Central European University
Department of Legal Studies
Human Rights
Budapest

Positive Rights or Constitutional Legitimacy?

A Comparative Analysis of the Jurisprudence of Socioeconomic Rights in Slovakia and South Africa

Submitted by Emily Ferrell in partial completion of an MA in Human Rights

Advised by Professor Nsongurua J. Udombana

Executive Summary

This thesis examines the jurisprudence of the Constitutional Courts in South Africa and Slovakia in relation to socioeconomic rights. The right to health care, the right to education, and the right to housing are analyzed through the judgments of the Constitutional Courts. Attention is focused on how the history of inequality in both countries, with regards to the black majority in South Africa and the Roma minority in Slovakia, has factored into the relevant judgments.

This study finds that the South African Constitutional Court has been more willing than its Slovak counterpart to uphold positive jurisprudence of socioeconomic rights. However, the South African Human Rights Commission, which is mandated to monitor the progressive realization of socioeconomic rights within South Africa, lacks autonomy from the Government. Conversely, citizens of Slovakia may be able to use the European Court of Human Rights as an outlet for enforcement of socioeconomic rights, which, as a regional court, maintains sufficient independence from the Slovak Government.

This thesis concludes that due to the independence of the ECHR and lack of alternative legal avenues in South Africa, Slovak citizens have a greater possibility of successfully garnering redress for violations of their socioeconomic rights than the citizens of South Africa.

List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
CC	Constitutional Court
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	UN Convention on Economic Social and Cultural Rights
CoE	Council of Europe
ECHR	European Court of Human Rights
HC	High Court
OAU	Organization of African Unity
SAHRC	South African Human Rights Commission
TAC	Treatment Action Campaign

Table of Contents

Introduction:

During the latter half of the 20th Century, the global community witnessed substantial changes throughout the world. It was a century of upheavals and reshaping of the global political landscape; the conclusion of the Cold War and dissolution of the Soviet Union; revolts against oppression and the collapse of colonies. Out of the rubble of the Berlin Wall and ruins of colonialism, new democracies were borne and novel Constitutions accompanied the innovative transformations. The drafters of these Constitutions struggled to pioneer judicial protections for social and economic rights by drafting formerly fragile privileges and ideals, into binding constitutional rights. The constitutions of both Slovakia and South Africa are eminent examples of such judicial protection; and both are leaders in the field of the constitutional inclusion of socioeconomic rights.

The Central and Eastern European post-soviet satellite states gained their independence at the turn of the decade, and ushered in the 1990s with feverish constitution-drafting and political reorganization. Along with the fall of communism, the collapse of the social safety-nets[1] came tumbling down throughout post-satellite states; leaving minority groups virtually unprotected during the transition to market economies[2]. Slovakia was no exception from this, with a Constitution adopted in 1992[3] after separation from the Czech Republic.

[1] It should be noted here that the effectiveness of social safety-nets during communism is still greatly debated; as to whether they did in fact provide a positive advantage or were a simple façade.
[2] In Socialist states a variety of "social safety-nets" were utilized by the governments. During the transition to market economies there was "a withdrawal of state subsidies from already underfunded and overburdened health care…" Susan Gal and Gail Kligman, The Politics of Gender after Socialism (New Jersey: Princeton University Press, 2000) 73
[3] Constitution, Slovak Republic, 1992.

During the same decade, the long and complex process of eradicating apartheid entangled South Africa. Strong currents of racial tension and discrimination running through the country persisted well into the 1990s; and it wasn't until 1996 that the current South-African Constitution was adopted[4], rendering the jurisprudence of the Constitutional Court infantile and un-tested. Despite historical differences, when the governments of South Africa and Slovakia drafted their Constitutions in the mid-1990s, both countries incorporated socioeconomic rights into the documents.

Social and economic rights, commonly referred to as the "second-generation" of human rights[5], are capable of triggering heated debate in current human rights theory. These rights, often guarantees in housing, healthcare, welfare, work, education as well as several other provisions, have been imbedded into many contemporary constitutions.

The debate surrounding social and economic rights focuses on the advantages of incorporating these as constitutional rights versus the potential harm in attempting to co-opt them. Scholars have argued that since the enforceability of these rights are commonly dependent on the economic abilities of the state, the constitutionalization of such rights threatens to erode the legitimacy of other rights. More specifically, the legitimacy of civil and political rights guaranteed by the constitution will be threatened should states not have the economic capital required to redress social and economic rights, because it will make all of the rights ingrained in the Constitution appear to be unenforceable and feeble.

[4] Constitution, Republic of South Africa, 1996
[5] Karel Vasek, The International Dimensions of Human Rights (Paris: Greenwood Press, UNESCO, 1982)

Research question and sub-questions

Research in the thesis at hand will include many different, sub-categorical inquiries. Primarily, however, the thesis will explore the differences and similarities between the jurisprudence of the Constitutional Courts in Slovakia and South Africa in relation to socioeconomic rights. More specifically, it will focus on the holdings of the Courts in relation to socioeconomic rights when concerning a member of the Roma community or of the black population, respectively. How has the jurisprudence of the courts in these two states differed, or co-aligned? Are the Constitutional Courts deciding in favor of socioeconomic rights or are these rights, embedded in the constitutions, simply bypassed due to concerns of enforceability? Ultimately, has the constitutionalization of socioeconomic rights had a significant impact on the jurisprudence of the Constitutional Courts in Slovakia and South Africa?

Definitions

The issues at the core of this thesis, addressing social and economic rights and Constitutions, are fiercely debated. Several of the terms are not widely used outside of the debate circle, or outside of the wider legal context. As a result, clarification on the definitions of several terms is necessary before proceeding further.

Socioeconomic rights form a cornerstone of this study. In this work, socioeconomic rights are to be understood as the combination of social and economic rights, allotted within the second generation of human rights. These rights include the right to: healthcare, housing, education, employment (and other such rights) which

require a positive obligation on the part of the state (often accompanied by economic capital).

Another important term to conceptualize is "Constitutionalization". This refers to the process of embedding rights, as well as obligations and duties, within a Constitution. When the constitutionalization of socioeconomic rights is discussed, this shall apply to the inclusion of social and economic rights into the constitution, as to establish these rights within the protection and jurisprudence of the Constitution.

The de-legitimization of other rights in constitutions is discussed in the following work. This is to be understood as the erosion, or degradation of the legitimacy, of rights protected within the auspices of a constitution.

Literature Review:

The debate surrounding the inclusion of socioeconomic rights into constitutions is extremely heated throughout many academic spheres. The first group which can be included in this debate are the scholars whom support, whole-heartedly, the inclusion of these rights into the constitution-drafting process. Derba Evenson's work, *Competing View of Human Rights*, describes and explains the incorporation of socioeconomic rights into many of the international human rights documents[6]. While her work focuses mainly on the exclusion of these rights from the U.S. Constitution, her analysis of the provision of welfare rights in international treaties is important in furthering the argument for the inclusion of these rights at a state-level. Furthermore, this is an important argument to

[6] Debra Evenson, "Competing View of Human Rights: The U.S. Constitution from an International Perspective", A Less Than Perfect Union, Ed: Jules Lobel (New York, NY: Monthly Review Press, 1998)

bear in mind when examining the incorporation of these rights into the South African and Slovak Constitutions by the drafters.

Herman Schwartz further supports the argument for the constitutionalization of socioeconomic rights in *The Wisdom and Enforceability of Welfare Rights as Constitutional Rights*. He argues that welfare rights are essentially, completely intertwined with civil and political rights[7]. Therefore, it would be impossible to separate the two categories of rights, thus excluding socioeconomic rights from constitutions, without damaging the chances of success for fully democratic civil and political rights.

The arguments made against the constitutionalization of socioeconomic rights is important to explore in the course of this thesis, as these opinions will be used to support, or discredit, many of the decisions made throughout the jurisprudence of the Constitutional Courts. Michael Ignatieff is well-known for his arguments made against the constitutional-inclusion of socioeconomic rights. In *Human Rights as Idolatry*, Ignatieff argues that the inclusion of welfare rights will cause "rights inflation". He argues that, "Rights inflation – the tendency to define anything desirable as a right – ends up eroding the legitimacy of a defensible core of rights"[8]. Following Ignatieff's argument, if basically anything can be prescribed into a constitutional right, than those truly important rights (in Ignatieff's view, likely civil and political rights) are tainted, in a sense, by the "less important" rights, and lose their sense of value and prestige.

Arguments made against the inclusion of socioeconomic rights into constitutions are also made in Limiting Government, authored by András Sajó. Sajó argues that

[7] Herman Schwartz, "The Wisdom and Enforceability of Welfare Rights as Constitutional Rights". (*Human Rights Brief*, Vol. 8, Iss. 2, 2001) 2

[8] Michael Ignatieff,, "Human Rights as Idolatry," Human Rights as Politics and Idolotry (Princeton, NJ: University Press, 2002)

constitutions will fail to survive if they include excess rights in addition to fundamental rights[9]. This argument is important to consider as both the South African and Slovak Constitutions are still fairly novel and thus have not been tested against time.

