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A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights

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ABSTRACT

This article takes a "second look" at the place of the South African Human Rights Commission and its role in the promotion of socioeconomic rights through monitoring. It argues that a "first look" at understanding drew heavily on international concepts of monitoring, including those of violations and progressive realization. These concepts have proven to be of limited usefulness in a national context where the justiciability of socioeconomic rights has been achieved. This "second look" proposes an alternative model of national monitoring of socioeconomic rights, based on greater participation, transparency, and a constitutional right of access to information.

The magnitude of the HIV/AIDS challenge facing the country calls for a concerted, co-ordinated and co-operative national effort in which government in each of its three spheres and the panoply of resources

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and skills of civil society are marshalled, inspired, and led. This can be achieved only if there is proper communication, especially by government. In order for it to be implemented optimally, a public health programme must be made known effectively to all concerned, down to the district nurse and patients. Indeed, for a public programme such as this to meet the constitutional requirement of reasonableness, its content must be made known appropriately.

Minister of Health v Treatment Action Campaign
(No. 2), 2002 (5) SALR 721 (CC) ¶ 123

I. INTRODUCTION

This article reexamines the role the South African Human Rights Commission (SAHRC, Commission) can and should play in the promotion of socioeconomic rights. In addition to the urgency of the challenges posed by the HIV/AIDS epidemic and other socioeconomic rights priorities, a further reason for such a reexamination is the Constitutional Court's crystallization of its socioeconomic rights jurisprudence. In the course of three foundational socioeconomic rights cases, the Constitutional Court has with relative clarity laid down the outlines of the South African constitutional jurisprudential framework for socioeconomic rights.¹ This framework will undoubtedly be subject to development and elaboration in the years to come.² Nonetheless, six years after the 1996 Constitution, it is now time for the Human Rights Commission as well as other similar institutions in the unique South African constitutional schema to work within and adapt their operation to the evolving constitutional framework.³ The interaction of a

1. Soobramoney v. Minister of Health, KwaZulu-Natal, 1998 (1) SALR 765 (CC); Government of the Republic of South Africa v. Grootboom, 2001 SALR 46 (CC); Minister of Health v. Treatment Action Campaign (No. 2), 2002 (5) SALR 721 (CC).
2. The Constitutional Court's framework for the promotion of socioeconomic rights is itself but one piece within the Court's overarching approach to judicial review of public law. The content of that approach has yet to be fully articulated by the Constitutional Court. The approach of that approach has however been clearly signaled in *Bel Porto School Governing Body v. Premier of the Western Cape Province*, 2002 (3) SALR 265 (CC). That case spoke of an approach of deference based on subject matter. The concept of deference in the constitutional era is discussed by Cora Hoexter, *The Future of Judicial Review in South African Administrative Law*, 117 S. Afr. L.J. 484 (2000); John Evans, *Deference with a Difference: Of Rights, Regulation and the Judicial Role in the Administrative State*, 120 S. Afr. L.J. 322 (2003).
3. Chapter Nine of the Constitution of the Republic of South Africa Act 108 of 1996 (the 1996 Constitution) is entitled "State Institutions Supporting Constitutional Democracy." It refers to seven institutions: the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor General, the Electoral Commission, and the Independent Authority to Regulate Broadcasting. Six of

national human rights institution with a framework of justiciable socioeconomic rights is and should continue to be of interest to the global human rights community.⁴

The first section of this article identifies the first look at the role of the Human Rights Commission in monitoring and promoting socioeconomic rights in South Africa. This section does not aim to present a full or complete picture of the Commission nor a comprehensive evaluation of the promotion and protection of socioeconomic rights in South Africa but will instead evaluate the role of the Commission in such promotion and protection. After setting out the relevant constitutional provisions, several initial academic analyses of the role of the Human Rights Commission will be examined. These writings, together with evidence from the Commission itself, indicate a primary initial conception of the Commission's role modeled on an international approach (the violations approach) to the promotion of socioeconomic rights. An exploration of the initial track record of the Commission in attempting to fulfill this role leads to the conclusion that such a role has not been particularly fruitful.

The second section advances two reasons as to why use of this international model is misconceived. In the light of the crystallizing Constitutional Court jurisprudence, the Commission is not required to play a central institutional role in the enforcement of socioeconomic rights. By the same token, it is thereby free to undertake a more appropriate promotional rather than protective role in their achievement.

Finally, the third section begins to chart a way forward for a new understanding of the Commission's role based on a national context of justiciable socioeconomic rights. This last section draws upon constitutional and administrative law themes of experimentalism as well as learning and innovation to argue that a national model of monitoring and promotion, rather than an international model, would be more effective for the promotion of socioeconomic rights. It gives content to such a third model by examining the Commission's own understanding of the linkage between the right of access to information and the promotion of socioeconomic rights.

these institutions have been established (sometimes under different statutory names), with the seventh, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, finally in process in establishment. The name used by the Commission itself, the South African Human Rights Commission, is different from the name given it by its implementing statute, the Human Rights Commission Act 54 of 1994.

4. For a broadly similar reexamination of a national human rights institution in an African context (although not within a legal order of justiciable socioeconomic rights), see Obiora Chinedu Okafor & Shedrack C. Agbakwa, *On Legalism, Popular Agency and "Voices of Suffering": The Nigerian National Human Rights Commission in Context*, 24 HUM. RTS. Q. 662 (2002).

In sum, the article proposes to chart an alternative institutional path for the Human Rights Commission to follow with respect to socioeconomic rights.⁵ This path is one that the Commission has already started down, and it is one it should continue to follow. It is also one that the global human rights community should be aware of and support.

II. THE FIRST LOOK OF THE SAHRC AT SOCIOECONOMIC RIGHTS⁶

A. The First Look in the Constitution

Section 184(1) of the 1996 Constitution gives the Human Rights Commission a general mandate to promote, monitor, and assess the observance of human rights in South Africa. Section 184(1)(a) requires the Commission to “promote respect for human rights and a culture of human rights”; section 184(1)(b) requires the Commission to “promote the protection, development and attainment of human rights”; and in terms of section 184(1)(c), the Commission must “monitor and assess the observance of human rights in the Republic.” Together with section 184(2), the democratically elected Constitutional Assembly thus gave the Human Rights Commission a general and wide-ranging mandate regarding human rights.⁷

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5. The article does not purport to explain the adoption by the Human Rights Commission of the model that the Commission has followed for the past seven years. It may be that this misconception is an example of the socioeconomic legal process whereby international concepts permeate national contexts, at times precluding innovative institutional development. See *GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY* (Yves Dezalay and Bryant G. Garth eds., 2002). Regional level institutions may provide better models for South African institutions than international ones. The contest between international and domestic conceptions of constitutional democracy is at base a political one. See HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* (2000).
 6. In late 2002, the terms of the first set of Commissioners of the Commission came to an end. A second smaller set of Commissioners was appointed. The first Chairperson of the Commission was Barney Pitso. The second chair is Jody Kollapen. As noted, this article restricts itself to an assessment of the Commission's operation and mission with respect to the promotion and protection of socioeconomic and does not address the record of the Commission generally. For a list of current commissioners, see the SAHRC's website, *available at* www.sahrc.org.za.
 7. The Constitution of the Republic of South Africa (hereinafter S. AFR. CONST.) provides: “The Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power—(a) to investigate and to report on the observance of human rights; (b) to take steps to secure appropriate redress where human rights have been violated; (c) to carry out research; and (d) to educate.” S. AFR. CONST. § 184(2), *available at* www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1. Materials related to the Assembly's understanding of the role of the Human Rights Commission with respect to socioeconomic rights are *available at* www.law.wits.ac.za.

