Unpacking “progressive realisation”, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance*

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1 Introduction

Despite the socio-economic rights guarantees in various human rights instruments, access is not always provided as universal from the outset. In these instruments, the effective implementation or realisation of socio-economic rights is often subject to the qualifications of “availability of resources” and “progressive realisation”. The International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)1 and the

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1 South Africa has signed but not yet ratified the ICESCR; however, it acts as persuasive authority in the interpretation of rights by virtue of ss 39, 233 Constitution. At the time of writing, Cabinet had approved South Africa’s ratification of the ICESCR but it is yet to be tabled before Parliament. See “Statement on Cabinet meeting of 10 October 2012”, http://www.gcis.gov.za/content/newsroom/media-releases/cabstatements/11Oct2012 (accessed 2013-07-08)
Constitution of the Republic of South Africa, 1996 (the Constitution) are some of the human rights instruments which recognise that socio-economic rights have to be realised over time and the progress towards full realisation is dependent on the availability of resources. This raises the question of the degree of obligation or expectation for immediate implementation. Some provisions under the ICESCR are capable of immediate implementation; and some rights in the Constitution, such as the right to be protected against arbitrary evictions in section 26(3), children’s socio-economic rights in section 28 and the socio-economic rights of detained persons in section 35, are not subjected to “progressive realisation”. Thus, not all rights provisions employ the “progressive realisation” terminology. Also, the African Charter on Human and Peoples’ Rights, 1981 (African Charter), to which South Africa is a party, does not expressly use the terminology. This does not however mean that a progressive realisation approach to enforcing the rights in the African Charter has been excluded (as explained below).

As explained subsequently, the progressive realisation qualification requires a state to strive towards fulfilment and improvement in the enjoyment of socio-economic rights to the maximum extent possible, even in the face of resource constraints. A state’s performance in terms of the progressive realisation would depend on, among other things, both the actual socio-economic rights people enjoy at a given moment as well as the society’s capacity of fulfilment (in terms of the resources available to the state).  

This article elaborates on what a progressive realisation approach to socio-economic rights means, drawing from the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR), the jurisprudence of the South African Constitutional Court, and to a limited extent and where relevant, the African Commission on Human and Peoples’ Rights (African Commission). The approach adopted by the paper is to first set out international human rights law on the issue (drawing mainly from the interpretations by the CESCR, and where relevant, the African Commission) and then look at how the South African Constitutional Court has approached the issue, including

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3 The CESCR is the supervisory body of the ICESCR. It monitors implementation of the ICESCR and compliance of states with their obligations contained therein through the reporting mechanism – through which states have to submit reports regularly to the Committee on their implementation of the rights in the ICESCR. With the entry into force of the Optional Protocol to the ICESCR on 20130505 (it was adopted in 2008), the CESCR can receive complaints on violations of the rights in the ICESCR. The Committee has elaborated on content of various socio-economic rights and on state obligations in the form of general comments.

4 The African Commission is the supervisory body of the African Charter, and has issued some landmark rulings on socio-economic rights.
acknowledging synergies and analyses strengths and weaknesses in the Court’s interpretations.

A consideration of the progressive realisation approach to socio-economic rights is warranted on the basis that the concept of “desperate need” does not seem to take us very far in terms of the enforcement of these rights, as the courts tend to focus more on “access” than on “improvements in access”. Moreover, though the Constitutional Court has dealt with this concept, the Court’s characterisation of it in a number of instances appears limited.

2 What Progressive Realisation Entails: The Concept in General

2.1 The CESCR and African Commission

The CESCR’s definition of the concept points to the fact that progressive realisation introduces an element of flexibility in terms of the obligations of states and also in the enforcement of rights. The concept recognises that the full realisation of socio-economic rights would not generally be achieved in a short period of time. The obligation on states therefore is “to move as expeditiously and effectively as possible” towards full realisation. The CESCR has reiterated that progressive realisation implies a specific and continuing obligation on states to, as much as possible, be expeditious and effective in working towards the full realisation of the right to education. For example, progressive introduction of free education implies that states must not only prioritise the provision of free primary education but must also take concrete steps towards achieving free secondary and higher education. The concept “should not be interpreted as depriving States parties’ obligations of all meaningful content”. Progressive realisation thus goes beyond achieving the minimum essential levels of a right; and beyond ensuring access to goods and services to improvements in access over time.

There are three main arguments in terms of understanding progressive realisation. First, there must be immediate and tangible progress towards the realisation of rights. The fact that progressive realisation introduces a flexibility to the enforcement of socio-economic rights does not therefore imply that states can drag their feet. Progressive realisation cannot be interpreted under any circumstance to imply for states the right to defer indefinitely efforts to ensure full realisation. States are required to begin immediately to take steps to fulfil their

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6 CESCR General Comment No 13 The Right to Education UN doc E/C12/1999/10 (1999) par 44.
7 Idem par 14.
8 Idem par 44. See also CESCR General Comment No 18 The Right to Work UN doc E/C12/GC/18 (2006) par 20.
obligations. Progressive realisation therefore includes some immediate (as well as tangible) obligations on states. For instance, in the context of the ICESCR, the obligation to take steps towards progressive realisation “must be taken within a reasonably short time”, after entry into force of the ICESCR for the state concerned. However, because the degree of obligations for different socio-economic rights varies to some extent, there is flexibility in terms of progressive realisation. In relation to the right to education, for example, there is less flexibility. States have an obligation to adopt a plan of action “within a reasonable number of years” and the timeframe must “be fixed in the plan”. The plan must specifically set out a series of targeted implementation dates for each stage of the progressive implementation of the plan. The steps taken must be effective and not be of negligible impact. Thus, it should not take an unreasonable amount of time to create effects. In addition, progressive realisation requires, for instance in the context of social security, that a state has a comprehensive social security system in place and carries out regular reviews of it to ensure that it is consistent with the right to social security. However, regular reviews of legislation or mechanisms without any improvements in the level of rights enjoyment would not pass the progressive realisation test.

The second argument is that states cannot pursue deliberate retrogressive measures, as progressive realisation also implies that deliberate retrogressive measures are not permissible and have to be fully justified by reference to the totality of rights. In this regard, the CESCR has stated that there is a strong presumption of impermissibility of any retrogressive measures taken in relation to rights such as education and water; retrogressive measures should in principle not be taken in relation to the right to work; and any retrogressive measures would have to be fully justified. In relation to justifying retrogressive measures, Liebenberg has stated that such measures may be justifiable where, for example, a state can show that the retrogressive measures are necessary to achieve equity in the realisation of the right or a more sustainable basis for adequate realisation of the rights. She, however, cautions that where retrogressive measures result in depriving marginalised and vulnerable groups of access to basic social services,

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9 Limburg Principles on the Implementation of the ICESCR UN doc E/CN4/1987/17, Annex, par 21; reproduced in 1987 Human Rights Q’ly 122-135. The Limburg principles have been a source of authoritative interpretation of rights at both the international and national levels.


