

## CHAPTER SIX

### TAKING SOCIO-ECONOMIC RIGHTS SERIOUSLY IN SOUTH AFRICA

#### 6.1 Introduction

Of the different theoretical justifications for some type of social and economic justice to transcend apartheid, it had to be rooted in rights-based theory (van der Walt 2005:2). Possible redistribution strategies through economic policies (see Smith 1995:45-56) to equalise living standards was constrained by economic factors, for instance, it was not desirable to increase by threefold social spending in the budget. This places pressure on idea systems and institutions restructuring post-apartheid relations to be creative in realising rights when state fiscal resources are constrained.

Much faith has been placed on the constitutional framework to guide transformation, yet there is contestation about the promised rights. A broad field of social scientists, legal scholars, jurists, and rights activists reflect diverse positions about the transformative potential of rights discourse in South Africa, some are optimistic, others despondent, and some are vigilant observers about how a rights culture unfolds. Neocosmos (2006) argues the nature of human rights discourse is such it disables political thought; the state's dominance in shaping the discourse in line with its neo-liberal economic policies creates a passive citizenry who accept the state as a trustee of human rights it claims to protect, support and promote; and, without popular struggles, a citizenry does not further their emancipation by engaging in the discourse of rights:

“Human rights discourse becomes hegemonic during the absence or weakness of popular struggles, and not during their presence; the absence of popular discourses of democracy, their replacement by the platitudes of the state-liberal version, makes it possible for human rights discourse to be seen as the only

intellectual reference for a 'left' politics, a politics which cannot ultimately be enabling of an active citizenship." (Neocosmos 2006:358)

In this chapter I sketch how dependence on the realisation of socio-economic rights has unfolded in the sense that they are a crucial complementary force to the economic policy choices the state makes towards addressing the legacy of inequality. I sketch some major trends which influenced the inclusion of socio-economic rights in the Final Constitution. I also sketch a configuration of forces, organisations, and events that are key elements and moments in contesting the meaning of rights and advancing constitutional promises to socio-economic rights in the transformation agenda unfolding in the post-apartheid period.

## **6.2 Incorporating social and economic rights in the Final Constitution**

Rights discourse is an indelible feature of the history of the struggle against domination, oppression and exploitation in South Africa. After the Boer and British conquest of several African kingdoms led by traditional rulers in the nineteenth century, rights discourse became influential in the subjugated black people's struggle against colonial rule in South Africa, which ensued up to the era of mineral discoveries and an industrial take-off at the end of the nineteenth century. Africans educated in European colonial mission schools and familiar with Western political ideas observed both the loss of land and franchise as colonial administrations asserted control over black people. At the end of the nineteenth century, this educated and small trader class of African political activists formed political organisations and articulated their claims to "national rights", "African rights", "civic rights" and "political rights" in poetry and newspapers with a large black readership (Odendaal 1984:1-29).

Rights discourse influenced black liberation thought and opposition to white minority rule, political exclusion, and exploitation of blacks during the segregation period which followed the formation of the Union government in 1910. In 1908

white representatives of the four colonial territories drafted a charter which announced the terms of formation of a Union government. In 1909 the South African Native Convention (called the African National Congress or ANC from 1921) pleaded that the charter include a clause that *all* persons within the Union “be entitled to full and equal rights and privileges subject only to the conditions and limitations established by law alike to all citizens without distinction of class, colour or creed.” (Karis, Carter & Johns 1972:11, 53). Sol T Plaatje, a mission educated African journalist and novelist, wrote of the Union government’s passage of the *Natives’ Land Act of 1913* in terms of its deprivation of “bare human rights” (Plaatje 1982:32). The ANC responded to the Union government’s racial segregation policies by adopting an *African Bill of Rights* in 1923, which stated that Africans had rights to land, liberty, and equality in the Union of South Africa. The end of the segregation era and midway through the Allies’ war against the fascists in World War II, saw the ANC converge with international rights thinking and draft a new *Bill of Rights (or African Claims in South Africa)* in 1943, demanding the rights and freedoms in the *Atlantic Charter*. The ANC’s view was the *Atlantic Charter’s* rights claims must apply to all peoples of the world. President-General of the ANC, AB Xuma, described *African Claims* as a “Bill of Citizenship Rights”(Karis, Carter & Gerhart 1973:210). The ANC’s document contained a “Bill of Rights” demanding civil and political rights, specifically: freedom of movement, no pass laws, the right to trade and professions, to education, to own, buy, hire or lease property (ANC 1943; Karis, Carter & Gerhart 1973:217). ANC member, Kader Asmal, says at this stage the ANC was still engaged in protest actions against the white government, it advanced its strategy from petitions to the government to claims in line with international developments in “human rights” thought when it adopted *African Claims* in 1943, which included socio-economic rights:

“*Africans’ Claims in South Africa* asserted human rights, including socio-economic rights, women’s rights, and other rights, in ways that were far ahead of international developments.” (Asmal et al 2005:1)

In the apartheid period after 1948, rights discourse shaped the demands in

liberation documents. The ANC's *Freedom Charter* drafted in 1955, demanded civil, political, and socio-economic rights for all South Africans, for instance: "Every man and woman shall have the right to vote for and stand as a candidate for all bodies which make laws"; "All shall enjoy equal human rights"; "All people shall have the right to live where they choose, to be decently housed, and to bring up their families in comfort and security." (Asmal 2005:60-4) Rights became central to political thought and liberation goals for the ANC as many of its documents show (Asmal et al 2005).

The ANC took into the constitutional negotiations its thinking on socio-economic rights. Sachs (1990:7-9) observed most protagonists limited their advocacy to the first generation civil and political rights, even those who supported a Bill of Rights emphasised first generation rights. Few advocated inclusion of the second generation social, economic and cultural rights as in the United Nations Charter of Human Rights from the 1960s, making them "justiciable" rights. It was agreed the new constitutional order had to embrace symbolically a commitment to social justice, but there was debate whether to include social and economic rights in the Bill of Rights let alone in the Constitution, and whether to include these as justiciable rights in the Constitution or merely as "directive" principles for state policy. Sachs advised that the "fundamental constitutional problem, however, is not to set one generation of rights against another, but to harmonize all three" (Sachs 1990:8). Devenish (1999:357) says that the NP initially approved of a Bill of Rights specifically protecting merely civil and political rights.

Later, Sachs (1992) showed that the strategic approach when negotiating the terms of the new Constitution was not to push for a "maximalist" approach to rights, despite the appalling apartheid legacy. Sachs (1992:7, 12-13) felt a rights-based constitution would ensure that "never again" should the life of humiliation as under the previous regime occur there, and, "at the very least" a dignified life should emerge from the governance guidelines set by a new constitution:

"Perhaps we now face the greatest battle of all, the one not against an external enemy but against our own doubt and failure of confidence. We honour our past and all those who died and the

many who supported us, not by insisting on maximalist demands, but by using our imagination and combativity to insist on what was always our core objective, namely, the helping of the poor and the oppressed to achieve decent and dignified lives for themselves. If the constitution does not respond to that challenge, if it answers only to the anxieties of the rich, it is not a proper constitution.” (Sachs 1992:9)

Sachs (1992:9) accepted that the human rights doctrine coupled with political pluralism, representative democracy, rule of law and good government, over time, “in other contexts” have been deemed a conservative doctrine; nevertheless, there was confidence the doctrine could be an agent of revolutionary transformation in South Africa.

Today, it is recognised that market institutions cannot overcome structured inequality, and state organisations on their own cannot overcome this. Hence, it is important to include social and economic rights in constitutions:

“The main argument used for not including them in the constitution is that, unlike first generation rights, they cannot by their very nature be enforced by recourse to the courts; including them must raise false expectations and clutters the constitution with pious proclamations which dilute the firm guarantees required for the protection of first generation rights.” (Sachs 1992:31)

Subsequent to the finalisation and acceptance (certification) of the Final Constitution, Devenish (1999:359) argues that the three generations of rights are interdependent and indivisible. Furthermore, he continues, the realisation of the three sets of rights by their beneficiaries in South Africa need not be an evolutionary realisation of the three sets of rights: South Africa’s constitution makers compared and learned from global developments, and produced a constitutional formulation promising their simultaneous enjoyment.

