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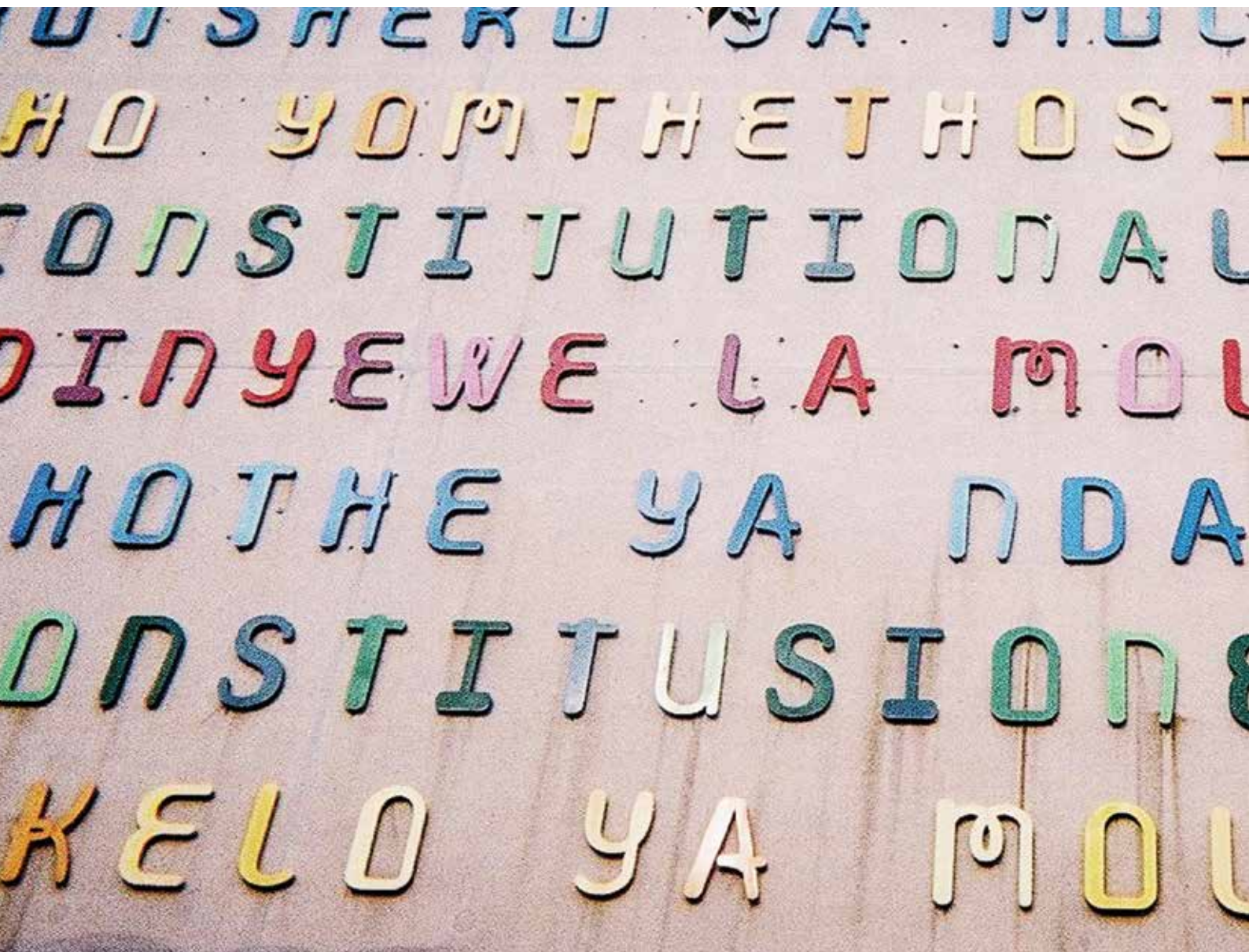to break down Poverty*

A Framework for Monitoring and Evaluating the Progressive Realisation of Socio-Economic Rights in South Africa

February 2015

Monitoring the Progressive Realisation of Socio-Economic Rights Project

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1. Introduction – Socio-Economic Rights (SERS) and Transformation

The inclusion of social and economic rights in South Africa's first democratic constitution envisioned the reconstruction and transformation of a divided and deeply unequal society. These socio-economic rights (SERs) to housing, food, water, education, social security, health care, a healthy environment, land and redress for past racial discrimination,[1] read together with the rights to life, dignity and equality,[2] establish a framework to *Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.[3]*

However, the unacceptable and unsustainable levels of poverty and inequality, compounded by widespread unemployment and a lack of access to basic services for many poor communities, continue to violate people's rights, ensuring persistent social, economic and political unrest.

There have undoubtedly been many achievements in the twenty years since South Africa's political transition, but as we enter the third decade of democracy, it is vital not only to reflect on the extent of the transformation as envisioned by the Constitution, but also to ask how transformation is to be measured - to what end, by whom, against what benchmarks and over what timespan.

Few people would disagree that the realisation of SERs is key for overcoming South Africa's persistent struggle with poverty and inequality. Although people can approach the courts if they feel that these rights are not being respected, protected, promoted or fulfilled, the Constitution (with the exception of the rights to basic education, environment, and the rights of children) limits the states' obligation to taking: *reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.[4]*

The limitation clause is silent on the content of these rights, what measures the state should take, how it should finance access to socio-economic rights, and the timeframes within which they must be realised. The challenge for policy-makers and oversight bodies alike is how best we are able to evaluate government programmes and budget allocations against this binding obligation on the state if there is no methodology for monitoring and addressing critical issues relating to the progressive realisation of these rights.