There are other factors which must additionally be taken into consideration when examining the position of socioeconomic rights in constitutions. In his article *Why does the American Constitution Lack Social and Economic Guarantees?* Cass Sunstein focuses specifically on the U.S. His analysis, however, is relevant to the larger debate of these rights. He lists four hypotheses about the inclusion, or exclusion, of welfare rights during the drafting of constitutions. Firstly, Sunstein focuses on the chronological aspect (or the date at which a particular constitution was drafted). In the case of both countries, Sunstein's historical hypothesis is important to bear in mind. Severe inequality was abundant in South Africa as well as Slovakia in the 1990s, the same time that the Constitution in each country was drafted. Thus, the inequality largely came into play with the incorporation of socioeconomic rights into the Constitutions. Sunstein also discusses the institutional feature (or the delegation of division of power within each government). The cultural aspect, Sunstein's third hypothesis, takes into account the society within each state. Finally, Sunstein focuses on the realist interpretation by concentrating on the currents of political realism within the U.S.[10]. Sunstein's cultural hypothesis will be an extremely important hypothesis to analyze for the purpose of this case-study between Slovakia and South Africa, taking into account cultural differences between the two countries.

[9] Andras Sajo, Limiting Government; An Introduction to Constitutionalism (Budapest, Hungary: Central European University Press, 1999)
[10] Cass Sunstein, "Why does the American Constitution Lack Social and Economic Guarantees?" *Public Law and Legal Theory Working Paper* No. 36 (Chicago, IL: The Law School, University of Chicago, 2003)

Wojciech Sadurski's article, *Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights* is important when analyzing the jurisprudence of the Constitutional Court in Slovakia. Sadurski states that the inclusion of socioeconomic rights into post-communist constitutions causes "positive" requirements on the part of the states[11]. While Sadurski does elaborate upon the "positive" requirement that the inclusion of these rights generates, a shortcoming of his work, in relation to the thesis at hand, is the overriding focus on the U.S. Bill of Rights. In relation to South Africa and Slovakia, the "positive" requirement that has been created by socioeconomic rights is evident in the jurisprudence of the Constitutional Courts in both countries.

Undoubtedly, the argument of economic-viability of welfare rights is paralleled with the broader debate of socioeconomic rights in general. Thomas J. Bollyky has conducted extensive studies on the cost-benefit analysis of socioeconomic rights[12]. Within his discussion of policy and budgets, Bollyky argues that welfare rights are economically-sustainable, specifically focusing on cases brought before the Constitutional Court of South Africa and the redress of judicial remedy.

Another scholar who focuses particular attention on socioeconomic rights in South Africa is David Bilchitz in his article "South Africa: Right to health and access to HIV/Aids drug treatment"[13]. Bilchitz is primarily concerned with welfare rights in relation to the right to healthcare. The article includes an inclusive history of the court's involvement with socioeconomic rights within the country. Bilchitz also, however,

[11] Wojciech Sadurski, "Postcommunist Charters of Rights in Europe and The U.S. Bill of Rights" *Law and Contemporary Problems*, Vol. 65: No. 2; 226.
[12] Thomas J Bollyky, "R if C > P+B: A Paradigm for Judicial Remedies of Socioeconomic Rights Violations". *South African Journal on Human Rights*. Vol. 18; 2002.
[13] David Bilchitz, "South Africa: Right to health and access to HIV/Aids drug treatment". *International Journal of Constitutional Law*, Vol. 1, No. 3. 2003; 524-534.

relates the obligation of courts in relation to the enforcement of socioeconomic rights with the guidelines constructed by the UN Committee on Economic, Social and Cultural Rights.

Bilchitz's article is pertinent to the study at hand for two main reasons. First, the right to health care in South Africa will come into play in both the *Soobramoney* and *TAC* Constitutional Court cases that are analyzed in Chapter 2. Secondly, Bilchitz points out a crucial element when talking about the UN CESCR. The South African Constitutional Court heavily relies upon international law when reasoning cases; a feature which is not as commonly employed by the Slovak Constitutional Court.

Expected Contribution

There is a complete lack of literature which directly compares and analyses the jurisprudence of socioeconomic rights in South Africa with those in post-socialist states, in this case Slovakia. Furthermore, a corresponding lack of research has been conducted on how the jurisprudence has affected the black community and Roma minority in both countries, respectively. The analysis at hand will serve in filing the gap that exists, as well as in examining the jurisprudence of the Constitutional Courts and the protection that their decisions have granted to the groups in question.

Methodology

A comparative analysis will serve as the main methodological approach to the thesis research. Again, the jurisprudence of the Constitutional Courts in Slovakia and South Africa, in relation to socioeconomic rights, will serve as the main foci of

comparison. However, the Roma in Slovakia and black population in South Africa will also serve as a reference point for comparative analysis.

In order to fully understand socioeconomic rights, the development of these rights within each respective Constitution is also necessary, thus incorporating a descriptive approach to the research conducted. Furthermore, in the analysis of the holdings of the Constitutional Courts, a normative element will be implemented.

A qualitative method will be utilized throughout the course of research and writing. This is a necessary aspect in researching the scope of the rights as well as the effect of their enforceability.

Case-Study

Due to an ideal balance of similarities, as well as variables, between the two countries, South Africa and Slovakia serve as two logical case study countries.

Both the South African and Slovak Constitutions are relatively new, and were adopted within several years of one another. Additionally, the current political system of each country is relatively novel, having been founded within the past several decades. Furthermore, South Africa, as well as Slovakia, struggles with the inclusion of specific groups of people; the black and Roma populations, respectively. Neither of the two groups has recently immigrated to their respective geographic locations; the blacks majority outdating the Dutch settlers, and the Roma having immigrated to Europe over hundreds of years ago.

There are several differences amongst the countries which will serve as variables. Primarily, the black population constitutes a majority of the South African population,

where as the Roma community in Slovakia comprises a minority of the state's population.

Also, the dichotomy which exists between the overall legal system within South Africa and Slovakia is extremely important; the former being a common law country, and the latter following a civil law tradition. As a result, it is likely that there will be a much greater precedent in the jurisprudence of socioeconomic rights of South Africa, where as the jurisprudence in Slovakia will most likely be more strongly based directly on the Constitution.

CHAPTER 1: South Africa and Slovakia at a Glance

As mentioned in the introduction, the Black community in South Africa and the Roma community in Slovakia will play an intricate role in the analysis of the jurisprudence of the Constitutional Courts in relation to socioeconomic rights. The two groups in their respective countries have a long history of informal, as well as clearly formalized, discrimination and segregation.

1.1 South Africa: A History of Apartheid

South Africa's long history of apartheid is important to the discussion of the socioeconomic protection afforded through the Constitution. The second line of the Preamble of the Constitution, starts by stating, "We, the people of South Africa, Recognise the injustices of our past;..., We therefore, through our freely elected representatives, adopt this Constitution,... so as to heal the divisions of the past..."[14]. The Constiution of South Africa was evidently created as a tool in an attempt to "right wrongs", or to compensate for injustices committed during South Africa's history.

The specific conditions and policies of apartheid were extremely complex, detailed and ingrained, and would alone be able to fill an entire academic thesis. As academic Robert Cottrell points out, apartheid has dominated the past several centuries of South African history. "Although slavery was abolished in South Africa in 1838, apartheid, or the segregation of non-whites from whites, was only lifted in 1994 after

[14] Preamble, Constitution, Republic of South Africa, 1996

years of bloodshed"[15]. The formal practices of apartheid may have been abolished during the last decade however there are still lingering effects of apartheid.

Severe inequality has continued to persist in South Africa well after the collapse of apartheid. Mickey Chopra and David Sanders, two economists in the field, note that, "…income inequalities have persisted; by 1995 the poorest 40% of households accounted for only 11% of the total income whilst the richest 10% commanded 40% of the total income."[16] Additionally, due to the years of formalized racial oppression during apartheid, the economic inequality is strongly divided by race.

The inequality that remained post-apartheid was inherited by the incoming government in the mid-1990s. Elisabeth Wickeri[17] notes that, "When the African National Congress took office in 1994, it inherited a country that had developed unequally over almost three hundred and fifty years of white minority rule."[18] The new government had many ideas of how to implement change and eradicated inequality. Wikeri continues on, mentioning that, "The constitutional entrenchment [of socioeconomic rights] stemmed in part from a desire to distance the new constitution and transitional government from the previous regime where rights – primarily 'traditional' rights – were available only to white South Africans."[19]

The wording in the Constitutional Court's decisions in socioeconomic cases is particularly pertinent to the lingering effects of the discriminatory governmental practices over the past century, directly referring in several cases to the conditions under apartheid.

[15] Robert Cottrell, South Africa: A State of Apartheid (New York, NY: Chelsea House Publishers, 2005) 92
[16] Mickey Chopra and Dave Sanders, *Public Library of Science*, Medicine. Vol. 4, No, 8, 2007; 158
[17] Elisabeth Wickeri is a Crowley Fellow in International Law and Justice at New York University.
[18] Elisabeth Wickeri, "*Grootboom's* Legacy: Security the right to Adequate Housing". (New York, NY: NYU School of Law, 2004) 7
[19] *Ibid*. pg 5

Wickeri states that the inclusion of socioeconomic rights in the South African constitution in 1996, "arose from the desire to distance the new 'rainbow nation' from the system that had existed pre-1994"[20].

1.2 Slovakia: Discrimination Against the Roma

Although the policies weren't as institutionalized as apartheid in South Africa, discrimination was simultaneously occurring in Slovakia. The Roma community has been, and currently still is, greatly discriminated against throughout Europe. Stanislav J. Kirschbaum has conducted extensive studies on the discrimination of the Roma throughout the region, as well as specifically within Slovakia. He points out that, "Estimated at 300,000 even if the 2001 census lists only 89,920 who declared themselves members of this group, the Roma (often called Gypsies) had been the object of a policy of neglect under socialism."[21]

Discrimination and prejudice persist at all levels throughout society, across the majority of sectors, and through formal, and institutionalized means, as well as informally. The National Democratic Institute for International Affairs states that, "While 17 years of democratic transition in Central and Eastern Europe has led to significant improvements in general living standards, Roma continue to suffer disproportionately from widespread poverty, discrimination and segregation"[22]. Often referred to as Europe's, "largest and most disadvantaged minority"[23], the Roma have been discriminated against in terms of education, employment and housing.

