Chapter 3
Socio-Economic Rights

3.1 Background

3.1.1 The Universal Declaration of Human Rights

On 6 January 1941, Franklin D Roosevelt delivered his famous Four Freedoms Speech. He identified what he called the "four essential freedoms" as:

- Freedom of speech and expression;
- Freedom to worship God in one's own way;
- Freedom from want; and
- Freedom from fear.[1]

After naming each one of these freedoms, Roosevelt emphatically writes: "everywhere in the world". He argues that freedom from want translates to "economic understandings which will secure to every nation a healthy peace time life for its inhabitants". Lone Lindholt suggests that Roosevelt articulated, in these freedoms, the basis for a sound human rights approach. She suggests that Roosevelt's statement provides the "essential all-encompassing principles expressing basic human requirements" on which a human rights system can be built.[2]

Two important considerations flow from Roosevelt's statement. The first is that human rights are of universal application. The second is that economic justice belongs in the human rights domain. He suggests that world peace and the enjoyment of civil and political rights may well be contingent upon economic justice.

On 10 December 1948, the Universal Declaration of Human Rights (UDHR) was adopted, and it proclaims:

- The right to social security (Article 22);
- Economic, social and cultural rights indispensable for the person's dignity and the free development of his personality (Article 22);
- The right to fair labour practices (Article 23);
- The right to a rest period for workers (Article 24};
- The right to an adequate standard of life, including food, clothing, housing, medical care, security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond the person's control (Article 25);
- The right to education (Article 26); and
- Cultural rights (Article 27).

Alongside these rights, the UDHR proclaims civil and political rights, It is noteworthy that the UDHR does not distinguish between civil and political rights on the one hand, and social and economic rights on the other.[3] Quite the contrary, it states

that all these rights are "a common standard of achievement for all peoples and all nations" and directs every individual and every organ of society "to secure their universal and effective recognition and observance".

Similarly, the language of the UDHR does not in my view suggest that some rights should be privileged and others ranked somewhat lower. I am cognisant of Shadrack Gutto's suggestion that the expression of specific rights or freedoms in the UDHR "differs and may allow for different implementation or enforcement strategies and means".[4] In interpreting Gutto, I think that one should take note that the UDHR, unlike the ICESCR, states in every case that the person has a *right* to X. It does not say that the person has a *right of access to X.* Therefore the right is direct. *Article* 22 of the UDHR, it is true, provides that the national effort to bring about the realisation of economic, social and cultural rights should be "in accordance with the organisation and resources of each State", Therefore it can be said that, according to the UDHR, the implementation of Socio-Economic rights is contingent upon the resources that the state has at its command.

However the same article implies a connection between Socio-Economic rights and civil and political rights where it speaks about "social and cultural rights" being "indispensable for [the person's] dignity and the free development of his personality". The statement in the UDHR preamble that states must secure the universal and effective recognition and observance of "these rights and freedoms by progressive measures" refers to all the rights listed in the Declaration. Therefore it cannot be a basis for ranking Socio-Economic rights lower than civil and political rights.

In my view Gutto's reading of the UDHR is coloured by his reading of the International Covenant on Economic, Social and Cultural Rights (ICESCR). I am of the view that if the UDHR is read on its own terms, it is clear and does not imply a differential approach to the rights it proclaims. Now, of course, as I have already indicated, the ICESCR is supposed to give effect to the protection of the

Socio-Economic rights enshrined in the UDHR. Therefore it would be understandable - it might even be essential - to read the UDHR against the ICESCR. But I think that, where one discusses the UDHR as such, it is important to read it on its own terms. On such a reading one must conclude that there is no textual support in the UDHR far the proposition that rights should be approached differentially. To only read the UDHR against the ICESCR and the International Covenant on Civil and Political Rights (ICCPR), and then proclaim *that* that is what it means, will impoverish our analysis. It will render us unable to appreciate the very case that Gutto is making out-viz. that the adoption of two human rights instruments by the United Nations was, in effect, the concretisation of ideological resistance to the injunctions of the UDHR on Socio-Economic rights.

3.1.2 Classifying Rights: International Covenant on Economic, Social and Cultural Rights

In any event it was not long before the custodians of the UDHR started classifying and ranking the rights it proclaimed. Gutto suggests that this classification and ranking was probably a function of the "bipolar ideological divisions within the United Nations"[5] The culmination of these ideological divisions was the adoption of two instruments on human rights-viz. the ICCPR and the ICESCR.[6] The ICCPR is not the subject matter of this study, and will therefore be referred to only if it is necessary for the purpose of making a specific point.