Included within the category of human rights is the category of socioeconomic rights. As Sandra Liebenberg and others have noted, “a striking feature of the Bill of Rights in South Africa’s final Constitution is its extensive commitment to socioeconomic rights.”⁸ Beyond the entrenchment of socioeconomic rights in Chapter Two of the Constitution, the Bill of Rights, the Constitution gives the Human Rights Commission a specific function in relation to socioeconomic rights. Section 184(3) provides: “Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.” Section 184(3) is apparently the only place in the 1996 Constitution where the content of the set of socioeconomic rights in the Constitution is identified.⁹ Indeed, the demarcation of these rights as socioeconomic rights may be the most constitutionally significant effect of section 184(3). Interestingly, while the right to the environment is included, the right to land—often considered a socioeconomic right—is not included. In any case, other than setting up this category, there is relatively little precise guidance that the Constitution provides for the institutional role of the Commission.¹⁰

As detailed above, the 1996 Constitution sets up both the category of socioeconomic rights and the structure of the Commission. Nonetheless, and perhaps inevitably, quite a bit of variation in terms of the implementation and operation of that category and that structure would be allowed. The most fully elaborated argument regarding the role of the Commission was offered by Christof Heyns of the University of Pretoria. In a 1999 *De Jure* piece, Heyns focused on the section 183(3) procedure and used the international treaty reporting procedure as a model in his development of a “domestic reporting procedure.”¹¹ In Heyns’ view, the international reporting obligations were “the closest analogy” available to the domestic reporting procedure.¹² He states that “it will be wise to model the

8. Sandra Liebenberg, *Violations of Socio-Economic Rights: The Role of the South African Human Rights Commission*, in *THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA’S BASIC LAW* 405 (Penelope Andrews & Stephen Ellmann eds., 2001).

9. Other indications of the category of these rights are indirect, such as the inclusion of the progressive realization clause in S. AFR. CONST. §§ 26(2), 27(2).

10. See S. AFR. CONST. § 184(3). In at least one respect, this subsection is fairly loosely worded, requiring only that the Commission must require the provision of “information on measures” to it by the relevant organs of state.

11. See Christof Heyns, *Taking Socioeconomic Rights Seriously: The “Domestic Reporting Procedure” and the Role of the South African Human Rights Commission in Terms of the New Constitution*, 32 *DE JURE* 195, 198 (1999).

12. *Id.* at 204.

implementation of domestic reporting procedures largely on the international reporting procedure.”¹³ Heyns explicitly argued that his analogy was a valid one:

The question could be asked whether it is correct to describe the system which section 184(3) creates as a “domestic reporting procedure.” In other words, is the analogy valid; does the section 184(3) procedure do something similar for socio-economic rights on the domestic level to what the reporting procedure in terms of treaties like the ICESCR do for these rights on the international level?

The essence of the international system of reporting could be described as follows: The institutions required to comply with the relevant human rights norms (*in casu* States Parties) are placed under a legal obligation to inform an independent monitoring body on a regular basis on the extent to which it has managed—or failed—to comply with these norms. At the heart of reporting as an enforcement mechanism lies the fact that it creates a duty of justification on the one side and a system of monitoring on the other; a system of introspection and inspection.

It is submitted that section 184(3) creates precisely such a system on the domestic level, whereby state organs are placed under a legal obligation to report on a regular basis to an independent body on their performance during the period under review. A duty of justification and a system of monitoring is created.

There are some differences between the two types of reporting. The monitoring body in the one case is international and dedicated only to monitoring the particular set of rights in question; in the other case the monitoring body is domestic and it has functions in other respects as well. However, in both cases they serve as independent monitors.¹⁴

It is hardly surprising that international models were used in proposing theoretical models to guide the work of the Human Rights Commission with respect to socioeconomic rights. Analysts may have drawn on these models for a variety of reasons. They perhaps drew upon international models because there were no comparative national models for a constitution that entrenched and made justiciable socioeconomic rights. International models would provide both legitimacy and certainty to the nascent Commission. Furthermore, the explicit mention in section 184(3) of an information provision mechanism of some kind was construed to refer to the international monitoring approach.¹⁵ In any case, Heyns was not alone in articulating an

13. *Id.* at 207.

14. *Id.* (also pointing out that the sources of legal obligations are different).

15. Of course, S. AFR. CONST. § 184(3) may not be the most powerful constitutional provision with respect to socioeconomic rights, even with respect to information provision. For instance, one could argue that the duty of justification placed on state organs with respect to socioeconomic rights is considerably broader than that of reporting on a

internationalist approach, and the concept was broadly adopted within the circle of South African lawyers and others working on the topic. For instance, in evaluating the Second Economic and Social Rights Report, Danie Brand and Sandra Liebenberg, two South African legal academics, called for the Commission to seek guidance from the international reporting procedure of the International Covenant for Economic, Social and Cultural Rights.¹⁶

Perhaps most importantly, the Human Rights Commission itself appeared to model itself on international treaty bodies. For instance, as recently as July 2002, the commissioner charged with specific responsibility for socioeconomic rights, Commissioner Charlotte McClain, wrote that “[t]he Commission would like to move towards a system of monitoring government policies and actions relating to socioeconomic rights that mirrors those of the United Nations treaty bodies.”¹⁷

Moreover, the international treaty reporting model was adopted with a particular interpretation of that model—the violations approach—being influential and prominent. The work cited by Liebenberg and Heyns (to a lesser extent) to justify their dependence on international treaty reporting is focused upon the violations approach to reporting, an approach proposed by Audrey Chapman.¹⁸ For instance, in her argument for an appropriate role

regular basis to an independent body. The textual source of any such duty of justification, at least in a general sense, must flow from the general limitations clause of the Bill of Rights (S. Afr. Const. § 36) as applied to a set of justiciable socioeconomic rights in the Bill of Rights rather than from any particular institutional mechanism set up by S. Afr. Const. § 184(3).