Opposition to second generation rights points to their fiscal implications; they

require the state to perform actions using considerable fiscal resources and expertise in order that such rights be realised (see Haysom 1991, also Murphy 1992). Devenish (1999:358-9) reports that the Constitutional Court ruled in its certification of the Constitution, in instances when called to rule on civil and political matters this has implications for other branches of government as well as the budget.

Despite the remarkable progress of included socio-economic rights in a Bill of Rights, and making them justiciable, the writers of the Constitution favoured a minimalist state role consistent with neo-liberal discourse of rolling back the welfare state. Recognising socio-economic rights in the Constitution pressures the post-apartheid state to expand on the rudiments of welfare state type of services available to blacks (see Seekings 2000), but, in practice, there are other forces causing the state to be minimal in its commitment to social citizenship rights. Liebenberg (1998:41-3, 4) reports that the Constitution's authors were wary about placing too much burden on the state's capacity:

“During the negotiations process for the final Constitution it emerged that most of the political parties supported the inclusion of socio-economic rights in some form in the Bill of Rights. An analysis of the initial party submissions by the Technical Committee on the Bill of Rights notes that socio-economic rights such as the right to housing should be drafted in such a way that:

‘(a)they do not place an obligation on the state which cannot be fulfilled in terms of its resources and capacity;’”

Reflecting on the “*Grootboom*” Constitutional Court case of 2000, Sachs, who had become a Constitutional Court judge, tried to come to terms with why social and economic rights were placed in the Bill of Rights. He recalled that during the struggle years, black law students opposed a Bill of Rights as they anticipated this would protect white privilege and prohibit social and economic transformation. Their position was, he says:

“The Bill of Rights would defend the unjust socio-economic situation created by apartheid, guarantee property rights in terms

of which whites owned 87 per cent of the land and 95 per cent of productive capital, and impose extreme limits on the capacity of the democratic state to equalize access to wealth. Ultimately, the poor would remain poor, albeit formally liberated, and the rich would get richer, though technically not advantaged. ... the Bill of Rights would in effect be a 'Bill of Whites'." (Sachs 2003:582)

Sachs argued this was a narrow viewpoint of a Bill of Rights as an instrument that constraining government, and that it had to be opposed since rights should be broadly construed as being of three generations: first generation civil and political rights; second generation rights to housing, welfare, education as well as health entitlements; and third generation rights to a clean and healthy environment, peace, development, and social identity.

Sachs (2003:584) recalled that three discernible positions emerged during the period of the negotiations between the NP and the liberation movements and the attention given to the place of social and economic rights: first, those who saw such rights as aspirational and not for inclusion in the Constitution; second, those who favoured the inclusion of such rights in the Constitution but with the status of guiding principles and not enforceable in courts; and, third, those who favoured the use of appropriate language to make them justiciable as enforceable Constitutional rights.

The scope of the protected rights identified in a Bill of Rights steered other institutions like government departments and the judiciary to act to ensure that citizens would realise these rights. Sachs (2003:587) contends it is the task of the courts to ensure that respect for the dignity of every person is maintained at all times; the fundamental rights in a Bill of Rights is not merely about protecting the interests of the privileged but also to secure dignity for society's have-nots.

In response to whether the Constitution is libertarian or communitarian, Sachs (2003:590) contends that, due to the different generations of rights being interrelated, it prompts the Constitutional Court to be "dignitarian" in its

deliberations. His view is that the interrelated nature also resolves tensions between these different rights doctrines. He elaborates this with a hypothetical situation about what this means when a citizen not enjoying one or more of the constitutionally guaranteed social and economic rights and is left at the mercy of nature's forces, that person nevertheless has libertarian rights and is free to condemn the government. In his view a communitarian approach would mean that citizens are free to, as well as justified, in their actions if they decide to invade and occupy land to protest their non-realisation of the right of access to adequate housing and to demand housing from the state. The problem, however, he continues, is that the latter situation violates the private property rights of the landowner, and it also pushes land invaders ahead of others in the queue for state-provided formal housing. The Court thus acts in ways that uphold basic human dignity and their actions simply cannot be associated with or pegged to any single rights doctrine.

The alternative position in the debate was not to make them "justiciable" rights; rather, they should be "directive" principles of state policy. Thus socio-economic rights would be stated as entitlements, they would not be rights fully enforceable by the courts. Nevertheless, they would be pertinent to the interpretation of legislation, and, the separation of the powers of the state still permitted judicial review of the executive branch of government's responsiveness, performance, and accountability in giving effect to rights. In many contributions to the debate the doctrine of the separation of the legislative, executive, and judicial powers of the state as a way to deepen democracy was a prominent issue. Notwithstanding, the inclusion of the rights has become *de facto* with a number of cases going to the Constitutional Court (Pieterse 2004:383-6, 389, 399).

Particularly in the Preamble to the Final Constitution, "Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights" (RSA 1996), the characterisation of the Constitution as rights-based and of the "transformative" kind (Klare 1998:50; Sunstein 2001:67) is substantiated. The characterisation the Final Constitution as of the transformative kind means:



“By *transformative constitutionalism* I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.” (Klare 1998:150)

Sunstein (2001:67-8) adds that it does not seek to preserve the past “but to point the way to an idealized future”. It rejects the apartheid legacy and promises equal protection before the law for all, and to improve the quality of life for citizens. Other than the recognition of the right of all citizens to participate in periodic elections, the central aspect of the Constitution’s promise to facilitate a transition from a legacy of socio-economic inequality would be the role played by the recognition and realisation of socio-economic rights.

### **6.3 The configuration promoting a rights culture in South Africa**

The Constitution, the international human rights agreements that SA signs, Parliament and the legislation that passes through it, rulings made in the Constitutional Court, the functions of the South African Human Rights Commission (SAHRC), and the activities of non-governmental organisations (NGOs) as well as civil society organisations, comprise a larger configuration of institutions and structures expected to have some impact on contesting (Pigou et al 1998:8) the meaning of rights and state obligations, in nurturing a culture of rights in SA (Sarkin 1998:629), and ultimately redressing the legacy of inequality, one might add.

#### **6.3.1 The Constitutional Court**

The political and constitutional negotiations found agreement on the institution

of a bill of rights and a constitutional court. The Interim Constitution of 1993 provided for the creation of an independent Constitutional Court as part of the transformations which would make South Africa a constitutional state. This body would be “the ultimate protector of the new democracy and of minority rights and fundamental rights” (O’Malley 1996:177). The powers and appointment procedures of the Constitutional Court judges had been one of the important transitional negotiation issues (Spitz & Chaskalson 2000). Among its duties as the highest interpreter of the Constitution, the role of the Constitutional Court is clarified in s 167 of the 1996 Constitution. There were fears that such a body would undermine the doctrine of the separation of powers because appointed, unaccountable judges could intervene in public policy and effectively become legislators (O’Malley 1996:178). Some commentators on the appointments made to the Court emphasised the appointment of people with views aligned to the ANC and to the exclusion of eligible persons with political affiliations to the ANC’s political rivals (O’Malley 1996:186; van Huyssteen 2003:211-4).

Hirschl (2004:1-3) says democratisation in South Africa followed a similar worldwide process, namely, the transfer of significant powers from representative institutions to judiciaries. I would add that the position of the Constitutional Court’s justices possibly has effectively positioned them in terms of the “rarefaction of the speaking subject” (Mills 2003:61) that Foucault spoke of where certain agents are elevated to speak authoritatively, a practice that excludes or silences other discourses; Foucault framed the question thus:

“... [W]ho is speaking? Who, among the totality of speaking individuals, is accorded the right to use this sort of language ...? Who is qualified to do so? Who derives from it his own special quality, his prestige, and from whom, in return, does he receive if not the assurance, at least the presumption that what he says is true. What is the status of the individuals who - alone - have the right, sanctioned by law or tradition, juridically defined or spontaneously accepted, to proffer such a discourse?” (Foucault 1972:50)

The Technical Committee on Constitutional Issues, which prepared documentation and facilitated the negotiation discussions, recommended that “the judiciary shall be competent, independent, and impartial and shall have the power and jurisdiction to safeguard and enforce the constitution and all fundamental rights” (Spitz & Chaskalson 2000:191). In the ANC’s submissions it was important that a Constitutional Court be separate from the other courts because of the advantages of this system; its judges would be recognised for their expertise in constitutional law and their understanding of South African society; and its judges “would develop its own identity, legitimacy, rules and procedures.” (Spitz & Chaskalson 2000:193)

Given the importance of their role, constitutional matters are no ordinary legal issues and must be heard by a full bench of constitutional judges; these judges are noted for their superior qualifications and experience; their capabilities are above questioning, in the sense that they are neither affirmative action nor political appointees; and the extent of the President’s influence in their appointment has to be checked (Spitz & Chaskalson 2000:193, 195-6, 199, 209). The rituals and reverence associated with the Court and the selection of its highly experienced judges, acting as an independent judiciary as prescribed in a separation of powers of doctrine, still may not prevent the Court from subjecting itself to the dominant discourse on social and economic rights and the capacity of states to act in ways that citizens may enjoy these rights.

