

CHALLENGES TO JUDICIAL ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN AFRICA: COMPARATIVE LESSONS FROM GHANA AND SOUTH AFRICA

Christopher Y Nyinevi

Abstract

It has become increasingly fashionable for many countries especially those in the developing world to include extensive Bills of Rights in their constitutions. The inclusion of socio-economic rights in such Bills of Rights has also been on the increase. While the developing world, particularly emerging democracies in Africa, have been keen on paying special attention to socio-economic rights in their legal systems, the opposite is what generally pertains in the developed world, at least in the United States and under the Strasbourg human rights regime in Europe. The beautifully crafted rights promise economic prosperity and social wellbeing. Courts are granted wide mandates to enforce them. But after several years of constitutional democracy, the majority of the populations in countries with such Bills of Rights are still poor and disillusioned. Disenchanted and frustrated, the masses lash out at the Courts. But, are the Courts really to blame? This chapter examines the above question and argues that the idea of enforcing socio-economic rights through the judicial process is misconceived as courts are ill-suited for the task. That judicial enforcement should at best be a complementary approach to be employed under the most compelling circumstances to aid a political mechanism of enforcement. To illustrate and buttress this point, the chapter reviews the seminal cases on socio-economic rights from Ghana and South Africa. It concludes that a modified form of the monitoring system used at the international level in the implementation of human rights treaties should be adopted at the national level.

1 Introduction

It has become increasingly fashionable for many countries especially those in the developing world to include extensive bills of rights in their constitutions. The inclusion of socio-economic rights in such bills of rights has also been on the increase especially in constitutions of emerging African democracies.¹ The beautifully crafted rights guarantee minimum standards of economic and social wellbeing for the people. Courts are

¹ Government of Ghana *Report of the Committee of Experts on Proposals for a Draft Constitution of Ghana 1992*, para 139: "The Committee also elaborated the social and economic aspects of human rights – aspects which are of particular relevance to the

granted wide mandates to enforce them.² But after several years of constitutional democracy, most people in countries with such bills of rights are still poor and disillusioned.

Some have blamed this state of affairs on the courts. They argue that the socio-economic right jurisprudence of the courts has been deferential to government policy and not made any difference in the lives of the many that 'remain desperately poor'.³ But are the courts really to blame? I examine this question by exploring the seminal cases on socio-economic rights from Ghana and South Africa. In the process, I attempt an explanation for why socio-economic right litigation has generally produced disappointing outcomes in the two countries. I then look at what should be the pragmatic approach to effectively implement socio-economic rights and the realistic role the courts can play in that process.

The discussion is structured as follows: After this introduction, I explore the development of socio-economic rights in Ghana, followed by a critical examination of the Ghana Supreme Court's jurisprudence on the subject. In the next two parts, I respectively discuss the origin of socio-economic rights in South Africa and the relevant socio-economic right cases of the South African Constitutional Court. I then examine the challenges to judicial enforcement of socio-economic rights generally and finally conclude with some suggestions for the way forward.

2 The development of socio-economic rights in Ghana

The British, whose protégé Ghana was, had a complicated human rights regime rooted in the common law. The common law recognised certain civil and political rights only. Australia's Chief Justice, Robert French, observes that what might be called human rights that existed at common law included the right of access to the courts; immunity from deprivation of property without compensation; legal professional privilege; privilege against self-incrimination; immunity from interference with vested property rights; immunity from interference with equality of religion; the right to access legal counsel when accused of a serious crime; immunity against deprivation of liberty except by law; and the freedom of speech and

conditions of Africa and the developing world generally. Some of these rights are included in the proposed Directive Principles of State Policy, except that here they are more precisely elaborated as rights.

2 See e.g., Constitution of Ghana 1992, art 2(1); Constitution of Kenya 2010, art 258(1); Constitution of South Africa 1996, sec 38.

3 L Berat 'The Constitutional Court of South Africa and jurisdictional questions: In the interest of justice?' (2005) 3 *International Journal of Constitutional Law* 39-64.

of movement.⁴ All these are civil and political rights that were scattered in centuries-old case law. Being common law based, they were vulnerable and ever in jeopardy of modification or abolition by a 'sovereign Parliament'.⁵ Thus until 1998 when the Human Rights Act was passed to domesticate the European Convention on Fundamental Human Rights and Freedoms, the British could not boast of a codified bill of rights.⁶

But ironically, the British handed to most of their former colonies constitutions that contained some declarations of rights at independence. This is particularly true for former British colonies in the Caribbean and others in Africa like Nigeria, Botswana, Kenya, Mauritius and the Seychelles Islands.⁷ Interestingly, Ghana's Independence Constitution toed the British tradition by having no bill of rights except for the measly provisions that prohibited racial or religious discrimination and expropriation without compensation.⁸

Besides the absence of a bill of rights, another significant feature of the Independence Constitution was its retention of the British monarch as Ghana's head of state. To abolish this system and to sever all colonial ties with the British, the 1960 First Republican Constitution was adopted. Though the idea was to move away from the British model of parliamentary democracy towards the American presidential system, in practice British constitutional doctrines were employed in implementing the 1960 Constitution. The case of *Re Akoto and Seven Others*⁹ illustrates the unfortunate situation where the Westminster doctrine of parliamentary sovereignty was used to stunt the development of a Republican Constitution that could have effectuated the rule of law and respect for

4 RS French 'Human rights protection in Australia and the United Kingdom: Contrasts and comparisons' (Address to the Anglo-Australasian Lawyers Society and Constitutional and Administrative Law Bar Association; 5 July 2012, London) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj-05july12.pdf> (accessed 30 November 2016).

5 See RD Lumb *Australian constitutionalism* (1983) 103 cited in French (n 4 above); see also J Go 'Modeling the State: Postcolonial constitutions in Asia and Africa' (2002) 39 *Southeast Asian Studies* 558-576.

6 SKB Asante 'Reflections on the constitution, law and development' (*J.B. Danquah Memorial Lecture Series* 35, March 2002) 27 ('Traditionally the British had no justiciable Bill of Rights. Although this was partly a reflection of the fact that it has no written constitution, British jurists were traditionally uncomfortable adjudicating on human rights issues on the ground that these inevitably involved the determination of sensitive political or social issues which were more appropriate for Parliament than the Judiciary.') (Though the British doctrine of parliamentary sovereignty is extant, at least in theory, it is safe to say that the Human Rights Act 1998 should not be as vulnerable as the common law guarantees of human rights. Being the domestication of the European Human Rights Convention that is binding on the UK, Parliament would be slow to take actions that undermine the Act and by extension Convention, for fear of the political, diplomatic and legal repercussions the country would face on the international plane.)

7 See Go (n 5 above).

8 See Ghana (Constitution) Order in Council, 1957: secs 31(2) -(3) and sec 34(1).

9 [1961] GLR 523.

human rights.¹⁰ Akoto and the other accused persons were detained under section 2 of the Preventive Detention Act 1958 which empowered the Government to detain a person for up to five years without trial if the person engaged in 'acts prejudicial to the security of the state'. The High Court dismissed their application for *habeas corpus*. On appeal to the Supreme Court, it was contended *inter alia* that the Preventive Detention Act, under which the appellants were detained, was in excess of the powers conferred on Parliament because it contravened the Declaration of Fundamental Principles which the President had to subscribe to on assuming office. The relevant parts of the Declaration as contained in article 13(1) of the Constitution were as follows:

That freedom and justice should be honoured and maintained; That no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief. That every citizen of Ghana should receive his fair share of the produce yielded by the development of the country. That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion, of speech, of the right to move and assemble without hindrance or of the right of access to courts of law.

