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Socio-economic rights in South Africa: the 'Christof Heyns clause'

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Introduction

Christof Heyns was not a scholar of socio-economic rights. In the heady period before and directly after the drafting and adoption of South Africa's 1996 Constitution,[1] he authored and co-authored a number of exploratory articles and chapters on socio-economic rights;[2] and edited a book with me on the topic.[3] After that, as far as I can tell, he never wrote on socio-economic rights again. But it is testament to the depth and scope of Christof's influence – and typical of the man – that he nonetheless had an important and lasting impact on the law and life of socio-economic rights in South Africa in another way than through developing a body of scholarship on the topic.

During the process of drafting South Africa's 1996 Constitution, when the focus of everyone else was on the 'justiciability' of these rights, Christof conceived the idea that to ensure an adequate constitutional framework for the realisation of socio-economic rights it was, although desirable, insufficient to render these rights justiciable. Instead, so he argued, the Constitution should in addition to justiciability, mandate more programmatic means for the realisation of socio-economic rights; mechanisms through which the state could be held to account in a systemic and lasting, and less adversarial manner concerning socio-economic rights. He proposed that what he called a 'domestic reporting system', akin to the reporting systems of international treaty monitoring bodies, be included in the Constitution for socio-economic rights.

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1 Constitution of the Republic of South Africa, 1996 (Constitution).

2 See eg CH Heyns 'Extended medical training and the Constitution: balancing civil and political rights and socio-economic rights' (1997) *De Jure* 1; CH Heyns & D Brand 'Introduction to socio-economic rights in the South African constitution' (1998) 2 *Law, Democracy and Development* 153-165; CH Heyns & D Brand 'Introduction to socio-economic rights in the South African Constitution' in G Bekker (ed) *A compilation of essential documents on economic, social and cultural rights* (PULP 1999) 1-12; CH Heyns & D Brand 'Socio-economic rights during the transition' in NC Manganyi (ed) *On becoming a democracy: transition and the transformation of South African society* (UNISA Press 2004) 25-39.

3 D Brand & CH Heyns (eds) *Socio-economic rights in South Africa* (PULP 2005).

Ever practical and strategic, he ensured that this idea was placed before the drafters in the form of a formal proposal, was presented during public hearings in the drafting process and so made its way into the Constitution. The end result was section 184(3) of the Constitution, which states the following:

> Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

In this chapter I focus on this section – let us call it the 'Christof Heyns clause'[4] - as an important aspect of Christof's professional and scholarly legacy. I describe Christof's idea and vision for 'his' 'domestic reporting system' and then trace what has happened to it since it started to operate. I close with something of a call to action to revive Christof's grand idea.

The idea: a 'domestic reporting system'

I could find nothing on paper on Christof's idea for a domestic socio-economic reporting system from before it was enacted into the Constitution. Fortunately, once section 184(3) was enacted, the Centre for Human Rights, through Christof, Frans Viljoen and I; and the Socio-Economic Rights Project at the Community Law Centre at the University of the Western Cape, through Sandra Liebenberg, started a project that ran for about five years to advise the Human Rights Commission on the implementation of section 184(3). In the course of this project Christof recorded his idea and vision for section 184(3) a number of times.[5]

The point of departure for Christof that emerges from this record of his ideas is that section 184(3) indeed creates a 'domestic reporting procedure' – that is, a domestic version of the reporting systems employed by a range of treaty monitoring bodies through which to monitor compliance with the treaties they are responsible for. This is important, because it means that for Christof, from the outset, the purpose of the section 184(3) procedure is to require the SAHRC to *monitor* the implementation of socio-economic rights. In other words,

4 It is not often that someone can be directly credited with scripting something into a constitution, but in this case we can. Although others were also closely involved (Frans Viljoen, Sandra Liebenberg, me) section 184(3) was Christof's idea and he was the driving force behind it being included in the Constitution.

