents. The Department of Communications was, at the time of writing, pursuing an exemplary process of consultation for the ICT Policy, including a Framing Paper canvassing views on the principles that should underpin the ICT sector, a Green Paper that canvassed the public on the strengths and weaknesses of media and ICT transformation, a national colloquium, and regional consultative meetings. Icasa also undertook a similar process reviewing its regulatory framework. However, often too little time is given for substantial inputs to these processes,

which tends to advantage more well-resourced organisations, leading to industry and parastatal dominance of policy processes. Draft policies and laws are gazetted with little effort being made to translate these documents into official languages or to simplify the often-highly technical jargon contained in these documents, which limits popular participation substantially. Civil society has limited capacity to participate, although there are coalitions such as SOS: Support Public Broadcasting Coalition and the Right2Know Campaign that participate on a regular basis. Overall, though, policy processes still tend to be dominated by government and industry, which disposes these processes to government and industry capture.

3.1.2 Compliance by government at different spheres

This section will address government's compliance with the right to freedom of expression as it relates to freedom from censorship, as government performance on the access questions has been addressed above. It will also extend its analysis to compliance by various statutory institutions.

The SABC is granted editorial and programming independence, and there have been no signs of direct governmental interference in the editorial content of the broadcaster through censorship. However, the broadcaster lacks administrative, institutional and financial independence. In terms of the SABC's Articles of Association, which are agreed between the Department of Communications and the SABC, the three top management positions, the Group Chief Executive Officer (GCEO), Chief Operating Officer (COO) and Chief Financial Officer (CFO), are appointed by the Minister of Communications. This arrangement is almost certainly unlawful as it violates the requirement in the Broadcasting Act for the Board to control the SABC's affairs. This means that the Minister of Communications controls indirectly the editorial content of the SABC: an arrangement that is most likely unconstitutional as well, as it violates the SABC's right to freedom of expression. The Articles of Association need to be amended to make it clear that the Board appoints the GCEO, COO and CFO, and not the Minister.

There are also many examples of inappropriate editorial decision-making that suggests political bias. These examples contradict the SABC's core

editorial value of editorial independence, and flies in the face of the broadcaster's declaration in its editorial code that 'we do not allow advertising, commercial, political or personal considerations to influence our editorial decisions'. The SABC's editorial decision-making problem dates back many years, and includes the non-screening of a documentary on former president Thabo Mbeki when it was scheduled for broadcast (the documentary was eventually broadcast after public controversy), the blacklisting of commentators that were considered critical of the government, the pulling of the 'Big Debate' series on spurious grounds, the call by COO Hlaudi Motsoeneng for a 70 per cent good news quota, and most recently the censorship of the booing of current President Jacob Zuma at the late Nelson Mandela's commemorative service.⁹²

The SABC's day-to-day editorial decision-making is guided by its Editorial Policies, which were developed in 2004 and which were undergoing review at the time of writing. According to the section on editorial responsibility, the onus is on individual journalists and executive producers to make sound ethical journalism judgements. If anyone is in doubt about whether to broadcast something, s/he should consult with their supervisor for guidance voluntarily: a process known as upward referral. However, the policies also state that an editor or producer should report programmes that are controversial or likely to have extraordinary impact before they are broadcast, and they will be 'held responsible' if they do not. This caveat effectively turns a voluntary arrangement into a mandatory one. The person who is ultimately responsible for editorial decision-making is the GCEO, but this role appears to have been delegated to the COO.

However, the SABC's policies identify certain subjects that trigger an obligation on journalists to consult with their relevant Head of Programming as a matter of course. While this list is meant to cover exceptional situations only – such as broadcasting stories that involve payment for information – it also extends to stories on national security matters, or instances where journalists need to gather information the public normally does not have access to. These categories are over-broad, which means that the mandatory upward referral process may apply to a large number of stories, rather than exceptional situations only. The upward referral system bureaucratises decision-making by adding additional lay-

ers of management to the decision-making system. Also, the GCEO and COO are management positions – and management should not be making editorial decisions at all, as non-interference of management in editorial decision-making is a well-recognised principle of media organisations worldwide, and there is no reason why the SABC should be the exception to the rule.

The tension between national security and freedom of expression is another major fault line that requires attention. These tensions are especially apparent in the law governing communications surveillance, RICA. In spite of the fact that its drafters attempted to strike the correct balance between the interests of justice and national security on the one hand, and civil liberties on the other, it ignores many of the most basic human rights protections set out in the International Principles on the Application of Human Rights to Communications Surveillance (otherwise known as the ‘Necessary and Proportionate Principles’).⁹³

The lack of protections means that several rights on communications networks are compromised, notably freedom of expression, access to information, freedom of association and privacy. The implication for freedom of expression is that people who wish to discuss sensitive matters that would otherwise receive constitutional protection, will refrain from doing so out of fear that their communications may be intercepted. This possibility is not far-fetched. In 2005, the state’s mass surveillance capacity was misused to spy on perceived opponents of the then contender for the Presidency, Jacob Zuma. *Sunday Times* journalist Mzilikazi wa Afrika had his communications intercepted to track his journalistic activities, and both he and fellow journalist Stefan Hofstatter have had their communications intercepted. In their particular case, it emerged that the police had duped the designated judge into issuing an interception direction.⁹⁴ At the time of writing, they were waiting for a case to be heard against the police for abuses of RICA. Several politicians and activists have alleged that their communications are being surveilled, although it is difficult to say whether this is the case. The *Mail & Guardian* has quoted sources inside the police and State Security Agency alleging that security personnel often do not even bother obtaining directions to intercept communications.⁹⁵

One of the problems with RICA is that no one is even informed that their communications have been surveilled, even after the investigation is complete. No information is available on the number of interceptions that actually result in arrests and convictions. The grounds for the issuing of interception directions are too vague, as they do not require probable cause or a similar level of finding. Influenced by the US's Communications Assistance for Law Enforcement Act, the South African Act forbids the provision of communications networks that are not capable of being surveilled, which threatens the rights to privacy and freedom of expression. By architecting security backdoors into communications systems, governments are creating vulnerabilities that can be exploited by intelligence agencies and criminals alike, and South Africa is no exception to the rule. An added problem is that foreign signals intelligence is completely unregulated by law, which is probably unconstitutional. The country's bulk monitoring capacity resides in the interception centre that undertakes foreign signals intelligence gathering; in other words, the state surveillance agency that has the greatest potential for mass surveillance is the one that is least regulated by law.

South Africa's Anti-terrorism Act, POCTDATARA, has been praised for not containing some of the more odious provisions seen in other laws, such as racial, ethnic or religious profiling, preventive detention and the use of special courts or introduction of modified criminal procedures in terrorism-related cases.⁹⁶ Furthermore, while most of the concerns for freedom of expression that were raised by POCDATARA were dealt with during Parliamentary deliberations after a protracted and often very fractious engagement between government and civil society, the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism expressed concern about the over-breadth of the definition of terrorism, which includes acts which by their level of harm could be justifiably considered as terrorist acts. The Act also sets out a reporting duty for the public in respect of all crimes covered by the Act, which according to the Special Rapporteur created potential problems for freedom of expression, and specifically for the ability of journalists to protect their confidential sources of information.⁹⁷

Activists have also complained about being harassed by intelligence agents, which could potentially deter them from being vocal about issues. In 2002, in the run up to the UN's World Summit on Sustainable Development (WSSD), evidence emerged of the NIA surveillance of activists feared of disrupting the Summit. During a 'Week of the Landless', which was held by the Landless Peoples' Movement (LPM), the entire leadership of the LPM was systematically harassed by the NIA. Activists were warned against participating in the week's activities, and their movements were tracked. Some received visits from the NIA, whose operatives also attended LPM meetings to monitor discussions. The Anti-privatisation Forum has also complained of its activists being placed under surveillance and being offered money to spy on the organisation. The Crime Intelligence Division of the police have also been deployed to monitor activists organising protests, including in the run up to the COP 17 conference in Durban in 2011.⁹⁸

Another area of government activity that limits freedom of expression, and that therefore requires attention, relates to the classification of films and publications by the Film and Publications Board. The Act governing the Board's activities has been amended several times since its promulgation in 1996, and a number of these amendments have led to worrying erosions of the right to freedom of expression. In a nutshell, the amendments broadened the scope for classification and prohibition of material, and the type of material covered by the Act, and reduced the independence of the Board and the transparency of its appointment process.

In the 1996 Act, a publication was defined as printed or duplicated matter, pictures and sculptures, recordings for reproduction (with the exception of a film soundtrack), and computer software.⁹⁹ This meant that Internet content was covered only once it was downloaded or printed out. However, in 1999, the Act was amended to broaden the definition of publication to include '... any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet'¹⁰⁰: an amendment which effectively gave the Board jurisdiction over Internet content.¹⁰¹ The definition of 'distribute' was also broadened to include failure to take reasonable steps to prevent access by a person under eighteen to classified publications.¹⁰²

In the 1996 Act, films were subject to pre-classification, but publications were classified only if complaints were received about them and they were found to fall into a classifiable category. However, the 2009 amendment mentioned earlier allowed anyone to request classification of a publication and further placed the onus on the publisher (except newspaper publishers) to submit for classification controversial material. These categories of publications could then be classified as 'refused publications', which appears to ban a publication for possession and distribution (its meaning is not defined in the Act). These 2009 amendments proved to be controversial and were the subject of Constitutional litigation by SANEF and PMSA. The Court struck down the section dealing with sexual content as being unconstitutional on the basis that prior restraint violated the right to freedom of expression.¹⁰³ Presumably, the Court was not asked to deal with the other grounds for pre-publication classification as they do not receive constitutional protection: as a result, the over-broad clause on hate speech was not challenged and therefore remains in effect for all publications other than magazines and newspapers that are members of PMSA.

With respect to the Board's independence, according to the 1996 Act, the Board was appointed by the President of South Africa, on advice of an advisory panel set up by the President. The advisory panel was obliged to invite public nominations and ensure transparency in the appointment process. Nominees could not have a direct or indirect financial interest in the film or publication industry, or hold 'an office of profit' in the service of the state.¹⁰⁴ The 1999 amendment changed these arrangements, to ensure that the Minister of Home Affairs appoints Board members.¹⁰⁵ The Minister was no longer obliged to invite nominations for the Board, but may do so. The amendments also broadened the grounds for removal of Board members and gave the Minister powers of removal.¹⁰⁶ This amendment also made it clear that the Minister could lodge complaints against publications.¹⁰⁷ While the Board (whose governance structure was renamed the Film and Publications Council) can issue directives of general application, such as classification guidelines, it can do so only in consultation with the Minister, which further undermines its independence.¹⁰⁸

Several Board judgments have raised freedom of expression concerns, including a decision to use a section in the Act to classify disturbing or harmful or age-inappropriate material for children, to ban a controversial painting by Brett Murray, entitled 'The Spear', for children under sixteen years of age. The classification decision applied to online versions of the painting, including an online version published by *City Press* newspaper. According to the Board's judgment on applications for classification of the painting, 'younger people and sensitive people may find the themes [in the exhibition] complex and troubling'.¹⁰⁹ The restriction was overturned on appeal. Then, in 2013, the Board refused classification for the film 'Of Good Report' on the grounds of child pornography. The ban was, once again, overturned on appeal, on the basis that the Board ignored the distinction between art and pornography set out in the De Reuck judgment. While the Board clearly has a very good appeal structure, it nevertheless remains of concern that it erred in favour of censorship on both occasions.