Hirschl’s argument is that these types of constitutional outcomes have a preservative nature: they protect the interests and hegemony of three types of elites. He notes how, in part, these elites favoured a trend to “juristocracy” in connection to a preference for neo-liberal economic policies thus:

“... threatened political elites who seek to preserve or enhance their political hegemony by insulating policy-making processes from the vicissitudes of democratic politics; economic elites who may view the constitutionalization of certain economic liberties as a means of promoting a neoliberal agenda of open markets, economic deregulation, anti-statism, and anticollectivism; and

judicial elites and national high courts that seek to enhance their political influence and international reputation.” (Hirschl 2004:43)

In South Africa’s political transition, guarantees of property rights and land reform were two key areas the negotiating parties dealt with (Hirschl 2004:94-5) when negotiating the contents of a bill of rights and the role of the judiciary. These issues continue to impact the post-apartheid housing rights, and are issues the judiciary have attempted to resolve.

Resolving these issues is framed by the broader tradition of legal reasoning established in the Court. Contestation in courts is crucial in a context where the obligations of government in the realisation of rights are not always concrete. The Court is deemed at an early stage of its evolution in making decisions on citizen’s rights as well as disputes between organs of state, or, as Scott and Alston (2000:206) say: “...the Constitutional Court [will] gradually feel their way forward in the adjudication of social rights”. Since the enactment of the new Constitution in 1996, a few notable cases on social and economic rights took the “justiciable” route and went to the Constitutional Court (Steinberg 2005; Wesson 2004:284). These include *Soobramoney v Minister of Health, KwaZulu-Natal* in 1997 (CCT32/97), *Government of South Africa and Others v Grootboom and Others* in 2000 (CCT11/00), *Minister of Health and Others v Treatment Action Campaign and Others* in 2002 (CCT8/02), *Khosa and Others v Minister of Social Development and Others* in 2004 (CCT12/03). Although, chronologically, the *Soobramoney* case precedes *Grootboom*, Wesson (2004:285) asserts that the *TAC* and *Khosa* judgements draw on the *Grootboom* judgement which appears to be the foundation of future socio-economic judgements.

#### 6.3.1.1 *Soobramoney: the right of access to health care services*

Mr Thiagraj Soobramoney, an unemployed 41-year-old diabetic with heart disease, developed chronic renal failure, and required dialysis treatment three times a week. His multiple diseases condition disqualified him for a kidney transplant in terms of the resource-rationing policy of a state hospital in

KwaZulu-Natal, which consequently discontinued his state-funded renal services. He exhausted his financial resources and could no longer pay for dialysis treatment. Although he wished to present his case for state-funded dialysis treatment as an “everyone has a right to life” issue as held by s 11 of the Constitution, the Constitutional Court heard the issue as a s 27 matter --- a “right to health care” matter.

Soobramoney argued that persons suffering from terminal illnesses and whose life could be prolonged were entitled to such emergency medical treatment in terms of s 27(3), which held: “No one may be refused emergency medical treatment” (RSA 1996). He had a particular view of the State, its obligations, and capacity to create the funds or resources to be of service to people in his situation; he argued that the State must make additional funds available to the renal clinic. The Constitutional Court determined it was a s 27(1) and s 27(2) matter. It pointed out that the State’s obligations are qualified by the preceding clause s 27(2), “within its available resources”. The summary of Mr Soobramoney’s claim runs as follows:

“Appellant based his claims on section 27(3) of the Final Constitution which provides that “no one may be refused emergency medical treatment” and section 11 of the Final Constitution which provides that “everyone has the right to life.”

...

“Appellant had contended that patients who suffered from terminal illnesses and required treatment in order to prolong their lives were entitled in terms of section 27 (3) to be provided with such treatment by the State. The State was obliged to provide funding and the resources necessary to discharge that obligation. Section 27 (3), so it was argued, should be construed consistently with the right to life entrenched in section 11. This required it to be read as meaning that everyone requiring life-saving treatment who was unable to pay for such treatment was entitled to have the treatment provided at a State hospital without charge.” (BCLR

1997(12):1697)

The justices' majority judgement acknowledged that the Constitution sought to address a legacy of disparities in wealth but the state's obligations were constrained by the extent of its resources:

“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. These conditions existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”

...

“What is apparent from these provisions is that the obligations imposed on the State by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which section 27(3) must be construed.” (BCLR 1997(12):1700-1)

It is clear the justices accept that even if the right was not qualified (“within its available resources”), the state would still not be able to meet the obligation, and there is a rationality about which state organs use their resources. It was precisely the provincial health department's resources position about the rationality behind the use of its available resources which had swayed the High

Court judge --- a decision the Constitutional Court supported. Moellendorf's (1998:330) assessment of the *Soobramoney* judgement avers that the justices were mindful of the State's fiscal position; they were wary of the pressures on the provincial health department's resources; it had overspent its current budget with the expectation of future overspending. The judgement noted the State's position on its available resources:

"At present the Department of Health in KwaZulu-Natal does not have sufficient funds to cover the cost of the services which are being provided to the public. In 1996-1997 it overspent its budget by R152 million, and in the current year it is anticipated that the overspending will be R700 million rand unless a serious cutback is made in the services which it provides." (BCLR 1997 (12):1704)

President of the Constitutional Court, Justice Chaskalson remarked:

"One cannot but have sympathy for the appellant and his family, who face the cruel dilemma of having to impoverish themselves in order to secure the treatment [Soobramoney] seeks in order to prolong his life. The hard and unpalatable fact is that if [Mr Soobramoney] were a wealthy man he would be able to procure such treatment from private sources; he is not and has to look to the State to provide him with the treatment. But the State's resources are limited..." (BCLR 1997 (12): 1706)

The justices noted that extending the availability of the dialysis machines meant additional costs in overtime wages and putting stress on machines that were showing signs of wear (BCLR 1997(12):1705 para. 28). Justice Sachs provided a deft statement of the Court's unwillingness to question the state's apportionment of its resources towards realising socio-economic rights:

"If resources were co-extensive with compassion, I have no doubt what my decision would have been. Unfortunately, resources are limited, and I can find no reason to interfere with the allocation undertaken by those better equipped than I to deal with the agonising choices that had to be made." (BCLR 1997(12):1714)

The penurious Mr Soobramoney's appeal was unsuccessful; he died three days after the Constitutional Court handed down judgement.

Although the issue dealt with a provincial health department's reasoning about its rational use of its available resources, the case does indicate the Court's views on the state's national budget allocations; the Court refrains from challenging the state on the rational allocation of resources because it believes the argument that state resources are limited, if judges were to force a state to realise one right it comes at the expense of other services and of other people seeking to enjoy the same right, furthermore, judges do not have the expertise to decide on the state's priorities. Following the *trias politica* principle, the Constitutional Court justices declined ("slow to interfere") to probe the state's rationality about the use of its resources:

"[29] 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."

Law scholar Pierre de Vos grasps the difficulty which state bodies encounter when rationalising only their health budget, let alone the allocations to realising other positive rights competing for fiscal resources too:

"In *Soobramoney* the applicant sought an order compelling the KwaZulu-Natal health department to provide him with access to extremely expensive dialysis treatment at a time when many poor people in that province had little or no access to any form of even primary health care services." (de Vos 2001:259-60)

6.3.1.2 *Grootboom: the right to have access to adequate housing*



This case involved people from squatter camps who had applied for low-cost municipality housing and were on waiting lists for years. Mrs Irene Grootboom and a group of indigent homeless squatting complainants (390 adults and 510 children) moved out of one overpopulated squatter settlement to occupy an area they believed was vacant land and called the place “New Rust”. They were evicted (in a manner that Constitutional Court Justice ZM Yacoob later described as “reminiscent of apartheid-style evictions” (BCLR 2000(11):1178), and appealed to the High Court (*Grootboom v Oostenberg Municipality and Others*).