[20] *Ibid*. pg 12
[21] Stanislav J. Kirschbaum, A History of Slovakia: The Struggle for Survival, 2nd Ed. (New York, NY: Palgrave MackMillan, 2006) 292
[22] National Democratic Institute for International Affairs. "Roma Political Leadership Academy." Bratislava, Slovakia: National Endowment for Democracy, Feb. 23-26, 2007.
[23] Finnuala Sweeney, "Slovakia seeks help on Roma issue" (Svinia, Slovakia: *CNN*, April 16, 2004)

Additionally, there is a long tradition of sending Roma children to schools for the mentally disadvantaged[24], not only in Slovakia but throughout the region[25].

1.3 Limitations on Socioeconomic Rights

The socioeconomics rights to health care and education are prescribed within each constitution. Additionally, the Constitution of South Africa contains a right to housing. Both the South African and Slovak Constitutions, however, additionally contain clauses which place possible limitations on the socioeconomic rights.

1.3.1 South Africa

The socioeconomic rights guaranteed by the South African Constitution within the Bill of Rights are limited by an additional Section. Chapter 2 of the Constitution of 1996 contains the socioeconomic rights applicable to the study at hand. Section 7 limits the rights guaranteed in Chapter 2, stating that, "The rights in the Bill of Rights are subject to the limitations contained or referred to in Section 36, or elsewhere in the Bill"[26]. This is an extremely important aspect to bear in mind when discussing the enforceability of such rights. Thus, the socioeconomic rights are limited by Article 36[27].

[24] Finnuala Sweeney, "Slovakia seeks help on Roma issue" (Svinia, Slovakia: *CNN*, April 16, 2004)
[25] Roma children have notably been discriminated against in the Czech Republic as well, being sent to schools for the mentally disadvantaged. However, in a landmark judgment, *D.H. and others v the Czech Republic*, the ECHR ruled against this policy mandating that Roma children enjoy the same education as members of mainstream ethnic groups.
[26] Constitution, Republic of South Africa, Chapter 2, Article 7(3)
[27] Article 36 of the South African Constitution states,
"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
(a) the nature of the right;
(b) the importance of the purpose of the limitation,
(c) the nature and extent of the limitation
(d) the relation between the limitation and its purpose; and,
(e) less restrictive means to achieve the purpose.

Although the rights in the South African Bill of Rights do not claim to be absolute, limitations may be imposed upon them, granted that the limitations fulfill numerous preconditions. Such preconditions include being "reasonable" and "justifiable" in an "open democratic society", as well as weighing upon other factors such as the nature of the right and importance of the limitation. Today the CC uses the tests of "reasonableness" and "proportionality" when ruling on the constitutionality of a limitation imposed upon a right.

1.3.2 Slovakia

In the Slovak Constitution socioeconomic rights are limited through Part 8, Common Provisions for Chapters One and Two. In this section, Article 51 states:

> The rights listed under Articles 35, 36, 37 (4), 38-42, and 44-46 can be claimed only within the limits of the laws that execute those provisions."[28]

Article 13 of the Slovak Constitution specifies the ways in which the rights are limited, or may be restricted. It states:

> "Limits to basic rights and liberties can be set only by law, under conditions laid down in this constitution."[29]

In order for a limitation to be placed upon a socioeconomic right, according to both Constitutions, the limitation must be prescribed by law, in agreement with the

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law my limit any legal right entrenched in the Bill of Rights".

[28] Constitution, Slovak Republic, Part 8; Article 51.

[29] *Ibid*; Article 13

Constitution and "justifiable in an open democratic society", or able to withstand challenge in a court of law.

1.4 Time Limitations for Realization of Rights

One of the primary arguments against the constitutionalization of socioeconomic rights is the possibility for the erosion of the legitimacy of other rights included into the constitution. It is argued that, as most socioeconomic rights are dependent upon the financial resources of a country, they are not always enforceable. If the jurisprudence of a constitutional court ordering the realization of socioeconomic rights goes unheeded, due to a lack of available resources, (following the reasoning of adversaries) the jurisprudence regarding other such rights may be ignored as well.

1.4.1 South Africa

In the case of socioeconomic rights, the Constitutional Court has recognized the possibility that the jurisprudence of the court may be ignored. As Lindiwe Mokate mentions, there was great debate during the Constitution-forming process, in relation to socioeconomic rights. In the end, she mentions, "It was acknowledged and agreed that the realization of economic and social rights would have to be achieved progressively in the medium to long term."[30]

In addition to the limitations and restrictions of socioeconomic rights, the time limit allowed for the fulfillment of these guarantees is an extremely important aspect. The South African Constitution strongly affirms the principle of *progressive*

[30] Lindiwe Mokate, "Monitoring Economic and Social Rights in South Africa: The Role of the SAHRC," (South Africa: International Policy Dialogue, 2003)

realization[31]. Within South African Constitutional legality, progressive realization is interpreted as requiring states, "…to move as expeditiously as possible towards the realization of the rights."[32] The South African Human Rights Commission, a subset of the South African Constitution, has supported this interpretation of *progressive realization*, thus granting the interpretation constitutional legality.[33] Additionally, the relevant organs of the state are responsible for annually reporting to the Human Rights Commission the steps that they have undertaken in order to work toward the progressive realization of socioeconomic rights including the right to health care, housing and education. [34]

While the South African Human Rights Commission is clear that the full enjoyment of socioeconomic rights is not immediately expected, state organs must constantly be working toward achieving the goal of full realization. The United Nations shares a similar interpretation of "progressive realization". The UN Committee on Economic and Social Rights has stated that, "the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content."[35]

[31] In relation to socioeconomic rights discussed within this work, progressive realization is mentioned in Sections 26(2) and 27(2) of the Constitution and is alluded to in Section 29 (1)b.
[32] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. UN Document E/CN.4/1997/17; Para. 21
[33] In the report, "The Right to Health Care", published in conjunction with the *5th Economic and Social Rights Report Series, 2002/2003 Financial Year*, the South African Human Rights Committee supports the Limburg Principles' interpretation of progressive realization, 9.
[34] Lindiwe Mokate, "Monitoring Economic and Social Rights in South Africa: The Role of the SAHRC," (South Africa: International Policy Dialogue, 2003)
[35] United Nations Committee on Economic and Social Rights, Para 9 of general comment 3, 1990

1.4.2 Slovakia

The socioeconomic rights in the Slovak Constitution lack internal limitations as to a timeline for realization. Therefore, there is no clause within the article that grants the right, a means of limiting or restricting that right. More specifically, the Articles which provide for the socioeconomic right fail to contain a statement similar to the terminology employed by the South African Constitution of progressive realization[36]. However, as it will be proved later in this study through the *Stanková* case, citizens of Slovakia have additional sources to turn for protection if their government fails to provide redress.

[36] For example, Article 40 of the Constitution of Slovakia prescribes the right to healthcare for citizens. It does not mention, however, a deadline nor allude to a timeline such as progressive realization.

CHAPTER 2: The Right to Health Care

The health of its citizens has been a major concern for governments throughout history. Access to services exist through numerous channels and vary across the world. While several countries, notably the U.S. maintain a system of privatized health care, the majority of developed countries incorporate a healthcare as socioeconomic right.

2.1 Health Care in South Africa

Section 27 in the Bill of Rights of the 1996 South African Constitution provides for the right to healthcare. Section 27 1 (a) states that:

> "Everyone has the right to have access to health care services, including reproductive care."[37]

Also, Section 27 (3) requires that,

> "No one may be refused emergency medical treatment"[38].

However, Section 7 (in conjunction with Section 36) provides a qualifying clause for the Bill of Rights, which pertains to Section 27. The Constitution implies that this socioeconomic right is not an absolute right. Thus, while everyone theoretically has the right to healthcare, this right may be limited. It is the job of the Constitutional Court to decide, in their jurisprudence, when and what limitations that have been placed upon this right are constitutional[39].

[37] Constitution of the Republic of South Africa, 1996; Chapter 2, Article 27
[38] *Ibid*
[39] As the Constitutional Court of South Africa does not hear cases based on abstract review, cases brought before the Court will be based on real limitations to the rights; limitations that have already occurred or are in the process of being placed upon a right.

2.1.1 *Soobrmoney v. Minister of Health*

The first case involving the right to healthcare to gain standing at the Constitutional Court level was *Soobramoney v. Minister of Health*[40]. Brought before the Constitutional Court in 1997, this case focused on the appellant, Thiagraj Soobramoney, who suffered from kidney failure. Soobramoney did not have the economic resources to employ private treatment for his condition. His illness was in a critical state and he sought treatment from a state-run hospital.[41]. His condition did not qualify him for medical care, as he failed to meet the hospital's guidelines for treatment[42]. Due to the denial for treatment in conjunction with the advanced and critical state of his illness, Soobramoney claimed that his right to health had been violated by the state health authorities. He brought a case against the Minister of Health[43]. After Soobramoney's case was dismissed by the High Court[44], he filed his case with the Constitutional Court.

Soobramoney claimed that his rights protected under Article 27(3) of the Constitution had been violated. The lower courts refused to order the hospital to provide dialysis for Soobramoney, and when brought before the Constitutional Court, the CC refused to overturn the decision of the lower court[45].