It is for this reason that Studies in Poverty and Inequality Institute (SPII), in partnership with the South African Human Rights Commission (SAHRC), has developed a **Socio-Economic Rights Monitoring Tool:** integrating policy and budget analysis with statistical indicators to monitor and evaluate the progressive realization of SERs in South Africa.

This paper **begins** by outlining the need for a comprehensive socio-economic rights monitoring tool in South Africa. This includes a summary of the measurement challenges as they relate to the obligations on the state, the meaning and interpretation of progressive realisation, and lastly, how to define the content of SERs. **Secondly,** the paper outlines the various reporting mechanisms which exist in South Africa, including the various actors such as the Constitutional Court and the South African Human Rights Commission (SAHRC), and the various existing approaches and tools used for such monitoring. **Thirdly,** this paper outlines the monitoring tool developed by SPII through a discussion of the three components involved in the monitoring and evaluation of the progressive realisation of SERs. Throughout, the paper discusses a number of the key challenges, lessons learnt and important questions this work needs to continue to ask as it develops.

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[1] The Constitution of the Republic of South Africa, 1996, sections 25-29.
[2] Ibid, sections 9-11.
[3] Ibid, *preamble.*
[4] Ibid, sections 26(2) and 27(2).

2. The Case for a Monitoring Tool

The measurement challenge of SERs

In order to monitor the progressive realisation of SERs, especially the performance of government, it is important to first understand the obligations on the state in respect of SERs; the meaning and interpretation of progressive realisation; and, how the content of such rights is defined in the South African context.

The obligations of states

It is now widely accepted, as affirmed by the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights[5] and the United Nations Committee on Economic, Social and Cultural Rights (CESCR), that SERs impose three types of obligations on states. These include the obligation to *respect*, to refrain from interfering with the enjoyment of SERs; the obligation to *protect*, to prevent violations of such rights by third parties; and the obligation to *fulfil*, to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights.[6] The CESCR has interpreted the obligation to fulfil to incorporate the obligation to facilitate, provide and promote. In South Africa, the obligation to promote is not stated as a subset of the obligation to fulfil, but as a distinct obligation. This includes advancing research on SERs, provision of information on SERs, and to support people in making informed choices about enjoyment of these rights.[7]

Progressive realisation of SERs

Both the CESCR and the South African Constitutional Court have emphasised that 'progressive realisation' implies a recognition that the full realisation of SERs will generally not be achieved immediately or even within a short period of time.[8] As a result, the International Covenant on Economic, Social and Cultural Rights (ICESCR) developed the idea of a 'minimum core obligation', which states that every government is obliged to - at the very least - achieve a minimum standard of each socio-economic right failing which it would be viewed as violating the Covenant. The ICESCR also set high barriers against claims of resource constraint for justifying the failure of meeting the minimum core obligation and has thus largely removed the 'minimum core' from the caveat of progressive realisation, instead reframing it as an obligation to be met immediately by the state. The Constitutional Court, however, rejected the idea of a 'minimum core obligation' on the basis that firstly, people's needs change over time and depend on their particular circumstances, secondly, the court in the case at hand did not think it was equipped with sufficient information to define a minimum core, and lastly, the court believed it impossible for the state to immediately provide even a basic level of all SERs.[9]

In place of the idea of a 'minimum core obligation' the Constitutional Court developed a framework of standards for assessing whether a policy or programme met the reasonableness test or criteria.[10] The proponents of a minimum core approach have argued that the reasonableness paradigm provides insufficient protection for the interests of the poor.[11]

> "The proponents of a minimum core approach have argued that the reasonableness paradigm provides insufficient protection for the interests of the poor"

[5] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, January 22-26, 1997.

[6] Ibid.

[7] Chenwi, Lilian, 'Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court', Research paper written for Studies in Poverty and Inequality Institute, 2010, p. 17.

[8] Ibid.

[9] Liebenberg, Sandra, *Socio-Economic Rights: Adjudication under a transformative constitution.* Juta & Company Ltd, Cape Town, 2010.

[10] Liebenberg, Sandra, *Socio-Economic Rights*, pp.152-153. The programme must be comprehensive, coherent and coordinated; Appropriate financial and human resources must be made available for the programme; It must be balanced and flexible and make appropriate prevention for short, medium and long-term needs; It must be reasonably conceived and implemented; and It must be transparent, and its contents must be made known effectively to the public.'

[11] Steinberg, Carol, 'Can reasonableness protect the poor? A review of South Africa's Socio-Economic Rights Jurisprudence', *South African Law Journal*, Vol. 123, No. 2, 2006, p. 267

Professor Sandra Liebenberg argues that a reasonable government programme must be provided for in respect of each SER in the Constitution, even though the provision of a basic level of services need not meet the qualitative standards implied by the full realisation of the relevant right.[12] However, the state is required to move as expeditiously and effectively as possible towards meeting this goal. 'Progressive realisation' further implies that deliberate retrogressive measures are not allowed. In relation to vulnerable or disadvantaged groups, the state must do more than refrain from negative violation of rights but take positive action with specially tailored measures and programmes for the most marginalised groups in society, and in South Africa, those groups affected by past racial discrimination. This includes the dismantling of a range of legal, administrative, operational and financial obstacles that impede access to SERs.[13] Furthermore, 'progressive realisation' requires states to take full advantage of their available resources, including external resources, and to continuously strive to provide the widest possible enjoyment of a right on a progressive basis even in the face of resource constraints.

A 2006 civil society submission proposing a basic package of healthcare services identified three ways that could be used to assess progressive realisation.[14] These are 'speed', 'fit' and 'monitoring' in relation to the implementation of rights:

- The **'speed' factor** has to do with whether the measures adopted to realise a right respond to the urgency of the socio-economic conditions. In this case the State is required to act quickly as the purpose of the measures is otherwise defeated. If resources are limited, an incremental approach may be adopted.

