CHAPTER 1: BACKGROUND TO THE 7th ESR REPORT

1. THE MANDATE OF THE COMMISSION

The South African Human Rights Commission (Commission) is a constitutional body governed by section 184 of the Constitution of the Republic of South Africa, Act 108 of 1996 (Constitution). Section 184 (1) and (2) clearly underlines the mandate, functions and powers of the Commission whereas section 184 (3) is specific in respect of the Commission’s requirement to monitor and assess economic and social rights (ESR). In particular, section 184 (3) requires that:

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

However, such monitoring and assessment is not only for the purposes of constitutional compliance but to ensure the advancement of social and economic rights so that the poor and vulnerable in society may enjoy the full benefits of democracy. This will include the specific objectives of:

1. Determining the extent to which the organs of state have respected, protected, promoted and fulfilled human rights.
2. Determining the reasonableness of measures including legislation, by-laws, policies and programmes adopted by organs of state to ensure the realisation of human rights in the country.
3. Making recommendations that will ensure the protection, development and attainment of human rights.

1.1. The 7th ESR Report

In 2008, the Commission drafted a Strategy for the Monitoring of Social and Economic Rights in South Africa, the aim of which was to develop a more structured framework for its monitoring and assessment mandate. Past monitoring activities of the Commission were seldom contextualised or rooted within a framework of objectives and indicators, and hence the strategy proposed for its 7th ESR Report was to utilise the indicators attached to the Millennium Development Goals (MDG) with the various human rights obligations providing the natural context and lens through which the goals and targets can be critically viewed and understood. This also fitted aptly with the Commission’s strategic principles of poverty eradication, development, equality and human dignity.

The Commission’s section 184 (3) monitoring mandate that refers to housing, health care, food, water, social security, education and environment has high levels of synergy with the MDG. However, by using the human rights obligations as the critical context, the strategy necessitated the monitoring of socio-economic rights to go beyond the mere quantitative targets of the MDG and towards an approach that makes an evaluative assessment of the qualitative and substantive issues with regard to the progressive realisation of economic and social rights.4

The MDG are an appropriate tool to use as they represent, through the Millennium Declaration, a structured and coherent response to contemporary global challenges such as widespread poverty, and have been heralded as a means for benchmarking and assessing progress in human development.5 In the Millennium Declaration, 189 member states of the United Nations signed and reaffirmed the commitment of the international community to eradicate poverty.6 The Declaration is a consolidation of eight interconnected development goals and constitutes a set of agreed and measurable targets and quantifiable indicators. The eight goals are designed to: (1) eradicate extreme poverty and hunger; (2) achieve universal primary education; (3) promote gender equality and empower women; (4) reduce child mortality; (5) improve maternal health; (6) combat HIV and AIDS, malaria and other diseases; (7) ensure environmental sustainability; (8) develop a global partnership for development.

While the MDG have galvanised unprecedented efforts to meet the needs of the world’s poorest at a political level, there are a number of reasons why the Commission decided to look beyond them in its assessment of

4 South African Human Rights Commission (note 1 above).
South Africa’s achievement of the progressive realisation of ESR. Firstly, while it is clear that there is a connection between the content of the eight MDG and the seven ESR enshrined in the Constitution, it is important to consider that the former are motivated by political commitments whereas the progressive realisation of ESR is driven by constitutional imperatives and international law. Secondly, even though there are minimum standards attached to both, ESR create the binding obligation to respect, protect, promote and fulfil the rights. In contrast, the political nature of the MDG means that there is no legal compulsion to meet the various targets. Thirdly, the minimum standards attached to both mean different things. The targets and indicators attached to the MDG may appear attractive but measured against the obligation of the progressive realisation of a right, it may mean that meeting the targets does not equate to the realisation of a right. For example, Goal 2 of the MDG ignores the requirement for free primary education and Target 7 focuses on improving the lives of 100 million slum dwellers, but a human rights-based approach would have provided greater focus on providing security of tenure for all.

However, the Millennium Declaration does place both human rights commitments and development goals at the centre of the international agenda for the new millennium. The Declaration made substantial reference to human rights, and world leaders made a commitment to respect all internationally recognised human rights and fundamental freedoms. Accordingly, the goals are underpinned by international law and consequently should be seen as part of a broader integrated framework of international human rights entitlements and obligations. If viewed through a rights-based lens, it can be argued that the intention of the Millennium Declaration is to help focus efforts to address discrimination, exclusion, powerlessness and accountability all of which lie at the root of poverty and other development problems. However, it must be emphasised that concerns have been raised that the practical application of the Millennium Declaration through the MDG has not provided enough attention to women and marginalised groups, nor has it addressed national and global power inequalities, and it may run the risk of lowering human rights standards.

A rights-based approach to development is essentially a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to integrate the norms, standards and principles of the international human rights system into the plans, policies and processes of development. These norms and standards are those contained in international treaties and declarations. The principles include express linkages to rights; equality and equity; accountability, empowerment and participation; and non-discrimination and attention to vulnerable groups.

The strategy of the Commission for the 7th ESR report was thus to fuse the MDG with national indicators and the national policy and legislative framework to form a comprehensive measurement tool to assess the progressive realisation of ESR within a rights-based framework. The contextual framework will thus in essence consist of a fusion of international, regional and national indicators and be biased towards human rights understandings within the South African and other developing contexts.

1.2. The Methodology
The primary methodology used as the basis for compiling the report was the public hearings on each right which were held from 8 to 12 June 2009. In research, a public hearing can best be described as a focus group which is intended to stimulate discussion among participants and bring to the surface responses that otherwise may lay dormant. Focus groups offer unique insights for critical inquiry as a deliberative, dialogic and democratic practice. In the context of human rights, a focus group as a problem posing formation serves to identify and interrogate the lived experience of the poor and change specific lived contradictions through ensuring that the voice of the poor is heard. Focus groups provide a number of advantages:

1. The open response of a focus group provides an opportunity to obtain large and rich amounts of data in the respondent’s own words.

2. It allows respondents to react and build on the responses of other group members.

3. The direct interaction provides opportunities for further clarification, follow-up and probing.

4. It can be used as an important tool for empowerment and the advancement of social justice as it can serve to expose and validate the lived experience of the poor.

The process and development of the public hearings entailed, in the first instance, the production of a working document. The purpose of the working document was to stimulate thinking by respondents around the MDG and economic and social rights by providing them with a conceptual and critical analysis of the subject matter that would inform their written submissions. Concomitant, the working document provided stakeholders with the Commission’s position on the progressive realisation of economic and social rights and its relation to the MDG. The working document also set the tone for the nature and content of the terms of reference in respect of the principles and critical questions that the stakeholders were expected to answer in their written submissions.

The written submissions together with the transcription of the hearings formed the basis for the analysis. Although the content of the submissions and the oral testimony of the hearings is invaluable, it is nonetheless limited in respect of reliability. To overcome this limitation, the research analysis was supplemented by extensive secondary research of government documents, academic texts, international literature and key informant interviews and discussions. The analysis took the form of a quantitative assessment of data as well as qualitative analysis of text in respect of the public hearings. In the latter, the critical analysis of text as well as the oral testimony revealed core themes that emerged across the various rights. In the former, a quantitative analysis was conducted on departmental budgets, strategic plans and annual reports. Both the quantitative and qualitative analysis informed the development of the particular report structure, using the definition of progressive realisation and the 4 As as the evaluative tool to determine such progressive realisation.