The High Court judgement referred to the Constitutional Court’s ruling in *Soobramoney* on the argument about the rational use of available budget resources by provincial health authorities; it ruled that the local authorities did have a rational housing programme within the means of its available resources and the courts should not judge on the suitability of such rational programmes. Some temporary relief came for the squatters because the High Court made a ruling in terms of s 28(c), that children have an unqualified right to shelter. The judge ruled that the children being protected thus could not be separated from their parents; this compelled the authorities to provide emergency relief for these homeless people. In turn, the various branches of government later appealed to the Constitutional Court. A summary of the appellants’ case to the Constitutional Court reads:

“Respondents had based their claim firstly on section 26 of the Constitution (which provides that everyone has the right of access to adequate housing and imposes an obligation upon the State to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources); and secondly on section 28(1)(c) of the Constitution (which provides that children have the right to shelter).” (BCLR 2000(11):1170)

Furthermore, the summary and Justice Yacoob’s words indicate another aspect of the states’ obligations in the wording of the right, that it is about the right of

“access to”; to a small measure the case touched on the notion of what constitutes “adequate housing”; that housing programmes are effected by the availability of land; and it made an issue of whether the state was solely responsible for this obligation, or more of a facilitator of the conditions for the realisation of the right:

“The right delineated in subsection (1) was a right of “access to adequate housing” as distinct from the right to adequate housing encapsulated in terms of the International Covenant on Economic, Social and Cultural Rights. This difference was significant. It recognised that housing entailed more than bricks and mortar. It required available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions must be met. There must be land, services, and a dwelling. Access to adequate housing also suggested that it was not only the State which was responsible for the provision of houses, but that other agents within society, including individuals themselves, had to be enabled by legislative and other measures to provide housing. The State had to create the conditions for access to adequate housing for people at all economic levels of society.” (BCLR 2000(11):1171, 1189)

The Constitutional Court decision, *Government of the Republic of South Africa and Others v Grootboom and Others* in 2000, was based on a deliberation of s 26; it ruled the homeless people’s appeal in terms of the right of access to adequate housing provided through the state’s resources unsuccessful. However, Alston and Scott (2000:207-211) add an interesting point about how the homeless may use the law and the Constitution; their analysis of the earlier High Court decision suggests how promising the Constitution may be with bringing interim relief to homeless people waiting to realise housing rights. They contend the High Court acted in a creative manner by deciding in favour of the children’s right to shelter (s 28) thereby securing a measure of interim relief for

the desperately homeless people. Nevertheless, eyewitness accounts (van Huyssteen 2003:295) report that one year after receiving materials for such relief, the community still lived in deplorable conditions and with a sense of being abandoned by the Court. Irene Grootboom died in 2008, still living in a shack and waiting for an RDP house (Joubert 2008a).

While jurisprudence on these rights is still developing, the Court once again revealed its deliberations and decisions are hemmed in by the principle of fiscal limits to the state's social spending, which influenced the Constitution's architects when choosing language on how the state would meet its obligations on the realisation of positive rights. The Court's ruling in *Soobramoney* clarified its understanding of the "within its available resources" clause of the Constitution, or s 26(2). Justice Yacoob declared:

"the obligation does not require the State to do more than its available resources permit. This means that both the content of the obligation 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." (BCLR 2000(11):1192)

Justice Yacoob noted, however, that although there was a nationwide housing programme, it did not take into consideration that some homeless people were desperate; he suggested that part of the national housing budget be set aside for such instances (BCLR 2000(11):1201). His suggestion appears to be that desperately homeless could use the law and courts to get faster relief.

Justice Yacoob also pointed out that although SA had signed the *International Convention on Economic, Social and Cultural Rights* (ICESCR), there was a difference in the wording of the ICESCR and SA's constitution on the obligation of states towards the realisation of socio-economic rights. The ICESCR provided for "the right to housing", making it absolute and unqualified. However, the SA Constitution acknowledged "the right of access to housing" (BCLR 2000(11):1186). This is a qualification of the right, dependent upon the state

demonstrating that it was taking “reasonable legislative and other measures” which would enable it “to achieve the progressive realisation” of the right to housing, and that this was dependent on its “available resources” (BCLR 2000(11):1190). The judgement was influenced by the precedent in the *Soobramoney* case, and, arguably, it comes down to accepting the fiscal limits of the state: rather than promise the right to housing as though the state’s resources are unlimited, by promising the right of access to adequate housing there is acknowledgement of the fiscal limits of the state.

Sachs (2003:580) says the *Grootboom* case is regarded as “at the cutting edge of world jurisprudence”, because of the question the case raised: “could social and economic rights be regarded as fundamental rights enforceable directly by the courts, and if so, how?” As to the influence of the various rights philosophies, as mentioned earlier, in Sachs’s opinion the approach the Court adopted in the *Grootboom* case was neither libertarian nor communitarian, but “dignitarian” (Sachs 2003:590).

Steinberg (2005) personifies this as the Government becoming wary it was having difficulties meeting the obligation to house everyone “in the long run”, and further contestation in the Constitutional Court would emerge. It was apparent that while the state progressively built up its resources, claims of the homeless to the right to housing and the actions they resorted to encroached on other people’s right to private property and land. In 2004, the case of *Port Elizabeth Municipality v Various Occupiers* and, in 2005, the case of *President of the Republic of South Africa and Another v Modderklip Boerdery and Others*, were about the eviction of squatters from private property. Judgements here were guided by s 27(3) of the Bill of Rights and the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998* (also called the “PIE Act”). Arguably, these judgements affect the approach to socio-economic rights since the issue of the pace of the state’s use of its resources to provide adequate housing was raised again and the manner in which the Constitution approached the interrelationship between land hunger, homelessness and respect for property rights. In the latter two cases the Court upheld that private property

rights will be protected, and that homeless people or evictees could not demand of the state immediate fulfillment of the right to adequate housing, furthermore, the Court would not demand such action by the state.

In retrospect, Wesson (2004:285) argues the *Grootboom* ruling laid the basis for the future adjudication of socio-economic rights. Steinberg's (2005) analysis of the Constitutional Court portrays it as 'crafty'; it would not budge on its approach that individuals cannot demand housing because, he says, it feared a cascading effect; in effect, people would have to be patient with the state's rational use of its available resources. However, de Vos (2001) argues the judges' decision in the *Grootboom* ruling indicates that the judges were taking seriously the rights recognised in the Bill of Rights' promise to be a transformative instrument by the fact they endorsed the claim of the homeless people in that case. This means the Constitution was an instrument developed in a particular social, political and economic context that required transformation and achieving equality, that the Constitution would have to be reinterpreted as these conditions themselves changed. One central aspect of the state's housing policy that would come under scrutiny as a consequence of the *Grootboom* judgement was that the state's housing policy entailed taking "reasonable and other legislative measures" as held in s 26(2) to meet the housing needs of all categories of homeless people, the state would have to demonstrate that its plans and use of available resources was to achieve the realisation of the minimum core of a rights entitlements (de Vos 2001:272-3). Furthermore, Wesson (2004:294) adds, the ruling shows the Constitutional Court accepts it is not qualified to dictate to the state how it should spend its money on long term plans and short term needs, and that it will only give the state guidelines in such instances.

#### *6.3.1.3 The Treatment Action Campaign: the right of access to health care services*

In 2002, the case of *Minister of Health and Others v Treatment Action Campaign and Others* was initiated by one of the most well-organised civil society organisations, the Treatment Action Campaign (TAC). TAC opposes the national

health department's policy on the link between the Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS). It has challenged the government's neo-liberal approach to health care policies (see Forrest 2003), and has attempted to use protest and constitutionally guaranteed rights to effect the constitutional promises to equality through court challenges (Friedman & Mottiar 2005).