In addition to the Film and Publication Board's reactions to 'The Spear' and 'Of Good Report', there have been other signs of artistic freedom of expression being under pressure. In 2009, Arts and Culture Minister Lulu Xingwana stormed out of an art exhibition containing the work of photographer Zanele Muholi, depicting women embracing, and branded the work immoral for its lesbian content.¹¹⁰ Then, in 2013, the Johannesburg Art Fair withdrew the work of artist Ayanda Mabulu, claiming that the work 'will offend sponsors and important people'. The painting in question, called 'Yakhal'inkomo – Black Man's Cry', is themed around the Marikana shooting and depicts a kneeling miner with horns on his head, metaphorically representing a dying bull, which is attacked by Zuma's dog, representing the police. Zuma is depicted stepping on another dying miner's head.¹¹¹ The exhibition organisers relented and re-hung the work after a storm of public controversy. These incidents suggest that artistic freedom is not well understood, including by arts administrators, and that more needs to be done to raise consciousness about the importance of this freedom.

Academic freedom of expression has also received some focus in the past few years, especially at the University of KwaZulu-Natal (UKZN).

The university administration on several occasions has sought to discipline staff and students for criticising them in the public domain, accusing them of bringing the institution into disrepute. The most well-publicised case took place in 2008, and involved two professors, Nithaya Chetty and John van der Bergh, who, in a series of articles, accused the Vice-Chancellor of the University, Malekgapuru William Makgoba, of authoritarian behaviour.¹¹² More recently, four students were threatened with disciplinary action for criticising the university in an open letter to the Vice Chancellor, although the disciplinary action was dropped after public controversy.¹¹³ While UKZN may be the most extreme case of academic free speech being under pressure, other universities that have corporatised and that are run along managerial lines may also be tempted to act against critics to prevent reputational damage, to the detriment of open debate about the sector and its challenges. It should also be noted that no incidents have arisen that raise concerns about the freedom of the university's core functions of teaching and research being compromised, and academics appear to be free to pursue these functions unhindered by external or even internal interference. But the main fault line appears to be when academics criticise the conditions for academic work: an aspect of academic freedom that is nevertheless still important to protect.

Media freedom also remains a contested area. While the ANC appears to have backed down on its calls for the establishment of a statutory MAT, the conduct of government and state officials at times does not become a country with an express commitment to freedom of expression. There have also been numerous incidents of journalists being frustrated in their work, too many to be enumerated here. For instance, before the 2014 national election, the police are alleged to have taken a camera from an ENCA journalist and deleted photographs of ANC T-shirts being dispensed from a police vehicle, suggesting political partisanship on the part of the police. The South African National Editors' Forum (Sanef) has been engaging with the South African Police Service (SAPS) to address this and other issues that impede journalistic reporting on police matters. Sanef has also called for a probe into the killing of freelance photographer, Michael Tsele, allegedly by the police, during a service delivery protest in Mothlutlung in the North West in January 2014, as it was

unclear whether his killing was because of his photography at the protest, although according to eyewitness testimony, he was unarmed when he was killed.¹¹⁴

The National Key Points Act, which impedes the rights of access to information and the right to protest, and by extension, freedom of expression, is dealt with in another paper, as is the controversial Protection of State Information Bill, otherwise known as the 'Secrecy Bill'.

One concern that has remained about freedom of expression has been the potential for creeping control of the media by the government, state entities and the ANC. Until recently, the government has preferred to promote media diversity by establishing and funding the MDDA, but more recently, the government and the ANC have expressed growing frustration with what they perceive to be the anti-government, anti-ANC nature of much of the media, especially the press. In 2011, the GCIS announced plans to transform its existing publication, *Vukuzenzele*, into a tabloid newspaper and publish it every month instead of every second month. With a print run of 1.7 million copies, it is the largest newspaper in the country. In making this announcement, the GCIS appeared to be concerned about the lack of accessibility of existing newspapers, and intended to reach audiences not traditionally reached by commercial newspapers.¹¹⁵ The growth of government media contradicts a key decision taken about the nature of government communication at the outset of the transition to democracy. In 1996, a task group on government communications, Comtask, rejected a statist approach to government information, including the setting up of a state news agency and a Ministry of Information. The group felt that a centralised information service had no place in a democracy, as it would be perceived widely as a propaganda outfit. Instead, Comtask proposed a more dialogic approach towards communications, while providing citizens with the informational tools for self-empowerment through the MDDA and USAASA. Comtask also argued that the GCIS should act as a service provider to government departments, and also empower departments and other government agencies to communicate, rather than becoming a communication arm in its own right.¹¹⁶

However, since the Comtask report, it has become increasingly appar-

ent that a more statist vision for communications has become influential in government communications thinking. The argument for government communication has been put succinctly by the former deputy Chief Executive Officer of the GCIS, Vusi Mona, when he argued, 'Citizens only have access to information to the extent that the commercial media are willing to act as the purveyor of government information, or willing to reach every nook and cranny of the country and all segments of the population. But this is not always the case as there are a number of limiting factors, both structural and editorial, faced by the commercial media'.¹¹⁷

While there can be no argument about the limited access of the press, it does not automatically follow that the establishment of government media is the best way of addressing the problem, as this may well lead to the establishment of the very kind of propaganda machine that Com-task has opposed in the 1990s. Rather, it would make sense to enable the rights to freedom of expression and access to information by facilitating independent media that serviced areas and constituencies that are underserved by commercial media; as has been noted above, government efforts to create and support such media initiatives have been inadequate. The GCIS has also been investigating ways of streamlining the government's advertising spend, which includes centralising decision-making in the GCIS rather than leaving decision-making to individual Departments. While this move may well save costs, care must be taken to ensure that centralisation does not lead to government and parastatal advertising being dispensed to advantage sections of the media that are considered to be more government-friendly, while starving critical media of this crucial income stream.

After the 2014 national elections, the Department of Communications was split into two: the Department of Communications, responsible for content services, and the Department of Telecommunications and Postal Services, responsible for communications infrastructure. At the time of writing, the government had provided no coherent public justification for the split. Civil society and opposition parties have speculated that the government made this change to enable the Department of Communications to bring under one roof a range of content services that would form

the basis of an undeclared Ministry of Information or Ministry of Propaganda.¹¹⁸

The press boasts considerable investigative journalism capacity, with the top investigative teams being based at the *Mail & Guardian* (in the form of the not-for-profit entity amaBhungane Centre for Investigative Journalism) Media24 (Media24 Investigations), the *Sunday Times* and Independent Newspapers. The online news service *The Daily Maverick* has some investigative capacity, but focuses mainly on news commentary. These investigative teams have been responsible for some of the most important investigative stories of recent times, such as impropriety in the lease deal concluded by the SAPS, and that ultimately led to the demise of the then Police Commissioner Bheki Cele,¹¹⁹ and gross overspending on President Zuma's residence Nkandla. These stories have aroused considerable ire with the ANC and the government, leading to often-hostile relations between themselves and the press. The press's investigative capacity is a major source of strength in South African journalism, which is often characterised by shallow 'churnalism', and it is important to ensure that the spaces for such journalism are protected.

However, the press has also been criticised by the ANC for lack of transformation, and not entirely without justification. A team set up by PDMSA, the Print and Digital Media Transformation Task Team, found in 2013 that the press was insufficiently transformed, both in terms of race and gender representivity, and that this situation was unsustainable and needed to change. To that end, the team proposed transformation targets that the press should commit itself to, to correct the situation.¹²⁰ However, these efforts at industry self-transformation have run parallel to other developments that have changed the face of the press, and also suggested a more ANC-friendly press. A new newspaper, *The New Age*, reputed to be more aligned to the ANC than the rest of the press, was launched in 2010. The paper is owned by TNA media, which in turn is owned by the Zuma-supporting Gupta family. The paper quickly became controversial for receiving state subsidies through the back door, in the form of parastatal funding to a series of SABC-sponsored business breakfasts.¹²¹

Then, in 2013, Independent Newspapers was sold to Sekunjalo Independent Media, widely considered to be close to the ANC and consisting

of a consortium of organisations, including the investment companies of Congress of South African Trade Unions (COSATU) members. While there is no doubt that the press needs to transform – as a press that is out of step demographically with the rest of society will lack legitimacy, no matter how relevant its offerings are – there is a danger that the manner in which transformation is being pursued may lead to the independence of the press being compromised, and new coalitions being established between the ANC government and sections of ‘patriotic capital’ that are pro-government in character.

While the higher courts have generally been supportive of freedom of expression, a number of quasi-judicial administrative bodies have adopted a fairly conservative approach to the right. The BCCSA, for instance, has been quick to penalise speech that is racist, sexist, homophobic or offensive, and has adopted an approach towards harm that has, at times, included speech that is merely hurtful. It has also been known to condemn speech on the grounds of dignity, which suggests that the body is adopting an over-broad approach to limiting freedom of expression.¹²²

Icasa is tasked with ensuring fairness of coverage for political parties during the electoral period; to that end, it promulgates regulations before elections after public hearings, to ensure that there is clarity on the electoral broadcasting ground rules. Ahead of the 2014 national elections, the regulator confirmed the SABC’s rejection of two party election advertisements. The advertisements were by the Economic Freedom Fighters (EFF) and the Democratic Alliance (DA). According to the regulation, party election broadcasts and party advertisements must not contain any material ‘... that is calculated ... to provoke or incite any unlawful, illegal or criminal acts, or that may be perceived as condoning or lending support to any such act’.¹²³ This provision is overly broad, as the Constitution does not extend protection of freedom of expression to a much narrower range of speech, namely to incitement to imminent violence. In other words, the speech needs to call for violence actively and the speaker should have this intention. Also, there needs to be a strong likelihood of violence occurring from the speech, and the speaker needs to know that. This means that the context in which the speech is made is all-important. Icasa’s regulations, and their recent application, demonstrate that

the broadcasting framework is not really designed to facilitate electoral competition: if it was, then it would be much more accommodative of the kind of 'cut and thrust' speech that is usually the stuff of competitive elections.

Hate speech is another contested area that requires vigilance to ensure that the constitutional exclusion is not interpreted too broadly by government, state agencies and administrative bodies, and by the courts. As stated earlier, the hate speech provision in the Equality Act is over-broad, and it has already been used to find former journalist and South Africa's ambassador to Uganda, John Qwelane, and EFF leader Julius Malema guilty of hate speech. In the case of Qwelane, he was found guilty of hate speech in 2011, for a 2008 column he wrote in which he denounced gay people. At the time of writing, Qwelane was challenging the ruling on constitutional grounds, on the basis that the hate speech clause was over-broad.¹²⁴ The Department of Justice has signalled its intention to develop a hate crimes Bill, which is likely to include measures to criminalise hate speech.¹²⁵ If this Bill is pursued, then care must be taken to ensure that it does not include the over-broad definitions found in the Equality Act and ICERD, as these could well lead to subjective interpretations of what constitutes hate speech, and the temptation to pursue selective prosecutions of political critics of the current administration will be great.