1.2.1. The Working Document

To guide the nature and content of the submissions, the Commission drafted a working document, titled “MDGs and the Realisation of Economic and Social Rights in South Africa: a Review,” which critically assessed the progress of ESR in the context of South Africa’s commitment to meeting the MDG. The purpose of the working document was to stimulate thinking for those who intended to make submissions, as it served as a foundational source of information on the relationship between the MDG and the Bill of Rights from the Commission’s perspective.

The working document was specifically attached to requests directed at relevant national and provincial government departments. However, it was made available on the Commission’s website which allowed anyone who was interested in making a submission to gain ready access to it.

1.2.2. The Terms of Reference

In line with its mandate in respect of section 184 (3) of the Constitution, the Commission called for written submissions from relevant national and provincial departments for the period April 2006 to March 2009. It also invited written submissions from civil society, academia and any other relevant interested party for the period from April 2006 to March 2009. The deadline for receipt of submissions by the Commission was 12 May 2009. The Terms of Reference (ToR) outlined the theme of the hearings “The MDGs and the Realisation of Economic and Social Rights in South Africa” and identified that the submissions should cover the following human rights: environment, water and food; social security; health; land and housing; and education.

The Commission requested that the submissions provide:

(a) An assessment of the progress that the state has made in the realisation of ESR from both a quantitative and a qualitative perspective; and

(b) An understanding of the content of the obligation placed on the state to achieve the progressive realisation of economic and social rights.
Participants were asked to forward all their enquiries to Senior Researcher, Mr Cameron Jacobs. Written submissions could either be e-mailed, faxed, posted or hand delivered to the Commission’s Head Office.

1.2.3. The Respondents
Categories of respondents were purposively selected and requested to make written submissions and they included all government departments and ministries, as well as civil society organisations, academic institutions and the general public. The written submissions were then categorised according to the subject matter, and respondents from a sample of each category were invited to make an oral submission at the public hearings.

1.2.4. Advertising and Postponing the Public Hearings
The Commission advertised in the Sunday Times in December 2008 requesting organs of state, civil society and any other interested stakeholders to make submissions. The initial announcement was that it would hold public hearings on 02 to 06 February and 09 to 11 March 2009 at the Commission’s Head Office located at Human Rights House, Johannesburg. It was also stated that submissions covering the period April 2006 to January 2009 would be accepted from relevant national and provincial departments as well as the public and other interested parties within the Terms of Reference. The final deadline for receipt of submissions by the Commission was 06 February 2009.

However, the initial response to the call for submissions was very poor, with only four government departments having made timeous submissions. This left the Commission with no option but to extend the deadline. In February 2009, the Commission released a press statement on the postponement, as well as an advertisement in the Mail and Guardian newspaper requesting stakeholders to make submissions on the progressive realisation of economic and social rights. The Commission was also hosted on a community radio station advertising the hearings and other aspects of the work of the Commission. The Commission also posted an advert on its own website calling for organisations and individual parties to prepare submissions. The public hearings were then re-advertised with new dates for both the public hearings and written submissions. The final deadline for receipt of written submissions by the Commission became 12 May 2009, and the public hearings were held from 08 to 12 June 2009 at the Commission’s Head Office located at Human Rights House in Johannesburg.

1.2.5. The Public Hearings
In research, a public hearing is a variant of a focus group which has the advantage of offering unique insights for critical inquiry as a deliberative, dialogic and democratic practice. The hearings were held in three languages, namely, English, Zulu and Sesotho and translators were provided for participants. In order to maintain consistency and uniformity, the format for each of the hearings was similar. The morning began with registration and tea, followed by a welcome speech by a Commissioner from the Commission. In the first session, submissions were made by the national government which were then interrogated through questions from the panellists. The second session entailed public engagement on the first session and subsequently inputs from other departments, civil society organisations and the academia were made. The session after lunch was reserved for civil society, academia and the public in general, followed by inputs from government departments and questions from the panellists. Further discussions were held with the public before closure of the session. Each session was finalised by a summary of the most important issues that emerged.

The programme for each day of the hearings is provided as an appendix to this report but for ease of reference the schedule for the hearings was as follows:

3. Health:  10 June 2009.
Participation: Submissions and Public Hearings

Submissions were made by departments and civil society organisations. In respect of the submissions from the government, only fourteen departments across all spheres of government provided the Commission with written submissions. The key departments and their provincial counterparts from whom the Commission requested submissions are listed below:

Table 1: Key Government Departments

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Out of the nine provincial governments in South Africa, four did not make any submissions to the public hearings: these are the Eastern Cape, the North West Province, KwaZulu-Natal (KZN) and the Free State. The Western Cape was the only province that showed a real commitment to the process and respect for the work of Commission. It made one general submission from the Office of the Premier, and five submissions from its departments, namely, from Environmental Affairs and Development Planning, Social Development, Health, Local Government and Housing and Education. It also made oral submissions to each of the sessions at the hearings. Gauteng, Limpopo, and the Northern Cape made one submission each. Two National departments did not make written submissions, namely the Departments of Social Development, and Rural Development and Land Affairs. The national department of Social Development did not attend the public hearings, but made a submission to the hearings. The Department of Rural Development and Land Affairs sent a representative who was identified the day before the public hearings. This setback for the Department of Rural Development and Land Affairs led to the department’s submission being prejudiced by the short notice as the representative did not have sufficient time to prepare in respect of the Commission’s terms of reference.

As time for questions and answers was limited, and significant questions were raised, government departments were requested to present their answers in writing to the Commission. However, none of the government departments provided the written responses as per the request of the Commission.

1.2.6. The Review and Reporting Process

Following a process of selection, an external provider, Southern Hemisphere Consulting, was appointed to write the report on the hearings. The provider received a guideline for report writing, as well as all the background documentation and the written submissions. The provider also attended each hearing and received the transcripts.

A report structure was approved by the Commission, and the first draft of the report was submitted on the 14 September 2009. Comments were received from the Commission on the 5 October 2009, and a final report was submitted by the external provider on the 7 December 2009. The Economic and Social Rights Unit of the Commission then edited the report for its launch and dissemination to the Parliament of South Africa.

According to the South African Human Rights Commission Act of 1994, the Commission has a constitutional mandate to submit reports to the President of South Africa and Parliament in respect of meeting its objectives. Parliament provides an effective oversight function over the Commission and its functions. The ESR report is one such report that the Commission is obliged to submit to Parliament as stipulated by section 184 (3) of the Constitution.
1.2.7. Limitations of the Methodology

As indicated above, the strategy of the Commission for the 7th ESR report was to fuse the MDG with national indicators and the national policy and legislative framework to form a comprehensive measurement tool to assess the progressive realisation of ESR within a rights-based framework. Consequently, the report also assessed the government’s progress in terms of meeting the targets set in the MDG.

As a framework for analysis of the progressive realisation of the right, the 4 As were adopted. The rationale for using the framework is that it is used in international discourse, particularly in the General Comments to the ICESCR, for interpreting the progressive realisation of the rights to housing, health and social security. However, the limitation of using the 4 As is that it is not standardised across all the rights. As a result, it is difficult to draw general conclusions. As a means to overcome this limitation, general conclusions were drawn from the principal themes that emerged from the analysis of the period under review.