The ICESCR was adopted in 1966 and requires state parties to:

- Introduce measures for the progressive, though full, realisation of the rights recognised in the ICESCR, to the maximum of their available resources (Article 2(1));

- Recognise the right to:

    - Work, which right means the state must provide vocational guidance and training programmes and techniques with a view to ensuring full and productive employment (Article 5(1));

    - Fair wages and equal remuneration for work of equal value;

    - A decent living for workers and their families;

    - Safe and healthy working conditions;

    - Equal opportunity for promotion at the workplace;

    - Rest, leisure and a reasonable limitation of working hours. (Article7);

    - Form and join trade unions and the right to go on strike (Article 8).

    - Social security (Article 9);

    - An adequate standard of living for everyone, which right includes the right to adequate food, clothing and housing (Article 11);

    - The enjoyment of the highest attainable standard of physical and mental health (Article 12);

    - Education (Articles 13 & 14); and

    - To take part in cultural life (Article 15).

3.1.3 Ranking Human Rights: Generations of Rights

Once human rights were carved into these two broad categories-civil and political rights on the one side and Socio-Economic rights on the other - the stage was set for a hierarchical ordering of human rights. And so it came to pass that human rights got divided into three generations. Civil and political rights came to be called first generation rights; social, cultural and economic rights second generation rights; and environmental rights third generation rights.

Writers are not agreed on the origins of the division of human rights into generations. Asbϕrn Eide and Bernt Hagtvet, in a footnote to Etienne-Richard Mbaya, write that the notion of three generations of rights was first proposed by Keba M'Baye of Senegal when he was the Director of UNESCO's Division on Peace and Human Rights. They suggest that the reasoning behind the classification was that civil and political rights were the first to emerge - in the 18th century. Social and economic rights, on the other hand, emerged in the 19th and first part of the 20th century. The 20th century, they write, was time for a third generation of rights to be recognised, namely solidarity rights.[8] Hanna Bokor-Szegö, on the other hand, writes that the notion of three generations of human rights was first introduced by K Vasak in *La déclaration universelle des droits de l'homme, 30 ans apres* in 1977.[9]

It would appear, though, that M'Baye might have worked in the capacity referred to above in the 1980s.[10] If that is correct, it would appear that preference must be given to the ascription of the division to Vasak, whose work appeared in 1977.

Whatever the origins of the notion, its effect was that only first generation rights came to be accepted as human rights properly so called.[11]
Socio-Economic rights, on the other hand, were deemed mere directive principles, painting the direction for policy formulation, but were not binding at all on the state.[12] The reasons advanced for the reluctance to accept Socio-Economic rights as proper rights were, amongst others, the following:

- Whereas civil and political rights are self executing, Socio-Economic rights "require legislative and other state actions".

- The implementation of Socio-Economic rights is the subject-matter of politics and not of law.

- Flowing from the reservation referred to above, it is improper for the courts to involve themselves with Socio-Economic rights. Suchinvolvement, if there is to be one, will inevitably involve the courts in politics, and this should not be encouraged.

- Adjudicating over Socio-Economic rights will negate the *trias politica* doctrine, in terms of which the three arms of government - legislature, executive and judiciary - are separate and independent of one another. Court judgements will have this effect because, in ordering the state to fulfil Socio-Economic rights, the courts will effectively be determining the appropriation and application of the budget.

- Socio-Economic rights are programmatic in nature and therefore not capable of immediate realisation.[13]

- Issues around affordability make Socio-Economic rights inappropriate for recognition as binding human rights.[14]

The merit of these objections and whether they still exert influence in South Africa are discussed under Section 3.2.2.9 hereof.

3.1.4 Implementation and Monitoring Implications of the Division of Rights

Reference was made earlier to Gutto's suggestion that the reading of the UDHR lends itself to "different implementation or enforcement strategies and means". Whereas I have expressed my reservation about his reading of the UDHR, I nevertheless agree with his inference with regard to the implementation or enforcement strategies for the two sets of rights.

Philip Alston writes that the ideological division within the United Nations also determined the importance that the contesting parties were to attach to each of these sets of rights. Countries with a socialist inclination tended to stress the importance of Socio-Economic rights and took the view that the full enjoyment of civil and political rights was contingent on the realisation of Socio-Economic rights.[15] The African countries, which had recently been admitted to the United Nations, also often supported the move to strengthen the commitment to Socio-Economic rights within the United Nations.[16]

Because of the dominance of Western Europe in the United Nations,[17] their attitude to Socio-Economic rights determined the importance attached to these rights by the world body. But initially this was also aided by the USSR which, in 1951, opposed

any reporting system on progress made in the implementation of Socio-Economic rights on the basis that it was incompatible with the sovereignty of the state.[18] This view coincided with that of the USA which, to date, has not ratified the ICESCR, precisely on that account.[19]

The result of this attitude towards Socio-Economic rights by the majority of member states was that they adopted "institutional arrangements" for implementing and for monitoring Socio-Economic rights that were inferior to those adopted in respect of civil and political rights.[20] Whereas, for example, the rights protected by the ICCPR were required to be honoured fully and immediately, those protected by the ICESCR were to be fulfilled progressively and in accordance with resources available to the state. Declan O'Donovan discusses how the Economic and Social Council (ECOSCO) deliberately and consistently refused to take decisions that were needed in order to advance a more serious approach to Socio-Economic rights.[21]