- The **'fit' factor** requires measures be adopted to respond to society's needs. The State must develop comprehensive plans which must reach as large a part of the population as possible and ideally all who live in the country. These plans therefore need to contain both short-term and long-term targets.

- **'Monitoring the realisation of the right'** is essential to allow for the evaluation of the implementation and degree to which a policy is achieving its objectives. Roadmaps from the various government departments that include timelines and targets would enable effective monitoring to assess both advances made through implementation and obstacles which may be hindering implementation and expected outcomes.

Defining the Content of SERs

The non-adoption of a 'minimum core' approach by the Constitutional Court has created a vacuum in respect of a substantive South African inspired interpretation of the normative content of the various SERs.[15] In the absence of established norms and standards, much of government's constitutional obligations remain poorly understood and defined. With the Constitutional Court repeatedly declaring itself unqualified to set up minimum core standards, the question remains whose responsibility is it? The lack of executive resolution and agreement on the normative content of specific rights does not prevent civil society from developing such frameworks and norms and standards. This is evident in the civil society submission for a basic package of health care services by the AIDS Law Project to the Department of Health.[16] The recent publication by the Department of Basic Education of legally binding norms and standards for school infrastructure must be seen as representing a response to the collective actions by various civil society organisations sustained in monitoring and campaigning, including Equal Education, Section 27 and the Centre for Child Law.[17]

A consensus on what should constitute the minimum core standards for various SERs is of obvious value in holding the state accountable. The danger, however, is that a defined minimum

[12] Liebenberg, Sandra, *Socio-Economic Rights*, p. 188
[13] Ibid, p. 187
[14] Basic Package of Health Care Services, Civil Society Submission to Department of Health, 17 March 2006, www.section27.org.za/wp-content/uploads/2010/04/Access-to-Health-Care-Services-2007-Joint-Annexure-1.pdf, (Accessed 5 June 2014)
[15] Liebenberg, Sandra, *Socio-Economic Rights*, pp. 173, 177.
[16] Basic Package of Health Care Services, www.section27.org.za/wp-content/uploads/2010/04/Access-to-Health-Care-Services-2007-Joint-Annexure-1.pdf (5 June 2014).
[17] Equal Education, Minimum Norms and Standards, www.equaleducation.org.za/campaigns/minimum-norms-and-standards,(5 June 2014).

core could encourage the state to restrict its activities towards promoting the full realisation of that right to a particularly low level despite changing circumstances, such as an upturn in economic growth for example. That said, minimum norms and standards in the South African context should rather be considered a 'floor' below which no one should fall below, rather than a ceiling. The SER monitoring project has taken the approach of unpacking and clarifying the broader content and components of SERs which need to be progressively realised to ensure their substantive enjoyment. This is evident in the broad choice of indicators which may include minimum norms and standards in certain instances but are framed rather in terms of defining what constitutes a life of dignity and hence a decent living level. The project also emphasises the interdependence and indivisibility of all rights. This means that the realisation of a given SER is often bound up with a number of other cross-cutting rights – including the right to public participation, equality, human dignity, just administrative action, access to information and access to justice – and other socio-economic rights.

Alongside the ICESCR minimum standards, the Committee on Economic, Social and Cultural Rights (CESCR) has set out principles to guide the steps that a state must take in accordance with a measurable plan of action towards the progressive realisation of SERs. For example, policies and programmes should be designed to improve the availability, accessibility, acceptability, adaptability and quality (the 4AQ approach) of goods and services necessary for the realisation of SERs.18 Availability represents the sufficient quantity of infrastructure, facilities, goods and services, and programmes required for accessing the relevant rights. *Accessibility* encompasses non-discrimination, physical accessibility and economic accessibility or affordability. *Acceptability* represents the qualitative dimensions of enjoyment of the relevant rights (i.e. cultural appropriateness and gender sensitivity). *Adaptability* requires that programmes must be flexible and regularly reviewed to meet changing socio-economic needs and contexts. Lastly, Quality refers to facilities, goods and services being of good quality.[19]

A number of different versions of the 4AQ framework have been developed internationally for the purposes of both unpacking and monitoring the multiple dimensions and content of various SERs. The Danish Institute for Human Rights (DIHR), for example, is currently developing an indicator framework based on the availability, accessibility, acceptability and quality (AAAQ) criteria which translates the international human rights obligations into specific, however generic, standards, indicators and benchmarks.[20] Professor Sandra Liebenberg has argued that applying these broader criteria in the South African context can assist in developing the normative standards against which the reasonableness of the State's acts or omissions can be evaluated.[21] SPII, as will be discussed under step-3 in this paper, has adapted these criteria to the South African context and evaluates the enjoyment of SERs along three dimensions: **Access, Adequacy** and **Quality.**

SERs – the who, what, where and how of what to measure and monitor?

Clearly articulating the obligations of government and the nature and scope of SERs is essential in ensuring progressive realisation and in carrying out effective monitoring. Given the multi-dimensional and indivisible nature of these rights, monitoring is a complex and demanding task, which must consider the following[22]:

- The normative **content** of each right;
- The concomitant **obligations** of duty bearers, primarily the State, to respect, protect, promote and fulfil each SER, and the **efforts** they undertake to meet those obligations;
- The **interdependence** and **indivisibility** of all rights, including SERs; and,
- Cross-cutting **human rights principles** such as non-discrimination, equality, participation, accountability and the rule of law.

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[18] CESR, 'The OPERA framework. Assessing compliance with the obligation to fulfil economic, social and cultural rights'. 2012, p. 5, www.cesr.org/downloads/the.opera.framework.pdf, (11 June 2014).

[19] See Liebenberg, Sandra 'Grootboom and the seduction of negative/positive duties dichotomy', South Africa Public Law, Vol. 26, 2011, pp. 57-58 for discussion on different criteria.