16. SOUTH AFRICAN HUMAN RIGHTS COMMISSION, 2ND ECONOMIC AND SOCIAL RIGHTS REPORT 1998–1999 8 (2000), available at www.sahrc.org.za/esr_report_1998_1999.htm. See also Danie Brand & Sandra Liebenberg, *The Second Economic and Social Rights Report*, available at www.communitylawcentre.org.za/ser/esr2000sept_report.php.
17. Charlotte McClain, *The SA Human Rights Commission and Socioeconomic Rights: Facing the Challenges*, 3 ESR Rev. 1 (2002), available at www.communitylawcentre.org.za/ser/esr2002/2002july_commission.php.
18. Audrey Chapman, A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights, 18 HUM. RTS. Q. 23 (1996) [hereinafter *A Violations Approach*]. See also Audrey Chapman, *Core Obligations Related to the Right to Health and Their Relevance for South Africa*, in EXPLORING THE CORE CONTENT OF SOCIOECONOMIC RIGHTS: SOUTH AFRICAN AND INTERNATIONAL PERSPECTIVES 35–60 (Danie Brand & Sage Russell eds., 2002) (prior to Minister of Health v. Treatment Action Campaign (No. 2), 2002 (5) SALR 721 (CC), arguing that courts may be willing to review whether health policies meet a core health standard). In comparing the right to health in South Africa to the right to housing which was considered in Government of the Republic of South Africa v. Grootboom, 2001 (1) SALR 46 (CC), Chapman notes that a General Comment, General Comment 14, of the International Covenant exists for the right to health unlike for the right to housing where no such general comment exists. She argued that this might provide sufficient information to identify the minimum core obligation in a constitutional case regarding the right to health. The Constitutional Court did not, however, refer to General Comment 14 in its discussion in *Treatment Action Campaign*.

for the Commission with respect to socioeconomic rights, Liebenberg developed a normative framework intended to assist the Commission in identifying violations of socioeconomic rights.¹⁹ Liebenberg notes that “the focus on violations is intended to demonstrate that socioeconomic rights impose substantive obligations on the state. Individuals or groups whose socioeconomic rights have been violated are entitled to appropriate redress.”²⁰

The violations approach is centrally concerned with international treaty reporting and argues to change the paradigm of reporting on international socioeconomic rights from the “progressive realization” to the “violation approach.” By focusing on violations rather than on state obligations, this shift in reporting is concerned with the development and meaningful and effective international human rights monitoring system.²¹ As Liebenberg has noted, one of the potential benefits of Chapman’s violations approach to reporting is that it would increase the effective monitoring of individuals’ socioeconomic rights throughout the world. Ultimately the goal is to elevate socioeconomic rights to the justiciable status of “rights.” Effective monitoring in and of itself is able “to enhance the enjoyment of rights of individual subjects and to bring them some form of redress when the rights are violated, not to abstractly assess the degree to which a government has improved its level of development on a range of statistical indicators.”²²

A particularly pointed and practical instance of international modeling on the part of the Commission and one arguably demonstrating the particular influence of the violations approach is the Commission’s willingness to use its general subpoena power (granted in terms of the Human Rights Commission Act) to force government departments to comply with the reporting requirements of section 184(3). This use occurred most notably during the compilation of the second and third reports. In each of these monitoring cycles, legal proceedings were held by the Commission when national and provincial departments had not complied with their

19. See Liebenberg, *supra* note 8. Liebenberg was careful to state that her focus on the violations approach was not to exclude other important purposes of reporting by organs of state on human rights obligations such as “encouraging a regular review of laws and policies, monitoring the actual situation regarding the relevant rights, promoting a principled policy-making process which incorporates human rights priorities, facilitating public accountability in the policy-making process, and identifying problems and shortcomings in realising the rights.” *Id.* at 407 (citing General Comment No. 1, U.N., Committee on Economic, Social, and Cultural Rights on Reporting by States Parties, 3rd Sess., ¶ 2–9, UN. Doc. E/1989/22).

20. See *id.* at 407.

21. The violations approach identifies three types of violations: failures of state action, patterns of discrimination, and failures to fulfill the minimum core. The progressive realization approach allows states to identify statistical indicators of stages they have achieved achievement of the rights. See Chapman, *A Violations Approach*, *supra* note 18, at 24.

22. *Id.* at 38.

obligations by responding to the Commission's protocols. Rather than respond, various arguments were advanced as to the justifications for their failures to comply. Ultimately at the end of the proceedings, the government departments adjudged by the Commission to be noncompliant were required to submit plans of action in order to fulfil their section 184(3) reporting obligations. While the proceedings related to the violation of a procedural requirement rather than to a violation of a socioeconomic right itself, the use of the subpoena power was consistent with the violations approach.

B. The First Look in Practice

Apart from the inclusion of the promotion of socioeconomic rights in its more general work of human rights education, the track record of the Commission with respect to socioeconomic rights is comprised largely of the publication of a series of reports. To date the Human Rights Commission has published four reports on socioeconomic rights.²³ The process of preparing and publishing these four reports demonstrated the conceptual limits of the first look at the Commission's role with respect to socioeconomic rights.

The first report covered the 1997/1998 period.²⁴ The process leading up to the first report was the subject of a fair amount of controversy as well as conflict. The conflict occurred between the Commission and an NGO network led by the University of Pretoria and the University of the Western Cape.²⁵ In the view of Brand and Liebenberg (from these institutions respectively), the result of this interchange was fairly productive. They write that "the Commission and its [NGO] partners developed an understanding of the nature and role of the protocols during the first cycle. This was intended to form the basis for the further development of protocols in the future."²⁶

23. SOUTH AFRICAN HUMAN RIGHTS COMMISSION, ECONOMIC & SOCIAL RIGHTS REPORT: BASELINE INFORMATION 1997–1998 (1999), available at www.sahrc.org.za/esr_report_1997_1998.htm; SOUTH AFRICAN HUMAN RIGHTS COMMISSION, 2ND ECONOMIC & SOCIAL RIGHTS REPORT 1998–1999 (2000), available at www.sahrc.org.za/esr_report_1998_1999.htm; SOUTH AFRICAN HUMAN RIGHTS COMMISSION, 3RD ECONOMIC & SOCIAL RIGHTS REPORT 1999/2000 (2001), available at www.sahrc.org.za/esr_report_1999_2000.htm; SOUTH AFRICAN HUMAN RIGHTS COMMISSION, 4TH ANNUAL ECONOMIC AND SOCIAL RIGHTS REPORT: 2000–2002 (2003), available at www.sahrc.org.za/esr_report_2000_2002.htm.

