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Research Paper:

Economic, Social and Cultural Rights in the South African and Indian Constitution

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I. Introduction

> "The implementation of economic, social and cultural rights is a most pressing item on the international human rights agenda. Millions of people go without food, health, shelter, education, work, social security not because the resources are unavailable to provide for these basic human rights but many times because societies are badly governed, or democracy is lacking, or the rule of law is absent, or simply because there is a failure of understanding about how one could go about the practical implementation of economic, social and cultural rights." (Ramcharan 2005: 1)

When it comes to the implementation of human rights, attention is mostly given to first generation human rights, also called civil and political rights. These rights should protect citizens from arbitrary state action. The International Covenant on Civil and Political Rights (1976) is the relevant international accord that prompted the acceding parties to take the necessary steps for adopting the provisions into national law.

However, increasing attention is given to second generation human rights, also called economic, social and cultural rights. Such rights are "concerned with encouraging governments to pursue politics which create conditions of life enabling individuals, or in some cases groups, to develop equally to their full potential" (Boyle 1996: 46). Governments have to become active to implement the rights of their citizens. The International Covenant on Economic, Social and Cultural Rights (1976), is the relevant international accord. These rights become more and more important in the attempt to combat poverty and inequality and in the quest for ensuring adequate living standards, something a big part of the world population is lacking of. However, as one can generally observe, these rights are often neglected in the constitutions of the member states.

As I had done some general research on the Indian constitution, I realized that economic, social and cultural rights can actually attain a practical meaning. In India, the main agents for promoting such rights were judges and legal activists, who *constructed* the *de facto* enforceability of economic, social and cultural rights – and that despite

Article 37 of the Indian constitution, which declares economic, social and cultural rights are *de jure* not enforceable. India is an often cited case within this overall subject matter. This January, I was the first time exposed to the South African constitution. It is, to my knowledge, the only constitution which *de jure* gives second generation human rights explicitly the same status as first generation human rights and thus does not discriminate them, when it comes to their enforceability. *De facto*, however, the enforcement of these rights is a little more modest, because Article 36 of the Bill of Rights Section significantly limits the scope of application. The South African constitution is particularly interesting, because it was drafted in consideration of the dark lessons from the apartheid, while India's constitution is an interesting example for a post-colonial constitution.

In this paper, I want to compare the Indian and South African constitutions in terms of their second generation human rights. I will at first strictly adhere to the constitutional text *(de jure)* and examine what kind of rights the constitution grants. Then, I will look at more practical examples *(de facto).* How do the Constitutional Court (South Africa) and the Supreme Court (India) respond to cases where the breach of second generation rights is given utterance? Do the courts strictly adhere to constitutional provisions? How practical are economic, social and cultural rights? Can the citizens benefit from their rights? Or are these rights hollow? Each section will be complemented by an appraisal, where I compare the situation in both countries. In the final conclusion, I will make some general remarks about the lessons we have learnt from my paper.

At this point, I want to give a short account on the nature of legal research. Every researcher, who has done work on a comparable topic in legal studies, will encounter the following phenomenon. During the first phase of research, namely screening the

secondary literature, one will always come across the same quotes from the same cases. Landmark judgments, often containing sensational statements of judges, are cited by researchers to bring forward their own argument. This is, of course, a valid strategy of developing a paper. However, we should be aware that a few landmark judgments can never stand for an overall body of legal cases. Often, these landmark judgments are from the highest judicial body. Many other cases, that never enter the highest court in charge for human rights matters – be it for administrative, standing, material or other reasons – remain concealed. Thus, I will never claim representativeness for the argument of my paper. I am well aware that many people, who broach the breach of economic, social and cultural rights, are often not heard from the courts in accordance with their constitutional procedural rights. In many cases, they are not even aware of their rights. Here, I only want to show some examples of cases that have entered the highest sphere of legal jurisprudence, in order to better understand the 'real constitutional meaning' of second generation rights in the two national constitutions. And I want to show how 'second generation human rights law can work'. It is but understood that national jurisprudences are the best point to do this study, because most human rights abuses – regardless of the fact that their root lies in international law – are addressed in national courts.

I hope to attract some interest for the salient features of the South African and Indian constitutions and jurisprudence, and maybe set a stimulus for further comparative research of human rights law. We could learn interesting lessons from the similarities and differences within national constitutions, which might be relevant for the overall body of human rights research, and which might be an incentive for international legal experts to work on a more comprehensive body of 'social human rights legislation'.

II. Economic, Social and Cultural Rights in South Africa and India

We should now have a look at the South African and Indian constitutions in order to determine the role of economic, social and cultural rights in the respective setting. At first, I will strictly adhere to the constitutional texts for knowing the *de jure* role. In other words, I will use a strictly textual interpretation of the respective provisions in the constitutions. In the next step, I will then discuss the *de facto* significance of these rights, using legal opinions, most importantly consisting of court verdicts.

A.) Economic, Social and Cultural Rights in the Constitutions *(de jure)*

1.) South Africa

The South African constitution, which came into force on February 4th, 1997, is a result of a year-long bargaining and negotiation process. It is the fourth constitution that came into effect after the independence of South Africa, but only the first post-apartheid constitution. Thus, the document has a significant meaning for the enfranchised state, when it comes to the issue of having a guideline for the necessary social transformation of the country.

