



# **Assessing the Performance of South Africa's Constitution**

## **Chapter 3. Fundamental rights in South Africa's Constitution**

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# Chapter 3. Fundamental rights in South Africa's Constitution

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This chapter considers the South African Constitution's performance in respect of the realisation of goals pertaining to selected rights. The Constitution recognises the gross structural inequality along (primarily) racial lines which apartheid had left in its wake. The means selected to overcome this need (or drama), includes the entrenchment of the rights to equality, property and a range of socio-economic rights. These rights each have their own specific goals and connect with the key goal of transformation. This chapter examines the ambitious nature of the South African commitment to an extensive bill of rights and the extent to which these goals have been realised.

## 3.1. Introduction

A justiciable Bill of Rights is a crucial prong of the new constitutional order. The adoption of these rights is seminal to the change which the Constitution is meant to bring about. Indeed, the transformative goals of the Constitution are given expression to most fully in the bill of rights which outlines a vision of the kind of society South Africa aspires to be whilst attempting to address key injustices of the past. The scope of this report does not allow for an in-depth analysis of each of the rights contained in the bill of rights. Some of the rights are touched upon in other chapters (the right to just administrative action and access to justice are discussed in the judiciary chapter the security services chapter deals with some of the criminal procedure rights, and the right to freedom of expression is touched upon in the democracy chapter).

This chapter will focus on the right to equality, the right to property and socio-economic rights. These rights have been chosen because they are directly related to several key goals of the Constitution: transformation, redress, reconciliation and distributive justice. The right to equality is the first right in the bill of rights and represents a fundamental statement of the normative shift in the new order from an apartheid government that sought to normalize unequal treatment. The equality right provides a clear commitment to eradicate unfair discrimination and allows the taking of positive measures to redress the unfairness of the past. The right to property was highly contested at the time of negotiation and attempts to establish a balance between the rights of existing property-holders and the ability of the government to redress the apartheid legacy of dispossessing and excluding black people from equal rights to property. The socio-economic rights are also aimed at helping to correct for the deliberate consignment of black people to an economic under-class; they also contain the wider universal goal of seeking to achieve greater social justice and equitable access to social goods for all. These rights thus all attempt to correct a central injustice that occurred in the past whilst embodying an ambitious set of goals for a different kind of future. They, in a sense, go to the heart of what the Constitution is seeking to achieve and hence provide a good sample upon which to test its performance.

An interesting and relatively novel feature of the Constitution is the fact that it extends the duties imposed by the fundamental rights not only to the state but also to private actors and individuals in section 8(2) of the Constitution.<sup>1</sup> This is known as the horizontal application of the Bill of Rights between private actors themselves rather than simply between the state and individuals. Apartheid involved a process of social engineering that affected the private relations between individuals: as such, it would be impossible to shift the power relations in the South African society if the rights of an individual were only to have imposed obligations upon the state.<sup>2</sup> A wider change was called for which reached into all facets of South African society. The responsibility of transforming the South African society could thus not rest on the government only.<sup>3</sup> It was also recognized that the state was not the only source of significant power: increasingly, private actors wielded the ability to harm the fundamental rights of individuals and thus they needed to be bound by the fundamental rights provisions. While the horizontal application of the Bill of Rights can be seen to have been a necessity for realizing the goals of the constitutional project, it is at the same time important to recognize the very ambition signaled by this feature of the new constitutional order. The law is fundamentally meant to change society in a deep way and courts are given a significant role to play in this regard. These duties are also not confined to requiring private actors to refrain from infringing upon the existing rights of another individual, but also place certain positive duties to act

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<sup>1</sup> Chirwa, 2006: 46.

<sup>2</sup> *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 145.

<sup>3</sup> Friedman, 2014: 67.

on private actors. The range of horizontal obligations are discussed in this chapter in the section on housing rights and the obligations of property owners toward people who occupy their land. Horizontal application of the Bill of Rights is also illustrated in the section on the equality right in respect of the prohibition of unfair discrimination by any *person*.<sup>4</sup>

The performance of rights in the constitutional order is measured alongside the performance of the institutions and policies which have been created to give effect to them. There is also another measure to consider in evaluating the performance of rights – the extent to which a consciousness of rights and their implications has taken root in society (which can be gauged, to some extent, from surveys and opinion polls). The limits of the law in truly changing peoples' hearts and minds must also be taken into account in this regard. The important point here is that looking only at the degree to which rights have been implemented may not give a complete picture of the extent to which rights 'matter' in a society: rights may also give rise to a shift in the way in which individuals conceive of themselves and their relationship to the government (and other actors) which can be of great significance for the constitutional order.

## 3.2. The right to equality in the South African Constitution

### **Context and internal goals**

Apartheid embodied a system of racial discrimination purposefully enforced by the state. The government enacted a series of laws to separate South Africans of different races and to ensure domination and the control of resources by the white minority.<sup>5</sup> According to Seekings, apartheid had the purpose of imposing a racial hierarchy in terms of which all classes of white South Africans benefitted at a tremendous cost to the rest of the South African society.<sup>6</sup>

Every aspect of a South African's life was primarily determined by the colour of his or her skin: the standard and availability of public facilities, work and education opportunities; eligibility to vote and the possibility of owning land.<sup>7</sup> Apartheid policies had a profound effect on the prospects of black people to acquire assets and to accumulate wealth. Legislation limited the areas and conditions in terms of which black South Africans could purchase land, and restrictive policies had the effect that only a few could manage to pledge property as security for repayment of a loan.<sup>8</sup> The 1950s Group Areas Act provided that black people were not permitted to own firms outside of specified areas in cities and towns. These firms were restricted to 25 activities. There were very few medium-sized and almost no large black-owned firms.<sup>9</sup> Regulations furthermore prevented black entrepreneurs from owning more than one business and from establishing companies and partnerships.

Even though most of the racially discriminatory laws were repealed by the time the Final Constitution was adopted, apartheid left a deep-rooted legacy.<sup>10</sup> After many decades of the rule of a system which exclusively benefitted the white minority, there inevitably existed massive inequalities in wealth, education, health status, income-security, land and housing access, and ownership along racial lines.<sup>11</sup> These material disadvantages were also matched by discriminatory attitudes and prejudice which were pervasive across the society. The equality right was primarily enacted to respond to this historical and sociological context.

Section 9 of the Constitution, which is 'the equality clause', provides:

'(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

<sup>4</sup> Section 9(4) of the Constitution.

<sup>5</sup> Some of these Acts were the Prohibition of Mixed Marriages Act of 1949 and the Group Areas Act and Population Registration Act of 1950. In 1953 the government enacted the Bantu Education Act, which imposed racial segregation in schools.

<sup>6</sup> Seekings, 2010: 3. Seekings explains that the poorest white South Africans would inevitably be economically elevated above almost all South Africans who were not white.

<sup>7</sup> *Harksen v Lane* NO 1998 (1) SA 300 (CC) para 54.

<sup>8</sup> Gelb, 2004: 21.

<sup>9</sup> Gelb, 2004:21.

<sup>10</sup> Seekings, 2010: 4.

<sup>11</sup> Albertyn and Goldblatt, 2008: 35-3.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

It is furthermore one of the founding provisions of the South African Constitution that the state is founded on the values of '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms'.<sup>12</sup> The Constitution furthermore aims at the creation of a non-racial, non-sexist egalitarian society. Section 7(1) of the constitution provides that the 'Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'. Section 9(2) which involves taking positive measures to achieve equality interacts with section 7(2) of the Constitution to impose a positive duty on all organs of state to protect and promote the achievement of equality.<sup>13</sup> Equality is thus protected as a right as well as an underlying value of the Constitution. The right helps give effect to one of the key overarching goals of the Constitution in that it seeks the transformation of South African society away from inequality on the basis of status and material goods into a more egalitarian future.

There appear to be two main internal goals for the right to equality. Firstly, the right seeks to eliminate unfair discrimination by the state or private persons. Secondly, the right seeks to encourage measures aimed at redressing past disadvantage and aimed at establishing a more equal future. It has been argued that the obligation of promoting the achievement of equality, when read with section 7(2) of the Constitution, also encompasses a duty on the state to ensure that prejudicial attitudes are changed.<sup>14</sup> While acknowledging the limits of the law in changing the personally held beliefs and views of individuals, it is nevertheless a goal of the Constitution to inform public norms and to create a society in which prejudice on racial and other grounds become socially unacceptable.

In aiming for these two goals, the equality right is not concerned with the achievement of mere 'formal equality' which simply aims at the elimination of all differential treatment in law.<sup>15</sup> If this was the case, the apartheid laws which imposed inequality would simply have been repealed and that would have been the end of what was required.<sup>16</sup> Such an approach would not be concerned with the continued socio-economic effects of decades of oppression on the black population in the country. Moreover, any positive measures to correct for the legacy of the past would violate a formal equality approach. The equality right rather aims at substantive equality and the remedying of 'entrenched' inequalities.<sup>17</sup> Substantive equality involves considering the actual social and economic inequalities in society which are often systemic in nature. It also requires attention to be paid to the conditions which produce these inequalities and thus involves a detailed attention to the context in which an equality claim arises. 'Substantive equality recognises that it is not the fact of difference that is the problem but rather the harm that may flow from this...Equality can thus be advanced through similar or differential treatment'.<sup>18</sup> This means

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<sup>12</sup> Section 1(a) of the Constitution.

<sup>13</sup> *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 24.

<sup>14</sup> Bilchitz, 2015: 24, referring to Dafele, 2014.

<sup>15</sup> Formal equality is focused upon treating those in a similar situation equally; the problem with it is that it presupposes a status quo of actual equality which is certainly not true of the South African context. *Van Heerden* para 142.

<sup>16</sup> Albertyn and Kentridge, 1994: 153.

<sup>17</sup> Albertyn, 2007: 259.

<sup>18</sup> Albertyn and Goldblatt, 2008: 35-7.

a number of things: that not only does the equality right require the repeal of racially discriminatory laws, but also the taking of positive measure to address the inequalities which pervade South African society.<sup>19</sup>

The Constitutional Court has laid down an approach to dealing with cases of alleged unfair discrimination as well as for considering the constitutional validity of restitutionary measures.

In *Harksen v Lane*, the test for unfair discrimination was laid down and, in its simplest form, comes down to these questions:

1. Is there a differentiation between people or categories of people which amounts to discrimination?
2. If so, is the discrimination unfair?
3. If so, can it be justified in terms of sections 36 of the Constitution (the limitations clause)?<sup>20</sup>

In cases where unfair discrimination is alleged, the court will start with the first enquiry and consider whether the differentiation amounts to discrimination. Section 9(3) does not only prohibit discrimination on the basis of race, but also on a number of other bases such as gender, disability, sexual orientation and religion.<sup>21</sup> The Constitution thus recognised that racism was not the only barrier to full participation in society and that it needs to respond to other 'systematic motifs of discrimination' such as patriarchy and heteronormativity.<sup>22</sup> These other forms of discrimination were also prevalent in the past and the Constitution can thus be seen to be an attempt to correct not only for arbitrary discrimination on the basis of race but also for discrimination on other grounds too. If the alleged unfair discrimination is based on one of these specified grounds, then discrimination has been established.<sup>23</sup> If the differentiation is not on a specified ground, then it will have to be established whether it is based on 'attributes and characteristics which have the potential to impair the fundamental human dignity of persons'.<sup>24</sup>

Once a party is able to show discrimination on a listed or similar ground, the enquiry shifts to the second stage of determining whether the discrimination is fair or unfair. If the discrimination is based on one of the grounds listed in section 9(3), it is presumed to be unfair.<sup>25</sup> It is nevertheless still possible to find that such discrimination is fair. The 'fairness' enquiry focuses on the vulnerability and disadvantage to the complainant, the purpose of the discrimination and whether the discrimination has the effect of impairing the dignity of the complainant.<sup>26</sup> Even where the discrimination is found to be unfair, the court has maintained that it is nevertheless possible to conduct a third enquiry as to whether such unfair discrimination can be justified in terms of section 36 of the Constitution. The third stage has not been used often and there is some doubt as to its applicability: presumably, if it is to be used, it would involve a consideration of reasons outside the domain of equality why unfair discrimination should be allowed.

There is an apparent tension between the provisions of the equality clause prohibiting unfair discrimination (Section 9(3) and (4)) and the provision authorising measures to promote the achievement of equality (Section 9(2)). The implementation of a measure which is aimed at the advancement of a class of person who had previously been disadvantaged would inevitably mean that members of a previously advantaged group will be

<sup>19</sup> Bilchitz, 2015. *Albertyn and Kentridge* 1994: 153.

<sup>20</sup> *Albertyn and Goldblatt*, 2008: 35-43.

<sup>21</sup> Section 9(3) also prohibits discrimination on analogous unlisted grounds. The Constitutional Court has explained that the grounds which are specified have been singled out because South Africans have faced marginalisation on the basis of these particular attributes in the past. The Court also acknowledged that there are usually a complex relationship between these grounds which relate to range of 'dimensions of humanity'. (*Harksen* paras 46 and 49).

<sup>22</sup> *Albertyn and Goldblatt*, 2008: 35-3; *Barnard-Naudé*, 2013

<sup>23</sup> *Currie and de Waal*, 2005: 235.

<sup>24</sup> *Harksen* at para 46. The section 9(3) list of prohibited grounds of discrimination is non-exhaustive.

<sup>25</sup> Section 9(5).

<sup>26</sup> There is a similarity between the enquiry into whether differentiation on an unspecified ground amounts to discrimination and the unfairness enquiry, since both consider the impairment of dignity. When considering whether an 'unspecified ground' is present, the focus is on the group involved and whether the treatment of the group amounts to discrimination, while the focus of an unfairness enquiry is on the specific complaint and whether or not the discrimination in question was unfair (*Albertyn and Goldblatt*, 2008: 35-49).

excluded or overlooked, on the basis of the 'prohibited' grounds. The Constitutional Court has held that the prohibition against unfair discrimination and the provision authorising restitutionary measures should not be read as opposing one another since both aspects are necessary for the fulfilment of the equality right.<sup>27</sup> The court has recently held in clear terms that 'measures meeting the requirements of 9(2) cannot be unfair discrimination under section 9(3) to (5)'.<sup>28</sup>

The internal goals of the equality right are thus to prevent or combat unfair discrimination on the one hand, and to create mechanisms for addressing and remedying past disadvantage on the other. The right also aims at shifting societal attitudes and prejudices.

### ***The relationship between internal goals and external goals***

The internal goals of the right to equality speak to Ginsburg's criteria of legitimacy. The apartheid state fundamentally lacked legitimacy due to its discriminatory policies. The removal of discriminatory laws and the taking of measures to address inequality, is necessary to restore the legitimacy of the state in the eyes of the majority of its citizens. It was also a signal that all citizens are to be treated with respect regardless of the various facets of their identities.

The right to equality's internal goals of prohibiting unfair discrimination and promoting the achievement of equality correspond to the external criterion as well of channelling conflict. South Africa remains a nation which is deeply divided along the lines of race. Discrimination is a source of social unrest and violence.<sup>29</sup> Racism easily escalates into further violations of human rights.<sup>30</sup> A society which has massive and persistent socio-economic disparities is prone to conflict. At the same time, positive discrimination and redress measures are often controversial themselves and also have the potential to threaten social stability. The Constitution envisages the creation of mechanisms for the channelling of conflict which arises from the discrimination against individuals and the implementation of restitutionary measures.<sup>31</sup>

The external goal of access to public goods overlaps with the internal goals of the right to equality. The prohibition of unfair discrimination aims to prevent a repeat of instances of exclusion of people from public goods or services on the irrational basis of deep physical or other characteristics and attributes. The goal of promoting the achievement of equality is aimed at reversing the patterns of inequality in access to socio-economic goods. It has been argued that the right to equality and socio-economic rights are interdependent.<sup>32</sup> The new Constitution provides clearly that access to public goods must seek to benefit everyone equally.

### ***Evaluation of performance***

#### ***Thin Compliance***

The goals of the Constitution in respect of the right to equality has been achieved in the thin sense. Legislation has been enacted with the view of promoting the achievement of equality. The Employment Equity Act 55 of 1998 is aimed at promoting equal opportunity in the workplace by providing for affirmative action measures and prohibiting unfair discrimination. The Broad-Based Black Economic Empowerment (B-BBEE) Act 46 of 2013 aims to ensure the meaningful participation of black people in the economy and to change the racial composition

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<sup>27</sup> *Van Heerden* para 30.

<sup>28</sup> *South African Police Services v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 37.

<sup>29</sup> Ban Ki-Moon, 2009.

<sup>30</sup> Racism escalating into violence will be discussed when considering the Skierlik tragedy in section 3 below.

<sup>31</sup> Section 9(4) prohibits unfair discrimination by individuals and provides for the enactment of legislation which prevents and prohibits unfair discrimination. This legislation is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which creates Equality Courts with the particular purpose of adjudicating claims based on the right to equality.

<sup>32</sup> Liebenberg and Goldblatt argue for 'interpretative interdependence' between the right to equality and socio-economic rights. They argue that group-based discrimination leads to socio-economic disadvantage and that poverty exacerbates the impact of discrimination, 2007: 337. The Constitutional Court has also acknowledged the realisation of socio-economic rights as necessary for the achievement of racial and gender equality (*Grootboom*, para 23).

of business ownership and management.<sup>33</sup> Various codes have been enacted in terms of the Act which measures the level of black ownership, effective control and skills development of private enterprises.<sup>34</sup>

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 has been enacted to give substance to the Constitution's commitment to equality, in terms of section 9(4).<sup>35</sup> One of the objects of the Act is to 'provide for measures to facilitate the eradication of unfair discrimination' and to provide remedies for victims of unfair discrimination.<sup>36</sup> The Act sets out a framework for unfair discrimination analysis and provides for a wide range of remedies.<sup>37</sup> Importantly, PEPUDA provides for the creation of Equality Courts.<sup>38</sup> These courts were established because there was a need for a mechanism to enforce the provisions of the Act, both in terms of deciding discrimination complaints and achieving societal transformation. The drafters of PEPUDA recognised that the justice system in South Africa is not accessible to all and that the traditional High Courts and Magistrates Courts would not easily have become effective mechanisms for achieving these goals.<sup>39</sup> It was therefore decided to use existing court infrastructure but to enhance accessibility: as a result, every High Court and a number of Magistrates' Courts were designated to function as Equality Courts in addition to their ordinary functions.<sup>40</sup> In a High Court or Magistrates' Court sitting as an Equality Court, different rules and procedures were to apply in order to create greater accessibility, affordability and to ensure the efficient adjudication of discrimination claims.<sup>41</sup>

PEPUDA also contains provisions for the promotion of equality. Chapter 5 requires certain state actors and various private entities to prepare 'equality plans' and to report regularly to a monitoring body or institution.<sup>42</sup> Regulations giving effect to these chapters have not yet been adopted due to the difficulty (and perhaps impracticability) of receiving and responding to thousands upon thousands of equality plans and reports submitted by organs of state, various private entities and any person contracting with the state.<sup>43</sup> Kok has suggested that the Chapter 5 provisions ought to be amended to require the listed entities to make their equality plans publicly available, rather than reporting them to institutions such as SAHRC.<sup>44</sup> He suggests that Equality Courts also ought to be given the authority to order the publication of equality plans upon application by an interested party.<sup>45</sup> As matters stand, this promotional aspect of PEPUDA has not been given effect to by the legislature and represents a gap in thin compliance.

In terms of sections 32 and 33 of PEPUDA, the Equality Review Committee was established as an advisory organ to the Department responsible for the administration of justice. It was to monitor the implementation of PEPUDA, and the practical effect of all legislation directed at achieving equality in society and preventing unfair discrimination in South Africa.<sup>46</sup> It has been 16 years since PEPUDA has been enacted, yet the DoJ has not established a dedicated and adequately-resourced unit to provide administration and support to the ERC. The

<sup>33</sup> The Act's beneficiaries are people from race groups who had previously been disadvantaged, women, the youth and people with disabilities.

<sup>34</sup> The Preferential Procurement Policy Framework Act 5 of 2000 was enacted to give effect to section 217 of the Constitution. Section 217(1) provides that when an organ of state contracts for goods or services, it must do so 'in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective'. Section 217(2) provides that organs of state may implement procurement policy providing for — '(a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination'. Section 217(3) provides that national legislation must prescribe a framework in terms of which the policy in subsection (2) must be implemented. The Act prescribes a points system in terms of which organs of state are to give preference to B-BBEE compliant enterprises in the procurement of goods and the awarding of tenders.

<sup>35</sup> Albertyn, Goldblatt and Roederer, 2001: 3.

<sup>36</sup> Section 2(c) and (f).

<sup>37</sup> Section 13-14 and 21.

<sup>38</sup> Chapter 4.

<sup>39</sup> Kok, circa 2013-2014: 48.

<sup>40</sup> Section 16.

<sup>41</sup> In terms of PEPUDA and the Regulations under the Act, a complaint may be brought by an unrepresented applicant and a light evidentiary burden is placed on the complainant. The presiding officer is placed in the unusual position of playing an inquisitorial and interventionist role in the proceedings and to ensure that all the necessary information is placed before the court. The ordinary common law restrictions surrounding standing and the ordinary monetary limit on the jurisdiction of Magistrates' Courts are done away with. Equality Court processes thus depart from the usual rules of civil procedure.

<sup>42</sup> See sections 25(3)(c); 25(4)(b); 25(5)(a); 26 and 27(2) of PEPUDA.

<sup>43</sup> SAHRC, 2014: 13.

<sup>44</sup> Kok, circa 2013-2014: 109.

<sup>45</sup> Ibid.

<sup>46</sup> SAHRC, 2014: 14

fact that serving judges are appointed to the ERC means that they struggle to dedicate sufficient time to the ERC or to attend its meetings.<sup>47</sup>

The Commission for Gender Equality has been created in terms of section 181(1)(d) of the Constitution. The purpose of this commission is to 'promote respect for gender equality and the protection, development and attainment of gender equality'.<sup>48</sup> The CGE's powers include the authority to 'monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality'.<sup>49</sup>

In the thin sense, the goals of the right to equality have largely been achieved in that legislation has been adopted and structures have been established to promote a greater level of equality in society and to prohibit and address unfair discrimination.

### *Thick Compliance*

The goals of the right to equality, in light of the extreme need which it was enacted to address, are particularly ambitious. The fact that decades of discrimination and inequality enforced by law have not been reversed in the space of 20 years, cannot be taken to mean that the right to equality has entirely failed to perform in a thick sense. In view of the aspirational nature of this goal, the achievement of thick compliance will be determined by considering the performance of the right in respect of three groups who possess characteristics which are 'prohibited grounds' of discrimination.<sup>50</sup> It will also be considered how the right has been interpreted and upheld in courts and whether there has been a shift in social recognition and access to social goods for groups that have previously been excluded. The performance of the Equality Courts, as the main institution for enforcing the right to equality, will also be considered.

### *Performance of Equality Courts*

In 2012, the SAHRC undertook a monitoring exercise of the Equality Courts around the country.<sup>51</sup> The SAHRC considered 5 courts in each of the 9 provinces in this exercise. The assessment included the ease with which the presence of Equality Courts could be identified; the availability of promotional material; the presence of Equality Court clerks and presiding officers who have been trained adequately; and the types and numbers of complaints at a particular court.

The SAHRC found that there were quite a number of courts which were struggling to accommodate an Equality Court. Many of the courts had no space specifically set up for the Equality Courts and no electronic resources or stationery. At the Magistrates' Court in Seshego, for example, there was no Equality Court running. The court manager explained that they could hardly manage with the number of courts that were already hosted in their building.<sup>52</sup>

Most of the courts reported not having the necessary promotional material, either because regional and national offices were unresponsive, or due to a lack of effort on the part of the court staff to request material from the relevant offices. Consequently, members of the public are not adequately informed about the functioning of the Equality Courts and its availability to resolve cases of unfair discrimination.<sup>53</sup> It was also suggested that promotional material should be in the language that would be accessible to specific communities which the courts served, instead of being exclusively produced in English. The Equality Court clerks, were also supposed to be officially designated to the Equality Courts, but tended to provide many service to the other understaffed courts.

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<sup>47</sup> SAHRC, 2014: 15.

<sup>48</sup> Section 187(1).

<sup>49</sup> Section 187(2).

<sup>50</sup> These 'prohibited grounds' are race, gender and sexual orientation. Race was chosen because racial discrimination and inequality represents the primary evil which the right to equality was enacted to address. Gender was chosen because unfair discrimination on this ground affects half the population, there is a firm legacy of patriarchy and one of the foundational values of the constitution is 'non-sexism'. Sexual orientation was chosen because there is a serious history of discrimination against lesbian and gay people, there has been a significant body of jurisprudence developed by the courts in this regard and it displays the potential of constitutional provisions to bring about rather dramatic legislative (and perhaps attitudinal) changes in a society.

<sup>51</sup> SAHRC, 2013: 18.

<sup>52</sup> Ibid.

<sup>53</sup> SAHRC, 2013: 19.

At the courts where there was a dedicated presiding officer and Equality Court clerk, the functioning of the Equality Court was much enhanced.

In terms of the profile of complainants, the SAHRC found that the majority of the complaints were brought by persons aged between 20 and 40 and that the complainants were 75 percent black and 12,21 percent coloured.<sup>54</sup> Issues surrounding hate speech were addressed by 43 percent of the complaints whereas issues around unfair discrimination were present in 25 percent of them. While it was envisaged that the Equality Courts across the country would receive 1.5 million complaints in their first year of existence, this target was missed by far.<sup>55</sup> In 2012/2013, only 310 matters were brought to ECs around the country.<sup>56</sup> The conclusion was drawn by the SAHRC that Equality Courts are underutilised, and public awareness about them ought to be intensified.

Similar findings were made by Kok and Botha in their empirical survey of the Durban and Pretoria Equality Courts.<sup>57</sup> They traced the underutilisation of the ECs and found that the discrimination matters which reach the court would rarely deal with subtle, indirect cases of discrimination. They were also particularly concerned about the quality of training of EC personnel. One positive finding of this study is that the success of a complainant's case does not depend on the presence or absence of legal representation. Only 15.4 percent of complainants in the Durban Equality Court made use of legal representation.<sup>58</sup> In the remaining 84.6 percent of cases, complainants without legal representation were successful in 120 out of 477 cases. Of the 87 cases filed where the complainants did have legal representation, 39 were successful. Kok and Botha draw the conclusion that the Equality Court's informal procedure, in which the judge would play a more active role than in other courts, is seemingly effective. They recommend that this aspect of accessibility of the Equality Courts ought to be emphasised in awareness-raising campaigns.<sup>59</sup>

From these two studies, it seems that the Equality Courts have had some notable successes and are functioning well in certain parts of the country. However, it appears necessary to allocate many more resources, to better train and equip personnel and to create much greater public awareness if Equality Courts are to fulfil their potential in broadly providing relief to victims of unfair discrimination. This is an issue in many advanced democracies, but South Africa's attempt to create special institutions to address the problem is relatively unusual.

