

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

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OPSOMMING

Uiteensetting van “Toenemende Verwesenliking”, die Verband met Hulpbronne, Kernminimum en Redelikheid, en Sekere Metodologiese Oorwegings om Nakoming te Toets

“Toenemende verwesenliking” is een van die beperkings waaraan die implementering van sosio-ekonomiese regte in verskeie grondwette, sowel as internasionale standaarde, onderwerp is. Die beperking kan deur state gebruik word om implementering te vertraag indien hulle die betekenis van die beperking nie korrek verstaan nie of dit misken. Hierdie artikel poog om te verduidelik wat die beperking behels. Die artikel oorweeg of ’n benadering van toenemende verwesenliking tot die afdwinging van sosio-ekonomiese regte inhou dat die verwesenliking van die regte van armes, benadeeldes, verstotenes of die mees miskendes in die samelewing, uitgestel word en of dit waarde toevoeg tot die begrippe “dwingende nood” of “redelikheid” soos deur die Suid-Afrikaanse Konstitusionele Hof ontwikkel. Laastens oorweeg die artikel metodes wat benut word om voldoening aan die toenemende verwesenliking-vereiste te toets.

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

* This article is based on research carried out for the Studies in Poverty and Inequality Institute in 2010. The article is a shortened but revised version of the research paper that was produced. It has been revised to include, among others, information from the African Commission on Human and Peoples’ Rights and two other methodologies in measuring progressive realisation. I would like to thank Jackie Dugard for her valuable comments on an earlier draft of the current article.

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/11Ict2012> (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).²

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),³ 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).⁴ 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

2 Fukuda-Parr, Lawson-Remer & Randolph “Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfilment” (2008) *Department of Economics Working Paper Series 22* (University of Connecticut) 7.

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 concept⁵ 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.⁶ 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.⁷ The concept "should not be interpreted as depriving States parties' obligations of all meaningful content".⁸ 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

5 CESCR General Comment No 3 *The Nature of States Parties Obligations* UN doc E/1991/23 (1990) par 9.

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.⁹ 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.¹⁰ 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.¹¹ 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.¹² 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,

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.

10 CESCR General Comment No 11 *Plans of Action for Primary Education* UN doc E/C12/1999/4 (1999) par 10.

11 CESCR General Comment No 19 *The Right to Social Security* UN doc E/C12/GC/19 (2008) par 68.

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.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.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.¹⁵

As observed earlier, the African Charter is silent on the progressive realisation terminology.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

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).

14 General Comment No 19 par 42.

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

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(3) 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 CESC’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

17 African Commission on Human and Peoples’ Rights *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights* par 14. The Principles and Guidelines were formerly launched in 2011.

18 *Idem* parr 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".²³ Progressive realisation also requires that measures adopted must be flexible so as to adapt to changing situations.²⁴ 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.²⁵

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".²⁶ 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,²⁷ 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.²⁸ 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.²⁹ 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".³⁰ 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.*

25 Bilchitz *Poverty Reduction and Fundamental Rights: The justification and Enforcement of Socio-Economic Rights* (2007) 193.

26 *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC) parr 40, 67 (the right of access to water – constitutionality of prepaid water metres and sufficiency of free basic water).

27 *Idem* parr 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.³¹ Resources in this context imply the resources both within a state (internal resources) and those available through international assistance and co-operation (external resources).³² 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.³³ 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.³⁴

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

31 General Comment No 11 par 9.

32 General Comment No 3 par 13; Limburg Principles par 26.

33 See Robertson “Measuring State Compliance with the Obligation to Devote the Maximum Available Resources to the Realizing Economic, Social, and Cultural Rights” 1994 *Human Rights Q’ly* 693 695-697.

34 Felner “Closing the ‘Escape Hatch’: A Toolkit to Monitor the Progressive Realization of Economic, Social and Cultural Rights” 2009 *J Human Rights Practice* 402 406.

use of resources available.³⁵ It can be effected not only by increase in resources but also the development of societal resources necessary for the realisation of rights.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.³⁷ When using available resources, states have to ensure the satisfaction of subsistence requirements and the provision of essential services.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;³⁹ and vulnerable members of society must be protected by the adoption of relatively low cost programmes.⁴⁰ The progressive realisation obligation is therefore not completely eliminated due to resource constraints,⁴¹ because resource constraints alone cannot justify inaction.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”.⁴³

Furthermore, the essential needs of members of vulnerable and disadvantaged groups must be prioritised in all resource allocation processes.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.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.⁴⁶ It has also requested

35 Limburg Principles par 23.

36 *Idem* par 24.