24. ECONOMIC & SOCIAL RIGHTS REPORT: BASELINE INFORMATION 1997–1998, *supra* note 23.

25. See Danie Brand, *Assessing the South African Human Rights Commission's assessment of socio-economic rights implementation: the first Economic and Social Rights Report*, available at www.chr.up.ac.za/centre_projects/socio/research.html.

26. Danie Brand & Sandra Liebenberg, *The Second Economic and Social Rights Report*, 2 ESR REV. 4 (2000), available at www.communitylawcentre.org.za/ser/esr2000.

The SAHRC's second report on economic and social rights covering the 1998/1999 period has also engendered significant controversy. The report itself was over a hundred pages long and presented information based on protocols developed in consultation with a Canadian expert on statistical indicators of socioeconomic rights. In each particular section, the second report had a section on "Commentary" and then one on "Recommendations." In the view of Brand and Liebenberg, the report represented a step forward in that at least it was clearly the product of an evaluation exercise. They noted that it "seems that the Commission now accepts that its role in the socioeconomic rights monitoring process is indeed to evaluate the performance of government in realizing socioeconomic rights, and to report to Parliament on its assessment."²⁷ From the Pretoria/UWC view, the second report focused understandably on the manner of government reporting to the SAHRC, rather than on the actual contents of the reports. Brand and Liebenberg looked forward to greater focus on the actual contents in future monitoring cycles.²⁸

However, Brand and Liebenberg also criticized the Commission for slipping towards a progressive realization approach to monitoring rather than evincing a violations approach. Brand and Liebenberg called for less attention to statistical detail and a more "thorough analysis of the legislation, policies and programmes adopted by all spheres of government, and the manner in which they are implemented."²⁹ This approach would serve to assess whether the measures taken were "'deliberate, concrete and targeted as clearly as possible' towards ensuring the effective realization of socioeconomic rights within the shortest possible time."³⁰ Thus, Brand and Liebenberg criticized the protocols used by the Commission. As they put it, the second round protocols "are problematic for two reasons: they ask government departments for too much, and they ask for the wrong things."³¹

27. *Id.* at 6.

28. The South African legal community has welcomed the commentary on the content of socioeconomic rights. See, e.g., Marius Olivier, *Constitutional Perspectives on the Enforcement of Socioeconomic Rights: Recent South African Experiences*, 33 VICTORIA UNIV. WELLINGTON L. REV. 117, 134 (2002) (addressing the right of social assistance). In the context of the right to health, Karrisha Pillay has argued that the Human Rights Commission could profit from the use of General Comment 14 interpreting the International Covenant on Economic, Social and Cultural Rights. See Karrisha Pillay, *South Africa's Commitment to Health Rights in the Spotlight: Do We Meet the International Standard?*, in *EXPLORING THE CORE CONTENT OF SOCIOECONOMIC RIGHTS*, *supra* note 18, at 61, 69.

29. Brand & Liebenberg, *supra* note 26, at 6.

30. *Id.* at 6 (citing General Comment No. 3, U.N., Committee on Economic, Social and Cultural Rights, 5th Sess., U.N. Doc. E/1992/23, ¶ 2, 9). One valuable function that can be served by the reporting process is giving content to the socioeconomic rights. However, this function will likewise always be subordinate to the interpretative and content giving power of the Court.

31. *Id.* at 4.

Indeed, Brand and Liebenberg looked back fondly at the protocols used in the first monitoring cycle, which focused on “very clearly defined and limited batches of information.”³² The protocols used in the second monitoring cycle (which are still being used) request statistical information that Brand and Liebenberg argue is readily available (and better packaged) from other public bodies such as Statistics South Africa.

Brand and Liebenberg brought forward two additional criticisms at the time of the second monitoring cycle. First, they criticized the SAHRC for only involving civil society minimally in the process of compiling the second report. For instance, the Commission only sought comment and suggestions from a limited range of NGOs on the draft protocols to be submitted to the relevant organs. Moreover, the Commission did not make monitoring reports submitted to the Commission by state agencies available to civil society prior to production of the report. Brand and Liebenberg argued that excluding civil society not only deprived the Commission of valuable independent analysis and input that would lead to a fuller assessment but also harmed the Commission’s image as a human rights body. They also pointed out that the Commission’s offer to keep the state agencies’ protocol responses confidential seemed of little purpose since all but one of the government departments approached directly by the NGOs was prepared to make their responses publicly available.

As a second criticism, Brand and Liebenberg issued a heavily qualified welcome to the Commission’s use of its subpoena power to force government departments to provide the Commission with the necessary information. Brand and Liebenberg argued that “[s]trong action by the Commission to ensure compliance with the monitoring process has to be welcomed.”³³ However, there was cause for caution:

One of the most important advantages of a human rights monitoring process is the opportunity it creates for a constructive dialogue between the monitoring body and those who are monitored. The Commission has the opportunity through its monitoring system to influence the policies, laws and programmes of Government through education and recommendations. The adversarial atmosphere created by the issuing of subpoenas is not conducive to the process of constructive engagement.³⁴

32. *Id.* The first protocols focused on “the impact of past discriminatory policies and practices on the implementation of socio-economic rights; the understanding by government departments of the obligations imposed on them by the socio-economic rights in the Constitution; the policies, laws and programmes planned or in place to implement socioeconomic rights; and the existence of information and monitoring systems within government departments through which to track the implementation of socio-economic rights.” *Id.*

33. *Id.* at 3.

34. *Id.*

Their suggestion was that the Commission provide training for the government officials in their reporting obligations.

The third report essentially followed the format of the second report, covering the 1999/2000 government year. In a similar manner, the fourth report covered two monitoring cycles, the financial years 2000/2001 and 2001/2002, bringing the process up to date.³⁵ The consistency of the last three reports, covering four financial years, seems to indicate that the monitoring of socioeconomic rights has settled into a pattern, albeit one with which neither the Commission nor its closest NGO and academic partners appear entirely comfortable.

As matters stand, the organizational dialogue between the Commission and its erstwhile NGO partners appears to be exhausted. The Commission is continuing its reporting with limited assistance from a limited number of NGOs. Seemingly these NGOs have concluded that a half a loaf is better than no loaf at all. Still, dissatisfaction remains. Recent criticisms from academics and NGOs have begun to strike out in new directions, focusing on the experiences of ordinary people. While the point is not explicitly made, this work at least implicitly questions the capacity and wisdom of the Commission's approach, insofar as it has not focused on the importance of this type of "ordinary" input when implementing socioeconomic rights.³⁶

III. THE (RETROSPECTIVE) MISCONCEPTIONS OF THE FIRST LOOK

At the international law level, the violations approach continues to be debated. For instance, Chapman's version of this approach to reporting has been criticized for adopting a "loose" definition of violations.³⁷ Nonetheless, it may well be that the violations approach to reporting will do better than the progressive realization approach in promoting socioeconomic rights. Thus, with respect to international treaty reporting, adoption of the violations approach bears serious consideration. Be that as it may, this section argues that the violations approach to reporting on socioeconomic

35. In a significant difference, the fourth report went beyond the earlier coverage to pose questions as well to metropolitan councils and parastatals. However, these organs of state were subject to a "minimalist" rather than the "maximalist approach in soliciting information from national and provincial tiers of government." 4TH ECONOMIC AND SOCIAL RIGHTS REPORT: 2000–2002, *supra* note 23, at 13.