*The performance of the Constitution in respect of the goals of the right to equality in terms of selected grounds of non-discrimination*

*(a) Race*

The main drama or need to which the South African Constitution, and the equality clause in particular, had to respond was racial inequality and a history of unfair discrimination based on race which had been deliberately engineered as part of government policy by the Nationalist Party. Whilst the bulk of racially discriminatory apartheid legislation had been repealed by the time the Constitution was enacted, the legacy and impact thereof on many facets of society needed to be addressed.

The Constitutional Court was tasked with addressing the prohibition of unfair discrimination on the basis of race in the matter of *Moseneke v Master of the High Court*.<sup>60</sup> The Court held that the Black Administration Act, which treated the administration of estates of black people differently from that of others in the country, constituted unfair discrimination on the basis of race, colour and ethnic origin.<sup>61</sup>

The courts have also heard a number of cases in which measures to promote equality were challenged by white claimants on the basis that the measures unfairly discriminated against them on the basis of race. One such case

<sup>54</sup> SAHRC, 2014: 13. While not explicitly stated in the report, it can be inferred that the remainder of the complainants were Indian and white.

<sup>55</sup> Kok, forthcoming.

<sup>56</sup> Of these matters, 57 were dismissed, judgments were handed down in 6 and 66 were referred to other courts or to alternative dispute resolution fora, 6 matters were settled out of court.

<sup>57</sup> Kok, forthcoming. There were only 594 complaints filed in the Durban Equality Court during its first nine years of existence.

<sup>58</sup> A total of 564 cases were heard by the Durban Equality Court between 2003 and 2012. In 477 (84.6 percent) of these cases, complainants were unrepresented.

<sup>59</sup> They also recommend that much emphasis ought to be placed on the training of Equality Court personnel.

<sup>60</sup> 2001 (2) SA 18 (CC).

<sup>61</sup> Section 23(1) of the Act, along with Regulation 3(1), provided that the estates of deceased black South Africans were to be administered by a magistrate and not by the Master, as is the case with the estates of deceased white South Africans.

is *Pretoria City Council v Walker*<sup>62</sup>, in which the City Council's policy was challenged which provided that residents of a formerly white suburb paid metered rates for municipal services while the residents of the formerly black township next to this suburb paid a flat rate for the same services. The Court held that there was indeed indirect discrimination on the basis of race (as the policy formally distinguished only on the basis of geographic locality), but that this was not unfair since the policy was a necessary and sensible response to the post-apartheid reality whereby there was a need for cross-subsidisation of those who were less well-off by those who were better off.<sup>63</sup> In that same case, the practice of the Council of only enforcing debts against residents of the formerly white area was also challenged. The court, in relation to this question, refused to sanction selective enforcement on the basis of race and found the actions of the council which were haphazard, threatened the rule of law and lacked any clear rationale. They thus constituted unfair discrimination.

The interpretation of the equality clause, in the context of employment and affirmative action, has been contentious. In the *Van Heerden* case, the majority of the Constitutional Court held that if a measure is shown to comply with the internal test of section 9(2), differentiation that ensues in its implementation is warranted.<sup>64</sup> The Court held that measures which meet the section 9(2) test cannot be presumed to be unfair. The Court also held that when a measure is challenged in terms of section 9(3), it can be defended by showing that the measure promotes the achievement of equality as contemplated in section 9(2).<sup>65</sup>

The section 9(2) internal test is articulated as follows:

1. Does the measure target 'persons or categories of persons who have been disadvantaged by unfair discrimination'?
2. Is the measure 'designed to protect or advance such categories of persons'?
3. Does the measure promote 'the achievement of equality'?<sup>66</sup>

The purport of the majority judgment is that section 9(2) provides a complete defence to a claim that positive measures constitute unfair discrimination. A defendant only has to demonstrate compliance with the internal test in section 9(2). If a measure is found to comply with section 9(2), then the enquiry ends. If it does not pass muster under section 9(2) and is based on a listed or unlisted ground in section 9(3), then it will be subject to the test in section 9(3) to determine whether it amounts to unfair discrimination.

In a dissenting judgment by Justice Mokgoro, it was held that greater care must be taken when considering whether or not a measure meets the test set out in terms of section 9(2). Justice Ngcobo also wrote a dissent in which he held that the measure in question did not meet the section 9(2) standard because not all the persons who benefitted from the measure in this instance were previously disadvantaged. In a separate judgment, Justice Sachs held that even where a measure falls under section 9(2), some degree of proportionality cannot be excluded.<sup>67</sup> Conceptually, he argues that the fact that a measure complies with section 9(2) does not mean that it cannot be subjected to the unfair discrimination enquiry; it rather means that the measure is *fair*.<sup>68</sup>

The question of the application of section 9(2) was further articulated, but not fully clarified, in the matter of *SAPS v Solidarity obo Barnard*.<sup>69</sup> In this matter, a white, female police officer applied for the position of

<sup>62</sup> 1998 (2) SA 363 (CC).

<sup>63</sup> Two other cases in this category would be *Van Heerden*, discussed in section 1 above and *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC).

<sup>64</sup> *Van Heerden* para 32. The majority judgment was written by Justice Moseneke with Chief Justice Chaskalson, Deputy Chief Justice Langa, Justice Madala, Justice O'Regan, Justice Sachs, Justice Van der Westhuizen and Justice Yacoob concurring. *Van Heerden* concerned an equality challenge to the Political Office Bearers Pension Fund established for members of Parliament after the transition to democracy in 1994. Between 1994 and 1999 the rules of the Fund provided an additional benefit to members of Parliament, who had entered the institution for the first time in 1994, in the form of an enhanced employer contribution calculated on a particular scale. Van Heerden, a member who had served in the pre- and post-1994 parliaments, claimed that the scheme amounted to unfair discrimination. The CC found the scheme to be constitutionally permissible and a positive measure in terms of section 9(2).

<sup>65</sup> *Van Heerden* para 37.

<sup>66</sup> *Van Heerden* para 37.

<sup>67</sup> *Van Heerden* para 152.

<sup>68</sup> *Van Heerden* para 140.

<sup>69</sup> 2014 (6) SA 123 (CC).

superintendent in a particular branch of the South African Police Services (SAPS). She was recommended for appointment by the interviewing panel but SAPS nevertheless decided not to appoint her and left the post unfilled. The National Commissioner explained that the reasons why she was not appointed was the fact that her presence at the particular salary level would not enhance racial representation and since the post was not essential for service delivery it was decided that no appointment would be made. Ms Barnard's case in the Labour Court, the Labour Appeal Court as well as the Supreme Court of Appeal had been that she had suffered unfair discrimination. The Supreme Court of Appeal held in her favour and the SAPS appealed to the Constitutional Court. Here, Ms Barnard claimed that the National Commissioner made an unlawful and unreasonable decision by failing to appoint her.<sup>70</sup>

The main issue before the Court was whether a challenge to the implementation of a constitutionally valid employment equity plan can be considered to be part of an unfair discrimination claim (since Ms Barnard's case in the lower courts had been that she had suffered unfair discrimination).<sup>71</sup> The majority took the narrow view that Ms Barnard's claim was not based on unfair discrimination, but aimed at reviewing and setting aside the National Commissioner's decision not to appoint her.<sup>72</sup> It was held that Ms Barnard did not seek to review the decision of the National Commissioner in the Labour Court and that it was impermissible to seek such review for the first time at the final appellate stage. The Court also held that, even if the challenge to the exercise of the National Commissioner's decision was properly before the Court, it would nevertheless have failed if measured against the minimum standard of rationality which applied in such matters.

There were two dissenting judgements which took a different approach to Ms Barnard's claim. Justices Cameron and Froneman and Acting Justice Majiedt held that Ms Barnard need not have brought a formal judicial review application to enable the Court to consider the lawfulness of the National Commissioner's decision.<sup>73</sup> In their view, it was impossible to consider Ms Barnard's complaint without formulating a standard against which the National Commissioner's decision could be evaluated.<sup>74</sup> They considered the appropriate standard to assess the individual implementation of a constitutionally compliant restitutionary measure to be 'fairness'. They also held that it is important to give due recognition to the possible infringement of dignity in the implementation of restitutionary measures and the importance of giving adequate reasons for these decisions. Justice Van der Westhuizen, in a separate dissent, also did not view the question on the implementation of the section 9(2) measure to be a cause of action which is separate from Ms Barnard's unfair discrimination claim. He suggested that instead of using 'rationality' or 'fairness' as the standard for evaluating the implementation of a valid section 9(2) measure, a proportionality analysis should rather be employed. He suggested that it should be determined whether the impact of the implementation of the measure has a disproportionate effect on other rights.<sup>75</sup>

The possible difficulties surrounding the implementation of a valid section 9(2) measure, which have been brought to light in the *Barnard* matter, indicates that there is perhaps a need for a more nuanced approach to the harmonious reading of section 9(2) and 9(3) than was suggested by the majority in *Van Heerden*.<sup>76</sup> The judgments in *Barnard* laid out the terrain and outlined the need for a complex balancing of claims that must take place in this area though much was left undecided and must await a future decision.

In terms of the impact of affirmative action measures, a considerable growth in the size of the black middle class can be noted. In 2012, it was estimated to have 4.2 million members, which means that it is now larger than the white middle class.<sup>77</sup> The African Development Bank attributes this success to BEE measures.<sup>78</sup> In a study on

<sup>70</sup> She argued that the National Commissioner did not properly consider all the relevant factors before making his decision and provided inadequate reasons for this decision. *Barnard* at para 58.

<sup>71</sup> It is impermissible for an appellant to plead an entirely different case from the original one on appeal.

<sup>72</sup> The majority judgment was penned by Acting Chief Justice Moseneke with Acting Deputy Chief Justice Skweyiya, Acting Justice Dambuzza and Justices Jafta, Khampepe, Madlanga and Zondo concurring.

<sup>73</sup> *Barnard* para 82. The reasoning of the Cameron, Froneman and Majiedt minority judgment was that Ms Barnard's unfair discrimination claim, which arises from the EEA, was squarely before it and encompassed the formulation of a standard for the implementation of restitutionary measures.

<sup>74</sup> *Barnard* para 84.

<sup>75</sup> *Barnard* para 164.

<sup>76</sup> The situation where an unfair discrimination claim cannot succeed, because the measure which is the source of the unfair discrimination is considered a restitutionary measure for the purposes of section 9(2), is perhaps an oversimplification of the complexities which arise in accommodating the different aspects of equality.

<sup>77</sup> The white middle class is 3 million strong. UCT Unilever Institute, 2014.

<sup>78</sup> African Development Bank, 2011: 13.

affirmative action by the Centre for Research on Inequality, Human Security and Ethnicity (CRISE) though it was found that improved access to education has had a much more significant effect on the shifting of the labour market than affirmative action did.<sup>79</sup> The study suggests that affirmative action had impacted upon very few individuals and that those who had benefitted were above average in terms of their skills and schooling.<sup>80</sup>

Our survey shows that support for affirmative action remains extremely low among white South Africans, with only 5 percent supporting giving preference to black candidates in order to redress past discrimination and 85 percent disagreeing that this should be done. While the majority of black (62 percent), coloured (64 percent) and Indian (53 percent) South Africans feel that white people still hold the economic power in the country, these same groups do not show particularly strong support for affirmative action measures either. Rather surprisingly, only about 50 percent of black, coloured and Indian respondents support affirmative action in the workplace. The majority of South Africans (85 percent) view black people to be just as capable as white people to be the head of a company and 82 percent of survey respondents believe that the colour of one's skin should be ignored in the employment process. These results suggest that, even though it is acknowledged that further shifts need to be made in the composition of the labour market, affirmative action is not viewed by a majority of people (in Gauteng at least) as the best vehicle to achieve this.

Considering the volatile context of a desegregated South Africa suddenly 'unified' after decades of an imposed racial caste system and the suppression and exclusion of the majority, one of the most important goals of the Constitution was to find an effective mechanism to channel racial conflict. That mechanism for the channelling of racial conflict has been to entrench in law and policy the prohibition of unfair discrimination on the basis of race and promoting the achievement of equality of people who had been previously disadvantaged on the basis of their race.

A major drama in this regard is an incident of violence based on race which took place in the Swartruggens area in the North-west province of South Africa. On 14 January 2008, a white man drove to the Skierlik informal settlement where he shot and killed four black people and wounded eight others. He was found guilty of racially motivated murder. This horrifying incident brought to light the extreme racism which is prevalent in that area and in many other rural areas in South Africa. During an investigation of the incident, the SAHRC found that class differences of inhabitants of the Swartruggens area remain racialized and that there is an unmistakable separation of races in public spaces.<sup>81</sup> Every person interviewed confirmed that racism in the area is rife. Black citizens of the informal settlement brought to light that they face immense challenges in respect of service delivery.<sup>82</sup> The white community of Swartruggens felt under threat of crime by black perpetrators and expressed concern that incidences of crime committed against white farmers of the area are taken lightly by the police and the government.

The picture painted of the situation in Swartruggens, and the racial violence which brewed there, demonstrates the necessity of continued racial reconciliation and effective channels to deal with racial conflict. According to the 2015 South African Reconciliation Barometer Survey<sup>83</sup>, racism remains pervasive: 60.2 percent of South Africans still experience racism in their daily lives.<sup>84</sup> 67.3 percent of South Africans indicated that they have little or no trust in people of race groups other than their own.<sup>85</sup>

In the 2013/2014 financial year, the SAHRC received 556 equality complaints, 53 percent of which were instituted on the basis of race.<sup>86</sup> While it is clear that unequal, unfair and in some instances hateful treatment on the basis of race remains pervasive in the country, the fact that complaints are brought to the SAHRC shows that there is at least one mechanism which is functioning in respect of channelling racial conflict. The majority of

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<sup>79</sup> Burger and Jafta, 2010: 23.

<sup>80</sup> Ibid.

<sup>81</sup> In terms of PEPUDA, the SAHRC is obligated to assess the state of equality in the country and to provide a report to Parliament in this regard.

<sup>82</sup> SAHRC, 2012: 13.

<sup>83</sup> This survey is an annual, national opinion poll on South Africans' attitudes toward reconciliation and transformation.

<sup>84</sup> IJR, 2015: 11.

<sup>85</sup> IJR, 2015: 15.

<sup>86</sup> Of the remaining complaints, 13 percent were based on disability, 10 percent on ethnic and social origin, 6 percent on religion, and 4 percent on the basis of gender, age and sexual orientation respectively SAHRC, 2014: 8.

matters reaching the Equality Courts are based on racial discrimination, mostly taking place in the workplace.<sup>87</sup> As mentioned in the section on Equality Courts, though, this mechanism has not been properly established in most parts of the country and remains underutilised: at the same time, it offers an important possibility, if built upon, for addressing racial discrimination through law.

It seems that the mechanisms in place to give effect to the prohibition of unfair discrimination and the promotion of the achievement of equality are not yet fully up to the task of channelling racial conflict. The shortcoming is perhaps not with the Constitutional provisions themselves, but rather with the mechanisms that have subsequently been established to address these issues, and perhaps with the limits of *any* institutional mechanism to reach certain aspects of private behavior. Towards the end of 2015 and early 2016, there has also been an upsurge in racism on social media and highly charged racial discourse on some university campuses.<sup>88</sup> These incidents have highlighted the continued racial divide in South Africa and its potential to destabilize the country. The constitutional commitment to prohibiting unfair discrimination and to taking measures to redress the past remains a work in progress and its success in achieving greater racial equality will in large measure determine the success or otherwise of the constitutional democratic order.

### (b) Gender

One of the goals of the South African Constitution was also to respond to a society which was deeply patriarchal at its core. In order for women to be on an equal footing with men in South African society, laws have been enacted to protect the exercise of reproductive rights<sup>89</sup>, ensure physical security<sup>90</sup> and reform the customary law of succession.<sup>91</sup> The Commission for Gender Equality has been established and affirmative action measures have been put into place which benefit women as a designated group in the workplace. PEPUDA contains particular provisions which prohibit gender-based violence, female genital mutilation, practices which impair the dignity of women and the denial of access to equal opportunities for women.<sup>92</sup>

The courts have also played a significant role in realising the goals of the equality provision in respect of women. It is evident from the case law that there is a close relation between claims of equality on the basis of gender and on the basis of marital status. In one of its very first judgements, the Constitutional Court invalidated provisions of the Insurance Act 27 of 1943 on the basis that they resulted in unfair discrimination on the grounds of both sex and marital status.<sup>93</sup> Section 44(1) and (2) of the Act had the effect that where an insurance policy had been ceded to a married woman or effected in her favour by her husband, less than two years before the sequestration of the husband's estate, she received no benefit whatsoever from the policy.<sup>94</sup> In the situation where a wife ceded or effected a life insurance policy in favour of her husband, however, the Act did not contain a similar limitation.

<sup>87</sup> This suggests that interracial interaction mostly takes place in the workplace, where people of different races have no choice but to relate with one another.

<sup>88</sup> Wicks, J. (2016). Twitter erupts after KZN estate agent calls black people 'monkeys'. *Mail and Guardian* [online]. available at <http://mg.co.za/article/2016-01-04-twitter-erupts-after-kzn-estate-agent-calls-black-people-monkeys> [accessed on 9 March 2016]; Louw, L. (2016). Chris Hart and Gareth Cliff – Both perpetrators and victims of racism? *Rand Daily Mail* [online]. available at <http://www.rdm.co.za/politics/2016/01/13/chris-hart-and-gareth-cliff--both-perpetrators-and-victims-of-racism> [accessed on 9 March 2016]; Pijoos, I & Pretorius, W. (2016). Racism being disguised as freedom of speech – ANC. *News24* [online]. available at <http://www.news24.com/SouthAfrica/News/racism-being-disguised-as-freedom-of-speech-anc-20160219> [accessed on 8 March 2016]; Lindeque, M. (2016). SAHRC: Don't underestimate UFS's racial tensions. *Eyewitness News* [online] available at <http://ewn.co.za/2016/02/24/HRC-SA-Dont-underestimate-UFS-racial-tensions> [accessed on 8 March 2016]; Whittles, G. (2016). Tensions high after UFS rugby brawl. *Eyewitness News* [online]. available at <http://ewn.co.za/2016/02/23/UFS-suspends-classes-after-black-vs-white-brawl> [accessed on 8 March 2016]; Nicholson, G. (2016). Report: Days of violence and thunder at the University of the Free State. *Daily Maverick* [online]. available at <http://www.dailymaverick.co.za/article/2016-03-01-report-days-of-violence-and-thunder-at-the-university-of-free-state/#.Vt9cVo0aLIU> [accessed on 8 March 2016]; Hess, L. (2016). #Colourblind campaign takes off after racial tensions at Tuks. *News24* [online]. available at <http://www.news24.com/SouthAfrica/News/colourblind-campaign-takes-off-after-racial-tensions-at-tuks-20160224> [Accessed on 8 March 2016].

<sup>89</sup> Choice on Termination of Pregnancy Amendment Act 8 of 2004.

<sup>90</sup> Domestic Violence Act 116 of 1998 and Sexual Offences and Related Matters Amendment Act 32 of 2007. The Sexual Offences Act has expanded the definition of rape to include sexual violence which used to be classified as "sexual assault" and could not attract the same severity of punishment as rape.

<sup>91</sup> Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

<sup>92</sup> Section 8.

<sup>93</sup> *Brink v Kitzhoff* 1996 (4) SA 197 (CC).

<sup>94</sup> If the life insurance policy had been ceded or effected in favour of the woman more than 2 years before the sequestration of her husband's estate, she could receive a maximum of R30 000 from that policy.

The Court held that the section disadvantaged married women while married men were not disadvantaged and the impugned provision was thus constitutionally invalid. In the *Van der Merwe v Road Accident Fund*,<sup>95</sup> the Court invalidated a legislative scheme which prevented spouses married in community of property from claiming patrimonial damages for bodily injuries caused by a spouse.<sup>96</sup> The provision was found to be discriminatory on the basis of marital status, but the impact of the provision on women was given particular consideration.<sup>97</sup> In the case of *President of the Republic of South Africa v Hugo*<sup>98</sup> the President's decision to pardon female prisoners who had children under the age of 12 was challenged on the basis that it unfairly discriminated against male prisoners on the basis of gender. The majority held that even though the benefit of early release was afforded to female prisoners only, the impact of this discrimination against male prisoners was not unfair.<sup>99</sup>

The Constitutional Court has been criticised for failing to ensure substantive equality to women in certain instances.<sup>100</sup> One such instance was when the Court considered the position of surviving partners in co-habiting relationship.<sup>101</sup> The Maintenance of Surviving Spouses Act 27 of 1990 was challenged for its failure to apply to unmarried partners in co-habiting relationships.<sup>102</sup> The Act grants a maintenance claim to a surviving spouse against the estate of their deceased spouse insofar as the surviving spouse is not able to provide for himself (or herself).<sup>103</sup> The majority held that the Act does not unfairly discriminate on the basis of marital status because it is open to co-habiting partners to obtain the protection afforded to marriages by entering one. Two minority judgements, however, held that heed must be taken of the fact that patterns of gender inequality would often lead to a situation of co-habitation where women are not in a position to insist on a marriage. The majority was criticised for failing to consider the financial dependence and unequal bargaining power of women in relationships and that it would not necessarily be their choice to be excluded from the protection of the marital regime.<sup>104</sup>

In the matter of *Harksen v Lane NO*<sup>105</sup> the majority of the Constitutional Court dismissed a constitutional challenge to provisions of the Insolvency Act 24 of 1936. In terms of this Act, the estate of an insolvent vests in the Master of the High Court upon sequestration. Section 21 of the Act provided that the property of a (solvent) person married to an insolvent will also vest in the Master. It was argued that section 21 of the Act discriminates on an unspecified ground due to the burdens and disadvantages it imposes on solvent spouses (married to an insolvent) which are not imposed on any other persons with whom the insolvent has business dealings or a close relationship. The Court held that the provision is rationally connected to the legitimate government purpose of helping a trustee to determine which of the property belonging to two spouses forms part of the insolvent estate and that the discrimination which solvent spouses suffer due to this provision is not unfair. In a minority judgment however, Justice O'Regan held that the provision does amount to unfair discrimination on the basis of marital status, since no similar provision applies to other family members and business associates whose affairs and property may also be interwoven with those of the solvent spouse.

The Court has also been criticised for its refusal to invalidate legislation which made it a criminal offence for a sex worker, but not her client, to engage in prostitution.<sup>106</sup> Albertyn argues that the Court ought to have done

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<sup>95</sup> 2006 (4) SA 230 (CC).

<sup>96</sup> In this matter, the applicant's husband drove over her with his car on purpose and caused her to suffer serious bodily injuries. Section 18(b) of the Matrimonial Property Act of 1984 prevented her from recovering damages for the suffering of serious bodily harm.

<sup>97</sup> The law had the effect of exempting third party insurers from reimbursing the injured spouse or the joint estate. An injured spouse's financial dependency on an abusive spouse would be maintained because she would have to obtain her spouse's consent to meet medical and other bills out of the joint estate.

<sup>98</sup> 1997 (4) SA 1 (CC).

<sup>99</sup> *Hugo* para 47. The majority held that the effect of the discrimination was not to deprive fathers of raising their children; this limitation was caused by the fact of their incarceration. It was furthermore open to male prisoners who were fathers of minor children to request reprieve from the President on an individual basis.

<sup>100</sup> Albertyn, 2007: 265 – 270.

<sup>101</sup> *Vols NO v Robinson* 2005 (5) BCLR 446 (CC).

<sup>102</sup> It was claimed that the Act unfairly discriminated on the basis of gender.

<sup>103</sup> Section 2(1) of the Act.

<sup>104</sup> Albertyn, 2007: 266.

<sup>105</sup> 1998 (1) SA 300 (CC).

<sup>106</sup> Section 20(1)(aA) of the previous Sexual Offences Act was considered in *Jordan v The State*.

more to further substantive equality in this matter and that it failed to take proper account of the structured power relations in a society which lead women to choose to engage in sex work.<sup>107</sup>

Gender equality has also been at the forefront of the intersection between African customary law and human rights law.<sup>108</sup> The impact of customary practices on the rights of women have often been considered by the courts.

In the matter of *Mayelane v Ngwenyama*<sup>109</sup>, the question concerned whether the validity of a second polygynous marriage is affected by the absence of the first wife's consent to this union. The applicant married her deceased husband in terms of Tsonga customary law in 1984. After her husband passed away in 2009, the applicant tried to register their marriage. She was informed by the Department of Home Affairs that her deceased husband had married another woman in terms of customary law in 2008 and that this marriage had been registered in terms of the Recognition of Customary Marriages Act.<sup>110</sup> The Constitutional Court developed the content of Tsonga customary law in light of the rights to equality and dignity and decided that the consent of the first wife was a requirement in order for any subsequent marriages of her husband to be valid.<sup>111</sup> Accordingly, the applicant's second marriage was held to be invalid.

In 2004, the Constitutional Court struck down legislative provisions which entrenched the African customary law rule that the oldest male family member was considered the heir of a deceased estate.<sup>112</sup> The provisions were paras (a), (c) and (e) of section 23(10) of the Black Administration Act.<sup>113</sup> This rule prevented women and children born out of wedlock from inheriting. The Court heard two matters jointly. One of the applicants, Ms Bhe, was the surviving partner of a man with whom she had two minor children. In terms of the rule of male primogeniture, the deceased's father should inherit his assets. Ms Bhe and her children would be disinherited and lose their home. The other applicant, Ms Shibi, was the only surviving immediate relative of her deceased brother. She would have inherited nothing from him and his entire estate would have gone to two male cousins. The Court was reluctant to develop the customary rule of primogeniture because of the difficulties associated with ascertaining the content of a 'living' customary law rule. Instead, it opted to invalidate the provisions of the Black Administration Act which codified this rule during the apartheid era. The Court ordered that, in the place of the invalidated legislation, the Intestate Succession Act 81 of 1987 was to apply to the estate of a deceased who died without a will.<sup>114</sup>

Questions have arisen about the actual effect and impact on the lives of women of decisions in which customary law has been developed in order to give effect to the right to gender equality. In her ethnographic research on the effect of the *Bhe* decision, Weeks has found that the remedy of applying the Intestate Succession Act has had negative consequences for some family members, other than wives, who had been dependent on the deceased.<sup>115</sup> The remedy has the effect of excluding even the deceased's sisters from inheriting. She argues that the Court construed male primogeniture to exist in a narrow way and that the reality was that community negotiations would often lead to the conclusion that women in the deceased's life ought to inherit.<sup>116</sup> In terms of the *Bhe* decision, each wife receives an equal portion of the inheritance, regardless of how many children she has to take care of.<sup>117</sup> Weeks found that what typically happens is that the community would divide the inheritance in a way that will ensure that all the deceased's children are taken care of, which may lead to inequality between the wives but would result in an outcome which takes the needs of the community into account.<sup>118</sup> Simply replacing

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<sup>107</sup> Albertyn, 2007: 269.

<sup>108</sup> Lehnert, 2005: 241. Customary practices such as polygyny or the obligation on a widow to marry her deceased husband's brother and the payment of a 'bride price' is viewed to be at odds with the Constitution.

<sup>109</sup> 2013 (4) SA 415 (CC).