37 *Idem* par 27.

38 *Idem* par 28.

39 General Comment No 3 par 11.

40 *Idem* par 12.

41 *Idem* par 11.

42 UN doc E/C12/2007/1 par 4.

43 UN doc E/C12/COD/CO/4 par 24.

44 See General Comment No 3 par 10; General Comment No 15 parr 37-38; Limburg Principles parr 25-28; Maastricht Guidelines parr 9-10. See also CESCR General Comment No 14 *The Right to the Highest Attainable Standard of Health* UN doc E/C12/2000/4 (2000) parr 43-47.

45 General Comment No 19 par 51.

46 CESCR *Concluding Observations on the Initial to Third Periodic Reports of Angola* UN doc E/C12/AGO/CO/3 20081201 par 30; CESCR *Concluding Observations on the Combined Initial and Second and Third Periodic Reports of Chad* UN doc E/C12/TC/CO/3 (2009) par 27.

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.⁴⁷

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.⁴⁸

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.⁴⁹ 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,⁵⁰

47 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.

48 CESCR UN doc E/C12/2007/1 par 10.

49 McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 195.

50 Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 91.

In *Soobramoney*,⁵¹ 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.⁵² 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.⁵³ 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.⁵⁴

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.⁵⁵ 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.⁵⁶ In *Olivia Road*,⁵⁷ the Constitutional Court stated that the state cannot go beyond the extent to which available resources allow, in the realisation of rights.⁵⁸ 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.⁵⁹

There are apparently synergies between the Constitutional Court's approach and that of the CESC. 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".⁶⁰

3 1 2 Aid / Foreign Assistance

The CESC has observed that the obligation to use the maximum of available resources entitles a state to seek and receive resources offered

51 *Soobramoney v Minister of Health (KwaZulu Natal)* 1998 1 SA 765 (CC) (a challenge to the resource rationing policy of a state hospital).

52 *Idem* par 11. See also par 43.

53 *Grootboom* par 46.

54 *Minister of Health v Treatment Action Campaign* 2002 5SA 721 (CC) par 32 (the right of access to health care services – access to antiretrovirals).

55 *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) par 62.

56 *Khosa*, par 82.

57 *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 (5) BCLR 475 (CC) (a challenge of several aspects of the City of Johannesburg's practice of evicting residents of so called "bad" buildings for health and safety reasons).

58 *Idem* par 18.

59 *Idem* par 44.

60 Liebenberg 194.

by the international community.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.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.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.⁶⁴ Minimum core obligations are meant to apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.⁶⁵ However, resource constraints are taken into account in assessing whether a state is meeting its minimum core obligations.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.⁶⁷

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

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/C12/2007/11 (2007) par 5.

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 par 16, 29.

63 Pieterse “Resuscitating Socio-Economic Rights: Constitutional Entitlements to health care Services” 2006 *SAJHR* 475 481; see generally Brand & Russell (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002).

64 General Comment No 3 par 10.

65 Maastricht Guidelines par 9.

66 General Comment No 3 par 10.

67 *Ibid.*

68 *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights* par 17.

jurisprudence, particularly in relation to minimum duties of a state as opposed to minimum essential levels of a right. In *SERAC*,⁶⁹ 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.⁷⁰

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.⁷¹

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 CESC, 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).⁷² 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 CESC 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”.⁷³ 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”.⁷⁴ 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

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* parr 32-33; *TAC* parr 34, 35, 38, 39; *Mazibuko* parr 60, 61.

73 *Grootboom* par 33.

74 *TAC* par 34

approach (discussed briefly below), 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.⁷⁵ 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.⁷⁶ 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.⁷⁷

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 accords 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.⁷⁸ The wording of article 8(4) of the Optional Protocol to the ICESCR is derived from *Grootboom*.⁷⁹ The Optional Protocol, as mentioned above, only recently entered into force, hence the lack of jurisprudence from the CESCR on a reasonableness

⁷⁵ *Mazibuko* par 76.

⁷⁶ Bilchitz "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence" 2003 *SAJHR* 1 11.

⁷⁷ *Idem* 12.

⁷⁸ For further reading on the Optional Protocol, see Chenwi "Correcting the Historical Asymmetry between Rights: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" 2009 *Afr Human Rights LJ* 23.