The South African Constitution is unique in many regards, especially in terms of the public participation during the drafting process. Already during the first stage, namely the creation of an interim constitution, public input in the form of 1.7 million petitions had been received (Sarkin 1999: 68). Part of this interim constitution was an interim Bill of Rights, which was subject to a vivid debate, because

> "[m]uch of the South African Bill of Rights debate was concerned to address the issue of whether second and third generation rights should be made justiciable. The

> interim Bill of Rights to a large extent eschewed reference to socio-economic rights, on the basis that these were not considered essential to the process of political transition." (Cockrell 1997: 526)

Following the interim Bill of Rights, the drafting of the final constitution began. Again, the public participated in this process, albeit indirectly in the form of an elected Constitutional Assembly. The reason for this is that "the negotiating parties had not felt it proper to make the final document without public endorsement through the electoral system" (Anonymous 1997: 246). Along with the final negotiations, the newly created Constitutional Court had to give a legal opinion on whether the draft of the new constitution complies with the schedule of the interim constitution. This entire process made the final Bill of Rights even stronger in its result, as compared to the interim Bill of Rights. Not only did the new Constitutional Court enhance the requirements for amendments to the Bill of Rights, but also did this process extend the scope of rights covered. A set of socio-economic rights was finally included into the catalogue of fundamental rights covered under the Bill of Rights (Cockrell 1997; Sarkin 1999).

Before identifying the particular economic, social and cultural rights, we should have a look at the Preamble of the South African constitution. A Preamble of a constitution is normally never directly enforceable in a court, but helps to interpret the entire constitution, because it contains in short the main ethic and main goals of a state. The Preamble of the South African constitution declares, inter alia, that

> *"We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –*
>
> *Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; […]*
>
> *Improve the quality of life of all citizens and free the potential of each person".*

From this, it can be inferred that the government should take *positive* steps towards improving the condition of all people, especially for those who had been victims of the system of apartheid. Attaining democratic values, social justice and fundamental human rights are the prime goal of the 'new South African state'. In Section 1(a), the constitution becomes a little more detailed and defines one of the state's values as

> *"Human Dignity, the achievement of equality and the advancement of human rights and freedoms".*

Equality in a constitutional context can best be attained through economic, social and cultural rights. Such rights are an integral part of Chapter 2 of the South African constitution (Sections 7-39), which comprises the Bill of Rights. The Bill of Rights, which is defined as *"a cornerstone of democracy in South Africa"* (Section 7(1)), contains a mix of first, second and third generation human rights. Normally, human rights are part of the relationship between the state and its citizens, whereby the citizens should be protected from arbitrary state action (negative human right), or can claim the state to act on their behalf (positive human right). Third party effects of constitutional rights are uncommon. However, the South African Constitution goes beyond this principle and clearly denotes in Section 8 (2) that *"[a] provision of the Bill of Rights binds a natural or a juristic person"*. Thus, the Bill of Rights does not only bind the state, but also requires private actors to abide to *all* provisions. This extends the reach of fundamental rights in South Africa significantly. Sarkin (1999: 80) summarizes succinctly:

> "Significantly, the final Bill of Rights not only binds the state (vertical application) but, to the extent that the nature of the rights permits, it also binds private and juristic persons (horizontal application). The extent to which it will operate horizontally remains for the Constitutional Court to determine as cases arise. […]A wider interpretation will permit the clause to have important constitutional implications for preventing discrimination in the private sphere."

Most of the rights in this chapter are classified as civil and political rights (see also Cockrell 1997: 525-526). Now, let us identify the specific economic, social and cultural rights that are laid down in the constitution. Liebenberg, Pillay et al. (2000: 23) identify seven of such rights:

1.) The right to a clean environment (Section 24)[1]
2.) The right to property (Section 25(5)-(9))
3.) The right to housing (Section 26)
4.) The right to health care, food, water and social security (Section 27)
5.) Certain rights for children (Section 28(1)(c)-(d))
6.) The right to education (Section 29)
7.) The right to conditions of detention that are consistent with human dignity (Section 35(2)(e)).

These rights are by no means discriminated against civil and political rights, but enjoy the same status within the constitution. Now, we should look at the corresponding section that defines their enforceability, as fundamental rights without any practical implication and procedural mechanisms would be redundant.

Section 38 of the constitution deals with the enforcement of human rights. It unambiguously attests that all of the rights included in the Bill or Rights are enforceable. And they are not only enforceable by the person concerned who believes that his right was infringed upon (Section 38(a)), but also by any other person acting on his behalf (Section 38(b)), or even anyone acting in the public interest (Section 38(d)). Section 38 thus reveals that all these economic, social and cultural rights are fully enforceable, and that the *locus standi* has been liberalized in order to enable more people (indirect) access to the courts and hence foster the transformation of the South African society.

[1] I challenge that the right to a clean environment is a second generation, or an economic, social and cultural right. In the international law literature on human rights, it is rather referred to as a "third generation human right" (Sieghart 1990: 376). Third generation human rights, also called solidarity rights, refer to "groups rather than to individuals, and require the Government and international agencies to co-operate with and assist those whose own resources are insufficient to achieve the necessary ends" (Boyle 1996: 46).

When it comes to interpreting the Bill of Rights by the courts, Section 39 (the last part of Chapter 2 of the constitution) becomes relevant. And Section 39 contains some very interesting and unique features, if seen in a comparative law perspective. Normally, law and treaties are in the first instance interpreted in accordance with its literal meaning and in the full context of the concerned law.[2] In other words, the language employed will be used as strict means of interpretation. If any resolution fails here or if it is unclear what exactly was meant by the selected wording, supplementary documents, as drafting materials or other historical documents that enable to determine 'the real meaning', might be consulted. A teleological, or purposive interpretation, is normally the matter of last resort. However, the Constitutional Court in South Africa must, when interpreting the Bill of Rights, "promote the values that underlie an open and democratic society based on human dignity, equality and freedom" (Section 39(1)(a)), "must consider international law" (Section 39(1)(b)), and may consider foreign law (Section 39(1)(c)).[3] In other words, to put it bluntly, it depends on the discretion of the judges how to interpret the clauses and how to decide upon particular cases. Using international or comparative foreign cases is done on a routine matter by courts around the world, especially if a court is in a deadlock and needs another practical reference. But determining the values which

