Socio-economic rights and implications for intergovernmental fiscal relations in South Africa

Paper prepared for the FFC Conference: A Review of South Africa's Intergovernmental Fiscal Relations System: An African Perspective on Fiscal Decentralization
10-13 August 2014

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A. Introduction

South Africa's Constitution has been widely hailed as transformative. The Bill of Rights entrenches an ensemble of basic rights, including so-called economic and social rights related to health, education, housing, and social assistance. The Constitution led the way to broaden rights guarantees beyond the traditional civil and political sphere, acknowledging the imperative of remedying South Africa's legacy of economic and social deprivation. With socio-economic rights in the Constitution, judicial enforcement became a means of advancing realization of these rights.

Under article 7(2) of the Constitution the State must respect, protect, promote and fulfill the rights in the Bill of Rights. It further provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of State. This means, for instance, that the National Treasury in its preparation of budget documents detailing allocations, the provincial departments of education in allocating funds to schools and purchasing textbooks, and local Governments in providing access to water, are all bound by Constitution, which creates affirmative duties ('promote and fulfill'). The critical point is that organs of State are subject to constitutional duties irrespective of whether their decisions or actions would seem, a priori, to fall within the scope of judicial review.

The traditional focus on justiciability and the role of the courts leads to the impression that only those decisions that can be taken before the courts involve the rights. This is problematic on a number of accounts. First, accountability for rights is not limited to judicial mechanisms – other mechanisms for accountability include Parliament, Chapter 9 institutions, civil society, and the media. For instance, under section 184(3) of the Constitution the South African Human Rights Commission is tasked with collecting from organs of State information on the realization of the rights concerning housing, health care, food, water, social security, education and the environment.[1] Second, policy-makers and decision-makers often operate under the assumption they are absolved from engaging with the rights dimension, forgetting that their actions and decisions take place in the context of the binding imperative to respect, protect, promote and fulfill rights. Under the South African Constitution the guiding values and parameters for technocratic planning are found in the Constitution itself. Lastly, it is not advisable to make hard-and-fast assumption what will be considered justiciable by a court in the future.

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[1] South African Human Rights Commission, Ninth section 184(3) Report on economic and social rights, 2012-2013 (2014).

Accountability for adherence to the Bill of Rights exists on a continuum, with judicial review at one end. A key argument underpinning the approach taken in this paper is that accountability of the organs of State for the duty to respect, protect, promote and fulfill rights runs well beyond the scope of decisions that would ordinarily be considered subject to judicial review. The question is thus not whether an issue could be reviewed by a court, but rather did the organ of State meaningfully engage with its rights obligations, demonstrating that it actions promoted and fulfilled the applicable right? The socio-economic rights can be realized to their fullest potential when decision-makers, whether notionally subject to judicial review or not, fully internalize and apply the duties to respect, promote and fulfill. The broad obligation to promote and fulfill socio-economic rights does not end with the allocation of a given budget. As the South African Human Rights Commission has noted[2]

> 'It is incumbent that the State devises sound macroeconomic, fiscal and monetary policies so as to maximise the revenue pool earmarked for the delivery of socio-economic rights [and to] manage public finances in an efficient and accountable manner so as to maximise the ability of the service delivery agencies to deliver services.

Lawyers are equipped for – and thus naturally drawn to – a court-centric analysis. This mode of analysis, for all its analytical power, does not consider other structural economic factors that may contribute to continued poverty and under-development, even in the event that the State were to comply adequately with its socio-economic rights obligations. Such factors might include monetary policy (higher interest rates to keep inflation in check, but with effect of higher borrowing costs), effect on local manufacturers of cheaper imports (lowering of tariff barriers in line with WTO mandates), mis-match between labour and skills demanded by labour market (weak education system), lack of appropriate infrastructure (lack of investment), and external shocks (the 2008 economic and financial crisis, natural disasters). Other broader structural issues such as violence against women and racism would also intersect with and reinforce negative impacts of economic factors.

Backdrop to the realization of socio-economic rights in South Africa

A legal analysis of socio-economic rights should not be undertaken without some consideration of the context. This is all the more the case for an analysis that looks at this question with regard to intergovernmental fiscal relations. In the South African context, at least two realities stand out: persistent inequality and the relatively sluggish growth of the South African economy.

Poverty and inequality

Apartheid has deeply scarred South Africa's development trajectory. The long-run legacies of racial interventions in the labour market, spatial development and housing, and unequal access to education and housing, and skewed expenditures on social services are hard to reverse. It is not entirely surprising that a system predicated on profoundly unequal development led to very high levels of inequality. Today South Africa remains one of the most unequal countries in the world,

[2] South African Human Rights Commission, Second economic and social rights report 1998-1999 (2000),quoted in K Chetty 'The public finance implications of recent socio-economic rights judgments' *Law, Democracy & Development* (2002) 231 at 236.

with a Gini coefficient – a measure of income inequality – of 0.7 in 2008.[3] By comparison, the Gini value was estimated as 54.7 in Brazil and 40.1 in the Russian Federation in 2009.[4]

At the same time, while most analyses suggest that aggregate poverty declined only slightly over the post-1994 period, there has been a significant improvement to public services, which constitute an important contribution to overall wellbeing.[5] This encompasses improvements in areas such as electrification, health care, housing and access to education. Yet income inequality has not improved since 1994.[6] In fact, in 2010, the income ratio between the 10 top and bottom 10 per cent of households was around 20, far higher than the level of 5 in the United States, which is one of the most unequal countries in the OECD. The share of income accruing to the wealthiest share of households has also risen, accounting for 58 per cent of total income in 2008.[7] At the root of this stark income inequality, is high and persistent unemployment.[8] This is due to both the large percentage of households who do not participate in the labour market, as well as the high inequality for those who do have access to the labour market, with the latter effect appearing to be stronger.

Without a the implementation of social assistance programmes – primarily the old age pension, the child support grant and the disability grant – the poverty picture would be far bleaker. The Government has a benefit system to tackle poverty and alleviate inequality by allocating significant resources to direct redistributive policies. These are designed to both provide income support to the poor, as well as halt the intergenerational transmission of poverty by enabling households to invest in better health, education and nutrition for their children. As a consequence, Government spending on social assistance has risen substantially, and at 4.4 per cent of GDP it is high by developing country standards. Two thirds of the income of the poorest 25 per cent of incomes derives from social grants.[9] The Planning Commission Diagnostic Report states that the provision of social grants was the most important contributor to falling income poverty from 2000 onwards.[10] Startlingly, without the roll-out of social assistance grants, it is estimated that two-fifths of the population would have seen its income decline in the first decade after apartheid.[11]

Over the period from 1994 to 2010, expenditure has grown across all main areas of spending, with the exception of defence, which dropped to below 2 per cent of GDP.[12] The sharpest increase has been in social spending, including the introduction and expansion of the child support grant, resulting in a share of over 4 per cent of GDP. Education at around 6 per cent of GDP and at 20 per cent of consolidated Government expenditure is significantly higher than any other category. The majority of this funding is allocated to provincial education departments to pay teachers' salaries.

Slow and not so steady

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[3] M Leibbrandt et al. *Trends in South African Income Distribution and Poverty since the fall of Apartheid* (2010) OECD Social, Employment and Migration Working Papers, No. 101, OECD Publishing 33.
[4] OECD, SA Country report (2013) 18.
[5] Leibbrandt et al, 45.
[6] World Bank, Country Update, 2012.
[7] Leibbrandt et al, 25-26.
[8] World Bank, supra note 6; Leibbrandt et al 45.
[9] Leibbrandt et al ,at 26, 63.
[10] National Planning Commission, Diagnostic Overview (2011) at 9.
[11] World Bank, supra note 6.
[12] National Treasury, 2014 Budget Review, 80.

While South Africa has averaged a credible 3.2 per cent since 1995, it has not been able to attain the levels of growth needed to absorb new entrants into the labour market.[13] We have seen above that the lack of employment, as well as inequalities in earnings, are at the heart of South Africa's severe income inequality. Commonly cited obstacles to higher growth include industrial concentration, leading to lessened competition and higher prices; skill shortages, partly due to poor education outcomes; labour market rigidities; and lack of investment infrastructure, as evidenced in the electricity sector.[14]

While boosting growth, South Africa also needs to make a transition to greater environmental sustainability in the medium- to long-term. The South African economy is energy intensive, the legacy of the mineral extraction and processing sector, facilitated by artificially low electricity prices. The dominance of coal for electricity generation means that per carbon dioxide emissions are high relative to population (per capita) and the size of the economy. South Africa is a dry country, and the sustainable management and use of water resources will become even more important as the population grows and the impacts of climate change are increasingly manifested.

Apartheid left poverty and economic growth with a spatial dimension. As a result, there is a skewed distribution of poverty, unemployment and low growth in certain parts of the country, and concentrations of wealth, economic growth and employment generation potential in others. These disparities in developmental needs and in revenue generation ability across provinces and municipalities place an additional burden on the fiscal equalization mechanism, a normal feature of any system of decentralized Government. Not only must the system of inter-governmental fiscal relations achieve a broadly fair and efficient distribution of revenues, but it must also address the above-mentioned disparities. Finally, this takes place in the context in which all spheres of Government are obliged to promote and fulfill socio-economic rights.

The structure of this paper

This paper proceeds as follows. We analyse the constitutional and legal context, and because of the voluminous nature of the cases, we mainly focus on the jurisprudence of the Constitutional Court in deciding socio-economic cases in light of budget considerations. We then move on to look at the international legal framework, including the International Covenant on Economic, Social and Cultural Rights, to which South Africa is poised to become a party, and some of the more recent recommendations made by select Special Rapporteurs. The next section moves on to explore implications of the constitutional duty to respect, protect and fulfill human rights in the context of intergovernmental fiscal relations. The paper then chooses a few areas of focus, including education and food security, and then concludes with a list of non-exhaustive preliminary recommendations for consideration.

B. Constitutional and legal context and oversight

[13] World Bank, supra note 6.

[14] World Bank, supra note 6; OECD Country Survey South Africa, supra note 4. Useful and contextualized discussion of growth limiting factors in the Diagnostic Overview prepared by the National Planning Commission, pp. 10-19.

A number of rights in the Bill of Rights are considered socio-economic rights.[15] Some are cast as unqualified rights, such as children's rights and the right to a basic education without any internal limitations. Others are cast as everyone having the right of access to rights, including the right to housing, health care, food, water and social security, providing that the State must take reasonable legislative and other measures, within its available resources, to achieve their progressive realization.

While it is important to focus on budgets and socio-economic rights, it is equally important to assess other public investment in basic infrastructure. Elson et al give the example of efforts to realize children's rights focusing exclusively on health and education with no infrastructure investments such as roads and public transport. Though the spending on health and education can have positive human rights outcomes, the lack of spending on infrastructure may deny some children access to clinics and schools. Thus spending on economic and social rights should not be limited to social sectors alone but should include investments in economic sectors such a transport and energy.[16] Where the private sector is subcontracted to provide public services, States have a duty to monitor and regulate the private provision of these services to ensure that human rights obligations are met. The extent to which socio-economic rights are supported by public funds does not only depend on the allocation of funds, but how effectively and efficiently it is used.

There are important implications for resource distribution in adjudication of socio-economic rights. The appropriateness of a court making decisions about how budgets are to be allocated and spent is at the heart of the separation of powers doctrine. The reasoning is that courts are generally ill-suited to adjudicate upon issues which could have multiple social and economic consequences for the community. Decisions which have financial and budgetary implications are normally reserved for the elected and political branches of Government. Courts lack the expertise and legitimacy to decide on any aspect of financial allocation and the budget, and have traditionally been cautioned to exercise significant restraint when these matters come before them. Polycentric decisions that involve resource allocation are seen to involve particularly complex issues and interdependent interests that courts have no expertise or legitimacy in deciding.[17]

We argue that the legislative and executive branches of Government are institutionally best equipped, and enjoy democratic legitimacy, to weigh up competing, polycentric issues and make a decision on the budget and to do so in the framework of a national economic policy. However, under our constitutional dispensation, the Constitution is the supreme law of the Republic, and any

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[15] Socio-economic rights are foregrounded in the Constitutional Court's jurisprudence. For example, in *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC), the Court noted that left unchecked, corruption would impact on a range of rights, including socio-economic rights. There are also other rights that overlap with socio-economic rights, such as the right to equality. See for example *Khosa v Minister of Social Development, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505(CC). Roux argues that 'judicial review of political resource allocation under the right to just administrative action may pose as great a risk to the court's reputation and standing as that posed by judicial review in respect of socio-economic or equality rights' T Roux 'Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court' *Democratization* (2002) 92.