⁷⁹ Porter "The Reasonableness of Article 8(4): Adjudicating Claims from the Margin" 2009 *Nordic J Human Rights* 39 49.

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".⁸⁰

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.⁸¹ In its general comments⁸² and concluding observations,⁸³ 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"⁸⁴ and to take "concrete and targeted steps"⁸⁵ 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 (2003) 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,⁸⁶ and that the measures should be based on equality and objective and reasonable grounds.⁸⁷

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.⁸⁸ 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”.⁸⁹ 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.⁹⁰ The state is thus required to take immediate interim measures of relief for those in desperate need.⁹¹

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

86 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication 276/2003 (2010) par 172.

87 *Idem* par 227, 238, 234, 296.

88 See, for example, Liebenberg “Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate” in *Constitutional Conversations* (eds Woolman & Bishops) (2008) 303-329; Liebenberg “Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review” in *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (eds Squires, Langford & Thiele) (2005) 73-88.

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.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.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.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

92 See generally *Olivia Road & Joe Slovo* cases.

93 S 184(3) Constitution.

94 Klaaren "A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights" 2005 *Human Rights Q'ly* 539 550, 554.

scope of this article does not allow for their consideration, and econometric tools are also quite complex.⁹⁵

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.⁹⁶ An indicator is a fact that indicates the state or level of something, such as literacy rates.⁹⁷ 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).⁹⁸ Benchmarks can provide an extremely valuable indication of progress and, accordingly, states are required to provide indicators and benchmarks in framework legislation and plans aimed at the realisation of rights.⁹⁹ 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.¹⁰⁰

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.¹⁰¹ Another concern relates to the question of how

95 See, for example, Anderson "Using Quantitative Methods to Monitor Government Obligations in terms of the Rights to Health and Education" (2008). <http://www.cesr.org/downloads/Quantitative%20methods%20for%20monitoring%20ESCR.doc> (accessed 2012-06-12).

96 United Nations *Report of the High Commissioner for Human Rights on Implementation of Economic, Social and Cultural Rights* UN doc E/2009/90 (2009) par 39, 41.

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.

100 CESCR *Concluding Observations on the Second Periodic Report of Benin* UN doc E/C12/BEN/CO/2 (2008) par 10, 31; *Concluding Observations on the Third Periodic Report of Morocco* UN doc E/C12/MAR/CO/3 (2006) par 13, 34; *Concluding Observations on the Initial Report of Zambia* UN doc E/C12/1/Add 106 (2005) par 13 35, 48, 54; *Concluding Observations on the Initial Report of Kenya* UN doc E/C12/KEN/CO/1 (2008) par 22, 24; *Concluding Observations on the Fifth Periodic Report of Poland* UN doc E/C12/POL/CO/5 (2009) par 35; *Concluding Observations on the Second and Third Periodic Reports of Paraguay* UN doc E/C12/PRY/CO/3 (2008) par 23(i); *Concluding Observations on the Fifth Periodic Report of Finland* UN doc E/C12/FIN/CO/5 (2008) par 17, 26; CESCR UN doc E/C12/FRA/CO/3 par 11, 31; *Concluding Observations on the Second Periodic Report of Bolivia* UN doc E/C12/BOL/CO/2 (2008) par 27, 34; *Concluding Observations on the Second to Fifth Periodic Reports of India* UN doc E/C12/IND/CO/5 (2008) par 58.

101 UN doc E/2009/90 par 43.

to determine what would be realistic and reasonable pace of progress in the light of available resources.¹⁰² 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.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷

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.¹⁰⁸ 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.

103 UN doc E/2009/90 par 48.

104 *Idem* par 49.

105 *Idem* par 50.

106 *Idem* par 48.

107 *Idem* par 54.

108 UN doc E/C12/AGO/CO/3 parr 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 concern 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.*

110 CESCR *Concluding Observations on the Second Periodic Report of the Democratic People's Republic of Korea* UN doc E/C12/1/Add 95 (2003) par 9.

111 CESCR *Concluding Observations on the State of Implementation on the ICESCR in Kenya* UN doc E/C12/1993/6 (1993) par 17; CESCR *Concluding Observations on the Second Periodic Report of Algeria* UN doc E/C12/1/Add71 2001-11-30 par 18, 20, 34, 40.

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 detracting 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

116 Chapman “A ‘Violations Approach’ for monitoring the International Covenant on Economic, Social and Cultural Rights” 1996 *Human Rights Q’ly* 23.