3.1.5 The Vienna Declaration

The reluctance of the United Nations and its agents to take Socio-Economic rights seriously did not, however, dampen the resolve of those who continued their struggle within the United Nations for the equal treatment of Socio-Economic rights vis-á-vis civil and political rights. In 1963, the USSR changed its tone and argued that implementation measures should be stricter for Socio-Economic rights than for civil and political rights. The USSR was concerned that reluctant member states might use the standard of "progressive implementation" which applied in respect of Socio-Economic rights, as an excuse for doing nothing.[22]

The struggle for the two sets of rights to be placed on an equal footing paid off on 25 June 1993 when the World Conference on Human Rights adopted the Vienna Declaration. In its preamble the Declaration states that "all human rights derive from the dignity and worth inherent in the human person" and that "human rights ... are the *birthright of* all human beings". (Emphasis added.) And then the Declaration states in Article 5:

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

3.2 Socio-Economic Rights in South Africa

In this section I propose to discuss the situation in South Africa with reference to Socio-Economic rights. I shall discuss briefly South Africa's position in relation to the ICESCR; South Africa's constitutional provisions in respect of Socio-Economic rights; and some court judgements on the matter.

3.2.1 The International Covenant on Economic, Social and Cultural Rights

As I have already pointed out, South Africa signed the ICESCR on 3 October 1994. South Africa has not, however, ratified the ICESCR as yet. By signing an international agreement, a country signifies that it intends to bring its laws in line with the relevant agreement. By ratifying the agreement, a country becomes a full party to the relevant agreement and must, within two years of signing it, bring its laws on which the agreement has a bearing in line with it. The country must then submit periodic reports an its performance in the area covered by the agreement.

The effect is, then, that South Africa is not yet a full party to the ICESCR, but has only signified its intent to be bound by it.

3.2.2 The Constitution

The constitution of South Africa institutes Socio-Economic rights in respect of the following:

3.2.2.1 Slavery, Servitude and Forced Labour

No one may be subjected to slavery, servitude or forced labour. (Section 13 of the Constitution.) This right is direct, immediate and unconditional.[23]

3.2.2.2 Labour Relations

Everyone has the right to fair labour practices. Workers are guaranteed the right to form and join trade unions; to participate in the activities and programmes of their unions; and to go on strike. Employers are guaranteed the right to form and join employer organisations and to participate in such organisations' activities and programmes. The right to collective bargaining is guaranteed. (Section 23.) These rights are direct, immediate and unconditional.

3.2.2.3 The Environment

Everyone has the right to an environment that is not harmful to his/her health or well-being. This entails the right to have the environment protected against pollution and ecological degradation. In promoting justifiable economic and social development, care must be taken to secure the ecology and to promote conservation. The first part of this right (as stated in the first sentence hereof) appears, on the face of the constitution, to be direct, immediate and unconditional. The second part of the right must be given effect to through "reasonable legislative and other measures". (Section 24.) Fulfilling the injunction of the constitution with reference to this right is not contingent upon resources available to the state, but it has to be balanced against "justifiable economic and social development".

3.2.2.4 Housing

Everyone has the right to have access to adequate housing. The state must take reasonable legislative and other measures to achieve the progressive realisation of this right within its available resources. No one may be evicted from their home or have it demolished without an order of court. (Section 26.) This is not a direct right: the bearer of the right is not guaranteed to have a house, only access to it. And then the house need only be "adequate". The right is not immediate: it allows for progressive realisation. Nor is it unconditional: it is contingent upon the state's available resources. The second part of the right imposes a negative duty on the state and on any other person to refrain from evicting a person from or demolishing their home without a court order.

3.2.2.5 Health Care, Food, Water and Social Security

Everyone has the right to have access to health care services, including reproductive health care; sufficient food; water; and social security. The state must take reasonable legislative and other measures for the progressive realisation of these rights within its available resources. No one may be refused emergency medical treatment. (Section 27.) Except for the right to emergency medical treatment, none of these rights is direct: people have only the right of access to their contents. They are not immediate, but allow for progressive realisation. And they are not unconditional: they are contingent upon the state's available resources.

3.2.2.6 Education

Everyone has the right to a basic education, including adult basic education. Everyone also has the right to further education, which the state must take reasonable measures to make progressively available and accessible. (Section 29.) The first part of the right is direct, immediate and unconditional. The second part is direct, unconditional, but not immediate: the state is allowed to bring its realisation about progressively.