<sup>110</sup> 120 of 1998.

<sup>111</sup> *Mayelane* para 89.

<sup>112</sup> *Bhe and Others v Khayelitsha Magistrate and Others; Shibi v Sithole and Others* 2005 (1) SA 580 (CC).

<sup>113</sup> 38 of 1927.

<sup>114</sup> Para 136.

<sup>115</sup> Weeks, 2015: 218. Weeks conducted field research in two villages in the Mpumalanga Province in order to determine if the *Bhe* decision has had an effect on customary succession in rural South Africa.

<sup>116</sup> Weeks, 2015: 248.

<sup>117</sup> Weeks, 2015: 251.

<sup>118</sup> Weeks, 2015: 255.

customary law provisions with the Intestate Succession Act thus may not have been the wisest course to advance substantive equality.

While the development of customary law in line with the Constitution is an incredibly complex task and the courts are perhaps not equipped fully to grasp the dynamic nature of customary law and its varied application, there has been at least one notable success in this regard. In 1968, the eldest daughter of a Chief (Ms Shilubana) was prevented from succeeding her father because the custom of the Valoyi community only permitted men to be their chief. In 1997, the Valoyi community decided that Ms Shilubana would succeed the current chief because they wished to develop their own custom in line with the Constitution and recognised that women are equal to men under the new dispensation. The Constitutional Court confirmed the right of the community to develop customary law in the matter of *Shilubana v Nwamitwa*<sup>119</sup>. The fact that a traditional community wished to develop their customs to allow for equality between men and women based on the adoption of the Constitution is a remarkable success for the normative impact of the right to equality on the development of community rules.<sup>120</sup>

It seems nevertheless that there is still a long way to go in terms of achieving the goal of gender equality. Women cannot be on an equal footing with men in a society where they are physically insecure in their own home environments. Violence perpetrated against women by their intimate partners has been recognised as a major impediment to their human development.<sup>121</sup> The Gender and Health Research Unit of the Medical Research Council has undertaken studies into gender-based violence and femicide in South Africa in both 1999 and 2009. In the absence of accurate statistics on gender-based violence, the Council estimates that in South Africa there are three gender-based murders per day.<sup>122</sup> It also estimates that only one in nine incidences of rape are reported to the police. Only 6 percent of the 67 000 sexual offences which were reported between April 2012 and March 2013 led to convictions.<sup>123</sup> In order for gender equality to be achieved in a thick sense, effective interventions would have to be made to combat the violence and physical abuse of South African women.

In terms of our survey results, just over half of the surveyed respondents (54 percent) feel that women should have the primary role in caring for children, yet a large number (82 percent) support the idea that men should have the same amount of paid leave to take care of their children as women, which suggests that men are viewed as playing an important role in this regard. Across all race groups, strong support can be detected for women to enter top positions in the labour market. Of our survey respondents, 88 percent feel that women and men should have equal career opportunities; 87 percent believe that women should be given the opportunity to become president and 87 percent feel that women are just as capable as men to be the head of a company. Despite this positive attitude about women in the labour market, women remain the more likely candidates to be performing unpaid work and unemployment rates remain particularly high among women.<sup>124</sup> In 2011, women with tertiary education earned only 82 percent of what men with tertiary education earn.

Steps have been taken and legislative and policy measures have been put in place to achieve greater levels of equality between men and women in South Africa. While there is an evident approval of gender equality within the South African society, which may be attributed in some measure to the Constitution, in practical terms, much needs to change in order for women in their real lived experience to be on an equal footing with men.

### (c) *Sexual Orientation*

The pre-democratic South African government imposed a repressive official attitude toward same-sex sexuality.<sup>125</sup> During apartheid, same-sex relationships were not accorded any legal recognition or protection; in

<sup>119</sup> 2009 (2) SA 66 (CC). The male heir who would have become chief of the Valoyi community, had it not been for the decision to recognise Ms Shilubana as chief instead, challenged this development and was successful in both the High Court and the Supreme Court of Appeal.

<sup>120</sup> See the discussion of customary law and traditional leadership and these cases in Chapter 7 as well.

<sup>121</sup> Woolman and Sprague, forthcoming.

<sup>122</sup> Snodgrass, L. (2015). South Africa: a dangerous place to be poor, black and a woman'. *Timeslive* [online]. available at <http://www.timeslive.co.za/local/2015/09/11/South-Africa-a-dangerous-place-to-be-poor-black-and-a-woman> [accessed on 10 March 2016].

<sup>123</sup> Oliphant, P. (2015). South African falling short in gender equality standards. *Mail & Guardian* [online]. available at <http://mg.co.za/article/2015-05-04-south-africa-falling-short-in-gender-equality-standards> [accessed on 10 March 2016].

<sup>124</sup> According to Statistics South Africa, the incidence of long term unemployment is almost 10 percentage point higher among women than among men. Statistics South Africa, 2015: 10-11.

<sup>125</sup> Bilchitz, 2015a: 3. The National Party government supported and imposed a conservative form of Christianity.

fact, sexual relations between men were criminalized as ‘sodomy’ and men were entrapped by police and imprisoned for engaging in same-sex sexual activity.

After a long and protracted struggle, South Africa became the first country in the world to prohibit discrimination on the basis of sexual orientation in its Constitution.<sup>126</sup> The inclusion of the right to equality, and the particular prohibition of discrimination on the basis of sexual orientation, has led to major reforms in this area.

The National Coalition of Gay and Lesbian Equality (NCGLE)<sup>127</sup>, which played a crucial role in lobbying for the inclusion of ‘sexual orientation’ as a prohibited ground in section 9(3), led the task of systematically challenging legislation which unfairly discriminated against the LGBTI community.<sup>128</sup> In considering the persistent negative social attitude toward LGBTI people, the NCGLE thought it best to take a ‘gradualist approach’ in pursuing law reform.<sup>129</sup>

The first case to reach the Constitutional Court in this regard dealt with the decriminalization of same-sex sexual conduct. The Court held that offences which are aimed at prohibiting sexual intimacy between men, unfairly discriminate against gay men on the basis of their sexual orientation. This discrimination was presumed to be unfair since sexual orientation is an expressly included prohibited ground of discrimination. No legitimate reason could be found why the rights of gay men should be limited and private conduct between consenting adults which causes no harm to anyone else should be criminalised. The Court confirmed an order by the High Court that the common law offence of sodomy and legislative provisions criminalizing sexual conduct between men are constitutionally invalid.<sup>130</sup>

In the next matter brought by the NCGLE, certain provisions in immigration laws were challenged. Section 28(2) of the Aliens Control Act 96 of 1991 provided that the Minister of Home Affairs may allow spouses of South African citizens to enter the country without being in possession of an immigration permit or temporary residence permit. Same-sex partners of South African citizens, on the other hand, could not benefit from this exemption. The Constitutional Court found the legislation to be unfairly discriminatory and required the law to apply to same-sex life partners as well as spouses.<sup>131</sup> This case was the first step in establishing that same-sex life partners ought to be afforded equivalent benefits to those granted to heterosexual married couples.

Two years later, a lesbian High Court judge challenged the constitutional validity of statutes and regulations providing that judges’ spouses could obtain pension and other benefits from the state, which had been understood to exclude life partners of gay and lesbian judges from these benefits.<sup>132</sup> The Constitutional Court struck down the provisions and developed the law to apply to same-sex life partners of judges to remedy this defect.

In 2003, the statutory prohibition against gay and lesbian couples jointly adopting children was successfully challenged.<sup>133</sup> Up to that point children could only be adopted by married persons in terms of the (now repealed) Child Care Act and Guardianship Act. In the same year, legislation that did not provide for persons in a permanent same-sex partnership who have undergone artificial insemination to register as parents of the children conceived was successfully challenged.<sup>134</sup>

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<sup>126</sup> Bilchitz, 2015a: 18.

<sup>127</sup> NCGLE is an umbrella body of LGBTI organisations.

<sup>128</sup> Bilchitz, 2015a: 13.

<sup>129</sup> Bilchitz, 2015a: 19.

<sup>130</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, 1999. This intrusion on the “innermost sphere of human life” was also held to violate the constitutional rights to privacy and dignity.

<sup>131</sup> *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, 2000.

<sup>132</sup> *Satchwell v President of the Republic of South Africa*, 2002.

<sup>133</sup> *Du Toit v Minister of Welfare and Population Development*, 2003. The applicants in this matter were partners in a lesbian relationship who wanted to adopt children. The legislation in place at the time had the effect that only one of the applicants could become the official adoptive parent of the children. It was held that the legislation in question unfairly discriminated on the basis of sexual orientation and marital status.

<sup>134</sup> *J v Director-General, Department of Home Affairs*, 2003. Regulations made in terms of the Births and Deaths Registration Act of 1992 only provided for the registration of one male and one female parent. The Constitutional Court unanimously declared the legislation unconstitutional.

The pinnacle of these cases was reached in the case of *Minister of Home Affairs v Fourie*<sup>135</sup>, in which the question of the exclusion of same-sex couples from the institution of marriage was brought to the Court. The Constitutional Court unanimously held that it was unconstitutional for same-sex couples to be excluded from the rights, responsibilities and status of marriage in law. The order of invalidity in relation to the existing law was suspended for 12 months in order to allow Parliament to correct the defect. Parliament responded by enacting the Civil Union Act 17 of 2006, which recognized the rights of same-sex couples to marry or form a civil partnership.

Apart from the commendable reforms which have taken place in respect of the legal recognition and protection of gay and lesbian people, there seems to also be a gradual positive shift in public attitudes. In 2008, the Human Sciences Research Council found that 80 percent of the South African population, aged 16 and above, expressed the view that sex between two people of the same gender would be 'always wrong'. In 2014, 61 percent of respondents participating in the Pew survey felt that homosexuality should not be accepted by society, while just 32 percent felt that it should be accepted. Our own survey contains a result which appears to contradict these statistics. Of the total respondents, 56 percent believe that sexual relations between people of the same sex are acceptable which is much higher than the other numbers.<sup>136</sup> This might be because the survey was limited to Gauteng which is the most diverse province in South Africa and people come into contact with a range of more liberal attitudes.

Data obtained from the 2013 Gauteng City-Region Observatory (GCRO) Quality of Life (QoL) survey<sup>137</sup> also delivered some encouraging results. Only about one fifth of 27 173 respondents believe that gays and lesbians do not deserve equal rights.<sup>138</sup> Less than half of all respondents felt that homosexuality was against the values of their community and only an eighth believed that it would be acceptable to be violent toward gay and lesbian people.<sup>139</sup> Our own survey has to some extent confirmed these positive findings. 38 percent of the total respondents would have a problem renting their homes out to a same-sex couple, whereas 48 percent would not. The lowest socio-economic class (LSMs 1-4) is more likely to discriminate with 52 percent of people in this category seeing a problem with renting their homes to same-sex couples. Importantly though, 61 percent of people expressed a willingness to rent their homes to same-sex couples if the Constitutional Court rules that they are not to discriminate unfairly on the basis of sexual orientation. These results are not entirely clear but may suggest that people can be influenced by the constitutional machinery to change their behaviour and perhaps even their attitudes. It seems that, though limited, the Constitution has played an important role in influencing societal attitudes and perceptions and breaking down homophobia.

The Constitution has also provided the framework for dealing with cases of individual discrimination on the basis of sexual orientation. Cases heard by the Equality Courts which are based on sexual orientation, display the value of the horizontal application of the Bill of Rights in ensuring the protection and realization of fundamental rights. In the matter of *Strydom v Nederduitse Gereformeerde Kerk Moreleta Park*<sup>140</sup> the Transvaal Provincial Division, sitting as an Equality Court, held that dismissing a music teacher from his position at a church on the basis of his sexual orientation amounted to unfair discrimination on a prohibited ground. It awarded him damages of R75 000. In another unreported matter, a privately-owned guest house refused to host the wedding of a lesbian couple. The couple brought a case to the Alberton Magistrates' Court, sitting as an Equality Court, alleging that the guest house had discriminated against them on the basis of their sexual orientation. The Court accepted an agreement between the parties and ruled that the guest house must pay a substantial amount to an organization working in the field of LGBT rights in South Africa.<sup>141</sup> These two cases illustrate how the Constitution has helped

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<sup>135</sup> 2006.

<sup>136</sup> Support in this regard is highest among black respondents (62 percent) and lowest among Indian (41 percent) and white (40 percent) respondents.

<sup>137</sup> The Observatory is a partnership between the Gauteng Provincial Government, the University of the Witwatersrand and the University of Johannesburg.

<sup>138</sup> Mahomed, 2015: 14.

<sup>139</sup> Mahomed, 2015: 15.

<sup>140</sup> 2009 (30) ILJ 838 (EqC).

<sup>141</sup> Centre for Human Rights. (2012). Press release: Equality Court affirms lesbian couple's rights. [online]. available at [http://www.chr.up.ac.za/images/files/news/press/2012\\_press\\_release\\_buitendag\\_eng.pdf](http://www.chr.up.ac.za/images/files/news/press/2012_press_release_buitendag_eng.pdf) [accessed on 20 October 2015].

to provide machinery whereby discrimination both by the state, civil society organisations and individuals can be resisted.

While heartening strides have been made in terms of realising the equality right in respect of sexual orientation, it remains a reality that gay and lesbian people still face much hardship and unfair treatment in their daily lives. Many prejudicial attitudes remain. The Constitution's prohibition on unfair discrimination, though shifting the attitudes of a large number of South Africans, has not been able to protect black lesbians who live in rural areas and townships, in particular, from being raped and murdered on account of their sexual orientation.<sup>142</sup> The growth in hate crimes against lesbian and gay people is alarming and suggests a need for renewed initiatives to stress the unacceptability of prejudice and discrimination on grounds of sexual orientation.

### **Recommendations and Overall Assessment**

In considering the overall picture of thick compliance with the goals of the right to equality, there are notable successes and failures. The main institution for enforcing the right to equality – the equality courts – is not yet functioning optimally. In terms of class and income, South Africa remains one of the most unequal countries in the world: the right to equality has nevertheless been instrumental in shifting income distribution across races. The black middle class has grown and affirmative action has played a role in ensuring that this happens. The focus of the cases surrounding the right to equality has been largely on ensuring a form of status equality for individuals with a wide range of differing characteristics. There is reason to believe that this right has informed some shifts in attitude toward the role and status of women, racial relations and perceptions of gay and lesbian people though this is an on-going process and currently incomplete. The racial cleavages are perhaps most significant for the future of the constitutional order: there is a limit to which these can be addressed by institutional design alone. Nevertheless, there is a need to think through whether supplementary mechanisms and processes are needed to advance the constitutional vision more actively.

## **3.3. The right to property in the South African Constitution**

### **Context and Internal goals**

For almost a century, laws were enacted to give effect to a racist vision of South Africa according to which the cities and most productive agricultural land would be the exclusive preserve of the white population.<sup>143</sup> The presence of black South Africans in the designated 'white' areas, which made up 77 percent of the land, was strictly controlled and only 'permitted' for the purpose of providing low-cost labour in white-owned industries, farms and homes.<sup>144</sup>

From 1913 up to the 1980s, a series of laws were passed which had the effect of dispossessing black South Africans of their land and providing separate areas where South Africans of different races were permitted to live. In terms of the Natives Land Act of 1913, a mere 8 percent of South Africa's land was reserved for black people.<sup>145</sup> Black South Africans were not permitted to buy or rent land outside of the reserved areas. Where black South Africans owned land in 'white areas', the state had the authority to implement measures to remove the inhabitants to the black areas. Black farmers, who were once independent, were often forced to become labour tenants with no land of their own.<sup>146</sup>

The Natives (Urban Areas) Act 21 of 1923 designated 'urban locations' near the cities which could be occupied by black South Africans. These urban locations were often over-populated and under-resourced. The Native Administration Act 38 of 1927 furthermore empowered the minister to move any 'tribe or native' as deemed necessary for the public interest. The 1934 Slums Act allowed the government to break down any housing structures which did not meet the Act's standard for housing, which had the effect of dislocating people from

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<sup>142</sup> Human Rights Watch, 2011.

<sup>143</sup> Even in the decades before South Africa became a union (in 1910), the British authorities gradually relocated and forcibly removed black South Africans from their land. Atuahene, 2014:8.

<sup>144</sup> *Tongwane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC).at para 26 (*Tongwane*).

<sup>145</sup> 77 percent of land was set aside for ownership by white people and white-owned companies and 13 percent was dedicated as forests and game reserves. The percentage of land reserved for black ownership was later expanded to 13 percent by the Native Trust and Land Act of 1936.

<sup>146</sup> Hall, 2010: 18. In terms of the 1936 Native Trust and Land Act, a limited number of labour-tenants were allowed on any one farm. Registration of labour tenants was required and the land owner had to pay a fee for every tenant registered.

urban areas. The Natives (Urban Areas) Consolidation Act 25 of 1945 controlled the movement of black males into urban areas and the Asiatic Land Tenure and Indian Representation Act of 1946 restricted Indian land ownership and residence to specific areas in Natal.

After the National Party came into power in 1948, it actively instituted a policy of apartheid and segregation. Millions of black South Africans living in urban areas were forcibly removed in accordance with the Group Areas Act.<sup>147</sup> The Trespass Act 6 of 1959 was used to 'secure the removal of people from land where their presence, has for one reason or another, become inconvenient to the owner and lawful occupier of the land or to the state'. From the 1960s onwards, masses of people were forced to leave the townships where they were living and move to 'Bantustans' or 'Homelands'.<sup>148</sup> It is estimated that 3.5 million people were forcibly removed from their land between 1960 and 1983.<sup>149</sup>

Apart from this series of mass relocation and dispossession, the legislature also enacted a regime which rendered the property rights of black South Africans within the 'reserved areas' feeble and weak. The Black Administration Act of 1927 provided that black South Africans could purchase land under exceptional circumstances, but the land could not be registered in their names.<sup>150</sup> The 'purchased' land was instead held in trust by the Minister of Native Affairs and the black 'purchaser' only had the right of use and occupation thereof. In terms of the Development Trust and Land Act of 1936, all rural and urban land which was reserved for 'natives' was held in the South African Native Trust. Regulations promulgated in terms of the Black Administration Act allowed for occupation of Trust land under strict conditions.<sup>151</sup>

A small step was taken toward repairing the racial discrimination in relation to title and security of tenure in urban areas in the late 1980s.<sup>152</sup> The NP government adopted the Conversion of Certain Rights to Leasehold Act 81 of 1988 which allowed for the conversion of occupation rights in urban townships into a 99 year leasehold.<sup>153</sup> In 1993, the Act was amended to provide for the conferral of ownership of property situated in formal townships.<sup>154</sup>

Decades, if not centuries, of land dispossession, forced relocation and the denial of property rights to the majority of the population is one of the urgent needs to which the South African Constitution responded by means of the property clause.<sup>155</sup>

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<sup>147</sup> This Act, consisting of a 1950 and 1957 version, assigned a separate living area to each ethnic group

<sup>148</sup> The government claimed to envisage the creation of 'independent states' for each of the different black ethnic groups. Some of the laws implemented in this regard were The Promotion of Bantu Self-Government Act 46 of 1959 which categorised black South Africans into eight ethnic groups based on their language and culture; the Bantu Homelands Citizenship Act 26 of 1970, the Bantu Homelands Constitution Act 21 of 1971 and the Black Law Amendment Act 7 of 1973.

<sup>149</sup> Platzky & Walker, 1985: 9-12.

<sup>150</sup> *Tongoane*, 2010: par 13.

<sup>151</sup> The Bantu Areas Land Regulations, Proclamation R188, GG 2486, 11 July 1969. The Bantu Affairs Commissioner was entitled to inspect the land and an occupier's land could be re-allocated to someone else if he was absent without permission for more than a year.

<sup>152</sup> The NP government came to realise that its policy of treating all black South Africans as mere 'visitors' in the city would have to be reformed. *Moloi v Moloi and Others; Smith and Another v Mokegedi and Others* [2012] ZAGPJHC 275 (26 October 2012) para 5.

<sup>153</sup> The Act applied to permits granted in townships in terms of regulations promulgated under the Black Urban Areas Consolidation Act. The Act did not, however, accord ownership to black occupants.

<sup>154</sup> The name of the Act was changed to the 'Conversion of Certain Rights into Leasehold and Ownership Act'.

<sup>155</sup> The property clause, which is Section 25 of the Constitution, reads as follows: "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. (2) Property may be expropriated only in terms of law of general application— (a) for public purposes or in the public interest; and (b) subject to compensation, the amount, timing, and manner of payment of which must be agreed, or decided or approved by a court. (3) The amount, timing and manner of payment of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant factors, including— (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; (e) the purpose of the expropriation. (4) For the purposes of this section— (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (b) property is not limited to land. (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress. (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property, or to equitable redress. (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform,

The internal goal of land reform is part of the overarching goal of transformation and is crucial to the entire constitutional project. The property clause also has the goal of protecting rights in property from arbitrary infringement. Section 25 has been drafted to strike a balance between the promotion of the essential public goal of land reform and the protection of individual rights.<sup>156</sup> This drafting was the result of much debate and contestation between the African National Congress and the National Party during the multi-party negotiations which lead to the adoption of the Interim Constitution.<sup>157</sup> The ANC's original stance was that there ought to be no protection for the individual right to property in the Constitution. It was argued that constitutionally protected property rights would entrench white privilege by standing in the way of land reform programmes. The ANC's suggestions for the Interim Constitution in respect of a property clause was limited to a mechanism which would ensure the restoration of land.<sup>158</sup> On the other hand, the NP's main concern was to secure existing white ownership of property after the democratic transition had taken place. It accordingly suggested that the Charter of Fundamental Rights should retain the rights of property owners to acquire, possess, enjoy and dispose of property and subject any expropriation to the payment of market-related compensation.<sup>159</sup> Some also argued that the inclusion of a right to property was necessary for stability and to secure investment in the country.<sup>160</sup> The property clause which was ultimately adopted is a compromise, taking heed of all of these considerations to a certain extent. In this sense, it connects with the 'peace-treaty' function of the constitution which sought to establish a durable compromise that could lead to political stability (as was explored in Chapter 2).

The property clause's 'protective goal' is found in the negatively framed right to property in subsections 25(1) to (3).<sup>161</sup> Section 25(1) provides that a person can only be deprived of property if this is in the public interest and the requirements listed in the section are complied with.<sup>162</sup> It is made clear from the outset that the right to property is subject to limitation.<sup>163</sup> Section 25(2) provides that expropriation is legitimate, but only if it is imposed by a law of general application, is in the public interest and is accompanied with compensation.<sup>164</sup> Section 25(3) provides that compensation for expropriation must be 'just and equitable' and must balance the interests of the affected parties and the public.<sup>165</sup>

The property clause's 'reform goal' is found in subsections 25(5) to (9). Section 25(5) places a general duty upon the state to take reasonable steps to create conditions which promote equitable access to land.<sup>166</sup> Section 25(6) and (9) places a specific duty upon the state to enact legislation which will ensure security of tenure or redress for persons or communities whose tenure of land is legally insecure. Section 25(7) entitles a person or community dispossessed of property after 19 June 1913, as a result of past racially discriminatory laws or practices, to restitution or equitable redress, as provided for in a law.<sup>167</sup> Section 25(8) reiterates that no provision of section 25 may impede the state from taking legislative and other measures to achieve land, water and related reforms in order to redress past racial discrimination, provided that such measures are in accordance with the limitation requirements in section 36. In order to achieve the goal of land reform, the Constitution envisages land restitution, land redistribution and land tenure reform.<sup>168</sup>

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in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of s 36 (1). (9) Parliament must enact legislation referred to in subsection (6)."

<sup>156</sup> The Constitutional Court has acknowledged, in the matter of *First National Bank Ltd v Commissioner for the South African Revenue Services* that the purpose of section 25 is to protect "existing property rights as well as serving the public interest, mainly in the sphere of land reform ... and also as striking a proportionate balance between these two functions.

<sup>157</sup> Chaskalson, 1995:223.

<sup>158</sup> The African National Congress 'A Bill of Rights for a new South Africa', a preliminary revised text May 1992 at Articles 12 and 13. Quoted in Chaskalson, 1995: 224-226.

<sup>159</sup> Republic of South Africa. Government's proposals on a charter of Fundamental Rights, 2 February 1993 at 11, quoted in Chaskalson, 1995: 224.

<sup>160</sup> The private sector would be reluctant to invest in a country where there is a risk of nationalisation or confiscation of property in the name of economic reform. Currie and de Waal, 2005:533.

<sup>161</sup> Van der Walt, 2005: 13.

<sup>162</sup> See note 156 above.

<sup>163</sup> This constitutional property right differs from property in private law, in the sense that the protection of the rights and interest in property (as well as any state interferences therewith) has to be considered in the context of the Constitution's values and goals. Van der Walt, 2005: 73.

<sup>164</sup> See note 156 above.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Hall, 2004:655.

The two internal goals of the property clause, namely land reform and the protection of private property against arbitrary interference, have a seemingly contradictory nature. It has been suggested that the right must be interpreted with the interests it is aiming to protect in mind.<sup>169</sup> Such a purposive approach would suggest that, while the Constitution aims to protect both of these interests, when they compete with one another a proportionality analysis informed by the foundational values of the Constitution would have to be undertaken in order to determine the extent to which the limitation of either or both of these interests is justifiable. The Constitutional Court has adopted an interpretation of section 25 which neither frustrates land reform nor undermines private property rights.<sup>170</sup> In so doing, it has sought to bolster these dual purposes and hold the constitutional compromise intact.

Another seeming internal conflict in the property clause is the limitation of land restitution claims to dispossession which have taken place after the promulgation of the Natives Land Act in 1913. It has been argued that this provision renders it impossible for the bulk of dispossessions, which had taken place through colonial conquest before 1913, to be redressed.<sup>171</sup> This conflict has been explained as a decision taken due to the difficulty which would be involved in unravelling claims which arose more than a century ago and the absence of documentation prior to this date. It is perhaps a flaw in the Constitution's design that claimants whose claims arose before 1913 do not even have an opportunity to have their cases considered. In November 2015, a National Dialogue was held on this cut-off date for land claims, in preparation of the 'Exceptions Policy Framework' which is to be submitted to cabinet for approval.<sup>172</sup> The purpose of this dialogue was to consider "targeted interventions" in land restitution, aiming at redressing the dispossession of the Khoi and San tribes prior to 1913. Should this Exceptions Policy Framework be adopted, it could lead to an eventual amendment of section 25 of the Constitution.