Another freedom of expression fault line concerns the free expression right of political activists engaging in advocacy on social and economic justice. Many cases have been reported of state harassment of activists, beyond what is necessary to ensure public peace. Abuses of the right to protest through the manipulation of the Regulation of Gatherings Act (RGA) will not be dealt with here, as they are dealt with in the freedom of assembly paper; but needless to say, violations of the right to protest impact on freedom of expression in addition to freedom of assembly, as protests are often the most popular and unmediated forms of expression for workers and the unemployed who may not have easy access to the media. There are also many cases of activists being arrested on illegal gathering or public violence charges, only for the cases to be dropped for lack of evidence months or even years later.

Other practices that restrict freedom of expression of activists have

also become apparent. For instance, in Grahamstown in 2011, after a protest that resulted in community members digging up a road in Phaphamani, Unemployed Peoples' Movement (UPM) and Womens' Social Forum activists were given bail conditions that effectively banned them from political activity, including organising or even participating in marches. The charges against the activists were dropped a year later.¹²⁶ Bail may also be refused on spurious grounds. In the same year, Thembehlile activist Bayi-Bayi Miya was arrested on charges of public violence and intimidation for leading protests in the area, in spite of the fact that Miya had in fact attempted to stop the violence. The state opposed Miya's bail successfully in the Magistrate's Court, and the police kept him in 'preventative detention' to stop him from organising any more protests. The Socio-Economic Rights Institute (SERI), representing Miya in the South Gauteng High Court, challenged successfully the magistrate's decision to allow the detention and deny bail, but only after Miya had spent a month behind bars. Last year, the case against the other residents was struck from the roll for lack of evidence after seven months and nine postponements, leading SERI to conclude that the case against their clients was, in fact, political.¹²⁷

Other weak cases have been prosecuted, only for them to be thrown out for lack of evidence. In 2009, members of the social movement Abahlali baseMjondolo were arrested on murder charges following an armed attack on members in Kennedy Road informal settlement. The charges were eventually dismissed after the judge found contradictions in the state's case. Several of the witnesses were unsatisfactory, and the judge questioned their truthfulness after it emerged in testimony that witnesses had been coached to point out members of an Abahlali-affiliated dance group, rather than just the perpetrators.¹²⁸ These practices suggest prosecutions of activists on weak grounds, to harass political critics of the ruling administration, which can deter activists from speaking out and lead to self-censorship.

The deficiencies of whistle-blowing protection, including in the Protected Disclosures Act, are dealt with in the access to information paper, but needless to say strong protections for whistle-blowers are needed to ensure their freedom of expression. However, since 2010, several whistle-

blowers have been assassinated in different parts of the country, but especially in Mpumalanga and KwaZulu-Natal. These whistle-blowers have alleged corruption and mismanagement in relation to a variety of issues, including the building of the Mbombela stadium ahead of the 2010 World Cup. However, only one killing has resulted in a successful conviction, which was overturned on appeal.¹²⁹ In 2009, ANC councillor and trade unionist Moss Phakoe was shot dead outside his home in Rustenburg, after he had found evidence of fraud in the province's drought relief projects. As the people alleged to have been responsible for the killing were released on appeal, his killers still remain at large. Inadequate protections for whistle-blowers are bound to deter other potential whistle-blowers in future.

3.1.3 Gender and age analysis

Access to the means of communications is gendered. This is because the largest number of unemployed people falls within the 15–34 age group, and unemployed women outnumber unemployed men, which means that women are much more vulnerable economically than men.¹³⁰ According to Research ICT Africa, by 2007/8 more women than men owned cellphones, although for every one woman that accessed the Internet, two men accessed it. While monthly mobile expenditure constituted 29.3 per cent of monthly disposable income, women spent more of their disposable income than men. Women tended to use cellphones largely to receive calls or to send missed calls, as buying airtime impacted on household budgets.¹³¹ More recently, and drawing on MyBroadband statistics, the Internet Society of South Africa has stated that 69 per cent of Internet users are male and 31 per cent female.¹³² The cost of connectivity limits access to the means of communications, which affects the freedom of expression of poor users, with women and the youth being affected disproportionately.

Women also remain under-represented as news sources. According to a Media Tenor report produced to coincide with Womens' Month in 2013, and focusing mainly on television, the report found that women accounted for a mere 14 per cent of coverage in South Africa, and women remain under-represented in most regions of the world, so the problem is not a peculiarly South African one.

The PDMTTT also found poor representation of women in ownership and management structures of the press. According to their report, the press has placed greater emphasis on attracting black and female editors than they have black and female managers, with the exception of Media24, where white women were represented disproportionately in their editorial staff. To correct this problem, the PDMTTT recommended that at least half of all board members are black and at least half of these are women. Very few newspapers were published in African languages, which affected women disproportionately, as women were more likely to be reliant on African languages as media for communication rather than English. Furthermore, women were almost completely absent at ownership levels. As a result, the PDMTTT argued for specific gender representation targets, skills development for women and a strategy for the promotion of women to senior management positions.¹³³

Youth representation in the media is a source of concern, especially given the bottom-heavy nature of South African society. According to a report produced by several researchers, including Media Tenor, and led by Rhodes University over an eighteen month period, few issues that mattered to young people were included in media coverage. Little media content targeted the youth. With the exception of education, youth input on issues of importance was minimal, with practically no youth input on crime. Coverage was largely negative and provided young people with few positive role models. Young men were more prominent in the coverage than young women. The young people surveyed (close to 1000 in four provinces) rated the media's credibility as being low, and lamented the lack of in-depth coverage that was relevant to them. Largely, the media failed to be a resource for young peoples' developing civic and political identities, with radio and television being rated more highly than newspapers and magazines. Yet in spite of this, respondents had high levels of trust in the media, in contrast to levels of trust in public institutions and political parties, which were low. Media policies were also largely silent on promotion of youth voices, reinforcing their marginal status in the media. The National Youth Policy document addressed some of the issues related to technology, where it proposed access to ICTs as one of the ways in which opportunities for young people can be enhanced.¹³⁴

4. Conclusion

South Africa has travelled a remarkable path in relation to freedom of expression in the past twenty years, and there is no doubt that the country has enjoyed levels of freedom that have been unprecedented in recent history. Censorship does occur, but it is vigorously resisted by robust sections of civil society. The media have also proved to be strong watchdogs of the right to media freedom and have organised themselves into associations to protect the right and promote ethical standards in the media. The courts have also developed the law on freedom of expression and some strong precedents have been set that have made censorship more difficult through, for instance, the imposition of prior restraints on media reportage, or over-broad interpretations of concepts like sexual conduct or child pornography. After a shaky start, the courts have swung towards supporting the principle of open justice, which has allowed more court proceedings to be broadcast, thereby demystifying the workings of the law for many people.

However, it should be noted that the law has not been developed in relation to some key issues; hate speech, for instance, has not been given legal content through case law, yet, especially the vexing question of whether incitement to cause harm refers to physical harm only or extends to psychological harm. Legal guidance on the definition of hate speech is important because any attempt by the Department of Justice to develop hate crime legislation will need to be guided by a proper definition of hate speech. Incitement to imminent violence and propaganda for war have also not been tested legally. There are signs of these constitutional exclusions being given extremely generous interpretations and then being used to limit freedom of expression, and the danger is these exclusions can be stretched to censor political critics of the ruling administration. National security should not be used to restrict freedom of expression unduly, and there are signs that this has happened in the wake of the September 11 attacks on the US.

While media freedom has strong champions, and is therefore well defended, freedom of expression more broadly is in need of vigorous defence too. Activists who act as change agents in their constituencies

are vulnerable to harassment and censorship, and generally lack access to resources of know-how to defend their rights. NGOs like SERI, the Freedom of Expression Institute (FXI) and the Right2Know Campaign (R2K) have played important roles in extending access to justice on freedom of expression issues, but the need in relation to these issues is great and cannot be borne by these organisations alone. None of these organisations operate a tracking system of freedom of expression violations, as Reporters without Borders does for media freedom violations, which means that trends cannot be identified very easily as accounts tend to rely on anecdotal evidence rather than quantifiable data.

With respect to increasing access to the means of communications, there have been significant developments over the past twenty years, but transformation in broadcasting was most pronounced in the first decade of democracy and has stagnated somewhat since then. Communications access has been extended massively, to the point where cellphones are practically ubiquitous, but this extension has happened largely in spite of, not because of, government policy. This policy sought to extend landline access across the country, but because it sought to meet conflicting objectives – attempting to achieve universality using a largely market-driven approach with limited public service top-ups – the policy failed. As a result, connectivity options for Internet-users are reduced, which limits their ability to use the Internet as a gateway to knowledge and democratic participation.

Similar weaknesses can be seen in the media as well. The democratic government can be credited with a media system that is characterised by far higher levels of plurality than existed twenty years ago, but this has not necessarily translated into a diversity of viewpoints. Because of the overly market-driven nature of media transformation, South Africa's media system remains fairly elite, which limits the ability of the media to constitute a public sphere where the most important issues of the day can be discussed and problems resolved. The most popular and accessible medium, the SABC, is subjected to worrying levels of governmental control. The investigative press have been a major success story of South Africa's media transformation, although it tends to be at its strongest when investigating abuses of power by the political (and to a lesser extent

the economic) leadership, rather than exposing abuses at grassroots level. Care should be taken not to allow this success to be thwarted by censorious measures such as statutory regulation of the press, which has no place in a democracy.

Nevertheless, the press needs to transform and unless the press is willing to take this problem more seriously and implement the targets as recommended by the PDMTTT, then a transformation charter for the sector needs to be pursued. Insufficient thinking has gone into how to respond to the excessively high levels of media concentration in South Africa; policy has been too timid on this issue and accommodative of market forces. Furthermore, the competition authorities have been slow to respond to anti-competitive behaviour that limits media pluralism. However, questions of how to respond to media concentration must be researched thoroughly to ensure that any measures taken to limit concentration are well-considered and serve a legitimate public purpose, rather than being used to cow an already-browbeaten press.

With these concluding points in mind, this paper recommends further investigation of the following aspects of *policy* relating to freedom of expression:

- Conducting an audit of all apartheid-era laws that remain on the statute books, and repealing and/or amending them to bring them into line with the Constitution.
- Defining hate speech according to the Constitutional definition of hate speech, and revising all laws and policies that are broader than this definition, including the Equality Act.
- Revising policies and laws impacting on national security, so that they satisfy the limitations analysis mentioned earlier, including POSIB (which at the time of writing had not yet been signed into law, in spite of the Bill having been with the president for over a year).
- Revising media and ICT policy to ensure a strong public service component, not compromised by market imperatives.
- Upgrading the independence of the SABC and Icasa to ensure that both have the capability to discharge their mandates effectively, including constituting common viewing and listening spaces for deliberative debate unhindered by censorship, limiting profiteering

in the communications sector and promoting universality of communications, including availability, accessibility and affordability of communications. Consideration should be given to making the SABC a Chapter Nine institution, and making it clear in the Constitution that communications regulation as a whole is protected, and not just broadcasting;

- Strengthening policies to promote media diversity, including limiting excessive media concentration and anti-competitive practices and promoting media that encourage women and the youth to become active participants in shaping democracy.
- Strengthening policies that promote public accountability of the press, while rejecting state accountability models.
- Strengthening the ability of dissenting voices in the political terrain to speak and be heard free of censorship and harassment.