[16] D Elson, R Balakrishnan and J Heintz 'Public Finances: Maximum Available Resources and Human Rights in *Human rights and public finance : budgets and the promotion of economic and social rights* A Nolan, R O'Connell and C Harvey (eds) at page 15.

[17] Lon Fuller in 1978 famously argued that polycentric disputes are unsuitable for adjudication by the courts (see L Fuller and Winston 'The Forms and Limits of Adjudication' in (92) *Harvard Law Review* (1978) at 353. A polycentric issue involves a large and complicated web of interdependent relationships, and where a change to one factor produces an incalculable series of changes to other factors. Fuller used the image of a spider's web to show how pulling on one string would distribute new and complicated tensions throughout all of the other strands of the web.

law or conduct inconsistent with it is invalid. The role of the courts to safeguard the supremacy of the Constitution is protected under it. Liebenberg argues that the legislative and executive branches of Government may not comply with their socio-economic rights obligations due to a range of problems, including oversight, bureaucratic inertia or influence exercised by powerful interest groups. She notes:[18]

> 'In adjudicating socio-economic rights claims, courts should not simply take refuge in the theoretical institutional advantages of the other branches of Government. Instead they should closely scrutinize the actual conduct and decisions of these branches in relation to the issues at stake in the litigation. The mere fact that the realization of a socio-economic right will have extensive resource implications does not constitute an automatic ground for judicial non-intervention.'

The traditional distinction between civil and political rights as conferring only negative obligations and socio-economic rights as positive rights has been rejected in the jurisprudence of the Constitutional Court.[19] It is not just in cases of socio-economic rights that courts make decisions about the allocation of resources, and the Constitutional Court has said that rights such as equality, freedom of speech and the right to a fair trial also has direct implications for budgetary matters. The Constitutional Court has held that in determining what is reasonable for the achievement of socio-economic rights, availability of resources is an important factor.[20]

(a) Reasonableness and budgets: a restrained role for the courts?

In *Minister of Health v Treatment Action Campaign (TAC)*[21] the Constitutional Court held that the Constitution contemplates a restrained and focused role for the courts, which was to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. While such determinations may in fact have budgetary implications, they are not in themselves directed at rearranging budgets. In this way, the Court noted, the judicial, legislative and executive functions achieve appropriate constitutional balance.

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[18] S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2012) at 195.

[19] Eighteen years ago, in *Certification of the Constitutional Court of South Africa* 1996 (4) SA 744 (CC), the Constitutional Court stated (at para 77) as follows: 'It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of State benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.' More recently, in *S v Jaipal* 2005 (4) SA 581 (CC) the Court stated at (paras 55-56) as follows: 'For the state to respect, protect, promote and fulfill the rights in the Bill of Rights, resources are required. The same applies to the state's obligation to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. The right to a fair trial requires considerable resources in order to provide for buildings with court rooms, offices and libraries, recording facilities and security measures and for adequately trained and salaried judicial officers, prosecutors, interpreters and administrative staff….. Few countries in the world have unlimited or even sufficient resources to meet all their socio-political and economic needs. In view of South Africa's history and present attempts at transformation and the eradication of poverty, inequality and other social evils, resources would obviously not always be adequate. However, as far as upholding fundamental rights and the other imperatives of the Constitution is concerned, we must guard against popularizing a lame acceptance that things do not work as they ought to, and that one should simply get used to it.'

[20] See for example, *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) at para 11; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 46.

[21] 2002 (5) SA 721 (CC) at para 38.

More recently, the South African Constitutional Court has more directly stated it is 'institutionally inappropriate' for a court to determine precisely what the achievement of any particular social and economic right entails. These matters, according to the Court, are best left for the legislature and executive which are '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.' The Court noted that it is a matter of democratic accountability that the legislature and executive should in fact do so because it is their programmes and promises that are subjected to democratic popular choice.[22]

In *Soobramoney*, the Constitutional Court held that that the claim against the State, in the context of the provincial health budget, to provide dialysis treatment was an unreasonable inroad into the budget. The applicant, a terminally ill patient without his own financial means, sought renal dialysis treatment from a provincial hospital which rejected him on the grounds that he did not meet the requirements for eligibility. The Court held that (at para 28):

> 'It is estimated that the cost to the State of treating one chronically ill patient by means of renal dialysis provided twice a week at a State hospital is approximately R60 000 per annum. If all the persons in South Africa who suffer from chronic renal failure were to be provided with dialysis treatment – and many of them, as the appellant does, would require treatment three times a week – the cost of doing so would make substantial inroads into the health budget. And if this principle were to be applied to all patients claiming access to expensive medical treatment or expensive drugs, the health budget would have to be dramatically increased to the prejudice of other needs which the State has to meet.'

In *Soobramoney*, the Court noted that funding for health care involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon which priorities should be met, and a court will be reluctant to interfere with rational decisions taken in good faith by the political organs and medical authorities.[23] The challenge for judges in cases dealing with healthcare rights is to devise appropriate standards of review that grant a sufficient margin of discretion to decision-makers, while demanding appropriate justification for infringements of constitutional rights. Pieterse argues that in the case of health care rights, this task is significantly complicated because of the deference to health care professionals, who have a monopoly on the scientific knowledge required to determine the need and likely success of medical treatment in any particular case, combined with deference to political decision-makers. [24]

In *Grootboom*, the first of the eviction cases, the reasonableness standard was more formally adopted by the Court. The test focuses on the fairness or appropriateness of Government action to give effect to socio-economic rights.[25] In this case the Constitutional Court pointed out that it was the joint responsibility of both national and provincial Government to fulfill the right to access to housing. A reasonable housing programme must clearly allocate responsibilities to the different spheres of Government and ensure that the appropriate financial and human resources are available, particularly in relation to the allocation of national revenue to the provinces and local Government

[22] *Mazibuko v City of Johannesburg* 2010 SA (4) 1 (CC) at para 61.
[23] At para 29.
[24] M Pieterse 'Health care rights, resources and rationing' 123 *SALJ* (2007) at 529. See also *Van Biljon v Minister of Correctional Services* 1997 (4) 441 (C).
[25] The Court rejected an approach called for by the amicus curiae on the basis of the idea that socioeconomic rights had a minimum core content based on the provisions of the International Covenant on Economic, Social and Cultural Rights.

on an equitable basis. The measures taken to achieve the right to housing 'must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable' (at para 46).

The Court held that the execution of the housing programme of the State had been a major achievement (at para 53):

> 'Large sums of money have been spent and a significant number of houses has been built. Considerable thought, energy, resources and expertise have been and continue to be devoted to the process of effective housing delivery. It is a programme that is aimed at achieving the progressive realization of the right of access to adequate housing.'

However, the Court held that a question which must be answered is whether the measures adopted are reasonable within the meaning of section 26 of the Constitution. The Court held that the failure to make provisions for those in desperate need was in violation of the Constitution. A reasonable part of the national housing budget needs to be dedicated to those in desperate need, but the precise allocation for this was for the national Government to decide. The Court held that implementation of the programme requires budgetary support by the national Government, requiring it to 'plan, budget and monitor the fulfillment of immediate needs and the management of crises'. The Court held that such planning requires proper co-operation between the different spheres of Government.[26] Any housing policy must provide relief for people with 'no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.'[27]

In *Treatment Action Campaign*, which sought the provision of Nevirapine to HIV-positive pregnant women to prevent mother-to-child transmission of HIV, the State raised resource constraints as its primary defense. The Court held, however, that it was not necessary to deal with the resource constraint arguments raised by the State because there had been a change in the conditions since the start of the case. The Court was informed of significant additional funds available for the treatment of HIV, including for reducing the incidence of mother-to-child transmission. Budgetary constraints were no longer an impediment and the problems of financial incapacity no longer existed.

Despite the effects of the decisions in *Grootboom* and *Treatment Action Campaign*, the Court has, in subsequent cases, been at pains to emphasize that both decisions simply illustrate its institutional respect for the policy-making function of the executive and the legislative branches of Government. The Court stated that it did not draft policy or determine the content, but simply found that the policy did not meet the required constitutional standard of reasonableness and directed appropriate remedies.

In *Mazibuko v City of Johannesburg*, O'Regan J crystallized the grounds on which the courts will generally review measures for determining reasonableness (at para 67):

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[26] At para 68.

[27] At para 99. See also *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 (3) All SA 169 (SCA) and *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* where the Supreme Court of Appeal and the Constitutional Court allowed the occupiers to remain on the land until alternative land or accommodation was made available by the state, and to require the state to pay Constitutional damages to the property owner for the violation of its property rights. In a decision confirmed by the Constitutional Court, the SCA held that the State failure to give effect to the obligation to provide basic temporary shelter for unlawful occupiers who face homelessness would constitute a breach of Constitutional rights.

> 'Thus the positive obligations imposed upon Government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If Government takes no steps to realise the rights, the courts will require Government to take steps. If Government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom*, it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If Government adopts a policy with unreasonable limitations or exclusions, as in *Treatment Action Campaign No 2*, the Court may order that those are removed. Finally, the obligation of progressive realization imposes a duty upon Government continually to review its policies to ensure that the achievement of the right is progressively realized.'

(b) Available resources

Sections 26(2) and 27(2) provide that the State must take reasonable legislative and other measures 'within its available resources'. In *Grootboom* the Court interpreted this phrase, stating that obligation to take measures

> '[D]oes not require the State to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.'[28]

It has been pointed out that 'available resources' can be interpreted in a narrow or wide sense. The former would encompass only resources budgeted for a particular programme, while the latter would notionally include all the resources at the disposal of the State.[29] The approach of the Constitutional Court has been to avoid being prescriptive, thus not encroaching explicitly on the budgeting process of the State. Roux points out that in *Grootboom* the State in giving effect to the ruling would be required to redistribute resources within the national housing programme, but the executive was not ordered to ensure that the shelter needs of persons in desperate need were met first, nor was it required to allocate more resources to the housing programme.[30] Assuming a budget covers a designated class of persons, and the court finds that measures excluding a category of persons from that class fail the reasonableness test, then clearly consideration of 'available resources' would be broader than the original budget. Of course, the availability of resources partially determines what is reasonable. Consider a case where pursuant to section 27(1)(b) a policy is adopted that exclusively funds access to clean water in urban settlements, leaving out rural settlements entirely on cost grounds due to their geographic dispersal. Would such a policy pass constitutional muster? This seems unlikely. What if the policy prioritized urban settlements, but added some less favourable measures to address the needs of rural areas? Cost as justification for denial of access, by a category of persons in need to basic service such as water, seems unlikely to be considered reasonable. Reasonableness, however, depends on the circumstances of the situation. Thus it could be argued that if provision in rural areas is more expensive than in urban areas, this may be an acceptable basis for differential service provision.

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[28] *Government of the Republic of South Africa v. Grootboom* at para 46.

[29] D Moellendorf 'Reasoning about resources: Soobramoney and the future of socio-economic rights claims' 14 *South African Journal on Human Rights* (1998) at 330.

[30] Roux at 98.