### ***Relationship between the internal and the external goals***

The Constitution, in its capacity as a 'peace treaty' had to chart a way forward between a majority which could not consider the new democratic order to be legitimate unless drastic shifts in land distribution were to take place; and a minority which feared losing their existing rights to property. It could be argued that the constitutional order's legitimacy was secured for both sides by the compromise which involved the Constitution's dual commitment to addressing historical injustices and the protection of individual property. At the same time, it might also be the case that neither side fully accepted the compromise and that this unhappiness translated into a general lack of enthusiasm for the constitutional order as a whole. Indeed, at present in political discourse in South Africa, discontent is expressed – particularly from more radical parties than the ANC – concerning the current property relationships and the perception that the constitution has provided support for the maintenance of an unjust status quo.<sup>173</sup>

Similarly, the Constitution has created several mechanisms and standards for channelling the conflict around land which could potentially erupt due to the extremely unequal distribution which existed at the time of its adoption. Formal processes have been created by which people who had suffered dispossession can institute claims and receive redress. Since the dispossession of land occurred over the span of many decades and the dispossessed property often had been acquired by multiple owners, it was decided that current owners of restored property would not bear the full cost of restitution.<sup>174</sup> Land claims are instituted against the state, which serves as a 'buffer' between claimants and owners and prevents direct conflict between parties.

The property clause also places a positive duty on the state to enact legislation to provide for land redistribution.<sup>175</sup> The Constitutional Court has expressed the view that the state has a duty to provide access to land.<sup>176</sup> The

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<sup>169</sup> Van der Walt, 2005: 17.

<sup>170</sup> Van der Walt, 2005: 25.

<sup>171</sup> Roux, 2008: 46-156.

<sup>172</sup> South African Government.(2015). Minister Gugile Nkwiti on national dialogue on 1913 Natives Land Act cut-off date. [online]. Available at: <http://www.gov.za/speeches/minister-nkwinti-officially-opens-national-dialogue-exceptions-1913-natives-land-act-cut> [accessed 26 November 2015].

<sup>173</sup> Politicsweb, (2014). *Taking back our stolen land – EFF*. [online]. Available at <http://www.politicsweb.co.za/documents/taking-back-our-stolen-land--eff> [accessed 9 December 2015].

<sup>174</sup> The current owners of the dispossessed property often only benefitted indirectly.

<sup>175</sup> Pienaar & Brickhill, 2008: 48-5.

<sup>176</sup> *Grootboom*, 2001: para 78.

property right is thus expressly linked to the external goal of providing access to an important public good such as land which can be the basis for subsistence agriculture, housing, food provision and much else.

The goal of the property right, to see large-scale land restitution and redistribution, is linked to the external goal of minimising agency costs. Since any land reform programme is inevitably complex and in the case of South Africa, solely dealt with by the state, the goal of limiting bureaucratic bottle-necks is of the utmost importance.<sup>177</sup> Considering that there are thousands of claimants and that the process is slow and complex, room is created for corruption – people may be prepared to pay to have their claim prioritised which compromises the integrity of the entire process. There are clear goals to limit agency costs in the form of corruption and bureaucratic burdens in the land reform process.

### **Evaluation of performance**

#### *Thin compliance*

##### *Reformative goal*

In a thin sense, much has been done to achieve the Constitution's reform goal. There are three 'legs' to South Africa's land reform programme: restitution of land to those who had been dispossessed after 1913; redistribution to those who do not qualify for restitution as well as a land tenure reform programme.<sup>178</sup> An array of policies and legislation have been adopted in order to achieve each of these aspects of the property clause's reformative goal. Provision has also been made for more equitable access to petroleum and mineral resources in the form of the Mineral and Petroleum Resources Development (MPRDA) Act 28 of 2002. The Act seeks to address the racially unequal distribution of mineral resources in South Africa by ensuring it is optimally exploited. It has the effect of converting unused old order mining rights to prospecting or mining rights and doing away with 'the right to neither sell nor exploit' minerals.<sup>179</sup> It aims, in some way, to shift ownership of mineral resources and petroleum from exclusively white hands.<sup>180</sup>

The Communal Property Associations Act 28 of 1996 has a bearing on all three aspects of the reformative goal. It provides for the establishment of landholding institutions (Communal Property Associations) which enable groups of people to acquire, hold and manage property through the various land reform programmes. The Act provides for the provisional and final registration of communal property associations. The association has to draft a constitution in accordance with prescribed principles of equality and non-discrimination<sup>181</sup> to qualify for final registration. The Act governs internal relationships between association members as well as external relationships. In terms of section 12 of the Act, the community property may not be disposed of or encumbered without majority consent.<sup>182</sup> This Act also gives expression to a more African ethos around land ownership which is not reduced to individual title. It also serves the function of mediating conflicts amongst a community over land. Thin compliance with each 'leg' of the reformative goal will now be discussed in turn.

#### *(a) Restitution*

The Restitution of Land Rights Act 22 of 1994 was enacted to 'provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices'.<sup>183</sup> In terms of the Act, people who had been dispossessed of land or their descendants, can

<sup>177</sup> Land claims are instituted against the state, the state takes the responsibility for settling the matter and bears the cost of the process. This means that there is much room for bureaucratic delays and difficulties.

<sup>178</sup> Hall, 2004: 655.

<sup>179</sup> The commencement of the Act has had the immediate effect of abolishing the right to neither sell nor exploit minerals. The State, as exclusive owner and custodian of South Africa's mineral resources, was given greater authority to grant mineral rights. Unused 'old order' mineral rights could not be sold, used or ceded until they were converted into 'new order' mining or prospecting rights. Holders of unused old order rights were given one year from the date of the coming into operation of the Act, 1 May 2004, to convert their rights. Old order mining rights that were in use could be converted into new order mining rights within five years, and prospecting rights within two years of the commencement of the Act. Old order rights which were not converted into new order rights within the prescribed time periods were permanently extinguished.

<sup>180</sup> *Agri South Africa v Minister of Energy and Petroleum* 2013 (4) SA 1 (CC).

<sup>181</sup> In terms of section 9 of the Act, some of the principles in terms of which the constitution has to be drafted are: accountability, transparency, equality of membership, fair access to the property held by the association and fair and inclusive decision-making.

<sup>182</sup> The Act also places the registration of communal property on an equal footing with the western-style registered land rights.

<sup>183</sup> Long title of Act.

submit claims against the state for restoration of their original land rights, the provision of alternative land, monetary compensation or other redress. The Act also establishes a Commission on the Restitution of Land Rights (CRLR) to assist people to make claims, to investigate the validity of claims and to facilitate their settlement or adjudication. The Act also establishes a Land Claims Court to adjudicate claims and make restitution orders.<sup>184</sup>

*(b) Redistribution*

The land redistribution programme was envisioned to make land available to those who do not qualify for restitution.<sup>185</sup> In terms of section 25(5), the property clause's goal of land redistribution will be met in a thin sense if the state has taken 'reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis'.

In terms of policy, the government originally implemented the Settlement / Land Acquisition Grant (SLAG) from 1995 to 1999. This policy provided small grants to groups of poor people to assist them in purchasing land. In 2001, the DLA launched the Land Redistribution for Agricultural Development Programme (LRAD). In 2009, the Comprehensive Rural Development Programme (CRDP) was adopted. The Rural Development Framework (RDF) was adopted in 2013, which defines the three phases of rural development envisioned in the CRDP.<sup>186</sup>

The Land Reform: Provision of Land and Land Assistance Act (PLAA) 126 of 1993<sup>187</sup> provides for the settlement of people on designated land and financial assistance for purposes of land reform. It is currently the main mechanism for the realisation of the goal of land redistribution.<sup>188</sup> In terms of the Act, the Minister of Land Affairs is to designate land and subdivide it in accordance with a 'partition plan' which provides for small-scale farming community and business purposes.<sup>189</sup> Persons who have no land or who have limited access to land, who wish to upgrade their land tenure or who have been dispossessed of their rights in land but do not qualify for restitution can apply for relief under this Act.<sup>190</sup> Financial assistance granted in terms of the Act may be used for developmental purposes, including the acquisition of capital assets and shares in other existing agricultural enterprises.<sup>191</sup>

The Land Reform (Labour Tenants) Act 3 of 1996 was enacted with the purpose of not only protecting labour tenants<sup>192</sup> from exploitation and eviction, but also providing for the acquisition of land or rights in land for this group. It is a purpose of the Act to phase out labour tenancy and for labour tenants to become land-owners in their own right.<sup>193</sup> The Act provides that labour tenants may apply for land, rights in land or financial assistance.<sup>194</sup> The landowner is informed of the claim and has the option of proposing an alternative to the granting of land or rights in land to the labour tenant. If the labour tenant and land owner cannot reach an agreement, the LCC may be approached to resolve the matter or it can be referred to arbitration.<sup>195</sup> If an application under the Act is successful, the labour tenant becomes a land owner in his own right and the original land owner is entitled to 'just and equitable' compensation.<sup>196</sup>

The Transformation of Certain Rural Areas Act 94 of 1998 is aimed at persons occupying land located in the former 'Coloured' rural areas within the Western Cape, Northern Cape, Eastern Cape and Free State provinces.

<sup>184</sup> Chapter III.

<sup>185</sup> Hall, 2004: 655.

<sup>186</sup> These three phases are firstly, meeting basic human needs, secondly, to develop rural enterprises and thirdly to develop rural agro-industries sustained by rural markets and providing credit facilities. DRDLR, 2015:

<sup>187</sup> Which is a redrafted version of

<sup>188</sup> Pienaar and Brickhill, 2008: 48-20.

<sup>189</sup> Sections 5-6.

<sup>190</sup> Section 10(2).

<sup>191</sup> Section 10(1)(b).

<sup>192</sup> 'Labour tenant' is a technical term which denotes a person who provides labour on a farm in exchange for the right to live on the farm or to use some of its land for farming.

<sup>193</sup> Pienaar and Brickhill, 2008: 48-16; Chapter III of the Labour Tenants' Act.

<sup>194</sup> Chapter III, sections 16 and 26. The application can be either for land which the labour tenant is currently occupying or land which they (or a predecessor) had occupied prior to an illegal deprivation. The application can also pertain to a parcel of land indicated by the landowner, which the applicant is not occupying at the time of application. The Act also provides that an application for land can be accompanied with an application for other limited real rights that will enable the applicant to make productive use of the land.

<sup>195</sup> Section 17.

<sup>196</sup> Section 23.

The Act is both a redistributive and tenure reform measure in that it seeks to replace the existing rural land tenure system with negotiated land reform measures.

(c) *Tenure reform*

Tenure reform is aimed at land users who already have access to land, but whose land rights and interests remain insecure because of apartheid laws and practices. Tenure reform aims to provide temporary or permanent protection to vulnerable land users through the adoption of anti-eviction provisions and the strengthening of specific weak and unsuitable tenure arrangements.<sup>197</sup>

The Interim Protection of Informal Land Rights Act 31 of 1996 was enacted as a temporary measure which ought to have lapsed by 31 December 1997, but it has been extended on an annual basis. The purposes of this Act was to protect insecure land rights for people living in former Bantustans which are not necessarily reflected in deeds registries records. The Act provides interim protection for a large range of land holdings and interests that lacked legal protection or recognition during apartheid. The Act seeks not to make changes to these rights but simply to secure them. The Act provides that the holders or occupiers may not be deprived of their land without their consent. This Act was not repealed by the Communal Land Rights Act 11 of 2004.

The Land Reform (Labour Tenants) Act 31 of 1996 which has already been mentioned was enacted to strengthen labour tenants' rights as well as to increase their access to agricultural land.<sup>198</sup> A labour tenant is not a salaried farm worker, but someone who provides labour on a farm in exchange for the right to use parts of the land.<sup>199</sup> The Act ensures that, subject to certain conditions, labour tenants cannot be evicted from the land on which they live and work.<sup>200</sup>

The Extension of Security of Tenure Act 62 of 1997 (ESTA), in terms of its long title, aims to facilitate long-term security of tenure for lawful occupiers of rural land. The Act protects lawful occupiers from unfair evictions<sup>201</sup> while also creating mechanisms in terms of which occupiers can obtain independent land rights.<sup>202</sup> The Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988, which had been enacted by the apartheid government, was assigned to the provinces in terms of the Interim Constitution in 1996.<sup>203</sup> The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 has been enacted to ensure that the eviction of unlawful occupiers only takes place in a manner that is fair.<sup>204</sup>

The government has failed to enact a law to secure the rights of people living in the former Bantustans. The Constitution makes provision that 'a community whose tenure of land is insecure as a result of past racially discriminatory laws or practices is entitled, *to the extent provided by an Act of Parliament*, either to tenure which is legally secure or to comparable redress'.<sup>205</sup> In 2003, the Communal Land Rights Act was enacted (CLARA), which gave traditional leaders and councils the power to control the occupation, use and administration of communal land.<sup>206</sup> The constitutional validity of the Act was contested by applicant communities who occupied

<sup>197</sup> Van der Walt, 2005: 310.

<sup>198</sup> Van der Walt, 2005: 312.

<sup>199</sup> Van der Walt, 2005: 312. The Land Reform (Labour Tenants) Act defines a labour tenant as someone "(a) who is residing or has the right to reside on a farm; (b) who has or has had the right to use cropping or grazing land on the farm ... in exchange for labour provided to the landowner or lessee; and (c) whose parent or grandparent resides or resided on a farm or had the use of cropping or grazing land on such farm ... in exchange for labour provided to the owner or lessee."

<sup>200</sup> In terms of section 7, a labour tenant can only be evicted if it is fair and equitable to do so and if it has been shown that there has been a breach of the labour tenant's duty to provide labour or another breach in relationship with the landowner or lessee that cannot be rectified. The Act provides for labour tenants to acquire ownership or other rights in the land and thus also supports the redistributive goal of the property right, see 3.1.1.2 above.

<sup>201</sup> Sections 1-3 and 8-25.

<sup>202</sup> Sections 4 and 6.

<sup>203</sup> In terms of Proclamation No. 41 of 1996, 26 July 1996 *Government Gazette* No. 17320. Section 235(8) of the Interim Constitution allowed for the administration of Acts which were in force under apartheid to be assigned to the provinces by Proclamation.

<sup>204</sup> This Act is discussed at length in this chapter in the section on the right to housing.

<sup>205</sup> Section 25(6) (emphasis added).

<sup>206</sup> Weinberg, 2015:14. CLARA aimed to create a new system for the administration of communal land by 'land administration committees'. It was envisioned that traditional councils will perform the functions of land administration committees. CLARA furthermore would have repealed and replaced the system of indigenous law in respect of communal land as it currently stands. *Tongoane* at para 77.

land that was administered under indigenous law and would have been affected by its operation.<sup>207</sup> The Constitutional Court held that the Bill was wrongly classified as an 'ordinary Bill not affecting the provinces'. This meant that the Bill was passed without being considered by the National Council of Provinces even though it was, in fact, a Bill which affected the provinces.<sup>208</sup>

Even though the Court declared the Act constitutionally invalid on a procedural basis and did not make a pronouncement on the constitutional validity of its substance, there is reason to believe that it could have been invalidated on its contents too. The Act provided that chiefs would make decisions on behalf of people because it was customary for them to do so, even though this was not confirmed by historical evidence.<sup>209</sup> The wide-ranging powers given to traditional leaders could have limited the rights of community members and sanctioned an abuse of power at their expense.<sup>210</sup>

The Communal Land Tenure ('Wagon Wheel') Policy (CLTP) was adopted in September 2014 and repeats the troubling trends in the substantive provisions of CLARA. CLTP aims to transfer full ownership of units of 'tribal' land in the former Bantustans to traditional councils. Individuals and families will be able to get 'institutional use rights' in parts of this land.<sup>211</sup> The policy has been criticized for heeding the traditional leaders' claim that they alone are the rightful owners of land in the former Bantustans. Government seems set on transferring land to traditional councils only. The policy does not take into account the fact that a group of claimants may not make up a traditional community that falls under the jurisdiction of a traditional leader.<sup>212</sup> Such a distinct, smaller group would be forced to become a minority within a larger tribal structure if they are to benefit from the land tenure policy.<sup>213</sup> The policy furthermore undermines pre-existing property rights of these groups – derived from either the common law, customary law or statute. The policy would have the effect of *compromising* tenure security and rights in land, contrary to section 25 of Constitution.

#### *Protective goal*

Since the protection of private property is formulated negatively, thin compliance with this goal would mean that measures adopted to achieve land reform, on the face of it, do not sanction deprivation of property beyond the limits of section 25. Legislation which has been adopted to give effect to the reformative goal of the Constitution has taken heed of the protective goal of the Constitution and has provided for the payment of compensation to property owners if their property is to be expropriated for the purposes of land reform. The Labour Tenants Act provides that the owner or any other person whose rights are affected by the operation of the Act shall be entitled to 'just and equitable compensation as prescribed by the Constitution'.<sup>214</sup> In terms of section 12 of PLAA, land can be obtained by means of expropriation, but the current owner must be afforded a hearing and is entitled to compensation. Furthermore, in executing the restitution programme, a 'willing buyer, willing seller' policy has been followed, which gives private property owners the leeway to refuse to give up their property in the name of redress, even where they will receive market-related compensation in return.<sup>215</sup> That policy, as we shall see, has been controversial and will be considered under the 'thick' compliance section. Parliament passed a new Expropriation Bill early in 2016. The Bill still has to be passed by the National Council of Provinces, but as it stands, compensation could be less than the current full market value plus damages for losses.<sup>216</sup>

<sup>207</sup> In terms of section 1 of CLARA, CLARA applies only to 'communal land': land 'which is, or is to be, occupied or used by members of a community subject to the rules or custom of that community'.

<sup>208</sup> In terms of section 74 to 77 of the Constitution, different procedures are followed when enacting Bills amending the Constitution; ordinary Bills affecting the provinces; ordinary Bills not affecting the provinces and money Bills. Parliament is required to classify a Bill in order to determine which process ought to be followed in its adoption.

<sup>209</sup> Weinberg, 2015: 14.

<sup>210</sup> Weinberg, 2015: 14.

<sup>211</sup> Weinberg, 2015: 17.

<sup>212</sup> Weinberg, 2015: 16.

<sup>213</sup> Alternatively, government policy could have allowed for the transfer of title to either tribal councils or CPAs, which could represent a smaller group. Rural Women's Action Research Program (2015). Communal Land Tenure Policy and IPILRA. [online]. available at [http://www.cls.uct.ac.za/usr/lrg/downloads/Factsheet\\_CommunalTenure\\_IPILRA\\_Final\\_Feb2015.pdf](http://www.cls.uct.ac.za/usr/lrg/downloads/Factsheet_CommunalTenure_IPILRA_Final_Feb2015.pdf) [accessed on 12 December 2015].

<sup>214</sup> Section 23.

<sup>215</sup> Hall, 2004: 654.

<sup>216</sup> Davis, G. (2016). Expropriation Bill closer to becoming law. *Eyewitness News* [online]. available at <http://ewn.co.za/2016/02/02/Expropriation-Bill-closer-to-becoming-law> [accessed on 10 March 2016].

### Conclusion

In a thin sense, private property is afforded protection from arbitrary interference and the protective goal of section 25 is achieved. Policies and legislation have been adopted in order to give effect to land redistribution, restitution and to enhance the security of tenure of vulnerable individuals. Legislation has not yet been adopted to strengthen communal tenure rights and the CLTP which has been adopted seems incapable of achieving security of tenure for communities. Apart from this failure, thin compliance with the goals of the property right has been achieved.

### Thick Compliance

The goals of the property clause are to protect private ownership, on the one hand, and to ensure that land reform programmes are undertaken in order to redress racially-motivated dispossession in the past on the other. The Constitutional Court has paved the way for thick compliance with both of these goals in its interpretation of the property clause. In the matter of *First National Bank Ltd v Commissioner for the South African Revenue Services* (*FNB case*), the Court states that the purpose of section 25 is to protect ‘existing property rights as well as serving the public interest, mainly in the sphere of land reform ... and also as striking a proportionate balance between these two functions’.<sup>217</sup> The Court’s careful consideration of how to engage in a section 25 challenge can be summarised as a six-stage enquiry:<sup>218</sup>

- 1) Is the right or interest in question constitutionally protected property?
- 2) If so, does the law at hand provide for the deprivation of property?
- 3) If so, was the deprivation arbitrary?
- 4) Does the law at hand provide for the expropriation of property?
- 5) If so, when, how and how much compensation should be paid?
- 6) Can an infringement of the property clause be justified under the limitation clause?

The Court has adopted a broad definition of the right to property. The Court was reluctant to give an exhaustive definition of ‘constitutional property’ in the *FNB case* and held that each case should be considered on its own merit within the constitutional framework. In *National Credit Regulator v Opperman*<sup>219</sup> the Court held that the personal right of an enrichment claim could be considered to be ‘property’ within the meaning of section 25.<sup>220</sup> In the case of *Shoprite Checkers (Pty) Limited v MEC for Economic Development*<sup>221</sup> the constitutional validity of an Act which had the effect of invalidating certain features of the liquor licenses held by grocery stores was challenged. The applicants argued that the liquor licenses were ‘property’ and that the Act would have the effect of arbitrarily depriving them of this property. The majority held that liquor licenses can be considered to be ‘property’ as envisioned in section 25 of the Constitution. It was held that ‘constitutional property’ is a concept which embraces entitlements beyond the scope of private common law property and that it could include an interest which has a commercial value. Froneman J expressed the view that the right to sell liquor is ‘clearly definable and identifiable by persons other than the holder; has value; is capable of being transferred and is sufficiently permanent...’.<sup>222</sup> In a separate judgement, Moseneke DCJ held that licenses allow people to do something which would have been otherwise prohibited. In his view, a license cannot be characterised as ‘property’.

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<sup>217</sup> 2002 (4) SA 768 (CC) para 50.

<sup>218</sup> Roux, 2008: 46-2.

<sup>219</sup> 2013 (2) SA 1 (CC).

<sup>220</sup> *Opperman* paras 61 -63.

<sup>221</sup> 2015 (6) SA 125 (CC).

<sup>222</sup> *Shoprite Checkers* para 68.

The *FNB* decision makes it clear that the property clause inquiry is dominated by the third question: the test for arbitrariness.<sup>223</sup> It is also at the point of considering the arbitrariness of a deprivation that the question of achieving a 'proportionate balance' between the two goals of the property right is struck.<sup>224</sup>

The precise test to be applied is the following:

'[D]eprivation of property is "arbitrary" as meant by s25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:

(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.

(b) A complexity of relationships has to be considered.

(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose of the deprivation and the person whose property is affected.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

(e) Generally speaking, when the property in question is ownership of land or a corporeal movable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25."<sup>225</sup>

The *FNB* decision has confirmed that every law that deprives a person of property, including by way of expropriation, must satisfy the requirements of section 25(1). As we have seen, these requirements allow for a consideration of the purpose of any deprivation which enables a balance to be struck between private property and public goals. The level of scrutiny can also vary allowing the courts flexibility in achieving this balance.

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<sup>223</sup> Roux, 2008: 46-3.

<sup>224</sup> Roux, 2008: 46-3.

<sup>225</sup> *FNB* para 100.

The two usual stages of a rights infringement inquiry have been conflated into a single stage in answering the question of whether the applicable law is justified against a standard of arbitrariness.<sup>226</sup> This means that it would only be on the rarest of occasions that a section 36 limitations analysis is actually reached. This stage only applies to a law of general application that does not allow for the arbitrary deprivation of property, but authorises the expropriation of property which is either not for a public purpose or which fails to provide for the payment of compensation. Commentators have noted that a law which does not meet the two expropriation-specific requirements would most likely not pass the arbitrariness test either.<sup>227</sup> Roux argues that it is a conceptual impossibility to justify a law which provides for the expropriation of property but does not provide for the payment of compensation or is not aimed at a public purpose.<sup>228</sup> It seems as a result that the provision in section 25(8), that any departure from section 25 must be in accordance with the provisions of section 36, is perhaps superfluous.

In what follows, the performance of the Constitution in respect of the protective and reformatory goals of the property right will be considered in a thick sense.

#### *Protective goal*

The Constitutional Court has confirmed that a person cannot be deprived of his or her private property arbitrarily.<sup>229</sup> A property owner is also entitled to compensation in the case of an expropriation of property.

The differentiation between deprivation and expropriation is important since compensation is only to be paid for an expropriation.<sup>230</sup> The Constitutional Court has held in *Reflect-All* that, in order to qualify as an expropriation, property has to be acquired by the state. This finding has been confirmed in the matter of *Agri-SA v Minister of Minerals and Energy*<sup>231</sup>. This case dealt with a challenge to the MPRDA. The case furthermore upheld provisions of the MRDPA which aim to eradicate discriminatory practices in the mining industry and to promote 'equitable access' to mineral resources and economic development of all South Africans.<sup>232</sup>

A question surrounding expropriation of property once again arose in the matter of *Arun Property Development (Pty) Ltd v City of Cape Town*<sup>233</sup>. In this case it was considered whether a private land owner ought to be compensated for land which the municipality had acquired through the operation of the Land Use and Planning Ordinance (LUPO) 15 of 1985.<sup>234</sup> The Act provides that, upon approval of a property development, the public streets vest in the local authority. One of the City of Cape Town's arguments was that the property owners were not entitled to compensation because the vesting of the public roads in the local authority amounted to a mere deprivation and not to an expropriation. The Court held that where roads in excess of what is needed for the property development vested in the state, in accordance with the official planning documents, a land owner ought to be compensated for this excess. The Court unanimously held that such an interpretation is 'at peace with section 25(2) of the Constitution'.<sup>235</sup>

<sup>226</sup> The two stages are: 1) determining whether a constitutional right has been violated and 2) determining whether such violation is justifiable in terms of the general limitations clause (section 36 of the Constitution). Roux, 2008: 46-4.

<sup>227</sup> Van der Walt, 2005: 56-57. Roux, 2008: 46-36.

<sup>228</sup> Roux, 2008: 46-36.

<sup>229</sup> *FNB* case.

<sup>230</sup> *Harksen v Lane* NO 1998 (1) SA 300 (CC) paras 32-33.

<sup>231</sup> *Agri-SA* paras 58-59.

<sup>232</sup> As discussed in the section on thin compliance, MRPDA removes the right to 'sterilise' mineral rights and converts unused 'old order rights' into mining or prospecting rights. Holders of unused old order rights were given an exclusive right to apply for a mining or prospecting right under MRPDA within one year after its commencement.

<sup>233</sup> 2015 (2) SA 584 (CC).

<sup>234</sup> Section 28 of LUPO provides that, upon the approval of a property developer's subdivision plan, areas indicated as public streets and public spaces vest in the local authority. The section reads: "The ownership of all public streets and public places over or on land indicated as such at the granting of an application for subdivision under section 25 shall, after the confirmation of such subdivision or part thereof, vest in the local authority in whose area of jurisdiction that land is situated, without compensation by the local authority concerned if the provision of the said public streets and public places is based on the normal need therefor arising from the said subdivision or is in accordance with a policy determined by the Administrator from time to time, regard being had to such need." The interpretation of this section and, in particular, whether the land owner whose land had vested in the municipality is entitled to compensation, is the crux of the matter.

<sup>235</sup> *Arun* at para 41.