This paper recommends further investigation of the following aspects of *practice* relating to freedom of expression:

- Encouraging civil society to develop monitoring mechanisms for freedom of expression violations, to track the extent of censorship, form of censorship and whether censorship is growing or declining.
- Discouraging quasi-judicial and administrative bodies from limiting freedom of expression unduly.
- Ensuring that the conduct of the security cluster is subjected through more thorough public scrutiny by, for instance, ensuring that the recommendations of the 2008 Ministerial Review Commission on Intelligence entitled 'Intelligence in a Constitutional Democracy' are implemented. This will ensure a greater flow of information about the work of the State Security Agency (SSA).

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The right to freedom of assembly, demonstration, picket and petition within the parameters of South African law

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1. Introduction

The right to freedom of peaceful assembly is among the most important human rights we possess. Simply put, this right protects peoples' ability to come together and work for the common good. This right is a vehicle for the exercise of many other civil, cultural, economic, political and social rights, allowing people to express their political opinions, engage in artistic pursuits, engage in religious observances, form and join trade unions, elect leaders to represent their interests and hold them accountable.

Today, the right to freedom of peaceful assembly is enshrined in international law as a fundamental freedom. People have struggled across time and space for the right to assembly and this demand is a universal feature of progressive and democratic politics around the world.

Since the demise of apartheid, South Africa has made impressive strides in securing a legal framework for the exercise of civil and political rights, including constitutional recognition of the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.² In the South African context, the right to protest lies at the heart of the political and legal contestation of the right to assembly. Accordingly, the

focus of this paper will be more on the right to protest, and less on apolitical assembly activities, such as those for social, educational, religious and other purposes.

In spite of the fact that the right to protest is the bedrock of democratic society, increasingly the right is being compromised, even in countries that have long considered themselves democracies. South Africa is no exception. The country's high levels of poverty and inequality, combined with violence and creeping authoritarianism make the country's politics particularly volatile, which has placed these rights under pressure.

There is also growing evidence that the police are becoming increasingly violent, and that they and local authorities are violating the right to protest more frequently. In the past decade, evidence has emerged of the intelligence services being politicised and abused to advantage political cliques. The reduction in transparency in the military, coupled with their increasing deployment in civilian life, suggest a creeping militarisation of society.

The second section of this paper sets out the international legal framework for the rights to engage in peaceful protest and political assembly. It explains the basis for the protections in international law, why the rights are foundational to democracy and outlines specific protected protest and assembly activities.

Section 3 sets out the domestic legal framework for the rights to freedom of assembly, demonstration, picket and petition. It explains step-by-step how the Regulation of Gatherings Act (RGA) works to give effect to these rights and summarises the only Constitutional Court case to date on the RGA.

Section 4 provides an overview of protest and examines the reasons for the upsurge in protest in South Africa. It attempts to quantify the scale of protests and asks why people are protesting; whether their protests are simply about frustration regarding the lack of services that they receive or whether there is something more fundamental about our democracy that they are protesting about.

Section 5 describes how the state censors protest in South Africa, through abuse of the law and the application of increasingly brutal means to suppress dissent.

The final section of this paper sketches recommendations for policy-makers and civil society actors engaged in the right to protest.

2. International Law

Because of their essential role in securing democracy and positive social change, the exercise of freedom of assembly rights through peaceful protests are provided broad protection in international human rights law.

International law recognises the right to freedom of peaceful assembly as the right to gather publicly or privately in order to collectively express, promote, pursue and defend common interests. This right includes the right to participate in peaceful assemblies, meetings, protests, strikes, sit-ins, demonstrations and other temporary gatherings for a specific purpose. States not only have an obligation to protect peaceful assemblies, but should also take measures to facilitate them. Everyone has the right to peaceful assembly. States may not limit this right for certain groups based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status.³ However, the right to freedom of peaceful assembly is not absolute under international law. Assemblies may be subject to certain restrictions, but such measures must be prescribed by law and ‘necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others’.⁴ Any restrictions must meet a strict test of necessity and proportionality. Freedom must be the rule and not the exception. Restrictions should never impair the essence of the right. International law only protects assemblies that are peaceful, and the peaceful intentions of those assembling should be presumed.⁵ The rights of those engaging in peaceful protest and political assembly are protected through an interconnected set of universally recognised human rights and fundamental freedoms. The freedom to protest is guaranteed by the twin pillars of freedom of assembly⁶ and freedom of expression.⁷ Peaceful protest and political assembly are also protected by the freedoms of opinion⁸ and of association,⁹ the rights to participate in

the conduct of public affairs,¹⁰ to promote and protect human rights,¹¹ to liberty and security, and to be free from arbitrary detention¹² and torture or cruel, inhuman or degrading treatment or punishment.¹³

These core rights and freedoms are recognised in all the major international and regional human rights treaties,¹⁴ including the International Covenant on Civil and Political Rights (ICCPR), which South Africa has ratified.¹⁵ As a state party, the South African Government has binding international legal obligations to respect, protect, promote and fulfil these rights. In addition, international law requires South African courts to interpret domestic law in line with the ICCPR. Under South African law, courts are required to consider international law in the interpretation of the Bill of Rights.¹⁶ Furthermore, as recognised by the African Commission on Human and Peoples' Rights, South Africa, as an African Union (AU) member that has ratified the AU Charter, is bound to respect the rights protected under the African Charter of Human and Peoples Rights.

The jurisprudence and reports of officials and bodies tasked with interpreting and applying human rights law provide persuasive authority on the content and interpretation of protest and assembly rights under international law.¹⁷ These precedents include the work of international committees,¹⁸ intergovernmental organisations,¹⁹ regional human rights courts and commissions,²⁰ experts appointed by international and regional intergovernmental organisations,²¹ and domestic courts applying international law.²²

3. South African Law

3.1 Regulation of Gatherings Act

Apartheid South Africa employed a wide range of laws to suppress the right to protest.²³ With the advent of democracy pending, the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation ('Goldstone Commission') drafted the Regulation of Gatherings Act (RGA), which departed significantly from the repressive practices of the past. The Commission argued that rather than seeing gatherings as

threats to national security, the State should recognise them as essential forms of democratic expression. The State should also have a positive obligation to facilitate gatherings. Municipalities would play this facilitative role, ensuring that negotiations took place between themselves, South African Police Services (SAPS)²⁴ and the convenors of the gathering. The Commission also argued for a radically different approach towards policing of gatherings, which were to be handled with tolerance and sympathy so as not to provoke a confrontation that may result in violence. Furthermore, gatherings were meant largely to be self-policing, with protestors being responsible for controlling participants through measures such as the delegation of marshals.

The political transformation that followed resulted in the adoption of the Interim Constitution – and eventually the Final Constitution – that guaranteed the right to freedom of assembly: ‘Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.’²⁵

Immediately after enacting the Interim Constitution, Parliament passed the Regulation of Gatherings Act of 1993²⁶ that transformed the law on assembly in South Africa.

The RGA ostensibly protects ‘demonstration as of right’, meaning that the ability to hold a public gathering, assembly or demonstration is not necessarily contingent upon approval by the State. The Act accordingly removes the requirement of permits before holding gatherings and assemblies.²⁷

A ‘demonstration’ consists of fifteen people or fewer by definition and requires no notification at all.²⁸ A ‘gathering’ by definition consists of more than fifteen people.²⁹ Gatherings, however, are subject to more onerous conditions. Unlike a demonstration, the notice of gathering must be given seven days in advance.³⁰ If less than seven days’ notice is given, reasons must be provided for the late notice.³¹ If less than 48 hours’ notice is given, the authorities have the right to prohibit the gathering.³²

An organisation intending to hold a gathering must appoint a ‘con- vener’, who is responsible for arranging the gathering and liaising with the State actors.³³ Notice of the intended gathering must be given to a ‘responsible officer’, who is delegated by the local authority to oversee

arrangements for the gathering.³⁴ After notice is given, the responsible officer must consult with an 'authorised member' of the SAPS³⁵ regarding the necessity for negotiations on any aspect of the conduct of, or any condition with regard to, the proposed gathering.³⁶

If, after such consultation, the responsible officer is of the opinion that negotiations are not necessary and that the gathering may take place as specified in the notice or with such amendment of the contents of the notice as may have been agreed upon by him and the convener, he notifies the convener accordingly.³⁷

If a convener has been so notified or has not, within 24 hours after giving notice of the gathering, been called to a meeting, the gathering may take place in accordance with the contents of the notice.³⁸

If such negotiations are necessary, the responsible officer calls the convenor and authorised member to a meeting.³⁹ The responsible officer is required to ensure that such discussions take place in good faith.⁴⁰

The RGA acknowledges that gatherings will, inevitably, disrupt traffic and contemplates an agreement between the responsible officer, the convener and the police that will ensure that 'vehicular or pedestrian traffic, especially during traffic rush hours, is least impeded'.⁴¹

However, if credible information on oath is brought to the attention of a responsible officer that there is a threat that a proposed gathering will result in serious disruption of vehicular or pedestrian traffic, injury to participants in the gathering or other persons, or extensive damage to property, and that the police and the traffic officers in question will not be able to contain this threat, the police are required to meet again in order to consider the prohibition of the gathering.⁴²

If, after this meeting the responsible officer is on reasonable grounds convinced that no amendment of the notice and no condition attached to the gathering would prevent the occurrence of any of the circumstances referred to above, he may prohibit the proposed gathering.⁴³ He is required to notify the convenor of the prohibition and provide reasons for the prohibition.⁴⁴ Any decision reached during the negotiations or conditions imposed on a proposed gathering, including the prohibition of a gathering, may be challenged in a Magistrate's Court or High Court.⁴⁵

Special permission is required to hold a gathering outside courts, Parliament and the Union Buildings.⁴⁶

If a gathering turns violent, or if there is serious risk of injury to persons or property, police may disperse the gathering within a reasonable time. In all cases police must use 'reasonable force' to disperse the demonstrators.⁴⁷

A material contravention of the Act is an offence carrying a maximum penalty of R20 000 and/or imprisonment for a period not exceeding one year.⁴⁸ If the gathering was spontaneous, rather than premeditated, this can be used as a defence against a charge of holding an illegal gathering, as the Act contemplates situations where people gather spontaneously in reaction to unforeseen events.⁴⁹

The RGA imposes joint and several civil liability on each member of the gathering for any damage caused by a gathering they have participated in.⁵⁰ This provision is aimed at deterring those enjoying the right to assembly from infringing proprietary rights of other individuals and, where they do, to make appropriate amends. This section was upheld in the *Garvas* case discussed below.