117 Chapman 43; Maastricht Guidelines par 14-15; General Comment No 19 par 64.

118 Anderson & Foresti “Assessing Compliance: The Challenge for Economic and Social Rights” 2009 *J Human Rights Practice* 469 471; Anderson & Foresti “Achieving Economic and Social Rights: The Challenge of Assessing Compliance” (2008) *Overseas Development Institute Briefing Paper 2 2-3* <http://www.odi.org.uk/resources/download/1584.pdf> (accessed 2012-06-12).

119 Olowu *An Integrative Rights-Based Approach to Human Development in Africa* (2009) 202.

120 Klaaren 552.

121 Kalantry, Getgen & Koh “Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR” 2010 *Human Rights Q’ly* 253 254, 299, 310.

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,¹²² the Index of Social and Economic Rights Fulfillment (SERF index) developed by Randolph, Fukuda-Parr and Remer,¹²³ and the OPERA framework developed by the Center for Economic and Social Rights.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) *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

¹²² See generally Felner *op cit*.

¹²³ Randolph, Fukuda-Parr & Lawson-Remer “Making the Principle of Progressive Realization Operational – The SERF Index: An Index for Monitoring State Fulfillment of Economic and Social Rights Obligations” (2009) <http://www.u.arizona.edu/~gunby/Randolph.pdf> (accessed 2012-07-06); Fukuda-Parr, Lawson-Remer & Randolph “SERF Index Methodology: Version 2011.1, Technical Note” (2011) <http://www.serfindex.org/wp-content/uploads/2011/02/Data-Technical-Note.pdf> (accessed 2012-07-07); Randolph & Guyer “SERF Index Methodology: Version 2012.1, Technical Note” (2012) <http://www.serfindex.org/wp-content/uploads/2012/03/Technical-Note-on-SERF-Index-Historical-Trends.pdf> (accessed 2012-07-07).

¹²⁴ Center for Economic and Social Rights “The OPERA Framework: Assessing Compliance with the Obligation to Fulfil Economic, Social and Cultural Rights” (2012). http://cesr.org/downloads/Draft%20CESR%20Paper_%20the%20OPERA%20framework.pdf (accessed 2012-07-07).

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 an 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.¹²⁵ 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”.¹²⁶ 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.¹²⁷ 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 framework 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

128 Center for Economic and Social Rights “Seminar: New Horizons in Economic and Social Rights Monitoring” <http://cesr.org/article.php?id=1253> (accessed 2012-07-07).

129 Centre for Economic and Social Rights 1.

130 *Idem* 10.

131 *Idem* 11.

132 *Idem* 13.

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.¹³⁶

On budget and expenditure analysis, while the CESC 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.¹³⁷ The Court added that the government is required to plan, budget and monitor the fulfilment of immediate needs and the management of crisis.¹³⁸ 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.¹³⁹ In *TAC* and *Khosa*, the Court engaged with and rejected the state's contention that it did not have the requisite resources.¹⁴⁰ In *Rail Commuters*,¹⁴¹ the Court was of the view that an assertion of resource constraints would require careful consideration.¹⁴² 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*¹⁴³ and *Gumede*¹⁴⁴ 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 Mpumalanga, 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.¹⁴⁵ He then called for a new model that emphasises the role of information¹⁴⁶ 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.¹⁴⁷ 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,

family head, with ownership of and control over all family property in the family home).

145 Klaaren 550, 554.

146 *Idem* 554.

147 Jacobs "Demystifying the Progressive Realisation of Socio-Economic Rights in South Africa" (2009) 13-15. Paper Presented at the Public Seminar on Monitoring ESC Rights, Australian National University, 2009-10-19. <http://acthra.anu.edu.au/PESCR/Publications/index.html> (accessed 2012-06-04).

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 from a report of the SAHRC, it is also a restatement of key elements of rights that the CESCRC 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

148 Studies in Poverty and Inequality Institute *Measuring the Progressive Realisation of Socio-Economic Rights in South Africa* (2011) 22-25.

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.

150 Studies in Poverty and Inequality Institute (2011) 24-25.

151 A number of illustrative questions that can be considered are outlined in Chenwi "Monitoring the Progressive Realisation of Socio-Economic Rights: Lessons from the United Nations CESCRC and the South African Constitutional Court" Research Paper written for Studies in Poverty and Inequality Institute (2010) 60-61 <http://www.spii.org.za/agentfiles/434/file/Progressive%20realisation%20Research%20paper1.pdf> (accessed 2012-07-07).

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.