12 General Comment No 13 par 45; CESCR General Comment No 15 The Right to Water UN doc E/C12/2002/11 (2003) par 19; General Comment No 18 par 21.
weighty justifications should be required.\textsuperscript{13} In relation to the right to social security, the CESCR has listed a number of issues it would consider when retrogressive social security measures are being justified: whether there was reasonable justification for the action; whether alternatives were comprehensively examined; whether there was genuine participation of affected groups in examining the proposed measures and alternatives; whether the measures will have a sustained impact on the realisation of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and whether there was an independent review of the measures at the national level.\textsuperscript{14}

The third argument is that progressive realisation requires that special measures for vulnerable and disadvantaged groups need to be put in place. States are required to do more than abstain from taking measures that might have a negative impact on the enjoyment of their rights. The obligation on the state is to take positive action to reduce structural inequality and to give appropriate preferential treatment to vulnerable and marginalised groups. Positive action includes specially tailored measures or additional resource allocation for these groups.\textsuperscript{15}

As observed earlier, the African Charter is silent on the progressive realisation terminology.\textsuperscript{16} However, in its elaboration on the nature of the obligations of states parties to the African Charter, the African Commission has stated:

While the African Charter does not expressly refer to the principle of progressive realisation this concept is widely accepted in the interpretation of economic, social and cultural rights and has been implied into the Charter in

\textsuperscript{13} Liebenberg, Socio-Economic Rights Adjudication under a Transformative Constitution (2010) 190. Liebenberg also considers an interpretative difficulty that arises when dealing with the concepts of progressive realisation and retrogressive measures (189).

\textsuperscript{14} General Comment No 19 par 42.

\textsuperscript{15} CESCR General Comment No 5 Persons with Disabilities UN doc E/1995/22 (1994) par 9.

\textsuperscript{16} Contrast this with the African Charter on the Rights and Welfare of the Child, 1990, which uses the progressive realisation qualification (see art 11(3)(b) on children’s right to education – the obligation of states to “progressively” make secondary education free and compulsory, art 13(5) on special measures of protection for handicapped children – obligation of states to “progressively” achieve “the full convenience of the mentally and physically disabled person to movement and access to public highway buildings and other places to which the disabled may legitimately want to have access to”). A consideration of the jurisprudence of the African Committee of Experts on the Rights and Welfare of the Child is beyond the scope of this paper but it is worth mentioning that its decision in the Nubian case highlights some elements of progressive realisation discourse in relation to education and health care (see generally Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v The Government of Kenya Communication No Com/002/2009 2011-03-22).
accordance with articles 61 and 62 of the African Charter. States parties are therefore under a continuing duty to move as expeditiously and effectively as possible towards the full realisation of economic, social and cultural rights.17

The Commission’s development of this concept in its jurisprudence is however limited. It is clear from its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights that the Commission’s has adopted the CESCR’s understanding of the concept.18

2.2 The Constitutional Court

The Constitutional Court has held that the understanding and meaning of the phrase “progressive realisation”, as contained in General Comment No 3, accords with the context in which the concept is used in the South African Constitution, and thus bears the same meaning.19 The Court observed in Grootboom that though the right could not be realised immediately, the state must take steps to achieve the goal of the Constitution, which is that “the basic needs of all in our society be effectively met”. The Court, however, as seen below, rejects the minimum core concept, which as I argue in this article, should be seen as part of the concept of progressive realisation. Notwithstanding this, the Court added that progressive realisation means that “accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time”. Also, the right must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.20 However, the Court in its subsequent jurisprudence has not engaged with the latter aspect.

In another case, the Court held that progressive realisation requires that the state “must accelerate reasonable and progressive schemes to ameliorate vast areas of deprivation”.21 Thus, as Liebenberg observes, even where people already have access to socio-economic rights, progressive realisation places a duty on the state to improve the nature and the quality of the services to which people have access.22 However, the Constitutional Court failed to engage with this aspect in Mazibuko, referred to subsequently in this article. In Modderklip, the Court held in relation to the right to adequate housing that “[t]he progressive

18 Idem par 13-15.
19 Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC) par 45 (right to adequate housing in the context of an eviction).
20 Ibid.
21 Minister of Health v New Clicks South Africa (Pty) Ltd 2006 8 BCLR 872 (CC) par 705 (regulatory measures in relation to medicines – pricing system for medicines and scheduled substances published by the Minister of Health).
22 Liebenberg 188.
realisation of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable processes are vital. Progressive realisation also requires that measures adopted must be flexible so as to adapt to changing situations. It thus, as observed by Bilchitz, involves an improvement in the adequacy of housing for the meeting of human interests ... it means that each is entitled as a matter of priority to basic housing provision, which the government is required to improve gradually over time.

The Constitutional Court adopted a restrictive approach to the concept in Mazibuko, stating that the concept “recognises that policies formulated by the state will need to be reviewed and revised to ensure that the realisation of social and economic rights is progressively achieved”. The Court was therefore of the view that the revision of policies over the years is consistent with the obligation to ensure progressive realisation of rights, regardless of what the revision entailed and whether it met the basic needs of people or without any consideration of the content of the right or the need of people. The Court was also of the view that progressive realisation requires increasing access to a right on a progressive basis, especially for the poor and disadvantaged groups. However, the Court’s analysis is lacking in relation to a thorough assessment of the extent to which the provision of the right in question has increased. The Court noted in this case that the municipality had continued to review its policy regularly and undertaken sophisticated research to seek to ensure that it meets the needs of the poor within the city of Johannesburg. The Court found the continual revision of the policy in question in the ensuing years to have improved the policy in a manner entirely consistent with an obligation of progressive realisation. It stated that “[a] policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution”. While regular review in this case improved the policy, the question left unanswered is whether it also improved the level of rights enjoyment. Hence, does regular review per se result in

23 President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 8 BCLR 786 (CC) par 49 (a private landowner’s efforts to execute an eviction order granted by the High Court against a community occupying its land).
24 Ibid.
26 Mazibuko v City of Johannesburg 2010 3 BCLR 239 (CC) par 40, 67 (the right of access to water – constitutionality of prepaid water metres and sufficiency of free basic water).
27 Idem par 40, 67, 162, 163.
28 Idem par 97.
29 Idem par 163.
30 Idem par 162.
actual improvement in the enjoyment of rights? While the Court acknowledges that progressive realisation also requires that access be continuously broadened, it does not actually engage with this. The Court thus took a restrictive approach by limiting its analysis to one aspect of progressive realisation – that of regular review of policies. Thus, all that the state had to show was that it regularly reviews its policies. However, regular review in itself is not sufficient as improvement in the enjoyment of rights is also required. The Court’s approach in this case is restrictive and problematic because of the reality of poor households being left for days or weeks at a time each month without access to water, and notwithstanding a right of access to sufficient water in the Constitution.