Finally, the Act addresses the issue of the use of deadly force by the police to disperse demonstrations. While the RGA permits the use of firearms and other weapons for crowd control and permits the use of force where there are apparently 'manifest intentions' to kill or to seriously injure persons, or to destroy or seriously damage property, the RGA provides that such use of firearms or force must be necessary, moderate and proportionate to the circumstances.⁵¹

3.2 The *Garvas* case

The sole judgment of the Constitutional Court dealing squarely with assembly to date is in the case of *SATAWU and Others v Garvas and Others*.⁵² The case clarified the legal position relating to liability for damage at a gathering. The judgment dealt with a protest march organised by the South African Transport and Allied Workers Union (SATAWU), which turned violent, causing extensive damage to vehicles and shops in the Cape Town city centre. The court ruled that members of the public who suffer damages from protestors have the right to recoup their losses

from whoever hosted the protest – whether the damages were caused by members of the organisation or not. There is no onus on the person suing the organisation to prove that the damages were caused by members of the protesting organisation – the mere fact that the damage happened during the march is enough in the way of proof for anyone to be able to claim damages from the organisers.⁵³ The facts of the case are described in the judgment as follows: SATAWU organised a protest march as part of a national strike. The march constituted a gathering as defined in the RGA. The march descended into chaos, resulting in extensive damage to vehicles and shops along the route. Small business owners along the route of the march who had suffered the brunt of the damage claimed that they sustained loss as a result of the riot and claimed damages from SATAWU in terms of section 11 of the Act in the High Court. SATAWU challenged the constitutionality of section 11(2)(b) of the Act on the basis that it was inconsistent with the constitutional right to assemble, demonstrate and picket.

The Constitutional Court rejected the argument presented by SATAWU and COSATU to the effect that section 11(2) of the Act was irrational because any reasonable organiser who took reasonable steps to guard against an act or omission materialising could never prove that it was not reasonably foreseeable and would automatically be found liable in terms of this section. The Court found that section 11(2) requires the organiser to determine whether an act or omission causing harm or damage is reasonably foreseeable and to ensure that reasonable steps are continuously taken to ensure that the act or omission that could become reasonably foreseeable is prevented. If the steps taken at the time of planning the gathering are indeed reasonable to prevent what was foreseeable, the taking of these preventive steps would render that act or omission that subsequently caused riot damage reasonably unforeseeable. On this basis section 11(2) was not irrational.

The Constitutional Court was careful to re-emphasise in its judgment that the constitutional right to assemble and demonstrate is constitutionally protected and guaranteed so long as it is exercised peacefully. In the event that an organisation reasonably foresees the possibility of damage or mayhem resulting from the gathering, it has a choice to proceed with

the gathering or cancel it. Accordingly, the decision to assemble resides with the organisation and hence it should be responsible for any reasonably foreseeable damage arising from such assembly.

The Court pointed out that the effect of section 11 was to enable victims of riot damage to look no further than the organisers for compensation without having to prove negligence. SATAWU and COSATU's argument that this was an unjustifiable limitation on the right to assemble and demonstrate as it placed the onus on organisers to prove the statutory defence set out in the section, was rejected on the basis that it would otherwise be very difficult for innocent victims of riot damage to succeed with their claims for compensation.

The Constitutional Court concluded that the purpose of section 11(2) was to protect the safety and property of the public from the reasonably foreseeable possibility of riots arising from a gathering and the balance between the limitation of section 11(2) on the right to assemble and demonstrate and its purpose, was established. SATAWU and COSATU's appeal to the Constitutional Court was accordingly dismissed.

The judgment means that in future the organisers of protest marches will not always be able to wash their hands of the violence and destruction flowing from a march. When a march turns violent, the organisers can be sued for the damage that ensues and unless they can show that they did not reasonably foresee that damage would ensue or that they foresaw it but took all reasonable steps to prevent it, they would be held liable for any damage caused. Only time will tell whether this will alter the behaviour of organisations holding large gatherings.⁵⁴

4. An Overview of Protest in South Africa

A literature review of the right to protest in South Africa reveals, on the one hand, a surprising paucity of analysis of the RGA and its application, and even less on violations of the right to protest. On the other hand there are confusing accounts of the numbers of protests in South Africa and even more so the numbers of violent protests and banned protests.

There are two research barometers tracking protests in South Africa.

Both rely on media reports to develop their barometers, which also track the number of protests that have turned violent.

The Service Delivery Protest Barometer was established in 2007 by the Local Government Project, Community Law Centre, University of the Western Cape.⁵⁵ The Service Delivery Protest Barometer presents trends in service delivery protests in South Africa. The Barometer focuses on trends in four areas, namely overall frequency, geographical spread, violence and nature of grievance. The project is based on statistical data of protest incidents collected from media reports and aims to provide an accurate, verifiable and objective understanding of protest activity in South Africa. The findings should be considered with an awareness of the methodological limitations of the research, most notably a reliance on outside media sources instead of original data collection. Municipal IQ is a web-based data and intelligence service specialising in the monitoring and assessment of South Africa's municipalities.⁵⁶ Municipal IQ's Hotspots Monitor monitors the occurrence of 'major service delivery protests' across South Africa.⁵⁷ Both the Service Delivery Protest Barometer and the Municipal IQ Hotspots Monitor suffer from inherent deficiencies, most notably a reliance on outside media sources instead of original data collection. They also fail to account for the myriad other protests that are either (or both) peaceful or unreported. This, significantly, contributes to an over-counting of 'violent' protests and an undercounting of peaceful protests, leading inevitably to skewed analysis.

The Municipal IQ Hotspots Monitor recorded an average of 105 'major service delivery protests' per year from 2009 to 2012.⁵⁸ The Service Delivery Protest Barometer of the University of the Western Cape and the Multi-level Government Initiative recorded some 180 protests over the same period.⁵⁹

Hirsh Jain and Jelani Karamoko from Harvard Law School extracted data from media reports of community protests contained in the South African Local Government Briefings Report⁶⁰ and the SA Media News Database.⁶¹ Jain and Karamoko found that South Africa experienced an average of 104 community protests in 2010, 213 protests in 2009, and 118 protests per year in 2007 and 2008.⁶²

Data supplied by the Minister of Police in response to parliamentary questions appears to reveal an entirely different picture of the numbers of protests in South Africa.⁶³ According to the Minister's 2010 statement, the average number of gatherings defined as 'crowd management incidents' was 8000 in 2004/5, rising to 11 003 in 2011/12. The University of Johannesburg's Professor Peter Alexander, who holds the NRF/DST Research Chair in Social Change, proclaims the statistics to be proof that South Africa is in the midst of a 'rebellion of the poor'. Alexander acknowledges that 'crowd management incidents' as defined by the Minister may be sporting activities, for example, but holds that 'the majority are related to protests of some kind'. Boring deeper into the statistics, during 2007/08 to 2009/10 'the most common reason for conducting crowd management (peaceful) gatherings was labour-related demands for increases in salary/wages'. For the same period, the most common reason for 'crowd management (unrest) was related to service delivery issues'.⁶⁴

A professor of journalism, Jane Duncan, at the University of Johannesburg, has attempted to make sense of these puzzling discrepancies in the numbers of protests recorded annually. Duncan notes that the data supplied by the Minister of Police includes both (political) protests and (non-political) gatherings, but some commentators have been too quick to assume that it refers to protests only, which leads to the number of protests being overstated. There is no empirical basis to assert this because no common measure exists across countries. In a veiled critique of Alexander's 'rebellion of the poor' conclusions, Duncan asserts that many on the political left would like to read a pre-revolutionary environment into the protests, which increases the temptation to talk them up. She notes, too, that the security cluster has a vested interest in talking up the protests to justify more resources and greater repression. Indeed, recent reports that SAPS plans to double its Public Order Police numbers and upgrade and expand their existing physical resources appears to give credence to Duncan's warnings.⁶⁵ There is much debate in the media and academic commentary about the underlying causes of protests in South Africa. There is, however, a paucity of in-depth research on the causes of contemporary community protests in South Africa, particularly

attempts to link this phenomenon to the crisis of local government. The research that does exist indicates that service delivery issues are at the heart of many protests, but other factors are also at play, such as unemployment and lack of information.⁶⁶ There are other protests relating to laws and policies that are considered undemocratic such as the Protection of State Information Act and e-tolls in Johannesburg instituted by the South Africa National Road Agency (SANRAL).

A clear reason for many protests is dissatisfaction with the delivery of basic municipal services such as running water, electricity and toilets, especially in informal settlements. Unemployment, high levels of poverty, poor infrastructure, and the lack of houses add to the growing dissatisfaction in these and other poor communities.⁶⁷

Bhayiza Miya, a Thembelihle community leader, says that what they experience under an unresponsive and uncaring government leaves them no option but to face such targeted arrests:

‘The conditions that we find ourselves living under, the toilets, the smell ... during summer it is unbearable,’ Miya says. ‘I don’t know if this government wants us to fold our arms and wait for them to deliver.’⁶⁸

Other reasons for protests include allegations of corruption and nepotism within local government structures. Some protesters blame poor service delivery on the deployment of ANC cadres to positions for which they are not qualified.

Many problems can be traced back to post-apartheid government policies that can be described as ‘neoliberal’. Privatisation of local services and inadequate investment in public goods has produced a shortage of skills necessary to administer local government and maintain municipal services, and ultimately neoliberalism has sustained massive inequality.⁶⁹ While in practice, local councillors are often at the receiving end of problems that began elsewhere, people are unhappy with local government representation, with the way their public representatives are putting forward their case, from ward councillors, mayors, provincial officials right through to the president. This is a ‘democracy deficit’, in the sense that voting every five years and electing someone to speak on their behalf is not resulting in a substantial improvement of the economic wellbeing of many people.⁷⁰

Another cause of protests is the poor communication between local government representatives and communities, essentially the task of ward councillors and local officials. A lack of access to information regarding the delivery of housing and basic services often leads to the rapid spread of rumours of favouritism, corruption, and mismanagement, which is not always true. Added to this, the need for services in informal settlements is not only greater than formal areas but indeed in most cases absolutely desperate.⁷¹

5. Repression of Protest by the Criminal Justice System

In practice the RGA has been manipulated in various ways to censor protests. The fact that many protests have taken place against the very municipalities that have the task of administering the Act has raised questions of conflicts of interest. Municipalities repeatedly conflate notification with permission seeking, treating the application process as a permission-seeking exercise. This has led to the police breaking up gatherings if the convenor cannot produce a permit proving that the march 'has permission' to proceed. Protesters must overcome a range of obstacles to enjoying their right to protest, most of which are plainly set up by intransigent officials and bear no resemblance to the actual legal requirements.

However even if protesters manage to navigate their way through the RGA processes, both the conduct of the police during protests and the criminal justice system after the arrest of protesters also act as powerful tools for the repression of protest.