36. See, e.g., Danie Brand, *The Minimum Core Content of the Right to Food in Context: A Response to Rolf Kunnemann*, in *EXPLORING THE CORE CONTENT OF SOCIOECONOMIC RIGHTS*, *supra* note 18, at 103 (using the example of black sharecropper Kas Maine to emphasize the particular and context-specific nature of socioeconomic rights).

37. See Scott Leckie, *Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 81 (1998).

rights within a national legal order with justiciable socioeconomic rights is misconceived as inspiration for the Commission.

There are at least two reasons why the adoption of the violations approach as an organizing model for the role of the SAHRC with respect to socioeconomic rights is misconceived. First, the violations approach is explicitly a means towards the achievement of a particular principle, the justiciability of socioeconomic rights. It is therefore misconceived as a guide for the SAHRC because that principle has already been adopted in this legal order. Rather than depend on the violations approach to establish the legitimacy and role of the Constitution and the Constitutional Court in protecting socioeconomic rights, South Africans have the Constitutional Court to police violations of socioeconomic rights and to grant relief in individual cases. The issue in South Africa is not whether these rights may be justiciable, it is how. The entrenchment of socioeconomic rights may be indeed recent and fresh. Still, it is no longer open to question that socioeconomic rights are rights like other rights, subject to court review and protection. The question now and here is how to protect these rights within a constitutional framework. As Geoff Budlender, the leading lawyer for the applicants in both the *Grootboom* and *TAC* cases, has noted, "The critical issue is not whether these rights are justiciable, but how to enforce them."³⁸ Ten years into a constitutional democracy, at least this feature of the South African legal order should be clear. The South African debate has gone beyond the ultimate objective of the violations approach—justiciability.

The acceptance of this principle and the consequent power of the Constitutional Court has or should have a direct effect on the function and power of the SAHRC. To use two of the enforcement terms introduced in section 7(2) of the Constitution, the Commission is free to play a role in *promoting* rather than narrowly *protecting* the socioeconomic class of constitutional rights. It need not attempt to replicate the achievement of the Constitutional Court in pursuing the justiciability of socioeconomic rights. It might be worth emphasizing that this redundancy only became readily apparent after the *Grootboom* case, proving once again that hindsight offers the clearest perspective. Before then, one could plausibly argue that it was entirely possible that the Constitutional Court would take a directive principles (e.g. non-justiciable) approach to socioeconomic rights.³⁹ Thus, from the point of view of ensuring the enforcement of socioeconomic rights, holding the Commission in reserve to police the legislative and the

38. See Kgomoane Mathipa & Geoff Budlender, *Concluding Observations*, 3 ESR REV. (2002), available at www.communitylawcentre.org.za/ser/esr2002/2002july_key.php.

39. See Jonathan Klaaren, *A Remedial Interpretation of TAC*, 20 S. AFR. J. OF HUM. RTS. 455 (2004).

executive through some mechanism was perhaps a good idea.⁴⁰ But this reserve role is no longer necessary.

There is a second reason for the misconception of the first look—at least in the South African context. To the extent that the focus of the first look is on judicially remediable violations (and in particular minimum core obligations), it marginalizes attention to the broader state obligations to promote socioeconomic rights.⁴¹ There are a variety of soft law rather than hard law methods by which the Commission can promote the achievement of socioeconomic rights.⁴² These include a range of legislative and executive mechanisms for the achievement of socioeconomic rights that can complement the rules of the justiciable socioeconomic rights jurisprudence as articulated by the Constitutional Court. Here, modeling the role of the Commission on the violations approach to monitoring is not only unnecessary, it is inappropriate.⁴³

That the achievement of socioeconomic rights can be pursued through means that are not focused on violations can be justified as a matter of South African constitutional law. To this point, the Constitutional Court has indicated support for the Commission and similar Chapter 9 institutions fulfilling an interpretative and promotional rather than a violations-focused role. Albeit in jurisprudence outside of the socioeconomic rights context, the Court has made space for institutions such as the Commission in constitutional interpretation although remaining silent on the precise contours of that role. For instance, in *S v Jordan*, Justices O'Regan and Sachs pointed to a privileged interpretative role for the Commission on Gender

40. Arguably, one could use either S. AFR. CONST. § 184(3) with a violations approach to monitoring or S. AFR. CONST. § 184(2) with a complementary role between the Commission and the judiciary to enforce socioeconomic rights. See S. AFR. CONST. See also the powers in S. AFR. CONST. § 184(1)(b), § 184(1)(c). *Id.* The Constitutional Court has made it clear that S. AFR. CONST. § 184(3) is not the only mechanism to enforce socioeconomic rights.

41. Nonetheless, the reasons advanced in this section for arguing that the violations approach is misconceived in the context of a national legal order with justiciable socioeconomic rights should not be confused with the argument that in principle it is impossible to establish a violation, for instance because of a lack of information or a lack of specificity in a national context. See S. AFR. CONST. § 184(3).

42. See Sandra Liebenberg, *Socioeconomic Rights*, in CONSTITUTIONAL LAW OF SOUTH AFRICA (Matthew Chaskalson et al. eds., 1996, 1998), recognizing the value of soft law approaches in the promotion of socioeconomic rights.

43. The distinction between hard and soft law here is used in order to emphasize the complementary nature of the role of the Commission. As David and Louise Trubek have argued in their examination of the Community Method ("hard law") and the Open Method of Coordination ("soft law") in the construction of Social Europe, "[t]he institutional debate should be about the *relative* capacities of different modes to handle specific certain governance tasks, and discussion should focus on evidence relating to those capacities." David Trubek & Louise Trubek, *Hard and Soft Law in the Construction of Social Europe* (July 2003) (unpublished manuscript, on file with author).