3.2.2.7 Cultural, Religious and Linguistic Communities

Provided that they do not breach any provision of the Bill of Rights, persons who belong to cultural, religious and linguistic communities have the rights to enjoy their culture, practise their religion, and use their language. They may form, join, or maintain organisations associated with these rights. (Section 31, read with Section 30.) Unlike the rights discussed previously, these rights do not impose any positive duty on the state. The state is not required to do anything to bring about their realisation. The rights impose a negative duty on the state-i.e. the state must not interfere with the enjoyment of these rights.

3.2.2.8 Terminology

A number of terms used in the articulation of these rights would require a bit of unpacking. I do not attempt to do that at this stage. An attempt to unpack these terms will be undertaken in Chapter 5.

3.2.2.9 The Merits of the Objections to Socio-Economic Rights

In Section 3.1.3 hereof reference was made to the objections raised against

Socio-Economic rights being justiciable. In this section I propose to discuss the merits of those objections.

3.2.2.9.1 *Socio-Economic Rights are not Self-Executing*

This objection says, basically, that the state does not have to do anything more in order to give effect to civil and political rights whereas, with reference to

Socio-Economic rights, that is necessary. The question suggests itself: what more? Positive state action, the answer is.[24] Such positive state action would, clearly, be taken by way of legislation and provision of funds. The objection asserts, therefore, that the state does not have to do anything more for the observance of civil and political rights and that, therefore, they are self-executing. Therefore they are justiciable and Socio-Economic rights are not.

Now, in Chapter 2 I discussed the meaning of the term "human right". There is ample historical evidence that rights are proclaimed, often, precisely because they are not being observed. And the evidence is that the culprit in the non-observance of human rights that makes their proclamation necessary is often precisely the state. If human rights were self executing, and the state did not need to do anything more for their realisation, the historical evidence suggests that we might never have all the declarations of human rights that we have had. But what we have seen is that *something more* has always been required in order to compel the observance of human rights. And, what is more, we have seen that the state itself needs to be compelled to observe human rights.

Conceptually, the notion that there are rights that are self-executing is difficult. At a conceptual level, therefore, that cannot be a reason for distinguishing

Socio-Economic rights from civil and political rights. Civil and political rights also depended on the state doing something more for their realisation before they got established. Even now, the state still has to do something more for their observance: they are not always observed automatically. South Africa's equality legislation is a good example of this fact.

3.2.2.9.2 Socio-Economic Rights: A Question for Politics, not Law

I propose, under this heading, to also discuss the two other objections. These are the objections that adjudication on the implementation of Socio-Economic rights would involve the courts in politics; and that it would blur the separation of powers.

These challenges to the justiciability of Socio-Economic rights must ultimately boil down to one issue - viz. that judicial intervention in the implementation of

Socio-Economic rights is contrary to the doctrine of *trias politica.* I do not think that we should dwell too much on the other two elements since, in my view, there is not in practice an iron curtain between politics and law. Often, in practice, the law is a distillation of the political choices made by those who are in power.[25] Once those choices have been distilled into law, it is no longer up to those who made them to see to their enforcement - their enforcement depends on the executive and the judicial arms of government.

Now, the crux of this challenge is that, by adjudicating on Socio-Economic rights, the courts would inevitably encroach on the functional area of the executive to the extent that such judgements would have budgetary implications. This issue, in South Africa, has been resolved by the Constitutional Court's judgement in the constitution certification case, which is discussed under Section 3.2.3.2 hereof. I take the view, however, that this should never have been an issue, and therefore I propose to discuss it in some detail here. In order to make my point, I propose to discuss briefly the rise of mercantilism and the way in which it overcame the legal hurdles it faced.

Mercantilism surfaced between the 11th and 12th centuries. The taking of profit and interest was essential to the development of mercantilism. During this period, however, the church played a crucial political role in Western Europe, and it was obstructive of the ways of mercantilism. The church reasoned that it was dishonest to take profit or interest, since one then received more than the value of the thing or more than one had given. This created a serious problem for mercantilists, since it rendered their trade precarious. Their efforts to have laws passed that would secure agreements they had with people in terms of which they would take profit from their sales or interest on their loans, were in vain, given the political role played by the church.

The courts, however, were not averse to the notion of profit and of interest, provided only it could be disguised so that it would not be obvious that something illegal was being done. Mercantilists, therefore, employed lawyers to draw up contracts that would secure their rights. Contracts, as we know them today, surfaced during this period. In a large measure, they were designed to meet the requirements of mercantilism. According to Tigar and Levy "the writing ... [of the agreement] began to take primacy over the substance".[26] The contracts were crafted in such a way that the profit or the interest was concealed. Thus, for example, if I borrowed R 100 at the interest rate of 10% per annum, and I was supposed to repay the money at the end of one year, the contract would state that I have borrowed R110. And then it would state that I forswear my right to dispute receipt of the amount stipulated in the contract.[27]

Now, when a contract says one person has borrowed R110 from another, and that the borrower hereby undertakes not to place the amount stipulated in the contract in dispute, it seems quite natural that the person who reads the contract must smell

a rat. It would be strange if the courts that enforced such contracts did not smell a rat-they did! However, as Tigar and Levy say, the ploy was simply to prioritise the written word over substance. Moreover, the morality that accompanied the law of contract until now, had to give way to, as Tigar and Levy call it, the "lawyer's maxim": "God keep us from the equity of parlements."[28]

The net effect of this is that the right to take profit and interest could not be established through political means, for the church obstructed that. Mercantilists and lawyers established the right via the judicial process. The right is not under attack on that account. It could be argued, of course, that the *trias politica* doctrine emerged much later. One can offer two answers to that.