5 CH Heyns 'Taking socio-economic rights seriously: the "domestic reporting procedure" and the role of the South African Human Rights Commission in terms of the new Constitution' (1999) *De Jure* 195; 'From the margins to the mainstream' (1998) 1(1) *ESR Review* 1 (Heyns 1998a); 'Update on the SA Human Rights Commission. Switching on the monitoring screens' (1998) 1(2) *ESR Review* 19 (Heyns 1998b).

rather than simply creating a system for the gathering and presentation of information about the state of implementation of socio-economic rights in South Africa, it requires 'a systematic gathering of information with the view to evaluating compliance with human rights commitments'.[6] In Christof's own words:

> At the heart of reporting as an enforcement mechanism lies the fact that it creates a duty of justification on the one side and a system of monitoring on the other; a system of introspection and inspection.[7]

Christof then proceeds to list a number of advantages that a domestic reporting procedures holds, as against reporting systems at international level and as against the courts.

Compared to international reporting systems, the domestic system holds the virtue, quite obviously, of being local: those who impart information to the system 'add the perspective of those who live with th[e] reality daily' and those who receive, process and evaluate that information bear 'intimate knowledge of the resources available to the state in question, and the challenges faced by the state'.[8] In addition, the domestic reporting system 'repatriates' monitoring. Instead of to some remote treaty monitoring body in far-away Geneva, domestic reporting is done to 'an institution which represents the interests of the people of the country itself, to whom the state owes its first duty'.[9] Finally, because it occurs more regularly and on a more ongoing basis than international reporting, the domestic reporting system better lends itself to the kind of 'constructive dialogue' between the monitoring institution (the SAHRC) and those that report to it, that the system is designed for.[10]

As against courts, the reporting system eschews the reactive, specific complaints based and problem solving nature of judicial work in favour of a more 'systematic and comprehensive approach', arguably better suited to socio-economic rights.[11]

In addition, the domestic reporting system potentially provides a contextualised and embedded accountability mechanism, enabling the people to hold the state to account for its socio-economic rights record on an ongoing, pro-active basis. In this way socio-economic rights are kept on the national agenda through a process that allows broad and

6 L Chenwi 'Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court' Research paper, Studies in Poverty and Inequality Institute (2010) 38.

7 Heyns (1999) (n 5) 207. See also Heyns (1998a) (n 5) 2; Heyns (1998b) (n 5) 19-20.

8 Heyns (1999) (n 5) 208.

9 As above.

10 As above.

11 As above.

diverse participation in both the interpretation of the rights and the assessment of policies and programmes. This enhances democracy and a culture of justification instead of command.[12]

For the domestic reporting system to operate optimally and to achieve the intended aims, so Christof continues, the following practical 'points of departure' must be accepted:

- The process must be managed in such a way as to avoid an adversarial relationship between the Commission and organs of state. Instead, it should be focussed on 'constructive dialogue'. [13]
- Ways should be found in which to limit the burden that the reporting system places both on those who must report and the Commission that receives and must make sense of the reports.[14]
- Linked to the above, reporting should be approached 'holistically', situated within the context of broader international reporting obligations and systems – reporting between these different systems should be coordinated, avoid overlap and feed from one another.[15]
- The system should work in close cooperation with civil society and in particular NGO's, whether through a system of 'shadow reporting' or through NGO's working with or for the Commission or simply through the reports submitted by organs of state from the outset being made available to NGO's for them to consider and evaluate.[16]

As an aside, before I turn to a description of the manner in which the domestic reporting system was implemented by the Commission: against this background it should be clear that the domestic reporting system was a quintessentially 'Christof' idea. The insistence on a holistic approach, in which the domestic reporting system is firmly entrenched as a smaller part of a bigger scheme, reminds of his fondness for and lifelong fascination with ambiguous South African statesman Jan Smuts, and his philosophy of 'holism'.[17] The emphasis on civil society participation and broad, diverse participation in both the interpretative and policy/programme evaluation role of the Commission recalls his notion that human rights do not exist in the abstract, but are made and remade through human endeavour, through struggle.[18] The almost immediate turn from the conceptual to the practical, a to-do list, reflects Christof's penchant and talent for making ideas work and his distaste for abstract theorising absent concrete plans.