This case was about the right of access to health care services (s 27), which the TAC had earlier brought to the Transvaal High Court. Specifically, the TAC demanded that the government make available in state hospitals the drug, Nevirapine, which is used by pregnant women in the prevention of mother-to-child transmission of the Human Immunodeficiency Virus. The High Court ruled that the State health authorities had to make the drug available to pregnant women with HIV who gave birth in public health facilities, as well as to their babies. In these hearings the matter of the separation of executive and judiciary powers became an issue. The government departments felt that the civil society group was asking the Court to make a policy choice whereas the Court should only rule on whether that department's policy to gradually realise the enjoyment of the right was reasonable.

Wesson (2004:296) argues the *TAC* case goes beyond the *Grootboom* case because it extended individual rights to a particular group. With regard to the state's fiscal limits, Wesson (2004:296) notes there were limited cost implications to extending this entitlement and, the Court was guided by the *Grootboom* approach in the sense that the state take reasonable measures in availing this service.

#### 6.3.1.4 *Khosa: the right to have access to social security*

In 2004, the cases of *Khosa v Minister of Social Development* and *Mahlaule v Minister of Social Development* were about the rights of persons who are not citizens but "permanent residents" to claim social security inscribed in s 27, as well as the equality of such persons with other citizens in the enjoyment of rights

held in the “Equality” clauses of s 9 of the Bill of Rights. The judgments in these cases found that the omission of the words “or permanent resident” in the Equality clauses was inconsistent with the Constitution. Although the challenge concerned one of the constitutionally guaranteed socio-economic rights, it was not about the meaning of the right, rather, it was about who may enjoy the right.

Noting the constitution’s weak statement of the state’s social rights obligations, one question I sought to answer was: does the judiciary’s adjudication of these rights still function to protect the hegemony specifically of the economic elite, despite the latter’s outwardly transformed non-racial appearance? It may be possible to pronounce on the outcomes of adjudication in terms of the consequences of rulings on the class interests of affected parties. The class, income, and indigent circumstances of the appellant in the *Soobramoney* case, the community in the *Grootboom* case, and the intended beneficiaries in the *TAC* case raise questions about the qualitative changes a constitutional order has meant for poorer segments of society and their dependence on positive state actions. Unfortunately for Mr Soobramoney there was no creative interpretation of the law to bring him emergency medical relief as happened in the *Grootboom* case, where similar issues of a rational use of available resources could be proven, but a creative interpretation of the law found emergency relief for a number of homeless people not immediately targeted to enjoy the right of access to housing. The *Grootboom* judgement, while dealing with housing, is argued (Fast Facts no.3 2001:2) to have further implications for evolving thinking about the realisation of socio-economic rights. Apparently, two reasons are very prominent. The first is people were informed they were not entitled to demand housing, or any other socio-economic right, from the state. The second is government was compelled to act “positively” to ameliorate poverty and deprivation. Wesson (2004:297-9, 305-7) feels the interpretations of the law in *Soobramoney* and *Grootboom* still leave society’s most vulnerable unprotected and, to advance from this, it is for the courts to incorporate the notion of “minimum core” in their judgements as used in the ICESCR which entails the minimum essential levels a state must attain in allocating resources towards the realisation of socio-economic rights. However, Justice Sachs (2003) recalls that

when the *amicus curiae* ('friend of the court') in the *Grootboom* case, the SA Human Rights Commission, begged the judges to make a decision based on the ICESCR's concept of a minimum core, the judges did not reject the notion, they merely declined because they felt the language of the Constitution expresses itself sufficiently and is an adequate guide; furthermore, there was no clear evidence of what such a minimum core entailed.

#### 6.3.1.5 *The Constitutional Court in the larger social structure*

Patrick Bond, a prominent partisan in the "new" social movements, offers a very unsympathetic appraisal of the Constitutional Court and its decisions. His appraisal is not restricted to the constitutional clauses which delimit the actions of the Court, such as s 167 (3) (b), which states that the Court may decide only on constitutional matters and issues connected with decisions on constitutional matters (RSA 1996). His appraisal also gives credence to Hirschl's (2004:43) argument that the global swing to "juristocracy" was because the "juristocracy" would protect the neo-liberal framework that economic elites are comfortable with. Bond's appraisal is tied to a critique of the ANC-led government's neo-liberal economic policies; it is a social structural approach which is not hemmed into the *trias politica* idea of separating the powers of the state where judges accept the executive performs its task in terms of a rational use of available resources. He feels, despite the fact that SA has a constitution promising socio-economic rights, the judges are afraid to challenge the state's neo-liberal policies. He reiterates the view of new social movements activists that first generation civil and political rights are abused by the police when communities mobilise for the realisation of socio-economic rights, and notes that neither President Mbeki nor the Constitutional Court judges make any subsequent comments about the protesters' first generation rights being curbed. Bond (2004a) bears no illusions that the inclusion of socio-economic rights places leftward pressure on the elite transition; he feels the Constitution is a "tattered" document because the judges do not take a stand against the government's neo-liberal policies. Furthermore, neither the judges nor President Mbeki condemned the arrests of Anti-Privatisation Forum protesters marching against



the installation of pre-paid meters in central Johannesburg on the same day that the new Constitutional Court buildings were being opened close to the march.

Disappointment about the Constitutional Court's socio-economic rights jurisprudence must be seen in terms of the larger social structural context in which the Court acts and overwhelms the transformative potential of rights:

“Rights-talk is empowering in that it affirms the inherent dignity of rights-bearers and awards political legitimacy to their demands for the satisfaction of their, otherwise overlooked, material needs. However, the transformative potential of rights is significantly thwarted by the fact that they are typically formulated, interpreted, and enforced by institutions that are embedded in the political, social, and economic status quo.” (Pieterse 2007:797)

The judges deliberation on socio-economic cases does not reflect on the political circumstances of the elite transition, the consequences of the ruling elites' choice of neo-liberal economic policies, and the unemployment and poverty caused by those policies, although they acknowledge there is an unemployment problem effecting the chances of the homeless to acquire housing. Pieterse's position is close to that of Brian Fay's (1975:94) interpretation of a critical social science which criticises the structure and institutions of capitalist society to explain how it predetermines social agents' actions and their outcomes, and the critical analysis of discourses approach which uncovers the systems of social relationships determining people's actions and their unanticipated consequences.

### 6.3.2 The South African Human Rights Commission

The South African Human Rights Commission (SAHRC) is one of the independent “Chapter 9” institutions created to support or strengthen constitutional democracy. Its functions are to:

“184. (1)(a) promote respect for human rights and a culture of

human rights;

(b) promote the protection, development and attainment of human rights; and

(c) monitor and assess the observance of human rights in the Republic.” (RSA Constitution 1998)

Much is expected of the SAHRC in terms of educating the public about human rights and suggestions are advanced of how this could be achieved through co-operation with educational institutions and civil society groups. Through gathering information for its annual reports the SAHRC has built up an archive of information on the government’s achievements on social and economic rights, however, it only makes this information available to the public in a filtered form in its annual reports. Thereby, it may be constricting the extent of civil society comment on and intervention in second generation rights matters, and thus offering an alternative interpretation of the meaning of rights (Sarkin 2001:30-1). The Commission itself also complains of the failure of government departments to submit information required to compile the annual socio-economic achievement reports, and it feels there is poor cooperation from government departments with helping the Commission to finalise complaints it pursues in terms of the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*, which it is a custodian of (SAHRC 2006:8-9).

To its credit as an independent monitor of the government, the SAHRC has hardhitting criticism of government’s poor performance about realising housing rights (SAHRC 2001:301), and also of its failure to meet the needs of the poor, the sick, households in needs of grants, and without access to drinkable water (Tabane & Sefara 2003). Common themes which emerge in its criticisms of the lack of delivery on these rights state that government’s failure to the poor is not because of lack of funds but because its promises to deliver are undermined by under-spending, maladministration and (Tabane & Sefara 2003)

Some commentators argue the government is seeking to restrain the SAHRC through a strategy of underfunding forcing it to look elsewhere for funding

(Cullinan 1996; Southall 2000:162). The SAHRC with other Chapter 9 bodies receive R2 billion to R3 billion (Ensor 2007a) but these bodies are targeted for restructuring to reduce costs in terms of a multiparty report submitted to the National Assembly in June 2007. The committee's probe into these bodies includes the examination of their performance, budgets, methods of appointments, efficiency, the high salaries of their officials, their internal governance, and their accountability and reporting activities (Ensor 2007). The committee aims to rationalise the SAHRC's total of 17 commissioners. There appears to be duplication in the work of Chapter 9 bodies and their proposed amalgamation would overcome this; and, Deputy Justice Minister Johnny de Lange, a member of the multiparty committee, expressed concern that some commissioners sat on civil society structures whereas they were expected to be neutral agents with respect to both government and civil society (Ensor 2007a). It is still too early to contemplate how this proposed rationalisation will impact the SAHRC's contribution to rights discourse in South Africa.