First, the case for the justiciability of Socio-Economic rights was never that the courts should legislate, It was always that the legislature should express

Socio-Economic rights in laws that make it possible for them to be enforced through the courts. Then the rights would be enforced like any other right, and if court judgements in such cases had budgetary implications, in principle that would be no different from other judgements courts make with budgetary implications.

Second, courts do make law in different ways, in any event, centuries after the emergence of the *trias politica* doctrine. Justice Holmes in the United States once observed that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law",[29] Even if one takes into account the reservations raised by Paton about this view (footnote 29 hereof), the debate about the law-making powers of the courts would not just disappear.[30] Quite apart from the general debate raging out there about the law-making powers of the courts, South Africa's constitution empowers the courts in given circumstances to, in effect, make law. According to Section 8(2) of the constitution, the Bill of Rights applies vertically as well as horizontally.[31] Then Section 8(3)(a)&(b) requires that, in applying Section 8(2), the courts will check first whether there is any specific legislation dealing with the right in question. If such legislation exists, the courts should apply that legislation. If not, the courts must apply the common law or, if necessary, develop it. The courts are specifically invited by the constitution to develop rules of the common law to limit the right in question, provided only that such limitation complies with Section 36 of the constitution.[32]

Now, the constitution makes this invitation to the courts notwithstanding its clear entrenchment of the *trias politica* doctrine.[33] Even if it were accepted, therefore, that the justiciability of Socio-Economic rights would constitute a violation of the *trias politica* doctrine, such a violation would not have been something out of this world.

There is another way of approaching the issue. In Section 2.3 hereof I discussed, *inter alia*, Dembour and Marx's critique of the theory of natural rights. I argued, with reference to their critique, that rights are often respected without enforcement. That argument has a bearing here too. A right is not a right because the bearer is able to litigate in the face of its violation. Quite the contrary, the bearer is able to litigate in the face of a violation because he/she has a right. The right, therefore, is logically prior to the ability to litigate.

Now, if the citizen has Socio-Economic rights, we must assume that the executive will honour them as a rule. We must assume that failure on the part of the executive to honour such rights will be the exception and not the norm. We do this in respect of civil and political rights. If this is accepted, then we must also accept that litigation in order to enforce the rights will be by way of exception and that it will not be the rule. Therefore we would be entitled to expect that, in its budgeting processes, the executive will budget for the Socio-Economic rights as well as it budgets for *the right to counsel,* for instance.

So seen, it will remain the executive's responsibility to deal with the budgetary implications of Socio-Economic rights, and the judiciary will only ever get involved in the issue if a specific right is infringed - as it is the case with every other right. The argument that adjudication on Socio-Economic rights collapses the boundary between the executive and the judiciary is based on an incorrect premise and fails to appreciate the point being made about the justiciability of Socio-Economic rights. It is premised on the executive not fulfilling Socio-Economic rights as a norm, and therefore having to be compelled by the judiciary, as a norm, to do so. But that understanding of a right is erroneous, since the executive would not have the choice to ignore Socio-Economic rights if they are considered fully fledged rights.

3.2.3 Case Law

In this section I propose to discuss briefly some judgements South African courts have handed down on Socio-Economic rights in recent years. A number of the cases referred to here, were decided in terms of the interim constitution. Danie Brand suggests, however, that they "provide guidance on possible approaches to the interpretation of Socio-Economic rights in the 1996 Constitution".[34]

3.2.3.1 The Justiciability of Socio-Economic Rights

Chapter 5 of the interim constitution made provision for the writing, adoption and certification of the current constitution. In order for it to assume binding force, the current constitution had to be certified by the Constitutional Court for compliance with the constitutional principles enunciated in Schedule 4 of the interim constitution.[35] When the certification process of the constitution came before the Constitutional Court, a challenge to its validity was made on the basis that the inclusion of justiciable Socio-Economic rights in its text was at variance with the said constitutional principles, and in particular Principle vi.

The principle read: "There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness." The essence of the challenge was that a judgement that orders the state to do something by way of honouring a

Socio-Economic right winds down to judicial budgetary interference. Therefore it blurs the separation of powers as envisaged by constitutional Principle vi.