[40] *Thiagraj Soobramoney v. Minister of Health (Kwazulu-Natal).* CCT 32/97) 1997, ZACC 17; 119 (1) SA 765 (CC) 1997 (12) BCLR 1696 (17 November 1997)
[41] International Network for Economic, Social & Cultural Rights. Thiagraj Soobramoney v. Minister of Health (Kwazulu-Natal) < http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=673074>
[42] The hospital guidelines admitted only those patients who, "could be cured within a short period and those with chronic renal failure who are eligible for a kidney transplant." Lindiwe Mokate
[43] Soobramoney was able to bring a case against the Minister of Health due to the tort law and regulations surrounding liability in South Africa, as The Minister of Health was the highest liable appendage of the state.
[44] Lindiwe Mokate, "Monitoring Economic and Social Rights in South Africa: The Role of the SAHRC," (South Africa: International Policy Dialogue, 2003)
[45] *ibid*

The decision of the Constitutional Court in the Soobramoney case created important precedence in the CC's right to healthcare jurisprudence. Justice Chaskalon delivered the majority decision of the court. He begins by pointing out the economic inequalities which exist in the country. Justice Chaskalon furthers the argument stating that as a result of such inequalities, many people lack adequate health services.[46]

There are several important precedents established in the *Soobramoney* decision. One principle, however, stands out as being notably important in relation to the constitutionalization of socioeconomic rights. Justice Chaskalon states that, "[unequal] conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order."[47] This wording highlights the importance that the Constitution-drafters considered socioeconomic rights to play in equalizing conditions between all South Africans.

Additionally, Justice Chaskalon notes that, "The hard and unpalatable fact is that if the appellant were a wealthy man he would be able to procure such treatment from private sources; he is not, and has to look to the state to provide him with treatmen."[48]

As illustrated in the excerpts taken from the wording of the judgment above, the Court emphasizes the importance of socioeconomic rights in addressing disparities within South Africa. Taking this into account, however, the Constitutional Court still fails to rule in favor of Soobramoney. Once ruling out 27(3) (emergency treatment) the Court turns to 27(1) and 27(2) in forming their judgment. These sections state that the right to

[46] *Soobramoney v Minister of Heatlh, Kwazulu-Natal. 1998 (1) South Africa, 765 (CC)*
[47] *Soobramoney v Minister of Heatlh, Kwazulu-Natal. 1998 (1) South Africa, 765 (CC)*
[48] Pat Sidley, "South African row over denial of dialysis" (Johannesburg, South Africa: *BMJ, December* 1997, 315) 1559-1564

healthcare when in a non-emergency, is available depending upon resources[49]. The reasoning of the *Soobramoney* judgment begins by focusing on the right to emergency treatment, as prescribed by Article 27(3)[50]. The CC rules that this case was not an emergency because, while his condition may have been critical, Soobramoney was not in need of an emergency kidney transplant or emergency dialysis.

Bearing this in mind, the CC takes the approach of judicial deference. The judgment states that the Court did not wish to interfere with the policies of the hospital on prioritizing patients and thus assumes that the decisions were made in "good faith" and fairly dependent upon the available resources. As this was the first CC decision based upon the right to healthcare, socioeconomic rights appear to have begun with extremely minimal protection in Constitutional jurisprudence and thus set a rather dangerous standard of judicial deference, which could be easily abused.

2.1.2 *Minister of Health v Treatment Action Campaign*

Several years after the *Soobramoney* ruling, another landmark case involving the right to healthcare in South Africa was brought to the judicial forefront. The case of *Minister of Health v Treatment Action Campaign (TAC)* was ruled on by the Constitutional Court in 2002[51]. This case involved a complaint, brought by the TAC against the Minister of Health due to a lack of access to an anti-retroviral drug for treating HIV/AIDS.

Some of the core motivations behind the inclusion of the socioeconomic right to healthcare within the constitution are addressed in this case. It lobbies for those persons

[49] *Soobramoney v Minister of Heatlh, Kwazulu-Natal,)*§36
[50] Constitution, Republic of South Africa, Article 27(3)
[51] *Minister of Health v Treatment Action Campaign.* 2002, 5 SA 721 (CC)

who are unable to afford medical treatment. As the majority opinion in this CC decision questions, "What is to happen to those mothers and their babies who cannot afford access to private health care and do not have access to the research and training sites?"[52]

Minister of Health v. TAC was brought on behalf of a pregnant mother who was denied access to Nevirapine, an antiretroviral drug which decreases the chance of Mother-to-Child transmission of HIV/AIDS[53]. The policy at the time, of the Government under the HIV/AIDS Strategic Plan 2002-2005 was to limit the use of this drug solely to training and research sites.[54] The Treatment Action Campaign filed a case against the Minister of Health[55].

Judge Chris Botha of the High Court ruled in favor of TAC, ruling that Nevirapine must be made available to, "infected mothers giving birth in state institutions."[56] Upon appeal from the government, the case was brought before the Constitutional Court.

Minister of Health v TAC additionally serves as a landmark case in regards to the CC's position on the justifiability of socioeconomic rights. The Court draws upon their past jurisprudence in *Soobramoney* and *Grootboom*[57] to illustrate the fact that the court has already decided that socioeconomic rights are legally justifiable. The majority opinion in *Minister of Health* states, "The question in the present case, therefore, is not whether socio-economic rights are justifiable. Clearly they are. The question is whether the applicants have show that the measures adopted by the government to provide access

[52] *Ibid*, §19
[53] *Ibid*
[54] South African Human Rights Commission, "The Right to Health Care," 5th Economic and Social Rights Report Series 2002/2003 Financial Year; Pg. 55
[55] The applicable subset of the Government in this situation.
[56] International Network for Economic, Social & Cultural Rights. Minister of Health v Treatment Action Campaign (TAC) (2002) 5 SA 721 (CC) < www.escr-net.org/caselaw>
[57] *Grootboom* addressed the right to housing, which will be discussed in the following chapter.

to health care services for HIV-positive mothers and their newborn babies fall short of its obligations under the Constitution."[58]

Thus, since the Court is not preoccupied with focusing on the justifiability of socioeconomic rights, it is able to concentrate on other aspects; such as the permissible limitations of these rights. The *TAC* judgment acknowledges that in two former cases involving socioeconomic right (*Soobramoney* and *Grootboom*) the Court, "recognized that the state is under a constitutional duty to comply with the positive obligations imposed on it by sections 26 and 27 of the Constitution"[59]. However, the Court is unwilling to completely disregard qualifications within the Section, in the spirit of upholding socioeconomic rights. "It was stressed, however," the Constitutional Court states referring again to the two previous socioeconomic decisions, "that the obligations are subject to the qualifications expressed in sections 26(2) and 27(2)." [60]

While the limitations of the right are still an issue, as the justifiability of such is no longer in question, the Court proceeds to examining other aspects comprised within the right; such as the "minimum core" of the right. The CC briefly discusses the notion of a minimum core right, however, the CC's affirmation of the High Court's jurisprudence in this particular case was not decided on the "minimum core" of rights. Instead, the CC drew upon jurisprudence that was established in a case involving a different socioeconomic right; the right to housing in *Grootboom*.

The majority opinion in *Minister of Health v TAC* decided that, in relation to Sections 26 and 27 of the Constitution, the state had two positive obligations. One, "an obligation to give effect to the 26(1) and 27(1) rights; the other a limited obligation to do

[58] *Minister of Health v Treatment Action Campaign,* §25
[59] *Minister of Health v Treatment Action Campaign,* §23
[60] *Minister of Health v Treatment Action Campaign,* §23

so progressively through 'reasonable legislative and other measures, within its available resources'."[61] As the South African Human Rights Commission reported the following year, "The Court utilized the test of 'reasonableness' as expounded by Justice Yacoob in the Grootboom case."[62] When specifically applied to *Minister of Health v TAC*, the CC found that, "'waiting for a protracted period' to make it available was 'not reasonable' within the meaning of section 27(2) of the Constitution."[63]

Jurisprudence based on reasonableness was still novel and at the time of *TAC* reasonableness had only been applied in cases based on the right to housing. The CC's judgment in *TAC* establishes the jurisprudence that the reasonableness argument may be applied to other socioeconomic rights, not solely housing. In this aspect, *Minister of Health v TAC* was a landmark decision, not solely for the protection it awards in halting Mother-to-Child transmission of HIV/AIDS, but also in the jurisprudence it institutes on the use of reasonableness across the range of socioeconomic rights.

2.2 The Slovak Constitution and Subsequent Right to Health Care

Part 5 of the Slovak Constitution entitled Economic, Social and Cultural Rights addresses socioeconomic rights. More specifically within Part 5, Article 40 of the Constitution provides protection in cases of medical care.

Article 40 reads:

[61] *Ibid*. §29
[62] South African Human Rights Commission, "The Right to Health Care," 5th Economic and Social Rights Report Series 2002/2003 Financial Year; Pg. 55
[63] South African Human Rights Commission, "The Right to Health Care," 5th Economic and Social Rights Report Series 2002/2003 Financial Year; Pg. 55

> "Everyone has a right to the protection of his health. Based on public insurance, citizens have the right to free health care and to medical supplies under conditions defined by law."[64]

Unlike the momentous jurisprudence established in *Soobramoney* and *TAC*, the Slovak Constitutional Court has yet to rule on a case focused on the socioeconomic right to health care.

2.3 Chapter Analysis

While slightly differently-worded, the right to health care exists at the constitutional level in both South Africa and Slovakia. The South African Constitutional Court has ruled on two different cases based on the right to healthcare, where the Slovak Constitutional Court has yet to rule on the right to healthcare. The South African CC started with a weak protection of socioeconomic rights ruling against Soobramoney. In the *TAC* decisions, however, the CC awarded greater protection to the right to health.