While SAHRC employers feel their monitoring role remains important to the enforceability of socio-economic rights, it faces the challenge of finding finances to monitor the implementation of rights (Mokate nd). Being a constitutionally created body to further democracy, SAHRC commissioners are distressed they have to seek funding in order to fulfill their mandate (McClain 2002:9): the Canadian, Finnish and Norwegian governments funded three of the SAHRC's annual reports on socio-economic rights (Newman 2003:210). Although the problem of poor response by governments to its protocols has been a problem in compiling its annual reports, it might be conjecture, but this funding situation may have influenced its decision (SAHRC 2007:iv, 9) to produce its detailed socio-economic reports every three years instead of annually.

The extent of SAHRC powers and actions remain unclear. It has subpoena powers, and can take government departments to court in order to get them to supply information required in its questionnaires or protocols. But its not clear what it can do, especially when government departments say lack of delivery is due to capacity problems. The SAHRC acknowledges improvements need to be

made to state departments; sometimes there is no response to the protocols because a state official tasked to do so was on leave. It appears the resolution is something needs to be done within state departments. My SAHRC informant (Interview: C Mphephu), acknowledged its not a “heads will roll” type of situation, which might inject improved efficiency, when they subpoenas state departments. An intimidatory use of subpoenas is also advised against (see Klaaren 2005:549), because it may create a confrontational interaction between the SAHRC and government departments whereas the SAHRC could dialogue with state departments and influence policies.

It appears the SAHRC may become hamstrung, both administratively and operationally, and its mandate may be restricting its impact. These internal issues constrain the organisation advancing a human rights culture:

“...the human rights agenda of the SAHRC must be examined and redirected. The present focus has been criticised for focusing on the “softer” human rights issues and ignoring core, major and difficult human rights issues with major relevance for South Africa. For example, the United States State Department in its South Africa Country Report on Human Rights Practices for 1998, noted that the SAHRC’s “operations have been hampered by red-tape, budgetary concerns, the absence of civil liberties legislation, several high-level staff resignations, and concerns about the Commission’s broad interpretation of its mandate”. The agenda of the SAHRC ought, therefore to be re-prioritised to tackle far more pressing issues than are presently focused on.” (Sarkin 2001:32)

The Black Sash has a long track record of working to realise socio-economic rights such as access to pensions as well as violations thereof. It has experience of co-operating with the SAHRC; it says, because the SAHRC is only a monitoring body, it is ineffective to do work the Black Sash does about such rights (Black Sash 1996:13; 1999:1). Despite its high profile and incisive criticisms of the failings of the state, the view that the SAHRC as a monitoring body on achievements around realising social and economic rights amounts to

a toothless watchdog is increasingly propagated in some circles: its conference on extending socio-economic rights “failed dismally to come up with any meaningful resolutions.” (Bunsee 2002)

### 6.3.3 International agreements on economic and social rights

The state appears to be the main player in realising social and economic rights. But its actions are not only prompted by class struggles or other organised pressure groups in society. The state’s willingness to bargain around rights must take cognisance that international forces play a role in shaping its willingness. Sociologist David Held (1984:68-9) argues state theorising focuses on domestic forces shaping a state’s actions, noting this theorising would gain from Theda Skocpol’s approach which considers international forces too. Although Skocpol (1979:32) was making a point about the breakdown and building of states during revolutions, her theorising of how the state operates in an international system of states entailing expectations, rewards and challenges, of how such international conditions and pressures shape the nature of the administration and policies of states, does offer instructive insight into how international conditions or pressures compel state leaders to use available resources. Arguably, in my thesis, it would be that state leaders cannot always decide autonomously on the use of available resources given the performance pressures of international conventions leaders feel compelled to sign.

International rights treaties and covenants exert certain pressures on states in terms of their policies and administration of rights. By 1999, 130 states had ratified the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) of 1966 (Devenish 1999:359). In 1994 ANC government leaders signed the ICESCR, the *International Covenant on Civil and Political Rights* (ICCPR), and the *Convention on the Elimination of All forms of Racial Discrimination*, demonstrating commitment to social and economic justice (Sarkin 1998:635-6; Seleane 2001:3). Parliament has yet to ratify the covenant, a similar approach taken by many governments and their national assemblies.

Essentially, government aims to bring its laws in line with and submit reports to the ICESCR, but is still not full party to the ICESCR (Pillay 2002:3; Seleokane 2001:2, 40). Craven's (1995:57) study of the ICESCR notes Article 16(1) obligates member states to submit reports to a UN committee on the measures adopted and the progress in achieving the specified rights, however, there appears to be poor compliance reporting. Poor compliance and enforcement by the ICESCR committee suggests the negligible impact of these instruments. Reporting to the ICESCR Committee on a signatory's achievements, as the SA foreign affairs ministry has done, has no implications in terms of questioning a signatory's interpretations and policies on socio-economic rights. It is an example of an international treaty weak in enforcement, it has no complaint procedure which would result in some forms of pressure on signatories, all signatories need report is they have adopted measures with results that meet their obligations to "respect", "protect" and "fulfill" specific rights (Ontario Human Rights Commission nd:8-9). In essence, these are undoubtedly the same Constitutional goals the SA government can self-congratulatorily claim it has sought to achieve through its housing policy, legislation, budgets, and courts. It also appears that international pressure on a signee state can still be skirted by the way recognition of a right is qualified in its own constitution: in the *Grootboom* case, Justice Yacoob highlighted how a difference existed between the ICESCR obligations and SA's constitutional statement of its obligation on the right of access to housing.

Leary (1990:18-21) argues Western philosophical thought dominated conceptualisations of rights in international covenants since the beginning of the twentieth century. Unsurprisingly, the *Universal Declaration of Human Rights* (UDHR) of 1948 reflects the individualistic and private property bias found in the US Constitution, although there is a concession to some communal forms of property ownership; Article 17 of the UDHR states:

"(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property." (in Lewis 2003:455-6)

Recognition is given to social and economic rights in the UDHR, but by the

1960s and the drafting of two international covenants that have succeeded even earlier attempts by the League of Nations, the ICCPR and the ICESCR, the now independent former colonies came to play a significant role in broadening the catalogue of citizenship rights (Leary 1990:17-21). Leary (1990:26) argues that the separation of these different generations or realms of rights in two covenants may serve to entrench minimising the importance of second generation rights, reducing them to “demands” or “claims” rather than entitlements. Initially, individuals or organisations could report violations of rights in the ICCPR to its committee. But the ICESCR did not provide such a system for individuals and organisations to file complaints, it merely requested that reports be submitted to the UN Economic and Social Council.

By being a signatory to international human rights treaties and the obligations on signatory states, theoretically, it would appear that states are drawn closer to the patterns of organisation of European welfare type states when developing policies and institutions to meet these obligations. Such treaties make up another factor in the configuration nurturing the development of a human rights culture and shaping the structures and institutions that subsequently emerge. Bayart (1993:8) argues that African states which sign international treaties, such as the ICESCR and ICCPR, find pressure placed on them to mimic and engage in budget allocations where the pattern of increasing proportions on social spending is characteristic of the welfare states of Europe and the standards of social justice that they aspire to (also Berting 1990:190, 197-201). This observation also applies to leaders of the post-apartheid state. By signing the ICESCR the duties of the state to realise social and economic rights are increased and the rights specified in the ICESCR are contained in the SA constitution (Fast Facts no.4 1998: 4). It, however, remains an open question of whether the SA state has been affected by such obligations. Other problems emerge too as it is not clear what is meant when the Constitution obliges courts to “consider international law” when interpreting the Bill of Rights. Although Justice Yacoob had done so in the *Grootboom* case, he had to point out the differences in the way the right to housing is qualified in the SA constitution.