The Court has also underlined that unsubstantiated claims of lack of resources are insufficient. In determining whether resource-based arguments presented by the State will be sustained, careful consideration will be given to the precise nature of the constraints, whether human or financial, in the light of the overall resources of the organ of State. These arguments should be carefully presented to the Court which will not simply tolerate a 'bald assertion' of resource constraints by the State.[31] The Constitutional Court will make orders with budgetary and resource implications where the State does not place clear evidence before the Court demonstrating that it lacks available resources or has other competing claims on its resources.[32] The State should be allowed the flexibility to decide how and from where it will gather the resources to give effect to the Court's judgment.[33]

Does 'available resources' constitute a stumbling block to the realization of socio-economic rights? First, as a matter of law, the grounds outlined in *Mazibuk*o on which the Court will test socio-economic rights claims are circumscribed. Thus supervision of existing programmes for impermissible discrimination or the unreasonable exclusion of certain groups, as in *Khosa*, would seem to imply by-and-large incremental additional resources. Second, even rulings with significant budgetary implications are unlikely to cause disarray in planning and budgeting processes. This is because the jurisprudence does not recognize directly enforceable claims, which would have to be immediately met, potentially upending planned budgets.[34] Rather, as we have seen, the review for reasonableness of plans and programmes is far more sensitive to context, with the State normally being provided with broad guidance on the elements of a reasonable response, as opposed to a rigid prescription. Sufficient flexibility exists in the IGFR system, for instance in the form of conditional grants, to accommodate policy changes occasioned by rights litigation.

The Court has also greeted with skepticism arguments about lack of resources in cases where budgeting for particular needs ought to have been foreseen. The issue that faced the Court in *City of Johannesburg v Blue Moonlight* [35]was whether a policy of the City of Johannesburg that excluded people evicted by private landowners from the provision of temporary shelter was consistent with Section 26(2) of the Constitution. The city's housing policy precluded it from funding emergency housing for those evicted from their homes by private landowners. The City alleged that they lacked the resources to provide the occupiers with emergency housing if they were evicted. The City submitted that it was not obliged to go beyond its available budgeted resources to secure housing, and to do so would amount to unauthorized expenditure [36] Rejecting this finding, the Court held that the municipality could not rely on an absence of resources when it had not attempted to find resources to allocate to emergency housing projects. The Court noted that the City ought to plan proactively

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[31] *Rail Commuters Action Group v Transnet Limited t/a Metrorail* 2005 (2) SA 359 (CC) at para 88.

[32] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* involved an application for an order confirming the Constitutional invalidity of legislation which limited eligibility for social assistance grants to citizens of South Africa. The Constitutional Court found, in relation to the budgetary constraint argument, that the costs of extending social assistance grants to permanent residents was relatively minor in the context of the total costs of the social grants programme.

[33] Under international law, the term "available resources" applies both to domestic resources and to any international economic or technical assistance or cooperation available to a State party.

[34] In Brazil, for instance, the courts have recognized direct enforceability of certain rights, such as health. See O Luiz and M Ferraz 'Between usurpation and abdication? The right to health in the courts of Brazil and South Africa, in O Vilhena, U Baxi and F Viljoen, eds. *Transformative Constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) 375.

[35] 2012 (2) SA 104 (CC).

[36] At para 72.

and budget for emergency situations in its yearly application for funds. The City is entitled to approach the province for assistance, but the city has the power and the duty to finance its own emergency housing scheme.

This obligation becomes more cogent when one considers that municipalities are ideally suited to react, engage and plan to fulfill the needs of local communities. A municipality should not pick and choose in deciding which housing crises it responds to, but should respond to all emergency housing situations in a reasonable manner. The fact that the property was owned privately did not matter: the owner was required to patiently wait to vindicate his/her property until the State has been given a reasonable opportunity to discharge its obligations to provide alternative accommodation. The City had not provided details of its budget to the Court. The Court held that it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfillment of its obligations.'[37]

(c) Progressive realization

In *Grootboom* the Court analyzed the meaning of 'progressive realization', recognizing the term's close kinship with the same language in the ICESCR. The Court cited with approval a passage from General Comment 9 of the Committee on Economic, Social and Cultural Rights:[38]

> 'It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.'

In the context of *Grootboom*, the Court explained that 'progressive realization' meant that access to housing should be progressively facilitated for not only a larger number of people, but also for a broader category of persons over time. In the process the State needed to examine, and lower if possible, legal, administrative, operational and financial barriers.[39] In *Mazibuko* O'Regan confirmed that 'the obligation of progressive realization imposes a duty upon Government continually to review its policies to ensure that the achievement of the right is progressively realized.' Failure to take reasonable measures to comply with this obligation would be grounds for judicial intervention. One could imagine that an organ of State that possesses the requisite administrative and operational capacity, and has garnered the financial resources needed to promote the further realization of a right, but remains inactive in addressing legal barriers to action, would be at risk of non-compliance with the duty of progressive realization. Inactivity and passive acceptance of barriers to action are signs that progressive realization is being neglected.

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[37] At para 74. See also *Occupiers of Skurweplaas v PPC Aggregate Quarries* 2012 (4) BCLR 382 (CC); and *Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread* 2012 (2) SA 337 (CC) where the Court held that the length of time of the occupation did not matter. The Court emphasized that courts have the power and the duty to order municipalities to investigate and furnish information relating to their ability to provide alternative accommodation, in the event that it is found that a municipality's approach is unsatisfactory.

[38] General Comment 3, 1990, para. 9.

[39] At para. 45.

(d) "Meaningful engagement" and resources

In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* [40] the occupiers approached the Court to set aside an order that they be evicted from buildings in the inner city of Johannesburg that was alleged to be unfit for habitation. This case introduced the concept of 'meaningful engagement' to socio-economic rights and held that every municipality had to engage meaningfully with people who would become homeless because it evicts them. The concept of meaningful engagement keeps the decision about how budgets are to be allocated with the Government, but requires them to negotiate with those who may be affected by evictions, and implement agreements that have been reached. The Court cannot 'walk away' if people are not able to understand the importance held that a municipality 'of engagement and must make all reasonable efforts to do so (para 15). Meaningful engagement requires the Government to invest significant financial, institutional and human resources to negotiate and come to agreement between the parties.

(e) Ensuring implementation of Government policy

The courts also make decisions on budgetary matters through ensuring the implementation of pre-existing Government policy. One of the persistent issues that the Court has to face is the bureaucratic inefficiency and lack of implementation. The Court will give firm guidelines, together with tightly set timelines, to the Government to implement its existing policy, often asserting that it is thereby not intruding upon the terrain of the legislative and executive. [41] In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC), twenty thousand people (the occupiers) sought to set aside an order for their eviction by the Cape High Court, which was granted in order to implement a housing project on the site of the Joe Slovo informal settlement The applicants had been promised temporary accommodation 15 kilometres away, but were not given any undertaking regarding whether they would be entitled to permanent occupied on the Joe Slovo site. The Court, despite five separate judgments, all agreed to an order that allowed the eviction on condition that it was staggered forty-five weeks; directed that sufficient schools and clinics be provided at the relocation site, laid down stringent conditions on the nature of the temporary houses and available services at the new location; directed that alternative accommodation be provided at the point of eviction, and required that the Government should ensure that 70 per cent of the houses that were to be constructed at Joe Slovo would be allocated to the people relocated from the site. The Court also required the Government to engage with the applicants and to report back to the Court at regular intervals on the progress with the implementation of the order. The Government was allowed to carry out the eviction it had sought, but the Court required it to implement the policy in the light of the some of the applicants' interests despite the significant additional costs that this would require. The Court was in other words 'willing to hold the

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[40] 2008 (3) SA 208 (CC). See also Yacoob J in *Abahlali Basemjondolo Movement v Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC) at para 69 where the obligation to meaningfully engage is extended to private parties seeking eviction.

[41] See *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) 312 BCLR (CC), where the applicants sought an order against the Municipality to provide them with basic services, pending a decision on whether their settlement would be upgraded to a formal township. Three years later, the MEC had not made a decision on the municipality's application to upgrade their settlement. The Court held that facts illustrate that the plight of the poor is desperate and that their patience is often tested to the limit by unfortunate and unjustified delays (at para 1). Despite the fact that the 'role of the courts in the achievement of socio-economic rights is an important but limited one', the case illustrated that bureaucratic efficiency and close co-operation between different spheres of Government and communities are essential. The Court held that 'the delay by the Province is the most immediate reason for the dilemma and desperate plight of the residents. As long as the status of the Settlement is in limbo, little can be done to improve their situation regarding sanitation, sufficient lighting to enhance community safety and access by emergency vehicles, as well as a range of other services.' The MEC was ordered to make a decision within 14 months of the date of the Court's order.

Government to its own account of what the policy was meant to provide, and to ensure that it was implemented.'[42]

(f) Setting new entitlements

The Court has also set new entitlements in the context of socio-economic rights which has budgetary implications. In *Joseph v City of Johannesburg*[43] the Court found that the applicants were entitled to notice before the city could terminate their supply of electricity. Dugard and Wilson argue as follows:[44]

> 'The creation of a constitutional right to electricity in *Joseph* was a significant advance in the interpretation and enforcement of socio-economic rights. The positive obligations correlated to the right are likely to be at least as circumscribed and difficult to define and enforce as they are with other socio-economic rights. However, the *Joseph* judgment opens up a range of new possibilities for holding electricity providers accountable. At the very least, the steps taken by electricity utilities, which might affect existing supply, will have to be taken in a procedurally fair manner.'

National Association of Welfare Organizations and Non-Governmental Organizations v Member of the Executive Council for Social Development, Free State [45] concerned the question of the amount of funding that non-profit organisations that provide social welfare services in the Free State province could receive from the provincial Government, and the extent to which budgetary constraints by the provincial Government could limit the amount of funding that was provided to them. The Government relies on non-profit organizations to a considerable extent for the delivery of social services, especially child welfare services.

Van Der Merwe J held that the provincial department's policy of funding for non-Governmental organizations had to take into account that the constitutional and statutory obligation of the department is to care for children, older persons and vulnerable persons in need and to provide statutory services. In providing such services, non-Governmental organizations essentially fulfill the constitutional and statutory services that the department ought to fulfill. The Court held that to determine how these organisations were to be funded 'the policy must contain a fair, equitable and transparent method of determination' of what NPO's are able to contribute to the provision of care for children, older children and vulnerable persons in need and statutory services'[46]. The policy of the department was in the circumstances, not reasonable, in that it lacked any method of determination described above. The Court held that because of the fact that department lacked 'leadership and/or capacity' it was satisfied that judicial supervision was called for in the process of the department adopting a revised or redrafted policy. Van Der Merwe J rejected part of the draft new policy in 2011 on the basis of the department's budget. He held that the department 'must do proper planning and prioritisation and there was no reason for the senseless procedures of approval of service plans that cannot be fully funded…and payment of palpably insufficient amounts to all approved NPO's.'[47] In the third hearing, the department was ordered to meaningfully engage with

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[42] J Dugard and S Wilson Constitutional jurisprudence: the first and second waves' in M Langford, B Cousins, J Dugard and T Madlingozi *Socio-Economic Rights in South Africa: Symbols or Substance* (2013)at50.

[43] 2010 (4) SA 55 (CC).

[44] Dugard and Wilson supra note 42 at 53. See also *Abahlahli* and the discussion of this case in the same article.

[45] Case no. 1719/2010 ZAFSHC 73 (5 August 2010)

[46] At para 49.

[47] *National Association of Welfare Organization and Non-Governmental Organizations v MEC for Social Development, Free State* Case no.1719/2010 ZAFSCH 84 (9 June 2011) at para 22.

the applicants and consider the applicants' comments and recommendations on the department's proposed revised policy.[48]

NPOs fill a gap in the provision of social services, in the process contributing to the realization of constitutional rights by providing a service on behalf of the Government. The Court found that there must be a clear policy, fairly remunerating them for their services. For the first time, in essence the Court recognized that NPOs fulfilled a constitutional and statutory responsibility entitling them to Government funding, and raising questions for appropriate planning and budgeting at the provincial level.