The appellants' arguments, in essence, were these: (a) that the Court should treat the Declaration on similar terms as the Bill of Rights in the United States Constitution; and (b) that applying by analogy the doctrine of judicial review established in *Marbury v Madison*¹¹ the Court should declare the PDA inconsistent with the declaration and therefore void. The Court was not persuaded. It held that the appellants' contention that the Declaration set out in article 13(1) should be considered as the a bill of rights was 'based on a misconception of the intent, purpose and effect of article 13(1) the provisions of which are, in our view, similar to the Coronation Oath taken by the Queen of England during the Coronation Service'.¹² Accordingly, to the court, 'the suggestion that the [D]eclaration made by the President on assumption of office constitutes a "Bill of Rights" in the sense in which the expression is understood under the Constitution of the United States of America [was] therefore untenable.'¹³

Had the appellants' approach to interpreting article 13(1) of the Constitution been accepted, it would have placed the Declaration on the pedestal of a bill of rights and this would have laid the foundation for the development of a human rights regime in Ghana. With such a result, the clause of the Declaration which said 'that every citizen of Ghana should

10 Asante (n 6 above) 26 ('Some commentators have, in denouncing the [Re Akoto] decision, suggested that the decision may have been induced by "judicial cowardice" or "judicial inertia"... I would submit that their decision is also explicable, at least in part, on the basis of strict adherence to ... juristic doctrines and traditions, which would have shaped the perspectives of jurists steeped in British legal traditions.') (emphasis added).

11 1 Cranch 137 (1803).

12 *Re Akoto* (n 9 above) 534.

13 *Re Akoto* (n 9 above) 534.

receive his fair share of the produce yielded by the development of the country' would probably have become the fountain of Ghana's constitutional jurisprudence on socio-economic rights through ingenious interpretation. The failure of the Court to take the bold step in asserting its role as the trustee of the Constitution and of the people's freedoms was a major setback to the development of a human rights culture within the body politic.¹⁴ It undoubtedly contributed to the events that led to the overthrow of the 1960 First Republican Constitution.

Having learnt from the failure of Court in the *Re Akoto* to assert its authority in defence of the fundamental human rights of the people, the 1969 Second Republican Constitution left nothing to chance. The Constitution explicitly provided for a justiciable Bill of Rights in chapter Four. It vested the Supreme Court with the power of judicial review to invalidate any act or omission of the Executive, Parliament or other agency of government that contravened provisions of Constitution including the Bill of Rights.¹⁵ Successive constitutions after the 1969 Constitution, namely the 1979 and 1992 Constitutions have all maintained and reaffirmed these fundamental values which have come to stay in Ghana's democracy.¹⁶ The 1979 Constitution provided for the first time not only an enforceable bill of civil and political rights, but also a chapter on social and economic rights described as the 'Directive Principles of State Policy'.¹⁷

The current 1992 Constitution of Ghana ushered in the Fourth Republic in January 1993. This was after four military interventions had plunged the country into economic misery and derailed its forward march on the path of democracy, the rule of law and human rights. The 1992 Constitution therefore promises democracy, the rule of law and respect for fundamental human rights. It gives the people an assurance of economic and social prosperity. Chapter five of the Constitution guarantees fundamental human rights and directs that they be respected by the 'Executive, Legislature and Judiciary and all other organs of government and [their] agencies and, where applicable to them, by all natural and legal persons in Ghana.'¹⁸ Chapter five contains some economic and social

14 See *Amidu v President Kufuor* [2001-2002] SCGLR 86, 138 (Kpegah JSC: 'Every student of the Constitutional Law of Ghana might have felt, after reading the celebrated case of *In re Akoto*, [1961] 2 GLR 523, SC that if the decision had gone the other way, the political and constitutional development of Ghana would have been different. 'Different' in the sense that respect for individual rights and the rule of law might well have been entrenched in our land, and we who now occupy this court would have had a well-beaten path before us to tread on in the discharge of our onerous responsibilities imposed upon us by the 1992 Constitution').

15 See Constitution of Ghana 1969, art 2.

16 Asante (n 6 above) 4.

17 See Constitution of Ghana 1979, chapter 4 (art 6 to 11).

18 Constitution of Ghana 1992, art 12(1) & 33(1).

rights including the right to education,¹⁹ the right to work and to earn fair wages, the right to form or join a trade union,²⁰ the right to maternity leave with pay²¹ and the rights of the disabled.²² Chapter six of the Constitution, entitled 'Directive Principles of State Policy' (the Directive Principles), is however the main part of the Constitution devoted to economic and social rights. Article 36(2) for instance enjoins the state to 'take all necessary steps to establish a sound and healthy economy whose underlying principles shall include

- (a) the guarantee of a fair and realistic remuneration for production and productivity in order to encourage continued production and higher productivity;
- (b) affording ample opportunity for individual initiative and creativity in economic activities and fostering an enabling environment for a pronounced role of the private sector in the economy;
- (c) undertaking even and balanced development of all regions and every part of each region of Ghana, and, in particular, improving the conditions of life in the rural areas, and generally, redressing any imbalance in development between the rural and the urban areas; [and]...
- (e) the recognition that the most secure democracy is the one that assures the basic necessities of life for its people as a fundamental duty.

The mainly civil and political rights in chapter five are declared to be 'enforceable by the Courts as provided for in [the] Constitution.'²³ But the Constitution is silent on the justiciability of the Directive Principles except a direction that it 'shall *guide* all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies ... in applying or interpreting [the] Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.'²⁴ Thus, for a long time, there had been conflicting viewpoints on the justiciability of the Directive Principles.

19 As above, art 25.

20 As above, art 24.

21 As above, art 27.

22 Art 29. (Art 33(5) of the Constitution indicates that rights contained in chapter five are not exhaustive. It therefore follows that socio-economic rights that are not mentioned in chapter five or any other part of the Constitution may nevertheless be enforceable in Ghana if 'they are inherent in a democracy and intended to secure the freedom and dignity of man'. In the *Lottery* case (n 28 below) 1096, the Supreme Court held that '[e]vidence of such rights can be obtained from either the provisions of international human rights instruments (and practice under them) or from the national human rights legislation and practice of other states.')

23 Constitution of Ghana 1992, art 12(1).

24 As above, art 34(1).

3 Socio-economic right jurisprudence of Ghana's Supreme Court

In *New Patriotic Party v Attorney General* (31 December case)²⁵ Justice Adade expressed the earliest view of the Supreme Court on the justiciability of the Directive Principles when he said:

It has been maintained in certain quarters that these directive principles are not justiciable, and therefore cannot avail the plaintiff. I am aware that this idea of the alleged non-justiciability of the directive principles is peddled very widely, but I have not found it convincingly substantiated anywhere ... I have not seen anything in Chapter 6 or in the Constitution, 1992 generally, which tells me that Chapter 6 is not justiciable.