The primary methodology was the public hearing and although it is a very useful technique for critical enquiry, it does pose certain challenges in respect of the reliability of what is being measured. However, this does not render the findings or the report any less valid but the limitations do point to need for the Commission to develop specific indicators for each right.
Chapter 2

The nature and content of the constitutional obligation
CHAPTER 2: THE NATURE AND CONTENT OF THE CONSTITUTIONAL OBLIGATION

2. INTRODUCTION

The purpose of this chapter is to expand on the nature and content of the constitutional obligations in respect of the various economic and social rights, through deconstructing progressive realisation and its nexus to the notion of reasonableness as expounded in the various constitutional court judgments. Part of the intention of this chapter is to shift the debate in human rights discourse from using “progressive realisation” as a generic term to unpacking it into its constituent elements. Generally, one of the major obstacles to monitoring and assessing economic and social rights has been the obtuse way in which state obligations have been defined in international law. The consequence of such vague language within the rights discourse has been three-fold. Firstly, there has been very little attempt by international or national human rights institutions to add value to the content of the fulfillment and enjoyment of human rights and to hold nation states accountable to their obligations. Secondly, and perhaps because it has been considered a futile battle to do otherwise, many have instead focussed their attention on the immediate obligations associated with economic and social rights. These are the duties to respect, protect and promote. It has been argued elsewhere that while this has been effective, it has diverted attention away from issues and standards of resource availability, progressive realisation and minimum core obligations. Thirdly, nation states are reluctant to accept legal accountability in the area of social and economic policy, and as a result hardly engage in human rights discourse and prefer to talk about development challenges without offering any binding solutions. The most obvious example is the Millennium Development Declaration. This chapter will be divided into a discussion and analysis on the relevant jurisprudence and how rights have been interpreted, the shortcomings of such interpretation especially as it relates to the obligation of progressive realisation and, finally, unpacking progressive realisation in the context of a human rights-based approach.

2.1. Progressive Realisation and Reasonableness

2.1.1. Relevant South African Jurisprudence

The economic and social rights enshrined in the Constitution are to a large extent phrased similarly to the rights in the International Covenant of Economic, Social and Cultural Rights of 1966. The rights in the Constitution can be divided into three main types, namely qualified rights, unqualified rights and rights that deal with prohibitions on the state:

(a) Section 26 (1) provides the right of everyone to have access to adequate housing and section 27 (1) provides that everyone has the right to have access to health care services, sufficient food and water, social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. These rights are qualified by a second subsection that provides that the “state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right”.

(b) The second category of rights are unqualified rights, and include the economic and social rights of children in section 28 (1) (c); the right to basic education in section 29 (1) (a) and the economic and social rights of detained persons and sentenced prisoners in section 35 (2) (e).

(c) The third category is phrased as prohibitions on the state to certain actions. Section 26 (3) prohibits the eviction of people from their homes without an order of court made after relevant circumstances are taken into account and section 27 (3) prohibits the refusal of emergency medical treatment.

Interpretation by the Constitutional Court of ESR

The Constitutional Court of South Africa has adjudicated on claims on ESR and thereby contributed to the interpretation of these rights. The four most important cases are:

1. Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC)
2. Minister of Health and Others v Treatment Action Campaign and Others 2002 (10) BCLR 1075 (CC)

13 Jacobs, C. Demystifying the Progressive Realisation of Socio-economic in South Africa. Paper presented to the Australia National University, (October 2009).
15 Ibid.
3. Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others 2004 (6) BCLR 569 (CC)

4. Lindiwe Mazibuko and Others v City of Johannesburg and Others 2009 ZACC 28, Case No CCT 39/09 (CC)

The Grootboom judgment\(^\text{16}\) focused on the right of access to adequate housing of a group of extremely poor people, 510 children and 390 adults, who were living in bad conditions\(^\text{17}\) in an informal settlement in Wallacedene, Cape Town. In a desperate attempt to ameliorate their living conditions, they moved onto vacant land that was privately owned and earmarked for low-cost housing. Eviction proceedings were successfully instituted against the community. The community then sought refuge on a sports field with nothing but plastic sheeting to protect them from the elements. They applied to the High Court for an order against all spheres of government to be provided with temporary shelter or housing until they got permanent accommodation. They relied on the right of access to adequate housing in section 26 (1) and the right of children to shelter in section 28 (1) (c) of the Constitution. The Cape High Court found that there was only a violation of the right of children to shelter and not the right to adequate housing, and hence the claim under section 26 (1) was rejected. The government then appealed the decision to the Constitutional Court but the court found that the state was in breach of its obligation in terms of section 26 on the basis of the reasonableness approach.

In the Grootboom judgment, the Constitutional Court developed a test for reasonableness as a guide to decide whether the government’s programme met constitutional requirements. In paragraph 39 of the judgment, the court held that a government programme: “must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available”. The court further held that “a co-ordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by Chapter 3 of the Constitution.”\(^\text{18}\) The programme must furthermore be coherent and capable of facilitating the realisation of the right\(^\text{19}\) and passing legislation is not sufficient to fulfil the constitutional requirement of reasonableness.

“The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executives. These policies and programmes must be reasonable in their conception and their implementation.”\(^\text{20}\)

Furthermore “the programme must be balanced and flexible and make appropriate provision for attention to housing crisis and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable.”\(^\text{21}\)

Finally, the test caters for those most in need: “Those, whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right.”\(^\text{22}\)

The court held that the state had instituted an integrated housing development policy in which medium and long term objectives cannot be criticised. However, it argued that the housing programme lacked any component providing for those in desperate need. It therefore found that the absence of such a component was unreasonable and therefore concluded that the nationwide housing programme fell short of the obligations imposed upon national government.\(^\text{23}\)

The TAC case\(^\text{24}\) pertained to the access to adequate health care. The Treatment Action Campaign (TAC) challenged the limited nature of government measures introduced to prevent mother-to-child transmission of HIV on two grounds. They argued:

\(^{16}\) Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC).

\(^{17}\) They had no water, sewage, refuse removal and only 5% of the shacks had electricity.

\(^{18}\) Government of the Republic of South Africa (note 17 above) 40.

\(^{19}\) Ibid 41.

\(^{20}\) Ibid 42.

\(^{21}\) Ibid 43.

\(^{22}\) Ibid 44.

\(^{23}\) Jacobs, C. (note 14 above).

\(^{24}\) Minister of Health and Others v Treatment Action Campaign and Others 2002 (10) BCLR 1075 (CC).
1. The government unreasonably prohibited administering the antiretroviral drug, nevirapine, at public hospitals and clinics, except for a limited number of pilot sites.

2. The government had not produced and implemented a comprehensive national programme for the prevention of MTCT of HIV.26

The High Court and the Constitutional Court applied the test for reasonableness developed in the Grootboom case and decided that the government’s programme did not comply with the right of access to health care services and the duty to take reasonable measures under section 27 (2) of the Constitution.