(g) Non-fullfilment of court orders

An ongoing problem in South Africa has been the tardiness of the Government, particularly local Government, to implement the decisions of the courts. In some instances municipalities have repeatedly requested postponements in order to comply with court orders and eventually fail to meet deadlines set by the courts. In *Mchunu v Executive Mayor of eThekwini* [49] the applicants had been relocated from their informal settlement to allow for the construction of a road. The relocation had been permitted on condition that the families be provided with permanent housing within a year of the court order. The deadline passed without the order being complied with. The Durban High Court held that the city's municipal housing officers, in particular the Executive Mayor, City Manager and Director of Housing, were constitutionally and statutorily obliged to take all necessary steps" to ensure that permanent housing was provided to the occupiers within three months from the court order. If this was not done they would be held in contempt of court and may be fined or imprisoned.

In *Hlophe v Johannesburg Metropolitan Municipality*[50] the Court was faced with numerous postponements and reports that failed to account for the measures undertaken by the city to comply with its obligations to provide alternative accommodation for a group facing eviction from a privately owned building. The City argued that it could not comply with the order and would not be able to provide alternative accommodation for the foreseeable future, this in spite of the City's previously agreement to be bound by the order. The Court directed the Executive Mayor, City Manager and Director of Housing for the City to personally explain why the City had not acted to provide shelter to those rendered homeless by eviction, and to take all necessary steps to ensure that the occupiers were provided with shelter within 2 months of the judgment. If they failed to do so they could be fined or imprisoned for contempt of court.

Non-compliance with court orders is a troublesome phenomenon in South Africa, leading to hollow and unenforceable court judgments and rendering judicial adjudication meaningless.[51] The

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[48] *National Association of Welfare Organization and Non-Governmental Organizations v MEC for Social Development, Free State* Case no.1719/2010 ZAFSHC 49 (28 March 2013).

[49] 2013 (1) SA 555 (KZD).

[50] 2013 (4) SA 121 (GSJ).

[51] See for example C Mbazira *You are the weakest link in realizing socio-economic rights: goodbye – Strategies for effective implementation of court orders in South Africa* (2008) Available online at: http://www.communitylawcentre.org.za/projects/socio-economic-rights/Research%20and%20Publications/Research%20Series/You%20are%20the%20weakest%20link%20in%20realising%20socio-economic%20rights%20-%20Goodbye%20-%20Strategies%20for%20effective%20implementation%20of%20court%20orders%20in%20South%20Africa.pdf/view; P De Vos 'Between moral authority and formalism: 'Nyathi v Member of Executive Council for Dept of Health, Gauteng' in *Constitutional Court Review* (2) 2009 at 409.

phenomenon has partly to do with the laziness and incompetence of State officials, bureaucratic inefficiency and poor communication between Government officials and levels and organs of Government. Whatever the reasons for the delays, even if it is occasioned by a need for urgent reallocation of resources which can be time-consuming, it is crucial that Government do so within the time limits set by the courts. Otherwise, the courts can be deprived of their independence and authority and the rule of law may be threatened.[52]

The non-enforcement of court orders has been particularly a problem in the case of social assistance grants in the Eastern Cape. In *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuzu*[53] the applicants brought class action proceedings against the Eastern Cape provincial Government to reinstate disability grants they had been receiving under the Social Assistance Act, which the province had, without notice to them, terminated. All persons were required to re-apply for their existing entitlements. The province claimed that reason was that inaccurate claimant records — including large numbers of 'ghost pensioners' — cost the province tens of millions of rands every month. Cameron JA held that the Government's action – or inaction- spoke of 'a contempt for people and process' that does not befit an organ of Government under our constitutional dispensation. He held that 'the province's approach to these proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as though it was at war with its own citizens, the more shamefully because those it was combatting were in terms of secular hierarchies and affluence and power the least in its sphere'. The fact that that the unentitled claimants were costing the province R65 million per month missed the point, 'which was the cost the province's remedy exacted in human suffering on those who were entitled to benefits.'[54]

In *Nyathi v Member of the Executive Council for the Department of Health, Gauteng* [55] the Constitutional Court struck down the provision of the State Liability Act which prevented the levying of execution against the State and to attach State assets to satisfy the judgment debt. The Court had suspended the declaration of invalidity of the section, giving Parliament one year in which to amend it. Madala J stated that in recent years courts have inundated with situations where court orders have been flouted by functionaries who seem not to understand their role in a constitutional State, which is that access to courts entails a duty not only on the courts to ensure access but on the State to bring about the enforceability of court orders. In the course of his judgment Madala J remarked (at 63) as follows:

> 'In my view, there can be no greater carelessness, dilatoriness or negligence than to ignore a court order sounding in money, even more so when the matter emanates from a destitute person who has no means of pursuing his or her claim in a court of law. But we now have some officials who have become a law unto themselves and openly violate people's rights in a manner that shows disdain for the law, in the belief that as State officials they cannot be

[52] As Kriegler J observed in *S v Mamabolo* 2001 (5) BCLR 449 (CC): Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights — even against the state' (at para 16).

[53] 2001(4) 1184 (SCA).

[54] At 1197. See also *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 (2) SA 611 (SCA) where the Supreme Court of Appeal held (at para 17) that 'Wholesale non- compliance with court orders is a distressing phenomenon in the Eastern Cape that has caused the Courts in that province to try to devise ways of coming to the assistance of social welfare applicants whom the provincial Government has failed'.

[55] 2008 (9) BLCR 865 (CC). Ironically, the *Government in Minister for Justice and Constitutional Development v Nyathi* 2010 (4) BCLR 293 (CC) was for a further extension of the period of one year for the legislation to be amended.

held responsible for their actions or inaction. Courts have had to spend too much time in trying to ensure that court orders are enforceable against the State precisely because a straightforward procedure is not available'.

C. Implications of international human rights standards for socio-economic rights

South Africa is not yet a party to the International Covenant on Economic, Social and Cultural Rights, although in October 2012 a Cabinet decision was taken to ratify the Covenant, which South Africa had signed eighteen years earlier. Upon ratification, South Africa would incur obligations under the Covenant; and in terms of section 39 of the Constitution, the South African courts are obliged to consider international law. In addition, under section 233, every court must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. There can thus be 'no escape, from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law'.[56] The following discussion gives an indication of select jurisprudence of the Committee in relation to budgets to determine South Africa's compliance with it.

Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that each State Party must take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means , including particularly the adoption of legislative measures.

Article 2 is one of the most important articles of the Covenant because it outlines the nature of States parties' legal obligations under the Covenant and determines how they must approach the implementation of the substantive rights contained in articles 6 to 15. The 'progressive obligation' component of the Covenant must not be taken to mean that only once a State reaches a certain level of economic development must the rights established under the Covenant be realized. Article 2 obliges all States parties, notwithstanding their level of national wealth, to move immediately and as quickly as possible towards the realization of economic, social and cultural rights.[57]

The Committee has dealt with the issue of the financial obligations that States parties incur under the Convention several times. For example, in 1997, in general comment no. 8 on the relationship between economic sanctions and respect for economic, social and cultural rights (1997): the Committee stated as follows:

> 'The imposition of sanctions does not in any way nullify or diminish the relevant obligations of that State party. As in other comparable situations, those obligations assume greater

[56] *Glenister v President of the Republic of South Africa* at para. 202.

[57] The Committee on Economic, Social and Cultural Rights, the treaty body which monitors implementation of the ICESR, has given more attention to the right to housing than to any other right under the Covenant. It states that '. . . the right to housing, should not be interpreted in a narrower restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head . . . Rather it should be seen as the right to live somewhere in security, peace and dignity . . . . (Para. 7.) The Committee has further defined the term 'adequate housing' to comprise security of tenure, availability of services, affordability, habitability, accessibility and location.

> practical importance in times of particular hardship. The Committee is thus called upon to scrutinize very carefully the extent to which the State concerned has taken steps "to the maximum of its available resources" to provide the greatest possible protection for the economic, social and cultural rights of each individual living within its jurisdiction. While sanctions will inevitably diminish the capacity of the affected State to fund or support some of the necessary measures, the State remains under an obligation to ensure the absence of discrimination in relation to the enjoyment of these rights and to take all possible measures, including negotiations with other States and the international community, to reduce to a minimum the negative impact upon the rights of vulnerable groups within the society.'

In 2007, the United Nations Committee on Economic, Social and Cultural Rights made a statement entitled 'An Evaluation of the Obligation to Take Steps to the 'Maximum Available Resource' Under an Optional Protocol to the Covenant'. It stated (at para 7) that

> 'The obligation to protect and, to a greater extent, the obligation to fulfill… often require positive budgetary measures in order to prevent third parties from interfering with the rights recognized in the Covenant (obligation to protect) or to facilitate , provide and promote the enjoyment of these rights (obligation to fulfill).'

The Committee highlighted the information it would consider, including the country's current economic situation; the existence of other serious claims on the State Party's limited resources; whether the State Party had sought to identify low cost options; and whether the State Party had sought cooperation and assistance or rejected resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.[58]

In May 2012, a letter from the Chair of the ICESCR was addressed to all States Parties. It stated that proposed policies to adjust the implementation of socio-economic rights must meet certain criteria, which included tax measures to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected.

The obligation to take financial measures to achieve rights extends to all the rights in the Covenant. In relation to social security for example, the Committee encouraged States parties to develop a national strategy for the full implementation of the right to social security, and should allocate adequate fiscal and other resources at the national level.[59] The Committee has stated that social security schemes should cover disadvantaged and marginalized groups, even where there is limited capacity to finance social security, either from tax revenues and/or contributions from beneficiaries. It has stated that low-cost and alternative schemes could be developed to cover those without access to social security, with gradual integration into regular social security schemes. The Committee also encouraged members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks to take steps to ensure that the right to social security is taken into account in their lending policies, credit agreements and other international measures. States parties should ensure that the policies and practices of international and regional financial institutions, in particular those concerning their role in structural adjustment

[58] CESCR *An Evaluation of the Obligation to take steps to the Maximum of Available Resources under an Optional Protocol to the Covenant* UN Doc E/C.12/2007/1(2007) para 10.

[59] The Committee stated in general comment no. 9 on Social Security that social security should be treated as a social good, and not primarily as a mere instrument of economic or financial policy.

and in the design and implementation of social security systems, promote and do not interfere with the right to social security. Under international law, the Committee on Economic, Social and Cultural Rights has asserted that the duty to implement certain rights exists independently of an increase in available resources and thus recognizes that all existing resources must be devoted in the most effective way possible to the realization of the rights enshrined in the Covenant..

In relation to the right to the highest attainable standard of health, the Committee extends the right to the highest attainable form of health as extending to the underlying determinants of health, including access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. These have budgetary implications as well.[60]

In its concluding observations to States parties after consideration of the report, the Committee has alluded to the financial obligations of the State. In the concluding observations of Iceland in 2012 for example, the Committee expressed its concern that the national financial and economic crisis has had a negative impact on the realization of economic, social and cultural rights, in particular with regard to the rights to work, social security, housing and education. The Committee recommended that that any proposed policy change by Iceland in reaction to the economic crisis (a) be of a temporary nature; (b) be necessary and proportionate; (c) not be discriminatory and comprise all possible measures, including tax measures, to support social transfers to mitigate inequalities and to ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected; and (d) identify a social protection floor and the minimum core content of rights, ensuring the protection of this core content of rights at all times.[61] The Committee also expressed its concerns towards Spain's austerity measures in 2012, recommending that it ensures that such measures reflect the minimum core content of all the rights in the Covenant. It also recommended that Spain compile disaggregated statistical information with a view to identifying the individuals and groups affected and that it increase the effectiveness of its efforts to protect their rights. The Committee also recommended that Spain review the reforms and austerity measures adopted in economic and financial crisis to ensure that they uphold the level of the protection guaranteed by the Covenant, and that such measures are temporary and proportionate.

Last year, in the concluding observations for Egypt, the Committee was concerned about the reduction in the proportion of budgetary resources allocated for health, education and housing. The Committee is also concerned at the increasing recourse to regressive indirect taxes without prior assessment of their potentially severe human rights impacts and careful consideration of more equitable revenue collection alternatives (art.2, para. 1). The Committee recommended that Egypt should ensure a budget formulation process that allows for meaningful inputs of stakeholders, including civil society. In particular, the Committee recommended that the Egypt increase public spending on health with a view to providing health insurance for all, non-discriminatory access to health facilities, goods and services, provision of essential medicines, access to reproductive, maternal and child health care and immunization against major infectious diseases. The Committee also recommended that Egypt increase its expenditure in education, by prioritizing educational reforms that ensure the equitable provision of free and quality education for children in rural areas

[60] General Comment no. 14: *The right to the highest attainable standard of health* (2000).