Not long after, in 1997, another decision emanated from the Supreme Court which contradicted Justice Adade's view. The *New Patriotic Party v The Attorney General (CIBA case)*²⁶ held that the directive principles standing alone were not capable of judicial enforcement, unless they were read in conjunction with the fundamental human rights enshrined in chapter 5 of the constitution. In that case the point of controversy was the 'rights of people to form their own associations free from state interference' under article 37(2)(a) of Directive Principles. The question was whether that provision was by itself justiciable without the need to read it together with article 21(1)(e) which also guarantees the freedom of association in chapter five. The Court held that the Directive Principles of State Policy, standing alone, were not enforceable, unless they were read together with other provisions of the Constitution which are expressly designed to be justiciable. Thus to the Court, article 37(1)(a) was only enforceable if it was read with article 21(1)(e), its twin provision in chapter five. Speaking for the Court Justice Bamford-Addo stated:

In general therefore it is correct to say that the directive principles are principles of state policy which taken together constitute a sort of barometer by which the people can measure the performance of their government. They provide goals for legislative programmes and a *guide for judicial interpretation but are not of and by themselves legally enforceable by any court*. However, there are exceptions to this general principle. Since the courts are mandated to *apply* them in their interpretative duty, when they are read together or in conjunction with other enforceable parts of the Constitution, 1992, they then in that sense, become enforceable.²⁷

The view of Justice Bamford-Addo became the longstanding position on the justiciability of the socio-economic rights under the Directive Principles of State Policy until it was overturned in *National Lotto Operators*

25 [1993-94] 2 GLR 35 66.

26 [1996-97] SCGLR 729.

27 As above, 745.

Association v National Lotto Authority (the *Lottery* case).²⁸ There, the court preferred Justice Adade's view in the 31st December case to Justice Bamford-Addo's in the *CIBA* case.

3.1 The *Lottery* case

In 2006, the National Lotto Act (Act 722) set up the National Lotto Authority (NLA), and made it the sole agency in the country to initiate and operate any form of lottery or game of chance. Private lottery was thus abolished and made an offence punishable by a fine, a three year term of imprisonment or both.²⁹ Angered by this, the private lotto operators who had been thrown out of business by the National Lotto Act filed a writ in the High Court. Among others, they prayed the court to declare that the monopolisation of lottery in the NLA infringed the constitutional duty of the government to ensure a pronounced role of the private sector in the economy and the right of private lotto operators to free economic activity.

Because these issues bordered on the interpretation of the Constitution, particularly, the socio-economic rights in chapter six, the High Court referred them to the Supreme Court³⁰ for determination. The Supreme Court, in its decision, overturned the *CIBA* case's reasoning that the directive principles were not enforceable unless they were read with the fundamental civil rights. The Court held that 'the starting point of analysis should be that all the provisions in the Constitution [including the directive principles] are justiciable, unless there are strong indications to the contrary in the text or context of the Constitution'.³¹ This by all standards is an innovative interpretation which makes the enforcement of economic and social rights which was, hitherto, in limbo unequivocal.

In spite of this, the Court reached a conclusion that is shocking and disappointing in a nation whose constitution promises 'the blessings of liberty, equality of opportunity and prosperity'³² to the population. The Court held that the National Lotto Act did not infringe the plaintiffs' right to economic activity or their right to work. The plaintiffs had argued that by monopolising the lottery business in the NLA, Parliament had stifled private initiative and creativity in economic activities and thereby reduced the role of the private sector in the economy contrary to article 36(1) of the Constitution. The Court's response was '*that the plaintiffs [were] crying wolf!*'³³ In its opinion, the plaintiffs did not have an absolute right to engage in the 'gambling business' as their claim amounted to seeking 'an untrammelled right to operate their private lotto business, free from any

28 [2007-2008] 2 SCGLR 1088.

29 National Lotto Act, sec 4.

30 See Constitution of Ghana 1992, art 130(2).

31 *Lottery* case (n 28 above) 1099.

32 1992 Constitution (Preamble).

33 *Lottery* case (n 28 above) 1115.

licensing regime established by Parliament.³⁴ That, ‘to afford the citizens and residents of Ghana an opportunity for individual initiative and creativity in economic activities *does not imply the denial to the Ghanaian State of the normal regulatory authority exercised by democratic states the world over.*’³⁵

Nevertheless, I would submit that on the facts of the case, it is surprising that the Court upheld the state’s monopolisation of the lottery business. Unless one equates regulation to ‘prohibition’ or ‘abolition’ as the Court did, it is hard to imagine that the state loses the right to regulate the lottery business merely because private persons are allowed to run their own lotto enterprises.

3.2 The right to education cases

On the educational front, the same ‘deference-to policy-makers’ jurisprudence can be observed. The seminal case in this regard is *Federation of Youth Associations of Ghana v Public Universities of Ghana (No 2)* (the *Fedyag* case),³⁶ which concerned the fee paying policy of the public universities in Ghana. To ensure diversity in their student population, the Public Universities have adopted a policy whereby a percentage of their yearly admissions are reserved for international students at full cost. However, the admission spaces reserved for international students have never been fully filled. Instead of offering such vacant slots to ordinary Ghanaian applicants on merit, the universities rather sell them to Ghanaian ‘fee paying students’ who can afford tuition at the same full cost as international students regardless of whether they are less qualified than the ordinary applicants.

The plaintiffs alleged that the Public Universities had turned the admission process into a money making venture by reserving more spaces than could ever be occupied by international students. In sum their claim was that the Public Universities were discriminatorily providing access to university education on grounds of economic status since applicants who could have been admitted on merit were being shortchanged through the sale of the surplus international students’ quota to Ghanaian fee paying students. In defence, the Public Universities submitted that the fee-paying policy was not discriminatory because it did not in any way diminish the quota of admissions available to the applicants admitted on merit. And that in any case, since the government is unable to fully meet the financial requirements of the public universities, they had to supplement government efforts by resorting to the fee-paying policy.

34 As above, 1116.

35 As above, 1116.

36 [2011] 2 SCGLR 1081.

The court had to decide whether Ghanaian fee-paying policy of the Public Universities infringes article 25(1)(c) of the Constitution, which provides that 'higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by progressive introduction of free education'. Interestingly, the court conceded that 'the full fee-paying policy is to the disadvantage of persons with low economic status as they may not have the ability to opt for the fee paying policy'.³⁷ Nonetheless, it went ahead to declare the policy as constitutionally valid because (i) 'it does not affect the quota for ordinary applicants admitted on merit'; (ii) 'it creates more opportunity for qualified students to get university education'; and (iii) 'the government cannot provide bursaries for all qualified students to enter the university'.³⁸ Indeed the court went as far as to say that 'since education comes with cost in terms of infrastructure ... well-resourced libraries and research centres, [and] teachers or lecturers, Ghana, like other African countries, cannot provide free education within the shortest possible time'.³⁹

An important question which the Court's decision failed to address, however, is whether there is or will ever be an instance in which the Court may be prepared to order the government to commit resources to implement a particular socio-economic right like education or health. Note that one of the reasons why the Court upheld the fee paying policy was because of Public Universities' assertion that even if they offered the vacant slots not taken by foreign students to ordinary Ghanaian applicants, the government would not be able to provide the bursaries needed for the training of those extra students. The Court seemed too ready to accept this defence without any scrutiny. But seeing as the government would always be quick to cite the lack of resources as the basis for its failure to implement a socio-economic right, one would have to wonder if or when the Court would be bold enough to question or reject such clichéd economic defences.