[64] Constitution, Slovak Republic, Part 5; Article 40.

CHAPTER 3: The Right to Education

Education is regarded as a fundament necessity in the promotion and creation of new opportunities, and the opening of new doors of possibility. However, just as easily as education can be used to create opportunities, it can also be used as a tool to limit opportunities and suppress certain groups and individuals. The black majority during apartheid and the Romani minority have both fallen subject to discriminatory practices in education at the hands of their governments.

3.1 The Right to Learn in South Africa

In the Constitution of South Africa, Article 29 contains the right to education. Section 1 (a) states that, "Everyone has the right to a basic education, including adult basic education"[65]. The basic education that the Constitution denotes has been developed over the past several years. The South African Human Rights Commission has elaborated upon this right, expanding it into three distinct areas of study. The Commission has determined that the right to education can be, "analyzed as a continuum of three bands of schooling – General Education and Training, Further Education and Training, and Higher Education and Training."[66]

The right to education is a vital aspect of post-apartheid South Africa in attempting to eliminate discrimination and inequality. However, Berger points out that schools are constantly under-funded and overlooked. He states that, "Nowhere is this paradox more evident than contemporary South Africa, where the country has included

[65] Constitution, Republic of South Africa, Article 29; 1(a)
[66] South African Human Rights Commission, "The Right of Access to Adequate Housing" (South Africa: 5th Economic and Social Rights Report Series, 2002/2003 Financial Year, June 21, 2004) x

the right to education in its emphatically modern Constitution, but where schools, particularly for poor blacks, remain woefully inadequate."[67]

While the Constitutional Court has taken on landmark cases and developed innovated jurisprudence with respect to the right to housing and the right to healthcare, a lack of precedence on the right to education in a strictly socioeconomic sense remains.

3.2 Slovakia's Right to Education

The Slovak Constitution provides a right to education through Article 42[68]. This Article, however, specifically denotes that the right to education is dependent upon, society's resources. Article 42(2) states:

"(2) Citizens have the right to free education at primary and secondary schools and, based on their abilities and society's resources, also at higher educational[69].

Cognizant of Article 42 (2), however, education in Slovakia has been anything but free and accessible, particularly for Romani children. The majority of Romani children in Slovakia have historically been placed in special schools, implicating numerous human rights violations and often considered to be one of the greatest discriminatory practices currently occurring against this minority group.[70]

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[67] Eric Berger, "The Right to Education Under the South African Constitution" (New York, NY: *Columbia Law Review,* Vol. 103, No. 3, April 2003) 1

[68] Article 42 states that:

> "(1) Everyone has the right to education. School attendance is compulsory. Its period and age limit will be defined by law.
> (2) Citizens have the right to free education at primary and secondary schools and, based on their abilities and society's resources, also at higher educational establishments.
> (3) Schools other than state schools may be established and instruction in them provided, only under conditions defined by law. Such schools may charge a tuition fee.
> (4) A law will specify under which conditions citizens who are engaged in studies are entitled to assistance from the state."

[69] Constitution, Slovak Republic, Article 42 (2).

[70] The Amnesty International Report *A Tale of Two Schools* (2007) concluded that, "Officially, children can only be placed in special schools after the formal diagnosis of a mental disability and only with the full consent of parents. However, Amnesty International found that many children had not been assessed at all

The figures on school attendance of Romani children in Slovakia are appalling. The Council of Europe's High Commissioner for Human Rights released a report in 2006, stating that only three percent of Romani children reached secondary school[71]. Amnesty International commented on the findings in the report, stating that, "This extraordinary figure has been highlighted in reports by national institutions, and raised as a concern by international human rights bodies".[72]

The vast majority of those Romani children that are attending school at the primary level are enrolled in "special schools" intended for mentally disabled children. Under Slovak law, parental consent –namely free and informed consent[73] - is required before a child can be enrolled at a special school. In the case of many Romani families, however, "such consent has been neither free nor informed."[74] Children are enrolled in special schools after they receive sub-satisfactory scores on school entrance tests (due to the fact that the tests are issues in Slovak and most of the children speak Romani language).

Additionally, Romani families are bribed through "motivational scholarships" offered through the Ministry of Labour and Social Affairs. Scholarships of monetary awards are given to families based on the academic performance of the children in school. However, "since special schools follow a simpler curriculum, it is easier for children of mainstream school ability to achieve higher grades there. Thus, motivational

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and that the assessment itself was deeply flawed. At the same time parental consent was often neither free nor informed", 4.

[71] Amnesty International, *Slovakia: A Tale of Two Schools: Segregating Roma into Special Education in Slovakia* (London, UK: Amnesty International, 2008) 11

[72] *Ibid.*

[73] Free and Informed consent in reference to Romani children and special schools was embellished in ECHR jurisprudence in the case of *D.H. and others v the Czech Republic* and is elaborated upon in Chapter 5.

[74] Amnesty International, *Slovakia: A Tale of Two Schools*,12

scholarships are all too commonly used as an incentive to entice parents into registering their children at a special school."[75]

A case brought to the Constitutional Court involving Romani children and based on the right to education would likely also incorporate Article 34 of the Constitution which provides that ethnic minority groups have the, "right to education in their own language."[76] However, a case has yet to be brought before the Slovak CC on the right to education.

3.3 Chapter Analysis

Jurisprudence founded on the right to education is lacking in South Africa as well as Slovakia. However, due to a recent and pioneer judgment, the European Court of Human Rights has established a substantial precedent with which Romani children in Slovakia may be able to use to claim their right to education.

[75] *Ibid*, 14
[76] Constitution, Slovak Republic, 1992, Article 34(2) (a)

CHAPTER 4: The Right to Housing

The socioeconomic right most widely differentiated between South Africa and Slovakia is the right to housing. While the former has included this right in the Constitution, as well as formulated landmark jurisprudence on it, the Slovak Constitution fails to identify a right to housing.

4.1 The Right to Housing in the South African Constitution

The constitutional protection of the right to housing in South Africa is strongly correlated to the history of apartheid. Wickeri points out that, "The apartheid government forcibly and often brutally evicted and relocated millions of black South Africans in order to secure the most and best land for white South Africans, resulting in overcrowded areas of abject squalor with no running water, electricity, sewage services or paved roads."[77]

As a result of overcrowding and refusal to give legal permission to blacks to settle in certain areas, squatter settlements sprang up at an alarming rate during the apartheid years. The past century in South Africa was, "one of untendable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor to the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removals".[78]

Chopra notes that 1 in 6 people, in South Africa, "lived in rudimentary shacks"[79]. The African National Congress, the main political opposition to the apartheid government

[77] Elisabeth Wickeri, "*Grootboom'*s Legacy: Security the right to Adequate Housing". (New York, NY: NYU School of Law, 2004) 5
[78] *Government of the Republic of South Africa v Grootboom*, 2000 (11) South Africa, 1169 (CC), §6
[79] Mickey Chopra and Dave Sanders, *Public Library of Science*, Medicine (Vol. 4, No, 8, 2007) 158

in South Africa vehemently called for a solution to the housing crisis. In fact, "as early as 1955, the ANC proclaimed a need to recognize housing rights."[80] The legal solution for housing inequality was to be found in the form of a constitutionally-protected right to housing. However, the practices of the apartheid government and living conditions of the majority of South Africans created a unique and paradoxical situation when the right to housing was introduced in 1996.

The ANC witnessed the fruition of their years of lobbying in Article 26 of the new South African Constitution. The right to housing state that:

> "(1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take responsible legislative and other measures, within its available resources, to achieve the progressive realization of this right.
>
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstance. No legislation may permit arbitrary evictions."[81]

Initial glance would suggest that Section 26 is a thorough safeguard for the right to housing, placing both positive and negative obligations upon the state. The Constitution places a negative obligation on the state through 26(3) so as to not arbitrarily deprive anyone of their right to housing without the actions first being prescribed by law and judicially reviewed.

However, Section 26 may not, in reality, provide an extensive amount of protection. The wording of this section which prescribes the right to housing also intermittently contains plausible loopholes. For example, 26(3) essentially allows for the court to evict a tenant, as long as "all the relevant circumstances" are first considered. To

[80] *Ibid* pg 11
[81] Constitution, Republic of South Africa, Article 26.

gain a more knowledgeable understanding of the interpretation of this Section, the jurisprudence of the Constitutional Court must be examined, such as the decision of the *Grootboom* judgment.

4.1.1 *Government of the Republic of South Africa & Ors v Grootboom & Ors*

Currently, the most notable case involving the right to housing to have been granted standing before the Constitutional Court is the *Grootboom* case. The respondent, Irene Grootboom, was a black South African who had been subjugated to years of discrimination at the hands of the apartheid government. Due to a lack of subsidized housing and other state-sponsored methods to make housing accessible to citizens, Grootboom was forced to illegally squat in a shack that lacked electricity, water and sewage systems[82]. In 1999, Grootboom, along with other illegal squatters, was forcefully evicted and her shack was bulldozed. The government refused to provide relief to Grootboom and the others, and thus she brought a case before the High Court charging that the government failed to meet its constitutional duty of ensuring her housing.[83]

The High Court ultimately ruled in favor of the Grootboom. However, the HC did point out that there was an immense housing shortage and the government was faced with, "am extremely constrained budget".[84] Additionally, the HC drew upon the International Covenant on Economic, Social and Cultural Rights, to argue that in this case a minimum core entitlement did not apply.