[2] See for instance Article 31 of the Vienna Convention on the Law of Treaties. The Vienna Convention is referred to by a lot of international dispute mechanisms, if two parties cannot mutually resolve their differences and have to call upon an international arbitrator. The principles of Article 31 can be found in many national legal systems. On a sidenote: 124 nations have acceded to the Vienna Convention, but not South Africa. I assume that the government during apartheid refused to join the system, and that the post-apartheid government has not yet fulfilled the criteria for ratification. As a matter of irony, the Vienna Convention could be used for the interpretation of matters surrounding the Bill of Rights, since it is an international treaty in accordance with Section 39(b) of the Constitution, and as the Constitution of South Africa has been passed *after* the Vienna Treaty was effective. It does not matter that South Africa is not a party of the treaty, because Section 39(b) talks about all international law and not solely of the agreements which South Africa has acceded to. As we know, such treaties are only relevant for a certain case if the treaty was passed before the law concerned was passed (Principle of Non-retroactivity, as formulated in Article 4 of the Vienna Convention).

[3] Using foreign law, South African judges can from the experiences of other Constitutions and the corresponding jurisdictions in the world.

are used for interpretation (Section 39(1)(a)), rather than demanding a textual interpretation in the spirit of good faith, definitely allocates the judges a lot of power as to how to conclude their judgments. It can almost be equalized with policy-making by the judiciary, because they will have the power to "promote the values that underlie an open and democratic society" and thus have a significant influence on the law-making and the politics in South Africa. This lies in contradiction with Montesquieu's Spirit of the Laws, as it impairs the division of powers. From this, we can see that the judiciary in South Africa has, at least constitutionally, considerate power to promote, or even prevent, the transformation of the society in the post-apartheid era.

Another important provision, when it comes to the enforcement of the rights, can be found in Article 36. Article 36(e) states that if the state has "less restrictive means to achieve the purpose" of the right, these rights cannot be fully claimed. In other words, if the state does not possess adequate resources to ensure the economic, social and cultural rights that are written down in the Bill of Rights, any attempt from the citizens to enforce them in front of the courts and thus demand a positive action of the state will fail. The judges will have to determine if such a case exists. This sounds like a very serious provision in the first instance, because it significantly limits the scope of the economic, social and cultural rights. But one can also see it the other way round: if the state possessed the resources to implement economic, social and cultural rights, and citizens as plaintiffs sue the state, it would be obliged to act in many cases.

From this short excurse into the *textual* meaning of the South African Constitution, we can see that there is some potential to enforce economic, social and cultural rights, at least when it comes to the *de jure* situation. Economic, social and

cultural rights belong to the regular set of fundamental rights and can be enforced in front of the courts in accordance with Section 38 of the constitution, should the state possess adequate resources in accordance with Section 36. However, as Section 39 reveals, judges have significant power in the decision of the cases, because they can interpret "the values that underlie an open and democratic society based on human dignity, equality and freedom", and use supplementary material in the court proceedings. Chapter II.B of this paper will analyze how the constitutional rights are implemented in reality (*de facto*), in illustrating some cases and discussing other legal opinions. But before, we should repeat this exercise at the example of the Indian constitution, in order create the framework for the comparison of both constitutions.

2.) India[4]

The Indian constitution came into effect on January 26th, 1950. Unlike the drafting process of the South African constitution, the final version of the Indian constitution was only decided upon by a Constituent Assembly that was "formed through indirect elections, chosen by provincial legislatures that had been elected in early 1946" (Sarkar 2001: 35). There was no element of direct participation, as it was the case in South Africa. Rather, as it can be inferred from Sarkar (2001), the drafting of the constitution was an affair of a limited number of Indian political elites that had emerged during the anti-colonial struggle against the British Raj. Of course, realizing the historical context, we cannot expect the Republic of India to have had a similar drafting procedure

[4] A part of this section has been adapted from another paper of mine: "Citizens' Action and Judicial Activism through Public Interest Litigation: Making the Constitutional Goals True?", online at http://www.subin.org/pil.pdf.

as it has happened in South Africa. However, this difference is worth noting, as it reemphasizes the unique way the South African constitution was created, with all lessons that were learnt from apartheid.

The Indian constitution has the distinct feature of being the longest written constitution on Earth (Cunningham 1991: 786).[5] It is a very liberal, modern[6] and progressive constitution, which was, *inter alia*, shaped by the colonial experience. Same as I did with the South African constitution, I will at first look at the Preamble of the Indian constitution, and then at the relevant parts that contain the fundamental rights for the citizens.

The Preamble, which is, as the South African one, not directly enforceable in the courts *per se*, gives an idea about the aims and objectives of the Indian constitution, which are phrased out more elaborately in the following sections.[7] It defines India as a "Sovereign Socialist Secular Democratic Republic". The terms "socialist" (and "secular") were only included into the preamble with the *42nd Amendment* to the constitution on December 18th, 1976.[8] In addition, the constitution puts an emphasis on equality, *inter*

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[5] The COI has more than 390 articles (plus sub-articles) and requires, as the author says, more than 180 pages in print. The length of the COI can be explained with the complexity of center-state relations in India, which take the overwhelming majority of Articles in the Constitution. Jain (2003: 12) gives a more detailed account and points out that the constitution has 441 Articles and 12 Schedules and "is probably the longest of the organic laws now extant in the world". It is interesting to note that hardly any publication displays the full text of the COI in one unity. Mehta's (1990) book is one of the only publications doing so (as the author claims) and an excellent reference for having the full text of the COI as of 1949, along with all amendments till 1990 (cross-referenced within the constitutional text) within one single publication.