3 Elaborating on How Progressive Realisation Relates to Resources, Minimum Core and Reasonableness

3.1 Progressive Realisation and Resources

The pace at which socio-economic rights are progressively realised depends on the resource availability to a state. This is because states have to take full advantage of their available resources to ensure that these rights are fully realised without discrimination of any kind. However, a state cannot escape the obligation to adopt a plan of action on the ground that the necessary resources are not available. Resources in this context imply the resources both within a state (internal resources) and those available through international assistance and co-operation (external resources). Furthermore, resources are also not limited to financial or human resources; information and technology, for example, are also resources essential in fulfilling most of the rights in the ICESCR. In addition, progressive realisation and resource availability implies that some states’ obligations under the ICESCR may vary from one state to another. Also, in relation to the same state, some obligations may vary over time.

3.1.1 Internal Resources, Budget Consideration and Review

3.1.1.1 The CESCR

Though progressive realisation depends on resources, the obligation exists independently of the increase in resources, as it requires effective
use of resources available.\textsuperscript{35} It can be effected not only by increase in resources but also the development of societal resources necessary for the realisation of rights.\textsuperscript{36} Attention must be paid to equitable and effective use of and access to the available resources in determining whether adequate measures have been taken for the realisation of socio-economic rights.\textsuperscript{37} When using available resources, states have to ensure the satisfaction of subsistence requirements and the provision of essential services.\textsuperscript{38} Where available resources are demonstrably inadequate, the obligation remains for a state to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances;\textsuperscript{39} and vulnerable members of society must be protected by the adoption of relatively low cost programmes.\textsuperscript{40} The progressive realisation obligation is therefore not completely eliminated due to resource constraints,\textsuperscript{41} because resource constraints alone cannot justify inaction.\textsuperscript{42} For example, in its concluding observations on the Democratic Republic of the Congo (DRC), while recognising the difficulties faced by the state, the CESCR stated that “budgetary constraints should not be invoked as the only justification for the lack of progress towards the establishment of a social security system”.\textsuperscript{43}

Furthermore, the essential needs of members of vulnerable and disadvantaged groups must be prioritised in all resource allocation processes.\textsuperscript{44} In this regard, in relation to the right to social security, the CESCR has stated that even where there is limited capacity to finance social security, it is important for social security schemes to cover disadvantaged and marginalised groups. Low-cost and alternative schemes could be developed to cover immediately those without access. Policies and legislative frameworks could be adopted for the progressive inclusion of those in informal economy or who are otherwise excluded from social security.\textsuperscript{45} The Committee has also requested the states to allocate sufficient budgetary resources to ensure the implementation of a comprehensive housing plan and policies especially for low-income groups and marginalised individuals and groups.\textsuperscript{46} It has also requested

\begin{itemize}
\item[35] Limburg Principles par 23.
\item[36] Idem par 24.
\item[37] Idem par 27.
\item[38] Idem par 28.
\item[39] General Comment No 3 par 11.
\item[40] Idem par 12.
\item[41] Idem par 11.
\item[42] UN doc E/C12/2007/1 par 4.
\item[43] UN doc E/C12/COD/CO/4 par 24.
\item[44] See General Comment No 3 par 10; General Comment No 15 par 37-38; Limburg Principles par 25-28; Maastricht Guidelines par 9-10. See also CESCR General Comment No 14 \textit{The Right to the Highest Attainable Standard of Health} UN doc E/C12/2000/4 (2000) par 43-47.
\item[45] General Comment No 19 par 51.
\end{itemize}
a state to ensure that the maximum available resources are allocated to the protection and fulfilment of socio-economic rights, especially to the most vulnerable and marginalised individuals and groups.\footnote{CESCR Concluding Observations on the Combined Initial and Second to Fourth Periodic Reports of Cambodia UN doc E/C12/KHM/CO/1 (2009) par 38.}

As mentioned above, the prohibition of retrogressive steps is a component of the progressive realisation concept. The prohibition is an immediate obligation not subject to the availability of resources; and any retrogression, as stated above, has to be fully justified not only with reference to the totality of rights but also with reference to the full use of available resources. The CESCR has stated that if a state uses resource constraints as an explanation for retrogressive steps, such information would be assessed taking into consideration a number of criteria including:

(a) the country’s level of development;
(b) the severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant;
(c) the country’s current economic situation, in particular whether the country was undergoing a period of economic recession;
(d) the existence of other serious claims on the State party’s limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict.
(e) whether the State party had sought to identify low-cost options; and
(f) whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purpose of implementing the provisions of the Covenant without sufficient reason.\footnote{CESCR UN doc E/C12/2007/1 par 10.}

3 1 1 2 The Constitutional Court

Unlike the ICESCR which uses the phrase “to the maximum of its available resources”, the South African Constitution uses “within available resources”, which implies that the obligation placed on the state does not require more than its available resources. McLean has observed in this regard that the phrase as used in the South African Constitution could refer to the resources that the state has made available or all resources that are potentially available to meet the state’s obligations. She adds that the latter would require an assessment by the courts as to whether the state has made suitable budgetary allocation to realise the right in question.\footnote{McLean Constitutional Deference, Courts and Socio-Economic Rights in South Africa (2009) 195.} Mbazira has however pointed out, and quite correctly so, that the differences in the phrase as used in the ICESCR and in the South African Constitution is at best nomenclature.\footnote{Mbazira Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice (2009) 91.}
In *Sooobramoney*, the Constitutional Court held that the obligations imposed on the state to progressively realise the right to have 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. Subsequently, in *Grootboom*, the Court stated that the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. In *TAC*, the Court held that the obligation does not require the state to do more than is achievable within its available resources or to realise the rights immediately.

*Khosa* however illustrates that in the absence of clear evidence to show the additional cost of providing a right to an excluded group (in this case permanent residents), a state cannot rely on resource constraints as an excuse for not realising the right of that group. The Court was also of the view that the importance of realising the rights of permanent residents outweighed the financial considerations that the state relied on; this is because a denial impacts on their life and dignity. In *Olivia Road*, the Constitutional Court stated that the state cannot go beyond the extent to which available resources allow, in the realisation of rights. It however added that the concerned municipality had the duty to take reasonable measures within its available resources to make the right of access to adequate housing more accessible as time progresses.