The Government subsequently appealed to the Constitutional Court. In the majority decision, the Constitutional Court acknowledges the current inadequacy of the

[82] *Government of the Republic of South Africa v Grootboom*, §7
[83] *Ibid*, §10
[84] *Ibid*

effect of socioeconomic rights in South Africa saying, "The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream."[85] Furthermore, the court draws a distinct link between apartheid and a housing crisis. The majority opinion states that, "The cause of the acute housing shortage lives in apartheid"[86].

The Court also reinforces the authority of socioeconomic rights, arguing that, "Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only… The question is therefore not whether socio-economic rights are justifiable under our Constitution, but how to enforce them in a given case."[87]

The reasoning of the Court in *Grootboom* provides, perhaps, the most comprehensive insight into the obligation that is imposed on the state as a result of socioeconomic rights. The court points out that, "The state is obliged: (a) to take reasonable legislative and other measures; (b) within its available resources; (c) to achieve the progressive realization of this right."[88]

Another important element of the *Grootboom* judgment is the Court's reinforcement of the mutual importance of all constitutionally-protected and guaranteed rights. The majority opinion states that, "All the rights in our Bill of Rights are inter-related and mutually supporting."[89] The Court did not venture as far as to state that all the rights were equal and placed on the same level. The Court did, however, say that the right to housing should be considered within a "cluster" of socioeconomic rights, along

[85] *Ibid* §2
[86] *Ibid*, §6
[87] *Ibid* §20
[88] *Ibid* §21
[89] *Ibid* §23

with the right to health care, food, water, social security and education[90]. It also highlighted the interrelated character, and thus mutual (albeit not equal per se) importance, of the rights.

In the majority opinion, the Constitutional Court questions whether the minimum core of right to housing should be dependent upon certain groups of people, or if a more individual approach should be exercised. The CC states, "There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people."[91]

Additionally, the Constitutional Court took international law into consideration when reasoning the *Grootboom* case. Justice Yacoob states that, "a state in which a significant number of individuals is deprived of basic shelter and housing is regarded as *prima facie* in breach of its obligations under the Covenant[92]."[93] The Constitutional Court then continues to determine the minimum threshold, or core, of the right to housing that is required to satisfy progressive realization (a necessity in order to comply with the right prescribed within the Constitution). The measures that the state takes in order to ensure the right to housing, must be reasonable.

Reasonableness is a concept that should apply to the entire Bill of Rights, according to the CC, and key to ensuring that these rights are recognized. In the *Grootboom* decision,

[90] *Ibid* §19
[91] *Ibid* §33
[92] International Covenant on Economic, Social and Cultural Rights, United Nations Office for the High Commissioner for Human Rights, GA Assembly Resolution, 16 December, 1966.
[93] *Government of the Republic of South Africa v Grootboom*, §30

the Court is adamant that, "A programme that excludes a significant segment of society cannot be reasonable"[94].

The CC concludes that only a situation in which constitutionalized socioeconomic rights can be progressively realized, is reasonable. Section 26 of the Constitution of South Africa stipulates that the right to housing must be progressively realized. Thus, following the above reasoning, the "policies and implementation measures, must be reasonable"[95], in order for them to be compliant with the Constitution.

Furthermore, "A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality."[96] Ultimately, the CC rules in favor of Grootboom, establishing that the government was in violation of Section 26(2) because, "no provision was made for relief to the categories of people in desperate need [Grootboom *et al*] identified earlier,"[97] and was therefore non-compliant with the Constitution.

4.2 The Right to Housing in the Slovak Constitution?

As mentioned above, the Slovak Constitution does not include a provision, comparable to that in the South African Constitution which guarantees a right to housing. Does, then, the lack of a constitutional right to housing leave Slovak citizens unprotected without any judicial protection?[98]

[94] *Government of the Republic of South Africa v Grootboom*, §43
[95] South African Human Rights Commission, "The Right of Access to Adequate Housing" (South Africa: 5th Economic and Social Rights Report Series, 2002/2003 Financial Year, June 21, 2004)
[96] *Government of the Republic of South Africa v Grootboom*, §44
[97] *Ibid* §68
[98] While independent of the Slovak Constitutional Court and non-binding on the Government, it should be noted that an alternative right to housing for the Roma was garnished by the United Nations Committee on the Elimination of Racial Discrimination. The Dobšiná municipality adopted a Resolution to provide members of the Romania community with subsidized housing. In response to protest and a petition that was issued by members of the community, the Dobšiná municipality revoked the resolution. After

In 2001 a case was brought before the Constitutional Court based on Article 19(2) of the Slovak Constitution which provides that, "Everyone has the right to protection against unwarranted interference in his private and family life."[99] The plantiff, Milota Stanková, shared a public housing apartment with her father and after he passed away she applied to have her name registered as the apartment owner. However, while her application was pending she was ordered to evacuate the flat. When she failed to comply she was evicted[100].

The Constitutional Court granted Stanková admissibility. Although this case was based on a right to privacy it essentially targeted the protection which would have been afforded in a right to housing. Ultimately, the Constitutional Court had to make a decision based on the constitutionality of the limitation imposed on Stanková's right to privacy, whether the forced eviction, could be justified by the government. The CC considered several different aspects of the case, concluding that the Poprad Municipality[101], "was under an obligation to assist the town's citizens in resolving their accommodation problems".[102] Thus, the Poprad Municipality had a positive obligation in this case, according to the CC.

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conducting a review, the Committee released a Communication that the Slovak Government was in violation of Article 14, Paragraph 7; Article 2, paragraph 1(a); Article 5, paragraph d(iii); and Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination. (Communication No. 31/2003: Slovakia. 10/03/2005).

[99] Article 19 of the Slovak Constitution states that:

> (1) Everyone has the right to the preservation of his human dignity and personal honor, and the protection of his good name.
> (2) Everyone has the right to protection against unwarranted interference in his private and family life.
> (3) Everyone has the right to protection against the unwarranted collection, publication, or other illicit use of his personal data."

[100] Centre on Housing Rights and Evictions. "European Court of Human Rights Issues Landmark Ruling Against Slovakia". Geneva, Switzerland, Oct. 2007. <www.cohre.org>

[101] The Poprad Municipality was the local government in the Stanková case responsible for pubic housing.

[102] *Stanková v. Slovakia*, 7205/02 [2007] ECHR 795 (9 October 2007) §61

As the Municipality failed to provide adequate housing for Stanková, it failed to uphold its Constitutional responsibility to Stanková. On July 10, 2001, the CC ruled in favor of Stanková. The Court stated that, "the effect of the ordinary courts' [the Prešov Regional Court] decision ordering the applicant to leave the flat without being provided with any alternative accommodation produced effects which were incompatible with her right to respect for her private and family life and for her home"[103].

Constitutional Court case law established by the Stanková case notes that, "Protection of privacy also includes inviolability of home. Any interference resulting in the impossibility of using one's home is likely to interfere also with private and family life of individuals"[104].

During the reasoning of the judgment, the CC considered the Civil Code, an additional step which is taken in a civil law country as opposed to a system based on common law. The CC, "noted that Article 3 of the Civil Code permitted the granting of relief from hardship in justified cases by ensuring that alternative accommodation should be provided to persons who had been ordered to move out of a flat."[105] The CC reprimands the Supreme Court for failing to examine if Article 3 of the Civil Code had been violated in this case.

Although the CC ruled in favor of Stanková they were unable to provide her with redress. According to past case law the CC decided that, "It could neither grant damages to the person concerned nor impose a sanction on the public authority liable for the violation found".[106] Thus, the Poprad Municipality would have to provide redress to

[103] *Stanková v. Slovakia*, §60
[104] *Ibid.*
[105] *Ibid* §6
[106] *Stanková v. Slovakia* §36

Stanková instead of the CC. As a result, Stanková won the CC case, but was never compensated.

The jurisprudence of the Constitutional Court provides legal protection comparable to the right to housing in the Stanková case, by ruling under the right to privacy. However, the CC failed to provide redress for Stanková. Does this mean that Stanková was uncompensated? Surpassing the Constitutional Court at the domestic level, Stanková brought her case into the international arena and once again the ECHR stepped forward to provide Slovak citizens with affirmative jurisprudence.

4.3 Chapter Analysis

Similar to cases involving other socioeconomic rights, the South African Constitutional Court has established greater jurisprudence and has been more active in respect with the right to housing than its Slovak counterpart. This may be one of the evident consequences of the common law system practiced in South Africa, as opposed to Slovakia's civil law system. Furthermore, the Court drew upon international law in deciding the judgment. The Slovak Constitutional Court also ruled in favor of the applicant, in the Stanková case. However, because the Slovak Constitution does not provide a right to housing, the case had to be ruled under a right to privacy. Ultimately, the Slovak Constitutional Court fails to provide Stanková with redress for the violation of her rights.

CHAPTER 5: Beyond Constitutional Court Jurisprudence

Constitutional Courts are generally regarded as the highest authority on cases involving rights prescribed in the Constitution. This holds true for Slovakia and South Africa, as cases have to funnel through the lower courts before appealing for standing at the level of the Constitutional Court. However, citizens in both countries are not without additional protection for their socioeconomic rights.

5.1 Alternatives in Slovakia

In Slovakia, additional protection can to be found in the form of a regional court, with binding jurisprudence over Slovakia.

5.1.1 European Court of Human Rights

In 1959 the European Court of Human Rights was established[107] which has since developed into a judicial body that is one starchiest defenders of human rights. The Court derives its jurisdiction from the European Convention of Human Rights, the drafters of which believed that "international machinery" would be necessary in order to enforce the rights granted by the Convention[108]. One academic, A.H. Robertson, states that the ECHR has, "Provided an inspiring model for other human rights systems"[109]. As a member of the Council of Europe, Slovakia participates in the ECHR and thus Slovak citizens have the potential to be granted standing before the Court.