[6] Jain (2003: 11) points out that the COI could build upon the experiences of different countries in constitution-building and cites in particular the examples of the Western liberal democracies of the USA, Canada and Australia, along with the unwritten British Constitutional Law.

[7] In *Golak Nath v. State of Punjab, AIR 1967 SC 1643, 1655*, the court says: "It [the preamble] contains in a nutshell, its [the constitutions'] ideals and its aspirations. The preamble is not a platitude but the mode of its realisation is worked out in detail in the Constitution."

[8] It is particularly interesting that Former Prime Minister Indira Gandhi decided to implement this Amendment during the State of Emergency and include the term "socialist" into the preamble, as it underscores her endeavor to eliminate "inequality in income and status and standards of life" (Shukla and Singh 1990: 2).

alia. The terms "socialist" and "equality" of the preamble help to understand the status of economic, social and cultural rights, which will follow in the main constitutional text.

Now, let us have a look at the fundamental rights of the Indian constitution. Unlike in the South African constitution, which contains a comprehensive Bill of Rights, comprising civil and political as well as economic, social and cultural rights, the Fundamental Rights Section (Part III of the Indian constitution, Articles 12-35) only contains civil and political rights. Through Article 32 (*right to constitutional remedies*), these rights are directly enforceable at the Supreme Court of India.

As we have learnt now, the Fundamental Rights section of the Indian constitution does not contain any economic, social and cultural rights. From a strictly literal meaning, India does not have any second generation human rights that are enforceable through the procedural right of Article 32. But let us look a little beyond Part III of the constitution and turn to Part IV. Part IV consists of the Directive Principles of State Policy (Art. 36-51). Here, we can identify a set of rights that come close to economic, social and cultural rights, because the state is required to engage in positive action for the benefit of the citizens – as we know one person's right is another person's duty. Such socio-economic rights include, *inter alia*:

1.) The right to adequate means of livelihood (Article 39(a)),
2.) The Promotion a distributive economic system (Art. 39(b) and 39(c)), to eschew a concentration of wealth (Art. 39(c)),
3.) The right to just and humane conditions of work and maternity (Art. 42)
4.) The right to a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities (Art. 43)
5.) The right for free and compulsory education for children (Art. 45)
6.) The duty for the state to raise the level of nutrition and the standard of living and to improve public health (Art. .47)
7.) The protection of the environment (Art. 48A).[9]

[9] Jain (2003: 1607-1632) is an excellent reference to delve deeper into these provisions and understand their dynamics.

In short, the Directive Principles, and the economic, social and cultural rights contained within, "are designed to usher in a social and economic democracy in the country" (Jain 2003: 1595). They have redistributive quality and impose policy-obligations on the state to institute procedures towards the improvement of the situation of the citizens over the course of time.

But are these provisions rights, and can people demand positive action from the state? As opposed to the preceding Fundamental Rights section, when it comes to the procedural provision, Art. 37 *unambiguously* says that the

> "provisions in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws".

In other words, these principles are *compulsory guidelines* for the state in making laws and policies (the administration is *strictly* bound by them), but they are not legally enforceable by the citizens. Thus, they can be classified as 'non-enforceable *positive human rights'*, where the state is actually obliged to do something specific.

From the textual interpretation of the relevant parts of the Indian constitution, we can summarize the following. The Fundamental Rights section (Part III), which is enforceable through Article 32 of the constitution, does not contain any economic, social and cultural rights. The Directive Principles of State Policy section (Part IV) contains economic, social and cultural rights, which are not enforceable in accordance with Article 37 of the Constitution. They are only compulsory for the policies of the state, but no one can sue the state if the latter does not adhere to these guidelines. If this is the truth, then India *de jure* does not grant her citizens any enforceable second generation human rights. Let is, in the next step, appraise these findings against the *de jure* findings of the South African constitution for establishing the first part of the comparison.

3.) Appraisal

From a strictly textual interpretation of the South African and Indian constitutions, it is obvious that the South African constitution is more progressive when it comes to the implementation of economic, social and cultural rights. At first, these rights are classified as fundamental rights and thus embedded within the Bill of Rights section. According to Section 38, citizens can approach the courts if they believe that the state does not do the necessary to promote their economic, social and cultural rights. Thus, using this approach, these rights are legally enforceable. The state can be compelled by the courts through citizens' action to pursue its policies in accordance with economic, social and cultural rights. However, as I have shown, Section 36 limits the application to the extent that the state needs to possess adequate resources, while Section 39 gives the judges more power when it comes to the interpretation of legal hearings.

Although the Indian constitution also contains economic, social and cultural rights, these rights are de jure not enforceable, since they do not belong to the Fundamental Rights section of the constitution, which in turn are enforceable through Article 32 of the constitution. Economic, social and cultural rights are only compulsory guidelines for the policies of the state. But the question whether the state adheres to these policies remains open. Who monitors this? And who can legally complain, if the state does not abide by these principles. According to Article 37, the citizens cannot sue the state, because they do not have the right to act as plaintiff and call upon the courts.

We can thus see that the constitution of South Africa seems to be more serious, when it comes to the 'theoretical practicability' of economic, social and cultural rights. We do not know, however, how the practice looks. Often, rights exist only on paper. Or

rights are interpreted, reinterpreted and recontextualized by lawyers, judges, advocates and other legal professionals. It would not require the profession of a lawyer, if rights were unambiguous like a mathematical function. Thus, the next section will look at legal practices in South Africa and India, respectively, and compare how courts have responded to cases with a pilloried breach of economic, social and cultural rights.