There are apparently synergies between the Constitutional Court’s approach and that of the CESCR. The Constitutional Court has however not paid attention to external resources in its analysis. This could arguably be because the resource implications raised by the current cases “could be accommodated within existing budgetary allocations”.

### 3.1.2 Aid / Foreign Assistance

The CESCR has observed that the obligation to use the maximum of available resources entitles a state to seek and receive resources offered...
by the international community.\textsuperscript{61} It should be noted that all states are entitled to get aid, whether or not they are state parties to the ICESCR, especially as international human rights treaties and standards generally recognise the need for states to seek aid in times of difficulties in realising rights. Failure to do so would amount to a violation of this obligation. Where international cooperation aid is provided to a state, a sustainable institutional framework on the use of such aid must be adopted. If a state fails to use aid or foreign assistance, the state would be in breach of its obligation to take steps to the maximum of its resources towards the progressive realisation of socio-economic rights. Also, development aid must be allocated to priority sectors and a state must ensure that it uses such aid for the progressive realisation of rights.\textsuperscript{62}

3.2 Progressive Realisation and Minimum Core

3.2.1 The CESCR and African Commission

A minimum core approach to rights involves identifying such subsistence levels in respect of each socio-economic right and insisting that the provision of core goods and services enjoys immediate priority.\textsuperscript{63} It thus represents a “floor” of immediately enforceable entitlements from which progressive realisation should proceed. As recognised by the CESCR, states have a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of socio-economic rights.\textsuperscript{64} Minimum core obligations are meant to apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.\textsuperscript{65} However, resource constraints are taken into account in assessing whether a state is meeting its minimum core obligations.\textsuperscript{66} However, for a state to attribute failure to meet minimum core obligations to resources, it must show that every effort has been made to use all resources that are at its disposal in an effort to satisfy as a matter of priority the minimum obligations.\textsuperscript{67}

The African Commission has recognised minimum core obligations, adopting the understanding of the CESCR in this regard.\textsuperscript{68} The Commission has referred to minimum core obligations in its

\begin{itemize}
\item \textsuperscript{61} CESCR An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant UN doc E/C12/2007/1 (2007) par 5.
\item \textsuperscript{62} CESCR Concluding Observations on the Combined Second to Fourth Periodic Reports of the Democratic Republic of the Congo UN doc E/C12/COD/CO/4 2009-12-16 parr 16, 29.
\item \textsuperscript{63} Pieterse “Resuscitating Socio-Economic Rights: Constitutional Entitlements to health care Services” 2006 S Afr J HR 473 481; see generally Brand & Russell (eds) Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives (2002).
\item \textsuperscript{64} General Comment No 3 par 10.
\item \textsuperscript{65} Maastricht Guidelines par 9.
\item \textsuperscript{66} General Comment No 3 par 10.
\item \textsuperscript{67} Ibid.
\item \textsuperscript{68} Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights par 17.
\end{itemize}
jurisprudence, particularly in relation to minimum duties of a state as opposed to minimum essential levels of a right. In SERAC, the notion of minimum duties is used in relation to the obligations of states to “respect” and “protect” rights. The Commission, in the case, held as follows:

[T]he minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples’ efforts to feed themselves.

The government’s treatment of the Ogonis has violated all three minimum duties of the right to food. The government has destroyed food sources through its security forces and State Oil Company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves.

It can thus be argued that meeting minimum essential levels of a right is an initial step towards progressive realisation. It is therefore part and parcel of the concept of progressive realisation.

3.2.2 The Constitutional Court

Unlike the CESCR, the Constitutional Court of South Africa has failed to recognise minimum core obligations based on the diversity of people’s varying needs and contexts as well as institutional and democratic concerns (the Court saw itself as not equipped to determine what the minimum core standards should be). However, while in the Court’s view it might not be possible to give everyone access to a core service immediately, the state must ensure that, as explained by the CESCR in General Comment No 3, at the very least, a significant number of individuals have access.

Notwithstanding its failure to consider a minimum core approach to socio-economic rights, the Constitutional Court has acknowledged that “there may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable”. Also that “evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable”. The Court has however failed to revisit the issue – the door seems to be closed at least for the foreseeable future. In spite of this, through the reasonableness

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69 Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria Communication 155/96 (2001) AHRLR 60 (alleged violations of the rights to health, to dispose of wealth and natural resources, to a clean environment and family rights).
70 Idem par 65
71 Idem par 66
72 Grootboom par 32-33; TAC par 34, 35, 38, 39; Mazibuko par 60, 61.
73 Grootboom par 33.
74 TAC par 34.
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It is argued that the Court thus sets minimum standards to be met in the progressive realisation of socio-economic rights.

It must be emphasised that minimum core obligations should be understood within the broader framework of progressive realisation, as it does not imply that governments should fulfil the bare minimum and then do nothing. The South African Court in Mazibuko, though not endorsing the minimum core obligations approach, did state that it will be reasonable for municipalities and provinces to strive first to achieve the prescribed minimum standard then proceed to provide beyond this standard for those to whom the minimum is already being supplied. Bilchitz has provided insight into the relationship between minimum core and progressive realisation, observing that states have an obligation to immediately realise a minimum level of provision of a right and then to improve the level of provision beyond the minimum on a progressive basis. He explains that progressive realisation recognises that what government is required to do is to provide core services to everyone without delay that will meet their survival needs and then qualitatively to increase these services so as ultimately to meet the maximal interests that the state is required to protect.

This approach accords with the CESCR’s approach in General Comment No 3 of viewing progressive realisation as including the provision of minimum essential levels of a right, which a state is then required to improve on with time. It also accord’s with the Constitutional Court’s view of avoiding viewing minimum core as a self-standing right but one that is relevant to reasonableness as stated above.

3 3 Progressive Realisation and Reasonableness

3 3 1 The CESCR and African Commission

The ICESCR does not refer to reasonableness but art 8(4) of the Optional Protocol to the ICESCR endorses this standard of review. The Optional Protocol is a mechanism through which socio-economic rights can be adjudicated before the CESCR. The wording of article 8(4) of the Optional Protocol to the ICESCR is derived from Grootboom. The Optional Protocol, as mentioned above, only recently entered into force, hence the lack of jurisprudence from the CESCR on a reasonableness

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75 Mazibuko par 76.
77 Idem 12.
approach in relation to the progressive realisation. However, the Committee has stated that in assessing state’s compliance with the obligations under the ICESCR, it will assess the reasonableness of steps taken, taking into account a number of factors including: the extent to which the measures are “deliberate, concrete and targeted”; whether the state “exercised its discretion in a non-discriminatory and non arbitrary manner”; whether decisions not to allocate resources accords with international human rights standards; whether the state, faced with several policy options, adopted a less restrictive option; “the time frame in which the steps were taken”; and whether the “precarious situation of disadvantaged and marginalised individuals or groups” was taken into account, in a non-discriminatory fashion but prioritised “grave situations or situations of risk”.