The Constitutional Court overruled the challenge, asserting that the judgements of the courts on a number of civil and political rights have the same effect.[36]

3.2.3.2 Education

Section 32(a) of the interim constitution provided that "[every person shall have the right] to basic education and to equal access to educational institutions". An order was sought from the Durban High Court, directing the University of Natal to admit a student to its medical faculty in terms of this section. The court decided that the term "basic education" does not include tertiary or higher education, and therefore declined the application.[37] Section 32(a) of the interim constitution, however, was held to create a positive obligation on the state to provide basic education to everyone. [38]

Section 32(c) of the interim constitution provided that "[every person shall have the right] to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race". The court was invited to determine whether the section imposed a positive obligation on the state to establish schools based on culture, language or religion, where practicable. The Constitutional Court ruled in the negative.[39]

3.2.3.3 Housing

Section 26 of the current constitution, dealing with the right to housing, has been referred to already. The Eastern Cape had a law prohibiting certain forms of settlement.[40] Section 3B of this law allowed for the summary demolition of unauthorised buildings or structures, and did not require a court order for this. The South Eastern Cape Local Division of the High Court was invited to pronounce whether such a law could survive Section 26 of the constitution. It answered the question in the negative.[41]

In *Uitenhage Local Transitional Council v Zenza and Others*[42] an eviction order was sought against people illegally occupying land owned by the Council. Section 26(3) of the constitution requires that the court must consider "all the relevant circumstances" in deciding a case like this. Floods in this case had destroyed the houses of the illegal occupiers and they had no alternative dwellings. It also transpired, however, that they had been "recalcitrant" in their dealings with the Council. The court decided that their recalcitrance, coupled with the fact that the land in question was needed in order to build houses for 8 000 people, outweighed the circumstances in their favour. Therefore the court authorised their eviction.

The Grootboom case[43] is arguably the most important case currently in so far as the right of access to housing is concerned in South Africa. The case went to the Constitutional Court by way of appeal against the judgement of Davis J., in which he had issued an order against the government. Davis had directed the government to provide shelter to the Children of the Applicants in terms of Section 28(1)(c} of the constitution. He further directed that the children concerned had the right not to be removed from their parents, the effect of which would have been to provide shelter to their parents as well.

On appeal, the Constitutional Court opined that it was wrong for the government not to have a policy on such matters. The court directed the government to provide applicants with basic sanitation facilities, water, and certain building materials. The court set a date by which its order must have been effected and directed the government to report to the Registrar.

3.2.3.4 Health

The two leading cases in this regard are *B and Others v The Minister of Correctional Services and Others* and *Soobramoney v Minister of Health, KwaZulu-Natal.*[45]

In the first case the applicants were prisoners. They were HIV-positive and approached the Cape High Court for an order directing the Department of Correctional Services to supply them with AZT. They relied on Section 35(2)(e) of the constitution, which reads:

Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

The court entered an order in favour of the applicants. It stated that, once it is established that any medication other AZT would be inadequate for the task at hand, it is no defence on the part of the state to say it does not have the money to supply the drug.

The second case went to the Constitutional Court by way of an appeal against a judgement of the Durban and Coastal Local Division of the High Court. Thiagraj Soobramoney, the applicant, suffered from diabetes, an ischaemic heart disease and had an irreversible chronic renal failure. He suffered a stroke as a result of

cerebro-vascular disease. The only treatment that could keep him alive was haemodialysis, and it was available at the renal unit of the Addington Hospital, Durban. Apart from Grey's Hospital in Pietermaritzburg, whose renal unit is very small, no other hospital in KwaZulu-Natal had dialysis machines.

The Addington Hospital had developed criteria for admitting patients to its dialysis treatment. *Inter alia,* the criteria stipulated that the patient must be eligible for a kidney transplant. Since Soobramoney had other ailments, which prevented him from recovery, he did not meet the hospital's criteria. Therefore he was refused admission to the hospital's renal clinic. Soobramoney did not have money to pay private clinics for the treatment. Neither did his relatives. He was on the verge of dying and approached the court - his prayer, as lawyers are wont to say, being that the court should direct the hospital and the Department of Health to admit him to the clinic at the expense of the state. He relied on Section 27(3) of the constitution, which reads: "No one may be refused emergency medical treatment." His counsel told the court, amongst other things, that Soobramoney had a life expectancy of another 15 to 20 years if he received regular dialysis.

In argument, the court put it to his counsel per Justice Albie Sachs that Soobramoney was competing for state resources with people dying from AIDS and TB and with children dying from lack of simple nutritional support. Aren't all these factors the court must attach weight to? Counsel for Soobramoney agreed, but reminded the Constitutional Court that he was also competing for state resources with people who are receiving benefits for non-life-threatening problems. The Constitutional Court ruled against him. The court reasoned that a chronic disease does not constitute an emergency within the meaning of the Bill of Rights even if it is life threatening. What was envisaged with the phrase "emergency medical treatment", the court opined, was something in the order of a sudden catastrophe, calling for immediate medical attention so as to avoid harm. The court, moreover, was satisfied that the hospital authorities had applied their mind properly on the criteria for admission to the clinic, and that it was not its place to interfere with the hospital's "rational decision". Soabramoney died shortly afterwards.