B.) Economic, Social and Cultural Rights in Practice *(de facto)*

1.) South Africa

We saw that South Africa has *de jure* a very sophisticated approach to economic, social and cultural rights, as they are legally directly enforceable, albeit with limitations. Let us make a short excursion into the nature of rights, before we examine more in detail how the jurisprudence in South Africa reacts to claims by its citizens for the enforcement of second generation human rights.

In reference to Article 26 of the South African Constitution (right to housing), Plotke (2000: 14) mentions that "while decent housing may be a right, South Africans should not expect it soon". He continues his section about rights inflation and asks the question: "If rights cannot be claimed now, what sort of constitution is this? Such failures can encourage populist upsurges aimed against a constitution devaluated as hollow and formalistic".

Is the South African constitution really hollow and formalistic? In other words, does it contain a number of great ideas and intentions, which are legally not practicable? Since the new constitution is relatively young and does not have the same body of jurisprudence as most of the other comparable democratic constitutions in the world

have, let us quickly have a look at secondary literature from other scholars, before looking at some cases that have been decided upon by the South African Constitutional Court.

As said, Article 39 extends the scope beyond a strict textual interpretation of the language and gives the judges a considerable quantum of autonomy to interpret the provisions in accordance with the principles as stated in the same article. Sarkin (1999: 77) summarizes this idea lucidly, while elucidating how the Constitutional Court of South Africa will pursue its role of a 'teleological interpreter' of the Bill of Rights:

> "[…] it should be borne in mind that the language of the Constitution is only one among a number of factors guiding judicial interpretation. Courts of the new Republic do not place great emphasis on the language and give limited weight to the intent of the framers. The Constitutional Court has already indicated that it will adopt a 'purposive' and 'generous' approach to constitutional interpretation."

The author points out that language is only one factor for interpreting the constitution. He also underlines that the Constitutional Court has indicated its willingness to interpret the Bill of Rights "purposive[ly]" and "generous[ly]". With generous, he probably means that the court will try to as much as it can in order to ensure that the state abides to the rules, in order to make the constitution a document for the people. However, we always have to keep in mind that resources of states are limited, and that people, either individually of organized as groups, will bargain to achieve the best possible deal. Hence, it is not a surprise that the final conclusion of the same author is more modest:

> "Already, the Constitutional Court has indicated that it will not be robust in its determination of issues relating to resource allocation. Thus, while second and third generation rights have found their way into the final Constitution, they will have little significance in practice, since the resource prioritization necessary to give them effect will solely depend on government determination." (Sarkin 1999: 87)

Thus, Sarkin's opinion matches significantly with Plotke's opinion. What sense does it make to formulate a right when it is limited within the same chapter of the

constitution and thus *de facto* can hardly be claimed? Or is it still possible to practically insist on economic, social and cultural rights? In order to give an idea about the practice, we should look at some relevant court judgments.

Let us begin with a short remark about the *Minister of Health and others (Appellants) v. Treatment Action Campaign and others (Respondents) case*.[10] The Government of South Africa was sued by the Treatment Action Campaign in front of a lower court in accordance with Section 27 (right to health) and Section 11 (right to life) to make nevirapine (for HIV and AIDS treatment) available to mothers and their babies within public health facilities. The government failed with its appeal in front of the Constitutional Court to overturn the original order of a lower court. This short example does show that economic, social and cultural rights can be successfully enforced. However, here the right to life (which has a much higher status than a first or second generation right) *might* have prompted to court to decide the way it did. So, let us look at a case where reference has been explicitly made to an economic, social and cultural right.

Probably the most cited case in this context is the *Irene Grootboom case*.[11] The plaintiff, along with 900 other applicants, was living under appalling conditions in the Wallacedene Township. Before, they had been occupying someone's land and were then evicted and thus homeless. Earlier, the Municipal Court had ruled that the applicants need to be provided with shelter and basic facilities. The government objected to the first judgment and called upon the Constitutional Court. The original applicants were at least partly successful in claiming their right to adequate housing in accordance with Section

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[10] Decided on 4th April 2002 (Case CCT 9/02), reprinted in (Ramcharan 2005: 144-153).

[11] *The Government of the Republic of South Africa (First Appellant), the Premier of the Province of the Western Cape (Second Appellant), the Cape Metropolitan Council (Third Appellant) and the Oostenberg Municipality (Forth Appellant) v. Irene Grootboom and others (Respondents), decided on 4. 10.2000 (Case CCT 11/00).* Reprinted in (Ramcharan 2005 297-336).

26 of the constitution. Although the Constitutional Court was hesitant in granting an absolute right of housing to all applicants, as the resources of the municipality would not have been sufficient, it took another approach to ensure that the applicants could enjoy minimal standards. In accordance with Section 28 of the constitution, it contemplated that at least the children of the applicants had a right to adequate housing, and thus also the parents of the children, who were seen as inseparable. The court ruled that

> "the order requires the state to act to meet the obligation imposed upon it by section 26(2) of the Constitution. This includes the obligation to devise, fund, implement and supervise measures to provide relief o those in desperate need"[12]

Seleoane (2002: 50-51) summarizes the implications of this judgment:

> "[Justice] Davis [of the Municipal Court] has directed the government to provide shelter to the Children of the Applicants in terms of Section 28(1)(c) of the constitution. He further directed that the children concerned had the right not to be removed from their parents, the effect of which would have been to provide shelter to their parents as well. On appeal, the Constitutional Court opined that it was wrong for the government not to have a policy on such matters. The court directed the government to provide applicants with basic sanitation facilities, water, and certain building materials. The court set a date by which its order must have been effected and directed the government to report to the Registrar."