In *Progressive Peoples' Party v Attorney General* (the *fCUBE* case)⁴⁰ the plaintiff political party sought a declaration that the government had failed to implement articles 25(1)(a) and 38(2) of the Constitution which enjoin the government to provide 'free compulsory universal basic education' (*fCUBE*) within 10 years of the coming into force of the Constitution. The plaintiffs contended that the failure of the government to implement the *fCUBE* policy had resulted in thousands of children of school going age being drawn to child labour and other hazardous activities instead of the classroom. While not disputing the facts, the Court held that the action did not implicate its exclusive jurisdiction to interpret or enforce the Constitution because, among others, the provision in question had already

37 As above, 1102.

38 As above, 1102.

39 As above, 1096.

40 Suit No J1/8/2014 (Judgment: 28 July 2015).

been interpreted by the court in the *Fedyag* case. The action was therefore dismissed.

The Court's decision seems rather interesting. Although both the *Fedyag* and *fCUBE* cases sought to enforce the right to education guaranteed by the Constitution, the substance of each case was different. The crux of the plaintiff's case in *Fedyag* was that the fee paying policy being implemented by the Public Universities of Ghana was discriminatory and inconsistent with the right to *tertiary education* under articles 25 and 38 of the 1992 Constitution. The substance of the *fCUBE* case was however to seek a declaration that the government had a specific obligation under the combined effect of articles 25(1)(a) and 38(2) to provide *free compulsory basic education* and had violated the Constitution by failing to do so. The Court's failure to recognise these differences was a grave error resulting in the abdication of its constitutional duty to hold the government accountable. It robbed the people of the opportunity to know from their 'constitutional court' whether the government can take forever to implement a constitutional injunction when a specific timeframe has been indicated by the Constitution itself. In fact, it appears too tempting to not think that the dismissal of the case at the jurisdictional stage was a convenient means by which the Court timidly avoided a confrontation with the government over a policy matter. The decision, like earlier ones from the Court, reflects the hopelessness in using the judicial process to enforce socio-economic rights in Ghana.

4 The origin of socio-economic rights in South Africa

South Africa's history of apartheid which was characterised by the evils of enforced racial inequality, segregation, socio-economic and political injustice, and the persecution of dissidents is a world record that speaks for itself. Respect for human rights and equality being a taboo topic in apartheid South Africa, it would be a mockery of the subject for one to situate a discussion of socio-economic rights within the apartheid era. There was no such thing as 'human rights for all', for one to even think of respect for social and economic rights. It is not surprising, therefore, that the Constitutional Court of South Africa in one of its earliest decisions after the abolition of apartheid said that 'the [post-apartheid interim] Constitution introduces democracy and equality for the first time in South Africa. It acknowledges a past of intense suffering and injustice, and promises a future of reconciliation and reconstruction'.⁴¹

Human rights, in general, and socio-economic rights in particular, is therefore a post-apartheid subject matter as far as South Africa is

41 *S v Mhlungu* (1995) CCT 25/94, para 111.

concerned. The long road to the institutionalisation of a human rights regime in South Africa was achieved through what has been described as a 'cautious, piecemeal process'⁴² of transition from apartheid to democracy.⁴³ With the end of apartheid in 1990, the country through its political leadership, including the anti-apartheid leaders, set in motion the transition to democracy by adopting an Interim Constitution in November 1993.⁴⁴ That Interim Constitution which was the product of extensive negotiations by the Government and the black liberation movements became the roadmap for the transition. Under this roadmap, there was elected a National Assembly which doubled as the Constitutional Assembly that drafted a 'Final Constitution' for the country. Although the white minority were prepared to relinquish power to the majority, they 'were determined to have a hand in drawing the framework for the future governance of the country'⁴⁵ obviously because of the fear and mistrust that built up between the two sides under apartheid. To allay these fears, the Interim Constitution provided for some constitutional principles which the Final Constitution had to conform to. Again as an insurance against either side shortchanging the other in the process, it was also provided that the Constitutional Court that had been created by the Interim Constitution should certify that the Final Constitution had complied with all the constitutional principles. Although the Interim Constitution had some socio-economic rights, they were not a broad range of socio-economic rights. Therefore when Constitutional Assembly finally settled down to work, it decided to add 'the rights of access to housing, health care, food, water, social security, and basic education to the draft Final Constitution.'⁴⁶ This move precipitated mixed reactions, but the pro-socio-economic rights bloc had their way. The final product of this long and laborious process is the current 1996 Constitution of South Africa which was duly certified by the Constitutional Court on 6 September, 1996.⁴⁷

The Constitution has very generous provisions on civil and political rights as well as economic and social rights. It is by far one of the Constitutions in the world with the most detailed bill of rights. Having regard to the history of discrimination and marginalisation of black Africans in the country during the apartheid era, the adoption of such extensive bill of rights is not surprising. The economic and social rights enshrined in the Constitution include the rights to education, housing, work and trade, a healthy environment, health care, food, water and social

42 M Ebadolahi 'Using structural interdicts and the South African Human Rights Commission to achieve judicial enforcement of economic and social rights in South Africa' (2008) 83 *New York University Law Review* 1565 1569.

43 As above, 1569.

44 As above, 1570.

45 *In Re Certification of the Constitution of the Republic of South Africa 1996*, 1996 (4) SA 744 (CC), para 12 (*Certification Judgment*).

46 Ebadolahi (n 42 above) 1570.

47 See *Certification Judgment* (n 45 above).

security; language and culture and membership of a cultural, religious or linguistic community.⁴⁸

Sandra Liebenberg, a South African constitutional lawyer, is of the view that the socio-economic rights in the 1996 Constitution are of three categories, namely, (a) qualified positive socio-economic rights; (b) unqualified or basic socio-economic rights; and (c) negative socio-economic rights.⁴⁹ The positive but qualified socio-economic rights are mainly, the rights of access to housing, health care, food, water, and social security. They 'are positive in so far as they require the State to take some affirmative action, but *qualified* to the extent that the provisions only ask the State to take *reasonable* legislative and other measures, *within its available resources*, to achieve the *progressive realisation* of these rights, acknowledging limited resources.'⁵⁰ The unqualified or basic socio-economic rights are those rights which the state considers as being among its topmost priorities and which despite resource constraints are subject to immediate, rather than progressive realisation. The classes of rights under this category 'include children's rights, the right to a basic education, and certain rights of detainees'.⁵¹ The last category of 'negative socio-economic rights' comprises those socio-economic rights that are considered as imposing limits on state action and the behaviour of private persons. Examples include 'the right to be free from summary, unjustified evictions (a notorious apartheid-era practice) and the right not to be refused emergency medical treatment.'⁵²

5 The socio-economic right jurisprudence of the South African Constitutional Court

Unlike Ghana, the South African Constitution contains an explicit injunction that makes its socio-economic rights enforceable by judicial action.⁵³ In spite of this, the Constitutional Court recognises the difficulty presented by the justiciability of socio-economic rights in a constitutional democracy underpinned by separation of powers. In *Soobramoney v Minister of Health, KwaZulu-Natal (Soobramoney)*,⁵⁴ it observed that 'a court will be

48 Constitution of South Africa 1996, secs 22 to 31.

49 See Ebadolahi (n 42 above) 1571-72 (It should be noted that Liebenberg's categorisation of the socio-economic rights in South Africa's Constitution is not faultless. Prima facie, none of the categories for instance capture the right to form or join trade unions. Nor do they reflect the fact that some of the rights have both negative and positive aspects. Nevertheless, as observed by Ebadolahi, her categorisation provides 'a useful starting point in understanding pertinent differences between various [socio-economic rights] included in the [South African] Constitution').