The Constitutional Court elaborated on the reasonableness test of government programmes by adding a transparency requirement. “In order for it to be implemented optimally, a public health programme must be made known effectively to all concerned, down to the district nurse and patients.”26

The Khosa case27 dealt with the right to social assistance. A group of permanent residents challenged the constitutionality of some provisions of the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act 106 of 1997. These provisions:

- Restricted access to social assistance to South African citizens only.
- Excluded permanent residents, elderly people and children, who would otherwise have qualified for social grants if there was no requirement of citizenship.
- Excluded primary caregivers who are not South African citizens from accessing the Child Support Grant (CSG) for children in their care, even where these children are South African citizens.

Yet, foster care parents did not have to comply with a requirement of citizenship. In other words, children of non-citizens would have to be removed from their families to join a foster family in order to benefit from the CSG. The Constitutional Court decided that:

1. Permanent residents are a vulnerable group.
2. The laws that exclude them from access to the benefit of social assistance treat them as inferior to citizens.
3. The costs of including permanent residents in the social security scheme would be small.
4. Excluding permanent residents from access to a social security scheme was not consistent with section 27 of the Constitution.
5. Excluding children from access to these grants on the basis of their parents’ nationality was unfair discrimination and violates their right to social security under section 28 (1) (c).

The reasonableness approach was here applied to the question of who is entitled to ESR, which is different from the Grootboom and the TAC cases where the reasonableness criteria was applied to the question of the normative content of the ESR.

The Phiri case28 dealt with the interpretation of the right to have access to sufficient water. The applicants were five residents of Phiri in Soweto who challenged the installation of pre-paid meters which they argued were not covered by the city’s bylaws. They also wanted the monthly free water allocation increased from six kilolitres to 50 kilolitres. The applicants raised four arguments as to why the city’s Free Basic Water policy should be declared invalid:

1. The applicants contended that the court should determine a quantified amount of water as “sufficient water” within the meaning of section 27 and that this amount is 50 litres per person per day.
2. They also contended that the standard set in the National Water Standards regulations is a minimum standard and that the court is free to determine a higher amount.
3. They furthermore contended that six kilolitres of free water per month is unreasonable within the meaning of section 27.

26 Minister of Health (note 25 above) 123.
27 Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others 2004 (6) BCLR 569 (CC).
28 Lindiwe Mazibuko and Others v City of Johannesburg and Others 2009 CCT 39/09 (CC).
4. Finally, they contended that the city’s indigent registration policy, which allows for an additional 4 kilolitres per month per household to indigent households is unreasonable, because it is demeaning or, in effect, under-inclusive.

The court refused to determine a quantified amount that would constitute sufficient water in terms of section 27 as the argument by the applicants was regarded in effect as an argument similar to a minimum core argument. The court stated that the right of access to sufficient water requires the state to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources. It does not confer a right to claim “sufficient water” immediately. The court furthermore said:

“Moreover, what the right requires will vary over time and context. Fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context. The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable. Secondly, ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.”

It ruled that the City of Johannesburg’s Free Policy fell within the bounds of reasonableness and therefore was not in conflict with either section 27 of the Constitution or with the national legislation regulating water services. The installation of pre-paid meters in Phiri was therefore found to be lawful.

The court added an interpretation to progressive realisation: “The concept of progressive realisation recognises that policies formulated by the state will need to be reviewed and revised to ensure the realisation of social and economic rights are progressively realised.” The court found that the relevant policies by the City of Johannesburg had been under constant review and were currently undergoing a revision.

**Critique of the Reasonableness Test**

It has been argued that economic and social rights are non-justiciable because of their budgetary consequences which would lead to judicial encroachment on legislative and executive terrain. In the TAC case the Constitutional Court reaffirmed the justiciability of these rights. It rejected the government’s argument and reiterated that the separation of powers underlying the Constitution is not absolute. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy. The Constitutional Court found that in economic and social matters courts are constitutionally obliged to ascertain the meaning of the rights in question, to evaluate compliance with the duties they impose as well as to state and to remedy non-compliance where this is found. However, as can be seen from above, the court refrained from determining precisely what the achievement of any particular social and economic right entails and what steps the government should take to ensure the progressive realisation of the right. Such an evasive stance has often been criticised by civil society especially in respect of the court’s refusal to elaborate on the minimum core content inherent in the rights to have access to housing and health care services. Instead, it has insisted in both the Grootboom and TAC cases that it was the standard of reasonableness, rather than core content of these rights, that was relevant to solving the matters at hand.

29 Ibid 59.
30 Ibid 60-61.
31 Ibid 40.
33 Minister of Health (note 25 above) 25.
34 Ibid 98.
Despite clearly affirming its interpretative authority in the TAC case, the Constitutional Court has, perhaps surprisingly, shown little vigour in carrying out the interpretative function in relation to the specific economic and social rights. Neither has the Constitutional Court related its understanding of economic and social rights to specific benchmarks, timeframes or minimum standards, from which either the extent of citizens’ socio-economic entitlements or of the state’s socio-economic obligations may be derived. Instead, the court has spent most of its energy devising and applying the abstract compliance measuring standard of reasonableness. The failure to link this standard explicitly to a more detailed elaboration on the content of individual rights and obligations is lamentable, as it removes the compliance-measuring standard from its context and fails to acknowledge the explicit prioritisation of socio-economic interests abundantly evident from a purposive reading of the constitutional text.36

The recent Phiri case is just another example of the court’s reluctance to give content to economic and social rights. The court furthermore determined its role narrowly when reviewing progressive realisation of these rights.37 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 the government to take steps; If the 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 the 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 realisation imposes a duty upon the government to continually review its policies to ensure that the achievement of the right is progressively realised.

2.1.2. International Law

“Progressive realisation” in the Constitution refers to a right that cannot be realised immediately. The goal of the Constitution is that the basic needs of all in our society should be effectively met. In order for the state to meet the progressive realisation criteria it must take steps to achieve this goal. “It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made accessible not only to a larger number of people but to a wider range of people as time progresses.”38

The content of section 26 (2) and 27 (2) is similar to Article 2 (1) in the United Nation’s International Covenant on Economic, Social and Cultural (ICESCR) of 1966. It reads “Each state party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”. South Africa has signed but not yet ratified the Covenant. In short, South Africa is politically bound to not go against the content of the Covenant but is not as such legally bound by the convention. However, in the interpretation of the socio-economic rights in the Constitution, and particularly when applying the reasonableness test, the courts refer to the Covenant and the General Comments on the ICESCR by the Committee on Economic, Social and Cultural Rights.39 General Comment 3 refers to progressive realisation and stipulates “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”.40

On a more informal level, bodies of experts have also formulated similar guidelines, the most important being the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1986. The Limburg principles strengthen the concept of progressive realisation by adding that state parties are obliged to move expeditiously towards the realisation of the ICESCR and that they are under no

37 Lindiwe Mazibuko (note 29 above) 67.
38 Government of the Republic of South Africa (note 17 above) 45.
39 The General Comments of the Committee on Economic, Social and Cultural Rights are non-legal statements adopted by the Committee that elaborate the meaning of the obligations in the Covenant.
circumstances to interpret this obligation as a licence to indefinitely defer the realisation of the rights outlined in the Covenant.\(^41\) It furthermore requires the “effective use of available resources”.\(^42\) Available resources refer to both the resources within a state and those available from the international community through international cooperation and assistance.\(^43\)