From this landmark judgment, we can learn that there is a possibility for claiming economic, social and cultural rights out of the South African constitution, as long as the resources permit an intervention to grant the citizens a minimal standard. On the other side, this judgment serves as evidence that economic, social and cultural rights are not as strong, because Section 36 limits the absolute application. The court clearly says that

> "Socio-economic rights are expressly included in the bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis."[13]

[12] At para. 96 of the judgment, reprinted in (Ramcharan 2005: 335).
[13] At para. 20 of the judgment, reprinted in (Ramcharan 2005: 306-307).

In other words, economic, social and cultural rights do not only exist in theory, the state is bound by them. But it has to be evaluated on a case-by-case basis how and to what extent they can be enforced.

On the positive side, the court has also directed the state to pass a corresponding policy, in order to comply with the constitutional rights of the citizens. In the same judgment, we receive some clarity about the status of economic, social and cultural rights. The court points out:

> "Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting."[14]

We can learn from the *Irene Grootboom case* that economic, social and cultural rights enjoy the same status of civil and political rights, and the state has to do the necessary to adhere to these rights, be it negative or positive action. The people of South Africa thus can be successful with applications that have their legal base in economic, social and cultural rights. Ramcharan (2005: 2) summarizes aptly:

> "In that very case, the South African Constitutional Court accepted the concept of the minimum core obligation enunciated by the Committee of Economic, Social and Cultural Rights".

A third case which is very interesting and amplifies the extent to which economic, social and cultural rights can be enforced, is *Thiagraj Soobramoney v. Minister of Health (Kwazulu-Natal)*[15]. The plaintiff could not afford *regular* dialysis treatment and cited Section 27 in front of the Constitutional Court, in order to force the hospital to give him the treatment free of cost. The application failed on the grounds that this was not a case of

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[14] At para. 23 of the judgment, reprinted in (Ramcharan 2005: 307)

[15] Decided on 27.November 1997, (Case CCT 32/97). Reprinted in (Ramcharan 2005: 47-65). The original citation of the judgment is 1998 (1) SA 765 (CC).

immediate emergency, requiring life-supporting measures. The Constitutional Court first explains the general scope Sections 26 and 27:

> "What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given the lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which section 27(3) must be construed."[16]

Then, the court gives the following reason to dismiss the application:

> "The appellant's demand to receive dialysis treatment at a state hospital must be determined in accordance with the provisions of sections 27(1) and (2) and not section 27(3). These sections entitle everyone to have access to health care services provided by the state 'within its available resources'"[17]

As said, this was not a case of emergency here. And the province of KwaZulu Natal does not have the adequate financial resources, as the judges determine in para. 24 of the court order. The state budget does not permit to acquire more dialysis equipment, and not even the available equipment is sufficient to meet the demand for emergency needs, ensuring health and safety regulations.

Interestingly, this case illustrates how South African judges refer to foreign law in order to interpret their own Bill of Rights. Explicit reference is made to a comparative Indian case. In *Paschim Banga Khet Mazdoor Samity and others v. State of West Bengal and another*,[18] as the judges point out, the court decided that denying emergency treatment (by state hospitals) to a patient in need of the same is a breach of the right to life in Article 21. The Indian jurisprudence has clearly indicated that the right to health can be concluded from Article 21. In this reference, the South African judges say:

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[16] At para. 11 of the judgment, reprinted in (Ramcharan 2005: 50).
[17] At para. 22 of the judgment, reprinted in (Ramcharan 2005: 53).
[18] AIR SC 2426

> "This is precisely the sort of case which would fall within section 27(3), It is one in which emergency treatment was clearly necessary. […] The treatment was available but denied"[19]

We learn that there is a right to health in the South African Constitution, and that the state has to take positive steps to safeguard this right. However, this right to health of Section 27 is confined to emergency treatment and does not give a free ticket to full medical treatment, if the public resources are not available. It would be interesting to see whether the scope of Section 27 would be extended, if the resources are available at some point of time in the future. However, one can only speculate over this question at present. In this particular case, the court pointed out that it will have to adopt a "narrower or specific meaning"[20] of Section 27.

We have learnt from this discussion so far that courts in South Africa realize economic, social and cultural rights, and that they seem to be willing to enforce such rights as much as the resources of the society permit. However, the power of the courts is bound, and the Constitutional Court has clearly expressed that every appeal has to be examined case-by-case. I would not be as pessimistic as Plotke and Sarkin, who do nevertheless have very important points, are. Rather, I see the objectives for the future rather optimistic, because the slow transformation of South Africa has already begun in the policy sphere, and maybe (and hopefully) it does not need as much support of the courts in the future to proceed. Seleoane (2002: 146; emphasis added), with his very extensive empirical study about all seven second generation human rights, with the goal to examine how they are practically enforced, comes to his very reasonable conclusion:

> "It seems clear in respect of each of the seven socio-economic rights that, from an empirical standpoint, there is a huge distance that must still be travelled before the deprivation which is sought to be addressed by the seven rights can be dented. This is not

[19] At para. 18 of the judgment, reprinted in (Ramcharan 2005: 53).
[20] At para. 17 of the judgment, reprinted in (Ramcharan 2005: 52).

> to deny that progress has been made in the fulfilment of a number of the seven rights under consideration. *With reference to housing, for instance, it is significant that 75% of the houses government promised in 1994 have been delivered.*"

In other words, there is still a lot of work to do. But the partial implementation of economic, social and cultural rights, with help of the Constitutional Court, is gradually happening to some extent. These are prospects to build upon in the future.

2.) India

How did Indian courts react in the past in cases that were concerned with economic, social and cultural rights? Recalling Chapter II.A.2. of this paper, we should not expect that citizens can enforce economic, social and cultural rights, because Article 37 unambiguously states that the rights of Part IV of the constitution (Directive Principles of State Policy) are not enforceable, but only compulsory guidelines for the policy of the Indian states. In other words, *de jure* there exists no legal channel to remedy a case where states have not acted in pursuit of Part IV of the constitution.