The reasonableness standard in the Optional Protocol acknowledges the institutional roles and limitations in giving effect to the right to effective remedies for socio-economic rights violations. The Committee’s conception of the standard also places emphasis on transparent and participative decision-making processes at the national level. In its general comments and concluding observations, the CESCR has also emphasised the importance of participation of right holders in decision-making processes and genuine consultation in the development and implementation of policies in relation to socio-economic rights.

Like the ICESCR, the African Charter is silent on the “reasonableness” terminology. The African Commission, has however referred in its jurisprudence to the obligation of states to “take reasonable and other measures” and to take “concrete and targeted steps” to ensure realisation of socio-economic rights, but does not elaborate on whether this should be understood within the context of reasonableness as developed by the South African Constitutional Court. The Commission

80 UN doc E/C12/2007/1 par 8.
81 Idem par 11.
82 See CESCR General Comment No 4 The Right to Adequate Housing UN doc E/1992/23 (1991) par 8, 12; General Comment No 5 par 14; CESCR General Comment No 7 The Right to Adequate Housing : Forced Evictions UN doc E/1998/22 annex IV par 13, 15; General Comment No 14 par 54; General Comment No 15 par 48, 56; General Comment No 18 par 42; CESCR General Comment No 17 The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which He or She is the Author UN doc E/C12/GC/17 (2006) par 78.
83 See UN doc E/C12/FRA/CO/3 par 41; UN doc E/C12/NIC/CO/4 par 11, 21.
84 Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria Communication 155/96 (2001) AHRLR 60 par 52
85 Purohit and Moore v The Gambia Communication 241/2001 (2005) AHRLR 96 par 84. The Commission in this case “read into Article 16” on the right to the best attainable state of physical and mental health, the obligation of states to “take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind”. This provision thus has some elements of progressive realisation as well as reasonableness.
has also observed that the state bears the burden of proving that measures adopted are reasonable, and that the measures should be based on equality and objective and reasonable grounds.

### 3.3.2 The Constitutional Court

The Constitutional Court employs the reasonableness approach in assessing the government’s compliance with its socio-economic rights obligations in the Constitution, which has been the subject of considerable literature, and thus not restated here. However, if one looks at the Court’s interpretation of progressive realisation stated above, it is clear that the reasonableness approach is influenced by some aspects of “progressive realisation” and “the availability of resources”. Furthermore, the reasonableness approach has some elements of minimum core obligations. While emphasising the progressive realisation of socio-economic rights, the Constitutional Court also holds that people in desperate need should not be left without any form of assistance, intrinsically implying recognition of minimum core. The Court in fact states in *Khosa* that “[a] society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational”. Based on this, Bilchitz has concluded that in attempting to avoid recognising a minimum core obligation, the Court has in fact incorporated an obligation to meet, at the very minimum, the short-term needs into the notion of reasonableness. The state is thus required to take immediate interim measures of relief for those in desperate need.

Requiring a state to take immediate measures or meet short-term pressing needs does not release the state of its obligation to provide for medium and long-term needs. Any measure aimed at the progressive realisation, as discussed above, must aim at meeting the short-, medium- and long-term needs, in order for it to pass the test of reasonableness. In providing temporary alternative housing, as evident in the Constitutional Court’s housing rights jurisprudence, the state cannot ignore its obligation to make provision for permanent housing. Interim alternative

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87 Idem par 227, 238, 234, 296.
89 Khosa par 52.
90 Bilchitz 149.
91 Kapindu, “From the Global to the Local: the Role of International Law in the enforcement of Socio-Economic Rights in South Africa” (2009) Socio-Economic Rights Research Series 6, Community Law Centre University of the Western Cape 46.
accommodation is provided pending the provision of suitable permanent housing by the government in consultation with those involved.\textsuperscript{92} The Constitutional Court’s jurisprudence illustrates that it has focussed largely on short-term needs, while leaving decisions on long-term needs in some instances in the hands of the state.

4 Assessing Compliance with Progressive Realisation: Some Methodological Considerations

There are numerous methodologies to assess compliance with the obligation to progressively realise socio-economic rights. The scope of this article does not allow for a consideration of all existing methodologies. The aim is to provide an overview of some of the methodologies (albeit briefly as they have been the subject of previous writings as seen below) while drawing from the jurisprudence of the CESCR where relevant, in order to highlight some of the issues that should be considered when assessing compliance with progressive realisation. The South African Constitutional Court’s approach that speaks to three of the methodologies is then briefly considered.

Assessing or monitoring compliance in respect of progressive realisation can be carried out by civil society, institutions of democracy or the state itself, depending on the purpose of the assessment. For instance, while courts play a key role in monitoring socio-economic rights through litigation brought before them, the Constitution mandates the South African Human Rights Commission (SAHRC) to monitor progressive realisation of socio-economic rights by the state.\textsuperscript{93} Sadly, the SAHRC has failed to adequately carry out this task resulting in questions on its capacity to monitor progressive realisation and calls for an appropriate monitoring model.\textsuperscript{94} The Court has also adopted a restrictive approach in undertaking this task. It must also be stressed that the scope and methods to assessing compliance with progressive realisation varies, based on who is conducting the monitoring and its purpose.

4.1 Overview of Selected Methodologies

Current methodologies include, but are not limited to, indicators and benchmarks, budget and expenditure analysis, violations approach, and “combined” approaches (or methodologies that combine various approaches). There are also various econometrics methodologies, but the

\textsuperscript{92} See generally Olivia Road \& Joe Slovo cases.
\textsuperscript{93} S 184(3) Constitution.
scope of this article does not allow for their consideration, and econometric tools are also quite complex.  

4.1.1 Indicators and Benchmarks

Indicators and benchmarks are seen as important ways to monitor progress, stagnation or retrogression in the realisation of a right over a certain period of time. An indicator is a fact that indicates the state or level of something, such as literacy rates. It is important in dissociating unwillingness and the lack of commitment from incapacity.

Benchmarks are targets relating to a given human right indicator, such as child mortality rates, to be achieved over a period of time (for example to halve the child mortality rate in 10 years). Benchmarks can provide an extremely valuable indication of progress and, accordingly, states are required to have indicators and benchmarks in frameworks and plans aimed at the realisation of rights. In practice though, states have failed to meet the obligation to set indicators and benchmarks as can be seen from various concluding observations of the CESCR.