[61] See also the concluding observations of New Zealand 2012, where the Committee expressed its concern about the retrogressive nature and possible discriminatory effect of welfare reforms, particularly in the light of the State Party's recovery from its economic downturn.

and/or situations of socioeconomic vulnerability and ensure the regular review of quality of teaching and school conditions.

The Convention on the Rights of the Child, to which South Africa is a State party, also has, in article 4, a reference to 'maximum available resources to ensure realization of economic, social and cultural rights'. The concluding observations of the Committee indicate that resources include not only financial resources, but also 'human, technological, organizational, natural and information resources.'[62] The role of International Development is also often highlighted in the concluding observations , with States Parties being encouraged to contribute 0.7 per cent of their Gross Domestic Product for International Development Assistance.

Several other UN Special Rapporteurs and Independent Experts have also addressed the issue of maximum available resources. For example, the Special Rapporteur on extreme poverty and human rights has stated that Governments must mobilize resources within the country to the best of their ability; Government expenditures must be efficient and effective; funds earmarked for the realization of socio-economic rights must not be diverted elsewhere and must be spent; and Governments should take all steps to secure international assistance when national resources are inadequate to realize economic, social and cultural rights.[63]

The Special Rapporteur on Housing has stated that States should promoting alternatives to private mortgage and ownership-based housing systems, and develop new financial mechanisms that can ensure the improvement of the living and housing conditions. States must ensure that financial institutions and regulation take account of the vulnerabilities and limited repayment capacities of low-income households. In some situations, States should consider intervening in the market, for instance through equitable land-use policies, public financing and housing provision, appropriate rent regulation and reinforcement of legal security of tenure.

Domestic resource mobilization is preferable to assistance from external sources. An efficient tax collection with an appropriate tax base can be a key contributor to financing the redistributive policies in the implementation of socio-economic rights.[64] On the question of taxation, the former Special Rapporteur on the Realization of Economic, Social and Cultural Rights Danilo Türk noted that: "Progressive (as opposed to regressive) measures of taxation can, if supported by adequate administrative machinery and enforcement mechanisms, lead to gentle and gradual forms of income redistribution within States without threatening economic stability or patterns of growth, thereby creating conditions that enable a larger proportion of society to enjoy economic, social and cultural rights."[65] In the longer term, the progressive realization of socio-economic rights requires an understanding that action should extend beyond the efficient and rights-sensitive administration of existing resources to include the structure of the tax system.

D. Intergovernmental budget system and the realization of socio-economic rights

This section will explore implications of the constitutional duty to respect, protect and fulfill human rights in the context of intergovernmental fiscal relations. At its core, the system of

[62] D Elson, R Balakrishnan and J Heintz supra note 16 at 15.
[63] M Sepulveda *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights (*2003).
[64] M Sepulveda *Report of the Special Rapporteur on extreme poverty and human rights* A/HRC/26/28 (2014). The report analyses the contribution of fiscal policy, and particularly taxation policies, as a determinant in the enjoyment of human rights.
[65] D Turk *Report of the Special Rapporteur on the realization of economic, social and cultural Rights*' (UN Doc E/CN.4/Sub.2/1992) at 16.

intergovernmental fiscal relations sets out the mechanisms for allocating funds among the national and sub-national components of governments. The efficient, effective, and equitable operation of the intergovernmental fiscal relations system is critical to enabling the realization of the socio-economic rights in the Bill of Rights.[66] The day-to-day operation of the fiscal relations system is the unglamorous, technocratic machinery for facilitating delivery on the commitment of transformation through the realization of socio-economic rights. Performance failures and gaps in the fiscal relations system will undermine the State's duty to protect, promote and fulfill the rights in the Bill of Rights.

Yet a crucial point must be made upfront – the system of intergovernmental fiscal relations is a facilitator, not a guarantor for the realization of socio-economic rights; it can be more or less attuned to a rights perspective, but it remains an instrument. And, as contended in this paper, it is an instrument that is generally working to in a manner that promotes the realization of socio-economic rights. As underlined at the beginning of the paper, accountability for rights realization should permeate all organs of state, in particular legislative bodies. Tweaks to system of intergovernmental fiscal relations cannot be a substitute for accountability, especially democratic accountability.

(a) Features of the system of IGFRs

In exploring the relationship between South Africa's system of IGFRs and the attainment of socio-economic rights, it is useful to cover some background on the issues that arise in relation to intergovernmental fiscal relations (IGFRs) and functions of government. These issues can be usefully summarized in the form of four questions:[67]

1. Who does what? This captures the dimension of *expenditure assignment*.
2. Who levies the taxes? This is the question of *revenue assignment*.
3. How is any imbalance between the revenues and expenditures of sub-national Governments that results from 1 and 2 to be resolved? This is the question of *vertical imbalance*.
4. To what extent should fiscal institutions attempt to adjust for the differences in needs and capacities between different Governmental units at the same level of Government? This is the question of *horizontal imbalances*, or *equalization*.

The Constitution sets out the functions of the different spheres of government, thus determining the answer to question 1 on the assignment of expenditure. Likewise, the power to raise taxes is determined by the Constitution, which grants revenue-raising powers primarily to the national and local spheres of government, with the provinces having limited capacity to raise revenues. Thus provinces raise a mere 3 per cent of revenues, while local Governments raise 73 per cent of their own revenues. But since provinces are constitutionally mandated to provide the bulk of services in areas such as health and education, this of course begs question 3, namely: How is any imbalance between the revenues and expenditures of sub-national Governments that results from 1 and 2 to be resolved? In South Africa, the so-called vertical imbalance is dealt with through the allocation to the provinces and local government of an equitable share of national revenues. The considerations guiding this process are analyzed in greater detail below. The fourth question considers how the share of revenue allocated to provincial and local Government, respectively, is shared among the different provinces and local authorities. In South Africa, this horizontal division or equalization is

[66] M. Govinda Roa, *Intergovernmental Finance in South Africa: Some Observations* at 6. Available at: http://www.nipfp.org.in/media/medialibrary/2013/04/wp03_nipfp_001.pdf

[67] R Bird and F Vaillancourt eds.*Fiscal decentralization in developing countries* 1998 15; R Bird *Intergovernmental Fiscal Relations: Universal Principles, Local Applications* Working Paper #00-2, School of Policy Studies, Georgia State University.

done on the basis of formula with components such as population, learners, and so on. Thus while the vertical division of revenue is the outcome of a political process, the division of the resulting shares – provincial and local – is not.

(b) Equitable sharing

Depending on historical context, constitutional traditions, and other factors institutions and practices developed in response to the 'four questions' will vary widely. South Africa's enormous developmental disparities made it paramount that the system of intergovernmental fiscal relations should redress these inequalities in services and opportunities. In contrast to some other jurisdictions, South Africa's basic framework for intergovernmental fiscal relations is clearly spelled out in the Constitution and legislation. In this regard, section 214(1)(a) states that an act of Parliament must provide for the equitable division of revenue raised nationally among the national, provincial and local spheres of government. The vertical division of revenue among the spheres of Government needs to ensure that all receive a share of national revenues commensurate with their developmental responsibilities and cognizant of their revenue-raising capacities. In terms of section 214(2), the abovementioned Act may only be adopted after the provincial Governments, organised local Government and the Financial and Fiscal Commission have been consulted. In the first Certification judgment the Court stated that 214 contains procedural and substantive safeguards in determining the amount of the equitable share, which are together designed to achieve a reasonable outcome.[68]

The framework legislation giving effect to the above provisions of the Constitution is the Intergovernmental Fiscal Relations Act of 1997, which provides for the adoption of annual Division of Revenue Act and establishes consultative bodies, the Budget Council for provinces, and the Local Government Budget Forum. Consultation and negotiation are therefore key to the process, but within a formally defined structure. What takes place has been described as "a complex bargaining process".[69] In the end, the equitable shares are determined the national Government after taking into account a list of factors.[70] Overall, the guiding principles of cooperative Government and intergovernmental relations set out in section 41 of the Constitution, including that spheres of Government and organs of State refrain from legal proceedings against one another, also applies to the process of setting division of revenue, especially in view of the statutory consultative bodies, as well as the input of an independent expert body, the Financial and Fiscal Commission (FFC).

The Financial and Fiscal Commission (FFC) is established under section 220 of the Constitution, which provides that the Commission is independent and subject only to the Constitution and the law, and must be impartial". The Ad Hoc Committee on Chapter 9 institutions in its 2007 report

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[68] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* paras.426-427.

[69] S Choudhry and B Perrin 'The legal architecture of intergovernmental transfers: a comparative analysis' in R Boadway and A Shah, eds. *Intergovernmental Fiscal Transfers: Principles and Practice* 2006 at 277.

[70] Its fits into what has been termed the 'ad hoc' model, which is the most centralizing and leaves the national Government with the most discretion. Other models are the shared tax and cost reimbursement approaches. *See* R Bahl, *Intergovernmental Transfers in Developing and Transition Countries: Principles and Practice* World Bank, Municipal Finance Background Series (2000) at 5. The FFC had previously recommended a 'costed norms' approach. See FFC *Preliminary Recommendations for 2001: A Costed Norms Approach for the Division of Revenue, Consultation Document*(2001). The Government declined to implement the recommendation on the grounds, inter alia, that a bottom up iterative approach is not an appropriate way to determine budgetary priorities, which requires political judgment in making difficult trade-offs, and the data required to estimate the cost of providing services are unavailable. See National Treasury *2000 Medium Term Budget Policy Statement* (2000) at 86.

noted that the FFC is an important advisory body, and went on to conclude that "[a]lthough the Commission is not a Chapter 9 institution, it is entrenched in Chapter 2 of the Constitution and, therefore, enjoys status and protection under the Constitution."[71] The Financial and Fiscal Commission Act 1997 provides that the Commission is a consultative body, which makes recommendations and gives advice to the national, provincial, and local spheres of government on financial and fiscal matters. While the Executive is not bound by the recommendations of the Commission, the requirement that non-acceptance or deviation from its recommendations must be justified (in the memorandum to Division of Revenue Bill) is important for reasons of transparency, as well as institutional respect. Even in cases where its recommendations are not ultimately adopted, such as on costed norms, the Commissions analysis and proposals can have the salutary effect of considering new ideas and approaches.

Section 214 also addresses the horizontal division of revenue. Thus sub-section (1) provides that an act of Parliament – the Division of Revenue Act – must in addition to the equitable division of revenue addressed above, also set out each province's "slice" of the total provincial share, and any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made. Also relevant is section 227(1) of the Constitution, which provides that: 'Local Government and each province – (a) is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it; and may receive other allocations from national Government revenue, either conditionally or unconditionally.'

(c) Determining the equitable share consistent with rights

In accordance with subsection 214(2), what is known as the Division of Revenue Act must taken into account 10 listed factors, including:

(a) the national interest;
(b) any provision that must be made in respect of the national debt and other national obligations;
(c) the needs and interests of the national Government, determined by objective criteria;
(d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;
(e) the fiscal capacity and efficiency of the provinces and municipalities;
(f) developmental and other needs of provinces, local Government and municipalities;
(g) economic disparities within and among the provinces;
(h) obligations of the provinces and municipalities in terms of national legislation;
(i) the desirability of stable and predictable allocations of revenue shares; and
(j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.

The argument is made here that in taking account of the listed factors Parliament – and the National Treasury, which prepares the Division of Revenue Bill - remains bound to exercise the constitutional duty to respect, promote and fulfill the rights in the Bill of Rights, and this case especially socio-economic rights. Some of the listed items are broad in nature and relate to national Government, such as (a) on the national interest. Four of the items - (d), (f), (g) and (h) – are of obvious relevance

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to the fulfillment of socio-economic rights.[72] That the bulk of spending on the social sector takes place at the provincial level makes this all the more important.