But as it can be said already now, activist judges and lawyers, as well as other well-spirited citizens have invented mechanisms that make the Indian jurisprudence unique and the "Supreme Court *of* India a Supreme Court *for* Indians" (Baxi 1994: 143, emphasis as in original). We will see how economic, social and cultural rights have become enforceable to some extent in India, kudos to the creativity of legal professionals, who identified the need to interpret the constitution as a whole, in the interest of those

who have the sovereignty within the Indian state – namely the people. For this purpose, I will refer to a few landmark cases and judgments.[21]

Dam and Tewary (2005: 384) point out, the 'virtual unity' the Supreme Court had earlier created between Part III and Part IV of the constitution, thus rejecting Fundamental Rights to be superior to the Directive Principles.[22] In actual fact, this does not simultaneously supersede Article 37. But it is astonishing to see how the Supreme Court teleologically 'overruled' this provision of the constitution and thus underlined its role as a social reformer in augmenting the status of economic, social and cultural rights to the same level as civil and political rights. In 1986, it read the Directive Principles into the Fundamental Rights Section and made them directly enforceable through a wide interpretation of the right to life (Article 21), in conjunction with the right to constitutional remedies (Article 32). In the much cited and stunning case *Olga Tellis v. Bombay Municipal Corporation*[23], it rules that "the right to life which is guaranteed by Article 21 includes the *right to livelihood*"[24]. The Supreme Court continues that Article 39(a) and Article 41 (both Directive Principles) oblige the state to secure the livelihood to its citizens and take the necessary steps to provide the citizens with employment in case of unemployment, respectively. Then the court maintains that

> "Article 37 provides that the Directive Principles, through not enforceable by any Court, are nevertheless fundamental in the governance of the country. The Principles contained in Arts. 39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. […] But, *any person, who is deprived of his right to livelihood* except according to just and

[21] A part of the following text has been adapted from another paper of mine: "Citizens' Action and Judicial Activism through Public Interest Litigation: Making the Constitutional Goals True?", online at http://www.subin.org/pil.pdf.

[22] The authors refer to *Minerva Mills Ltd v Union of India AIR 1980 SC 1789, para. 56*, where it is said that "to give absolute primacy to one over the other [would be] to disturb the harmony of the Constitution".

[23] *AIR 1986 SC 180.*

[24] *AIR 1986 SC 180*, *193, para. 32*. My emphasis.

> fair procedure established by law, *can challenge the deprivation as offending the right to life conferred by Art. 21*."[25]

We can learn from this verdict that the right to life of Article 21 includes a right to livelihood, which itself covers wide sections of Part IV of the constitution, thus assigning the economic, social and cultural rights as embedded in the Directive Principles the status of legally enforceable Fundamental Rights under the aforementioned conditions. In other words, Article 37 becomes void when the court sees it as pertinent that any of the rights of Part IV includes a right to livelihood. This opens the door for the citizens of India to sue the state while claiming the right to life, if the latter does not comply with the obligations as stated in Part IV of the constitution.

Let me amplify the bandwidth of this mechanism the Indian Supreme Court has developed. The right to constitutional remedies (Article 32), in connection with the right to life (Article 21), was again instrumental to overrule the provision that the Directive Principles are not directly legally enforceable (Article 37). In *Subhash Kumar v. State of Bihar*[26], another case that was invoked through a PIL, the court ruled that the

> "Right to live is a Fundamental Right under Art. 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life".[27]

From this example, we can see that although de jure second generation human rights are not enforceable, the Supreme Court has reacted towards the detrimental living conditions in India and established a legal mechanism for enforcing these rights, in creating a constitutional unity between first and second generation human rights. In other words, the economic, social and cultural rights might not be *de jure* enforceable, but *de*

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[25] *AIR 1986 SC 180, 194, para. 33*. My emphasis.
[26] *AIR 1991 SC 420.*
[27] *AIR 1991 SC 420, 424, para 7.*

facto this novel mechanism that has been invented gives the citizens of India some hope to demand positive action from the Indian state with regard to the implementation of these rights. We should note that in India, the role of 'reformist judges' was imperative for interpreting the constitution pro-second generation human rights. This remains a crucial point.

3.) Appraisal

In a comparative perspective, we have two interesting scenarios. In South Africa, economic, social and cultural rights are part of the Bill of Rights and legally enforceable. However, Section 36 limits the application of all rights significantly. On the flipside, Section 39 enables judges in the future to use international and foreign law for the further interpretation of these rights and thus renders a 'creative interpretation' of these rights possible. Even to date, we have interesting evidence, in which the courts have compelled the government to act positively in accordance with economic, social and cultural rights.

In India, judges did 'creatively reinterpret' the constitution, in order to make economic, social and cultural rights work. As we have seen, Article 37 prevents the judges from enforcing the economic, social and cultural rights as laid down in Part IV of the constitution. However, in a few landmark judgments that are earmarked to establish a constitutional unity and reinterpret the Indian constitution in favor of the citizens, the judges have made Article 37 practically void. Citizens can claim economic, social and cultural rights, if they can prove that their right to live, or more broadly, their right to a livelihood, is impaired. The creativity of Indian judges and lawyers could be an interesting precedent for South African judges, if they are willing to interfere with the legislative and executive branches of the government for the benefit of the people.