Concerns have been raised regarding the use of indicators and benchmarks alone in monitoring the progressing realisation of socio-economic rights based, largely on, the lack of information (because information produced by the state is often inaccessible publicly) and non-disaggregation of data. Another concern relates to the question of how

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97 Felner 409.
98 Idem 410.
99 General Comment No 13 par 52; General Comment No 1 par 3 6, 7; General Comment No 12 par 29; General Comment No 14 par 57, 58; General Comment No 15 par 47, 53, 54; General Comment No 16 par 39; General Comment No 17 par 49, 50; General Comment No 18 par 46, 47; General Comment No 19 par 74-76.
101 UN doc E/2009/90 par 45.
to determine what would be realistic and reasonable pace of progress in the light of available resources. An understanding of how progressive realisation relates to resources (considered above) is relevant in this regard.

4.1.2 Budget and Expenditure Analysis

The OHCHR has identified different ways of conducting budget analysis. The first is referred to as static analysis, which evaluates a given budget by itself. This involves, from a socio-economic rights perspective, mapping out the allocation of resources for each right and comparing them with the percentage of other allocations, which provides an indication of the government’s priorities. Alternatively, one could map out the main beneficiaries of some budget allocations. In the area of education, an example of non-compliance is where a significant percentage of the budget is allocated to subsidise private schools that cater for children from middle to high-income families compared with public schools serving low-income sectors of population, which would show that the priorities of government are not in line with its obligation to pay particular attention to the vulnerable and marginalised. The second budget analysis approach is referred to as dynamic analysis, which compares the evolution of budgets over time, looking at variations in allocations and spending over different periods. An example of non-compliance is underspending in an area where targets have not been met or where indicators show significant gaps in the full realisation of socio-economic rights. This would imply that the government is not meeting its obligation to take steps to the maximum of available resources. Consistent underspending over a number of years in a particular sector would also show that planning is inadequate or funds are not released promptly.

The CESCR has considered how states have allocated resources. In doing so, the Committee analyses macro-budget information relating to the national budget allocated to a specific sector, paying particular attention to the adequacy/sufficiency of the budget, government’s priorities in terms of resource allocation, lack of clear strategic lines in the budget in relation to the vulnerable and marginalised, regressive patterns of social spending and mismanagement of international cooperation aid. For instance, the Committee raised concern over the decrease in the budget allocated to education in a particular state, despite the rapidly rising number of children in the school age. This implies that budget allocation must take into consideration the changes in the size of beneficiaries of a particular right. The Committee then used

102 Felner 411.
104 Idem par 49.
105 Idem par 50.
106 Idem par 48.
107 Idem par 54.
108 UN doc E/C12/AGO/CO/3 par 39.
macroeconomic growth as a yardstick in assessing the state’s compliance, raising concern about insufficient jobs for men and women despite the country’s macroeconomic growth, and the state’s failure to take advantage of this growth to promote policies to create jobs especially for the marginalised and disadvantaged.\(^{109}\) The Committee has also raised concerned over high levels of defence expenditure in contrast with shrinking budgets for key socio-economic rights areas;\(^{110}\) and regressive patterns of social spending.\(^{111}\) Continuous decrease of resources allocated to social sectors such as health and social protection, while budgetary allocations to defence and public security are increased considerably and international development aid has been provided, would amount to a breach of the progressive realisation obligation.\(^{112}\)

Budget and expenditure analysis is a challenging exercise as socio-economic rights are not always broken down within the state’s budget lines, and funds allocated for other rights can be related to or have an impact on socio-economic rights. The OHCHR has cited the example of birth registration, which is a civil right but also relates to the enjoyment of socio-economic rights such as health, social security and education.\(^{113}\) In addition, Felner has warned that although budget allocation to a specific sector could, in many instances, be an indication of the level of commitment to promoting that sector, it should not be used as the single indicator in assessing compliance. This is because, other than the budget allocated to a specific social sector, there are several factors related to the availability of resources in a state that bear upon the progressive realisation of socio-economic rights. These include the impact of economic growth on the expenditure spent per person in a given social sector, the impact of extra-sectoral spending on the realisation of socio-economic rights, regressive patterns of social spending, and inefficiency in the use of resources.\(^{114}\) Another challenge with this approach relates to the role of civil society in assessing compliance with progressive realisation (most human rights activists do not have the technical skills, time and resources to undertake complex budget analysis).\(^{115}\)

\(^{109}\) Ibid.
\(^{112}\) UN doc E/C12/COD/CO/4 par 16.
\(^{113}\) UN doc E/2009/90 par 53.
\(^{114}\) Felner 412-414.
\(^{115}\) Felner 420.
4.1.3 Violations Approach

This approach was first proposed by Chapman116 and involves identifying violations that signify negative compliance with obligations. The CESCR avoids using the terminology “violation” in its concluding observations where a state has failed to meet its obligations; instead, it merely expresses its concern over a state not meeting its obligations or refers to a “breach” of obligations, sometimes qualified with the word “serious”. However, the CESCR might not be able to avoid the “violation” terminology, considering the opportunity to consider complaints alleging violations of the rights in the ICESCR under the Optional Protocol to the ICESCR.

With the violations approach, three types of violations have to be distinguished.117 The first is violations resulting from state action and policies (such as adoption of legislation or policies that are incompatible with pre-existing legal obligations relating to rights or adoption of deliberately retrogressive measures). The second is violations relating to acts or policies that reflect discrimination (such as failure to abolish discriminatory laws that impact on enjoyment of rights). The third is violations resulting from a state’s failure to fulfil minimum core obligations (such as failure to put in place policies to implement rights).

The violations approach has been criticised for being punitive rather than facilitative;118 for over-generalising the elements that would constitute violations and avoiding the complexities of the concept of progressive realisation;119 and for detractions attention from the broader state obligations to promote socio-economic rights.120 Notwithstanding the criticisms, the violations approach has been seen to be “even more salient” with the adoption of the Optional Protocol to the ICESCR; and if used with indicators, can “enhance treaty compliance” and the enforcement of obligations, “including progressive realisation obligations”.121

117 Chapman 43; Maastricht Guidelines part 14-15; General Comment No 19 par 64.
120 Klaaren 552.
4 1 4 Combined Approaches

The “combined” approaches briefly explained in this section are: the “three-step methodological framework” and the “basic framework” both proposed by Felner,\textsuperscript{122} the Index of Social and Economic Rights Fulfillment (SERF index) developed by Randolph, Fukuda-Parr and Remer,\textsuperscript{123} and the OPERA framework developed by the Center for Economic and Social Rights.\textsuperscript{124} The combined approach, as seen below, incorporates indicators and benchmarks, budget and expenditure analysis and violations.