Cases brought before the ECHR must be based upon the European Convention not the Slovak Constitution (and thus not directly related to the Slovak Constitutional

[107] European Court of Human Rights, Historical Background <www.echr.coe.int>
[108] A.H. Roberts and J.G. Merrills, Human Rights in Europe: A Study of the European Convention on Human Rights, 3rd Ed. (Manchester, UK: Manchester University Press, 2001) 250
[109] *Ibid,* 1

Court). However, one landmark cased managed to go above and beyond the rights prescribed in the Slovak Constitution and bring a case before the ECHR which garnished an alternative right to housing. After failing to be redressed by the Constitutional Court, Stranková brought her case to the ECHR. As there was no right to housing contained within the ECHR (similar to this provision lacking in the Constitution) it would appear that Stanková lacked standing before this Court. She was, however, able to frame her case around Article 8, and the right to privacy[110].

The European Court concluded that the Constitutional Court has been correct in its reasoning that there was an interference with Stanková's right to privacy. In its judgment the ECHR states that, "The Court finds the reasoning of the Constitutional Court convincing and sees no grounds for reaching a different decision."[111] The ECHR ruled in favor of Stanková, and ordered Slovakia to pay her damages.

The decision of the ECHR in the *Stanková* case carries great weight for two reasons. First, the European Court agreed that the Constitutional Court of Slovakia was correct when it ruled in favor of Stanková.

Secondly, while in agreement with the rational-process of the Slovak CC, and thus simultaneously reinforcing domestic jursiprudce, the European Court is uninhibited in highlighting the mistakes of the lower courts. The European Court asserts that the, "Prešov Regional Court had not duly considered the… relevant facts."[112] Due to the lack

[110] Article 8, European Convention on Human Rights, states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[111] *Stanková v. Slovakia*, 7205/02 [2007] ECHR 795 (9 October 2007) §62

[112] *Stanková v. Slovakia*, 7205/02 [2007] ECHR 795 (9 October 2007) §11

of a provision guaranteeing the right to housing in the Slovak Constitution, the European Court refers back to Article 19[113] of the Slovak Constitution, which guarantees the right to protection of privacy[114]. This is a momentous statement in the decision of the European Court because within its judgment the Slovak CC had in fact stated that Article 19 should not apply to Stanková, and that she should have sought redress under Article 11 of the Civil Code[115]. Thus, the European Court again exhibits its lack of inhibitions in disagreeing with a CC in order to uphold socioeconomic rights.

Overall, the European Court affirms that the Slovak CC has ruled correctly in favor of socioeconomic rights. Secondly, the European Court made a statement to the Slovak CC as well as other members of the Council of Europe that the Slovak CC was incorrect in failing to provide Stanková with redress. The ECHR ruling is important to not only the Slovak CC, but to other European states as well. As Jack Donnelly avows, "The decisions of the European commission and court, and the general guidance provided by the European convention, have had a considerable impact on law and practice in a number of states."[116]

Without the ECHR, Stanková would have been left with very few alternative outlets – if any – to turn to after the Constitutional Court failed to provide her with redress. Due to the ruling of the ECHR in the *Stankoná* case, however, the appellant was

[113] Article 19 of the Constitution of the Slovak Republic states that:

"(1) Everyone has the right to the preservation of his human dignity and personal honor, and the protection of his good name.

(2) Everyone has the right to protection against unwarranted interference in his private and family life.

(3) Everyone has the right to protection against unwarranted collection, publication, or other illicit use of his personal data.

[114] *Stanková v. Slovakia*, 7205/02 [2007] ECHR 795 (9 October 2007) §12

[115] *ibid*, §13

[116] Jack Donnelly, International Human Rights: Dilemmas in World Politics, 2nd Ed. (Boulder, CO: Westview Press, 1998) 83.

able to garnish additional protection, using the ECHR as an oversight to the decision of the Constitutional Court

5.1.2 D.H. and Others v the Czech Republic

The ECHR is able to foster additional protection of socioeconomic rights to Slovak citizens; even in cases that lack any immediate ties to Slovakia. The jurisprudence established by the European Court is binding on all countries within the Council of Europe, even if the other member countries are not directly involved in the case which creates the precedent. This aspect of the ECHR is particularly pertinent to the socioeconomic rights of Slovak citizens as a result of the case of *D.H. and others v. the Czech Republic*.

In 2000, a case was filed against the government of the Czech Republic at the ECHR on behalf of eighteen Romani children who claimed that their right to education had been violated. The children were enrolled as students at a "special school"[117] (*zvláštní školy*) in the sleepy Northeastern city of Ostrava, Czech Republic. The applicants claimed that several of their rights had been violated including the right to education, established at the European level under Article 2[118] of the European Convention's First Protocol.

As is rudimentary process in order to determine if a case has standing before the ECHR, the European Court verified that all domestic remedies had been exhausted[119]. Thus, the Constitutional Court had already ruled on the case, before it was heard at the

[117] See Chapter 3 of the current study for information on Romani children and discrimination in education.
[118] ECHR Protocol 1, Article 2 states:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.

[119] *D.H. and Others v. the Czech Republic*, 57325/00[2007] ECHR, §112

European level. The ECHR ruled that the Constitutional Court had not had not provided adequate redress for D.H. and the other applicants[120]. Ultimately, the Grand Chamber of the ECHR concluded that Article 2 of Protocol 1, as well as Article 14 had been violated by the Czech government.

In relation to the right to education, the ECHR's Grand Chamber judgment is significant for several reasons. First, in order to even be granted standing before the ECHR, the applicants were required to exhaust all domestic remedies. Thus, before even ruling on the case, the European Court knew that whatever decisions they made would either override or reinforce the decision of the CC.

Secondly, the European Court specifically notes that the recognition of the right to education is a problematic issue throughout the region; not solely in the Czech Republic. In its judgment, the Grand Chamber of the ECHR states that, "the Czech Republic is not alone in having encountered difficulties in providing schooling for Roma children: other European States have had similar difficulties."[121] Bearing in mind that the jurisprudence it sets is obligatory on all Council of Europe member states, the ECHR acknowledges that other states in the region have the same problem with recognizing the right to education. Essentially the Court implies that other states need to make changes within their education systems as well.

Lastly, the Grand Chamber's judgment is paramount in once again stepping into domestic law, and publicly asserting that the CC failed to provide adequate redress for the applicants. As in the ruling in the Stanková case, again the European Court

[120] *Ibid*, §122
[121] *Ibid*, §205

intervened, providing protection additional to what was garnered by the Constitutional Court.[122]

5.2 Searching for Independence from the Constitutional Court in South Africa

Rather unsurprisingly, citizens of South Africa lack standing before the ECHR. They do not have a currently functional regional court to which they may appeal, and in addition, they lacked, for many years, even the theoretically protection of the Universal Declaration of Human Rights[123]. Unlike Slovakia, however, citizens of South Africa have additional protection for their social and economic rights, on a domestic level.

[122] Additionally, protection has been granted to the Romani community through several Communications issued by the Committee on the Elimination of All Forms of Racial Discrimination including:
L.R. et al v. Slovakia (CERD/66/D/31/2003)
Koptova v. Slovakia (CERD/C/57/13/1998)
Lacko v. Slovakia (CERD/59/D/11/1998)

[123] In 1948 the UDHR was adopted by the totality of the General Assembly save eight countries (South Africa, Saudi Arabia and the Soviet bloc countries). The UDHR does include several social and economic rights such as the right to social security (Article 22), and the right to an education (Article 26). South Africa does now endorse the UDHR.

5.2.1 South African Human Rights Commission

The South African Human Rights Commission was created in 1995 though authority garnered from the Constitution, as well as from a separate Act[124]. Chapter 9 of the Constitution prescribes "State Institutions Supporting Constitutional Democracy". Section 184 elaborates upon the idea of a South African Human Rights Commission, or an independent Commission at the state level which would serve as the watch-dog of human rights within the country. Under Section 184 the South African Human Rights Commission is charged with the task of:

a) promoting, "respect for human rights and a culture of human rights"

b) promoting, "the protection, development and attainment of human rights; and"

c) monitoring and assessing, "the observance of human right in the Republic".[125]

Today the SAHRC primarily monitors the implementation of social and economic rights[126]. It does this by seeking redress when violations have occurred, and raising awareness of the social and economic provisions in the Constitution, as well as possible human rights violations, through education.[127]

The South African Human Rights Commission fulfills a vital "watchdog" role, overseeing the progress made toward, or regression away from, the realization of jurisprudence established by the Constitutional Court. In a recent report the Commission

[124] The Human Rights Commission Act 54 of 1994 also provides mandate for the South African Human Rights Commission.
[125] Constitution, Republic of South Africa, Chapter 9, Section 184
[126] South African Human Rights Commission, website, <http://www.sahrc.org.za/sahrc_cms/publish/cat_index_88.shtml>
[127] The current Mission Statement of the SA Human rights Commission includes the tasks of, "(a)Addressing human rights violations and seeking effective redress for such violations; (2) Monitoring and assessing the observances of human rights; (3) Raising awareness of human rights issues; and, (4) Educating and training on human rights".

noted that, "The judicial enforcement of [social and economic] rights by the courts and the constitutional mandate of the South African Commission to monitor and assess the observance of the rights by the State and non-state entities also contribute to the effectiveness of the constitutional guarantee of these rights."[128]

The ECHR serves as an oversight to the Slovak Constitutional Court as a completely separate entity which garnishes authority from the Council of Europe. The South African Human Rights Commission, on the other hand, was borne out of the South African Constitution and is still heavily reliant upon the South African government and Constitutional Court in several aspects. After all, it was the Constitution itself that, "tasked the Commission with a specific mandate to advance social and economic rights."[129]

The Commission periodically releases reports, highlighting the progress that the government and public authorities have on the process to full recognition and enjoyment of the socioeconomic rights prescribed in Constitutional Court jurisprudence. The Commission has recognized a potential conflict of interest between CC and Commission reporting that, "One of the concerns acknowledged by the Commission about the monitoring process so far is that it still relied heavily on reports from the government."[130] The SAHRC is currently working toward moving away from governmental dependence, although complete autonomy has yet to be achieved. The set-up of the South African CC allows for additional oversight, however, reaching above and outside of the domestic level.