The question of the calculation of an amount of compensation, as required in terms of section 23 of the Labour Tenants Act, has been considered by the LCC in the matter of *Khumalo v Potgieter*.<sup>236</sup> The LCC suggested that the market value of the property should be determined according to accepted methods, and that this value should be adjusted by considering the section 25(3) factors.<sup>237</sup> The question of calculation of compensation for the expropriation of property also arose in the matter of *Du Toit v Minister of Transport*.<sup>238</sup> In this matter, the roads Board extracted 80 000 cubits of gravel from Mr du Toit's farm which amounted to an expropriation in terms of the National Roads Act of 1975. Mr du Toit was compensated in terms of the Act and in accordance with the actual financial loss suffered due to the expropriation. He contended that the market value of the gravel is a consideration which ought to have been accorded more weight. The majority of the Constitutional Court held that compensation in terms of the National Roads Act should be calculated according to the approach to calculation as set out in the Act and that, after the calculation has been made, the factors listed in section 25(3) of the Constitution should be considered to ensure that such an amount is just and equitable. The starting point thus in determining just and equitable compensation was market value from which departures could be allowed in terms of the section 25(3) criteria. In a separate judgment, Langa J held that the Constitution requires a determination of compensation in which considerations of justice and equity play a central role. He rejected the notion that market value should be privileged at the expense of other considerations of justice and equity.<sup>239</sup>

In a thick sense, the protective goal of the property right has been accorded recognition in legislation and case law and has been balanced carefully with the need to achieve land reform. At the same time, the wider context in which property is held cannot be ignored: the high rates of property-related crime in South Africa such as theft and robbery render people insecure in their property holdings. The state has failed to protect individuals and to manage to control the wave of crime. As a result, substantively, individual property holdings remain precarious despite formal legal protections.

#### *Reformative goal*

It has been established in the previous section that, for the most part, thin compliance with the reformative goal of the property right has been achieved. This section will consider the effect of the legislation, policies and measures which have been adopted pursuant to this goal and whether the Constitution's desired outcome has been achieved.

##### *(a) Restitution*

In a thick sense, it seems that the restitution programme has been the most effective of all the land reform measures which have been undertaken in terms of section 25.

The courts interpreted provisions of the Restitution Act and Constitution in favour of providing redress to as large as possible a class of claimants. The concept of 'dispossession', which has not been defined in the Act, has been interpreted widely: the LCC has held that the loss of actual physical occupation is not a requirement<sup>240</sup> and the Supreme Court of Appeal has confirmed that forced removal is not required either.<sup>241</sup> Since dispossession can occur in a series of events over a period of time, a date of dispossession is also not a requirement.<sup>242</sup> The courts interpret any loss of possession which has been prompted or indirectly caused by a racially discriminatory law or practice to amount to 'dispossession'. Such an interpretation caters for the situation where property was sold in anticipation of an expropriation or if there was an 'element of compulsion' outside of the direct application of a discriminatory law or practice at play.<sup>243</sup>

<sup>236</sup> [2000] 2 All SA 456 (LCC).

<sup>237</sup> In the *Modderklip* case, discussed at length under 'the right to housing' in the socio-economic rights section of this chapter, it was decided that it was in the interests of justice to compensate an individual where a community which occupied his property could not be moved.

<sup>238</sup> 2006 (1) SA 297 (CC).

<sup>239</sup> The Court did not interfere with the financial loss-related compensation amount awarded to Mr du Toit.

<sup>240</sup> *Dulabh v Department of Land Affairs* 1997 (4) SA 1108 (LCC).

<sup>241</sup> *Abrams v Allie & Others* 2004 (4) SA 534 (SCA).

<sup>242</sup> *Richtersveld* at paras 100-101.

<sup>243</sup> *Ex parte Pillay* (unreported, LCC Case No 1/99, 13 September 2004) para 9.

In determining whether a dispossession was the result of a ‘racially discriminatory law or practice’, the LCC originally held that the measure had to be connected with ‘creating spatial racial segregation’.<sup>244</sup> This restrictive approach was overturned by the Supreme Court of Appeal in the *Richtersveld* matter.<sup>245</sup> The Richtersveld community instituted a claim for a strip of land in the Northern Cape Province which had historically been occupied by the community and its ancestors. The LCC held that the community had lost control of the land in 1847 when the land was annexed and declared Crown land and therefore did not qualify for restitution under the Act.<sup>246</sup> The LCC also held that the dispossession did not take place due to discriminatory laws or practices.<sup>247</sup> The matter eventually reached the Constitutional Court. It was held that despite the 1847 annexation of the land, the community continued to reside there and make use of it. Since the area was vacated in terms of the Precious Stones Act of 1927 after the discovery of diamonds in the 1920s, it was contested in the LCC whether the dispossession was a result of racially discriminatory laws or practices.<sup>248</sup> The Constitutional Court held that the Precious Stones Act recognized and protected common law rights, while the indigenous rights in land of the Richtersveld community were not recognised or protected. The Court held that the impact of the law was racially discriminatory and that it was covered within the ambit of the Restitution Act.<sup>249</sup> A similar finding was subsequently made in the *Goedgelegen* case.

The Act initially provided that claims should be lodged between 1 May 1995 and 31 December 1998. By 31 December 1998, 63 455 claim forms have been lodged at the CRLR.<sup>250</sup> Only 41 claims were settled in the CRLR’s first five years, which prompted a ministerial review in 1999.<sup>251</sup> After this review, the CRLR’s role was expanded and the restitution process became largely administrative. Only cases where there are disputes or when the type or level of compensation is contested would be referred to the court.<sup>252</sup> Atuahene criticizes the expanded power accorded to the CRLR after the court’s ability to review all its settlement decisions was removed. She argues that most claimants do not have the resources to approach the LCC, which rendered the CRLR’s decisions final. A situation was created where the CRLR had the roles of defending the interests of both the claimants and the state.<sup>253</sup>

A further step which has been taken to expedite the restitution process was the introduction of Standard Settlement Offers (SSO) of cash compensation for urban claims.<sup>254</sup> This standardization of financial compensation meant that each and every claim did not have to be valued separately.<sup>255</sup> While this step led to greater speed in settling restitution claims, this system and financial compensation as redress in general, has been the subject of controversy. The way in which the CRLR has handled the settling of claims through compensation has arguably undermined the objectives of the section 25.

While the main aim of the Restitution Act is restoration, people were often not given a choice between compensation and restoration. Even when they had the option to choose between land and compensation, they would still make the choice to take the money rather than wait for the CRLR to restore land to them: this could largely be explained by the fact that the CRLR’s processes are complicated, the waiting period is long and there is always a possibility of the claim not being settled. SSO led to 70 percent of urban claimants receiving small monetary awards which generally did not significantly increase the recipients’ wealth because it was mostly spent

<sup>244</sup> *Minister of Land Affairs v Slamdien* 1999 (4) BCLR 413 (LCC) para 26.

<sup>245</sup> *Richtersveld Community v Alexkor Ltd* 2003 (6) SA 104 (SCA) para 97.

<sup>246</sup> The LCC’s reasoning was that actual dispossession had taken place long before the 1913 cut-off date.

<sup>247</sup> The LCC followed the *Slamdien* approach in holding that the reason for the community’s removal was not based on a measure intended to promote spatial racial segregation but on the ‘racially neutral’ Precious Stones Act of 1927.

<sup>248</sup> The argument was that since the Precious Stones Act did not have racial segregation or discrimination as a deliberate goal (in the way that other apartheid statutes did) that its effects might not be considered to be ‘racially discriminatory laws or practices’ for the purposes of a restitution claim. Pienaar and Brickhill, 2008: 48-62.

<sup>249</sup> *Richtersveld* para 9

<sup>250</sup> This number does not accurately reflect the number of claims, since some claims by members of the same community were consolidated while others were split and dealt with separately. Hall, 2011: 28-29.

<sup>251</sup> The following problems were identified in the review: 1) a single dispossession could lead to a proliferation of claimants; 2) the absence of any coherent or nationally consistent set of management structures, policies, systems and procedures; 3) legal and procedural complexities of the Restitution Act; 4) Contradiction of the Restitution Act which created an “independent” CRLR which was accountable to Parliament, while being located in the DLA; 5) metropolitan government avoided responsibility for dealing with land claims

<sup>252</sup> Hall, 2004: 657.

<sup>253</sup> Atuahene, 2014: 166.

<sup>254</sup> The Standard Settlement Offer was R40 000 per urban household and R17 500 per household for former long-term tenants.

<sup>255</sup> Hall, 2011: 27.

on urgent household items and settling debts.<sup>256</sup> By compensating claimants with money, the government effectively eliminated the rights to land which these former black owners might have had. As a result, only the current owners were left with rights to the land and the balance of economic power has not been addressed or changed.<sup>257</sup>

Commentators have criticised the CRLR for granting symbolic compensation to claimants whose land could not be restored, but giving the current owners market-related compensation when the state expropriates their land to transfer it back to dispossessed communities. This state of affairs undermines the purposes of the redistributive goal: it means that whites generally receive market-related compensation while blacks receive symbolic compensation.

The question of the method for computing 'just and equitable' redress was recently considered by the Constitutional Court. In the 1950s, the Florence family bought a house in Rondebosch, Cape Town and paid off the full purchase price over a period of 13 years. The Group Areas Act prevented the registration of the property in Mr Florence's name because the area in which it was situated was designated as a 'white' area.<sup>258</sup> Mr Florence and the owner of the property reached an agreement to cancel the sale in 1970. Soon thereafter, the Florence family had no choice but to leave their home. Mr Florence instituted a restitution claim in 1995. The family initially sought the restoration of the property, but this was not practical due to developments which it had undergone since their departure. The Florence family amended their claim and sought 'equitable redress' in the form of financial compensation instead.

The main question in the *Florence* matter was the appropriate measure for determining equitable redress in the form of financial compensation. The LCC held that the Florence family qualified for redress under the Restitution Act because they were dispossessed of their rights in land due to past discriminatory policies. The LCC held that even though the owner repaid an amount of R1350 to the Florence family when the purchase agreement was cancelled, they had been under-compensated by R30 513 at the time. The LCC also held that the family had effectively paid off the purchase price and ought to be compensated as the owners of the dispossessed property. In order to determine what the value of the Florence family's 1970 loss was at the time of granting compensation, the LCC had to consider 'changes over time in the value of money' in terms of section 33(eC) of the Restitution Act.<sup>259</sup> The LCC held that the best interpretation of the phrase 'changes over time in the value of money' is 'what the person can buy with the money'.<sup>260</sup> The LCC held that the Consumer Price Index (CPI) is the most appropriate method of conversion to use as it measures the actual value of money. It was accordingly ordered that the Florence family be paid the amount of R1 488 890 in compensation.

The Florence family (with Ms Florence as the applicant) appealed against this decision to the Supreme Court of Appeal where they contested the LCC's chosen conversion method. The Supreme Court of Appeal confirmed the LCC's use of the CPI as it had previously held that this was the appropriate metric to determine an equitable amount of compensation in terms of the Restitution Act.<sup>261</sup>

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<sup>256</sup> Atuahene, 2014: 166.

<sup>257</sup> Atuahene, 2014: 168.

<sup>258</sup> Mr Florence was not classified as "white" and the property was situated in a designated white area.

<sup>259</sup> Section 33 of the Restitution Act provides: In considering its decision in any particular matter the Court shall have regard to the following factors: (a) The desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices; (b) the desirability of remedying past violations of human rights; (c) the requirements of equity and justice; (cA) if restoration of a right in land is claimed, the feasibility of such restoration; (d) the desirability of avoiding major social disruption; (e) any provision which already exists, in respect of the land in question in any matter, for that land to be dealt with in a manner which is designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination in order to promote the achievement of equality and redress the results of past racial discrimination; (eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession; (eB) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land; **(eC) in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money;** (f) any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 9 of the Constitution.

<sup>260</sup> *Florence (Dodgen) v Government of the Republic of South Africa* [2013] ZALCC 11 para 32.

<sup>261</sup> *Florence v Government of the Republic of South Africa* [2013] ZASCA 104 referring to *Farjas (Pty) Ltd v Minister of Agriculture and Land Affairs and Others* [2012] ZASCA 173 para 16.

In the Constitutional Court, the majority<sup>262</sup> held that compensation under the Restitution Act ‘is not to be likened to a delictual claim aimed at awarding damages that are capable of precise computation of loss on a “but-for” basis’.<sup>263</sup> It held that what is ‘just and equitable’ in a particular matter also has to take account of the interest of the national fiscus and society as a whole and the CPI (which is essentially a standard for measuring inflation) was the appropriate metric in this instance.

Justice Van der Westhuizen, in a dissenting judgment, reasoned that a purposive interpretation of the Restitution Act would mean that when a claimant receives financial compensation in the place of restitution, she ought to be placed in the same position she would have been, had the property not been dispossessed. The minority<sup>264</sup> held that the CPI is not suitable to determine the appropriate amount of compensation for the loss of an immovable asset.<sup>265</sup> The Florence family would not have been able to buy a property, equivalent to the one they have lost, with the compensation calculated using the CPI. It was also held that, since restoration of property is the starting point of the Restitution Act, equitable redress ought to place claimants in a similar position as they would have been in, had the property been restored.<sup>266</sup> Justice Van der Westhuizen reaches the conclusion that an investment measure ought to have been used.<sup>267</sup>

In considering the empirical performance of the restitution programme, it seems to have been quite successful. 51 267 out of 60 000 claims (85 percent) lodged by December 1998, have been finalised.<sup>268</sup> While the restitution programme has been the most successful of all the land reform programmes in terms of transferring land to the landless, it has numerous shortcomings. Although 85 percent claims have been settled, they have not all been finalised.<sup>269</sup> Furthermore, the CRLR does not have a qualitative measure for the performance of the restitution programme. The method used does not consider the claims that are ‘settled’ but later refuted, or which need to be re-processed due to conflict between claimants.

The Department of Performance Monitoring and Evaluation (DPME) has been mandated to conduct an implementation evaluation of the Restitution Programme under the National Evaluation Policy Framework. The evaluation, conducted by Genesis Analytics, covered the period from January 1999 to March 2013 and five of the nine provinces.<sup>270</sup> The overall finding of the evaluation was that the Restitution Programme is not efficiently implemented. Major shortcomings were identified in each of the stages of the restitution process. It took up to 15 years for some of the claims to be settled and in the five provinces surveyed, the overall percentage of ‘chaotic’ files was 40 percent and only 11 percent of files were in order and contained all of the key documents.<sup>271</sup> Considering that land restitution is a ‘systematic administrative legal process’, the lack of comprehensive and detailed records compromise the legal basis of transfer.<sup>272</sup> Genesis Analytics has noted some of the constraints as the absence of standardised procedures for the country as a whole; the absence of a single management information system (which makes it difficult to monitor a single claim all the way through the process) and weak human resources and management systems.<sup>273</sup>

Similar findings were made by the SAHRC, which decided to conduct an ‘Investigative Hearing on Systemic Challenges Affecting the Land Restitution Process in South Africa’ after receiving nearly 200 claims based on section 25.<sup>274</sup> The main aim of the SAHRC hearing was to gather an understanding of why claims remain unresolved nearly two decades after the promulgation of the Restitution Act. The panel received submissions

<sup>262</sup> Written by Acting Chief Justice Moseneke with Acting Deputy Chief Justice Skweyiya, Acting Justice Dambuzza and Justices Jafta, Madlanga and Zondo concurring.

<sup>263</sup> *Florence* para 125.

<sup>264</sup> Van der Westhuizen J with Cameron J, Froneman J and Majiedt AJ concurring.

<sup>265</sup> *Florence* para 59.

<sup>266</sup> *Florence* para 61.

<sup>267</sup> Using the measure as suggested would have resulted in R2 211 732, 42 compensation for the Florence family.

<sup>268</sup> Genesis Analytics, 2014: x. The CRLR has translated all of its claimant records into the number of claim forms outstanding and settled to date and reached this number. According to Genesis Analytics, this is an accurate indicator of the restitution programme’s achievement.

<sup>269</sup> In some cases the actual transfer of property and payment of compensation still has to take place. Genesis Analytics, 2014: 56.

<sup>270</sup> Limpopo, KwaZulu-Natal and the Free State, Western Cape and Eastern Cape.

<sup>271</sup> The provinces surveyed were Eastern Cape, KwaZulu-Natal, Western Cape, Limpopo and the Free State. The remaining 49 percent of files contained the key documents, but they were not in order.

<sup>272</sup> Genesis Analytics, 2014: 21.

<sup>273</sup> The restitution process currently relies on a paper-based system which hinders effective decision-making and quality control.

<sup>274</sup> The hearings were held on 12 November and 5 December 2013. The SAHRC’s findings correspond with those of Genesis Analytics in respect of the lack of an information management system and the monitoring of claims.

and heard oral testimonies from representatives of the DRDLR, the Department of Public Works, CRLR, the Chief Surveyor General and the Land Rights Management Facility. The SAHRC found that a major weakness in the restitution programme is research into claims. The CRLR routinely outsource research and this causes delays in this stage of the process.<sup>275</sup> The loss of documents and files does not only hinder the settlement of claims, but creates a perception (and opportunity) of manipulation by officials.<sup>276</sup>

The Constitution has not managed to create an awareness of or sympathy for the importance of restitutionary measures among the white population. According to the Gauteng survey we conducted, only 8 percent of white respondents support land restitution and a full 79 percent do not believe that land taken away from black South Africans ought to be returned. It seems that, despite the constitutional protection against arbitrary deprivation of property and the way in which this right has consistently been balanced with the need for land reform, white South Africans in Gauteng nevertheless feel that the land reform programme poses a threat to their rights.

Black (71 percent), Indian (60 percent) and coloured (65 percent) South Africans still show strong support for a land restitution programme which is indicative of a need to continue this process. Government has responded to this need by reopening and extending the opportunity to institute restitution claims for a further five years, starting from 30 June 2014. The CRLR is prioritising the 8065 claims lodged before the 1998 deadline which have not yet been settled.<sup>277</sup> The reopening of claims has heightened the urgency of addressing the shortcomings in the restitution programme.

(b) *Land Redistribution*

In the past twenty years, little has shifted in terms of the actual redistribution of land. There is no data available on the exact percentage of black and white land ownership. While it was found in the State Land Audit of 2013 that 79 percent of land is privately owned, it is difficult to determine whether land owned by trusts or companies should be considered either black or white-owned.<sup>278</sup> While the state owns a quarter of the country's land, this cannot be equated to 'black ownership'.<sup>279</sup> From statistics which are available, it seems that the transfer of land to black ownership had been taking place at a slow pace. In the period of 1995 to 2005, only 2.9 percent of agricultural land had been redistributed.<sup>280</sup> By 2012, only 7.95 percent of land had been transferred from white to black ownership.<sup>281</sup> In a thick sense, the goal of redistribution of land has not yet been achieved.

There are a number of reasons for the slow pace with which land redistribution has been taking place. Communal Property Associations were created to serve the needs of groups receiving land under redistribution programmes or the Restitution Act.<sup>282</sup> However, these associations lack the institutional support they need to function optimally.<sup>283</sup> The process of transfer of land to CPAs is often delayed due to conflict between CPAs and tribal authorities. PLAAS, a unit of the University of the Western Cape which conducts research on land-holding and structural inequality, has reported that the government is prevented from transferring land titles on to CPAs because of opposition from traditional leaders. At least three Eastern Cape CPAs have been waiting for their land titles, the transfer of which have been approved, since 2000. In the recent matter of *Bakgatla-Ba-Kgafela*

<sup>275</sup> SAHRC, 2013: 46.

<sup>276</sup> SAHRC, 2013: 46.

<sup>277</sup> CRLR Report, 2015: 8. The validity of the Restitution of Land Rights Amendment Act 15 of 2014 has been challenged by a number of organisations who have an interest in land rights and agrarian reform in the matter of CCT 40/15 *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others*. The applicants challenged the Act on the basis that it was passed without the facilitation of adequate public involvement. In the alternative, the applicants also submitted that the section in the Act which prioritises existing claims is incurably vague. The case was heard by the Constitutional Court on 16 February 2016 and judgement has been reserved.

<sup>278</sup> Department of Rural Development and Land Reform, 2013). *State Land Audit*. [online]. Available at: <http://www.ruraldevelopment.gov.za/phocadownload/Cadastral-Survey-management/Booklet/land%20audit%20booklet.pdf> [accessed 10 December 2015].

<sup>279</sup> Department of Environmental Affairs, 2012.

<sup>280</sup> Pienaar and Brickhill, 2008: 48-24.

<sup>281</sup> Walker, C. (2013). The distribution of land in South Africa: An overview. [online] Available at <http://www.plaas.org.za/sites/default/files/publications-pdf/No1%20Fact%20check%20web.pdf> [Accessed 12 December 2015].

<sup>282</sup> The Communal Property Associations Act created mechanisms in terms of which communities may possess restored or acquired land.

<sup>283</sup> DRDLR, Communal Property Associations: Annual Report 2014/2015:6.

*Communal Property Association v Bakgatla-Ba-Kgafela Tribal Association*, a delayed registration of a CPA, due to disagreements between the CPA and the Tribal Authority, reached the Constitutional Court.<sup>284</sup>

Another reason for the lack of performance of the goal of redistribution is due to lack of capacity and poor management within the DRDLR. The Department has been underspending its budget, which has caused it to be decreased every year for the past five years.<sup>285</sup>

Even though policies and legislation has been adopted to ‘foster conditions which enable citizens to gain access to land on an equitable basis’<sup>286</sup>, the institutions giving effect to the right to property have not performed well in this regard. The lack of land redistribution has become a thorny political issue and one which is leading to great discontent with the ruling party. It has the potential to pose a threat to the very legitimacy of the constitutional system if not remedied.

### (c) *Tenure Reform*

As discussed in the section on thin compliance, the government has not yet enacted legislation which provides adequate security of tenure to land owned by communities. The Wagon Wheel Policy which is currently in place undermines the existing rights of communities by transferring ownership of land to traditional councils. Since thin compliance has not been achieved in respect of communal tenure rights, thick achievement is not a possibility.<sup>287</sup>

The formal achievement of individual tenure security has been achieved in a thin sense through the enactment of ESTA. Nevertheless, it seems that substantive security of tenure on an individual basis has not been realised. The Land Tenure Security Policy for Commercial Farming Areas has found that there has been a total system failure in the state’s enforcement of ESTA. PLAAS has noted that despite the enactment of ESTA, evictions of farm-dwellers has continued.<sup>288</sup> PLAAS estimates that only 1 percent of these evictions have been legal and that even those who are legally evicted do not have the benefit of legal representation and have not been provided with suitable alternative accommodation.<sup>289</sup>

The DRDLR has attempted to address this failure of ensuring security of tenure by proposing amendments to ESTA. Unfortunately, these amendments do not address the underlying issue, which is the failure of implementation of existing legislation.<sup>290</sup>

It appears that the goal of tenure reform and securing of land tenure has not been achieved in a thick sense. The DRDLR has not only failed to adopt legislation or policies which provide effective security of tenure to communities, but have also failed to implement legislation which ought to protect farm-dwellers from eviction.

### *Conclusion*

The picture that has been painted above indicates that there is only limited performance that has taken place in the reformative goal of the property right in a thick sense. It must be noted that the constitutional goal of achieving wide-spread land-reform through a law-governed process is extremely ambitious and there are very

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<sup>284</sup> 2015 (6) SA 32 (CC). The Bakgatla-Ba-Kgafela community wished to regain ownership of communal land which it had lost during apartheid. The community wished to hold the property in an association, the Tribal Authority wished to hold it in trust and this disagreement lead to a delay in the registration of the CPA.

<sup>285</sup> R3.9 billion was allocated to redistribution of land and tenure reform in the 2013/2014 financial year. This amount has been decreased to R2,6 billion in the 2015/2016 financial year. National Treasury, 2015.

<sup>286</sup> Section 25(5) of the Constitution.

<sup>287</sup> A third of South Africa’s population reside in former “Bantustans” and are suffering due to government’s failure to carry out tenure reform. Weinberg, 2015: 11.

<sup>288</sup> PLAAS available at <http://www.plaas.org.za/blog/whats-alternative-governments-flawed-extension-security-tenure-amendment-bill>

<sup>289</sup> Hall, 2014.

<sup>290</sup> Some of the amendments are furthermore problematic in that it creates even greater space for the denial of rights of farm dwellers. One such a suggestion is that subsidies (which are directed at farm dwellers) be replaced with tenure grants (which will be directed at farm owners).

few success stories across the world where this has taken place. Understood in this context, South Africa has made significant progress though less than the constitution demands. It is important to recognise that the constitution is itself not an obstacle in the face of land reform (as some political actors have suggested) but rather an enabler thereof to take place in an orderly, systematic, law-governed manner. The alternative – such as has taken place in Zimbabwe – has eroded the rule of law there and largely destroyed the economy and productive capacity of that state. South Africa must therefore persist with the constitutional compact and seek fuller and better realisation thereof. Failure to do so may well push people to demand more radical solutions (that may ultimately be counter-productive) and undermine the legitimacy of the current Constitutional order.

The Constitution envisions a balance to be struck between the protection of individual property rights and land reform measures. The Constitution has also deferred to some extent the decision of where the balance between these competing rights ought to be struck to the courts. The courts have, in general, sought to give effect to the balance in the Constitution and the Constitutional Court has emphasized that the property clause is not an obstacle to achieving wide-spread land reform and that less than market value compensation may well be acceptable. The number of cases surrounding the right to property that have reached the Constitutional Court has been limited.

The bureaucratic nature of the restitution programme has hindered the restoration of land. Many who have been dispossessed and wished to have their land restored settled for cash compensation in order to avoid being disadvantaged by inordinate delays in the restitution process. The inefficiency and lack of communication on the part of the CRLR has caused a perception of interference and manipulation with the process by government officials, which further undermines the legitimacy of the land reform project.<sup>291</sup>

The reformative model has been designed to channel conflict between claimants and land owners to the state and, overall, this objective has been achieved. Individuals and communities are not taking the land reform process into their own hands, but are using the structures which have been created for this purpose. In some sense, that is a success of the constitutional order in developing a law-governed process by which land reform is to take place. The land reform programme has, however, been a cause of conflict within communities. The state has not provided the necessary support to CPAs and have adopted policies which have the effect of phasing out CPAs and strengthening the authority of tribal authorities. Disputes over ownership of communal land is causing division within communities.<sup>292</sup>

In terms of providing access to social goods, the right to property has not fully reached its goal. The 'social good' of land and rights in land have only been provided to a small percentage of landless South Africans due to the shortcomings in the redistribution, restitution and tenure security programmes.<sup>293</sup> Read purposively, the reformative goal aims to have a sustainable impact on the lives of its beneficiaries through the provision of land as a social good. It has been found, however, that rights to land do not necessarily lead to development. The Sustainable Development Consortium conducted a diagnostic study of six restitution claims where land had been restored to communities in 2007.<sup>294</sup> It was found that many of the 'beneficiaries' of these land restorations have received no material benefit. The results of the study were that, due to strategic partnerships in which the land is transferred to a third party to manage on behalf of the community, community members were often prevented from moving onto the land.<sup>295</sup> In none of the cases where CPAs received incomes through strategic partnerships did this income actually reach the members.<sup>296</sup> Where community members have been able to move onto the restored land, they would rarely receive the necessary post-transfer support to enable them to use the land productively.<sup>297</sup> What emerges is that even cases which will be counted as 'the successful restoration of land' could nevertheless not necessarily result in greater access to social goods on the part of beneficiaries.