4 1 4 1 The Three-Step Methodological Framework

The three-step methodological framework is broken down as follows: Step 1 is the identification of deprivations and disparities in the enjoyment of socio-economic rights, using outcome indicators. This step measures the essential levels of enjoyment of socio-economic rights, progressive realisation over time, available resources in relation to progressive realisation, and inequality in enjoyment of socio-economic rights in order to ascertain deprivations and disparities. Step 2 is to identify main determinants of deprivations and inequalities that help in assessing the extent to which the state is complying with its obligations. The determinants include provision, poverty and cultural barriers, and direct (participation, quality and capacity) and indirect factors (demand factors and performance of right-bearer) that affect outcomes. Step 3 is to assess the adequacy of policy efforts to address the determinants identified in step 2. This involves identifying policy failures in the provision and utilisation of essential goods and services, and monitoring resource allocation, using the basic framework (explained below).

4 1 4 2 The Basic Framework

The Basic Framework also comprises three steps. Step 1 requires a comparison of social indicators with gross domestic product (GDP) \textit{per capita}, thus enabling one to measure progress over time in accordance with a country’s development. For example, a social indicator such as primary school completion rates as a proxy for the enjoyment of the right

\textsuperscript{122} See generally Felner \textit{op cit}.


to education can be compared with GDP per capita as a proxy for available resources. This implies that if a country simultaneously experiences a reversal in a social indicator and a significant economic growth, this would indicate non-compliance with its obligation to progressively realise the specific right. This step is however not helpful in all instances as countries normally make some progress over time. Step 2 requires an analysis, using quantitative tools, of resource allocations (the magnitude, composition and distribution) in order to ascertain whether a state is devoting the maximum of its available resources to the progressive realisation of rights. For instance, in relation to the right to education, if the primary education expenditure ratio of a state (which is the relevant indicator), when compared to other countries (in the same region with similar needs and overall income), is lower, then that state is not complying with its obligation to devote the maximum of its available resources towards the progressive realisation of the right to education. Step 3 is an analysis of expenditure per capita on specific social sectors. Such analysis could assist in the identification of common policy problems that hinder progressive realisation of rights, establishment of types of policy strategies a state should adopt and disclosure of “deeply embedded inefficiencies” in the use of resources. For example, if a state has a low level of financial commitment to a social sector that also has a low level of expenditure per person in that sector, this would imply a violation of its obligation to devote its maximum available resources to the progressive realisation of the relevant right. One can deduce, with regard to step 3 that an effective and accurate analysis of expenditure per capita would require data that is properly disaggregated. For instance, if the poor are not further classified into rural and urban, when using expenditure per capita in relation to the poor in general, it would be difficult to establish if the expenditure is balanced or equitably distributed between the rural and urban poor.

4.1.4.3 The SERF Index

The SERF index is relevant in measuring a state’s compliance with its obligations of results in relation to the fulfilment of the substantive socio-economic rights in the ICESCR. It thus focuses on outcomes in the enjoyment of rights. The index makes use of indicators and benchmarks and uses "objective, survey-based data published by national and international bodies to measure the performance of countries and sub-national units". The index has two steps: the first involves using indicators to measure the extent to which the different socio-economic rights are enjoyed; and the second involves measuring the extent to which the state is required to fulfil these rights. The SERF index is useful in measuring progression and retrogression in rights fulfilment as well as disparities between regions or groups. However, it is quite technical. It also does not measure aspects such as the extent to which a

125 Randolph et al op cit.
126 Ibid.
127 Ibid.
state has guaranteed procedural rights such as participation, non-discrimination and accountability, which could be seen as a limitation in terms of the index’s comprehensiveness.

4 1 4 4 The OPERA Framework

The OPERA model is a four-step framework that can be used to analyse various aspects of the obligation to fulfil socio-economic rights. The rationale behind its development was due to the fact that existing frameworks have developed in isolation and in a fragmented way.128 As the name suggests, the frameworks looks at “Outcomes, Policy Efforts and Resources to make an overall Assessment.”129 Unlike the SERF index which focuses on obligations of results, the OPERA framework looks at both obligations of conduct and of results.130 Step 1 (“Outcomes”) requires using indicators to collect data in order to measure levels of rights enjoyment.131 Step 2 (“policy efforts”) involves identifying legal and policy commitments, examining their content and implementation, and analysing the policy processes.132 Step 3 (“resources”) involves analysing planned and actual resource expenditure, resource generation and relevant policies.133 Step 4 (“Assessment”) requires identification of contextual factors that limit rights enjoyment, understanding the constraints that the government faces and determining compliance.134 The Framework proposes a human rights-based analysis. Accordingly, it identifies in relation to each step, relevant human rights standards and principles, including various procedural rights that should be taken into account in monitoring the fulfilment of socio-economic rights as well as the tools and techniques to be used. A positive aspect of the OPERA framework is that it can be adapted to various contexts.

4 2 Methodologies that the Constitutional Court has Used

The Constitutional Court has used some of these methodologies explained in the preceding section, particularly indicators and benchmarks, budget and expenditure analysis and violations approach, in its enforcement of socio-economic rights. With regard to indicators and benchmarks, the Constitutional Court has called on the national government (as in Mazibuko), to clearly set targets it wishes to achieve in respect of socio-economic rights so that citizens are able “to monitor government’s performance and to hold it accountable politically if the standard is not achieved” or is unreasonable.135 The Court has used the

129 Centre for Economic and Social Rights 1.
130 Idem 10.
131 Idem 11.
133 Idem 17.
134 Idem 20.
135 Mazibuko parr 61, 70.
reasonableness standard in other cases as a benchmark against which government’s performance is measured.  

On budget and expenditure analysis, while the CESCR has been, comparatively speaking, robust in its budget and expenditure analysis, the Constitutional Court has been cautious in undertaking budgetary analysis or scrutinising resource allocation (the same can be said for the African Commission). Though Grootboom did not concern resource constraints issues, the Court emphasised that financial and human resources must be made available for the implementation of measures aimed at the progressive realisation of socio-economic rights, to avoid the government’s action being seen as unreasonable. The Court added that the government is required to plan, budget and monitor the fulfilment of immediate needs and the management of crisis. In Soobramoney, the Court avoided dealing with budgetary issues but it is clear in the Court’s judgment that in the face of resource constraints, there must be clear criteria for regulating access to rights. In TAC and Khosa, the Court engaged with and rejected the state’s contention that it did not have the requisite resources. In Rail Commuters, the Court was of the view that an assertion of resource constraints would require careful consideration. In TAC, the evidence was that provision of anti-retrovirals (ARVs) would save money, which the Court accepted. Khosa, on the other hand, was different in terms of a concrete examination of budgetary increases.