3.3 Socio-Economic Rights: The Stepsister of Civil and Political Rights?

Alston writes that Socio-Economic rights have been "the poor and neglected cousins of civil and political rights" for many years.[46] Should they have been?

In Chapter 2 I have argued that human rights are an expression of basic human needs, and that these needs are natural.[47] I have argued that civil and political rights, although their naturalness is not immediately obvious, are also an expression of basic human needs. In my view the connection between nature and

Socio-Economic rights is much more obvious than the connection between nature and civil and political rights. It is odd, therefore, that so much effort had to be laid out in justifying Socio-Economic rights whereas civil and political rights were embraced more readily. Upon serious reflection it becomes clear that calling the status of civil and political rights into question would in fact have had more conceptual integrity than calling the status of Socio-Economic rights into question.

In Chapter 2 and in this chapter I have referred to suggestions that, in the end, the full enjoyment of civil and political rights is in fact contingent upon the enjoyment of Socio-Economic rights. Denial of the right to health care, for instance, impacts directly and fundamentally on the right to life. When the United Nations General Assembly initially debated the ICESCR in 1950, the "socialist" states argued for the inclusion in the Covenant of an article on the right to work. They argued that the right to work is the cornerstone of modern society and that it is foundational to many

other rights, notably the right to life.[48] It has also been suggested that without shelter, food and education, not only is the right to life precarious, but that human dignity vanishes instantly. Karl Marx understood this only too well when he wrote:

> The premises from which we begin are not arbitrary ones, not dogmas, but real premises from which abstractions can only be made in the imagination. They are the real individuals, their activity and the real material conditions under which they live, both those which they find already existing and those produced by their activity.... The first premise of all human history is ... the existence of living human individuals. [The first historical act of these individuals distinguishing them from animals is not that they think, but that they *produce their means of subsistence.*][49]

It was only after people had overcome these subsistence problems, Ernest Mandel writes, that it was possible to free some from productive labour and assign specialised, though non-productive, duties to them. These included, indeed, governing others, which throws up the discourse on human rights as we know it today. Writes Mandel;

> The birth of the state is therefore the product of a double transformation: the appearance of a permanent social surplus product, relieving a part of the society from the obligation to work in order to ensure its subsistence, and thus creating the *material conditions* for this part of society to specialise in the accumulative and administrative functions; and a social and political transformation permitting the exclusion of the rest of the community from Che exercise of the political functions which had hitherto been everyone's concern.[50]

These views, it is important to state, were also well taken by Franklin Roosevelt as evidenced by his Four Freedoms Speech. In any event, the Vienna Declaration just about seals the debate on the status of Socio-Economic rights. Alston writes:

> A key principle of international human rights law is that all human rights - civil and political, as well as economic, social and cultural rights - are closely interrelated and of equal status. Practical experience has shown that it is erroneous to assume that if one set of rights is implemented, the other will follow automatically.[51]

The case law referred to in South Africa also seals the question whether

Socio-Economic rights are justiciable or not-they are. Bertus de Villiers writes:

> [T]here is general agreement in South Africa that the state, acting on its own and in partnership with the private sector, has a responsibility in fields such as housing, welfare, education and employment. The disputed question is whether the state could and should be placed under a legal obligation in terms of a Bill of Rights to undertake certain actions and develop assistance programmes or if it is purely a matter for legislative and political discretion to develop such programmes.[52]

It is only necessary to add that, after De Villiers had written about the disputed question referred to in the foregoing passage, the constitution indeed placed the state under a legal obligation to undertake such actions. And the Constitutional Court ruled that that is as it should be. Therefore, in my view, it is not correct and it never was, to view Socio-Economic rights as a stepsister to civil and political rights.

Footnotes

[1] US Information Service, n.d., *Living Documents of American History,* p. 71.

[2] Lindholt, *supra*, p. 30.

[3] See Gutto,1998, p. 86.

[4] *Ibid*.

[5] Ibid, pp. 86-87. See also Alstan, 1992, in Alston (ed.), pp. 474 & 485; Craven, 1995, pp. 194 -195.