Equality.⁴⁴ Most directly, in *Grootboom* (a direct socioeconomic rights case), the Constitutional Court offered the Commission a role in reporting upon and interpreting to the Court government compliance with the Court's order in that case.⁴⁵ While this role might be seen as revolving around a violation (monitoring compliance with the Court's order), the character of the role was entirely interpretive.⁴⁶

This second point that the achievement of socioeconomic rights can be pursued through means that are not focused on violations is perhaps more directly and additionally justified by the realization that African legal orders, including the South African legal order, must, in the words of Abdullahi An-Na'im, "do more with less."⁴⁷ An-Na'im's "less" refers to both fewer economic resources as well as a lesser state capacity. Indeed, it must be recognized that available national resources limit socioeconomic rights, just as they limit the promotion and protection of other rights. Likewise, states' regulation strategies and capacities also bind the national ability to fulfill socioeconomic rights to their full potential. It is pragmatic to recognize these institutional and remedial limits and to work from these points towards a realistic implementation model for socioeconomic rights.⁴⁸ From

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44. A five-judge minority of the court deciding *S. v. Jordan*, 2002 (6) SALR 642 (CC) ¶ 70 stated:

In determining whether the discrimination is unfair, we pay particular regard to the affidavits and argument of the Gender Commission. It is their constitutional mandate to protect, develop, promote respect for and attain gender equality. This Court is of course not bound by the Commission's views but it should acknowledge its special constitutional role and its expertise. In the circumstances, its evidence and argument that [the statutory section at issue] is unfairly discriminatory on grounds of gender reinforces our conclusion.

Available at www.concourt.gov.za/files/jordan/jordan.pdf.

45. Gov't of the Republic of S. Afr. v. *Grootboom*, 2001 (1) SALR 46 (CC) ¶ 97; see also Kameshni Pillay, *Implementation of Grootboom: Implications for the Enforcement of Socioeconomic Rights*, 6 L. DEMOCRACY & DEV. 255 (2002).
46. There would seem no reason in principle why this privileged and largely interpretive role should not be extended to the other State Institutions Supporting Constitutional Democracy beyond the Human Rights Commission. Perhaps one aspect to take into account in determining the scope of the privileged interpretive role would be the jurisdiction of each institution. Each of these institutions has a particular subject matter constitutionally associated with its function (as well as a particular history of its adoption). For instance, there is an ongoing debate regarding the overlapping nature of the subject matter of the Commission on Gender Equality and the Human Rights Commission. One direction for further research would be to explore to what extent these institutions have engaged in specific interpretive work.
47. Abdullahi An-Na'im, *The Legal Protection of Human Rights in Africa: How to Do More with Less*, in HUMAN RIGHTS: CONCEPTS, CONTESTS, CONTINGENCIES 89 (Austin Sarat & Thomas Kearns eds., 2001). An-Na'im's point is deeper than one about state capacity. He argues that the ways of thinking about the achievement of human rights in Africa need to be rethought rather than adapted from an international context.
48. For an assessment of the barriers of resources and capacity in the field of social assistance, see Sandra Liebenberg, *The Right to Social Assistance: The Implications of Grootboom for Policy Reform in South Africa*, 17 S. AFR. J. OF HUM. RTS. 232 (2001).

these starting points, An-Na'im argues that both states and human rights advocates should pursue strategies to realize the *implementation* and legal *protection* of human rights.⁴⁹ While An-Na'im's argument is specific to the African context, it is consistent with the more general claim that domestic rather than international enforcement of human rights is most effective. South African scholars also accept that the implementation of socioeconomic rights may differ in nature between the international and the domestic levels. For instance, Danie Brand has argued:

[B]ecause the institutions through and the manner in which socio-economic rights are to be enforced in South Africa differ from those on the international level, we have to be far more specific, particular, concrete, context-sensitive and flexible in our thinking about basic standards, core entitlements and minimum obligations.⁵⁰

The Commission would do well to move away from its initial imprinting of the internationally derived violation model for the following reasons, the recognition of the justiciability of socioeconomic rights and the efficacy of non-violations and non-judicial means of their achievement. The question then becomes what constitutes the shape of an appropriate institutional model.

IV. TOWARDS A THIRD MODEL OF MONITORING AND PROMOTING SOCIOECONOMIC RIGHTS

Departing from the assumption that a progressive realization model of monitoring lacks effectiveness and that a violations approach would indeed be misconceived in the South African context, this section argues in favor of an innovative third model emphasizing the role of information. This model is a national model rather than an international one of either the violations or the progressive realization variety. This third model would be appropriate and effective for use by the Commission in the promotion of socioeconomic rights in a national framework of justiciable socioeconomic rights.

In principle, the identification of such an emerging third model for monitoring and promoting socioeconomic rights is supported by Martha

49. An-Na'im defines implementation as "a proactive deployment of a variety of measures and policies to achieve the actual realization of human rights" and protection as "the application of legal enforcement methods in response to specific violations of human rights norms in individual cases." An-Na'im, *supra* note 47, at 90.

50. Brand, *supra* note 36, at 101. Brand also has warned with a relatively conservative South African judiciary that "[s]trategically it would be wiser to avoid the idea of an 'absolute' minimum core content as opposed to a 'qualified' rest and rather to focus on the requirement that is expressly posed by the constitution, that the state take reasonable steps to realise socioeconomic rights." *Id.* at 108.

Minow's recent assessment of the human rights tradition of the last century.⁵¹ As Minow points out, exactly how the history of the implementation of universal human rights is told "reflects and affects a range of possible ideas about them."⁵² Her assessment of this history covers the Nuremberg Trials, the founding of Human Rights Watch, and the invention of human rights institutions such as truth commissions and international criminal tribunals. Minow's survey of institutions within this tradition identifies "a legacy of novelty."⁵³ As she says "the meaning of a right cannot be determined unless we know how and when it is enforced."⁵⁴ She argues that the tradition of innovation in the implementation of human rights cuts across state and non-state contexts. For instance, she remains hopeful for the eventual implementation of the International Criminal Court, which she sees as a worthwhile institution, even in the face of US, sole superpower opposition. Minow's conclusion is that individual persons may offer the best hope for the implementation of human rights. Drawing on Minow's idea of a legacy of institutional novelty, we can see South Africa, especially with respect to socioeconomic rights, as a national space in a position to fashion new human rights institutions that need not and should not draw on international models.

To begin with, it is important to note that a particular understanding as to what role the right of access to information has to play with respect to the achievement of socioeconomic rights is beginning to surface within the Commission itself. This understanding surfaced notably at a May 2003 "Indaba" (a term for an inclusive deliberative meeting) held by the Commission to consider views regarding the implementation of the access to information regime and the current debate surrounding the proposals to reconfigure and supplement the Commission's role in enforcing the Promotion of Access to Information Act (PAIA).⁵⁵ For instance, the SAHRC Chairperson expressed an understanding of the role of the right of access to information that goes beyond the usual understanding of accountability:

The right of information is not something that lives in the air, or something that thrives within Academia, but in the day-to-day lives of citizens and in the important decisions they take around bread and butter issues. Access to credible, reliable and accurate information is so important in the kind of

51. Martha Minow, *Instituting Universal Human Rights Law: The Invention of Tradition in the Twentieth Century*, in *LOOKING BACK AT LAW'S CENTURY 58* (Austin Sarat et al. eds., 2002).