[20] The Danish Institute for Human Rights, 'Concept note on the Availability, Accessibility, Acceptability and Quality (AAQ) Toolbox: Realising social, economic and cultural rights through facts based planning, monitoring and dialogue, Draft report, September 2013.

[21] Liebenberg, Sandra, 'Grootboom and the seduction', p. 58.

[22] OHCHR, 'Human Rights Indicators. A Guide to Measurement and Implementation.', 2012, p. 33, www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdfIbid, (24 July 2014).

3. Monitoring mechanisms in South Africa

Monitoring can be carried out by different bodies including the state itself, civil society, community based organisations and institutions of democracy.

Actors involved in monitoring SERs

The **Constitutional Court** of South Africa plays an important role in ensuring that the state complies with its SER obligations through the consideration of cases. The court's role in the widespread transformation of socio-economic conditions and ensuring the state fulfils its constitutional mandate, however, is constrained for a number of reasons. The first is the requirement that the court respect the separation and distribution of powers between the legislature, executive and judiciary. This separation and distribution of power in determining socio-economic obligations is a particularly contentious issue.[23] The Constitutional Court's decision to decline defining the content of SERs, as seen in the *Grootboom* case, is in part due to 'the court's limited institutional competence in respect of policy making'.[24] The Constitutional Court's role is also limited by the nature of the cases that are actually brought before it. Justice Zak Yacoob has described how many of the cases that have been brought before the court have been ad-hoc and re-active, and few applicants have attempted to ask for an order requesting the development of long term programmes and policies which can be carefully and vigorously monitored and evaluated – both in terms of what is happening on the ground and in terms of how money is spent.[25]

As a Chapter Nine institution, the **South African Human Rights Commission (SAHRC)** is constitutionally obliged to report annually on the defence and advancement of the rights, particularly SERs, in the Constitution. The Commission's objectives are to:

1. Determine the extent, to which the organs of State have respected, protected, promoted and fulfilled human rights.

2. Determine the reasonableness of measures, including legislation, by-laws, policies and programmes adopted by organs of the state to realise human rights in the country.

3. Make recommendations to ensure the protection, development and attainment of rights.[26]

The Commission's monitoring to date has largely involved a methodology in which questionnaires (commonly known as 'protocols') are sent to various government departments for completion and return, research fieldwork, and more recently, public hearings and consultations with affected communities and civil society. This approach, as is the case internationally, has largely focussed on documenting violations of rights rather than measuring positive realisation of rights. A major constraint has been the low response rate from the various government departments who have generally failed to complete and return the questionnaire or to provide substantive information, beyond what is reflected in departmental annual reports. The SAHRC has highlighted the need for a monitoring tool which is linked to indicators and reliable data to compliment what has largely been a qualitative process, and to enable it to verify the administrative data submitted by the state.[27]

South Africa has a vibrant **civil society** with a wide ranging number of organisations and social movements that work hard to support transformational principles and to hold the government

[23] Steinberg, Carol, 'Can reasonableness protect the poor'
[24] Ibid, p. 271
[25] Zak Yacoob opening address at SPII workshop: 'How to make sense of progressive realisation of socio-economic rights and evaluate progress over time', 23 May 2014
[26] SAHRC, The 8th Economic and Social Rights Report: Transforming society, securing rights, restoring dignity, 2012, p. 14 www.sahrc.org.za/home/21/files/Section%2018(3)%20Report.pdf, (24 July 2014)
[27] Ibid.

accountable in the delivery of the SERs enshrined in the Constitution. These include, but are not limited to SECTION 27, SPII, The Socio-Economic Rights Institute, Centre for Applied Legal Studies, Equal Education, Social Justice Coalition, Black Sash, Treatment Action Campaign, Sonke Gender Justice Project, Ndifuna Ukwazi, the Legal Resource Centre, and the Budget Expenditure Monitoring Forum (BEMF). These organisations have used various tools and approaches from litigation, research and campaigning, picketing and monitoring initiatives at a local level, including social audits.

Other **Chapter Nine institutions** established in terms of the Constitution to advance our democratic transition include the Public Protector, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission), the Commission for Gender Equality and the Auditor-General.

Approaches and tools for monitoring the realisation of SERs

Monitoring SERs involves assessing firstly, if government policy and programmes comply with SER obligations and human rights principles; secondly, if adequate amounts of money are being spent on realising SERs; and lastly, evaluating whether money allocated and spent leads to good outcomes. Given that SERs can be realised progressively, it is imperative to monitor both the outcomes and enjoyment of right(s) under review but also the processes underlying these outcomes to fully understand the state's compliance. This involves monitoring the **obligations of _conduct_ and obligations of _result_** which are contained in the obligations to respect, protect, fulfil and promote.[28] As a result, the use of a combination of approaches and tools is widely acknowledged as being necessary when monitoring the progressive realisation of SERs.

In recent years, various methodologies have been developed to assess states' compliance with their obligations to progressively realise SERs. These include: indicators and benchmarks; analysis of budget/expenditure or resource allocation; identifying violations; econometric tools and methodologies that combine some of these approaches.[29]

There has been growing interest internationally in the development of statistical indicators for the monitoring of SERs. The **UN Office of the High Commissioner for Human Rights (OHCHR)** has developed a framework that combines indicators that have been categorized as structural, process and outcome indicators to evaluate the steps taken by the State to meet its obligations. There is no automatic correspondence between the different kinds of obligations and the indicators but it is argued that the various obligations can be covered by the three categories of indicators:[30]

- **Structural indicators** help evaluate the state's implementation of the standards it has accepted in the ratification and adoption of **_legal instruments_**. This includes if **_domestic legislation_** incorporates the required international standards and the **_institutional mechanisms_** that promote and protect those standards. Structural indicators provide an indication of the commitment of government to realising the right but also provide relevant benchmarks for holding the government accountable.
- **Process Indicators** measure duty bearers' **_ongoing efforts_** to implement its commitments on the ground. This includes assessing government policies and programmes, budget allocations and specific regulatory or redress interventions.
- **Outcome Indicators** reflect the state of **_enjoyment_** of rights in a given context. Outcome indicators consolidate over time the **_impact_** of various underlying processes and measure both the implementation and effectiveness of policies and programmes.