5.1 Abuse of the RGA

Professor Duncan has published media summaries of research she conducted with Andrea Royeppen into the abuse of the right to protest in South Africa during 2011 to 2012, focusing in particular on the Rustenburg Municipality.⁷² The statistics used in the research were sourced from the Rustenburg Municipality's own records as well as the SAPS's Incident Registration Information System (IRIS). In Rustenburg, the

overall number of gatherings increased from 162 in 2011 to 226 in 2012. Roughly 19 per cent of both these figures were classified as protests, forming the minority of applied-for gatherings over the time period.

In 2011, only 32 per cent of protests were approved⁷³ while another 39% fell into the murky category of not being specified as approved or not. In 2012, the number of approved protests remained steady at 33 per cent while those not approved spiked dramatically from 29 per cent to 53 per cent. The unspecified protests shrunk to only 14 per cent. Duncan attributes this massive change in percentages to the municipality becoming 'more categorical in their decisions... [and] more prone to prohibiting protests'. The unspecified protests may very well be indicative of the common complaint among activists that municipalities often notify protesters of a prohibition verbally so as not to leave a paper trail, says Duncan. This means that the number of prohibitions could well include the entire 'not-specified' figure.

Whether or not this is true, the prohibited figures in Rustenburg far outstrip the 'unrest-related' incidents in the IRIS database for the same period. IRIS records all violent and peaceful marches in the country. 'Unrest-related' incidents make up around 10 per cent of the annual national total number of gatherings. These incidents are ones that the SAPS noted as becoming violent and the ones that the media tend to focus on.

Duncan blames the municipality for these radically-skewed figures, saying that they have illegally set the bar for lawful gatherings far too high.

What is clear from the research of Duncan and others is that local authorities tasked with regulating gatherings have conspired to abuse the RGA in several ways.

Permission-seeking

The RGA requires a convener to complete the simple administrative task of filling out a notification form in order to render a gathering legal.⁷⁴ In the absence of a response from the responsible officer, the gathering is automatically legal. This default position is often subverted by the erroneous belief that, in the absence of a written permit from the authorities, the gathering is illegal. The notification process in the RGA is thus per-

verted into a permission-seeking exercise, making the legality of a gathering subject to the whim of a responsible officer and making nonsense of the constitutional promise of ‘assembly as of right’. This misconception has the practical effect of frustrating many a convener who waits in vain for a superfluous ‘permit to march’. This has also led to the police breaking up gatherings if the convenor cannot produce a permit proving that the march has ‘permission’ to proceed.

Section four meetings

If, within 24 hours of notification, a convener is not called to a meeting in terms of section 4 of the RGA (colloquially known as a ‘section four meeting’), the gathering may take place as planned.⁷⁵ The purpose of this provision is clearly to ensure that there is enough time between notification and the gathering itself for the parties to come to terms on the arrangements for the gathering. The legislature may well also have foreshadowed the prospect of last-minute negotiations on gatherings. Unfortunately, responsible officers often flout this ‘24-hour rule’. Section four meetings are seldom called within 24 hours of notification. When a section four meeting is called on the eve of a gathering and that gathering is prohibited, this effectively deprives a convener of recourse, because it may be too late or practically impossible to approach a court on such short notice to overturn the prohibition and obtain permission to gather.

The RGA requires that a responsible officer consults with the authorised member regarding the necessity for negotiations with the convener on any aspect of the gathering.⁷⁶ Should such negotiations be necessary, a meeting with the convener is called – the section four meeting – to discuss amendments to or conditions on a proposed gathering.⁷⁷ The responsible officer is required to ensure that the section four meeting takes place in good faith.⁷⁸ However, in practice section four negotiations often do not take place in good faith and in a spirit of negotiation. Municipalities and the police have been known to impose conditions that may compromise the purpose of the protest and alter its message, thereby reducing the meaningfulness of the protest.

Municipalities also have been known to invite individuals into the section four meeting who have a vested interest in the protest, such

as councillors, who in turn have been known to influence decisions about whether to allow gatherings or not, especially if the gatherings are protests against their own performance.

In the event of a responsible officer receiving warning that a gathering may be dangerous, the responsible officer is required to convene a second, 'section five meeting' with the convener and authorised member to consider the prohibition of a gathering. Accordingly the RGA requires the responsible officer to consult and negotiate with the convener at two separate meetings before considering prohibition. However, many gatherings have been prohibited without any meeting at all. Besides violating the RGA, this attitude betrays the bad faith of the responsible officer who fails to consider alternative options short of outright prohibition.

Checklists and fees

Some municipalities unlawfully levy fees on protesters as a prerequisite for obtaining 'permission' to protest. For example, the Emfuleni Local Municipality charges protestors R165.00 per traffic officer per hour or part thereof as a condition for allowing a gathering. The Johannesburg Metropolitan Police Department (JMPD) charges a fee of R129.34 as a 'planning cost'.⁷⁹ Such practices are discriminatory and unconstitutional as they make the exercise of a right subject to financial means.

Even more prevalent appears to be the use of a checklist of documentation to be supplied by the convener before permission is granted for a protest. For example, the JMPD hands a pro forma letter to every convener requiring that the following be obtained prior to 'permission' for a protest being granted: 1) confirmation letter from the recipient, 2) permission letter from the ward councillor, 3) permission letter for the place of gathering, 4) copies of identity documents for the conveners, 5) copies of the proof of residential/work addresses for conveners, 6) names of the marshals. Of the items on this checklist, the RGA only requires the names of the marshals 'where possible'.⁸⁰ There is no requirement to supply any other information or documents from the convener. Moreover, imposing a requirement to collect elusive 'permission letters' would appear to defeat the very constitutional mandate of 'assembly as of right' that the RGA seeks to implement.

Grounds of prohibition

A responsible officer may only prohibit a gathering in limited circumstances, namely where a proposed gathering will result in a serious disruption of traffic, injury to people or damage to property.⁸¹ However, municipalities have prohibited gatherings on grounds that are not recognised by the RGA, such as requiring that grievances are first formally presented to government before resorting to protest.⁸²

Other gatherings have been prohibited on the grounds that there is no one to accept the memorandum.⁸³ This makes the right to protest subject to the veto of the target of the protestors' ire, who can then frustrate the gathering by simply not making themselves available to accept the memorandum.

Another popular reason for prohibiting gatherings is that other gatherings are taking place on the same day, and the police do not have the resources to police more than one gathering. This reason has been manipulated in the past to allow gatherings that are more politically palatable to the ruling party, while disallowing gatherings that are more critical.⁸⁴

Only where an affidavit with credible information on uncontrollable threats to safety of person and property is brought to the attention of a responsible officer, may a gathering be prohibited. Such an affidavit is necessarily subjective, based on dangers that the deponent – typically a police officer – foresees. Nevertheless the RGA provides no option for a convener to challenge, or even receive, these affidavits, much less provide alternative affidavits, before the responsible officer makes a decision. The absence of a competing narrative makes this an inherently one-sided process, capable of manipulation by municipalities and the police. The fact that many protests have taken place against the very municipalities that have the task of administering the RGA has raised questions of conflicts of interest.⁸⁵

Blanket bans

The Act does not contemplate a situation where blanket bans of protests can be instituted, except under a state of emergency when the right to assembly can be suspended. Nevertheless there have been several cases

where municipalities have instituted a ban on all gatherings in a particular place for a particular period of time.⁸⁶

5.2 Abuse of the Criminal Justice System

Even if protesters manage to navigate their way through the RGA processes, the criminal justice system often conspires to make their lives difficult during and after the protest. Many protesters are subject to abuse by the police in the form of assaults and/or gratuitous arrest, typically on charges of alleged public violence or damage to property.⁸⁷ This, in turn, results in many protesters spending lengthy periods in prison awaiting trial. In most instances, there is simply no case to answer and the case is withdrawn for lack of evidence.

Even in cases where protestors are awarded bail, bail conditions often restrict basic political rights by requiring protestors to withdraw from political activities or move out of an area pending the conclusion of their criminal proceedings. The issue of affordability of bail is also a concern to poor protestors, who are often unable to afford the bail requested.⁸⁸ For women-headed households in particular, this has harsh consequences for children of incarcerated women, left at home with no caregiver.

It seems no coincidence that community leaders and conveners of protests who are labelled 'troublemakers' by police appear to be targeted for arrest and detention disproportionately.

According to Bhayiza Miya, a Thembelihle community leader arrested in 2011:

'When protests turn violent the police just shoot and arrest randomly. Sometimes, like in my case, they come for community leaders. Other times they just snatch anyone who they can get their hands on. It is just done to intimidate and silence people.'⁸⁹

The unavoidable conclusion to be drawn is that the police conspire with prosecutors to criminalise legitimate protest action and silence dissent.⁹⁰ By criminalising popular dissent in this way, the State is capable of silencing arguably the most effective tool at the disposal of marginalised and ignored communities.⁹¹ Formal mechanisms of participation have often

failed these communities and consequently protest is usually the last resort to highlight their grievances to those in power.⁹²

5.3 Increased police brutality

In recent years the police have been criticised for their increased brutality, heavy-handedness and use of wholly inappropriate lethal force, particularly in the context of protests.⁹³ The systemic and widespread nature of this problem has been highlighted by various prominent instances of police brutality in recent years.

In August 2012, the police shot and killed 34 striking mineworkers in Marikana, which was the single most lethal use of force by South African security forces against civilians since the Sharpeville massacre during the apartheid era. Since 2000, almost 50 people have been killed during protests.⁹⁴ The high profile case of the brutal beating and killing of community activist Andries Tatane in April 2011, during a protest for access to water in Ficksburg, Free State, has also become emblematic of the often brutal force used by the police to suppress the expression of popular dissent.⁹⁵

Cases of police brutality in South Africa leapt from 416 during 2001–2002 to 1722 by 2011–2012.⁹⁶ Closely tracking the upward curve of cases of brutality is the almost complete absence of police accountability. While there was a net increase of 313 per cent in cases in a decade, only one in 100 cases against police officers results in a conviction. There are no prosecutions on the horizon for the perpetrators of the Marikana massacre, while in the Tatane case all six accused were found not guilty on the basis that the identities of the officers could not be confirmed.⁹⁷ There is, however, no absence of clear and unequivocal policy on the use of force in the RGA and the Public Order Policing (POP) Policy, which both provide that the use of force should be reasonable and proportional to the threat encountered. In terms of the RGA the police are required to call on protesters to disperse, failing which force may be used, excluding the use of weapons likely to cause serious bodily injury or death. The degree of force which may be used cannot be greater than is necessary for dispersing the persons gathered and must be ‘proportionate to the circumstances of the case and the object to be attained’,⁹⁸ namely the peaceful dispersal of pro-

testers. Both the Act and the Policy make it clear that lethal force and the use of live ammunition may only be used where life or property are threatened and where less harsh methods have proved unsuccessful.