50 Ebadolahi (n 42 above) 1572.

51 Ebadolahi (n 42 above) 1572-73.

52 Ebadolahi (n 42 above) 1572-73.

53 Constitution of South Africa 1996, secs 8 & 38.

54 1998 (1) SA 765 (CC).

slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibilities it is to deal with such matters'.⁵⁵ In *Soobramoney*, the appellant was suffering from kidney failure, ischemic heart disease and a cerebro-vascular disease that had induced stroke. He was terminally ill, but his life could be prolonged if he had regular renal dialysis. Because he could not afford private treatment, he turned to the state-run Addington Hospital in Durban. Due to inadequate dialysis machines and other medical resources, the hospital had formulated guidelines to manage demands for dialysis treatment.

By the guidelines, only patients who suffered acute, but treatable, renal failures were given automatic renal dialysis. Patients like the appellant who suffered terminal renal failure did not get automatic treatment. Such patients could get renal dialysis if they were 'free of significant vascular or cardiac disease' and therefore eligible for kidney transplant.⁵⁶ Because the appellant had stroke and heart disease in addition to a renal failure, and was therefore not eligible for heart transplant, he was turned away. His application to the High Court to compel the hospital to provide him dialysis treatment was dismissed.

On appeal, the Constitutional Court held that contrary to his argument, the appellant's case did not implicate the right to life and the right to emergency medical treatment. In the Court's view, the right to emergency medical treatment enshrined in article 27(3) of the South African Constitution envisages a situation where a person 'suffers a sudden catastrophe which calls for immediate medical attention'.⁵⁷ Thus, to the Court, the purpose of the right to emergency medical treatment was to prevent 'the particular sense of shock to our notions of human solidarity occasioned by the turning away from hospital of people battered and bleeding or of those who fall victim to sudden and unexpected collapse'.⁵⁸ Since the appellant's medical condition was not the type of emergency envisaged by section 27(3), the proper standard of assessment, according to the Court, was subsections (1) and (2) of section 27. Under those provisions the state must only 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of the right to health care. The Constitutional Court therefore affirmed the High Court's ruling and by extension the Addington Hospital guidelines.

A similar conclusion was reached in *Government of the Republic of South Africa v Grootboom* (*Grootboom case*).⁵⁹ Ms Grootboom and the other plaintiffs were living in shacks at Wallacedene, an informal settlement near

55 *Soobramoney*, as above, para 29.

56 As above, para 4.

57 As above, para 20.

58 As above, para 51.

59 2001(1) SA 46 (CC).

the municipality of Oostenberg. The settlement was in a sorry state. There was no potable water or sanitation system, and only 5 per cent of the population living in the waterlogged slum had access to electricity. Many of the dwellers who had applied for low cost housing from the municipal authorities had been on the waiting list for as long as seven years. In their bid to escape these deplorable conditions, Ms Grootboom and her family moved their shacks to an area on a private land which had been earmarked for the development of low cost housing. The private developer obtained a court order to evict them, but they continued to stay because they had nowhere else to go. At the onset of the cold, windy and rainy winter, the shelters of Ms Grootboom and the other litigants were pulled down with bulldozers resulting in their forced eviction. They filed an action in the High Court claiming that they had a right to temporary housing under sections 26 and 28 of the South African Constitution. They prayed the court for an order directing the government to provide 'adequate basic temporary shelter or housing [for them] and their children pending their obtaining permanent accommodation' or alternatively make available 'basic nutrition, shelter, healthcare and social services' to their children who in this case were more vulnerable.⁶⁰ The High Court rejected the argument of the petitioners that they were entitled to immediate temporary housing pending the provision of permanent housing by the state. It however ruled that the children were entitled to such a right, in unqualified terms, under the section 28 of Constitution and that the provision of such shelters for the children should take account of their parents, since it was crucial to the best interest of children that their parents should be with them. The Court therefore ordered the Government to provide Ms Grootboom and the other petitioners with basic shelter such as tents, portable latrines and a regular supply of potable water.

On appeal, the Constitutional Court was of the opinion that even though the national housing policy the Government had developed was laudable, to the extent that it did not take account of sections of the population who were in crisis and desperately needed temporary housing, it failed the constitutional test of reasonableness. Despite this conclusion, the Constitutional Court overturned the ruling of the High Court. It held that 'neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand.'⁶¹ The Court reasoned that 'section 28's requirement that children have a right to shelter was one that rested primarily with parents and only secondarily with the state'.⁶² It therefore dismissed the idea that children's right to shelter under the South African Constitution was absolute. By so holding, it also rejected the

60 *Grootboom*, as above, para 13.

61 As above, para 95.

62 See Berat (n 3 above).

argument that the state had a minimum core obligation⁶³ to provide housing upon demand to persons who were in desperate need.

The next socio-economic rights case worthy of consideration is *Minister of Health v Treatment Action Campaign (Treatment Action Campaign)*.⁶⁴ As part of its broader strategy to combat the AIDs pandemic in South Africa, the Government launched a programme to stem mother to child transmission by supplying the drug Nevirapine to pregnant women. Despite receiving free supplies of the drug, the government decided to pilot the distribution at two sites within each province of the country citing concerns over its safety and efficacy. Public sector doctors outside the pilot sites were precluded from prescribing the drug for their patients. But in view of the scale of the HIV/AIDs pandemic in the South Africa at the time, the Treatment Action Campaign and the other applicants in the case thought the government's pilot distribution of Nevirapine was unreasonable. They sued in the High Court of Pretoria arguing that by sections 27 and 28 of the Constitution, the government was obliged to implement an effective programme to prevent mother-to-child transmission of HIV throughout the country.⁶⁵ The High Court agreed with them. It held that the government had a duty to supply Nevirapine to pregnant women with HIV outside the pilot sites and to also implement a comprehensive national programme to prevent mother-to-child transmission of HIV.⁶⁶

The government appealed to the Constitutional Court. The Constitutional Court was of the view that the most relevant question that the case raised was 'whether the applicants had shown [that] the measures adopted by the government to provide access to health care services for HIV-positive mothers and their new born babies [fell] short of its obligations under the Constitution'.⁶⁷ In addressing this issue, the Court, relying on its decisions in the *Soobramoney* and *Grootboom* cases held that the rights guaranteed under both sections 26 and 27 do not place an obligation on the state 'to go beyond available resources or to realise these rights immediately'.⁶⁸ Rather, they only require the government to take reasonable measures within its available resources to progressively implement a particular socio-economic right. However, in the instant case, the Court agreed with the applicants that since the government's policy prevented a substantial number of pregnant women with HIV outside of

63 The Committee on Economic, Social & Cultural Rights introduced the concept of minimum core obligation in its General Comment 3 of 1993. Essentially, it is the obligation of a state party 'to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [in the ESCR Covenant] ... It is the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation.' *Grootboom* (n 59 above) para 31.