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<sup>291</sup> SAHRC, 2013:48.

<sup>292</sup> A recent instance of such a conflict reached the Constitutional Court. See *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Community*.

<sup>293</sup> The wealth of the large number of claimants who received cash settlements instead of the restoration of their property has not increased and they have not gained access to the land as a social good.

<sup>294</sup> Hall, R. (2007). *The Impact of Land Restitution and Land Reform on Livelihoods*. [online] p. 14. available at [http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/90/Hall\\_Impact2007.pdf?sequence=1](http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/90/Hall_Impact2007.pdf?sequence=1) [accessed on 10 December 2015].

<sup>295</sup> Hall, 2007: 21.

<sup>296</sup> Ibid.

<sup>297</sup> Ibid.

### **Overall Assessment of Performance**

Considering the performance of the property right overall, the courts have indeed formally sought to achieve the protective goal by offering protections against arbitrary deprivations of property by the state. As we saw, despite the formal legal position, private property in South Africa, remains insecure due to the large number of crimes which involve theft, robbery or destruction of property.<sup>298</sup> The state's consistent failure to protect its citizens against such crimes results in the underperformance of the property right in a vertical as well as horizontal sense.

Courts have followed the inherent tension in the clause and sought to balance private interests in property with the public interest as a whole. Courts, in general, have made it clear that they do not wish to place obstacles in the face of land reform. Nevertheless, as has been shown above, there is only a limited extent to which the reformative goal of the Constitution has been achieved. .

The drafting of the Constitution cannot be held to be the reason for the failure to perform better in relation to the reformative goals of the Constitution. The SAHRC, in its assessment of the restitution programme, has recognised that the Constitution and its subsequent legislation are not the culprits in the failure to meet reformative goals. Indeed, to the extent that the constitution is being regarded as the reason for the slow pace of land reform, we believe this to be misplaced. The enormous and complex task of changing the status quo of landownership stumbles at the point of implementation. It should be noted that this is not a unique feature of the South African landscape and there have been very few successful land reform programmes around the world. The property clause in the South African constitution embodies a highly ambitious attempt to use law-based means to address a very complex pattern of property relationships in the past. There have been some successes but the failure fully to achieve substantial land reform does not speak to a problem with the constitution but the need to re-double efforts to achieve its goals.

### **3.4. Socio-economic rights in the South African Constitution**

#### **Internal Goals**

One of the features of the South African Constitution that is often referred to as 'transformative' is the inclusion of fully justiciable socio-economic rights. Most Constitutions prior to the wave of constitution-making in the late 1980s did not include such rights, or if they did, they were included as directive principles which could not be adjudicated upon by courts. The South African Constitution was one of the first African constitutions to include such rights as fully justiciable and was unusual in the English-speaking world in that regard (constitutions in Latin America and Eastern Europe more frequently included such rights). The purpose of including these rights in a constitution is itself debated amongst scholars and thus, it is not possible to identify goals that are free of controversy in doing so.<sup>299</sup>

At the same time, the South African and global context point to two sets of reasons why these sets of rights were included. First, the policy of apartheid had essentially sought to maintain black people as an economic underclass and source of labour for the advancement of white economic interests. One of the main architects of apartheid, Hendrik Verwoerd, had expressly indicated the racist view that black people did not need further education as they were to be physical labourers.<sup>300</sup> The Apartheid government deliberately instituted a policy of

<sup>298</sup> In the year of April 2014 to March 2015, there were 253 716 reported burglaries at residential premises; 12 773 cases of carjacking; 24 965 cases of stock theft; 4127 cases of arson and 120 662 cases of malicious damage to property. South African Police Service (2015). *Crime Statistics of Republic of South Africa*. [online]. available at [http://www.saps.gov.za/resource\\_centre/publications/statistics/crimestats/2015/crime\\_stats.php](http://www.saps.gov.za/resource_centre/publications/statistics/crimestats/2015/crime_stats.php) [accessed on 10 December 2015].

<sup>299</sup> Michelman, 2008: 673-674; Mclean, 2009: 14.

<sup>300</sup> Harrison, 1981: 191. During a debate in Senate about the Bantu Education Act of 1953, Verwoerd made the following statement:

“The school must equip the Bantu to meet the demands which the economic life in South Africa will impose on him... There is no place for him in the European community above the level of certain forms of labour. Within his own community, however, all doors are open ... Until now he has been subject to a schools system which drew him from his own community and misled him by showing him the green pastures of European society in which he is not allowed to graze ... What is the use of teaching a Bantu child mathematics when it cannot use it in practice? ... That is absurd. Education is not, after all, something that hangs in the air. Education must train and teach people in accordance with their opportunities in life... It is therefore necessary that the native education must be controlled in such a way that it should be in accordance with the policy of the state.”

providing inferior education to black people (known as Bantu education), prevented most black people from going to university, and confined black people that were not needed for manual labour to areas that were economically under-developed through a permit system which prevented free movement across South Africa. The effects of these policies and others was to create a situation where the vast majority of black people had a limited education and were living in conditions of poverty. One important rationale for the inclusion of socio-economic rights was, therefore, what might be said to be a concern for 'corrective justice':<sup>301</sup> the need to address this shocking legacy of the past. The inclusion of socio-economic entitlements would signal to black people that the government was committed to reversing the severe effects these policies had. A guarantee of access to housing would address those whose economic situation left them without a fixed abode; a basic social welfare net was envisaged by requirements to provide food, water and social assistance; the health-care services would be expanded; and, the right to education guaranteed with a requirement continually to improve the access to the education that people were afforded.<sup>302</sup>

The second rationale is more 'universalistic' in nature. The South African constitution was not created in a vacuum and, at the time, it was drafted, a greater emphasis was being placed upon the realization of socio-economic rights with, for instance, the publication of General Comment no 3 of United Nations Committee on Economic, Social and Cultural Rights in 1990 and the inclusion of these rights in many constitutions across Latin America and Eastern Europe. In these contexts, it would seem, that such rights were regarded as necessary conditions for the very legitimacy of the basic structure of the society in question.<sup>303</sup> The international community recognized that guaranteeing a minimum level of resources was the hall-mark of a decent society and that, failing to do so, could lead poor people to regard the social structures as not catering adequately for them. These rights could also create a more 'balanced' constitution<sup>304</sup> where civil and political rights did not automatically trump socio-economic rights and allow for a proper weighing up of their respective merits in the case of a normative conflict. Moreover, they could attempt to address the political problem that the interests of the poor are often not adequately addressed through representative structures and require concerted government attention to be focused upon their concerns.<sup>305</sup> In relation to each right, there are goals that relate specifically to its field of focus such as housing or food.

The manner in which these rights were included in the South African Constitution also indicate an understanding of the scale and scope of the problems facing South African society and that the immediate realization of these rights would not be possible. The conditions in which these rights were to be realized were described by Chaskalson P in the judgment of *Soobramoney v Minister of Health*<sup>306</sup> as follows:

'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 already 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.'<sup>307</sup>

These conditions influenced how the provisions relating to socio-economic rights were structured. The first sub-provision outlines the general right such as in section 26(1), which states that 'everyone has the right to have access to adequate housing.' The second sub-provision, however, involves a number internal limitations being placed on what can be claimed. Section 26(2) thus, for instance, requires the state to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right'. The Constitution thus creates three potential limitations on the right: a) the government has the duty to take **reasonable** legislative and other measures; b) it can only do so within its available resources; and c) it must do so through **progressive realization**. These limitations have been the subject of constitutional court judgments and evoked much discussion in the literature around socio-economic rights in South Africa. It can be said, at a minimum, that the constitution on its face recognizes the impossibility of fully realizing the socio-economic rights

<sup>301</sup> Mbazira, 2009: 103-111.

<sup>302</sup> Dixon and Ginsburg, 2011: 8 point out that there may also have been political reasons for inclusion of these rights: when it was accepted to include a right to property, socio-economic rights may have been included to 'help shield, or immunize, progressive legislation or policies against the potential for further constitutional attack'.

<sup>303</sup> Michelman, 2008: 684-685.

<sup>304</sup> Ewing, 2001: 323.

<sup>305</sup> Bilchitz, 2015b: 93, 97-101.

<sup>306</sup> *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) (*Soobramoney*).

<sup>307</sup> *Soobramoney* para 8.

immediately and, as a result, imposes limitations on those obligations. There is also a commitment to incremental but steady change. Exactly what model the constitution proposes for giving effect to these rights has been the subject of controversy and affects how we capture the goals of including such provisions in the constitution.

The Constitutional Court signaled in the seminal case of *Grootboom*<sup>308</sup> that its analysis would largely focus on the notion of reasonableness. It held that the government has a duty to develop a programme to realise the right and the court would order the government to do so if it had not developed any such programme. The court would then evaluate the programme against the standard of ‘reasonableness’.<sup>309</sup> That standard, the court held, would involve considerations of the rationality of the programme (were the means suited to the achievement of the ends?), whether it treats people equally, and whether it gives priority to the needs of those who are most vulnerable.<sup>310</sup> The underlying goal of the reasonableness enquiry seems to be the requirement that government programmes must be justifiable and that the role of courts is essentially to expose weaknesses in policies, to require transparent justifications and thereby to improve existing programmes.<sup>311</sup> The focus here is on putting in place a justifiable process that will advance the access individuals have to socio-economic resources without any determinate substantive standards of what must be provided.

Critics have argued that the reasonableness standard moves away from a substantive focus on rights and what they enable individuals specifically to claim. They have highlighted that the notion may itself be incoherent as an evaluative tool without committing to any determinate goals that must be achieved in terms of provision. Moreover, some assert that the reasonableness approach has failed to provide concrete guidance to courts and individuals which severely weakens the effect of these rights. Instead, it has been argued, that the socio-economic rights in the South African Constitution should be recognized to provide certain concrete guarantees, such as the entitlement to be provided as a matter of priority with a minimum essential level of provision – referred to as a ‘minimum core’ - that is to be determined by identifying the urgent interests each right seeks to cater for.<sup>312</sup> The duty on the government on this view is not simply, for instance, to increase the number of people with access to housing as the reasonableness approach allows. Instead, the government is required to provide everyone with basic shelter in the immediate future whilst increasing their access to a higher level of provision over time. The focus in this alternative approach is thus on determinate standards of provision: a universal minimum must be guaranteed and the quality of provision continuously improved for everyone in contrast with the gradual, quantitative increase in access required by the reasonableness approach.

We raise this controversy concerning the interpretation of socio-economic rights as, in some sense, it identifies some of the tensions in capturing the internal goals of these rights. Are they in the bill of rights simply to place the government under a duty to justify its programmes on socio-economic questions and to initiate a process of provision? Or do they require specific substantive goods to be provided to every individual? In a sense, the South African Constitution left open the answer to these questions. That open-ness could be defended and the ensuing debate around the minimum core could be seen as a success of these rights, in forcing a deeper articulation as to the point of including them in the constitution. The fact that they embrace the contested nature of economic policy and models for development could be regarded as a plus too in enabling decisions on these questions to be reached through the democratic process. Yet, that very vagueness could also be regarded as a design flaw: if these rights were envisaged as providing specific goods for the deprived, the lack of clarity has led to courts avoiding doing so in many cases. The approach articulated by the court has rendered it difficult for the poor to run successful cases: large amounts of evidence need to be gathered to show the unreasonableness of a government programme. For a country with the high level of poverty of South Africa, the number of cases on socio-economic rights has also been relatively small: since the advent of the Constitutional Court, only a relatively small number of cases have been decided that directly implicate these rights.<sup>313</sup> The socio-economic rights have thus not perhaps had the major impact that could have been predicted when they were first included in the

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<sup>308</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46.

<sup>309</sup> *Mazibuko* para 60.

<sup>310</sup> *Grootboom* paras 39-44.

<sup>311</sup> Bilchitz, 2007: 9-10.

<sup>312</sup> Bilchitz, 2007: 14.

<sup>313</sup> See, for instance, Dugard and Wilson, 2014: 36 who count about 12 cases. The tally depends on what one classifies as a case concerning socio-economic rights.

Constitution. At the same time, as will become evident from an analysis of the specific rights engaged below, they have had some significant impacts.

### ***Relationship between internal and external goals***

The discussion thus far has indicated how we might seek to capture the internal goals of including socio-economic rights in a constitution and the difficulties of doing so. There are also several important relationships that exist between the internal goals identified and the external goals identified by Ginsburg.

As has already been mentioned, one key reason for including these rights relates to the legitimacy of the constitutional order. Individuals who lack the most basic needs may have little reason to show fidelity to a constitutional order in which they are starving and homeless. By committing to addressing these forms of deprivation and by requiring the government to make concerted efforts to do so under the possible supervision of the courts, the Constitution itself proclaims its commitment to addressing the inadequate material conditions within which many people live. That, in turn, enhances its own legitimacy in the eyes of citizens. The approach of the constitutional court and its failure to connect with the real reasons people are interested in these rights (addressing their lack of resources) may be seen to reduce the effectiveness of these rights in this regard; these ideas will be explored more fully in the section below.

The rights were also rendered justiciable in courts. This meant that they were meant to provide a possibility for enforcement through legal methods. In this way, instead of taking extra-legal approaches to addressing their interests, the poor were encouraged to channel their concerns through the legal system. This has led social movements and other civil society actors to adopt legal mobilization strategies whereby 'a desire or want is translated into a demand as an assertion of rights'.<sup>314</sup> The inclusion of these rights also plays a role in legitimizing claims made by the poor in the political space and thus also helps them to advance their interests through simply claiming that they are attempting to have existing rights enforced. The inclusion of these rights also ensures that the political space has to address these interests and helps channel conflict in this manner.

One of the key responsibilities of government agencies becomes the realization of socio-economic rights in the South African constitution. There is a moral and legal imperative placed upon these agencies in that regard. Corruption has often been regarded as a violation of these rights through channelling much-needed resources away from the poor.<sup>315</sup> The imperative placed on state agencies has also helped create a moral disapproval of corrupt practices. Unfortunately, the realization of these rights has also created incentives for corrupt activities: desperate and law-abiding individuals may well lose out to those who are prepared to pay for some form of priority.

Finally, socio-economic rights are centrally concerned with the provision of public goods. Ensuring individuals have access to decent health-care and education systems is crucial for individuals and enabling them to develop their potential and access opportunities. Access to adequate housing improves the lives of people and communities and creating adequate social security and welfare systems relieves the worst possible levels of desperation in the society.

### ***Evaluation of performance***

In evaluating performance in relation to these rights, there is a large number of initiatives taken by the government in that regard as well as key failures. We cannot exhaustively attempt to analyse policy and legislation in these areas. Our focus will be on the main issue as to whether the constitutionalisation of these rights has made a difference to law, policy and people's lives. It will be easier to answer this question in relation to law and policy though we will attempt to marshal evidence to provide some understanding of the impact on people's lives as well. In this evaluation, we will not be considering the performance of all of the socio-economic rights protected in the Constitution, but focus on three key rights, namely, the right to have access adequate housing, adequate

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<sup>314</sup> Zeemans quoted in Madlingozi, 2014: 92.

<sup>315</sup> *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 167.

health care and education.<sup>316</sup> These are arguably amongst the core socio-economic rights that seek to ensure a basic set of needs that all people require and are entitled to.

### *Right to Have Access to Adequate Housing*

The historical background around housing in South Africa is required to understand the ‘corrective’ component involved. The Apartheid government instituted a system of controlling the movement of black people through a pass system, which strictly sought to regulate the entry of black persons into urban areas (this was known as influx control). Since black people were not meant to be there (or in very limited numbers), no provision was made to house them. Thus, in the Cape Peninsula area (comprising the city of Cape Town), there was a freeze placed on the provision of family housing for African people since 1962.<sup>317</sup> Despite this, African people continued to move to urban areas due to colonial dispossession and a rigidly enforced racial distribution of land which had disrupted the rural economy and rendered African farming precarious.<sup>318</sup> This led to the growth of informal settlements around urban areas in South Africa. As the Constitutional Court details in the *Grootboom* case, the ‘cycle of the apartheid era, therefore, was one of untenable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor to the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removals’.<sup>319</sup> This led to two key violations of rights: first, there was the ability to evict individuals rather easily through legislation such as the Prevention of Illegal Squatting Act 52 of 1951 (PISA). If occupation of property was found to be unlawful, individuals could be evicted and they were subject to criminal prosecution. Secondly, there was a failure to plan and provide housing for black people which led to a massive housing shortage. There was, for instance, a shortage of more than 100 000 housing units in the Cape Metropolitan areas upon the advent of democracy in 1994.<sup>320</sup> Housing is, of course, also important as a universally important human need: as Justice Yacoob recognizes in the *Grootboom* case, this raises questions of dignity and treating human beings ‘as human beings’.<sup>321</sup>

It is in this light that section 26 of the Constitution needs to be seen. It provides that:

- (1) Everyone has the right to have access to adequate housing
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

The right to housing can be seen to attempt to correct the twin problems of the past whilst recognizing a universal entitlement. On the one hand, it creates negative obligations not to interfere with people’s housing and only to do so in a manner where the court has considered all relevant considerations and is ‘non-arbitrary’. It also in the first two sub-sections envisages a range of positive obligations which are qualified by the notions of being ‘reasonable’, having ‘available resources’, and achieving ‘progressive realisation’.

### *Thin Compliance*

The government has enacted a number of important measures to give effect to its constitutional obligations. In relation to evictions, the most important Act is the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (known as ‘PIE’). This Act creates procedural and substantive requirements that have to be met when the eviction of unlawful occupiers is being addressed. Several constitutional court judgments have elaborated upon the protections afforded by the Constitution and PIE. These will be considered in relation to thick compliance. PIE moves away from a criminal law framework for addressing unlawful occupation and

<sup>316</sup> Due to the time and space constraints of this project, it was decided that the focus should be on the socio-economic rights which have most often been the subject of court battles and civil society campaigns. Although the importance of the right to food, water and social security cannot be discounted, the performance of these rights are not included in the scope of the report.

<sup>317</sup> *Government of the Republic of South Africa v Grootboom* para 6.

<sup>318</sup> *Ibid.*

<sup>319</sup> *Ibid.*

<sup>320</sup> *Ibid.*

<sup>321</sup> *Ibid.* para 83.

attempts to create a balance between the rights of those who lack a home and the rights of land-owners.<sup>322</sup> It clearly requires an order of court before any eviction can take place and creates requirements that are non-arbitrary and thus conforms to the requirements of section 26(3).

In relation to the positive obligations of the government, the government adopted a series of measures post-1994 to give effect to housing policy. It issued several white papers and passed both the Housing Act 107 of 1997 which came into operation on 1 April 1998 and a Housing Code. The Housing Act seeks to facilitate sustainable housing development. It defines housing development to include two elements: '(a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and (b) potable water, adequate sanitary facilities and domestic energy supply'.<sup>323</sup> The Act also outlines general principles for housing development, and outlines the responsibilities of different tiers of government (national, provincial and local) in relation to housing. It does not contain detailed policy and instead provides that the Minister must publish a Housing Code that contains the national housing policy.

In September 2004, the Minister published a policy known as 'Breaking New Ground: the Comprehensive Plan for the Creation of Sustainable Human Settlements'.<sup>324</sup> In 2009, a Revised Housing Code was published which now governs the sector. There have also been additional pieces of legislation such as the Social Housing Act 16 of 2008 and the Rental Housing Act 50 of 1999. The government has clearly established a policy framework for housing and passed legislation in this regard. One possible area of concern, identified by McLean, is that the Constitution in section 26(2) mandates the taking of 'reasonable *legislative* and other measures' in order to realise the right. Arguably, '[a] purposive interpretation of this injunction would mean that the most important principles and policy choices relating to housing delivery should be deliberated upon by Parliament'.<sup>325</sup> Yet, the Housing Act is in a sense secondary to the Housing code which contains the most important policies relating to housing. The executive is thus placed in charge of housing policy and implementation with very limited legislative oversight: as McLean argues, '[t]his situation arguably amounts to the abdication by Parliament of its constitutionally mandate role, and may, in addition, violate the principle of legality and the rule of law'.<sup>326</sup> Subject to the qualification mentioned by McLean, it does seem that there has been thin compliance with the constitutional provisions, at least, in the sense of developing a policy and legislative framework.

#### *Thick Compliance: Negative Obligations and Evictions*

In attempting to assess thick compliance, we need to consider the obligations of the state and the extent to which they have in fact been realised against the internal goals highlighted above. In terms of negative obligations, the key legislation as we have seen is PIE. The courts have elaborated upon PIE and developed a number of principles governing eviction: first, as per the constitution, there must be a court order. Such an order allows the court to evaluate a number of elements of the situation before them and they have established that the central principle is to attempt to strike a balance between the rights of the landowner and the rights of the unlawful occupiers.<sup>327</sup> Striking such a balance means that evictions will not automatically be allowed even where there is a legal reason for it. For instance, in the case of an individual who is unable to pay their mortgage, the courts will engage in a proportionality enquiry to determine whether it is fair to evict the individual from his/her home: the court has indicated for a very small debt, it will not be just to do so.

The courts have also recognised that in order to grant an order, they must be satisfied that there has been a process of engagement between local authorities and the individuals (or the community) concerned. The process of engagement can be considered to connect with the right to dignity as well as the right to political participation. As such, fundamental decisions cannot be taken about people's lives without engaging with them and this understanding embodies at least a minimal form of deliberative democracy. Often, that engagement leads to a solution without having to use the strong-arm of the law as occurred in the case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg*.<sup>328</sup> In that case, the city had wanted to vacate

<sup>322</sup> Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) para 33.

<sup>323</sup> Housing Act, section 1.

<sup>324</sup> National Department of Human Settlements (2004) [online] Available at [http://www.thehda.co.za/uploads/files/BREAKING\\_NEW\\_GROUND\\_DOC\\_copy-2\\_1.pdf](http://www.thehda.co.za/uploads/files/BREAKING_NEW_GROUND_DOC_copy-2_1.pdf) [accessed 28 November 2015].

<sup>325</sup> Mclean, 2008: 55-5.

<sup>326</sup> Ibid.

<sup>327</sup> *Port Elizabeth Municipality* para 33.

<sup>328</sup> 2008 (3) SA 208 (CC).

a number of unsafe buildings in which residents were living in terrible, unsanitary conditions. At the same time, they offered to move them far away from their places of income which would have rendered them even worse off. An agreement was reached between the parties whereby temporarily the residents would remain in the buildings and various safety and health measures taken to improve the conditions in which they lived. The residents agreed to the eviction, however, several months later after the city offered to provide accommodation to them in the inner city.

Apart from engagement, a key element of the court's jurisprudence in this area has been the requirement that individuals who are evicted must be provided with alternative accommodation. The court here recognises that eviction from a particular property should not be allowed to result in homelessness which would constitute a further violation of the right of individuals to housing. The requirement for alternative accommodation was initially outlined in relation to evictions from public land; however, in the important *Blue Moonlight Properties* case,<sup>329</sup> it was also held to apply to evictions from private land. The government is required in such instances to step in and ensure individuals are provided with alternative accommodation. Private landowners have a duty to be patient with unlawful occupiers for an interim period pending their access to alternative accommodation which is an important implication flowing from the horizontal application of the right to have access to adequate housing.<sup>330</sup> The courts have also refused on occasion to remove occupiers from land where that would disrupt a community of 40000 people and instead ordered the state to provide compensation to the private land-owner for their land.<sup>331</sup>

The framework set out in PIE and articulated by the courts has the potential fundamentally to change the face of evictions in South Africa and prevent the resulting homelessness. The constitution can be said to have stimulated the development of standards which attempt to address the legacy of the past and exemplify a sense of equity concerning the conflicting interests at stake. Yet, unfortunately, despite these principles being laid down by the highest court, it is clear that evictions continue to take place in violation of these standards. An example of this took place in a complex of buildings known as Schubart Park which housed between 3000 – 5000 people. After protests erupted around living conditions in these buildings, the city evicted large numbers of people and refused to allow them to return. The Constitutional Court had to intervene to enable them to return to their properties.<sup>332</sup> Evictions without court orders and in the absence of engagement and meaningful accommodation also continue unabated in places such as Hillbrow.<sup>333</sup>

One of the strange aspects of unlawful evictions is that the High Courts have often appeared to disobey the very law set down by the Constitutional Court. This is extremely concerning and poses a threat to the rule of law itself. Very few cases reach the constitutional court and thus, High Court decisions can affect individuals in a negative way. A few examples are outlined below.<sup>334</sup> In the *Golden Thread* case,<sup>335</sup> the Constitutional Court dealt with the unlawful occupation of land in Tshwane Municipality and an application in the North Gauteng High Court for the eviction of the occupiers. The High court ordered an eviction without the provision of alternative accommodation, effectively finding it was just and equitable to do so. The Constitutional Court criticized the High Court for not taking account of the local authority's obligation to provide reasonable alternative accommodation to the occupiers (even where the occupation had been less than six months as part of the 'all relevant circumstances enquiry' as required by section 26(3) of the Constitution) and working with a conception of ownership rights as 'virtually unlimited'.<sup>336</sup> In the *Occupiers of Skuurveplaas 353 v PPC Aggregate Quarries* case<sup>337</sup>, similarly, an eviction was granted by the North Gauteng High Court. Whilst the High Court did consider alternative accommodation, the judge also preferred the land-owner's rights, allowing the people to be rendered

<sup>329</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

<sup>330</sup> *Ibid* para 40.

<sup>331</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

<sup>332</sup> *Schubart Park Resident's Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC).

<sup>333</sup> Shange, N. (2015). Red ants evict dozens in Hillbrow. *News 24* [online]. <http://www.news24.com/SouthAfrica/News/Red-Ants-evict-dozens-in-Hillbrow-20150812> [Accessed 12 December 2015].

<sup>334</sup> This analysis is drawn from the article by David Bilchitz published in *Constitutional Court Review V*, 2014a 'Avoidance Remains avoidance: Is it desirable in socio-economic rights cases?'

<sup>335</sup> *JR v Golden Thread (Ltd)* 2012 (2) SA 337 (CC).

<sup>336</sup> *Golden Thread* para 17.