The OHCHR framework has been adapted and expanded by other international monitoring mechanisms including the Inter-American Commission for Human Rights and the Economic and Social Rights Working Group of the African Commission on Human and People's Rights.[31]

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[28] CESR, The OPERA framework, p. 13
[29] For a more detailed summary of these monitoring approaches see Chenwi, Lilian, 'Monitoring the progressive realisation of socio-economic rights'.
[30] OHCHR, Human Rights Indicators, p. 32-42.
[31] CESR, The OPERA framework, p. 7

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> The Constitutional Court's role is also limited by the nature of the cases that are actually brought before it
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Exhaustive lists of potential indicators can be overwhelming to apply in practice. The challenge is therefore to strike a balance between developing a tool which on the one hand is sufficiently comprehensive to account for the various factors discussed in this paper, and on the other, is selective, focused and responsive to the limitations of data-availability and the ultimate users of such a tool.

The **Centre for Economic and Social Rights (CESCR)** has developed a methodological framework known as the **OPERA Framework** which examines both obligations of conduct and result – and importantly makes the link between the two.[32] The framework looks at different dimensions of the obligation to fulfil, grouped around Outcomes, Policy Efforts and Resources. It then triangulates the findings from each step to make an Assessment of a state's compliance with its obligation to fulfil. The framework represents four broad dimensions which need to be considered in the monitoring of SER implementation within which various tools and methodologies (both qualitative and quantitative) can be employed.

4. The Studies in Poverty and Inequality Institute (SPII) SER monitoring tool

> **"** The purpose of monitoring goes beyond constitutional compliance and aims to achieve specific objectives. **"**

An analysis of the various judicial and legislative measures and reporting mechanisms and tools used in South Africa to address and monitor SERs, highlights their various limitations or shortcomings and points towards the need for a comprehensive monitoring tool which can be applied across all rights.

SPII, with the support of Ford Foundation and the endorsement of the SAHRC, has developed a methodology based on a combination of policy -and budget -analysis and statistical indicators to monitor and evaluate the progressive realisation of SERs in South Africa. The methodology developed by SPII builds on international best practice and combines various approaches to monitoring SERs. The methodology bears many similarities with the OPERA framework discussed above, but has been tailored to the South African context and the various reporting mechanisms which are already in place.

This Tool uses a methodology for monitoring and evaluating the performance of government and the realisation of SERs that is based on a combination of policy (step 1) and budget (step 2) analysis, and the development of statistical indicators for each of the rights (step 3). This involves unpacking the content of these rights and the obligations they impose on government, evaluating the extent to which government policies and budget allocations adequately address these obligations, and measuring the enjoyment of rights by people on the ground.

The monitoring tool attempts to provide a standardised approach which can be used by various actors as the context and aim requires. Primarily it is hoped that it can guide policy makers in making decisions around the extension of policies and in adjudicating competing priorities. It is also hoped that the tool will assist in linking up and co-ordinating organisations efforts to hold the state accountable. Distinguishing features of the tool are firstly, its programmatic long term approach to monitoring with the overall aim of guiding policy and the implementation of SERs, and secondly, the emphasis on quantitative measures that are well suited to mapping trends and patterns over time, but remain largely absent in the monitoring process of SERs in South Africa.

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[32] Ibid, p. 13
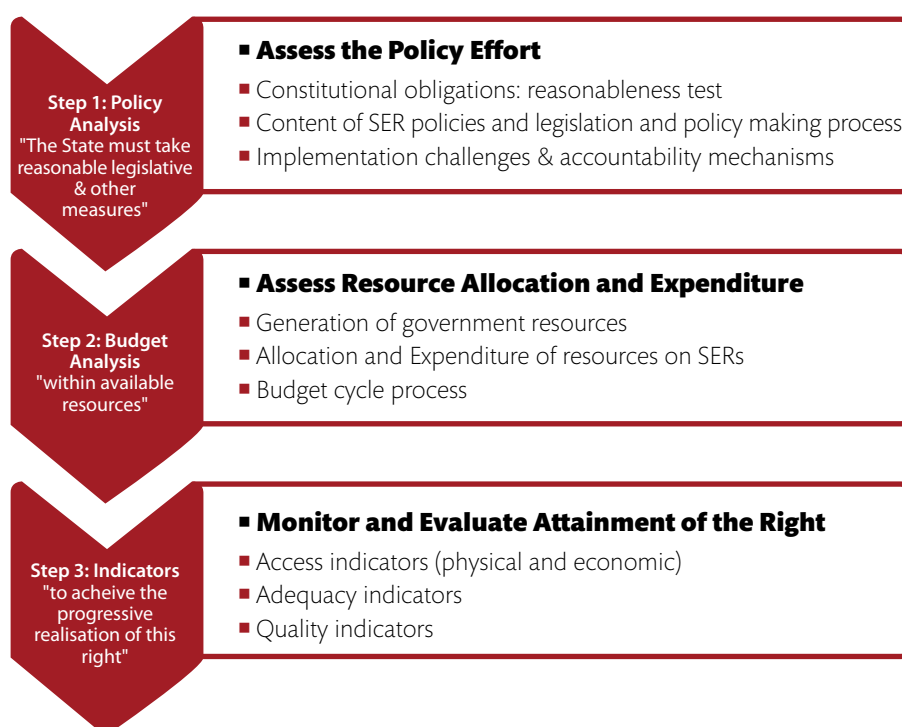
Objectives of the Monitoring Tool

The purpose of monitoring goes beyond constitutional compliance and aims to achieve specific objectives. These include, *firstly,* clarifying and unpacking the **content of the SERs and the obligations on the state** to ensure access to and enjoyment of SERs is continuously broadened.