64 2002 (5) SA 721 (CC).

65 *Treatment Action Campaign*, as above, para 5.

66 As above, para 8.

67 As above, para 25.

68 As above, para 32.

the pilot centres from having access to Nevirapine, it failed the constitutional test of reasonableness. It therefore affirmed the High Court's order that the government should supply Nevirapine to all public hospitals outside the pilot sites.

Nevertheless, in examining the outcome of the case, we cannot discount the Court's consideration of the government's concession that no additional or significant cost would be incurred by supplying Nevirapine to 'those public hospitals and clinics outside the research sites where facilities [already existed] for testing and counseling'.⁶⁹ Had the situation been otherwise, the outcome would probably have been different given the Court's decision that the state has no obligation to go beyond available resources to realise a socio-economic right immediately.

The last case we consider is *Mazibuko and Others v City of Johannesburg* (*Mazibuko* case).⁷⁰ The case concerned a new water distribution policy that the City of Johannesburg piloted in a part of Soweto to address the recurring loss of 75 per cent of the water supplied to Soweto and its attendant revenue shortfalls. The policy involved (i) the free supply of six kiloliters of water per month to every household ('basic water supply') and (ii) the option for a household to get a pre-paid meter if it required water beyond the basic supply. The question was whether the policy was consistent with section 27(1)(b) of the Constitution which guarantees the right of every person to 'sufficient food and water'.

Reversing the decision of the Supreme Court of Appeal, the Constitutional Court held that since the constitutional entrenchment of socio-economic rights did not imply an obligation 'to furnish citizens immediately with all the basic necessities of life',⁷¹ the state's obligation under section 27(1)(b) of the Constitution was not an unqualified obligation to provide everyone with 'sufficient water' immediately. Rather, that obligation was one which required the state 'to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources'.⁷² By so holding, the Court also rejected the applicants' invitation for it to quantify the amount of water per person that would be considered 'sufficient' under section 27(1)(b). In its view, to do so would amount to endorsing the 'minimum core' doctrine which the Court had rejected in *Grootboom* and *Treatment Action Campaign*.

69 As above, paras 49 & 66.

70 2010 (4) SA (CC).

71 *Mazibuko*, as above, para 59.

72 As above, para 50.

6 Challenges to judicial enforcement of socio-economic rights

While there have been some successful outcomes for using the judicial process to enforce socio-economic rights in South Africa, the record of success in Ghana is nil. On the whole, the jurisprudence of the two apex courts reveals that even the best attempts of the courts to enforce socio-economic rights do not go far enough. In Ghana, private lotto operators have condemned the *Lottery* case as creating a 'dangerous situation which will not serve the public good or be in the public interest'.⁷³ The socio-economic rights jurisprudence of the South African constitutional court has also been criticised as 'timid', 'deferential' and 'flawed'.⁷⁴

The reasons for this 'low energy' approach to enforcing socio-economic rights are not hard to find. Generally, courts are wary of making orders that are incapable of enforcement. Because they want to be respected and taken seriously, the last thing a court wants to do is to make a mockery of itself by making an order that cannot, or will not, be obeyed. Thus Chief Justice Archer of Ghana for instance, 'held the view that [the Supreme Court] like equity must not act in vain. In other words, it should not make orders that could be lawfully and legitimately circumvented so as to make the court a laughing stock.'⁷⁵ Accordingly, even Justices of the most activist courts, like the Supreme Court of India, acknowledge the need to maintain a level of respect for the political branches by refraining from making orders that are incapable of performance. Justice SP Bharucha has thus cautioned that

[the] court must refrain from passing orders that cannot be enforced, *whatever the fundamental right may be and however good the cause*. It serves no purpose to issue some high profile mandamus or declaration that can remain only on paper ... It is of cardinal importance to the confidence that people have in the Court that its orders are implicitly and promptly obeyed and is, therefore, of cardinal importance that orders that are incapable of obedience and enforcement are not made.⁷⁶

Undoubtedly, these principles of judicial restraint operate on the minds of judges when they have to make decisions which potentially involve confrontation with the political branches. If courts face this level of self-inhibition even in cases of negative rights where they mostly have to order

73 MA Banasseh 'GLOA files for review at Supreme Court' 21 August 2009 <http://akumabel.blogspot.com/2009/08/gloa-files-for-review-at-supreme-court.html> (accessed 30 November 2016).

74 See K Lehmann, 'In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core' (2006-2007) 22 *American University International Law Review* 163,165.

75 31 December case (n 25 above) 50.

76 SP Bharucha 'Inaugural lecture on public interest litigation at the Supreme Court Bar Association's Golden Jubilee Lecture Series' (2001).

governments to refrain from doing certain acts, then one can imagine what occurs when they have to make orders directing governments to take specific positive measures to realise socio-economic rights. It is in this light that the decisions in cases like the *Lottery* case, the *fCUBE* case or *Grootboom's* case come as little surprise. For instance, in the *Lottery* case, the Court was of the opinion that 'the enforceability of economic, social and cultural rights need not be implemented in the same way as the political and civil rights'.⁷⁷ Those rights, the Court said, have 'to be liberally construed in order not to interfere with the democratic mandates of successive governments'.⁷⁸ Similarly the South African Constitutional Court has been restrained and deferential in its interpretation of the socio-economic rights in the South African constitution. In *Mazibuko*, Justice O'Regan observed that

[it] is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights.⁷⁹

Not surprisingly, what could be considered as one of the victories of socio-economic right litigation in South Africa, *Occupiers of 51 Olivia Road v City of Johannesburg (51 Olivia Road)*,⁸⁰ was achieved through a political engagement process, albeit judicially supervised, and not by an outright order of mandamus by the Constitutional Court. In that case, the City of Johannesburg sought the orders of the High Court to evict about 400 people from some buildings in the inner city of Johannesburg which the city authorities considered unsafe for habitation.⁸¹ The residents opposed the application arguing among others that since the City had not provided them with adequate and alternative housing they had no right to evict them. Relying on *Grootboom* the High Court held that the City of Johannesburg had failed to develop and implement a plan that would 'foster conditions to enable respondents to have access to adequate housing in the inner city'.⁸² Consequently, the Court ordered the City to refrain from evicting the residents but rather implement a programme that would ensure the progressive realisation of the right to adequate housing. On appeal, the Supreme Court of Appeal reversed and granted the order of evictions subject to the provision of temporary housing for evictees who were desperately in need of it.⁸³

77 *Lottery* case (n 28 above) 1107.

78 As above, 1113.

79 *Mazibuko* (n 70 above) para 61.