12 Heyns (1999) (n 5) 209.
13 Heyns (1999) (n 5) 210.
14 As above.
15 Heyns (1999) (n 5) 211.
16 Heyns (1999) (n 5) 222.
17 See eg CH Heyns & W Gravett '"To save succeeding generations from the scourge of war": Jan Smuts and the ideological foundations of the United Nations' (2017) 39 *Human Rights Quarterly* 574.
18 See eg CH Heyns 'A "struggle approach" to human rights' in A Soeteman (ed) *Pluralism and law* (Kluver Academic 2001) 171.

The practice: the South African Human Rights Commission and what happened

As already noted above, once the section 184(3) process was included in the Constitution and the Commission turned to its implementation, the Centre for Human Rights at the University of Pretoria (primarily Christof and I) and the Socio-economic Rights Project at the Community Law Centre at UWC (Sandra Liebenberg) collaborated closely with the Commission in an advisory and assistive capacity to get the process up and running.

The collaboration lasted for more or less five years, but almost from the get-go the Commission was at odds with its NGO partners. This centred mostly around four related issues.

First, while the advice from the CHR and the CLC (echoing Christof's practical pointers related above) was that the reporting system at the very least should be implemented in a staged fashion and not all at once, but probably should always be dispersed in some way to lessen the burden on reporters and the Commission and make the process practically feasible, the Commission insisted on not only requesting reports from all relevant organs of state every year on all the listed socio-economic rights, but also preparing a report annually on everything that was reported to it. Its rationale was that section 184(3), in explicitly requiring it each year to request reports from relevant organs of state about the relevant rights, left it no space to decide, for example to focus on one or two rights only in a given year; or working only with a small group of 'relevant' organs of state from year to year.[19]

Second, from the outset the Commission never seemed sure whether it was indeed performing a monitoring function, as Christof envisioned (introspection combined with inspection), or simply gathering, collating and presenting information on the state of socio-economic rights implementation in South Africa. While at times the Commission was explicit that its role indeed was to monitor,[20] it also often declared itself opposed to monitoring in the evaluative sense that Christof had in mind.[21] Indeed, at the end of the five year period of collaboration with its two NGO partners, the Commission formally decided to move more toward the information gathering rather than monitoring role.[22]

19 See D Brand & S Liebenberg 'The South African Human Rights Commission. The second Economic and Social Rights Report' (2000) 2(3) *ESR Review* 21 24-25.

20 J Kollapen 'Monitoring socio-economic rights. What has the South African Human Rights Commission done?' (1999) 1(4) *ESR Review* 30 31.

21 See eg T Thipanyane 'The Human Rights Commission' (1998) 1(3) *ESR Review* 16 17; D Brand 'The South African Human Rights Commission. The first Economic and Social Rights Report' (1999) 2(1) *ESR Review* 34 35-36.

22 J Klaaren 'A second look at the South African Human Rights Commission, access to

Third, when almost from the outset the Commission experienced if not resistance then at least debilitating tardiness from organs of state in submitting their required reports, it elected to issue subpoenas to the relevant officials to appear before it to explain the failure to report. At an early stage already this raised the risk of the Commission jeopardising its relationship with relevant organs of state and putting at risk the constructive engagement with organs of state that the reporting process lends itself to.[23]

Fourth and finally, from the start the Commission adopted the position that, although it appreciates and encourages NGO and broader civil society participation in the section 184(3) reporting process, it would not make public and accessible the reports that organs of state provided to it in their 'raw' form. Instead, civil society would only be allowed entry into the process once the Commission had prepared its own report in draft form, to comment on the draft. The explanation for this position was throughout that the organs of state provided their reports to the Commission in good faith and to make that information public would breach that trust and bedevil the relationship.