As mentioned earlier, the equitable division is the outcome of a political consultative process, which contains procedural safeguards and is guided by substantive considerations in 214(2).[73] In combination, this meant to protect the interests and functions of the provinces and local Government. A separate line of analysis, which is relevant here, is to what extent the listed items under section 214(2) provide entry points for the consideration of socio-economic rights concerns and principles. What follows attempts to tease out possible connections and linkages, seeking to demonstrate that the Executive and Parliament are bound to interpret the listed items in a manner that advances the fulfillment of socio-economic rights.

The memorandum attached to the Division of Revenue Bill provides some insight into how the Treasury and Legislature interpret the constitutional principles.[74] Accordingly, item (a) relating to the national interest covers those broad governance goals that benefit the nation as a whole. In this context, the 2014 Division of Revenue Bill cites the implementation of the National Development Plan (NDP), as well as priority outcomes adopted by Cabinet in 2010.[75] Clearly the national interest is broad and elastic term, but it ought to be understood in the context of Government policies or strategies, such as the above-mentioned NDP. The next item (b) is provision for debt costs, which arise from the need finance the budget deficit, as well as the debt public enterprises and the provinces. At present the fastest-growing item of main budget expenditure is debt-service costs, at 114.9 billion rand or just under 10 per cent of 2014 (revised) expenditures.[76] A high debt burden and associated debts servicing costs can severely constrain a Governments spending on social and other services. However, South Africa's debt burden is considered sustainable, especially as it is in the main not exposed to exchange rate fluctuations.

Item (d), on ensuring that the provinces and municipalities are able to provide basic services is key from a socio-economic rights perspective, because provinces and municipalities are responsible for critical service delivery functions such as education, health, social, development, housing, roads, and provision of electricity, water and municipal infrastructure. The 2014 division of revenue allocates 43.5 per cent of nationally raised revenue to provinces and 9 per cent to municipalities. The tight linkage with basic service provision is easily illustrated. For instance, the 2014 division makes greater provision for delivery of basic services by local Governments, and mentions in this regard resources made available for the rollout of bulk water and sanitation infrastructure and building capacity for cities to manage the development of human settlements. The local Government equitable share includes a subsidy of R293 for households with a monthly income below R2 300, which is designed to support the provision of free basic amounts of electricity, water, sanitation and refuse removal.[77] This is designed to cover the cost to local government of a national policy decision, in relation to free "lifeline" access to electricity and water.

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[72] K Chetty supra note 2 at 235.
[73] *See Certification* judgment, supra note 68.
[74] The explanatory memorandum to the Division of Revenue Bill is intended to fulfill the requirement set out in section 10(5) of the Intergovernmental Fiscal Relations Act that the bill be accompanied by an explanatory memorandum detailing how it takes account of the matters listed in sections 214(2)(a) to (j) of the Constitution.
[75] 2014 Division of Revenue Bill, W1 Explanatory memorandum to the division of revenue.
[76] 2014 Budget Review Ch. 5.
[77] 2014 Budget Review at 100.

The reality of very limited provincial revenue-raising capacity is acknowledged in item (e) on the fiscal capacity and efficiency of the provinces and municipalities. For the provinces allocations commensurate with meeting service delivery needs are all the more important. The allocation of fund at the local Government level, through the local Government equitable share formula and grants, must also take into account local Government in rural areas generally has lower revenue raising capacities than urban municipalities. The question of efficiency is an important one, concerning whether the mechanisms for allocating funds to the provinces and local Government facilitate prompt service delivery, with a minimum of waste.

Under the developmental needs of provinces and local Government, item (f), the relevant considerations are the commitment to increase the provincial and local Government shares of nationally raised revenue, and as the reflection of developmental needs in the formulas used for dividing national transfers among municipalities and provinces, as well as conditional grants. Of particular importance here are infrastructure grants and growing capital budgets in provinces and local Government. Sustainable and quality delivery of basic services requires that the related infrastructure meets those needs – in other words, is not directed to towards prestige or white elephant projects – and that adequate provision for maintenance is built into the programmes.

According to item (g) the division of revenue must also be sensitive to economic disparities within and between provinces. Thus the provincial equitable share and infrastructure grant formulas are designed to be redistributive towards poorer provinces and municipalities.[78] They are designed to address horizontal equity. Interestingly, the text of the Constitution requires that the division of revenue is responsive to disparities between provinces, as well as those within provinces – that is promote equity within provinces. This can be achieved by ensuring that provincial programmes target the poorest and those in vulnerable situations. In this case the language of the Constitution on revenue sharing echoes the jurisprudence of the Constitutional Court, in particular its emphasis in *Grootboom* on addressing the needs of the most vulnerable. This accords with human rights principles that stress the imperative of reaching the poor and most vulnerable, as opposed to merely meeting aggregate targets. Overall, there has been an emphasis in the development discourse of moving beyond aggregate measures of progress highlighted in the United Nations Millennium Development Goals (MDGs), towards "leaving no one behind".[79] The focus on national provincial averages may conceal broad and evening widening disparities in poverty among and within provinces.

The above discussion has outlined how section 214 provides explicit entry points for socio-economic rights to be considered in the process of arriving at the provincial equitable share. The consultative requirements also enable the interested parties to be heard.

(d) IGFRs and some design considerations

One of the main arguments for decentralized decision-making, including federalism, is that it brings into closer alignment citizen's preferences and public goods and services than would be the case in unitary State.[80] Public sector performance is potentially enhanced because Government is more attuned to local preferences and needs, as well as knowledgeable about the local endowments of

[78] Memorandum to Division of Revenue Bill, supra note 74 at 61.

[79] See *A New Global Partnership: Eradicate Poverty and Transform Economies Through Sustainable Development, The Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda* (2013). Available at http://www.un.org/sg/management/pdf/HLP_P2015_Report.pdf

[80] S Choudhry and B Perrin supra note 69 at 259. The classic case for fiscal decentralization is Wallace Oates *Fiscal Federalism* (1972).

human and natural capital.[81] Bringing Government 'closer' to the people potentially also enhances legitimacy, accountability and transparency. However, the decentralization of fiscal responsibilities – revenue raising and spending – entails a number of adverse consequences, or fiscal externalities in the language of economics.[82] One consequence is that decentralization may result in differential fiscal capacity to deliver public roads, healthcare, education, in the absence of transfers. Simply put, two taxpayers, one resident in an affluent province with good services, the other in an under-developed province with spotty services, both pay the same tax rate, but receive very different "bang for their buck". This difference (termed net fiscal benefits) creates fiscal incentives for individuals and firms to re-locate to regions with better services. Whether or not this is a problem in South African, it does seem reasonable to assume that areas with poorer public services will find it harder to attract firms and skilled labour. Another objection rests on equity grounds, as persons are treated differently simply on the basis of the region they inhabit.

From an institutional design perspective, the type of framework adopted in South Africa provides the national Government with considerable flexibility, since the process of fixing the provincial and local government share is a political one, largely determined by the centre, as opposed to more rigid mechanism, such as system of sharing with sub-national governments a fixed percentage of certain taxes. In theory then, the national government can more easily impose the cost of fiscal consolidation or retrenchment on sub-national governments.[83] Also, in theory, the central Government can effectively shift spending priorities without changing legislative/Constitutional functions (expenditure assignments) of sub-national government. An example would be increasing the proportion conditional grants relative to the provincial share.[84] This need not be in any way irregular, because for instance it can be observed that sub-national governments have a preference for consumption expenditure over infrastructure investment. A resulting under-provision of infrastructure would serve as the rationale for increasing conditional grants. Overall, the equitable share should enable sub-national Governments to comply with their constitutional mandates, while the conditional grants deal with the potential violations of efficiency and equity resulting from the process of fiscal decentralisation.[85] However, if the pendulum swings too far in the one direction, the FFC has pointed out:[86]

> "An increasing use of conditional grants may result in a reduced amount of transfers flowing through the discretionary equitable share (PES and LES) and therefore may impact on the flexibility of sub-national Governments to implement programmes according to their constitutional legislative mandates."

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[81] L R De Mello Jr *Fiscal Decentralization and Intergovernmental Fiscal Relation: A Cross-Country Analysis* (2000).

[82] R Boadway, 'Inter-Governmental Fiscal Relations: the facilitator of fiscal decentralization' 12 *Constitutional Political Economy* 2001 at 95. See also the summary in R Nthite et al, 'A comprehensive review of conditional grants in the South African Intergovernmental Fiscal Relations System' in, *Review of Transfers in the Intergovernmental Fiscal Relations System in South Africa*, Research Reports in support of the FFC submission for the Division of Revenue 2007/08 (2006) at 3.

[83] However, to date this has not occurred. The vertical division since the 2008 fiscal crisis has largely protected provincial and local equitable share proportions. However, provincial governments and poor municipalities which are grant dependent are most exposed to this risk.

[84] Under section 227(1)(a), provincial and local Governments are entitled to equitable share of national revenue to enable them to provide basic services and perform the functions allocated to them. This places a limit on the proportion of national revenue can be allocated to provinces and local Government in the form of conditional grants, as opposed to flowing into the equitable share.

[85] R Nthite supra note 82 at 5.

[86] Nthite et al, supra note 82 at 6.

In this regard, it is worth noting the rise in conditional grants from R31, 5 billion in 2007/8 to almost R70 billion in 2011/12. At the same time reporting from the Auditor-General indicates considerable under-spending of conditional grants, so that in 5 provinces more than 50 per cent of municipalities under spent grants by more than 10 per cent.[87] The use of conditional grants also imposes additional administrative and monitoring costs, a point that is evident from even a cursory reading of the relevant provisions of the Division of Revenue Act.

Lastly, possible consequence of a system where the sub-national shares are determined by the national Government is that:[88]

> "Subnational Governments are likely to be discouraged from increasing efficiency and from becoming self-reliant if all grants are made on an ad hoc basis. Local officials will feel less in control of their budgets, and less accountable to their voters for the level of services provided. It will be very convenient to blame any service delivery shortfalls on the inadequate services provided by the center"

(e) Issue in focus: Capacity problems and problematic expenditure

As we have seen, judgments in socio-economic cases are rife with concerns about administrative capacity, financial management, and overall levels of performance. Reports of institutions such as the Auditor-General, the Public Service Commission, and the SAHRC seem to attest to the problems. Many of these reports are voluminous and detailed, and care should be taken not to generalize, but the following provide examples from the Auditor-General illustrate some of the problems encountered:[89]

- Unauthorised expenditure of R2 978 million was incurred, with Provincial departments accounting for 98 per cent of the total value.
- Irregular expenditure of R28 378 million was incurred, with provincial departments accounting for 73 per cent of the total irregular expenditure.
- Fruitless and wasteful expenditure of R1 793 million was incurred, with provincial departments account for 55 per cent of the total.
- Forty-six per cent of departments that received qualified or disclaimed audit opinions experienced lengthy vacancies at senior management level and 35 per cent of them had also not advertised the vacancies timeously. Positions were vacant for longer than 12 months in the finance units of 24 per cent of auditees that received qualified or disclaimed audit opinions.
- 58 per cent of national departments were able to avoid qualifications due to the correction of material statements during the audit process.[90]

In assessing the credibility of budgets and orderly and planned spending, a generally accepted guideline is that under-expenditure should not be more than 2 per cent and that no over-expenditure. The Public Service Commission reports that in the 2011 financial year only two provinces stayed within the 2 per cent margin, while at the departmental there was considerable variation, with many departments reporting under-expenditure of more than 10 per cent.[91] The PSC

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[87] Auditor-General, Presentation to SCOPA: Audit outcomes of national departments as at November 2013. Available at http://db3sqepoi5n3s.cloudfront.net/files/140205pfma.pdf

[88] See Bahl supra note 70 at 7.

[89] Auditor-General, Executive Summary *Consolidated General Report on National and Provincial Audit Outcomes* 2011-2012.