But as the South African judges point out themselves, their constitution is different to the Indian one:

> "In India the Supreme Court has developed a jurisprudence around the right to life so as to impose obligations on the state in respect of the basic needs of its inhabitants. Whilst the Indian jurisprudence on this subject contains valuable insights it is important to bear in mind that our Constitution is structured differently to the Indian Constitution. Unlike the Indian Constitution ours deals specifically in the bill of rights with certain positive obligations imposed on the state, and where it does so, it is our duty to apply the obligations as formulated in the Constitution and not to draw inferences that would be inconsistent therewith."[28]

This statement elucidates the difference of the South African and Indian constitution, and the reservation of the South African Constitutional Court to use the Indian approach. However, I can think of two possible scenarios. Either, the resources are available, and the judges make their decisions increasingly in favor of economic, social and cultural rights. Or, in accordance with Section 39(1)(c), the judges learn from the Indian experience, reinterpret the constitution in favor of increasingly granting economic, social and cultural rights for the people and put harder obligations of the state to spend its income for social projects. This is not unlikely, as it only needs one single landmark judgment to create a precedent. And it is common that in judicial practice, certain trends of interpretation are followed. So I could imagine that one judge sets a ball rolling in creating a progressive body of case law that might in the end support the government in pursuing a social revolution for a country that was heavily shaken by apartheid.

We should conclude this section by making the following statement. South African legal practice in terms of economic, social and cultural rights is thus far quite modest. But by no means are such rights only written on paper or hollow. As the cases have shown, there is a respectable probability that future judges impose more positive

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[28] At para. 15 of the *Thiagraj Soobramoney v. Minister of Health (Kwazulu-Natal)* judgment, reprinted in (Ramcharan 2005: 51).

obligations on the state for becoming active. In India, judges and legal activists have helped to make economic, social and cultural rights reality, although Article 37 defines them as not enforceable. Maybe it needs legal activism, if governments fail. But this could also be dangerous. The pendulum could swing back and transform countries that have strong judicial branches into judicial dictatorships. That is the danger of law, if it is interpreted teleologically in consideration of undefined values and other axioms that go beyond the literal meaning of the constitution, which was so carefully drafted.

III. Conclusion

What do we learn from the comparative approach of this paper? Many salient points have already been noted in the appraisal sections of this paper. Let me sum up.

It is definitely far-fetched to claim that economic, social and cultural rights exist only on paper. We have seen at the example of both the South African and Indian case that economic, social and cultural rights have an important role in the respective jurisprudence. In South Africa, we are at the beginning of a comprehensive jurisprudence, keeping in mind that the South African constitution is just ten years old. However, it can be inferred that there is a ray of hope in the sky, if the resources of the state increase and if the judges take the constitutional text literally. In India, we have a comprehensive body of legal decisions with regard to second generation human rights. While initially, the Supreme Court had identified civil and political rights as superior to economic, social and cultural rights (Rudolph and Rudolph 1987: 109; Sathe 2002: 106), the courts' judicial conservativism changed in the aftermath of the state of emergency. Although economic, social and cultural rights are de jure not part of the Fundamental

Rights catalogue of the constitution (Part III), courts in India consider them to be on one level with civil and political rights through interpreting the constitution very innovatively.

Although in South Africa, economic, social and cultural rights are part of the Bill of Rights, their application is significantly limited in referring to the availability of resources. In India, these rights are not part of the Fundamental Rights but of the Directive Principles of State Policy (Part IV). Nevertheless, as I have shown, they can be legally enforced through creative legal detours. This makes the Indian constitution and jurisprudence unique in many regards. Judges have actively and intentionally overruled a constitutional provision in order to give a row of hollow economic, social and cultural rights practical expression. In turn, in South Africa, judges are legally constrained, and it would require a lot of courage to act like Indian judges have done. This is not impossible though, as the determination of resources could be done more liberally. Moreover, South African judges – and I consider this as a likely scenario, because foreign law is a justified source of law in South Africa – could refer to Indian legal cases, if they are willing to promote economic, social and cultural rights and thus a more rapid transformation of the country. Hence, I would not call economic, social and cultural rights in South Africa ineffective *per se*. It will probably take some more time to observe and estimate their effectiveness more profoundly. But these rights not only define the ethic of the post-apartheid state in South Africa succinctly, the also offer an interesting starting point to foster a 'socio-economic revolution' in from the judicial branch of government.

The last point is an interesting point to be aware of. Although law should be interpreted in the spirit of good faith, and ideally by neutral judges, often it depends on the appointment of judges how constitutions are interpreted. In India, first the judiciary

was rather conservative. Only after the emergency, the jurisprudence became more liberal and palpable for the citizens, thanks to the chief justices Krishna Iyer and Bhagwati. But now, we can again discern a diametrically opposite trend, as Shukla (2006: 3757) concludes in the context of the recent decision of the Supreme Court that slum dwellers do not have a right to a notice before eviction and demolition of their homes.[29] In other words, maybe not the constitution per se, but the persons who interpret it are the driving forces behind any legal innovation. At this point, I miss the empirical knowledge of South African court decisions to estimate any similar trend for their jurisprudence.

Nevertheless, it can be said that both India's post-colonial and South Africa's post-apartheid constitutions offer innovative mechanisms for promoting the enforcement of economic, social and cultural rights in their settings. With India, we have seen the practicability, although these rights de jure only exist in a mitigated form. And with South Africa, where these rights exist explicitly, we see that the rights are not that strong at the moment, but that there is potential for the future, during the judicial learning process with the juvenile South African constitution. The Indian example gives a lot of hope for South Africa. And should South Africa become more effective with the enforcement of economic, social and cultural rights (which I expect), we will know that second generation human rights are by no means phony. If legislations and courts in other countries were serious with the implementation of economic, social and cultural rights, they should learn both from the South African constitution and the Indian jurisprudence, provide their citizens with legally enforceable second generation human rights and monitor their promotion sincerely.

[29] The author refers to *Almira H Patel v. Union of India, AIR 2000 SC 1256*.

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