Taking measures within available resources recognises that resources are not limitless, and that the state must do the best it can within the resources it has. The state can defend an allegation that it is not making sufficient progress in realising socio-economic rights on the grounds that it does not have sufficient resources and is doing all that is reasonably possible in the circumstances. What “pie” of resources gets taken into account to assess whether government is doing all that is reasonably possible? The government cannot indefinitely delay taking clear measures that will advance the rights. It must also make sure that it correctly prioritises its budget and other resources to enable it to fulfil its constitutional commitments. It cannot claim that it lacks “available resources” when its budgetary and financial policies clearly favour privileged groups in society at the expense of disadvantaged groups. The government’s first priority should be to ensure that vulnerable and disadvantaged groups have access to at least a basic level of socio-economic rights, for example, shelter, primary health care, basic education and nutrition. This is what the UN’s CESCRI calls the state’s “minimum core obligations”.\(^44\)

It is controversial whether the socio-economic rights in section 26 and 27 in the Constitution impose minimum core obligations on the state. The CESCRI developed minimum core obligations in interpreting the positive obligations of the state to realise socio-economic rights under the ICESCR. The UN Committee further held that socio-economic rights contain a minimum core obligation that must be fulfilled by state parties.\(^45\) This would require every state party to fulfil minimum essential levels of ESR and a failure to do so may constitute a prima facie failure to discharge its obligations under the International Covenant on Economic, Social and Cultural Rights. This means that minimum core obligations are in fact components of progressive realisation and the two cannot be divorced from one another.\(^46\)

The minimum core obligation can be defined as the minimum standards for defining the right in question to ensure that the basic subsistence needs of the population are met. Therefore, progressive realisation should be seen as a continuum where the rationale is to start at the minimum socio-economic provision necessary to meet people’s basic needs (minimum obligation) to its full realisation of the significant improvement of the capabilities of people in society to the extent that they can meaningfully participate in and shape society.\(^47\)

However, in the Grootboom, TAC and Phiri cases, the Constitutional Court rejected the minimum core argument. The court said that:\(^48\)

- The drafting and language of the socio-economic rights provisions in the Bill of Rights does not support the idea that these rights impose a minimum core duty on the state.
- It would be difficult to determine a “core”, as rights varied a lot and needs were diverse.
- Deciding on a minimum core duty for a particular right requires a lot of information that courts often do not have access to.

In Grootboom, the court stated that the minimum core idea was, however, relevant to assessing the reasonableness of the measures taken by the state.\(^49\)

In discussing the Grootboom case, Bilchitz suggests an alternative interpretation of progressive realisation to the one applied by the Constitutional Court. It involves understanding the notion of progressive realisation is comprised of two components: the first component is a minimum core obligation to realise the levels of housing required to meet minimum interest; the second component is a duty on the state to take steps to improve the adequacy of

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\(^{42}\) Ibid (B23).

\(^{43}\) Ibid (B25).

\(^{44}\) Khoza, S (note 26 above).

\(^{45}\) General Comment (note 41 above) 3 (10).

\(^{46}\) The South African Human Rights Commission (note 2 above).

\(^{47}\) Ibid.


\(^{49}\) Government of the Republic of South Africa (note 17 above) 33.
the housing in accordance with standards. In other words, progressive realisation means the movement from the realisation of the minimum interest in housing to the realisation of the maximum interest. It means that each person is entitled as a matter of priority to basic housing provision, which the government is required to improve gradually over time. Bilchitz also argues that this resonates with the approach adopted by the UN committee on Economic, Social and Cultural Rights. Faced with interpreting the idea of progressive realisation, the UN Committee was concerned that states could use this idea to deprive the rights of all content. To avoid this consequence, it held that the notion of progressive realisation does not exempt states from immediately providing, as a minimum, for the survival needs of its population under all circumstances. The notion of progressive realisation must thus be read to include as a base-line the provision of minimum essential levels of a right which the state is then required to build upon.

At this stage, it is difficult to conclude on the exact content and correctness of the interpretation of economic and social rights and particularly the application of the reasonableness and progressive realisation by the Constitutional Court and the Executive. While the Constitutional Court seems to apply a cautious role, the norms and standards of many of the government’s constitutional obligations remain loosely specified. This unfortunately leads to the government’s tendency to employ the notion of progressive realisation as a “get-out clause” when resources are scarce. The lack of a clear vision on how rights are to be realised over time, with concrete outcomes and longer term planning, is evidence that the government has not paid enough attention to their realisation.

The apparent attitude of the state that business will continue as usual until rights are contested (either through protest or litigation), is not a sustainable pathway to development and to strengthening a constitutional democracy.

2.2. From Access to Fulfilment and Qualitative Improvement

There is a need to define a new approach to the monitoring and assessment of the progressive realisation, fulfilment and enjoyment of economic and social rights. The MDG and indicators are stepping stones to providing a framework for measuring indices of poverty and human under-development. However, they lack the quality elements of the enjoyment and fulfilment of the rights, which the rights-based approach to a large extent provides.

A human rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. Of central importance to a rights-based approach is seeing individuals as rights-holders and states as duty-bearers. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress. Mere charity is not enough from a human rights perspective. Under a human rights-based approach, the plans, policies and processes of development are anchored in a system of rights and corresponding obligations established by international law. This helps to promote the sustainability of development work, empowering people themselves, especially the most marginalised, to participate in policy formulation and hold accountable those who have a duty to act.

The full enjoyment of economic and social rights can be said to be the end-goal of progressive realisation. However, a rights-based approach to development is not only about outcomes and content, it also emphasises the importance of process, including the principles of participatory democracy and access to information. These criteria will be applied in the assessment of the progressive realisation of the specific rights.

2.2.1. Access

“Access” is paramount in any research trying to ascertain whether the state is fulfilling its obligation to achieve the progressive realisation of the right in question. Contextually, access implies that it must be possible for every person to obtain the right and therefore, the state’s obligation in progressively realising the right would be to establish the necessary conditions that will allow such access. The necessary minimum conditions are arguably the dimensions or constituent elements of “access.” These include:

52 Jacobs, C. (note 14 above) 11-12.
- physical accessibility of goods and services;
- economic accessibility and affordability of services;
- non-discrimination; and
- information accessibility.

Taking this into account, access can be defined as the minimum conditions required in order for the state to meet its constitutional mandate of progressively realising economic and social rights.

### 2.2.2. Progressive Realisation

In General Comment No. 3 of the UN Committee for Economic, Social and Cultural Rights, progressive realisation “imposes an obligation to move as expeditiously and effectively as possible” toward the full realisation of the right.53 The UN Committee further held that socio-economic rights contain a minimum core obligation that must be fulfilled by state parties.54 This would require every state party to fulfil minimum essential levels of these rights and a failure to do so may constitute a prima facie failure to discharge its obligations under the International Covenant on Economic, Social and Cultural Rights. This means that minimum core obligations are in fact components of progressive realisation and the two cannot be divorced from one another. The minimum core obligation can be defined as the minimum standards for defining the right in question to ensure that the basic subsistence needs of the population are met. Therefore, progressive realisation should be seen as a continuum where the rationale is to start at the minimum socio-economic provision necessary to meet people’s basic needs (minimum obligation) to its full realisation of the significant improvement of the capabilities of people in society to the extent that they can meaningfully participate in and shape society.