80 2008 (3) SA 208 (CC).

81 See *City of Johannesburg v Rand Properties (Pty) Ltd and Others* [2006] 2 SA 240 (W) (*Rand Properties*).

82 *Rand Properties*, as above, para 32.

83 As above, para 78.

On further appeal to the Constitutional Court by the plaintiffs, the Court adopted a rather interesting approach to resolving the case. After hearing their arguments, it ordered the parties to 'engage with each other meaningfully ... in an effort to resolve the differences' taking account of 'the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned'.⁸⁴ In accordance with the order of the Court, the parties filed affidavits outlining the settlement they had reached following the engagement. Among others, it was agreed that the City should provide 'all occupiers with alternative accommodation in certain identified buildings'.⁸⁵ 'The nature and standard of the accommodation to be provided' and the manner in which the rent was to be determined were specified in the agreement.⁸⁶ All the affected residents were obliged to move into the alternative accommodation⁸⁷ while the City continued its consultations with them to provide permanent housing solutions.⁸⁸ The Court approved the settlement as part of its final judgment. It noted that the City should have made efforts to have a meaningful engagement with the occupiers both individually and collectively before considering the application for eviction. Considering the numerous constitutional obligations owed by the City towards its residents, the Court thought that the City had acted 'in a manner that is broadly at odds with the spirit and purpose' of the Constitution by seeking to evict the plaintiffs without first engaging them.⁸⁹

By adopting the process of meaningful engagement in arriving at its final decision, the Court showed that it was unwilling to make decisions and issue orders that involve serious budgetary and policy considerations. Rather, it would allow the political branches, which are best placed to make such decisions, to do so and only intervene where there have been serious breaches of the Constitution.⁹⁰ From this perspective, it is apparent that socio-economic rights litigation is indeed unconventional and generally not suited for the judicial process. It challenges the courts to entertain cases and to grant remedies foreign to the traditional notions of the judicial process. If a court were to accept such challenges without

84 *51 Olivia Road* (n 80 above) para 5.

85 As above, para 26.

86 As above, para 26.

87 As above, para 26.

88 As above, para 26.

89 As above, para 16.

90 It should be noted that some have rationalised the 'meaningful engagement' approach by the Constitutional Court as a way of ensuring democratic participation of the parties in crafting remedies as opposed to a self-imposed restraint by the Court on its powers to issue orders for the enforcement of socio-economic rights. Those who share this view argue that the meaningful engagement approach would often motivate compliance because the remedy is mutually negotiated by the parties instead of being imposed by the Court. See L Chenwi 'Meaningful engagement' in the realisation of socio-economic rights: The South African experience' (2011) 26 *Southern African Public Law* 128 and A Pillay 'Toward effective social and economic rights adjudication: The role of meaningful engagement' (2012) 10 *International Journal of Constitutional Law* 732.

regard to the doctrine of separation of powers and the proper limits of checks and balances, it would cease to be a court of law and instead become a populist or activist forum for second-guessing executive and legislative policies. But since most courts remain what courts are, and perhaps should be, they end up rejecting populist challenges to government policy resulting in the kind of restrained and deferential opinions which the apex Courts of Ghana and South Africa have produced.

7 Conclusion

What then is the way forward? What mechanism should be adopted to implement socio-economic rights? And what role, if any, should the courts have in that process? I would submit that making the judicial process the primary mechanism for the enforcement of socio-economic rights would be misconceived. As discussed in the earlier sections of this paper, the very nature of socio-economic rights makes them ill-suited for judicial enforcement. Their implementation involves finding answers to crucial moral, political and, sometimes, ethical questions that are better handled by the political branches. The preferred and pragmatic alternative would therefore seem to be a political monitoring system which should, in appropriate cases, be complemented by judicial enforcement.

The idea of using a monitoring system to ensure the effective implementation of socio-economic rights is not altogether new. In fact, it is one of the main mechanisms employed at the international level for the implementation of various human rights treaties. Under the International Covenant on Civil and Political Rights 1966,⁹¹ the International Covenant on Economic, Social and Cultural Rights 1966,⁹² the African Charter on Human and Peoples' Rights 1981,⁹³ and the Convention on the Elimination of All Forms of Discrimination Against Women 1979,⁹⁴ state parties are required to submit periodic reports to the monitoring bodies of those treaties on the steps they have taken to implement the obligations assumed. This mechanism if replicated at national levels, and strictly enforced, could prove quite effective in implementing socio-economic rights. To make it very effective, such reports could, for instance, be required of the government quarterly or half-yearly for specific sectors. They would set out in particularised detail the steps taken to implement socio-economic rights and the results achieved. This will ensure that periodically the representatives of the people are apprised of the government's action on socio-economic rights. The political costs which are likely to follow if the government showed a consistent and systematic

91 Art 40.

92 Art 16.

93 Art 62.

94 Art 18.

pattern of non-performance, will definitely be a motivation for the government to take the implementation of socio-economic rights seriously.

The possible criticism of this approach could be that in cases where you have the governing party dominating the legislature, one is not likely to have the reports strictly scrutinised, and hence the essence of the reporting system will be defeated. That argument cannot be entirely correct. This is because the report, whether presented to a house with a strong opposition membership or to one with government party dominance, would end up in the public domain. The media and the general public would get to make their own assessments independently of what the legislature does, whether or not it is dominated by one party. The essence of the reporting system, thus, lies in the real pressure the government would feel not only from the legislature, but also from the media and a civic-conscious public to take socio-economic rights seriously. However as a counterweight to the intransigence of a government that may neither take concrete steps to realise socio-economic rights nor report on them, a measure like requiring Parliament to freeze future appropriations to the government until it complies may be worthwhile. Beyond this point, a judicial order enforcing compliance with the reporting requirement on pain of conviction for contempt and possible impeachment would also be appropriate.

It would seem that the 1992 Constitution of Ghana has already taken a step towards this political monitoring and reporting approach. Article 34(2) of the Constitution mandates that the President '*shall report to Parliament at least once a year all the steps taken to ensure the realization of the [directive principles of state policy] and, in particular, the realization of basic human rights, a healthy economy, the right to work, the right to good health care and the right to education.*' In spite of this potent tool the Constitution has provided to ensure that socio-economic rights are realised for the 'blessings of liberty, equality of opportunity and prosperity' promised in the Constitution to trickle down to the masses, Parliament has failed to make Presidents and successive governments accountable to the people on how the nation's resources have been utilised. This Parliamentary inertia to strictly invoke article 34(2) may partly be blamed on the failure to understand the interpretative differences between article 34(2) and article 67 of the 1992 Constitution. While article 34(2) enjoins the President to '*report to Parliament all steps taken*' to ensure the realisation of the socio-economic rights in chapter Six of the Constitution, article 67 says '[t]he President shall, at the beginning of each session of Parliament and before a dissolution of Parliament, deliver to Parliament a message on the state of the nation.'