#### 6.3.4 Civil society organisations

The ANC played a major role in the negotiations for political transition, but the actions of a variety of civil society organisations had been a major contribution to ending the apartheid government (Greenstein, Heinrich, Naidoo 1998:iii-iv). At the onset of the political changes of the 1990s civil society groups contemplated what role was left for them after the end of the apartheid regime. Civic organisations were prominent opponents in black townships against local government on housing shortages, issues of rent increases, and poor social services. In the last few years of the reforms initiated by PW Botha, as well as in the early years of the ANC government, civics enjoyed participation in formulating government policy, particularly housing policy, through the National Housing Forum, thus giving the semblance of some type of pluralist, inclusivist engagement between the civics and the Housing Department (Atkinson 1996:296-7, 308-10).

In Atkinson's (1996:295) view, the struggle culture in civil society organisations contributed to their success as adversaries of the apartheid state, but did not prepare them for a role in a democracy. Although the RDP spoke of a major role for civil society structures in the reconstruction and development process, after the political transition it turned out that civics seemed useful to the new government only insofar as they could end bond, rent and service boycotts and get communities in line with the government's drift to market policies for the provision of services. It appeared that social movements whose actions were vital to bringing about a political transition in South Africa were to be demobilised in a fashion similar to that observed in other contexts in the corpus of 'transition theory', once the political elites drifted to neo-liberal economic policies (Ginsburg 1996:74-6). A diversity of positions were offered on what role civil society organisations should assume in relation to a new democratic government and state structures (Pillay 1996:342-50). Some civics organisers were wary about the extent of their inclusion and felt that in the post-apartheid order they still needed to play a type of watchdog role:



“... there must be a party that monitors that the daily needs or problems of the people are met by government. Government can promise you everything and not deliver. So we must be watchdogs and watch whether or not government delivers. If it does not deliver, then we will have to use the old political tactics.” (Moses Mayekiso, quoted by Ndletyana 1999:34)

This watchdog role included some form of participation in policy-making processes. But the civics discovered the ANC government was not enthusiastic about consulting with them. Instead, it implemented its own projects. The civics were further weakened by dwindling revenues, their capacity was diminished by the migration of the civics' leadership to employment in high-income government jobs, and the premier umbrella civic organisation, the South African National Civic Organisation (SANCO), was hamstrung by internal infighting due to corruption allegations (Gumede 1998). Terreblanche (2002:450) claims that civil society groups were weakened after enjoying their heydays of common purpose --- the abolition of the apartheid state. Losing vital organising cadre weakened the civics' role and dulled their vision to their continued role monitoring the new government and defining what the “general will” is or ought to be. Notwithstanding, SANCO expressed their dissatisfaction with government's withdrawal from election promises, the abandonment of the RDP for GEAR, its housing policies, the extent of local government funding, as well as of social spending in the budget (Gumede 1998). Ironically, civic organisations, like other civil society organisations, enjoy the enabling environment of the political transition (SA Labour Bulletin 2003:9), but civics have been marginalised (Seekings 2000a:205). Civics were involved in negotiations to reform local government, but, once local government structures were democratised, the civics increasingly lost their influence, despite several former civics activists being appointed to local government structures.

On the eve of the imminent political transition, many civil society groups such as civic associations, housing and rent action committees, which dealt with housing issues, endorsed the *Freedom Charter* and found themselves ideologically in

close association with the ANC through the broader coordinating body formed in 1992, SANCO. They felt this temporary alliance would end once the ANC assumed state power, and, if necessary, these organisations would remain independent but continue to pressure a new government to be responsive to the needs of the homeless (Murphy 1993). In the case of SANCO, its close relationship with an ANC in power after 1994 possibly contributed to its demise, despite its executive members occasionally making statements about housing protests that have escalated since 2004. The organisation still holds national congress meetings, which only reveal divisions among its executive, particularly about who to support in the ANC's leadership succession, and a membership that has no confidence in the executive; the meetings do not discuss matters that affect the poor, such as poverty and unemployment (Mgibisa 2006). Part of SANCO's demise is due to the leadership's identification with the ANC government's programmes and attempts to get communities to accept these programmes. It began to fiercely chastise branches about using rent boycotts after the political transition. However, local branches undermined and it was not consultative. They resisted implementation of the programmes, as well as continued to independently engage in local community issues. They also formed links with the 'new social movements' opposing the ANC government's neo-liberal economic policies and became involved in their protest actions (Nthambeleni 2007:6, 8-9). More recently, SANCO is seen to be "paralysed" because its members split over who to support in the internal ANC battles over whom should succeed President Mbeki (Mgibisa 2006). Its activities suggest it has adopted a co-operative strategy of working with the ANC government, and is at the centre of disappointment. It was expected the civics would still have a role to play as "watchdogs" of the community on local government and community development, as SANCO's constitution defined its role (Nthambeleni 2007:5), that it would constantly remind the ANC government of the need to deliver on housing. For Ndletyana (1999:37) the demise of SANCO has meant it cannot play that role: it has become a "toothless watchdog", its alliance with the ANC prevents it from embarking on protest over the poor performance of local government; it will have to be independent of the ANC to be effective.

The civil society organisations, which have since the political transition experienced an enabling environment by the democratisation processes, also have had to face the consequences of neo-liberal economic policies. These policies have animated some of the new social movements emerging in the post-apartheid order (Coetzee 2004; SA Labour Bulletin 2003:9). Habib (2003) categorises several combinations of relationships evident between civil society organisations and the post-apartheid state. He claims some organisations operate in marginalised communities assisting them in their daily survival struggles; others are openly adversarial and challenge the government's neo-liberal economic policies. Elsewhere, he and others (Ballard, Habib, Valodia 2006:400) add that some new social movements draw from class-based ideologies and explicitly have a counter-hegemonic project against the state, sometimes calling themselves 'socialist movements'; others have formal relationships or partnerships with the state; in some cases, there is vacillation between these strategies; in some instances, the movements use the Constitution's socio-economic rights framework to further their goals (Ballard, Habib & Valodia 2007:17, 400, 402). Noting the consequences of the shift from the RDP to GEAR, Habib, citing figures that may seem exaggerated but possibly depending on the intricate calculations of McDonald's (2002a:162) research, says: "there have been approximately ten million cut-offs in water and electricity services because people have not paid their bills, and a further two million people have been victims of rates and rent evictions"; he concludes that many organised civil society groups would find themselves in an "adversarial" relationship with the state (Habib 2003:227, 236, 237-9).

Organisers in the new social movements point to the government's ditching of the *Reconstruction and Development Programme* (RDP) for the neo-liberal oriented *Growth, Employment and Redistribution* (GEAR) in 1996/7, as a prompt for the growth of an adversarial relationship between government and civil society organisations, as well as the growth of new social movements opposed to the thrust of the neo-liberal economic policies, for instance, the Anti-Privatisation Forum (Ngwane 2003a). These neo-liberal policies encouraged local governments to privatise the delivery of services such as water, electricity,

and garbage collection, to embark on “cost recovery” (see McDonald 2002) campaigns to get communities to pay for the costs of installing and maintaining infrastructure, and subsequently dropping the idea of “people’s budgets”. Many working class households are unable to pay the charges for services whose prices are not fixed but increasing. Social movements activist Ashwin Desai claims to offer a “sober” appreciation of the consequences of the government’s neo-liberal economic policies by certain social movement and civil society analysts and organisers, but we can see that the adversarial language is evident:

“...[T]he ANC has used its political legitimacy to launch a massive assault on the poor via disconnections from water and electricity, evictions and exclusions from access to education.” (Desai 2004)

The actions of the new social movements frequently embarrass the ANC government, hence President Mbeki’s tactics of dubbing organisations which claim to be a new vanguard of the working class as “ultra-leftists” (Mbeki 2002; Forrest 2003). Consequently, when members of such organisations are arrested they make claims that they are subject to various forms of repression and restrictions of their civil and political rights. Mbeki (2002) argues that, given the objective conditions, the ANC had settled on realistic policies to advance the “national democratic revolution”; he characterises these “ultra-left” opponents as bearing a common sentiment that the ANC has become an agent of international capitalist interests, including the World Bank and IMF, hence it is against the interests of the working class, consequently, the ANC policies must be abandoned in favour of socialist policies.