<sup>337</sup> *Occupiers of Skuurveplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd* 2012 (4) BCLR 382 (CC).

homeless pending the provision of alternative accommodation by the city. The Constitutional Court ruled that this was 'neither just nor equitable'.<sup>338</sup>

The *Marlboro Crisis* committee case saw the Constitutional Court approve a settlement in terms of which the City of Johannesburg was required to provide emergency housing to the occupiers of various properties in Marlboro and engage meaningfully with them pending their eviction. The unlawful occupiers were removed twice in June and August 2012, with their possessions being destroyed during the latter eviction. The city claimed that the Metro police acted pursuant to their law enforcement functions to prevent trespassing and that this was not an ordinary eviction. In a deeply troubling High Court judgment<sup>339</sup>, the judge upheld this argument, contending that when JMPD acted pursuant to its law enforcement powers, its actions did not constitute an eviction. The judge made it clear that in his view, 'it must be instilled in the minds and consciences of potential land-grabber and unlawful or illegal occupiers, that landowners and contractors of space too are bearers of constitutional rights and that conduct violating those rights tramples, not only on them but on all'.<sup>340</sup> The framework developed by the Constitutional Court surrounding evictions clearly recognizes that unlawful occupiers are not to be treated as criminals.<sup>341</sup> Moreover, the judge in this case, also incorrectly used pre-constitutional common law to avoid the application of the constitutional framework relating to evictions, of which the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act<sup>342</sup> (PIE) is the central pillar. The balancing framework evident in this legislation and the need to consider the engagement between the municipality and the occupiers as well as the availability of alternative accommodation were all not properly applied.<sup>343</sup>

In *Johannesburg Housing Corporation v Unlawful Occupiers of Newtown Village*<sup>344</sup>, Willis J was also concerned with an eviction application against the unlawful occupiers of a property in Newtown, Johannesburg. The judge raised an understandable concern concerning the need for 'clear, certain, and implementable guidelines' as to how the court should go about making its order.<sup>345</sup> The judge then raised a number of questions concerning how to interpret the notion of what is 'just and equitable' used in PIE and, disturbingly, articulates an approach to socio-economic rights which appears to be at odds with the normative thrust of Constitutional Court decisions which require a balance to be achieved between the property rights of land-owners and the housing rights of occupiers.

These cases are not designed to create the impression that High Court judges are all ignoring or bypassing the constitutional framework on evictions. Yet, the results in these cases suggest a problem in translation from the Constitutional Court's progressive jurisprudence to the manner in which High Courts give effect to its ruling and the experience of individuals on the ground with less than optimal results being obtained for the poor. Part of the problem perhaps relates to the fact that the court has sought to allow every matter to be determined on its own facts and within its own context. In general, it has been unwilling to provide general principles as to how to make decisions. Whilst this sounds reasonable, this approach grants judges in the High Courts significant discretion as to whether to grant an eviction order or not. Those not sharing the Constitutional Court's sensitivity to vulnerability and working with a more traditional conception of the common law, often tend to over-emphasize the rights of land-owners. This situation results in eviction orders which create much misery and hardship. The lack of clear guidelines and the failure to develop a more substantive framework allows the space to be filled by judges whose normative views are not in conformity with the new constitutional framework relating to evictions.<sup>346</sup> In this area, we thus see a development of the law that complies substantively with the requirements of the right to have access to adequate housing; at the same time, there is a serious failure in the implementation of these changes by other branches of government, security companies conducting evictions and, even, the courts tasked with giving effect to this framework.

#### *Thick Compliance: Positive Obligations and the Provision of Housing*

As we have seen, the Constitution mandates a series of positive obligations upon the government in relation to housing. Only a brief analysis can be provided here of the fulfilment of the government's obligations. The

<sup>338</sup> *Skurweplaas* para 13.

<sup>339</sup> *Marlboro Crisis Committee v City of Johannesburg* Case 29978/12 (ZAGPJHC 187, 7 September 2012).

<sup>340</sup> *Marlboro Crisis Committee* para 100.

<sup>341</sup> *Port Elizabeth Municipality* at para 12.

<sup>342</sup> 19 of 1998.

<sup>343</sup> For a detailed engagement with the flaws in this judgment, See D Bilchitz and D Mackintosh, 2014.

<sup>344</sup> 2013 (1) SA 583 (GSJ).

<sup>345</sup> *Newtown Village* para 28.

<sup>346</sup> See *Port Elizabeth Municipality* case which appears to be an exception in this regard; see, the discussion of this case Dafel, 2013.

Constitutional Court in the *Grootboom* case had an opportunity to consider the obligations of the government in relation to housing. The case concerned a group of people who landed up on a field in the driving rain of the Western Cape with only plastic sheeting to cover them. They claimed that the Constitution provided them with the right to have access at least to shelter from the elements. The case offered the opportunity for the Constitutional Court to outline its approach to socio-economic rights: as indicated above, it held that the government had a duty to develop a programme in relation to the right to housing and that the programme would be evaluated against the standard of reasonableness. The court examined the government programme in that case and found that, whilst a lot had been done in relation to housing, there was no plan to address the short-term situation of those in desperate need. The court found that the housing programme was unconstitutional as it did not make provision for those ‘with no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations’.<sup>347</sup> The court thus clarified that the government could not simply focus on providing housing needs in the longer-term whilst ignoring the desperation of individuals in the shorter term.

The General Household Survey of 2014 conducted by Statistics South Africa provides a snapshot of some of the state’s activities in relation to housing. The percentage of people receiving a government subsidy in relation to housing increased from 5.5 percent in 2002 to 15.3 percent in 2014. This would seem to indicate that the government was progressively increasing the number of South Africans with access to housing. Government housing policy can be broken down into those who receive actual homes (who are those earning below a threshold of R3500/month) and those who receive a subsidy to assist them in being able to afford a home (those earning between R3500 and R15 000).

The annual report of the Department of Human Settlements in 2015 claims that in the previous year, around 120 000 housing units were built and that around 75000 units were upgraded from informal to formal housing.<sup>348</sup> By May 2013, the government had provided 3 million houses or housing opportunities.<sup>349</sup> Since 1994, one study suggests that the government had provided more than 2.5 million houses and 1.2 million serviced sites.<sup>350</sup>

What is clear from these figures is that the government has been attempting to increase the amount of formal housing available to individuals. Unfortunately, there remains a major backlog, which is estimated by some NGOs to be around the region of 2.1 million units.<sup>351</sup> Around 3 million individuals in 2013 still lived in shacks.<sup>352</sup> Reasons for this relate to the increased urbanization in South Africa as well as a strong influx of individuals from other parts of the African continent in particular. The government has, in response, revised its housing policy which now focuses particularly on the upgrading of informal settlements.<sup>353</sup>

There is some tension as well between providing housing to the greatest number of people (the breadth requirement) and attempting to provide better quality housing to fewer persons (the depth requirement). The initial approach was to provide a lesser standard of housing to more people rather than a higher standard to fewer people.<sup>354</sup> Yet, in practice, the policy has changed from breadth to depth with fewer people gaining access to housing and the backlog increasing.<sup>355</sup>

Whilst the quality of housing has improved over the years, the General Household survey of 2014 still indicates significant problems in that regard. 14.5 percent of households surveyed complain of weak or very weak walls

<sup>347</sup> *Grootboom*, para 99.

<sup>348</sup> Department of Human Settlements (2015). *Annual Report*. [online] available at [http://www.dhs.gov.za/sites/default/files/annual\\_reports/Annual%20report%202015\\_web.pdf](http://www.dhs.gov.za/sites/default/files/annual_reports/Annual%20report%202015_web.pdf) [accessed on 5 December 2015].

<sup>349</sup> South African Government, Housing, [online] available at: <http://www.gov.za/about-SA/housing> [accessed on 5 December 2015].

<sup>350</sup> Institute for Race Relations (2015). *South Africa’s Housing Conundrum*. [online] available at <http://irr.org.za/reports-and-publications/atLiberty/files/liberty-2013-south-africas-housing-conundrum> [accessed on 5 December 2015].

<sup>351</sup> SANGONET (2013). *Addressing the housing backlog in South Africa*. [online] available at: [www.ngopulse.org/article/addressing-housing-backlog-south-africa](http://www.ngopulse.org/article/addressing-housing-backlog-south-africa) [accessed on 5 December 2015]. See also *ibid*.

<sup>352</sup> Housing Development Agency (2013). *South Africa: Informal Settlements Status 2013*. [online] available at [www.thehda.co.za/uploads/files/HDA\\_South\\_Africa\\_Report\\_Ir.pdf](http://www.thehda.co.za/uploads/files/HDA_South_Africa_Report_Ir.pdf) [accessed on 5 December 2015].

<sup>353</sup> Socio-Economic Rights Institute of South Africa (SERI) (2013). *A review of housing policy and development in South Africa since 1994*. [online] available at <http://spii.org.za/wp-content/uploads/2013/12/review-of-the-right-to-housing.pdf> [accessed on 28 November 2015].

<sup>354</sup> Institute for Race Relations Report, 2015: 4.

<sup>355</sup> *Ibid*.

and 13, 9 percent complain of weak or very weak roofs.<sup>356</sup> The results suggest wholesale mismanagement and lack of capacity to provide in provinces such as the Eastern Cape where over 33 percent of individuals claimed weak walls and roofs. The uneven quality of the provision of housing highlights areas of particularly weak governance within South Africa. Indeed, whilst initially, a strong centralized approach was envisaged, the federal elements of the South African Constitution led provinces to take a lead in this regard. The role of local government was unclear initially and, whilst its competences in this area have been bolstered in recent policy, it is often constrained by funding allocations and provincial decisions.<sup>357</sup> The overlapping competences contained in the Constitution thus could play some role in inefficient delivery.<sup>358</sup>

Moreover, in response to the *Grootboom* case, the government did pass Chapter 12 of the Housing Code which made provision for local governments to be able to access funding for emergency housing. As Mclean writes, '[t]he programme, however, fails to provide adequate short-term relief for those in crisis situations, and relies on a cumbersome set of procedures which do not allow for the immediate accommodation of those in need'.<sup>359</sup> The policy has often not been put into practice as well and thousands of people remain homeless on the streets of the main cities in South Africa with limited attempts by the government to address their conditions.<sup>360</sup>

### *Performance of the Right to Housing*

The inclusion of the right to have access to adequate housing in the South African Constitution has not solved the housing problems created by past policies or current conditions. Nevertheless, as one commentator puts it, the right to housing has been the 'cornerstone of housing policy, and is likely to remain so'.<sup>361</sup> One possible way of evaluating performance would be to consider what would have been the position in South African law without the right. It can almost certainly be asserted that the cases based on the right relating to evictions have fundamentally changed the law in that regard which has the potential to affect the lives of thousands of individuals in a positive way. Including the right has been important for establishing a balance between the rights of landowners and those of occupiers.<sup>362</sup> It has also led to an emphasis being placed on participation and a recognition of the need to provide alternative accommodation. The choice to recognize the horizontal application of the Bill of Rights has also been important in placing a number of requirements on landowners to avoid evicting individuals without following the correct legal procedures and also to allow occupiers to remain on their land temporarily pending the provision of alternative accommodation by the government.

As we have highlighted, there have been significant efforts taken to help realise this right positively, though the implementation of government initiatives and policy in this regard remains uneven. Similarly, the inclusion of positive obligations on the part of the government has not eliminated homelessness, the most extreme deprivation of this right, as some commentators have urged. The latter failing may, to some extent, result from the choice of the drafters to qualify the right to have access to adequate housing through the notions of 'reasonableness', and 'progressive realisation' without providing any specific guidelines as to how these notions were to be understood. Section 20 (5) of the Kenyan constitution suggests an alternative whereby the attention of courts could be directed specifically at the vulnerability of individuals. The approach adopted by the Constitutional Court to these vague provisions has not helped provide a firmer commitment on the part of the government to eradicating homelessness. It has though led to the development of certain constitutional factors for evaluating a government programme on housing and catapulted certain policy changes by the government such as Chapter 12 of the Housing Code which, unfortunately, is a narrower response to the *Grootboom* judgment than could have been expected. The Constitutional Court's approach to adjudicating the right may be blamed for the lack of more cases on the positive obligations flowing from the right and, perhaps also, for the lack of more radical implications such as a concerted effort by government to eliminate homelessness. The inclusion of this right in the constitution has nevertheless had an important effect on housing

<sup>356</sup> Statistics South Africa (2015). *General Household Survey 2014*. [online] Figure 26 available at <http://www.statssa.gov.za/publications/P0318/P03182014.pdf> [accessed on 5 December 2015].

<sup>357</sup> Institute of Race Relation Report, 2015:5-6.

<sup>358</sup> More will be said on this in chapter 7 on multi-level governance.

<sup>359</sup> Mclean, 2005: 55-21.

<sup>360</sup> This report, for instance, indicates that there were at least 2500 homeless people living in Cape Town on the streets: see Lewis, A. (2015). Homeless choose streets over shelter. *IOL News*, [online] available at [www.iol.co.za/news/south-africa/western-cape/homeless-choose-streets-over-shelters-1.1829353#.Vi9PDdIrLIU](http://www.iol.co.za/news/south-africa/western-cape/homeless-choose-streets-over-shelters-1.1829353#.Vi9PDdIrLIU) [accessed on 5 December 2015].

<sup>361</sup> Institute of Race Relations Report, 2015:13.

<sup>362</sup> In a sense, this bears out the argument of Dixon and Ginsburg, 2011 that socio-economic rights help to counter-balance the effects of including the right to property in the South African Constitution.

policy and can, to that extent, be considered a success. The approach of the Constitutional Court to interpreting the right though has reduced the more extensive impact that it may have had.

### *Right to Have Access to Health Care Services*

Apartheid had deliberately sought to create separate structures for providing services to black and white people. The field of health-care was no different and the separation led to vast inequality. World-class facilities were developed for whites, whereas the provision of health-care for black people was wholly inadequate. There are several reasons for the negative effect apartheid created for the health particularly for black people. First, there were a range of social conditions which led to disease. The migrant labour system, for example, drew African men away from their families to work in industry and on the mines. The pass laws prevented them from living in 'white' areas and so they were confined to living in under-developed townships in unsanitary conditions. Many also lived in single-sex hostels which were a breeding ground for diseases such as TB. The removal from their families created mental health problems, and alcoholism. The sex work trade grew and, later on this would have an impact in the 1990s on the growth of HIV/AIDs in South Africa. Environmental conditions thus led black people to become more at risk of disease. For instance, in 1971, deaths from diarrhea were 100 times more likely in black children than white children; and in 1978, black people were 48 times more likely to contract typhoid fever than white people.

Black people were also less able to access health-care services which were segregated according to race. The provinces and bantustans had separate health departments. In 1987, the number of dentists for every white member of the population was 1: 2000 whereas the number of dentists for black people was 1: 2 000 000. In 1990, the number of doctors in urban areas was 1: 900 whereas in rural areas, it was 1: 4100. Black people were prevented from training as doctors at 'white' universities and from seeing white patients. The apartheid government spending was also unequal according to race: in 1987, it spent R137 on each black person whereas it spent R597 on each white person.<sup>363</sup>

In the face of these inequities, the constitution included various provisions guaranteeing a right to health. Section 27(1)(a) provides an entitlement of everyone 'to have access to health-care services, including reproductive health care'. Section 27(2) specifies the state obligations in this regard, requiring, once again that the state must take **reasonable** legislative and other measures, within its available resources to achieve the **progressive** realization' of this right. Section 27(3) provides that no-one may be refused emergency medical treatment. Section 24 (a) also includes a requirement that everyone has a right to 'an environment that is not harmful to their health or well-being'. These constitutional rights can be seen, on the one hand, to have a corrective purpose: to address the inequities of the past. On the other hand, they attempt to achieve the distributive justice goal of ensuring all South African gain access to a decent level of health-care services. It must also be noted that there is a close relationship between these specific rights dealing with health and other rights – such as the right to have access to adequate housing and sufficient food and water – which have an impact on health.

### *Thin Compliance*

Since 1994, the government has taken a range of measures to advance the right to have access to health-care of South Africans. The primary piece of legislation in this area is the National Health Act 61 of 2003 which creates the framework for a unified health-care system in South Africa. The Act defines the rights and duties of users of the health-care system as well as health-care personnel. It also provides an understanding of the respective roles of national, provincial and local spheres of government in respect of health matters. The National Health Amendment Act of 2013 established an office of health standards compliance which requires an inspection of public hospitals every four years and a complaint mechanism from members of the public. Legislation relating to the general functioning of the health-care system which has been updated since 1994 includes the Health Profession Act 56 of 1974 and the Medicines and Related Substances Act 101 of 1965.

There are many other pieces of legislation that have been passed which generally focus on particular areas. The Mental Health Care Act 17 of 2002 sought to change the approach to the care of the mentally ill in South Africa with a focus on their rights. The Choice on Termination of Pregnancy Act 38 of 2004 provided for legal abortions

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<sup>363</sup> The statistics and analysis in this section is taken from the document 'Background to health and human rights in South Africa'. Section 27 (2010). [online] available at <http://www.section27.org.za/wp-content/uploads/2010/04/Chapter1.pdf> [accessed on 28 November 2015].

up until 3 months and restricted access to abortion until 20 weeks of pregnancy. The Tobacco Product Controls Amendment Act of 2000 banned smoking in public places.

Health is also impacted upon by other laws which are not directly focused upon it. For instance, the National Environmental Management Air Quality Act 39 of 2004, the National Environmental Management Act 107 of 1998 addresses wider questions of environmental impact and pollution; the Occupational Health and Safety Act 85 of 1993 addresses health at work; and the Water Services Act 108 of 1997 prescribes national norms and standards that must be met in the provision of water services.

The government has also adopted several policies to address issues around health-care. For instance, between 2009 and 2014, it adopted a ten point plan that sought amongst other things to improve the management of the health system as well as the quality of health-care services. It also sought to improve the human resources in the health-care sector. It has passed a national strategic plan from 2012 – 2016 to address HIV/AIDS and TB which engages with questions of prevention and treatment. It has also outlined ambitious plans for a National Health Insurance which is designed to ensure universal access to decent health-care for all in South Africa. It has also embarked on a project to improve health infrastructure through refurbishing public health facilities.

It is clear therefore that the state has taken legislative and other measures to address issues in relation to the right to health. Perhaps the single biggest failure of health-care policy in the past 20 years has been the approach of the government to HIV/AIDS where its policies failed initially to include a programme of treatment for those suffering from HIV/AIDS which had become a pandemic in South Africa. This situation could be seen as a failure of thin compliance in that there was a lack of any reasonable programme to address HIV/AIDS in place. We will, however, consider this matter at length under the thick compliance section as it involves a range of issues which also highlight wider failures of government policy in this area.

#### *Thick Compliance*

It cannot be said that the government does not spend in the health-care sector: In 2015, the government aimed to spend 157 billion Rand on health-care, which amounts to around 11 percent of the national budget. Yet, one of the major problems relating to funding involves where that money is spent, inefficiencies in allocation and detailed problems overall in the health-care system. In 2009, an Integrated Support Team appointed by the Minister released a report in which it detailed many problems facing the public health-care system.<sup>364</sup> The report found significant over-spending and a variety of unfunded mandates: these included new policies such as new vaccinations, promises made by MECs such as the funding of new clinics and even legislative requirements such as the funding of the district health system.<sup>365</sup> The provision of a legislative scheme without a proper funding plan would violate the requirements laid out for a reasonable programme in *Grootboom* (where appropriate resources must be allocated for a specific programme).

The report also detailed the fact that there were ten health departments in South Africa without one coherent vision or strategy. There was also fragmentation between the national government policies and those developed at the provincial level. There is a lack of co-ordination and communication between these various layers.<sup>366</sup> Once again, we see how the structure of co-operative governance and federalism has impacted upon the efficient delivery of services.<sup>367</sup> There are inadequate systems to address the human resource needs in the system, to ensure the provision of decent care by nurses and a shortage of doctors in rural areas. Similarly, there is a lack of adequate information management systems. Medicines were also not treated as a major strategic issue and many provinces run out of critical supplies as a result of over-expenditure.<sup>368</sup>

All these maladies facing the public health care system have a large impact upon the access to health care services of the population in South Africa. In a study conducted by Harris et al<sup>369</sup>, the authors found that 'poor, uninsured,

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<sup>364</sup> Consolidated Report of the Integrated Support Team on the right to health and the public's right to know. Rural Health Advocacy Project (2009). [online] available at <http://www.rhap.org.za/ist-reports-on-the-state-of-the-health-system-and-the-publics-right-to-know/> [accessed on 5 December 2015].

<sup>365</sup> Consolidated Report, 2009: 9.

<sup>366</sup> Consolidated Report, 2009 11-12.

<sup>367</sup> Once again, this connects with the analysis in the chapter on multi-level governance.

<sup>368</sup> Consolidated Report, 2009: 19.

<sup>369</sup> Harris, 2011: 102-123.

black Africans and rural groups have inequitable access' to health-care services in South Africa.<sup>370</sup> The fact that transport was unaffordable, there was expectation of disrespectful treatment and the belief that care would be ineffective played a role in hampering access for these groups. The poor can least afford to use private health-care services yet a fifth of them did do so to try and gain access to decent treatment. Many of the groups supposed to be exempted from paying services fees in the public hospitals also still had to do so.<sup>371</sup> In the public sector, 37.5 percent of out-patients surveyed complained about the timeliness of treatment whilst 25.5 percent of in-patients did. Over half (54, 7 percent) of all respondents said that those treated in public hospitals were not treated with respect and dignity.<sup>372</sup>

These empirical facts suggest that the goal of reducing inequalities created by apartheid has largely not occurred despite large amounts of government expenditure. Access to decent health-care services is still the preserve largely of the rich who can afford to pay for private services (South Africa still has a strong division between public and private services). These inequities have a major impact on health outcomes. A study in 2000 found that 90 percent of premature deaths in South Africa are caused by four main causes: the HIV/AIDS pandemic (accounting for 75 percent of premature deaths), injuries from interpersonal violence and road traffic accidents (around 5 percent), diseases flowing from poverty (around 5 percent) and cardiovascular conditions (around 5 percent).<sup>373</sup> Diseases such as diabetes, kidney disease and prostate cancer have also grown.<sup>374</sup> Obesity rates are high with roughly ten percent of men and a quarter of women being obese; and a fifth of the South African population above 15 suffers from hypertension.<sup>375</sup>

As can be seen from the above statistics, the major crisis facing health in South Africa from the 1990s onwards concerned the massive growth of the population who had HIV/AIDS. By 2008, it was estimated that in over 5.5 million people lived with the disease.<sup>376</sup> The mortality rates that resulted provide an alarming picture. The number of deaths increased substantially in South Africa between 1994 and 2006 which seemed to be the peak. By 2009, it was estimated that over 2, 6 million South Africans died of HIV/AIDS, mainly children and young adults.<sup>377</sup> The number of deaths of children doubled over that time period whilst the number of young adults trebled. <sup>378</sup> The median life expectancy in South Africa dropped from 52 in 1997 to 43 in 2007. <sup>379</sup>

The catastrophic health-policy of the government was partly to blame for these figures together with the high-cost of anti-retroviral drugs.<sup>380</sup> Initially, the government response seemed promising as it passed legislation to allow for the manufacture of these drugs in South Africa without the patent holder's authorisation (compulsory licensing) and parallel importation of these drugs from places where they were sold for a cheaper price. These measures drew the ire of the pharmaceutical industry who, in 2001, took the government to court for infringement of their patents on these drugs.<sup>381</sup> Protests erupted around the world which had a highly negative effect on the image of these corporations and eventually they dropped the litigation. It seemed that South Africa would be able to drop the prices of the drugs finally and render them accessible to all.

Unfortunately, the President decided to involve himself directly with health-care policy. Together with the pliant Health Minister, they aligned themselves with dissident views which denied that HIV caused AIDS. The President and Health Minister emphasized the toxicity of anti-retroviral drugs without recognizing their benefits and essentially refused to make them accessible in the public health system throughout the country to treat those infected by the disease. They also obstructed the acquisition of Global Fund grants.<sup>382</sup>

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<sup>370</sup> Harris, 2011: 119.

<sup>371</sup> Harris, 2011: 118.

<sup>372</sup> Harris, 2011: 115.

<sup>373</sup> Harrison, 2009: 9.

<sup>374</sup> Harrison, 2009: 9.

<sup>375</sup> Harrison, 2009: 12-13.

<sup>376</sup> Chigwedere, 2008: 410.

<sup>377</sup> Harrison, 2009: 6.

<sup>378</sup> Harrison, 2009: 6.

<sup>379</sup> Harrison, 2009: 6.

<sup>380</sup> Other factors also existed such as the stigma of the disease and cultural beliefs surrounding its causes and treatment: see Steinberg, 2010.

<sup>381</sup> Ferreira, 2002: 1148-1158.

<sup>382</sup> Chigwedere, 2008: 413.

This situation eventually led a civil society organization, the Treatment Action Campaign (TAC), to launch a challenge in the courts. The case it took related to a drug called nevirapine which had been shown to be effective in reducing the likelihood of transmission of HIV between mothers and their children at birth (this is known as mother-to-child transmission). The manufacturer had offered to make the drug available for free to the government for five years. The government, however, insisted that it would only make the drug available at two health-care facilities per province in order to test its efficacy and develop a programme relating to it. The effect of the government's policy was to prevent thousands of people across the country from gaining access to the drug and allowing unnecessary HIV infections of children.

The TAC challenged the reasonableness of the government's policy of restricting access to these drugs to only two sites per province and also the failure of the government to develop a comprehensive programme to roll-out the drugs across the country. The organization won in the High Court and the case went up to the Constitutional Court. The Court re-affirmed its view that the right required the development of a programme which would be assessed on the grounds of reasonableness.<sup>383</sup> The government had failed, the court found, to show any good reasons why the drug should be restricted to two sites per province as it had been shown to be safe and efficacious. The drug had also been made available to it for free. The research around a programme could not be allowed to inhibit the availability of a drug which would save thousands of lives. The Court found the government programme to be unreasonable and thus to violate its obligations in relation to the right to have access to health-care services. It ordered the government to provide the drug in all health-care facilities across the country, to provide counselling and to develop a comprehensive programme to address mother-to-child transmission of HIV.

This court decision is perhaps one of the most significant in the history of the Constitutional Court. Whilst the minister of health initially suggested that the department would disobey the court, the order was implemented, albeit patchily across the country. The availability of nevirapine meant that many children did not develop HIV who otherwise would have. The Harvard School of Public Health issued a study in which it estimated the number of people who could have been saved had the South African government implemented an ARV programme earlier. It estimated that more than 330 000 people and approximately 2 million life years were lost because such a programme was not implemented. 35 000 babies were born with HIV 'resulting in 1.6 million person-years lost by not implementing a mother-to-child transmission prophylaxis program using nevirapine. The total lost benefits of ARVs are at least 3.8 million person-years for the period'.<sup>384</sup>

The fact that the Constitutional Court forced the government to change its policy can thus be seen to have had concrete life-saving effects on thousands of children. Currently, the rate of transmission of HIV from mother-to-child has reduced to only 2,7 percent of children born.<sup>385</sup> The impetus created by the court case led to an entire questioning of the government's policy on anti-retrovirals throughout the society and an inability of the government to justify its refusal to provide such treatment across the country in the case of all persons suffering from HIV/AIDS including adults as well. The Department of Health began to make such drugs available and, today, South Africa has one of the largest anti-retroviral programmes in the world. Perhaps millions of people have been saved as a result of this change of policy which, to some extent, can be connected to the constitutional court case. Recent estimates suggest that around 2.2 million lives have been saved by the change of policy by the government.<sup>386</sup> This case must for all time count as a strong reason in favour of constitutionalizing a right to have access to health-care services which helped address a massive failure of government policy which was affecting the very survival of millions.

The Constitution has also helped guard against further irrational action by the government in the health-care sector. In 1999, the government passed the South African Medicines and Medical Devices Regulatory Authority Act in 1998 which controlled the flow of medicines on the market through placing medicines in particular categories.<sup>387</sup> To be effective, the Act required a complex regulatory structure to be in place which assigned medicines to particular Schedules. Acting in good faith, the President signed the Act into force without the relevant schedules being in place. The result would have been that there would be no controls over medicines –

<sup>383</sup> *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721.