[128] South African Human Rights Commission, "The Right of Access to Adequate Housing" (South Africa: 5th Economic and Social Rights Report Series, 2002/2003 Financial Year, June 21, 2004) vii
[129] *Ibid.*
[130] *Ibid*, xxiii

5.2.2 Drawing Upon International Law

The South African Constitutional Court routinely draws upon international law to aide in formulating jurisprudence and setting precedence. There has been no exception in cases brought before the CC involving socioeconomic rights, and international law was heavily relied upon in the *Grootboom* case. Throughout the judgment, Justice Yacoob continuously quoted reports regarding the Convention on Economic, Social and Cultural Rights[131].

5.2.3 African Union & the African Court on Human and Peoples' Rights

In addition to drawing upon international law in its CC jurisprudence, South Africa is a member of the African Union. While a member of the Organization of African Unity, the African Union's predecessor, South Africa signed onto the African Charter on Human and Peoples' Rights[132]. Article 16 and Article 17 of the African Charter are particularly important in the discourse on socioeconomic rights. Article 16 addresses healthcare, although not explicitly providing a right to healthcare as prescribed in the South African Constitution. The African Charter states that, "Every individual shall have the right to enjoy the best attainable state of… health," and that Parties of the Charter, "shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention."[133] The wording of the African Charter is vague about the specific obligations that it imposes upon the state.

[131] Office for the High Commissioner for Human Rights. The nature of States parties obligations (Art. 2, para. 1 of the Covenant). CESCR General comment 3, 5th Session, 1990, Para. 9

[132] African [Banjul] Charter on Human and Peoples' Rights. Adopted June 27, 1981, Organization of African Unity.

[133] *Ibid*, Article 16

Article 17 of the Charter clearly stipulates that, "every individual shall have the right to education."[134] The Charter does not provide a right to housing, however. Thus the South African Constitution provides protection to its citizens additional to what is prescribed in the Charter. Similar to the Commission established by the South African Constitution, the African Charter mandates the creation of a Commission to serve as a safeguard and to monitor the enforcement of the rights and duties laid out in the Charter[135].

In 2004 the African Court on Human and Peoples' Rights was established, the regional body in Africa most parallel to the European Court of Human Rights. The mandate of the African Court is to aide in the interpretation of the African Charter[136]. Unlike the ECHR, however, the African Court also has the jurisdiction to provide advisory opinions[137]. At present the African Court lacks jurisprudence on cases involving socioeconomic rights as it is still inexperienced.

In particular, the right to education is also encompassed in the African Charter on the Rights and Welfare of the Child, to which South Africa is party. More specifically, this charter implores signatories to, "provide free and compulsory basic education"[138]. Additionally, applicable to both South Africa and Slovakia, the right to education is enshrined in the Universal Declaration of Human Rights, the International Covenant on

[134] *Ibid*, Article 17
[135] *Ibid*. Article 30.
[136] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Article 3.
[137] *Ibid*. Article 4.
[138] African Charter on the Rights and Welfare of the Child. OAU Doc. CAB/LEG/24.9/49 (1990) Art. 11

Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and the Convention on the Elimination on All Forms of Discrimination Against Women.[139]

[139] Human Rights Watch, Human Rights Standards. South Africa: HIV/AIDS and access to education. New York, NY: 2005. <www.hrw.org/reports/2005/africa1005/3/htm>

Chapter 6: Conclusions

6.1 What Can Be Deducted?

After an analysis of the jurisprudence of the Constitutional Courts of South Africa and Slovakia, it's possible to deduct several conclusions:

1. **The Constitutional Court of South Africa has a more extensive history of upholding constitutionally-protected socioeconomic rights than the Slovak Constitutional Court.**

2. **There are additional outside influences which affect the jurisprudence and realization of socioeconomic rights in both South Africa and Slovakia.**

3. **Citizens of Slovakia can turn to the ECHR for redress, while the citizens of South Africa have the Human Rights Commission. However, the Human Rights Commission heavily relies upon reports from the Government of South Africa and lacks autonomy, which may be problematic and present conflicts of interest.**

1. The Constitutional Court of South Africa upheld the socioeconomic rights of South African citizens in *Minister of Health v. TAC* as well as in *Government of the Republic of South Africa v. Grootboom.* In each case the judgment of the Constitutional Court set exemplary precedent in recognizing the right to healthcare and the right to housing,

respectively[140]. The Slovak Constitutional Court found in favor of the applicant in the Stanková case, however this case was essentially based on the right to privacy. The ruling begins to create plausible jurisprudence on a right to housing. However, as the right to housing is not a constitutionally-protected right for Slovak citizens, the ruling of the Stanková case fails to create precedent for any tangible socioeconomic right. Thus, the South African CC has established concrete jurisprudence for more socioeconomic rights than the Slovak CC.

2. The Constitutional Court is the highest domestic judicial authority in both South Africa and Slovakia. However, there are a significant number of influences in addition to the Constitutional Court which come into play in regards to socioeconomic jurisprudence. While actually reasoning cases, the South African Constitutional Court draws upon outside influences and international law. Reliance upon international law is a note-worthy feature of the South African CC, and when discussing jurisprudence, it must be kept in mind that South Africa is common law, where Slovakia follows a civil law tradition. Thus, ECHR jurisprudence factors into judgments of the Slovak CC, however again, Slovak judicial authorities will be less willing to rely upon past precedence. Furthermore, the South African Commission serves as an oversight, reporting on the progress of progressive realization of socioeconomic rights within the country.

[140] In relation to socioeconomic rights, the South African CC provided additional protection to these rights, based on reasonableness as established in the *Grootboom* case. The Court held that the Constitution, "gave everyone the right to have access to social security". *Khosa & Ors v Minister of Social Development & Ors.* [2004(6) BCLR 569(CC)]

3. The ECHR serves as a vital outlet to which Slovak citizens can turn when their socioeconomic rights are being denied. The citizens of South Africa do not have a comparable outlet. The South African Constitutional Court has proven more likely to uphold the socioeconomic rights of their citizens. However, should the Constitutional Court fail to rule in favor of socioeconomic rights, such as in the *Soobramoney* case, the applicant has limited, if any, future possibilities. Additionally, the SAHRC is charged with tracking the development of rights, specifically in terms of progressive realization. However, the SAHRC still relies extremely heavily on reports issues by the Government, when analyzing the situation of socioeconomic rights. This source is too closely related to the Constitutional Court and interests of the Government and the lack of autonomy may be problematic for the SAHRC to provide unbiased information. As the ECHR is a regional body, completely independent of the Slovak Government, it is more likely to provide unbiased decisions and jurisprudence.

Furthermore, even when the Constitutional Court does rule in favor of an applicant, if the redress is not then carried out, the applicant lacks available sources as to seek help. For example, in the *Grootboom* judgment, Grootboom garnished her right to housing. However, "both the interim and general order of the Constitutional Court has declined to play any role in supervising or overseeing the implementation of the various orders."[141] If she wished to challenge the non-compliance of the state with the orders issued in the judgment, Grootboom would need to file an entirely new case before the same court. Although a separate case also has to be filed at the ECHR if an individual

[141] Kameshni Pillay, "Implementing *Grootboom*". University of the Western Cape, South Africa: *ESR Review*. Vol. 3, No. 1, 2002

wishes to challenge their state's non-compliance, at least this case is then heard by the European Court, and not the same Constitutional Court which heard the original case.

Regardless of the exact decisions made and jurisprudence established, one aspect of socioeconomic rights as a whole is clear; the competition they face amongst other rights, and the debates that surround them. Jack Donnelly points out that the "central issue in the contemporary discourse on human rights" is, in fact, "the balance between civil and political rights on the one hand, and societal and economic rights on the other."[142]

As Constitutional Courts and various regional courts continue to tread forward, making landmark decisions, creating precedents and establishing jurisprudence, it is important to keep in mind that socioeconomic rights are at the focus; and are fundamentally different in a sense than other rights traditionally included in constitutions. This is not to say that they shouldn't be included in constitutions, and should be ignored or expected to be unenforceable, but they must be treated slightly differently; even if this means they deserve greater protection at times. After all, "if someone is wrongly imprisoned he can apply for a writ of *habeas corpus*. If he does not receive a fair trail, he can appeal to a higher court, and so on. With economic and social rights, however, it is different."[143]

Despite the challenges which stand in the way – be they economic, political or any other obstacle – those socioeconomic rights which are ingrained within Constitutions must be continue to be enforced by Constitutional Courts, not just to prevent de-

[142] Jack Donnelly, Universal Human Rights: In Theory & Practice (2nd Ed.) 1994; pg 110
[143] A.H. Roberts and J.G. Merrills, Human Rights in Europe: A Study of the European Convention on Human Rights, 3rd Ed. (Manchester, UK: Manchester University Press, 2001) 349

legitimization of other rights, but more importantly to protect those groups and individuals most vulnerable within society.

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