[90] Auditor-General *Presentation to SCOPA: Audit outcomes of national departments as at November 2013.*

[91] Public Service Commission Fact Sheet on the State of the Public Service 2011 at 12.

also reports that under-expenditure on capital assets ranged from 1.8 per cent in the (Western Cape) to 36 per cent(Eastern Cape), with huge variations at the departmental level. At the national level under-expenditure was 2.30 per cent, with the spending on capital assets worse than consumption expenditure. A review of spending by selected national Government departments concluded that:[92]

> 'While….monies are being made available to realise the socio-economic rights contained in the Constitution, the inability of Departments to spend their budgets is a reflection of the capacity challenges and poor planning and implementation in the financial administration of the specified Government departments.'

(f) Issue in focus: Education

Section 29(1)(a) of the Constitution provides that "everyone has the right to a basic education". Unlike other socio-economic rights, this right is unqualified and thus immediately applicable and not subject to progressive realization.[93]

The report of the National Education Infrastructure Management Information system (NEIMS) makes clear that there remain severe infrastructure deficits with respect to public schools.[94] Thus, of the 24,793 public ordinary schools in 2011, 3,544 schools did not have electricity, 2402 schools had no water supply, 913 did not have any ablution facilities while 11,450 schools were still using pit latrine toilets. The lack of suitable ablution facilities is especially problematic given the need for adequate facilities for girls, in view of the demonstrated link between gender-appropriate facilities and school attendance of girls. This situation is incompatible with the right to basic education and the commitment to gender equality and the empowerment of women and girls. The recent report of the SAHRC draws attention to this issue, noting that more high-school girls drop out of school than do boys.[95] As regards other facilities, 76 per cent of schools did not have a computer centre and 84 per cent of schools did do not have any laboratory facilities.

In 2007 Parliament amended the South African Schools Act. This saw the introduction of section 5A into the Act. Section 5A provides for the Minister to make regulations prescribing minimum uniform norms and standards for public school infrastructure, and it specifies what the regulations must contain. The amendment also inserted section 58C which imposes mechanisms to ensure that the provinces comply with the norms required under Section 5A by requiring MECs to annually report to the Minister on provincial progress. In June 2010 the Minister published the National Policy for an equitable Provision of an Enabling School Physical Teaching and Learning Environment, which, among other things provided that national norms and standards would be developed and adopted by the 2010/2011 financial year.[96]

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[92] K Lomahoza, S Brockerhoff, I Fry *A Review of National and Provincial Government Budgets in South Africa* 2007/08-2011/12, Studies in Poverty and Inequality Institute, Working Paper 7 (2013).

[93] *Juma Musjid Primary School v Essay NO (Centre for Child Law as Amicus Curiae)* 2011 (8) BCLR 761 (CC), noting that the right to basic education is immediately realizable, without any internal limitation requiring that the right be progressively realized within available resources.

[94] Department of Basic Education, NEIMS May 2012 reports. Available at http://www.education.gov.za/LinkClick.aspx?fileticket=hHaBCAerGXc%3D&tabid=358&mid=180

[95] South African Human Rights Commission, Ninth section 184(3) *Report on Economic and Social Rights, 2012-2013* (2014) at 26.

[96] Government Gazette 33283, Notice 515 of 11 June 2010.

The publication of the norms and standards was not forthcoming. On 2 March 2012 the Legal Resources Centre (LRC) on behalf of Equal Education (EE) and the infrastructure committees of two applicant schools in the Eastern Cape, filed an application in the Bisho High Court against the Minister of Basic Education and others to secure national minimum uniform norms and standards for school infrastructure. On 19 November 2012 the Minister entered into a settlement agreement[97] with EE in which she undertook to publish a draft of the regulations for public comment on or before 15 January 2013 and to promulgate regulations on school infrastructure by 15 May 2013. The norms and standards were promulgated on 19 November 2013 and provide, among other things, that schools built entirely from mud and those lacking any form power supply, water, or sanitation must be prioritized.[98]

Several other cases relating to the right to education have come to court. In *Section 27 v Minister of Education*[99] and *Basic Education for All v Minister of Basic Education*,[100] both cases dealing with non-delivery of textbooks in Limpopo, the court found that the right to textbooks was part of the right to basic education. Kollapen J in *Section 27* ordered that the Limpopo Department of Education institute a remedial/catch-up plan and to submit monthly reports regarding the implementation of the plan until September 2012. The Department of Education did not comply with the order and in *Basic Education for All*, the Department pointed to budgetary constraints as the main reason. The Department averred that it had asked the fiscal authorities for the money they calculated was necessary for them to meet their textbook requirements but were given a smaller sum. Adopting a deferential approach, Tuchten J held that he 'could not think of an issue which was more policy laden and polycentric than the compilation of the national budget.[101] These were essentially political issues, which required political solutions.

In *Madzodzo v Minister of Basic Education*[102] 2014 (3) SA 441 (ECM) the Court considered the failure of Government to provide essential school furniture, in the form of desks and chairs, to certain public schools. Goosen J held that the State's obligation to provide basic education is not confined to making places available at schools. It requires a range of educational resources, including appropriate facilities for learners, and a lack of appropriate and sufficient chairs and desks furniture undermines the right of access to basic education.[103] The Government contended that budget constraints and the lack of availability of resources constrained them in their ability to meet the basic requirements of the right to basic education immediately. The fact that they not complied with the terms of two previous court orders was due to the fact that they were not able to meet short deadline and that the Department remains hamstrung by serious budget constraints. They thus suggested that they would formulate a comprehensive plan to provide furniture to the schools once the extent of the shortage was determined by an audit. The Court rejected this argument, finding that the respondents were aware for a long period of time that steps need to be taken to address the furniture shortage and to fulfilll the right to basic education. Under these circumstances, it was not good enough to assert that there were inadequate funds and that the State cannot be placed on terms to deliver furniture to schools within a fixed period of time. Goosen J held that he was 'mindful of the fact that the extent of the furniture needs in public schools in the province appears, on anyone's version, is very

[97] Available at http://equalizermagazine.files.wordpress.com/2013/01/settlement.pdf
[98] Government Gazette 37081, Regulation Gazette 10067.
[99] 2013 (2) SA 40 (GNP).
[100] 2014; Case no. 29349/14 (as yet unreported).
[101] At para. 76.
[102] 2014 (3) SA 441 (ECM).
[103] At para 20.

substantial. The most recent estimate of the projected costs associated with those needs is in the order of R360 million. Securing an appropriate level of budget allocation for the Department from the National Treasury will no doubt take some time and require significant commitment by both the Provincial and National Treasuries. When the budget funds are available the process of procurement of the furniture required will also take time. This much is self evident'. But because the respondents could not provide guidance as to how long it would take, the Court granted a period of 90 days as a reasonable period within which it may be expected that the furniture needs of the public schools in the Eastern Cape could be met.[104] The Government could return to court to explain legitimate delays if it was unable to comply.

A number of points are worth noting in relation to the abovementioned cases. First, the High Court judges adopted a pragmatic, hands-on approach to interpreting the right to basic education, focused less on assessing the reasonableness of Government measures - the test articulated by the Constitutional Court – and more directly on the actual incidents of the right, such as textbooks and school furniture.[105] This may have been because the right to basic education is not subject to progressive realization, and the courts were face with very concrete failings. Second, the judgments show the courts having to grapple with arguments concerning budgets and available resources. Given that education is funded out of the provincial equitable share – and provinces accordingly determine the share of spending on textbooks, furniture, and so on –some of the references to Parliament not having allocated sufficient resources appear somewhat misleading. In this regard, the SAHRC found that one of the biggest challenges affecting almost all provinces related to budget management.[106] Overall, there appeared to be poor management of budgets allocated to provincial education departments for the provision of learner material. In most provinces, the amount allocated to schools for the procurement of learning materials was largely consumed by the payment of staff salaries. It was also apparent that Departments lacked mechanisms to track and monitor the spending patterns of schools.

As a right unqualified by progressive realization, the fulfilment of right to basic education requires concerted effort from the State. Yet in practice the realization of the right is hampered by a range of coordination, planning and budget problems. This despite the fact that the State spends an internationally respectable share of GDP on education; financial resources are not the crux of the problem. The lack of clear accountability, in part structural, has intersected to with inadequate administrative and managerial capacity to deliver outcomes that arguably fail the constitutional standard for basic education. The complexity and blurred lines of accountability that are one of the weaknesses of South Africa's IGFRs system are thrown into stark relief in this area.

(g) Issue in focus: Food security

Under section 27(1)(b) everyone has the right to have access to sufficient food and water. The right of children to basic nutrition is guaranteed in section 28(1)(c).

According to latest data, 45.6 per cent of the of South Africa's population was food secure, having access at all times to sufficient, safe, and nutritious food that meets their dietary needs for an active

[104] At para 40.

[105] The SAHRC has drawn up the Charter of Children's Basic Education Rights (2013) with the aim of providing a statement what is required in law (internationally, regionally, nationally) of the State in order to give effect to the right of all children in South Africa to basic education.

[106] SAHRC, *Final Report of the SAHRC Investigative Hearing: Monitoring and Investigating the Delivery of Primary Learning Materials to Schools Country-Wide* (2013) at 45.

and healthy life.[107] The share of households experiencing hunger (food insecure) stood at 26 per cent in 2012. While food insecurity halved between 1999 and 2008, progress has stalled since then, with the latest figure essentially unchanged. The largest percentage of persons who experiencing hunger live in urban informal and in rural formal localities, demonstrating the overlap of food insecurity with other indicators. The prevalence of stunting (chronic undernutrition), wasting and underweight for children under five years are calculated to be 21.6 per cent, 2.5 per cent, and 5.5 per cent respectively.[108] Since the last survey in 2005, there has been a slight increase in stunting, with decreases in wasting and underweight. In relation to the global context, these prevalence levels can be classified as of medium severity for stunting, and low for wasting and underweight.

Reviewing the Government's various policy interventions UN Special Rapporteur on the Right to Food states that [109]

> 'These various strategies and policies demonstrate the commitment of the Government towards improving food security. However, commitments should translate into concrete action. Tremendous disparities in food security persist, linked strongly to inequality in terms of geography, gender and race.'

In his recommendations the Rapporteur emphasized the importance of a rights-based approach, as well as the need to ensure accountability for non-delivery. His report recognized the important contribution to food security of existing social security assistance, but recommended that the Government address protection gaps, including through the establishment of a basic income grant to provide support to individuals between the ages of 18 to 59 who are ineligible for one of the existing cash transfer grants.

The point had earlier been made that South Africa lacked an overarching policy framework designed to realize the right to food.[110] There is also evidence of inadequate coordination between Government departments, variance between allocation and spending in some Government departments, under-skilled staff, and general inefficiency of service delivery.[111] In this regard, the National Development Plan recognizes food and nutrition security as one of the enablers for achieving the Plan's objectives and calls for a number of interventions, including the development of a nutrition programme for pregnant women and young women.[112]

In 2013, the Government published the National Policy on Food and Nutrition Security.[113] The Policy summarizes as one of South Africa's key food security challenges that safety nets and food emergency management systems are inadequate to provide for those who are unable to meet their immediate food needs, or to mitigate the impact of natural and non-natural disasters on food security. The Policy identifies food assistance as one of the pillars of food and nutrition security, and

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[107] E. Hoosain et al, The South African National Health and Nutrition Examination Survey, 2012: SANHANES-1: the health and nutritional status of the nation, HSRC (2013) at 144.
[108] South African Health and Nutrition Survey, supra note 107 at 211.
[109] Report of the Special Rapporteur on the right to food, Olivier De Schutter, Mission to South Africa, A/HRC/19/59/Add.3 (2012), para. 19.
[110] D Brand, 'Between availability and entitlement: the Constitution, *Grootboom* and the right to food', *Law. Democracy & Development* (2003) 1 at 11.
[111] SAHRC, *Concept Paper on the Strategic Focus Area: The Right to Food* (2012) at 7.
[112] National Planning Commission, *National Development Plan: Our future 2030 – make it work* (2012).
[113] Available at http://www.nda.agric.za/docs/media/NATIONAL%20POLICYon%20food%20and%20nutririon%20security.pdf

states that among the interventions could include "an expanded and improved school nutrition programme, fortification of foods, and the use of foodbanks and food kitchens."[114] It is clear that the scope for direct assistance is narrowly drawn. Other pillars of the policy are: Improved nutrition education, Alignment of investments in agriculture towards local economic development, Improved market participation of the emerging agricultural sector, and Food and Nutrition Security Risk Management. No mention is made of expanded cash transfers, as recommended by the UN Special Rapporteur.