<sup>384</sup> Chigwedere, 2008: 412.

<sup>385</sup> Cullinan, K. (2014). ARV programme saves 780 000 lives. *Health E-News*, [online]. available at: <http://www.health-e.org.za/2014/04/11/arv-programme-saves-780-000-lives/> [accessed on 5 December 2015].

<sup>386</sup> Cullinan, K, 2014.

<sup>387</sup> *Pharmaceutical Manufacturer's Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674.

no matter how dangerous – pending the passing of these schedules. The President himself asked for his action bringing the Act into force to be declared invalid by the courts.<sup>388</sup> The Constitutional Court held that all exercises of public power had to be rational and that the President's actions were objectively irrational in these circumstances. They were, as a result, invalid. Whilst the case was not decided in terms of the right to health, it demonstrates how a rule of law requirement may have important implications for protecting people's health.

The Constitutional Court has also had to address the problem of resource scarcity in the context of the right to health. It was faced with this problem in its very first case in this area relating to a Mr Soobramoney who suffered from chronic renal failure.<sup>389</sup> He needed kidney dialysis and argued that, in terms of the Constitution he was entitled to it as he could not afford to provide it himself. Given the limited number of dialysis machines, the state had adopted a rationing policy only to provide dialysis to those who had acute renal failure which could be treated and remedied or those eligible for a kidney transplant. The majority of the court dismissed the argument that Mr Soobramoney could claim a right to kidney dialysis in terms of the right of everyone to have access to health-care services. Judge President Chaskalson found that the court needed to respect rational decisions taken in good faith by other branches of government in relation to the rationing of scarce health-care resources. The following statement expressed the dominant approach of the court to interpreting this right:

'What is apparent from these provisions is that the obligations imposed on the State by ss 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'<sup>390</sup>

The court here signals that its understanding of the right in question can be limited by the resources that are available. It has been criticized severely for this ruling which has been said to be overly deferential.<sup>391</sup> The court only considered the existing provincial budgetary allocation to health: as Moellendorf argues, however, rights are meant to guide budgetary decisions and the focus of the court on what resources were available was too narrow. The court also only specified a rationality standard for evaluating rationing decisions which might offer people limited protection. This was an earlier case than TAC and so, it is unclear whether or not the reasonableness standard might apply today.

Nevertheless, given the poor state of public health, it is surprising there have been so few cases in this area and this may partially be explained by the conservative approach of the court in *Soobramoney* and the difficulty of establishing the government programme has been irrational/unreasonable. In countries with a comparative right in their bill of rights such as Colombia, there have been many more claims in terms of the right to health as courts have been willing to entertain individual claims about continued failings in the health-care system.<sup>392</sup> That approach has also been said to have many disadvantages, allowing those who can approach the court to be privileged over those who cannot. In South Africa, the court requires that the approach adopted be programmatic which allows for better planning and less ad hoc effects. A programmatic approach, however, may be designed and yet still not place significant hurdles in the face of prospective litigants; the disadvantage of the existing approach of the court, however, is that it sets a high barrier for any litigant given the complexity of the health-care system. Moreover, litigation is discouraged as a successful challenge may not necessarily result in concrete effects for litigants.

#### *Performance of the Right to Have Access to Health Care Services*

The inclusion of a right to have access to health-care services was seen to be important both in addressing past inequities in the health-care system and ensuring every South African has access to decent health-care. Neither of these goals has been achieved fully in the past 20 years with vast inequities remaining in the health-care system and poorer South Africans still often being able to access only sub-standard health-care. There were of course significant challenges in expanding access and the advent of an HIV/AIDs crisis just as South Africa was transitioning to democracy placed great strain on the health-care system. Unfortunately, as we saw, the initial government response to the pandemic was not evidence-based and led to a large number of unnecessary deaths. The constitutional right to health extended the battle lines within which advocacy and activism could take place

<sup>388</sup> *Pharmaceutical Manufacturer's Association* para 7. The President instituted this action after it came to light that the Government Notice purporting to publish the schedules to the Act was invalid.

<sup>389</sup> See n 306 above.

<sup>390</sup> *Soobramoney* para 11.

<sup>391</sup> Moellendorf, 1998: 331-333.

<sup>392</sup> Yamin, 2010: 431.

and encouraged bolder steps on the part of social movements.<sup>393</sup> The constitutionalisation of the right to health enabled courts to intervene in the face of a significant policy failure. The correction ordered, in turn, ensured drugs for millions of South Africans and saved their lives. If this were the only impact of the right to have access to health-care services, in our view, its inclusion in the constitution could be said to have been successful. The reasonableness approach of the court and its decision in relation to scarce resources in the health-care sector has though inhibited much litigation. Whilst the right has made a difference, we believe it could have made more of a difference if it were easier for litigants to approach the court and highlight many of the unacceptable practices that occur within the health-care sector. A re-consideration of the burden on litigants in courts as well as a consideration of how there could be easier access should be considered in enabling this right to reach its full potential for change. A dedicated, easy-to-access mechanism outside courts should also be considered to address situations where individuals in the public health sector are being denied adequate medical treatment or where they are treated with disrespect.

### *The Right to Education*

Schooling in South Africa became part of the implementation of the apartheid policy. There were separate schools for black and white learners. The education given to white learners was deliberately superior to that provided to black learners as part of the apartheid philosophy that whites would assume skilled and managerial positions in society with black people essentially becoming the unskilled labour work-force in the country.<sup>394</sup> Whilst there are some different accounts of apartheid history, the consistent message is that the schools and schooling was based on 'inequalities, violations of human rights and were blatantly racist'.<sup>395</sup> This philosophy left a concrete legacy. First, there was inadequate infrastructure to provide for the education largely of black people. Secondly, there was inadequate training of teachers often who would provide education in black schools. Thirdly, there were 18 separate departments across the country which had to be merged into nine provincial departments. Fourthly, the number of black students in higher education was relatively small and universities were often divided according to race.

In the face of these realities, the Constitution provided in section 29(1) that 'Everyone has the right to (a) basic education including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible'. A compromise clause was agreed upon concerning the right to receive education in the official language of choice which was largely to protect Afrikaans-language education. A right was also enshrined to maintain, at one's own expense, independent educational institutions subject to a number of conditions. The focus of this section will largely be on section 29(1) although the other sections will be mentioned where relevant.

### *Thin Compliance*

The South African government has passed much legislation since 1994 to realise the rights in section 29. It has passed the South African Schools Act no 84 of 1996 which regulated the funding and governance of schools and the National Education Policy Act 27 of 1996 which allows for the determination of a national policy for education. The government has also adopted a series of policies which attempt to make basic education free for all: see, for instance, the 'Plan of Action for Improving Free and Quality Education for All'.<sup>396</sup> This document seeks to outline plans through which the poorest 40 percent of learners can have the quality of their education improved and through which barriers to their access are removed.

In relation to Higher Education, the government passed a Higher Education Act 101 of 1997 to regulate universities, ensure proper governance and maintain standards; a Further Education and Training Colleges Act 16 of 2006 to regulate education and training that is higher than secondary schooling but lower than tertiary university education; and a National Qualifications Framework Act which is designed to ensure a national system

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<sup>393</sup> Kavanagh, forthcoming.

<sup>394</sup> Christie, 1982: 61.

<sup>395</sup> Carrim, 2006: 175.

<sup>396</sup> Department of Education (2003). *Plan of action: Improving access to free and basic education for all*. [online]. available at <http://www.education.gov.za/LinkClick.aspx?fileticket=IBMz%2fjGelkc%3d&tabid=390&mid=1124> [accessed on 5 December 2015].

of registration and accreditation of qualifications. It issued a National Plan on Higher Education<sup>397</sup> and set up a system known as National Student Financial Aid Scheme which is meant to provide loans to students to enable them to have access to higher education.

There are many other laws and policies and it is clear that, to the extent that the government has passed these, there is some thin compliance with the Constitution. Moreover, there has been an expansion of children in schooling and students in higher education since 1994 so, on a quantitative level, there is some compliance. Unfortunately, the implementation of the legislation and policies has been poor and the actual content of the education received by many learners, particularly the poor is very limited. These points will be illustrated in relation to thick compliance.

#### *Thick Compliance: Basic Education*

The right to basic education differs from the other constitutionally protected socio-economic rights in that it is not internally limited to 'progressive realization' within 'available resources'.<sup>398</sup> The Constitutional Court has confirmed in the case of *Governing Body of Juma Masjid*<sup>399</sup> that it is 'immediately realisable' and can only be limited in terms of the general limitation clause.<sup>400</sup> This formulation of the right creates the expectation that more ought to be done to ensure the realization of its positive dimension than is the case with other 'progressively realisable' rights. The government seems to take this 'immediately realisable' right seriously in that it spends the largest proportion of the national budget on education. In 2015, it aimed to spend 265,7 Billion Rand, which is 18.5 percent of the total budget. Yet despite this large expenditure, the goals of the right to education do not seem to have been achieved in a thick sense.

One success of the right to basic education is that primary education has been made available to virtually everyone between the ages of 7 and 15 years.<sup>401</sup> Between 2002 and 2014, the percentage of learners who attend no fee schools increased from 0.4 percent of learners to 65.4 percent of learners.<sup>402</sup> Yet, the basic education offered in most schools in South Africa is not of a high quality and the inequality which apartheid created in the schools system persists.

In 2009, the National Education Evaluation and Development Unit (NEEDU) was established as a unit within the DBE to evaluate the quality of teaching and learning in South African schools.<sup>403</sup> NEEDU evaluated the numeracy and literacy skills of learners in foundational as well as intermediate grades and has found them to be falling short of the standards set by the curriculum.<sup>404</sup> NEEDU evaluated 215 Grade 2 classes and found that 72 percent of the three top learners in each of these classes were reading at a rate below the average benchmark for this group.<sup>405</sup> From a sample of 1790 Grade 5 learners from rural schools, 10 percent of students could not understand English (which was the medium of instruction in the schools they attended), 22 percent were illiterate and only 49 percent of learners had an acceptable reading capacity expected of a Grade 5 learner.<sup>406</sup>

Due to the legacy of apartheid, there is a large discrepancy between the performance of learners at 75 percent of South African schools, which still lack even the basic resources, and the top 25 percent of schools which achieve outcomes that are comparable to international standards.<sup>407</sup> Research conducted by Spaul suggests that the difference in performance between learners from the top 25 percent and the bottom 75 percent of schools is so

<sup>397</sup> Department of Education (2001). *Draft national plan for higher education in South Africa*. [online]. available at <http://www.dhet.gov.za/HED%20Policies/National%20Plan%20on%20Higher%20Education.pdf> [accessed on 5 December 2015].

<sup>398</sup> *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC), para 37.

<sup>399</sup> Ibid.

<sup>400</sup> Section 36 of the Constitution provides that a right in the Bill of Rights can only be limited in terms of a law of general application that is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

<sup>401</sup> General Household Survey, 2014: 18.

<sup>402</sup> General Household Survey, 2014: 20.

<sup>403</sup> NEEDU, 2013: 1.

<sup>404</sup> Equal Education, (2015). EE demands answers from Minister Motshekga on the leaked NEEDU Report. [online] available at: <http://www.equaleducation.org.za/article/2015-04-24-ee-demands-answers-from-minister-motshekga-on-the-leaked-needu-report> [accessed on 6 December 2015].

<sup>405</sup> NEEDU, 2012: 10.

<sup>406</sup> NEEDU, 2013: 41.

<sup>407</sup> Spaul, 2013: 36.

stark that the top 25 percent's results have the effect of skewing the national results and create a misleading representation of the general performance of South African schools.<sup>408</sup> This difference in outcome can be attributed to the fact that many South African schools lack the basic infrastructure and resources such as a sufficient number of suitably qualified teachers, safe school buildings, desks and chairs, electricity and sanitation.<sup>409</sup> Despite the primacy of education and the large budgetary allocation to this area, the DBE has not made significant strides in reversing the effects of apartheid's deliberate education discrimination.

The constitutional right to basic education has given much room to civil society to make demands on the DBE for the improvement of conditions in former black-only schools. It has provided fertile grounds for the involvement of courts in ensuring the adoption and implementation of policies guaranteeing the necessary conditions for the realization of the right.

*(a) Mud Schools*

As of 2010, there were hundreds of dilapidated and unsafe schools across the country and in the Eastern Cape in particular. Many of these schools were built by community members using mud and branches and left learners exposed to the elements. The schools furthermore had a shortage of desks and chairs and did not have access to potable water. The Centre for Child Law (CCL)<sup>410</sup> and the Legal Resources Centre (LRC)<sup>411</sup>, instituted proceedings against the DBE on behalf of seven of these schools in the Eastern Cape High Court. It was argued that the DBE's conduct and policies fell short of meeting the constitutional requirements in section 29(1)(a).<sup>412</sup> A settlement agreement was reached in 2011 in terms of which the DBE undertook to spend more than 6.2 billion Rand over three years to replace inappropriate structures at schools in the Eastern Cape. The programme became known as the Accelerated Schools Infrastructure Delivery Initiative (ASIDI) and is aimed at upgrading 496 'mud schools' by the end of 2016.<sup>413</sup>

While the adoption of the programme was a clear success of the constitutional right to basic education, there remain several hurdles in its way to full implementation. ASIDI aimed to have upgraded 49 schools by the end of the 2013 financial year, but only managed to complete the upgrading of 10.<sup>414</sup> The DBE spent a mere 10 percent of the School Infrastructure Backlog grant in the 2011/2012 financial year and 23 percent in the 2012/2013 financial year. The project deadline has been extended by a further three years. A monitoring exercise undertaken by LRC and CCL at the end of 2014 also revealed that many schools which ought to have been included on the ASIDI list for upgrading have been left out. After repeated requests for the inclusion of these schools were ignored, the LRC once again instituted proceedings. Negotiations and court proceedings which would hopefully ensure the implementation of ASIDI are still ongoing.<sup>415</sup>

The 'mud schools' cases serve as an example of how the right to basic education can provide the space for civil society to force the government to the negotiating table in order to provide a plan as to how it will fulfil its obligations. Social mobilisation, along with the involvement of the courts, has led to the adoption of a new government programme and the drastic improvement of some rural schools in the Eastern Cape. It is also clear that ongoing civil society engagement is essential in ensuring that the goals of the right are achieved.

*(b) Minimum Norms and Standards for School Infrastructure*

The right to basic education has also been instrumental in the adoption of Minimum Norms and Standards for School Infrastructure by the DBE in terms of section 5A of the South African Schools Act. The purpose of these

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<sup>408</sup> Spaul, 2013: 38.

<sup>409</sup> According to NEEDU, one of the main reasons for the below par performance of learner is a shortage of sufficiently qualified and capable teachers in rural areas in particular, 2013.

<sup>410</sup> A Centre of the University of Pretoria which advocates for children's rights.

<sup>411</sup> A public interest law non-governmental organisation.

<sup>412</sup> Legal Resources Centre, 2012 :20.

<sup>413</sup> Legal Resources Centre, 2012: 20.

<sup>414</sup> Abdoll and Barberton, 2014: iv.

<sup>415</sup> A second settlement agreement was reached and made an order of court. The DBE failed to fully comply with the 2014 agreement. Contempt proceedings have been instituted with the main aim of ensuring that the DBE updates the ASIDI list in April 2015.

regulations are to provide a standard in terms of which school infrastructure can be measured and in terms of which the DBE can be held to account. Their absence, in turn, contributes to the failure to provide adequate infrastructure at public schools and undermines the right to basic education.

Proceedings were instituted against the Minister of basic education in March 2012 by the LRC and Equal Education<sup>416</sup> on behalf of two Eastern Cape schools. An order was sought which would compel the Minister to set national binding norms and standards for schools in terms of classrooms, electricity, water, sanitation, libraries, laboratories, recreational facilities and security. A settlement agreement was reached in terms of which the Minister undertook to promulgate these regulations. The Minister kept her part of the agreement in publishing draft norms and standards. However, after comments were submitted on this draft by more than 20 organisations, the Minister failed to publish the final regulations within the agreed timeline. The Minimum Norms and Standards were only published in November 2013, after another court order was made compelling the Minister to fulfil her obligation.

The tireless social mobilization by Equal Education played an important role in the final adoption of these regulations and the organization remains active in ensuring their provincial implementation.<sup>417</sup> As result of the combination of the adoption of the Minimum Norms and Standards for School Infrastructure and sustained activism, the provision of infrastructure at public schools has improved. The National Education Infrastructure Management System (NEIMS) Reports of 2011 and 2015 provides the following figures on school infrastructure:<sup>418</sup>

#### **Number of schools lacking particular facility**

<b>Facility:</b>	<b>2011</b>	<b>2015</b>
Electricity	3544	913
Water	2401	452
Sanitation	913	128
Library	22 938	18 150
Laboratory	21 021	20 315
Computer lab	19 037	15 984

While the impact of the right to basic education is evident in the improvement in the provision of these facilities, the government's continued failure to provide the basic necessities for the fulfilment of the right means it still falls far short of thick compliance with its requirements.

#### *(c) The Textbook Saga*

The provision of textbooks has also been a stress point which has lead to a recent pronouncement by the Supreme Court of Appeal on the content of the right to basic education. The DBE adopted a new education curriculum for the entire country in 2012. This new curriculum was to be phased in over a period of three years. During the phasing-in period, the DBE was simultaneously running two different curricula for different grades, which placed much pressure on its resources. Delays in the delivery of textbooks in the Limpopo province arose. In May 2012, an urgent application was brought to the North Gauteng High Court to compel the delivery of textbooks and the adoption of a catch-up plan. Kollapen J held that the DBE's failure to provide textbooks to schools in Limpopo is a violation of the right to basic education. The DBE was directed to deliver the outstanding textbooks for grades 1 to 3 and 10 by a certain date and to develop a catch-up plan. The DBE failed to ensure full delivery of the books in accordance with the court order. A settlement agreement was made an order of court on 5 July 2012. A fresh order was issued on 5 October 2012 extending the date of delivery to 12 October 2012. Considering

<sup>416</sup> Equal Education is an organisation which advocates for quality and equality in education in South Africa.

<sup>417</sup> Equal Education held numerous marches, vigils, public rallies and media statements in order to mobilise a 'collective voice'.

<sup>418</sup> Figures obtained from NEIMS Reports of 2011 and 2015.

that the school year had already started in January, it does not seem like much of a victory that textbooks were finally delivered to all of the learners by the middle of October in 2012. This litigation did, however, prepare the way for future challenges to the state's failure to deliver textbooks.

In 2014, the third and final stage of the roll-out of the new curriculum took place.<sup>419</sup> While most of the textbooks had been delivered, proceedings were nevertheless instituted against the DBE. The DBE's defence was that it had not violated the right to basic education because 97 percent of textbooks had been delivered by 21 April 2014. Tuchten J, in the North Gauteng high Court, confirmed rulings made by Kollapen J in 2012 that the right to basic education includes the right of *every* learner to be provided with a textbook for *every* learning area before the curriculum is due to commence. The DBE appealed directly to the Constitutional Court against this decision and this application for leave to appeal was dismissed. The DBE subsequently appealed to the Supreme Court of Appeal, where a full engagement with the obligations on the state in terms of section 29(1)(a) of the Constitution occurred.

The SCA held that the DBE's failure to deliver textbooks to 3 percent of students not only infringed upon their right to basic education, but also amounted to unfair discrimination. The Court held that the 3 percent of learners who were not provided with textbooks were adversely affected and that this differential treatment was not justifiable. The SCA confirmed that the Section 29(1)(a) right entitles every learner to every textbook before the school year starts and that the DBE's failure to deliver *all* textbooks to *all* learners is a violation of this right.

Once again, the constitutional right to basic education provided a platform for litigation and allowed courts to order the enforcement of the right that enhanced access to the basic conditions for learning.

#### *The Crisis in Further Education*

Section 29(1)(b) provides that '[e]veryone has the right ... to further education, which the state, through reasonable measures, must make progressively available and accessible'. Access to tertiary education has been made available to very few South Africans. In 2014, only 783 545 people out of a population of 53 million were enrolled at universities and universities of technology.<sup>420</sup> This is due to the failures in the primary and secondary school system as well as institutional capacity limitations. Tertiary education is also prohibitively expensive for the majority of South Africans.

The government has aimed to fulfil its section 29(1)(b) obligations by establishing the National Student Financial Aid Scheme (NSFAS) which provides loans and bursaries to students whose families earn below a defined income level. It has been suggested that this fund has been mismanaged and that it does not have effective mechanisms in place to disburse monies to students and to ensure the repayment of loans. It furthermore provides inadequate funding to cover all tuition fees (and living expenses) of qualifying students and some universities attempt to step in to address this shortfall.<sup>421</sup>

The state has also been taking steps in terms of its 29(1)(b) obligations by funding public universities and technikons directly.<sup>422</sup> However, state funding per student has been decreasing by 1,1 percent every year from 2000 up to 2010.<sup>423</sup> In response to this decline in funding and increases in student numbers, universities have been increasing their tuition fees by 2.5 percent per student on an annual basis.<sup>424</sup>

In October 2015, the University of the Witwatersrand announced that its student fees for 2016 would increase by 10.3 percent.<sup>425</sup> Students reacted to this hike in fees by organising protests and bringing activities on the campus to a standstill. Students from other universities, who were facing similar fee increases, joined the protests.<sup>426</sup> While most of the protests were conducted peacefully and orderly, there were instances of arson and

<sup>419</sup> The delivery of textbooks in the roll-out of the new curriculum in 2013 did not lead to any litigation.

<sup>420</sup> General Household Survey, 2015.

<sup>421</sup> The only criteria for funding is academic potential and financial need.

<sup>422</sup> In terms of section 38G(1) of the Higher Education Act 101 of 1997. Fleisch, 2008: 57-42.

<sup>423</sup> Ministerial Committee for the Review of the Funding of Universities, 2013: 152.

<sup>424</sup> Ibid.

<sup>425</sup> Areff, A. (2015). Student protests against fee hikes across South Africa. *TimesLive* [online] available at <http://www.timeslive.co.za/local/2015/10/20/Students-protest-against-fee-hikes-across-South-Africa> [accessed on 12 December 2015].

<sup>426</sup> Ibid.

destruction of university property on the part of the students as well as claims of police brutality in response.<sup>427</sup> The protests eventually required the intervention of the President who responded to these protest by announcing that there will be a 0 percent fee increase at all universities across the country. The President has also stated that provision will be made for the shortfall in funding for universities.<sup>428</sup>

### *Performance of the Right to Education*

Despite the heightened urgency for compliance with the right to basic education (which is ‘immediately realisable’), the state has not fulfilled its obligations adequately in this regard. The litigation which has led to the enforcement of certain aspects of this right can be counted as successes of the Constitutional right. The right has provided a normative basis from which civil society and the courts could intervene to support the provision of basic education.

The state has also failed to make further education progressively available but has adopted retrogressive measures instead by decreasing funding to tertiary institutions. The right to further education has performed in the sense that it has served as the basis for public protests against increased exclusion in tertiary education though there have not been any cases on the exact requirements of the right.

### **Recommendations and Overall Assessment**

The South African government has put numerous policies and legislative schemes in place and has made large proportions of its budget available for the fulfilment of its duties in respect of socio-economic rights. Yet, there remain major discrepancies between the socio-economic rights guaranteed in the Constitution and the reality faced by large numbers of the South African population who lack access to the goods promised. The socio-economic rights in the Constitution have had an impact, as we have shown, on the demands made by civil society and provided the basis for advances in policy to take place through litigation. As was shown, these rights have effected large-scale changes even where they have not been interpreted by the courts to place an onerous and immediate burden on the state. Arguably, a more expansive interpretation would have encouraged even greater efforts to be expended in reducing absolute poverty and placed a greater focus on ensuring those whose needs are most urgent would have been catered to. Rendering the courts more accessible and the path of litigation easier would have also facilitated more cases and perhaps greater legitimacy for the role of the courts in defending the poor. The manner in which the rights have been framed in the Constitution may have played some role in this weaker approach being adopted towards their enforcement by the courts as well as the overhang of a very traditional and conservative understanding of the separation of powers. Nevertheless, the approach to interpreting these rights cannot be viewed as the primary source of the state’s failure to advance further on the project of providing for the basic necessities of all South Africans.

### **3.5. Overall assessment and recommendations: Performance of rights**

The rights in the South African Constitution have had a significant impact upon the society. In this chapter, we have focused on five key rights that have been central to the transformative goals of the Constitution. These rights have been shown to have generated legislative and policy responses; yet, a long way remains towards the full achievement thereof.

In terms of the performance of socio-economic rights, it has been noted that the government has taken significant steps to fulfil its obligations. Despite the constitutionalisation of these rights, however, masses of South Africans still do not have access to adequate housing, health care and a quality basic education. Whilst this reality is sobering, it should not detract from a recognition that these rights have played a role in improving the position: litigation has forced the adoption of policies where none existed, helped address a significant health crisis and forced the implementation of policies where government has been dragging its feet. It has also strengthened the hand of civil society groups in negotiating with the government. There is thus an evident impact which these

<sup>427</sup> Duncan, J. (2015). #FeesMustFall: A question of human rights violations. *Mail and Guardian* [online]. available at <http://mg.co.za/article/2015-11-09-the-question-of-human-rights-violations-against-feesmustfall-protesters> [accessed on 12 December 2015].

<sup>428</sup> Gqirana, T. (2015) There will be money for students next year, Zuma. *Sowetan* [online] available at <http://www.sowetanlive.co.za/news/2015/11/19/there-will-be-money-for-students-next-year---zuma> [accessed on 12 December 2015].

rights have had on peoples' lives. We have indicated that a more robust approach to the interpretation of these rights and greater accessibility of the courts may have led them to have had even more effect.

Notable redress measures have been taken in terms of both the equality and property right. There has been some performance in this regard and change in patterns of employment and land ownership. The equality right has created a greater sense of awareness of diversity and has created mechanisms with which unfair discrimination by either the state or individuals can be addressed. It has been noted that the Constitution appears to have had some effect on societal attitudes. There seems to be a growing acceptance, for instance, of same-sex relationships within a generally conservative South African society. At the same time as these attitudes seem to be changing, there are high levels of violence against women and LGBT persons. The state has not as yet fully grasped its promotional role in advancing these rights and shifting social attitudes.

Legislation has also been adopted pursuant to the reformative goals of the property right which instituted important mechanisms for land restitution and the strengthening of tenure security. At the same time, progress on land reform and redistribution has been slow and there are increasing demands for faster progress to be made in that regard. The property clause in many ways embodies the compromises necessary to establish the new constitutional order in South Africa and achieve fairness for all. It stands against uncompensated dispossession for existing land-owners whilst seeking to expand access to land and effect redress for past wrongs. It is highly ambitious and the failure fully to achieve its goals 20 years on cannot be seen fairly as a serious flaw of the constitutional schema. Instead, efforts need to be re-doubled in considering how these goals can be achieved more extensively within the constitutional schema rather than outside it.

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