Unfortunately, Parliament and successive Presidents under the Fourth Republic have apparently deemed the usual 'State of the Nation Address' delivered to Parliament at the beginning of each session and which often contains nothing but the empty and recycled campaign promises as a

fulfillment of article 34(2). A critical reading of the two articles and an examination of the language used by the draftsman should, however, tell every reasonable and fair reader that delivering 'a message on the state of the nation' ('State of the Nation Address') referred to in article 67 cannot mean the same thing as 'report[ing] to Parliament all steps taken' under article 34(2). The differences are quite obvious. While the draftsman, in article 67, uses the expression 'deliver ... a message' which would ordinarily mean delivery of a 'speech' or 'address', in the article 34(2) the expression 'shall report' is employed. In a speech or address, the President has the discretion to choose the items he wishes to address the nation on and what he wishes to tell the nation about those items. It is no wonder therefore that on almost all occasions, the opportunity offered by article 67 has been used to tout politically biased messages meant to excite the support bases of the person delivering the address. The expression 'shall report to Parliament' on the other hand as used in the context of article 34 could only mean 'to give an account to Parliament' or 'to account to Parliament' on the steps taken to realise the socio-economic rights in chapter six.

Again more instructive is the fact that while article 67 is silent on what should be the content of the 'message on the state of the nation', article 34(2) particularises the thematic areas on which the President's report card should give account to Parliament. The report in article 34(2) must particularise 'all the steps taken' to ensure the realisation of the Directive Principles and 'in particular the realization of basic human rights, a healthy economy, the right to work, the right to good health care and the right to education'. Under article 34(2) therefore, no discretion arises; the report must give account of the items listed and nothing less. This is why I would submit that the perennial state of the nation address given by successive Presidents under the Fourth Republic cannot be taken to be a fulfillment of the obligation under article 34(2). Far from the usual thirty to forty-five minute political speeches usually presented as the 'message on the state of the nation', article 34(2) clearly envisages a situation where detailed reports outlining the steps taken to realise each of the socio-economic rights, and highlighting the successes and/or failures chalked on each of them are laid before Parliament for scrutiny. The failure of successive parliaments and presidents under the Fourth Republic to heed article 34(2) is not only unfortunate, but also an unconstitutionality that the Supreme Court may ultimately have to address. Until Ghana and other emerging African democracies take this monitoring and reporting approach to the enforcement of socio-economic rights seriously, it will be difficult to see any significant improvement in the realisation of socio-economic rights.

With a robust political system of enforcement in place, adjudication of socio-economic rights could play then an effective complementary role. This could come in two ways: (i) negative enforcement of socio-economic rights and (ii) judicial orders for emergency humanitarian relief.

Concerning negative enforcement, the idea is that because most socio-economic rights are difficult to enforce positively, the court should leave positive enforcement to the political process and rather seize every opportunity that presents itself to stop governments from abridging socio-economic rights. In other words, since the government can generally not be compelled to satisfy a socio-economic right on demand, it should not be allowed, through policy or legislation, to frustrate an individual's independent effort to realise a socio-economic right capable of personal realisation. This approach fits more into the traditional functions of the Court and does not present conflicts between the courts' role and that of the political branches. The Constitutional Court of South Africa hinted about this in the Certification Judgment when it held that '[a]t the very minimum, socio-economic rights can be negatively protected from improper invasion'.⁹⁵ So in the *Lottery* case for instance, by adopting this principle, the Court could have held that because the government may not be compelled to provide employment to the lotto operators on demand, it could equally not be allowed to throw them out of their own private businesses by monopolising the industry.

On humanitarian relief orders, the suggestion is that the courts should be able to make orders for the positive enforcement of socio-economic rights, but only under compelling humanitarian circumstances. Such circumstances would usually be cases where sections of the population find themselves in humanitarian crises resulting from natural disasters (e.g., floods, earthquakes) or other unforeseen catastrophes, and where the government has failed to take reasonable measures to remedy the suffering of the affected persons. Where such conditions exist, it is only prudent that the courts should be recognised as having the power to order the government to take positive measures to ameliorate the suffering of the people who find themselves in the humanitarian crisis. Alternatively, if instead of a natural disaster, there is a demonstrated, systemic failure of the government to realise a socio-economic right with the result that there is or likely to be gross human rights violations like mass starvation, deaths, a disease epidemic or widespread and proven destitution, then there is no reason why the court should not be able to intervene. The humanitarian relief order would thus create an exception to the principle that courts ought, generally, to abstain from making orders for positive enforcement of socio-economic rights.

The guarantee of socio-economic rights in national constitutions is definitely a step in the right direction, and is particularly important in the third world where majority of the population continue to live in abject poverty. At the very least, it shows the sense of priority such countries attach to eradicating poverty and bridging the wide gaps of inequality. But there is no doubt that the judicial process, as we have seen so far, is not very

95 *Certification Judgment* (n 45 above) 78.

suited for the enforcement of socio-economic rights. As earlier discussed, a number of factors explain why this is so. First, the doctrine of separation of powers teaches that courts must exercise restraint concerning matters within the exclusive domain of the legislature and the executive, although, socio-economic rights litigation will have judges run ‘a government by the judiciary’. Second, although courts are generally wary of making orders that would be difficult to obey especially where they require expenditure of economic resources, socio-economic rights would normally require the making of such orders. Thus because the realisation of socio-economic rights is largely tied to the availability of financial, human and technological resources they are best handled by the political branches, at least in the first instance.⁹⁶ The courts are not the managers of the public purse; it is therefore difficult for them to determine whether the government has the financial capacity to carry out an order requiring budgetary allocation. With these complex considerations operating on their minds, it is not surprising that judges have tended to be deferential in their socio-economic jurisprudence. Accordingly, while I do not discount the role courts can play in social transformation, I would submit that building strong institutions of political accountability to monitor the day-to-day implementation of socio-economic rights would better serve the people than primarily depending on judicial enforcement which in any case is only triggered *if* someone brings a suit for an alleged constitutional violation.

And even in instances where the court’s intervention is appropriate to compel the government to take positive steps to realise a socio-economic right, ingenuity in formulating remedies and the need to guard against overambitious orders is still crucial. A court must be careful not to decree the impossible. Thus, instead of imposing its own view of what it thinks to be the appropriate measures the government ought to take to realise a particular socio-economic right, it could as a first option order that the government submit to the court, within a timeframe, a plan of action detailing all the steps, strategies, measurable targets and timelines by which the government undertakes to effectuate the particular socio-economic right. To ensure compliance, the court may further direct that the government submit a report, at periodic intervals, particularising all the steps taken, and targets met in implementing the action plan. In appropriate cases, the court may order that the claimants and the government negotiate to fashion out remedies acceptable to both parties. Where the government fails to provide a reasonable action plan or is unable to reach an agreement with the claimants as the case may be, the

96 This conclusion should be considered with the caveat that the need to expend financial, technological or human resources though usually associated with socio-economic rights, is not exclusive to them. Some civil and political rights such as the right to vote or fair trial would normally also require the expenditure of resources to effectuate them. But otherwise, generally, an order enjoining an infringement is sufficient to effectuate most civil and political rights.

court may then step in with its own orders probably formulated with inputs from court appointed experts or the country's human rights commission. This structured judicial approach to enforcing socio-economic rights is less confrontational and strikes a fair balance between separation of powers and judicial checks and balances. It is well suited to the complementary role of the courts argued in this chapter and is likely to engender the confidence and respect of the parties involved in a socio-economic right litigation.