### 2.2.3. Fulfilment and Enjoyment

Fulfilment is defined as the minimum conditions that are required for the state to meet its obligations in order for individuals and groups to obtain access to an economic and social right. The enjoyment of the right should be seen as the articulation of such fulfilment.

These concepts and how they articulate with one another within the spectrum starting from access to the right to its full realisation can be graphically represented as follows:

**Figure 1: Spectrum of Progressive Realisation of Rights**

In the General Comments, the Committee on Economic, Social and Cultural Rights has provided normative content and criteria for monitoring specific economic and social rights.55 Although these criteria vary depending on the specific right, the core denominators are accessibility, availability, acceptability and appropriateness (or quality). These criteria will be applied within the rights-based approach in the following chapters when assessing the progressive realisation of the specific rights.

In conclusion, it should be noted that these criteria are not legally binding and there is a need to develop a new enforceable methodological framework.

53 General Comment (note 41 above) 3 (9).
54 Ibid 3 (10).
55 General Comment (note 4 above).
Chapter 3

Impediments to the enjoyment of rights
CHAPTER 3: IMPEDIMENTS TO THE ENJOYMENT OF RIGHTS

3. INTRODUCTION

One of the advantages of a focus group as a research technique is its utility value as an important tool for empowerment and the advancement of social justice as it can serve to expose and validate the lived experience of the poor. In addition, focus groups often produce data that are seldom produced through individual interviewing and observation and that result in powerful interpretative insights. This revelation was particularly acute across all the rights in the public hearings, as what became apparent were not only challenges to the nature and content of the particular rights, but four external impediments that hinder access, enjoyment and the fulfilment of the rights. One can perhaps infer that the nature of the impediments is such that despite the justiciability of economic and social rights, South Africa as a country is still far from practicing a *bona fide* human rights culture. The purpose of this chapter is to explicate these impediments and to highlight how they have undermined the respective rights. The impediments that have been identified across all the rights are:

1. The conceptual misunderstanding by the government of its constitutional obligation to progressively realise rights.
2. The inadequate fulfilment of public participation processes and access to information which are key elements of a rights-based approach.
3. The social exclusion of the poor and vulnerable which includes women, persons with disabilities, persons living with HIV and AIDS, non-nationals, farm workers and indigenous populations.
4. The disjuncture between strategic planning and implementation which resides in the weak capacity of government departments to deliver on their intended outputs.

3.1. The Conceptual Misunderstanding of Progressive Realisation

Outcomes of government programmes need to be measured against the constitutional obligation to meet socio-economic rights and are assessed on the basis of the extent to which they are progressively moving towards fulfilling these rights. The full enjoyment of the rights can be said to be the end-goal of progressive realisation. However, a rights-based approach to development is not only about outcomes and content, it also emphasises the importance of process, including the principle of participatory democracy and access to information. One of the main problems with assessing the progressive realisation of rights, as highlighted in Chapter 2, is that the norms and standards of many of the state’s constitutional obligations remain loosely specified. This implies lacuna in how the state understands the notion of progressive realisation, the nature and content of the respective rights, as well as its obligations in respect of constitutional accountability.

As a consequence, the findings indicate that the state possesses a limited understanding and appreciation of what it means to adopt a rights-based approach to socio-economic development and how to fulfil its constitutional obligations in terms of the Bill of Rights. In fact, one can cogently argue that many of the gains that have been made in the arena of economic and social rights in South Africa have not come about through efforts on the part of the state but rather as the result of litigation. This is indicative of a lack of a clear vision on how rights are to be realised over time, with concrete outcomes and longer term planning, and is further evidence that the government has not paid enough attention to their realisation.

The apparent attitude of the state that business will continue as usual until rights are contested (either through protest or litigation) is not a sustainable pathway to development and to strengthening a constitutional democracy. The neglect of critical issues, some of which have been raised for over ten years, and the lack of enforcement of court orders, result in people feeling neglected and unheard, often culminating in “service delivery” protests or acts of xenophobic violence. These are expressions of frustration that indicate that the state is not adopting a rights-based approach where people feel empowered to participate meaningfully. The extent to which the state appreciates community efforts to mobilise in defence or in advancement of their rights is not clear. Indications are that these are not appreciated, as evidenced in the intolerant attitude and harassing behaviour toward the social movements, such as the Treatment Action Campaign which was prevented from participating in key health forums by the government due to its challenges regarding the provision of anti-retroviral medication to all people infected with HIV.

In respect of the nature and content of the government’s obligation, the findings show that while there is significant policy and legislation which could enable the state to progressively realise economic and social rights, there are many lacunae when translating policy into action. For example, in respect of the right to social security, the public hearings revealed a broad belief that the South African government interprets its obligation in terms of targeting specific social grants as opposed to ensuring that the poor have the maximum possible opportunities to lift themselves out of poverty. While it is argued that a safety net is crucially important, it is also held that the progressive realisation of the right to social security must encompass the significant improvement of the capabilities of people to the extent that they can meaningfully participate in and shape society. The same can be applied to the right to education in which broad access to quality education, which could improve the capabilities of young people to play a meaningful role in society, is not being fulfilled.

In conclusion, in this period under review the evidence suggests that there is still no clear understanding throughout the government system regarding the content of its constitutional obligation of progressive realisation. Consequently, a human rights-based approach is seldom integrated with policy design and implementation. Therefore, there is much work to be done by the government to give meaning to words such as adequate, access, fulfilment and reasonableness, as they remain mere notions that are poorly defined and understood. To reiterate, in the absence of established norms and standards, much of the state’s constitutional obligations remain loosely specified and this in turn may have implications for its levels of constitutional accountability. Even though the Constitution acts as the guiding framework for policy and legislation, it often appears as if the state is more mindful of political targets than it is of its constitutional obligations. This is particularly apt in respect of the right to provide adequate housing in which the chasing of targets resulted in the erection of houses that were of poor quality, delivered on the urban edge, and in dormitory type neighbourhoods without adequate infrastructure or services.

3.2. The Inadequate Fulfilment of Public Participation and Access to Information

“A human rights-based approach is not only about expanding people’s choices and capabilities but above all about the empowerment of people to decide what this process of expansion should look like.”57 This implies that the principle of participatory democracy is paramount in a rights-based approach to development, and public participation is thus critical. This approach has been addressed in most areas of government legislation and programmes. Examples are the Environmental Impact Assessment process in the environmental legislation, the inclusion of School Governing Bodies in Education and the implementation of public hearings in the development of new legislation.