In various forms and to various degrees, these four problems in the Commission's implementation of its section 184(3) mandate have persisted. It must be said that the process has progressively weakened, to the extent that it has now more or less ground to a halt.

The Commission produced reports in terms of section 184(3) from 1997/98 to 2012/13 – a total of nine Economic and Social Rights Reports. From 2013 onwards it has not produced another overarching report. Its approach since then has been to continue to request and receive from relevant organs of state reports on the steps they have taken to realise socio-economic rights, but to refrain from preparing its own report to Parliament or for the public. Instead, it has intermittently prepared focussed, much shorter 'policy briefs' on specific aspects of specific rights – such as on a Basic Income Grant as an aspect of the right to social assistance; or on the education of children with special needs. It does seem as though the core of Christof's idea – that the process would be one of real monitoring, involving the receipt, analysis and then critique of information, with conclusions about responsibility for failures or violations – has been jettisoned by the Commission. It seems that efforts are ongoing at least to make the received reports available to the public on an accessible platform, but so far this has come to naught.

From the outside, there appears to be a partial collapse of the Commission's execution of its section 184(3) mandate which was

information and the promotion of socio-economic rights' (2005) 27 *Human Rights Quarterly* 539.

23 Brand & Liebenberg (n 19) 23.

brought about by the problems related above. With the scope and depth at which it sought to report combined with its unwillingness to accept NGO assistance at an early stage of the process it seems that the Commission has increasingly lacked capacity to complete the reports at any level of usefulness and eventually simply could not continue to do so. In addition, the Commission experienced increasing and persistent inability or unwillingness on the side of organs of state to participate.

In short, Christof's idea has petered out, because Christof's initial advice was not followed.

What now?

It seems the height of (tragic) irony that the slow collapse of the Commission's section 184(3) socio-economic rights monitoring function occurred in particular over the last decade or so. During this time South Africa has experienced and is still experiencing a crisis of government. Due to a combination of incapacity, ineptitude and corruption, in particular local and to some extent provincial (and even in some instances – water comes to mind – national) government has failed and in many instances collapsed completely. The impact of this failure or collapse is most evident precisely concerning socio-economic rights. When a municipality disappears, the effect is that its residents do not have water or electricity or access to housing.[24]

Although the root causes of this collapse of what euphemistically is called 'service delivery' are the incapacity, ineptitude, lack of political will and corruption referred to above, the proximate cause is the lack of capacity of the citizenry to hold the government that touches their lives to account. In a province such as my own, the Free State, it is not so much that accountability has failed, as it is that the very notion of accountability – the idea that government can and should be held to account – has simply disappeared.[25]

How different might things have been had the Human Rights Commission from the outset approached the potentially powerful accountability mechanism with which it is mandated in terms of section 184(3) in an effective, collaborative, realistic manner? If it had, for example, for a given year focussed in its monitoring on one sphere of government only (let's say local government), in one province only,

24 See eg E Ellis 'Municipal government crisis: the solution lies far beyond November polls' *Daily Maverick*, 28 September 2021 https://www.dailymaverick.co.za/article/2021-09-28-municipal-government-crisis-the-solution-lies-far-beyond-november-polls/ (accessed 26 November 2021).

25 M Williams 'Accountability is a myth in South Africa. The system is not designed to be responsive to voters' *The Citizen*, 10 November 2021 https://www.citizen.co.za/news/opinion/opinion-columns/2906458/accountability-is-a-myth-in-sa/ (accessed 26 November 2021).

requesting information on one right only (water?). If it had built over time lasting and effective relationships with NGO's and broader civil society and been willing to harness the expertise and resources that are available from that sector to analyse and process the more manageable amounts of information it would then have received? If its focus had consistently been to monitor, to evaluate in a constructive and assistive manner?

Perhaps the time has come to take a look again at the section 184(3) reporting procedure that Christof conceived and created now more than 25 years ago. And this time, to try to do what Christof was so good at: to make things work.