Secondly, to determine the extent to which organs of the state have respected, protected, promoted and fulfilled their obligations. This involves identifying achievements, deprivations, disparities, and regression to illuminate both **causation and accountability** in terms of policies, resources spent, implementation and institutional capacity. *Thirdly,* to provide **evidence** for **advocacy initiatives** and **legal interventions,** and make **recommendations** that will ensure the protection, development and universal enjoyment of SERs. The tool is ultimately not about being a watch-dog, but about guiding policy around SERs and moving all actors towards developing roadmaps and time frames for how and by when to achieve universal access for all people living in South Africa, as guaranteed in the Constitution. Cutting across these three objectives is the aim of building greater consensus between the three branches of government, civil society, labour and business on how far we've come (progressive realisation) and what steps (policies and budgets) are required now to realise the social and economic transformation envisaged by the Constitution.

SER Monitoring Tool: 3-step methodology

The methodology adopted for the SER Monitoring Tool is based on three distinct but interrelated steps. The first two steps measure obligations of conduct, which is important because the realisation of rights needs to be planned for and actively implemented. These steps include an analysis of the *policy effort* **(Step 1)** and the *allocation and expenditure of resources* for specific rights **(Step 2)**. This analysis of state conduct is then complemented by the development of statistical indicators in **step 3**, which assist in monitoring and evaluating obligations of *result* by measuring the *attainment of rights* on the ground. As much as the three steps are distinct it is essential to understand and explore how they relate to each other. For example, have political commitments been planned and budgeted for? Has evidence which suggests the failure or success of certain programmes been taken into account in budget choices, priorities, and shifts in policy and institutional arrangements?

SER Monitoring Tool: 3-step methodology

Step 1: Policy Analysis
"The State must take reasonable legislative & other measures"

■ **Assess the Policy Effort**
■ Constitutional obligations: reasonableness test
■ Content of SER policies and legislation and policy making process
■ Implementation challenges & accountability mechanisms

Step 2: Budget Analysis
"within available resources"

■ **Assess Resource Allocation and Expenditure**
■ Generation of government resources
■ Allocation and Expenditure of resources on SERs
■ Budget cycle process

Step 3: Indicators
"to acheive the progressive realisation of this right"

■ **Monitor and Evaluate Attainment of the Right**
■ Access indicators (physical and economic)
■ Adequacy indicators
■ Quality indicators

Step 1: Analyse the policy effort

The first step of the analysis takes a closer look at the underlying policies and legislation guiding the realisation of SERs. This step is important to measure the progress made by the state in meeting its obligations of conduct.

This step *firstly* assesses whether the actual content of social and economic policies adequately reflects the **Constitution and international treaty obligations** that the state has ratified. *Secondly,* this step evaluates both the **content and implementation** of existing legislation, policy frameworks and government programmes to assess what gaps (in principle and in practice) exist. This assessment is based upon a fundamental human rights framework that includes non-discrimination, gender and race sensitivity, dignity, participation, transparency and progressive realisation.

An important component of evaluating the policy effort is an assessment of the **policy making process** in terms of transparency and public participation in decision-making by the relevant civil society organisations and communities specifically affected by the policy under review.[33] Another important dimension is to analyse the departmental responsibilities and institutional arrangements to assess the **capacity challenges and accountability mechanisms** currently in place.

The kinds of questions to ask in relation to an analysis of government policy and programmes from a human rights framework include:[34]

▶ Does a baseline assessment exist of needs?
▶ Have sufficient legislative, policy and administrative measures aimed at progressive realisation been made and were they taken within a reasonable time?
▶ Are the state's efforts effective, targeted and do they set goals to be achieved?
▶ Are the measures adequate, accessible, affordable and reasonable?
▶ Do the measures give priority to the needs of the vulnerable and disadvantaged or are there specially tailored measures and additional resources for these groups?
▶ Does a roadmap exist for full realisation that can be monitored, evaluated and adapted over time?
▶ Have the measures been consistently revised and improved over the years?
▶ Has access to rights been increased over the years?

Step 2: Assess Resource Allocation and Expenditure

The second step assesses the reasonableness of the budgetary priorities in light of the obligations on the state and human right principles and standards. This step is important to measure the government's effective and reasonable use of the available resources towards progressive realisation of the right(s) under review.

Monitoring government budgets for the fulfilment of SERs therefore requires an analysis of *firstly*, the **generation of government revenue**. The Constitution mandates the state to realise rights "within available resources", while the ICESCR requires the use of "maximum available resources". These obligations mean that the state must use all the resources that it has available to it and justify if the resources allocated to a particular cause or issue are limited. Gaps that hinder translation of policies and programs into efficient and equitable delivery of quality goods and services often result from under-resourcing of these policies. Although such underfunding is often attributed to a lack of sufficient resources, there is a growing consensus that resource generation for human rights fulfilment needs to look beyond the budget itself and evaluate the relevant fiscal and economic policies according to human rights principles.[35] This step therefore includes assessing the reasonableness and progressive nature of fiscal and tax policies and the broader macro-economic context within which budget decisions are made.

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> An important component of evaluating the policy effort is an assessment of the policy making process
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[33] As required by Section 195 (e) of the Constitution.
[34] Chenwi, Lilian, 'Monitoring the progressive realisation', p. 60
[35] Balakrishnan, Radhika and Elson, Diane, 'Auditing economic policy in the light of obligations on economic and social rights', *Essex Human Rights Review*, Vol. 5, 2008.