However, the findings highlighted the inconsistent application of public participation in decision-making processes. Whereas public participation is defined as the creation of opportunities that enable all members of the community and the larger society to actively contribute to and influence the development process and to share equitably in the fruits of development,58 the findings revealed that the nature of public participation in South Africa is often neither meaningful nor effective. For participation to be meaningful, participants require access to information, to be empowered to make informed decisions and to be engaged in high-level types of issues and implementation concerns. The lack of meaningful participation and citizen engagement results in frustration and mistrust and it can be argued that it is a contributing factor to the protests that have been erupting in communities over the last few years. For example, the participation of housing beneficiaries and stakeholders in determining the scope of housing provision has been inadequate and mostly instructive on the part of the state. This is indicative of a top-down approach in which beneficiaries and those affected by evictions and relocation are only engaged in pseudo-participation. This was echoed by the Constitutional Court in the Joe Slovo judgment which ordered the housing authorities to engage the community in meaningful participation. It must be emphasised that access to information is critical if the public is to adequately engage the government on questions of the progressive realisation of rights as well as to participate in decisions about their lives. However, despite the existence of the Promotion of Access to Information Act (PAIA), a recurring concern across all the rights has been the inadequate access to information. For example, several submissions in respect of the right to environment, water and food highlighted the lack of public access to information that is essential for the monitoring of social and environmental issues. These submissions further stated that government departments were often unresponsive and ignored requests

for access to information and even went so far as to abuse the confidentiality clauses of PAIA to deny access to information.

3.3. The Social Exclusion of the Poor and Vulnerable

Addressing the needs of the most vulnerable and disadvantaged in society is considered to be one of the cornerstones in the advancement of a rights-based approach. However, evidence suggests that in attempting to meet the vast needs in our society, inadequate and insufficient consideration has been given to the needs of the most vulnerable. The marginalisation of particularly vulnerable groups through inadequate access, coverage or service emerged in the public hearings as a broad and serious concern. Particular emphasis in the public hearings was on the equality of access and gender inequality. Such groups include women, child-headed households, people in isolated communities, farm workers, people with disabilities, non-nationals and people living with HIV and AIDS.

3.3.1. Equality of Access

Unfortunately, the findings revealed that equality of access, particularly for the poor and vulnerable is not in accordance with the principles of creating a transformative society based on human dignity, equality and freedom. The MDG targets do not help in this regard either, as the lack of disaggregated data obscures the reality of service delivery for the socially vulnerable and marginalised groups in society. Effectively, this means that meeting the target would not necessarily translate into the progressive realisation of the right. To cite an example of the right to water, the MDG and goals framed by the DWEA do not address issues of geographic distribution. This means that the worst performing municipalities in terms of service delivery might not improve access at all by 2014 but South Africa could still reach its target of halving the proportion of the population without access to water. These municipalities usually serve the poorest of the poor. With regard to education, the statistics revealed that South Africa has almost reached MDG 2 with a 98% net enrolment rate in primary education. Whilst this is impressive, economic and physical access to schooling remains a challenge for many poor children across the country largely because policy implementation to improve access has not been consistent at a school level. For example, the introduction of No-Fee Schools and Exemption policies have the potential to guarantee access for poor and vulnerable children. However, the policy vision has not been achieved consistently for all poor learners and schools. Furthermore, large groups of vulnerable children are also unable to access education including children with disabilities, refugee and non-national children, children who are infected with and affected by HIV/AIDS, orphans and child-headed households. This is because the principle of non-discrimination and standards of adaptability to meet their special needs are not being applied.

3.3.2. Gender Inequality

- Civil society groups contended that there exists a directly proportional relationship between the cut-off age of 15 years for receiving the child support grant and the higher school drop-out rate, for girl children in particular. More alarming is that for young girls the loss of the benefit may encourage dependency on older males and subject them to all forms of exploitation. This underlines the importance of extending eligibility for CSG to 18 years.

- The dismal figures on the maternal mortality rate are a key indicator that women’s health is inadequately addressed in the health care system. The maternal mortality rate is increasing and a recent study showed that 38.4% of the deaths could have been prevented.

- With regard to land, women are the biggest losers in the government’s failure to secure land rights as they often have to rely on male farm workers to gain access to land, and they also customarily have no rights to land in traditional areas.

- In terms of housing, there are no medium and long term housing options for women survivors of domestic violence. Although the Department of Social Development does make provision for short-term sheltering for women and children, they either become homeless when they leave the shelters or are forced to move back in with the perpetrator resulting in the continuation of the cycle of violence.

3.4. The Disjuncture between Strategic Planning and Implementation of Policy

At times the problems with service delivery result from flawed policies, as is highlighted with regard to the rights to land and housing. These tend to be one dimensional as opposed to being designed to meet the diverse needs of beneficiaries. While the government has been responsive in addressing policy gaps in some respects, this has often amounted to tinkering with the policy, which has had limited impact in respect of significant changes to
outcomes. One can hence argue that the root causes of policy failure have not always been clearly understood and the findings in this report highlight significant gaps between strategic planning and implementation. Firstly, the report has found a significant gap in the availability of good quality data on which to base proper plans and this can only be regarded as a serious impediment to proper and efficient planning. In respect of data, it was also found that the failure to disaggregate on the basis of vulnerability often means that discrimination remains hidden. Secondly, the monitoring of implementation as a learning tool has been identified as another issue of concern and the lack thereof results in little reflection between planning periods. In addition, the report has found a lack of systematic monitoring measures and the choice of indicators is often very limited. When it comes to monitoring it seems that quantitative indicators tend to prevail and this provides little insight into the quality of service provision of government programmes and the evaluation thereof. The monitoring of the enforcement of court orders is also a major concern. Thirdly, one of the main gaps that has been raised in all the chapters is the vertical and horizontal co-ordination of and cooperation between government departments. Even though the government has attempted to address this issue by implementing the Cluster system, it remains very problematic. At times the cause of this lies in the allocation of powers and mandates to the various tiers of government which do not match expectations of programme design. In fact, the Department of Cooperative Governance and Traditional Affairs raised this as one of the main barriers to housing and infrastructure delivery. At other times it is a simple matter of communication – for instance a clinic is built without ensuring that the municipality can provide infrastructure.

3.4.1. Data Validity and Reliability
The hearings found that there is a lack of reliable data as well as a proliferation of conflicting data which must be addressed in the interest of measuring progressive realisation. This is a serious inhibitor for effective planning as it means that there is a high probability that such planning occurs without a statistically informed basis. In its submission, Statistics South Africa identified the following main concerns in respect of the quality and availability of data:

- There is insufficient data with which to populate the indicators for the MDG or other user needs of similar magnitude;
- Where data are available they are oftentimes of unknown quality, and depending on the source, often contradictory; and
- There is no dependable system or process yet in place for sustainable production of sufficient and good quality data.