In relation to the violations approach, the Constitutional Court has identified violations of socio-economic rights and granted relief in individual cases. With regard to the first category of violations identified above, Abahlali is an example, where the Constitutional Court ruled against legislation that was contrary to the Constitution and housing legislative framework, as it undermined protections against arbitrary evictions. For the second category, Bhe and Gumede are illustrative examples of such violations in the South Africa jurisprudence. As for the

136 Idem parr 78-102; See also Khosa parr 44, 48-49, 53-57; Grootboom parr 39-45.
137 Grootboom par 39.
138 Idem par 68.
139 Soobramoney par 31.
140 TAC par 118-120, 135; Khosa parr 58-67, 60, 62.
141 Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 4 BCLR 301 (CC) par 88 (positive duties imposed by the South African Transport Services Act 9 of 1989 to secure the safety of commuters).
142 The Court also considered budgetary allocations in the case of Premier, Province of Mpuamalanga, v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 2 BCLR 151 (CC), in which it set aside the provincial government’s policy decision to terminate the payment of subsidies to certain schools and ordered that payments should continue for several.
143 Bhe v Magistrate, Khayelisha 2005 1 BCLR 1 (CC) parr 91-93, 241 (challenge of the African customary law principle of male primogeniture).
144 Gumede v President of the Republic of South Africa 2009 3 BCLR 243 (CC) parr 34, 35-36 (a challenge of legislation that recognised a husband as the
third category, the Constitutional Court, as observed above, has been reluctant to endorse minimum core obligations but has gone ahead to find the state to be in violation of its obligations by not providing the basic necessities of life such as alternative accommodation in the event of an eviction and social assistance to permanent residents.

Despite considering the above methodologies, the Court has not developed a comprehensive standard on progressive realisation. This has resulted in attempts by other institutions to look at existing methodologies with the goal of developing a methodology that would be suitable to the South African context.

4.3 Fleshing out Methodologies in the South African Context

It is evident from the methodological considerations above that a single methodology cannot be used to adequately assess compliance with progressive realisation. Also, the type of methodology used would be influenced by who is carrying out the assessment and the purpose of the assessment. As noted earlier in this article, the Constitutional Court (and subsequently the government) has focussed on a restrictive approach to progressive realisation that focuses on “access”, paying little attention to “actual improvements in access”; hence, the need to properly understand progressive realisation and what to consider in assessing compliance with this obligation.

The SAHRC has used a violations approach in monitoring socio-economic rights, which Klaaren believes could be misconceived in the South African context. He then called for a new model that emphasises the role of information but fails to provide much to start with as regards the design, content and format of a new model. The SAHRC has been considering a model – progressive realisation and constitutional accountability model – for monitoring compliance with progressive realisation, which has three phases. The first phase involves using key quantitative data to identify deprivations and disparities of outcome in respect of the particular right with reference to access, fulfilment, enjoyment and progressive realisation. The second phase is a determination of the reasons for the status of the right and the deprivations identified in the first phase. The third phase is two-fold: an assessment of the adequacy of policy efforts and an undertaking of legal interventions in respect of violations identified. The model seems to draw from the existing approaches as indicators and benchmarks,
analysis of resource allocation and use, and identification of violations would be used. The legal intervention dimension is quite novel and its effectiveness could be enhanced if there is co-operation between the SAHRC and civil society organisations and human rights institutions in the implementation of this aspect of the third phase.

Recently, the Studies in Poverty and Inequality Institute (SPII) has proposed that progressive realisation, in the South African context, be measured along four dimensions – access, geography, adequacy and quality.148 Though the four dimensions, as indicated by SPII, draw form a report of the SAHRC, it is also a restatement of key elements of rights that the CESCR has considered in assessing state’s compliance with progressive realisation; some of which (such as access)149 have also been considered by the Constitutional Court. SPII notes that the vision of transformation would be achieved if the four dimensions are taken together in assessing state compliance.150 The proposed approach is still being developed, so does not provide much to enable one to undertake a proper analysis of its adequacy.

Notwithstanding this, if progressive realisation is to be effectively assessed in the South African context, one needs to go beyond accessibility, geography, adequacy and quality to look at other issues that have been highlighted in this article, including placing particular emphasis on assessing budgetary priorities in the light of human rights standards and international cooperation aid and its use, access to information and meaningful engagement in the provision of goods and services. Alternatively, an expansive understanding of these dimensions that allows for the inclusion of other aspects based on various contexts could be adopted.151

5 Conclusion

For decades now, there has been growing advocacy on the effective implementation and enforcement of socio-economic rights. These efforts are however undermined if there is ambiguity in relation to how the

149 See Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd 2008 11 BCLR 1123 (CC) par 85, where the Court held that the content of the right to food comprises “availability” and “accessibility”. Note that the case did not focus on the right to food per se as it was an appeal against a Supreme Court Appeal judgment concerning a proviso added to the definition of agricultural land in the Subdivision of Agriculture Land Act 70 of 1970.
concept of progressive realisation should be understood and applied in socio-economic rights cases. This article has unpacked the concept of progressive realisation by first looking at the understanding of the concept in general and elaborating on three aspects stemming from that understanding. It is evident that a progressive realisation approach to socio-economic rights enforcement would add value to the concepts of “desperate need” and “reasonableness” developed by the South African Constitutional Court. Progressive realisation, however, goes further than desperate need as it places emphasis on improvements in access once those in desperate need have been granted access. If one takes Mazibuko for instance, if the Court had adopted a progressive realisation approach that is not restrictive, it would have not only focussed on the review of the relevant policies and the improvement of the policies but would have looked at the actual level of improvements of rights enjoyment; otherwise, the policies remain excellent in “paper” and not practice.

This article has also engaged with methodological considerations in assessing compliance with progressive realisation, which are useful in ascertaining whether sufficient steps have been taken to progressively realise socio-economic rights. Assessing compliance with progressive realisation is, however, a complex and demanding task, that even the courts, due to their often limited research capacity, would require assistance (through the placing of the relevant information before it) in terms of undertaking the assessment. The fact that there are many socio-economic rights with different dimensions and the relevant obligations of states have various dimensions adds to the complexity of such an exercise. Notwithstanding this, reviewing achievements and detecting failures and gaps, among others, could result in re-orienting state action when needed. For this to be done effectively, a comprehensive framework needs to be developed. The Constitutional Court would also have to take the bold step of going beyond measuring progressive realisation through, for instance access and constant review of policies, to actually develop the concept of appropriateness and adequacy over time. The Court also has to be more robust in its budget and expenditure analysis.