52. *Id.* at 59.

53. *Id.* at 70.

54. *Id.*

55. The Parliamentary portfolio committee, the Commission, and NGOs working in the area appear to share a consensus in favor of greater enforcement mechanisms, although they differ on the issue of where such mechanisms would be located.

decisions they make. Not just decisions about the kind of government they want, but decisions about the kind of house they want, the kind of education they want for their children, the kind of accountability they are entitled to demand from local government officials and elected representatives.⁵⁶

Leon Wessels, the SAHRC Commissioner charged with the lead responsibility for the right of access to information, also linked the right of information to the achievement of socioeconomic rights in a manner that set the right within the institutional design of the Constitution:

[T]he drafters of the Constitution charged us with something very special and that is monitoring the progressive realization of socioeconomic rights. . . . Now in a very strange way I believe that the access to information supplements and impacts on our socioeconomic rights role and the Minister alluded to that in his comment and so did others. I do not think we as a Commission and I do not think South Africans at large have used it to that effect, but certainly people are entitled to demand, through the Act, from a relevant government department: what are your plans as far as security in this particular village or town or city is concerned, what are you[r] plans in terms of building schools, providing access and entry points for pensioners where they should receive their grants, et cetera, et cetera. So that debate is an ongoing one.⁵⁷

Drawing on the theme of transition, Commissioner Wessels later noted explicitly that the right of access to information extends into the realm of socioeconomic rights:

It is important to have that information to transform our society and that is the challenge, how do we achieve that? But what is further of paramount importance is to ensure that people begin to understand that access to information goes beyond the traditional political and civil rights and I think the Human Rights Commission, given the vision we have of ourselves and the way we interpret our mandate, should take on the challenge to understand completely that our constitutional role to monitor and report annually on the realization of socioeconomic rights is matched by the obligations we have under PAIA.⁵⁸

These statements indicate an emerging understanding of an institutional model in which a national human rights commission understands and promotes the right of access to information within the framework of a bill of

56. Commissioner Jody Kollapen, Remarks at the Conference on the Promotion of Access to Information Act 11 (22–23 May 2003) (transcript on file with author).

57. Commissioner Leon Wessels, Remarks at the Conference on the Promotion of Access to Information Act 54–55 (transcript on file with author).

58. *Id.* at 56–57. For another reference by a senior Commission official to this linkage see *id.* at 198. The linkage was also stressed by civil society representatives. See *id.* at 133, 135, 157.

rights in order to achieve socioeconomic rights. These statements are all the more remarkable considering that the Commission's involvement in the implementation of the PAIA was not an institutional task initially desired by the Commission. Rather, Parliament thrust this task upon the Commission when searching for an institution to promote that Act, when Parliament itself was required by the Constitution to pass legislation implementing the constitutional right of access to information within a period of three years.⁵⁹ Indeed, the understanding of the right of access to information has itself arguably undergone a sea-change over the short life of South Africa's constitutional democracy. As originally conceived and placed within the interim Constitution and as Constitutional Principles IX, the right fulfilled a straightforward accountability function and served to promote good government.⁶⁰ Additionally, the right has acquired an equally, if not more significant aspect, with respect to socioeconomic rights. Both within the understanding of parliamentarians and within the NGO community, this right of access to information has been viewed as a key mechanism in the achievement of these rights.⁶¹ Contained within this development is the elaboration of an important aspect of the right of access to information, an aspect distinct from its role in fostering accountability. The end result is that the Commission is not alone in articulating a linkage between the right of access to information and the promotion through monitoring of socioeconomic rights.

The remainder of this section links this emerging institutional conception of the role of the SAHRC expressed at this "Indaba" with a school of thought in the literature of comparative administrative law that emphasizes themes of experimentalism and regulatory models that encourage learning and innovation.⁶² In jurisdictions without constitutional entrenchment of socioeconomic rights, these themes are discussed most often within the realm of administrative law. Nonetheless, these themes belong as well

59. Whether the confluence of constitutional competence in terms of the South African Constitution over the right of access to information and the promotion of socioeconomic rights in the Commission is a coincidence of politics or is reflective of constitutional design is a topic for further investigation.

60. Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of S. Afr., 1996 (4) SALR 744 (CC) ¶ 85.

61. See generally *THE RIGHT TO KNOW, THE RIGHT TO LIVE* (Richard Calland & A. Tilley eds., 2002).

62. This theme is apparent in Brand and Liebenberg's call for a constructive dialogue between the Commission and relevant organs of state on measures needed to improve access to socioeconomic rights. See Brand & Liebenberg, *supra* note 26, at 7. See also Heyns, *supra* note 11, at 218:

It is particularly important to bring to the attention of state officials that the only way to fulfill socioeconomic rights is not through expenditure of public funds, but that innovative schemes and regulations in the private sphere could also form an integral component of the overall strategy.

within the ambit of constitutional law,⁶³ and in any case, are of particular importance given the confluence of meager state capacity and strong constitutional socioeconomic guarantees for an African state such as South Africa.

In line with recent scholarship on the Constitutional Court, one might label the emerging model for the SAHRC's role with respect to socioeconomic rights as an administrative law model. Cass Sunstein has used the analogy of "administrative law" in describing the South African Constitutional Court's socioeconomic rights jurisprudence.⁶⁴ However, such a term is not quite adequate. To identify and emphasize the particular and potential institutional contribution of the Commission to the achievement of socioeconomic rights, another term must be used that will capture the justiciable character of South African socioeconomic rights model. Terms such as "policy-making" or "standard-setting" come closer. They would point to the Commission's important potential role in providing enforceable content to socioeconomic rights in the South African context. Still, these labels do not satisfy. While this aspect of the Commission's role is important, a single-minded focus on the substance of socioeconomic rights is not sufficient. It is as important to focus both on the institutional niches that the Constitutional Court and the Commission ought to occupy and on the involvement of ordinary persons themselves in the achievement of socioeconomic rights. Terms such as "policy-making" or "standard-setting" ultimately do not capture the cutting edge role that transparency, communication and the circulation of information can and ought to play in the implementation of socioeconomic rights "down to the district nurse and patients" as the TAC Court put it. Perhaps the term "information promotion model" works best to identify the emerging institutional role of the SAHRC, now implicit in the South African socioeconomic rights jurisprudence.⁶⁵

In order to link the emergent SAHRC model into broader debates, one place to start might be with an effort similar to the alternative governance approach of the European Union, originally used in the creation of a single currency market.⁶⁶ The European Union has termed this alternative gover-

63. See Micheal Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); see also James Liebman & Charles Sabel, *Emerging Model of Public School Governance and Legal Reform: Beyond Redistribution and Privatization* (Oct. 2002), available at www.law.columbia.edu/sabel/papers.htm; Micheal Dorf & Charles Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000); Eric Berger, *The Right to Education under the South African Constitution*, 103 COLUM. L. REV. 614 (2003).