Secondly, an analysis of the **allocation and expenditure of such resources** to reduce disparities, prioritise the most vulnerable and disadvantaged groups, and progressively realise SERs, must take place. This step uses various budget analysis techniques to monitor *planned* (i.e. budget allocations) and actual resource expenditures at both national and provincial levels and therefore assesses the delivery and implementation of government policy and programmes as they relate to the realisation of rights. There are various different levels of analysis and budget tools that can be applied which include the following considerations:[36]

▶ ***Adequacy:*** Are resource allocations transferred to departments sufficient given the objectives of the programme, likely demand and the costs of intervention, and are they increasing in real terms over time? Are there any regressive spending patterns?

▶ ***Equity and Priority of allocations:*** Are resources being utilised to prioritise the needs of the most vulnerable and disadvantaged, to reduce disparities in line with the constitutional goal of substantive equality. Is the spread of resources across departments, spheres of government, geographic localities equitable and justified? Are funds available to cover emergency situations?

▶ ***Efficiency:*** Is the overall expenditure of the programme efficient given the costs of the intervention? Are institutions capable to spend the funds allocated to them efficiently? Are funds being accounted for and spent on their intended purpose? Are there any under or over-expenditure patterns? Can their cause and impact be identified?

▶ ***Effectiveness:*** Is the money being spent on the right things and having the desired results and impact? Is it bringing about tangible improvements in access to SERs? Are targets met? Is sufficient data available to assess this and it adequate monitoring taking place?

Thirdly, an analysis of the **budget cycle process** from the perspective of human rights principles of participation, non-discrimination, transparency and accountability.

An assessment of resource availability cannot be separated from an analysis of institutional arrangements, human resources and local capacity which are necessary for the efficient and effective spending of budgets.

Step 3: Monitor and Evaluate Attainment of SERs

The third step measures the enjoyment of rights by rights-holders and therefore monitors and evaluates the state's obligation to fulfil the realisation of SERs. This step is distinct from the previous two in that it focuses primarily on the obligation of result rather than conduct placed on the state. This step evaluates the state's performance via the development of statistical indicators which provide a clearer and more specific illustration of SERs enjoyment on the ground over time. The outcome indicators make reference to the three dimensions of access (physical and economic), adequacy and quality over time. This requires that quantifiable and replicable indicators (proxies for the different dimensions of SERs) be developed along with agreed benchmarks and targets.

The indicators need to be aligned to data that is freely and easily available in annual surveys and data sets, and must be capable of being decomposed (disaggregated) by region, race, gender and age – wherever possible and useful. This allows disparities between e.g. different population groups or geographical regions to be identified, and an assessment of the extent to which progress has been made over time. This data also enables international comparative analysis. An example of this is the Social and Economic Rights Fulfilment Index (SERF Index) which provides a rigorous international comparative measurement of governments' compliance with their obligations to fulfil SERs.[37]

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[36] Chenwi, Lilian, 'Monitoring the progressive realisation', pp. 60-61
[37] Fukuda-Parr, Sakiko S. & Greenstein, Joshua, 'Monitoring state performance. South Africa's scores on the Social and Economic Rights Fulfilment Index', *ESR Review*, Vol. 13. No. 2, 2012.

The Process of Developing Indicators

The SER monitoring tool has developed and refined a methodology for the development of socio-economic rights indicators in South Africa. This process has incorporated our learnings since the drafting of the first methodology paper in 2012, regarding the importance of including right-specific expert and stakeholder input from the beginning to ensure broader ownership and more immediate access to existing work. The methodology has also streamlined the process of developing indicators. This process begins with a broad literature review to unpack the content of the right under review from both an international and South African perspective. The key reporting formats and indicators that exist for the specific right from international and local organisations and the Department for Performance, Monitoring and Evaluation (DPME) at the Presidency are then reviewed.

This process is consolidated into a set of conceptual indicators which unpack the key components and content of the right under the three dimensions the monitoring tool aims to evaluate the progressive realisation of SERs: access, adequacy and quality (see below). After such a list is compiled, the project team sets up meetings and consultations with right specific experts in both academia and civil society to get feedback on the conceptual indicators and the possible sources of data. Once this feedback is received, a list of potential indicators is developed, followed by a thorough scoping of existing data sets to ascertain whether data would be available for each draft indicator. The criteria used to select the final set of indicators include:

- Is data available from a reliable source
- Is data available annually (ideally)
- Is data disaggregated to geographic area, income group, race, gender
- Is the indicator easy to understand by the general public
- SMART Criteria – Specific, Measurable, Attainable, Relevant, Time-framed

After the verification of data sources and ensuring that the final indicators meet the above criteria, a final set of indicators is developed. This final set is often substantially reduced given the data challenges but every attempt is made to ensure the key components of each right has at least one outcome indicator. Once further feedback on these indicators has been received, the indicators are populated to show change over time.