In respect of the various rights, the following concerns around the quality and availability of data were raised:

- In respect of social security, the Children’s Act (2005) makes provision for a child head-of-household, or the designated adult, to collect any social security payment for which the household is eligible. Child-headed households, a dramatically increased phenomenon in South Africa in recent years, are among the most vulnerable but the lack of social security information around such households greatly impedes critical programmatic planning and intervention.
- With regard to health, the inconsistency in data gathering and consequent unreliable statistics is a major problem. In fact, there is little agreement on which figures are reliable and those used by civil society and government are different. In addition, the lack of a proper baseline makes it difficult to measure the progress in reaching the MDG. This is particularly the case with statistics on child mortality and maternal mortality. Furthermore, there is a lack of disaggregation of indicators on child and maternal mortality in terms of specific disabilities, which impairs the utility of the information with regard to appropriate planning.
- The data on land reform is very poor and the Department of Rural Development and Land Reform only reports on two global indicators, namely, hectares of land transferred and number of land claims settled each year. The national data base of land reform projects from which one could gain the project type, location, size, land and membership is not available for public scrutiny and is not used for reporting. The extent to which this data is critically analysed to effect improved planning is unknown.
- Housing statistics are too global and need to be further disaggregated in respect of key demographics and geographic location. Furthermore, the constant and consistent tracking of population trends and population movements is critical for the purpose of planning.
- In respect of the right to education, concerns were raised regarding the ability of the Department of Basic Education to provide the reliable and accurate data necessary for assessing progress in implementation.
3.4.2. Planning, Monitoring and Evaluation

Planning, monitoring and evaluation are integrally linked processes but they seem to be conceived and implemented separately in government. This disjuncture means that planning does not draw on the lessons learned from monitoring and evaluation activities. Monitoring is a key instrument of accountability and if done poorly it would inhibit the government’s ability to account for its actions and the results thereof. One of the general issues is the lack of a results-based framework for monitoring and evaluation, and the tendency has been to focus on quantitative outputs as opposed to measuring outcomes. Some of the main gaps arising from the findings regarding planning, monitoring and evaluation are raised below:

- When planning around mining and granting prospecting licences, there appears to be inadequate consideration of the cumulative impacts that such mining will have on the surrounding communities.
- Inadequate monitoring and evaluation systems led to a lack of enforcement of conditions under which environmental authorisations were granted by provincial and national departments.
- Regarding conservation, a lack of information on the state of conserved areas hinders efforts to adequately conserve open spaces and the plant and animal species that inhabit these spaces.
- Although much attention has been given to addressing the backlog of the provision of water and sanitation in South Africa since 1994, there are varying accounts of the level of service delivery that has been achieved to date. Some organisations have reported discrepancies in statistics.
- Poor planning and fragmented policies in respect of design and implementation are seen as root causes for many of the challenges in housing service delivery.
- The poor definition of indicators is another problem raised in housing and terms that mean different things are used interchangeably. For example, the figures for housing opportunities (which include serviced sites) and the figures for houses (which include a top structure) are often both counted when referring to the numbers of houses built.

In conclusion, a solid monitoring and evaluation plan is central to good planning. A number of systems and structures are currently being institutionalised in order to improve the monitoring and evaluation in various government departments, such as the National Demand Data Base in housing, but they are still in their early stages and their use needs to be tracked. There are also systems for the monitoring of schools and tracking of learners but human resource constraints have been highlighted as one of the main impediments to effective monitoring of schools, particularly at a district level. Effectively, impact studies need to occur to assess the extent to which the outcomes of policies are relevant to meeting the needs of beneficiaries. This has been raised as particularly important with regard to land reform and support for small scale farmers. In these impact studies the following questions need to be addressed:

(a) Has the quality of life improved when people receive land, houses, hospitals, social grants, and etcetera?
(b) What are the next needs that emerge once certain basic needs are satisfied?
(c) How should the government plan to address those needs considering that there is still a massive backlog in meeting the basic needs of others?
(d) What are people’s aspirations and what can they realistically expect to achieve in their lifetime?

These critical questions could be answered by periodic evaluations and systematic monitoring of government programmes.

3.4.3. Intergovernmental Relations and Communication

The realisation of economic and social rights requires significant intergovernmental cooperation and communication. The gaps in this regard are consistently raised in the submissions and literature on government performance. Examples from the various themes are provided below.

With regard to vertical integration between the various tiers of government, the following key points emerged:

- The Department of Cooperative Governance and Traditional Affairs raised the problem of vertical integration which is contained in how the powers and functions of the three tiers of government are defined in the White Paper on housing. Housing, for example, is not specified as a municipal function, and as such, municipalities see housing provision as an unfunded mandate and many are not accredited to provide
housing in accordance with the ‘Breaking New Ground’ policy.

- In respect of the right to education, the relationship between the national and provincial structures impacts on the implementation of education policy and legislation. The national government has exclusive legislative responsibility for tertiary education, and concurrent responsibility with the provinces for all other levels of education. Whilst the national government works with provinces to formulate national policy, the provincial governments are responsible for the implementation of the nationally determined policy. This system has been criticised for its insufficient national-provincial alignment because provinces are not obliged to observe national priorities, particularly regarding the allocation of financial resources.

Issues regarding horizontal co-ordination and communication within and between government departments are:

- With regard to the implementation of Developmental Social Welfare, the hearings revealed the lack of any strong linkages between the receipt of a social grant and the provision of opportunities for recipients to prepare for the labour market. This is in turn indicative of a lack of synergy between the Departments of Social Development, Education, Labour and Public Works.

- In terms of the right to health, integrated services for vulnerable groups are often lacking mainly because AIDS orphans, detainees, refugees, and persons with disabilities are cross-cutting groups that need to be targeted by various departments. However, these groups are often not prioritised in any one department and, due to the lack of any coherent integrated service, many do not receive the requisite service. For example, it is recommended that AIDS orphans need to be specifically prioritised by the Department of Health, particularly in terms of providing VCT and ART. Furthermore, health care for detainees, persons with mental and physical disabilities, refugees and sex workers need to become particular focal areas for the Department of Health.

- Horizontal co-ordination and communication between the Department of Basic Education and other departments has also negatively affected the planning and implementation of key programmes in the past such as the National School Nutrition Programme (NSNP) and the learner transport programme. This impacts on the learners’ physical and economic access to education.

3.5. Conclusion

It is the government’s ultimate responsibility to deliver or facilitate the provision of services if the socio-economic circumstances of people in the country are to improve. However, the above discussion on the four impediments cogently shows the multiplier effects on service delivery in respect of all economic and social rights. For example, the hearings on social security revealed the poor governance of social development programmes at both the national and provincial levels. This included a range of difficulties from extremely poor service at social grant pay points, to inadequate inter-departmental co-ordination on anti-poverty measures. In sum, it is clear that the poor service co-ordination and programme implementation at key departments is militating against the progressive realisation of the right to social security and to the achievement of MDG 1. Similarly, in respect of the right to health, the hearings revealed that since the transformation to the primary health care model, there have been difficulties with internalising roles at each level of government and this in turn has had a negative impact on service delivery. Some of the concerns include whether community care workers have been sufficiently trained as without sufficient numbers of adequately trained and motivated health workers, no health care system can fulfil its human rights obligation. Service delivery needs to be strengthened at a district level, thereby effectively operationalising the primary health care approach. To fulfil the requirement of progressive realisation, the Department of Health must make sure that health workers at community clinics are appropriately trained to implement the policies and legislation and that they are properly managed. More specifically, it has been reported that they need to be trained in how to diagnose disabilities, disability education and management, as well as how to collect a pap smear and how to train women in the use of female condoms. The very same can be applied to the other rights.

As the chapter has already demonstrated, but the crux of the matter is that whilst the state has made policy commitments in respect of the various economic and social rights, any real improvements to the lived experience of beneficiaries will remain at a rudimentary level unless these chief impediments are eradicated. A priority on the agenda for the government therefore must be a real and unanimous understanding of progressive realisation, the nature and content of the various rights and what it means for a government to be held constitutionally accountable for its action or inaction. This must then be operationalised at the level of policy and programme activities aligned to a competent administrative implementation structure, so that the lived experience of the most vulnerable is positively transformed.