64. See CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* (2001).

65. The term "information circulation reinforcement" gets the idea across but seems cumbersome.

66. Trubek and Mosher describe one instance of the use of this open method of coordination in the field of employment in the European Employment Strategy (EES). As they

nance approach “the open method of coordination.”⁶⁷ As opposed to traditional command and control approaches to regulation, this alternative approach is more accepting of diversity and encourages semi-voluntary forms of coordination. The strategies within this approach differ significantly from traditional regulation. According to David Trubek and James Mosher, they combine “broad participation in policy-making, coordination of multiple levels of government, use of information and benchmarking, recognition of the need for diversity, and structured but unsanctioned guidance from the [European] Commission and Council.”⁶⁸ As Trubek and Mosher describe the open method of coordination, it is one that is “iterative, multi-level, and multi-actor.”⁶⁹ When examining the operation of the open method of coordination in the sector of employment policies, Trubek and Mosher have evaluated its performance positively.⁷⁰

The analysis of the open method of coordination is just part of a broader body of literature promoting the view that governance systems that promote learning and innovation are preferable to traditional regulation.⁷¹ For

recognize, substantial controversy has accompanied its development, with optimists claiming it will allow for innovative strategies leading to greater employment and pessimists claiming it is only a smokescreen for rolling back the European welfare state. Despite the creation of the Union, the component nation states were reluctant to grant legal competence for social policy and industrial relations. This was in part the result of “the deep embeddedness of social policy in unique national institutions.” David Trubek & James Mosher, *New Governance, EU Employment Policy, and the European Social Model in Mountain or Molehill?: A Critical Appraisal of the Commission White Paper on Governance* 95–116 (Christian Joerges et al. eds., 2001), available at www.jeanmonnetprogram.org/papers/01/011501.html.

67. *Id.*

68. *Id.*

69. An example of its iterative nature is the annual revision of employment guidelines. At first, there was no such guideline. In 2000, the Council was convinced to set a guideline of 70 percent employment of the eligible population. In the preparation of national action plans and in their annual review, many different units and level of governments are involved as well as many different social actors. One consequence of this is that contacts and networks are created among officials from different parts of member states as well as with social partners. *Id.*

70. Evaluating the impact and success of the EES so far, Trubek and Mosher are cautiously optimistic. They argue that the EES has had substantial success in moving European employment policies from passive to active unemployment policies although more limited results in making the taxation system more employment friendly. They do recognize that the actual practice of these learning and innovation strategies has not been quite as positive as the planning. For instance, the actual identification of best practices in the review of national action plans has been only two to three pages in an appendix, providing only a few examples. *Id.*

71. See, e.g., Richard Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. Rev. 437 (2003) (discerning the emergence of two new regulatory methods: government-stakeholder network structures, such as the Open Method of Coordination, and economic incentive systems). For a South African perspective on governance, see GUY MHONE & OMANO EDIGHEJI, *GOVERNANCE IN THE NEW SOUTH AFRICA* (2003).

instance, benchmarking has been advocated as a learning mechanism with democratic governance structures.⁷² Other institutional elements within this learning and innovation approach include:

[M]echanisms that destabilize existing understandings, bring together people with diverse viewpoints in settings that require sustained deliberation about problem-solving; facilitate erosion of boundaries between both policy domains and stakeholders; reconfigure policy networks; encourage decentralized experimentation; produce information on innovation; require sharing of best practice and experimental results; encourage actors to compare their results with those of the best performers in any area; and oblige actors collectively to redefine objectives and policies.⁷³

Setting the emergent model within this broader literature helps to draw out a set of specific suggestions for the SAHRC. Given a commitment to expand participation into the protection of socioeconomic rights, the possibilities for expanding participation should not be sought from the experiences of international treaty reporting but rather from the national model of promoting information. Thus, one should not look primarily towards increasing NGO participation within Commission processes or hearings on the reports. One should look rather to strengthen national processes of information circulation that would encourage learning and innovation. These practices would "encourage decentralized experimentation; produce information on innovation; require sharing of best practice and experimental results."⁷⁴ In particular, the Commission should continue on its recent path of vigorously defending and advancing the PAIA through all means at its disposal, with a particular focus on the operation of these laws with respect to socioeconomic rights. Such an effort should encourage the circulation as well as the production and consumption of information in order to fulfill socioeconomic rights. If it is supported by a national champion, the PAIA can be a mechanism of direct public participation in the achievement of socioeconomic rights. Moreover, the use of the subpoena power in aid of the section 184(3) reporting procedure should be reconsidered and retargeted. More important may be the judicious use of the Commission's subpoena powers in aid of resolving information blockages in respect of socioeconomic rights in situations where the PAIA proves inadequate or ineffective. While the Commission need not play a role competitive with existing constitutional structures of accountability, it

72. Dorf & Sabel, *supra* note 63.

73. David M. Trubek and James Mosher, "New Governance, Employment Policy, and the European Social Model," in *GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS* (Jonathan Zeitlin & David M. Trubek eds., 2003) (as quoted in Trubek and Trubek, *supra* note 43, at 20).

74. *Id.*

certainly has an important independent role to play in interpreting, influencing, and critiquing the state's obligations with respect to socioeconomic rights.

V. CONCLUSION

The argument in this paper is consistent with a point that runs contrary to some current orthodoxy in international human rights thinking. In some instances, the international best practice is not the best practice. In much contemporary human rights discourse, it is assumed or explicitly argued that the identification and implementation of international best practices of good governance will necessarily contribute to the promotion of human rights. For instance, Linda Reif's recent study of national human rights institutions (including ombudsmen, general jurisdiction human rights commissions, and hybrid institutions) argues that such institutions have the effect of improving the legality and fairness of public administration as well as providing a mechanism for domestic implementation of international human rights obligations.⁷⁵ In this view, national human rights institutions are seen as akin to transmission mechanisms for ascertainable international norms, both procedural and substantive. However, such arguments fail to take into full account the variation in national resources, state bureaucratic capacities, and constitutional and public cultures with respect to domestic understandings of human rights. In some instances, such as the first look the SAHRC and other human rights advocates took of the Commission's role in promoting socioeconomic rights from 1995, the implementation of international best practice may divert national human rights institutions from a more effective path.

75. Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1 (2000). Although she includes South Africa in her study, Reif's argument in favor of national human rights institutions might be limited to democratizing states in which judiciaries are slow or ineffective and in which socioeconomic rights are not justiciable.