A further concern is that the presence of POP units and the unsympathetic attitude of the police may aggravate the violence that sometimes occurs during protests. This seems to be a frequent complaint of protestors. Thus protests tend to turn violent in reaction to police violence usually directed at a largely peaceful protest.⁹⁹

6. Recommendations

At a Right to Protest Workshop in 2013, many activists argued that the RGA was being used as a political and ideological tool to manipulate the right to dissent.¹⁰⁰ The Act, they said, is either deliberately misused by the authorities to deprive people of their constitutional rights, or is misapplied by police due to their own ignorance or incapacity. This evidence from communities on the ground is supported by much of the academic writing captured in this paper.

Participants proposed a number of strategies and actions to carry forward from the workshop. First, more research is needed into where the problematic municipalities are as well as the correlation between banned protests and violent protests. Second, awareness-raising around problematic municipalities through publicity such as ‘naming and shaming’ in the media. Third, trying to bring cases to court that challenge checklists and other unlawful prohibitions of protest by municipalities. Finally, establishing a platform for information and knowledge-sharing between organisations and creating activities that bring organisations together on the right to protest.

What is also clear, however, from a literature review of the right to protest in South Africa, is that there is relatively little data on the RGA and its application, and even less on violations of the right to protest. There is not even a common understanding of the number of protests occurring annually in South Africa. There is insufficient research on why protests occur, and if many are violent, or many are banned, why

this should be so. This absence of a common factual baseline presents an obvious difficulty in making recommendations to policy-makers for remedying whatever flaws there may be in the architecture of the RGA and the implementation and enforcement of the law by the authorities.

Complicating the issue further is that the existing protest barometers and academic analysis examine the regulation of gatherings from a top down basis; that is, they examine the legislative, policy and institutional environment for the regulation of protest.

What is clearly required is a 'ground up' account of the right to assembly, prioritising activist accounts while providing activists with assistance in their peaceful and unarmed protests. This ground up approach is important as research strongly suggests that there is a huge discrepancy between the official policy position on the regulation of gatherings and the actual reality as experienced by those who attempt to exercise their right to assemble.

Professor Duncan's research project attempts to fill this gap by documenting examples of violation of the right to protest. She has already conducted a case study of the application of the RGA in Rustenburg and is rolling out the project in other towns. This project has already provided evidence of widespread abuses of the right to protest, especially in the areas falling within the Rustenburg Municipality, under whose jurisdiction the Marikana massacre occurred.

However, what is still absent from protest research and barometer activities is a project that records, in real-time, attempts to get grievances heard through protests and official responses to these attempts, and non-responsiveness and even the repression that appears to be a common trigger for violent protests. There is no system currently in place to track protests in real-time. Unless there is a service which provides protesters with an opportunity to obtain assistance on their particular protest, as well as creating an outlet for their stories to be transmitted to the public domain, the impunity will continue: police violence against protestors, on the pretext that they are prone to criminal behaviour and criminals are legitimate targets for the unofficial policing doctrine of 'maximum force', as opposed to the public order policing doctrine of 'minimum force'.

Allied to this lacuna in data collection and record-keeping, there is also no system in place to support protesters. Evidence suggests that the State is drifting towards greater intolerance of protests, with softer forms of policing being replaced by harder and even lethal policing, and municipalities routinely censoring protests that are critical of their own performance. There is a pressing need for a service to provide both material and legal support to protesters, as well as providing strategic advice, by understanding their concerns, mediating conflicts with authorities and, ultimately, facilitating peaceful protest.

One solution has been suggested by a nascent project called 'Right2Protest', recently created by a coalition of NGOs¹⁰¹ and community-based organisations.¹⁰² The project aims to provide support to protesters who encounter problems in exercising their right to protest in three discreet ways: first, providing a telephonic advice service for victims of violations of the right to protest; secondly, a protest alert service for the media, civil society and others to obtain real-time information about protests and their underlying issues; thirdly, research on protest to inform advocacy efforts.

The information collected by the telephonic hotline would be used to provide information and analysis and supporting documentation to key stakeholders, including those who are directly affected by the problem as well as Parliament and government, the police, journalists and civil society, to publicise the findings and conduct advocacy in support of the right to protest.

Ultimately, this project aims to facilitate the holding of peaceful and unarmed protests in order that the voices of disempowered communities are heard by those in power. The project aims to change the behaviour of those who are violating the right to protest, be it the police or the protesters themselves, and to intervene to stop the cycle of violations and violence, moving the dominant culture towards respecting the right to protest. It aims to provide immediate information on protests before they happen, to ensure that problems can be resolved before protests are banned or violence ensues. Data collected from the project would be analysed to show trends around protest: where the protest hotspots are in the country, what problems are experienced by protesters and whether interventions made

from the hotline succeed. This is especially so with regards to protests that have resulted in violence, and particularly where media access has been limited, heightening the potential for violations of rights.

Growing incidents of violent protests imply that lawful avenues for protest may have been closed down, forcing protestors to make their voices heard 'by any means necessary'. The project needs to assess whether this is in fact the case. Where it is the case, then the project could, for example, 'name and shame' municipalities and the police by issuing press releases, to discourage others from following suit. Furthermore the project aims to build the capacity of journalists and civil society to report on and defend the right to protest, by exposing problems when they emerge in their proper context, and to provide the knowledge resources necessary to defend these rights. This project would tie in neatly with the recommendations made at the 2013 Right to Protest Workshop.

Broader research and deeper analysis of the application of the RGA will determine whether, and how, it needs to be amended. The conclusion of research by Mzi Memeza, Freedom of Expression Institute (FXI) researcher, is that protester organisations and regulatory local authorities support the architecture of the RGA, albeit for different reasons.¹⁰³ In that study, civil society organisations and social movements indicated that the scheme of the RGA is progressive and provides a viable institutional space for the presentation of community and socio-economic-related demands.

On the other hand, Memeza notes that local authorities suggest that while the RGA is a good piece of legislation, it is not clear and authoritative enough about its powers. The most glaring difficulty is the discretion vesting in the responsible officer to prohibit a gathering, given less than 48 hours' notice, without providing reasons.¹⁰⁴ Other legal commentators have noted that this section of the RGA, if tested in court, may well be struck down as unconstitutional because it violates the basic tenets of administrative justice that require reasons for decisions by government.¹⁰⁵

Duncan has noted that the RGA was passed in 1993, and therefore needs to be reviewed and re-negotiated. She suggests that an independent ombudsman may need to be established to regulate the RGA on a provin-

cial or district level.¹⁰⁶ Others have suggested that there should be a legislative review process to look into those aspects of the implementation of the RGA that have evolved over the years with a view to codifying them, for instance the 'requirement' that marshals comprise 10 per cent of the total number of participants in a gathering.¹⁰⁷

Commentators have long stressed the need for training on the RGA for protesters, local authorities and police.¹⁰⁸ They point out that there seem to be wide-ranging misunderstandings about what the RGA actually provides for, i.e., the *de jure* position, as opposed to what has evolved over time through practice, i.e., the *de facto* position. The latter has in many instances been mistaken to mean what the RGA actually provides for in law. A case in point is the unlawful requirement of confirmation letters and compliance with various checklists before 'permission' to gather is granted.

According to Shaun Tait and Monique Marks of the University of KwaZulu-Natal, appropriate training of the relevant police is essential, as are ways of shifting the mindset of police with regard to the right to protest and demonstrate. Heavy-handed responses to gatherings and protest need to be carefully monitored. In order for there to be a positive shift, police members and units involved in public order policing need to feel safe and secure. This requires an effective management and accountability structure, and action to ensure that all members engaged in such policing are appropriately equipped. During the actual protest, a preoccupation with law and order should, as far as possible, give way to the narrower focus of preserving the peace, and protecting people and property against harm.

In making choices about how public order policing is structured, we need to take heed of the warnings given by Duncan and Tait and Marks.¹⁰⁹ Paramilitary solutions do not assist with dealing with 'security gaps'. Moreover they warn, in post-conflict and newly democratising countries, the presence of paramilitary forces may be seen as reminders of political repression, thus creating more problems than they solve. It would be wise, they note, for the police's political masters and managers to engage in public discussions about the relative merits of the different models and techniques that are available to them.¹¹⁰

Ultimately what we want are public order police officers who are deeply conscious of citizens' constitutional and other rights, are firm and impartial, and operate in ways that are professional. The best that we can hope for is a contextually and situationally appropriate South African model of public order policing.

Tait and Marks suggest that training should inform police about the motivation behind protests and why they are – at times – violent in nature. Such an understanding would assist in making police members sympathetic representatives of a democratic state. In so doing, police may become advocates for social justice who are concerned with creating a society based on the principles of equality and solidarity, underpinned by the values of human rights, and recognising the dignity of all human beings. This in turn is likely to reduce the potential for violent protest, thus rendering the job of the police less delicate and controversial. Such an approach fits well with a more community-oriented approach to policing and it provides police commanders with a framework for devising a range of tactical options available to them in developing operational plans.¹¹¹

The police cannot 'fix' the underlying problems that result in protest. But the police can put in place a set of routines intended to produce a degree of certainty in managing fundamentally problematic yet recurrent situations. At the very least, in a democracy, the strategies and techniques of the police need to be in line with the Constitution and with legislation that upholds basic rights to protest and demonstrate without infringing on the rights of those who are not involved. Police engaged in public order policing must adhere to the 'rules' of democratic policing, which include embodying values respectful of human dignity, adhering to due process, intervening in the life of citizens only under limited and carefully controlled circumstances, operating in equitable ways, and being publicly accountable.¹¹²

There is a need to engage local municipalities about the underlying philosophy of the RGA, as well as the day-to-day application of the law. Opportunities should be created for a dispassionate discussion with authorities on what the law is, as well as how to come to a common understanding of how best to implement the law and engage with com-

munities to ensure peaceful gatherings. The ideal fora for this discussion would be nationwide workshops and training sessions, attended by all three members of the ‘golden triangle/security triumvirate’, namely protesters, local authorities and police. The Right2Know campaign has also produced a simple and plain-language pocket-sized guidebook to the RGA¹¹³ that should be made available to – and used by – everyone involved.

At the same time, a national campaign is needed to inform citizens about the legal framework and acceptable procedures for conducting protests and demonstrations. Citizens and civil society groupings need to be aware of their own rights and responsibilities with regard to protest and demonstration, as well as the rights, mandate and responsibilities of the police in public order situations.

The last resort for protesters frustrated by official intransigence is of course, the courts. There have been several successful court challenges to unlawful prohibitions of gatherings.¹¹⁴ Several legal NGOs have legal capacity – albeit limited – to deal with violations of the RGA by the authorities.¹¹⁵ The perennial challenge is to provide legal assistance to protesters outside the major metropolitan areas, especially small towns where there is limited, if non-existent, legal assistance available.

7. Conclusion

South Africa faces increasing threats to its fragile right of assembly. There is a growing awareness in civil society about problems with protest and much hand-wringing about police brutality on the one hand, and the increasing tide of protests on the other. However, there has been no proper discussion about where the locus of the problem lies: whether it is with the implementation and enforcement of the RGA or whether the Act itself is a problem because it lends itself to misinterpretation and abuse. A review of the RGA may well be needed, to see whether it is in fact meeting its stated objectives. This is not without risk, because any review of the Act may result in a much worse act than the one that is in place. Research, training and legal intervention on the RGA is certainly

required, but so too is a system or systems to support and empower protesters themselves. As this paper has outlined, there is much to be done to arrest, and ultimately reverse, the increasing hostility between protesters and police, and the slide towards increasing repression and away from the rule of law.