Overall, the thrust of the Policy appears similar to the prevailing practice, which has been described as demonstrating a preference for longer-term interventions in food accessibility, including through capacity building, rather than through direct food transfers.[115] Laudable as an approach predicated on longer-tem solutions may be, it arguably falls short of addressing the urgency of the situation, bearing in mind that a quarter of the population experiences food insecurity, a figure that has not budged since 2008. In this context, a reasonable preliminary conclusion might be that the obligation to achieve progressive realization of the right requires a re-evaluation of current policy and practice.

E. Conclusion and recommendations for moving the IGFR system towards supporting progressive realization of socio-economic rights

This section seeks to briefly identify concrete entry points for the IGFR system to contribute to realizing socio-economic rights in accordance with the Constitution.

The available budget documents are a remarkably open and accessible resource, consisting of detailed information and explanatory materials. What emerges is a picture of a highly sophisticated system, certainly at the cutting edge in terms of transparency and accessibility. It is clear that at very broad level the commitment to social spending and the delivery of basic services is unquestionably prioritized in spending and allocation frameworks. At the national level, the State is allocating expenditures in line with the constitutional commitment to promote and fulfill socio-economic rights. Priority areas, which have also been the subject of court cases, are reflected in the enhanced allocations for bulk water and sanitation, as well as upgrading of informal settlements.[116] State dedicates a large share of spending to the delivery of basic services, in fulfillment of its socio-economic rights commitments, and does this through an intergovernmental fiscal relations system that is attuned to the developmental needs of the provinces and local Government. Yet, descending from the 30,000 foot level, from the MTEF and the precision of the Division of Revenue Act, it is clear that something is amiss closer to ground level. The cases cited in this paper paint a picture of critical and persistent failings.

Under South Africa's system spending functions are devolved to sub-national Governments, in theory 'bringing Government closer to the people'. But devolution or decentralization also has a number of consequences (a) loss of control by central Government, e.g. the national Government cannot direct provinces spending of the equitable share; and (b) increased barriers in monitoring

[114] National Policy on Food and Nutrition Security, at 19. Other pillars are: Improved nutrition education, Alignment of investments in agriculture towards local economic development, Improved market participation of the emerging agricultural sector, and Food and Nutrition Security Risk Management.
[115] Brand, supra note 110 at 19.
[116] See for instance the urban settlements development grant, amounting to R32.2 billion over the period 2014-2017.

efficiency in expenditure management and service delivery.[117] Within the context of intergovernmental fiscal relations the negative side-effects, such as under-performance with respect to socio-economic rights, can be ameliorated through the imposition of national norms and standards. But these should be clear, simple to apply, and ideally constructed in terms of outcomes, as opposed to inputs, wherever possible. There is thus a strong case for beefed up monitoring and evaluation capacity at all levels of government.

In South Africa, the abovementioned consequences of devolution are combined with differing administrative and managerial capacities across the provinces and at the local Government level. Decentralisation tends to increase the demand for skilled administrators by the Government sector as provincial and local authorities require their own administrative staff.[118] A long-term commitment to capacity development is key for the future

Under the South African framework, the role of national Government is primarily to formulate policy and develop norms and standards, while the provinces and municipalities are largely responsible for implementation. As the 2014 Budget Review states, '[i]n practice the lines of responsibility and accountability are often blurred. These challenges can be overcome through institutional frameworks that allow for greater coordination.'[119] A less rosy view is that without a re-alignment of incentives there is likely to be only limited improvement.

To a degree these problems are structural and stem from the Constitution's allocation of concurrent responsibilities and the effects of fiscal decentralization. Thus it has been suggested that concurrent competence of the national Government and provinces for health and education has left the precise responsibilities inadequately defined.[120] The upshot is that provinces may receive transfers for education and health, but use them for other purposes, in the belief – not unjustified - that the national Government will intervene to cover the deficit and ensure that services are provided. In circumstances where sub-national Governments possess limited revenue raising capacity and revenue sharing is important in correcting vertical fiscal imbalances, the literature suggests that there are incentives for provinces to 'free-ride', that is inflate budget so as not to lose out to other provinces.[121] Similarly, the incentives for efficiency are further diminished when grants are made to repeatedly finance provincial deficits.[122] Especially in the case of provinces, which are dependent on the national government for almost three-quarters of their revenue, the effect of mis-aligned incentives cannot be wished away. Incentives drive behavior, whether of humans or institutions.

The Bill of Rights and the intergovernmental fiscal relations are expressed in very different terms and concepts, but the constitutional imperative of fulfilling socio-economic rights brings them together. What is missing in many cases is the set of principles and practices, rules and standards,

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[117] So-called agency problem. See LE De Mello Jr., Fiscal decentralization and Intergovernmental Fiscal Relations: A Cross-Country Analysis 28(2) *World Development* 2000, 373.
[118] J de Bruyn and D Budlender 'Intergovernmental Fiscal Relations', in D. Budlender ed.,*The Third Women's Budget* IDASA (1998).
[119] At 94.
[120] Odd-Helge Fjelstad, *Intergovernmental fiscal relations in developing countries: A review of issues*, WP 2001: 11, Chr. Michelsen Institute, 5.
[121] De Mello supra note 117 at 374.
[122] A Sha *A Practitioner's Guide to Intergovernmental Fiscal Transfers* World Bank Policy Research Working Paper 4039 (2006), 47; R M. Bird 'Transfers and incentives in Intergovernmemtal Fiscal Relations' in: Shahid Javed Burki, Guillermo E. Perry, Florence Eid eds., *Proceedings, Annual World Bank Conference on Development in Latin America and the Caribbean, Decentralization and Accountability of the Public Sector* (1999) 111.

and systems for monitoring and accountability that facilitate the translation of socio-economic rights guarantees into effective provision of services. In this regard, minimum norms and standards for basic services have been considered integral to linking progressive realization to the intergovernmental fiscal relations system. Without norms and standards, it is difficult to assess whether budget allocations are sufficient or to monitor delivery of services.

Preliminary recommendations

- **Organs of state are obliged to take all reasonable steps to achieve and fulfill socio-economic rights**, with or without the threat of court action to mandate compliance with the Constitution. What is considered 'reasonable' will depend on the circumstances, and has been elucidated in the jurisprudence of the Constitutional Court. It would be considered unreasonable for the Government not to put in place an implementable plan or to make progressive efforts towards housing for the most vulnerable over time. Exercises that might be considered "technical", e.g. planning and assessment, priority-setting, ought to take socio-economic rights into account. These rights must be fulfilled without arbitrary distinction or exclusions between groups.

- **Government at all levels must plan and budget for the progressive achievement of socio-economic rights.** The obligation to fulfill rights is ratcheted up as more resources become available or can be redirected. Government is under an obligation to strive for continual improvement against constitutional benchmarks. Municipalities in particular are ideally suited to react, engage and plan to fulfill the needs of local communities. The planning and budgeting process must be transparent and engage with communities and non-Governmental organizations to the maximum possible extent. In particular, provincial and local Government ought to plan proactively and budget for emergency situations in their yearly application for funds. While they are entitled to approach the national and provincial Governments for assistance, they have the power and the duty to finance their own schemes for the achievement of socio-economic rights. In relation to the right to housing for example, municipalities are obliged to provide access to adequate alternative accommodation to occupiers who are evicted from their home and would otherwise be rendered homeless. Municipalities must budget for all categories of persons in desperate or emergency need of housing and, if necessary, they should leverage provincial and/or national funding to do so.

- **A bald assertion of budgetary constraints will not be acceptable** if the Government is taken to Court. The Government must always be able to justify and defend all the reasonable steps it has taken to ensure the fulfillment of the right, allowing the court to make a just and equitable decision having regard to all the relevant circumstances. This includes providing a full and detailed account of its budgetary constraints, including why it is not able to meet the financial and fiscal requirements for realization of the right.

- **The needs of the poorest and most vulnerable must be prioritized.** This imperative is in line with the jurisprudence of the Constitutional Court and international human rights norms and standards. There is considerable evidence that vulnerable groups, such as disabled persons, are being denied the equal enjoyment of their rights to education. Planning and budgeting processes ought to be sensitive and response to equity concerns, addressing unfair and unjust circumstances that deprive people of the enjoyment of their fundamental rights.

This has implications for both programme design and implementation, as well as monitoring and evaluation.[123]

- **In line with constitutional jurisprudence, Government must meaningfully engage with communities affected by its decisions about socio-economic rights.** A municipality must make, and be able to justify, all reasonable efforts to meaningfully engage. The meaningful engagement process requires additional resources from the State, and should be 'well structured, coordinated, consistent and comprehensive and not be misleading; take into consideration language preferences; and enable individuals or communities to be treated as partners in the decision-making process'. If the Government is developing a strategy to meet its constitutional obligations of fulfilling a specific socio-economic right, it must engage with communities at all stages, including the decision-making, planning, implementation and evaluation processes. [124]

- **The Government must fully implement its pre-existing policy**. If any level of Government has decided on a policy to implement socio-economic rights, it should be fully planned for and budgeted. The courts do not hesitate to set firm criteria, together with tightly set timelines, for the Government to implement its existing policy.

- **There is a need for clearer national norms and standards.** Such norms are needed facilitate uniform and comparable fulfillment of socio-economic rights. Overall, such norms and standards should promote moves towards accountability for outcomes (test scores/pass rates, schools re-furbished) as opposed to input measures.

- **Ameliorate perverse incentives in the existing system of IGFRs and improve coordination.** Strengthen monitoring and early warning systems and limit financing of provincial deficits. Introduce "sun-setting" of grant programmes and integrate prompt review and evaluation

- **Improve efficiency and strengthen mechanisms for monitoring and review.** Ongoing work of the FFC in this regard, including on the provincial wage bill, and greater effectiveness of public finances, through greater and more rigorous oversight to ensure the elimination of fruitless, wasteful, and unauthorised expenditure.

- The extent to which socio-economic rights are supported by public funds does not only depend on the allocation of funds, but how **effectively and efficiently it is used**. Resources are not only financial but human, technological, organizational, natural and information resources.

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[123] M Bamberger and M Segone *How to Design and Manage Equity-Focused Evaluations*, UNICEF Evaluation Working Paper series (2010).

[124] L Chenwi and K Tissington *Engaging meaningfully with Government on socio-economic rights: a focus on the right to housing* (2010) at 9. Available at: http://www.communitylawcentre.org.za/projects/socio-economic-rights/Research%20and%20Publications/SER%20Publications/Engaging%20meaningfully%20with%20Government%20on%20socio-economic%20rights%20-%20A%20focus%20on%20the%20right%20to%20housing.pdf

- Where the private sector is subcontracted to provide public services, the **State has a duty to monitor and regulate the private provision of these services** to ensure that human rights obligations are met. Importantly, parastatals and state-owned enterprises are also obliged to promote the implementation of socio-economic rights to the extent that their mandates are relevant to then rights. Government, the controlling shareholder of such entities, must in setting their plans and strategies, also take into account the constitutional obligations of parastatals.

- The FFC should consider engaging in further research with a view to formulating recommendations addressing how the fiscal and financial framework can better advance the realization of socio-economic rights. This could include spending and performance analysis, particularly at the provincial level, in selected areas such as health, education and social services. Planning and budgeting tools and monitoring and evaluation for practical, day-to-day integration of socio-economic rights into decision-making could also be provided, for instance, screening tools identifying areas with a critical rights impact analysis. The FFC could consider integrating the equity dimensions of the budget into its analysis, and in this regard, consider making explicit submissions to the Government, including with other institutions such as the SAHRC.