[6] Gutto, *supra,* p. 87*,*

[7] Bokor-Szegö, *supra*, p. 20; De Villiers, in Van Wyk *et al, supra,* p. 603; Mbaya, *supra,* p. 68. It is noteworthy that there does not seem to be consensus even on the question whether there are two or three generations. Shadrack Gutto, for instance, speaks about a bipolar approach where the division is simply between civil and political rights on the one hand, and economic, social and cultural rights on the other. (Gutto, *supra*, p. 86.) And then writers like Asbjφrn Eide and Bernt Hagtvet noticeably omit to mention cultural rights in periodising human rights generations. It is further noteworthy that, where other writers speak about environmental rights, Asbjφrn Eide and Bernt Hagtvet speak about solidarity rights. Therefore there is still a lot of clarification required both about the classification of rights into generations on the one hand, and the content of the classes of rights as such.

[8] Mbaya, *ibid.*

[9] Bokor-Szegö, *op cit, loc cit*.

[10] Kumar C., South Wind: On the universality of the human rights discourse, in Lindholm, *supra*, p.133.

[11] Gutto, *supra,* p. 87.

[12] De Villiers, *supra*, pp. 614-621; Davis,1992, pp. 475 *et seq.*

[13] De Villiers, *supra*, pp· 606-607.

[14] Gutto,1992, *supra*, p. 91; De Villiers, *supra*, p. 623.

[15] Alston,1992, *supra*, p. 485, Bokor-Szegö, *supra*, p. 22; Eide, *supra*, p.11.

[16] O'Donovan, in Alston,1992, *supra*, p.119.

[17] See Alston,1992, in Alston, *supra*, p.195; Alston,1998, in ESR Review, p. 2. [18] Altson,1992, *supra*, p. 485.

[19] Alston,1998, *supra*, p. 3.

[20] Ibid.

[21] O'Donovan, *supra*, p.115.

[22] Alston,1992 *supra,* p. 486.

[23] When I use the word "unconditional" in this section, I use it in the sense that everyone is entitled to the right without regard to the resources commanded by the state and without regard to the circumstances of the specific bearer of the right.

[24] See De Villiers, in Van Wyk, *et al*.1994, p. 624.

[25] See Tigar & Levy,1977, p. 279; Pashukanis,1978, pp. 3 & 96.

[26] Tigar & Levy, *supra*, p. 154.

[27] *Ibid*, pp.172-173.

[28] *Ibid,* p.151.

[29] Quoted by Paton, *supra*, p. 83. Justice Frank, also of the USA, remarked that before there is a court decision on any issue, "[the only law available is] a guess as to what a court will decide" – *Ibid*. Paton believes that Holmes and Frank went a little too far in their formulation, since this has often led to the denial of the existence of any body of rules and to the view that all the law that exists is "a collection of [court] decisions". He prefers a formulation by Justice Cardozo, which is that "a principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged ... is a principle or rule of law." Apart from the reservation that people like Holmes and Frank go too far in emphasising the law-making power of the courts, Paton argues that many rules of law never go to court. To say that such rules - e.g. rules of administrative law - are not law would be absurd, Paton reasons.

[30] For a detailed discussion of the issue, see Hoffmaster,1982, pp. 21-55.

[31] It binds, in other words, the state as well as persons.

[32] *Section 36* requires that any such limitation be in terms of a law of general application; and that it be reasonable and justified in an open and democratic society based on human dignity, equality and freedom.

[33] *Section 43(a)* vests the legislative authority in Parliament. *Section 85(1)* vests the executive authority in the President. *Section 165(1)* vests the judicial authority in the courts.

[34] Brand,1998, p. 8.

[35] *Constitution of the Republic of South Africa Act, 200/1993/71(1)(a).*

[36] *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC).

[37] *Motala and Another v University of Natal,* 1995(3) BCLR 374 (D).

[38] *In Re The School Education Bill of 1995 (Gauteng)* 1996(4) BCLR 537 (CC).

[39] *In Re The School Education Bill of 1995 (Gauteng), supra.*

[40] *Prevention of Illegal Squatting Act, 52/1951.*

[41] *Despatch Municipality v Sunridge Estate and Development Corporation (Pty) Ltd 1997 (8)* BCLR 1023 (SE).

[42] 1997(8) BCLR 1115 (SE).

[43] *Irene Grootboomand Others versus Government of the Republic of South Africa and Others,* CCT 38/00.

[44] 1997(6) BCLR 789 (C).

[45] 1997(4} BCLR 1696 (CC).

[46] Alston, 1998, *supra*, p. 4.

[47] I am not concerned here with the question whether there is something like human nature or not, in the manner debated by Andrew Collier--c.f. *Scientific Socialism and the Question of Socialist Values* in Mepham & Ruben (eds), 1981, pp. 5-13. I am concerned only with the view posited in Chapter 2 that normal people want to do or have the things signified by the statements expressing human rights.

[48] Craven,1995, P. 195.

[49] Marx,1984, in Marx/Engels/Lenin, p. 17.

[50] Mandel,1979, p. 27.

[51] Alston,1992, *supra*, p. 2.

[52] De Villiers, in Van Wyk *et al*.,1994, p. 621.