Habib’s (2003:237) characterisation of these organisations presents them as having a fundamentally different economic and political perspective to that of the ANC government:

“They are not survivalist agencies, but they are more political animals. Indeed, they have been largely established with the explicit political aim of organising and mobilising the poor and marginalised, and contesting and/or engaging the state and other social actors around the implementation of neoliberal social

policies. As a result, they implicitly launch a fundamental challenge to the hegemonic political and socio-economic discourse that defines the prevailing status quo.”

The new social movement’s adversarial posturing and intent to confront the “capitalist state” is presented in a language inspired by socialist views. Trevor Ngwane of the Anti-Privatisation Forum (APF), an organisation with individual activists clearly espousing counter-hegemonic socialist strategies (Buhlungu 2007; Ballard, Habib & Valodia 2007:400), speaks of the opposing interests between the ANC government and the working class thus:

“There is a new state under the ticket of working class aspirations but there has been a betrayal and that is where the clash occurs. There is a capitalist state ruling in the name of the very working class it is smashing.” (Ngwane 2003:32)

Individual members within some organisations express little optimism for the outcome of election rituals. Consequently, they encourage boycotts of elections, while a few organisations adopt the boycott call as an organisational standpoint:

“People do not have hope in the vote but in their power to continue struggle. The vote was the power we got from collective action.” (Ngwane 2003:32)

Critics of their boycott stance argue that, by choosing to boycott the institutions of representative democracy, the social movements may only be undermining their ability to make a meaningful contribution to social transformation (Sachs 2003:25, 27). Instead, the movements need to reconsider the usefulness of the universal franchise as a mechanism for redistributive politics.

Once it was apparent that SANCO, which once played the premier role in opposing apartheid housing and rent policies, if not moribund, had succumbed to more of a partnership role with the state, it created a space for organisations drawn to an adversarial approach on housing issues. The vacant space for mobilising on housing rights, has sometimes been filled by spontaneous actions

and ephemeral organisations, as well as those proving to last longer such as the Landless People's Movement (LPM) and Abahlali baseMjondolo ('shackdwellers' in Zulu, see Gibson 2008). Both organisations are independent of the ANC and are characterised as having an "adversarial" strategy of engagement with the state because they are animated by an opposition to the ANC's neo-liberal economic policies, which have worsened unemployment and poverty (see Habib 2003:237-9). Added to this, is the formidable possibility of the social movements' coalition with COSATU in a "United Democratic Front" of organisations commonly opposed to GEAR and agitating for economic reforms (see Tabane 2005) and talking in terms of the formation of a working class party opposed to "ANC capitalists" (see Laurence 2005).

The LPM's main concerns include land rights, land reform, and realising the right of access to adequate housing. The organisation's name can misleadingly cause people to believe they are concerned predominantly with rural land reform in the interests of people seeking agricultural livelihoods, however, its campaigns have linked the urban housing shortage to a need for urban land reform too. Press releases of LPM marches and campaign demands in Gauteng Province involving squatters in Protea South and Kliptown (Soweto), Thembelihle (Lenasia) and Thembisa (Kempton Park), I would argue, reveal a concern with issues of an urban nature, namely, the issues of the urban homeless with an interest in securing permanent urban livelihoods in opposition to the plans of city authorities to clear out informal settlements and prevent land occupations (Greenberg 2004:12). Slogans announcing the claims behind a specific march read: "HOUSING! LAND! WATER AND ELECTRICITY! AN END TO FORCED REMOVALS! AN END TO POLICE BRUTALITY AGAINST THE POOR!" (LPM 2007).

Abahlali baseMjondolo's (AbM 2006) statements reveal an adversarialism which is distrustful of the notions of rule of law underlying the new constitution as well as of leftwing intellectuals:

"When Abahlali marched ... a number of left intellectuals declared them criminal in the national press ... it was clear that competing

elites in the state and the institutionalised left were united on the position that the poor should not think their own politics and that doing so rendered the movement 'out of order' and even criminal. Abahlali's intellectual project is founded on the decision that "when order means the silence of the poor then it is good to be out of order"

These organisations are not always a disciplined, united "ultra left" opposition: organisations such as AbM, may have a reasonable struggle over the slow delivery of housing and the enduring plight of shackdwellers, nevertheless, it only tarnishes its own credibility because its impatience with the strategies of organisations it has otherwise has comradely relationships with has prompted it to disrupt the activities of the latter organisations (Tolsi 2006). The adversarial posture of these organisations may also be because, according to Ashwin Desai (in Robinson 2003), they "are the shock troops" which "exposed the real brutalities of the transition system". Thus they are contrasted with service-oriented bodies such as SANGOCO and may have more of a role in the actions which reconstruct the discourse of rights:

"[Sangoco]... has been hamstrung for too long by institutional questions about leadership rather than political issues, like how to define poverty and impact on people's lives beyond resolutions, conferences and talk shops." (Robinson 2003)

#### **6.4 Conclusion**

In some contexts, rights thinking was construed as a conservative doctrine, but in South Africa there is also faith that rights can be an agent of revolutionary transformation, and the supporting institutions can make headway towards transcending the apartheid legacy. There is, however, some despondency about the possibility that the state's hegemonic role in shaping rights discourse within the framework of its neo-liberal economic policies may be limiting the emancipation of the newly enfranchised if it does expand the discourse of rights.

Key forces promoting rights culture have been persuaded by the Constitution's guidelines to addressing socio-economic needs, as well as by the argument that particular socio-economic rights can be realised only through the rational plans state departments have demonstrated to have in place to use their available resources towards the progressive realisation of such rights. Enjoying human dignity and full citizenship in post-apartheid South Africa must be supplemented by a notion of rights that supercedes a bias towards or emphasis on merely civil and political rights. The contemporary trend towards capitalist liberal democracies poses a challenge to the enhancement of social citizenship rights, despite their inclusion in constitutions. The central political philosophies emerging in the West and expanding the potential of the notion of rights have all been demonstrated to have potential to support social and economic rights. The idea of rights has tremendous potential to shape social relations and social action in ways that further the struggle for social and economic transformation. The Constitutional framework that shapes the discourse on rights in South Africa has yet to be pushed by government agencies, human rights enforcement bodies and international covenants, civil society organisations and judicial institutions in ways that give urgency to social citizenship rights.

Adrian Leftwich (1984) sees the struggle for the distribution of resources as a major feature of the essence of politics. Similarly, realising social and economic rights is, about the struggle for the distribution of resources. In this case the resources would be access to water, access to materials for building houses, access to medicines and health care services, access to food, access to an income for the unemployed, access to social security for the poor and aged. In a sense, it is a struggle about increasing the state's capacity to control such resources and distribute them to more needy sectors of society, and, it is also a struggle to have social forces such as private corporations and market regulations act in ways that they increase access to these resources. Forces like the Constitutional Court, the SA Human Rights Commission, probably these more overtly than others, play a key role in the institutionalisation of conflict over the distribution of resources, and ultimately the legitimacy of the state, as well



as the continued longevity of a particular discourse of rights. Marais (2001:298), drawing from Adam Przeworski, says the following about how these organisations institutionalise conflict and enforce the hegemony of a particular rights discourse:

“To a great extent, therefore, the architects of the post-apartheid order took to heart Adam Przeworski’s argument that democratic consolidation requires the institutionalization of conflict. Broadly, the political framework has been explicitly geared to this. More narrowly, one encounters a host of structures and institutions set up to serve as fora for the arbitration and, hopefully, resolution of conflicts and differences - for extending the juridical and social reach of newly won rights and liberties. In theory, as long as they retain legitimacy and trust - the prospects for further democratic consolidation are enhanced.”

Does Marais’ statement imply that there be doubt about the transformation of institutions and policies? Should there be doubt that, in reality, they would not operate in ways to undo apartheid’s inequality legacy? Such doubt was still expressed by the ANC’s allies in 1992, a few years before the passing of the Final Constitution of 1996. Marais (2001:90) notes that SA Communist Party member, Blade Nzimande, was convinced the outcome of SA’s transition would be similar to transitions initiated by repressive regimes. Analysts of these democratic transitions (O’Donnell & Schmitter 1986) claim they did not have far-reaching transformations in the economy and did not effect a redistribution of economic resources to improve the circumstances of subordinate groups. My subsequent chapters takes this uncertainty further and analyses the nature of developments on the constitutional right of access to adequate housing.