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Notes

1. Thanks go to Maureen Isaacson, Dale McKinley and Richard Pithouse for very useful comments on earlier drafts of this paper, which was completed in May 2015.
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3. R Burnett 'The Right of Peaceful Protest in International Law' (1986), a paper presented at a Seminar on the Right of Peaceful Protest 3–4 July 1986; B Rutinwa 'Freedom of Association and Assembly: Unions, NGOs and Political Freedom in Sub-Saharan Africa' (2001).
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5. Ibid.
6. E.g. International Covenant on Civil and Political Rights art. 21.
7. E.g. ICCPR, art. 19(2).
8. E.g. ICCPR, art. 19(1).
9. E.g. ICCPR, art. 22.
10. E.g. ICCPR, art. 25.
11. E.g. G.A. Res. 53/144, 4 (arts. 1, 5).
12. E.g. ICCPR, art. 9.
13. E.g. ICCPR, art. 7.
14. Major international and regional human rights treaties: these include Article 5 of the UN Declaration on Human Rights Defenders, Article 20 of Universal Declaration of Human Rights, Article 21 of the International Covenant on Civil and Political Rights; and regional standards: Article 11 of African Charter on Human and Peoples' Rights, Article 15 of American Convention on Human Rights, Article 11 of European Convention for the Protection of

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 20. E.g. the European Court of Human Rights, the Inter-American Court and Commission of Human Rights, the African Commission on Human and Peoples' Rights
 21. E.g. UN Special Rapporteurs and Special Representatives, and Inter-American Commission and African Commission Special Rapporteurs.
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 23. Chief among these were the Suppression of Communism Act 44 of 1950, the Criminal Law Amendment Act 8 of 1953 and the Riotous Assemblies Act 17 of 1956 quoted in Woolman S *Constitutional Law of South Africa*, Chapter 43 Freedom of Assembly.
 24. Until 1994, the SAPS was called the South African Police (SAP).
 25. Section 16 of the Interim Constitution of 1993 and section 17 of the Final Constitution of 1996 contain identical wording of the right to freedom of assembly.
 26. Act 205 of 1993.
 27. Section 4 (3).
 28. Section 1 (v) 'Demonstration' includes any demonstration by one or more persons, but not more than fifteen persons, for or against any person, cause, action or failure to take action.
 29. Section 1 (vi) 'Gathering' means any assembly, concourse or procession of

more than 15 persons in or on any public road ... or any other public place or premises wholly or partly open to the air.

30. Section 3(2).
31. Section 3(3)(I).
32. Section 3(2).
33. Section 2(1).
34. Section 2(4)(a).
35. Section 2(2)(a).
36. Section 4(1).
37. Section 4(2)(a).
38. Section 4(3).
39. Sections 4(2) and (3).
40. Section 2(d).
41. Section 4(4)(b).
42. Section 5(1).
43. Section 5(2).
44. Section 5(3).
45. Section 6.
46. Section 7.
47. Section 9.
48. Section 12(1).
49. Section 12(2).
50. Section 11.
51. Section 9(2).
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64. See Natasha Vally (2009) 'National trends around protest action: mapping protest action in South Africa' (Centre for Sociological Research and Development Studies Seminar, University of Johannesburg); Peter Alexander (2010), 'Rebellion of the poor: South Africa's service delivery protests – a preliminary analysis' *Review of African Political Economy* 37(123), 26–27; National Assembly (2010), 36/1/4/1/201000030, Question No. 194, 19 April.
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66. See, for example, K Allan and K Heese 'Understanding why service delivery protests take place and who is to blame' (2011) *Municipal IQ* <http://www.municipaliq.co.za>; F Cronje 'Behind the rise of protest action in South Africa' *Politic-*

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70. Ibid.
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73. The word 'approved' is misleading, because it denotes the giving of permission which, as the author points out earlier, is not what the RGA requires. Since the RGA only requires notification for a gathering there should be no such thing as a generic 'approval'. Rather, what may have been recorded – and incorrectly labelled by Prof Duncan – are those instances where the authorities did not react to the notification by subsequently prohibiting the planned gathering.
74. Section 3.
75. Section 4(3).
76. Section 4(1).
77. Section 4(2)(b).
78. Section 4(2)(d).
79. This is official policy, no aberrant instance of corruption. An official in the JMPD's legal department justified the policy to this writer by pointing to a City Council Resolution authorising the tariff, read with Section 4(1)(c) of the Municipal Systems Act that gives a Municipal Council 'the right to finance

affairs of the Municipality by ... charging fees for services.

80. Section 3(3)(g). The same official justified the checklist by quoting Section 3(3) of the RGA: 'The notice [of the gathering]...shall contain *at least* the following information ...' According to her, the JMPD is therefore entitled to ask for any other information or documents from the convener.
81. Section 5(1).
82. The Mogalakwena Municipality in Limpopo banned a march by the GaPila community on the basis that their grievances were not taken to the ward committee first. The Act does not specify any particular route for grievances to follow before they can form the basis of a gathering.
83. According to the Emfuleni Municipality's traffic department, the organisation wishing to hold a march must secure a written undertaking from the institution they are marching against confirming that a representative will be available to accept the memorandum. The Rustenburg Municipality also has this requirement.
84. The Tshwane Municipality prohibited a picket of 80 people by the Right2Know Campaign outside the Arms Procurement Commission of Inquiry (where former President Mbeki was due to testify) on the grounds that there was another gathering on the same day in Tshwane. Right2Know took the decision on judicial review and on 12 June 2013 the North Gauteng High Court overturned the prohibition and the picket went ahead.
85. In the wake of the police killing of striking mineworkers in Marikana, several protests have been prohibited by the Rustenburg Municipality under whose jurisdiction Marikana falls. Two of these were planned by the Wonderkop Community Womens' Association and were prohibited by the Municipality on spurious grounds. The prohibition was overturned by the North West High Court and the march went ahead, although stringent conditions were applied.
86. The City of Tshwane issued a directive in 2010, presumably for the Soccer World Cup, that there would be 'no marching through the City'. The eThekwin Municipality also imposed a blanket ban on protests during the 2013 African Cup of Nations.
87. R Pithouse 'On State Violence' *South African Civil Society Information Service* (SACSIS) (10 May 2011); D Bruce 'The Road to Marikana: Abuses of Force During Public Order Policing Operations' *SACSIS* (12 October 2012); J Dun-

- can 'The Criminal Injustice System' SACSIS (18 February 2013).
88. Ibid.
 89. D Knoetze 'Criminalising protest and dissent in South Africa' *Mail & Guardian* (18 September 2014): <http://mg.co.za/article/2014-09-18-criminalising-protest-and-dissent-in-south-africa>.
 90. J Duncan 'The Criminal Injustice System' SACSIS (18 February 2013); M Clark 'An Anatomy Of Dissent and Repression: The Criminal Justice System And The 2011 Thembelihle Protest' (2014) at 33.
 91. See Madlingozi 'Post-Apartheid Social Movements' in Langford et al *Socio-Economic Rights* 109–112; Dugard 'Urban Basic Services' in Langford et al *Socio-Economic Rights* 286–291; D McKinley and A Veriava *Arresting Dissent: State Repression and Post-Apartheid Social Movements* Centre for the Study of Violence and Reconciliation Research Report (2005) 43–60.
 92. Clark (note above) illustrates that this criminalisation of protest is clearly evident from the police conduct during and after the Thembelihle protest in September 2011.
 93. See Dawson 'Resistance and Repression' in *Mobilising Social Justice in South Africa* 101–136; Pithouse 'On State Violence' SACSIS (10 May 2011); Bruce 'The Road to Marikana: Abuses of Force During Public Order Policing Operations' SACSIS (12 October 2012).
 94. http://en.wikipedia.org/wiki/Political_repression_in_postapartheid_South_Africa#People_killed_by_police_during_protests. Another disturbing development is the rise of political assassinations. For more detail, see Gareth van Onselen 'Political assassinations are on the rise' *Rand Daily Mail* (29 February 2016): <http://www.webcitation.org/6j5qmoxya>.
 95. Clark (note above) at 55.
 96. D Smith 'South Africa: reports of police brutality more than tripled in the last decade' *The Guardian* (22 August 2013).
 97. The State bodies responsible for investigating and prosecuting police misconduct have much to answer for. However, an analysis of the role of the Independent Police Investigative Directorate (IPID) and the NPA in what appears to be a pattern of impunity is beyond the scope of this paper.
 98. Section 9(2)(b) and (c).
 99. J Hornberger 'We Need Complicit Police! Political Policing Then and Now' (April 2014), a paper presented at a panel discussion on Police against the

- People as part of the Public Positions Series hosted by the Wits Institute for Social and Economic Research (WISER).
100. Workshop on the right to protest, 11–12 March 2013 at Stay City, Johannesburg. Organised and funded by the Foundation for Human Rights.
 101. Right2Know Campaign, Freedom of Expression Institute, Lawyers for Human Rights, Centre for Applied Legal Studies, Socio-Economic Rights Institute, amaBhungane.
 102. Members of the steering committee elected at the Right to Protest Workshop in 2013.
 103. M Memeza *A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993 – a Local Government and Civil Society Perspective* (July 2006) 41.
 104. Section 3(2) of the RGA.
 105. Woolman S *Freedom of Assembly* in Woolman S et al, *Constitutional Law of South Africa* (2nd ed). Original Service, Butterworths; R La Grange *Constitutional and statutory analysis of the Regulation of Gatherings Act* Legal Opinion for the Freedom of Expression Institute (2004).
 106. Remarks made at the workshop on the right to protest (2013) (ibid).
 107. Memeza (ibid), S Tait and M Marks (ibid).
 108. Memeza (ibid), S Tait and M Marks (ibid), J Duncan and A Royeppen (ibid).
 109. S Tait and M Marks (ibid), J Duncan and A Royeppen (ibid).
 110. Arguably, however, these political masters are ultimately responsible for the repression and abuse and thus should be the main ‘target’ of advocacy efforts and demands for reform.
 111. S Tait and M Marks (ibid).
 112. Although the cynic would argue that there is no meaningful chance of this being the case when many of the police’s political masters do not embody these values or follow these rules.
 113. Right2Know Campaign *Protesting: Your Rights. The Regulation of Gatherings Act: Arrests and Court Processes* (2013) <http://www.r2k.org.za>.
 114. See earlier reference to the Right2Know Campaign court order obtained on 12 June 2014 against the City of Tshwane, granting permission to gather after the City had unlawfully prohibited the gathering.
 115. In Gauteng, the leading NGOs involved in this area of work are the Freedom of Expression Institute, Lawyers for Human Rights, Centre for Applied Legal

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Studies, Socio-Economic Rights Institute and the Legal Resources Centre. There is also pro bono assistance available from the corporate legal sector available through probono.org.