Summary of the process of developing indicators

1. **Literature review to unpack the normative content of the right** – this entails looking at South African and international jurisprudence as well as academic and other literature which deals with the content of the right in question
2. **Identify and analyse key reporting formats and indicators that exist for the right** – this step aims to draw upon existing reporting formats and indicators that may have been developed by government, international bodies or civil society for evaluating performance and/or the attainment of rights
3. **Develop list of conceptual indicators for each right** – this is an 'ideal' list of indicators that we would like to measure for the right
4. **Host initial meeting with sectoral content and rights-specific experts and civil society partners, including relevant committees of the SAHRC where appropriate** – this step aims to incorporate the perspectives and experience of as wide a range of stakeholders as possible, both to draw upon their knowledge and to ensure the indicators are accessible and relevant to their needs
5. **Identification of potential indicators** – at this stage the conceptual indicators identified in step 3 have been refined based on the feedback and insights received from stakeholders
6. **Verification of the existence of reliable data sets for each indicator** – indicators must be populated with data that is reliable and freely available, ideally on an annual basis, and from a baseline of at least 2002, so that trends can be analysed over time. Data should also be capable of being disaggregated by region, race, gender, age and other sub-sets, where necessary or useful
7. **Hosting of subsequent meeting with initial group of sectoral experts to present verified indicators** – this allows for further feedback to be incorporated before the indicators are finalised
8. **Final set of indicators developed and populated with data**

Dimensions of SERs – Access, Adequacy & Quality

This project has not adopted the 4AQ framework entirely, but instead decided to measure progressive realisation of SERs along three dimensions: Access, Adequacy and Quality. The criteria of availability, accessibility, acceptability, adaptability and quality are reflected in the three dimensions which are unpacked below. For example, having a sufficient quantity of certain goods, services or facilities (availability) is included under access. The acceptability criteria are captured under adequacy which measures if goods and services are ethically sensitive, culturally appropriate and gender sensitive. Measuring quality goes beyond the quality of a specific good or service and measures the broader impact or wellbeing of individuals and households.

- **Access indicators** assess both physical and economic access to rights. Assessing physical access includes availability – i.e. is there sufficient facilities, goods and services, and programmes available for accessing the relevant right. Access indicators also measure economic access or affordability which includes the upfront and on-going costs incurred in accessing rights.

- **Adequacy indicators** measure the quality and acceptability of the facilities, goods and services, and programmes. These indicators also evaluate if basic norms and standards (as a minimum) have been met and acceptability standards - if facilities, goods and services are ethically sensitive, culturally appropriate and gender sensitive.

- **Quality indicators** although similar to adequacy, focuses on outcome or impact indicators which measure wellbeing and how much the quality of life of an individual or household has changed by gaining access to the right.

Data Availability, Challenges & Disaggregation

The two main **sources of data** for the development of indicators are administrative data (i.e. the state's own data used in the administration or implementation of their policies) and household level data from various nationally representative surveys conducted by Statistics South Africa (Stats SA). These include the General Household Survey (GHS), Income and Expenditure Survey (IES), Living Conditions Survey (LCS) & the Community Survey (CS). Administrative data sets are critical but access to these is often severely constrained and limited to annual reports. There are concerns with the accuracy of this data with significant discrepancies being common place and a lack of consistency in the questions asked and methodology used. Challenges regarding household data are also numerous and include the unit of analysis, definitions, sampling frames and accessibility of long-term data.

Stats SA has decided to collapse the four major household surveys (GHS, IES, LCS & the Community Survey) into one survey instrument known as the Continuous Population Survey (CPS) which is expected to come into effect in 2015. The reason for the change came as a result of Stats SA identifying a need to integrate surveys with common content (LCS, GHS, IES), but also a growing need to produce more development indicators at lower levels (i.e. municipal level). The complication, however, is that not all data points and questions in the household surveys will be incorporated into the CPS. The project has used the publically available draft version of the CPS document to verify which indicators we can assume will be available from 2015 onwards.

An important consideration with human rights indicators is **disaggregation** which enables an analysis of the enjoyment of rights on the ground to be done for different geographic areas, income groups ages, race groups and gender. This is important to be able to detect deprivations and disparities in the provision and accessibility of certain rights. The majority of data can be decomposed to a provincial level but cannot currently be decomposed to the municipal level. This is important as the real implementation challenges often occur at the local level and relate to local government capacity challenges. The anticipated CPS should make this type of analysis possible which is important given the spatial legacy of apartheid.

> " That said, minimum norms and standards in the South African context should rather be considered a 'floor' below which no one should fall below, rather than a ceiling "

Benchmarks & Targets

Indicators say nothing without clear benchmarks and tangible targets against which governments' performance can be evaluated to assess whether there has been progress, stagnation, gaps or regression. In the absence of road maps or long term plans for each of the SERs which would provide such benchmarks, the question remains: how should such benchmarks be derived and decided upon? Should these come from legislation, constitutional obligations, the jurisprudence, international best practices, or all of the above? An important question is also how the reasonableness standard is incorporated into the deriving of benchmarks. In the absence of established norms and standards, the content of such rights and the obligations on the state are poorly defined which makes the development of benchmark indicators very difficult. A starting point is to monitor and evaluate the attainment of particular rights in relation to what government has already committed to. This is of course complicated by instances in which specific targets are not always clearly defined and departmental annual reports do not consistently and accurately report these outcomes. It is clear that road maps need to be developed with clearly defined benchmarks and specific targets which incorporate the reasonableness standard as well as other standards in the Constitution, legislation and jurisprudence to assess progress. The DPME's outcome agreements provide, despite shortcomings (see next section), a set of performance outcomes and indicators which can be monitored and tracked over time.

Anticipated use and users of the tool

It is envisioned that the tool will be used by a range of actors including the SAHRC, civil society, government departments, the DPME and other stakeholders. The question of who will ultimately have responsibility for the monitoring remains an open question, and it might be a multi- stakeholder range of actors. SPII, however, foresees the possibility of a web-based composite data collection, depiction and analysis programme which would be able to receive the anticipated community- based qualitative data collection. This web site would also provide accessible trend analysis over time to users, illustrated through the use of easy-to-read graphics showing the rate, pace and direction of progress in terms of progressive realisation for each right from 2002 onwards.

▶ **SAHRC** – The SAHRC has supported SPII in our work from quite an early stage in the project, and has been involved in the development of the monitoring tool and specifically in the final selection of indicators. The Commission is committed to integrating the tool, in particular the statistical indicators, into their SER monitoring and reporting activities. The data will be used to supplement information from government departments to prove or refute claims and adds a quantitative element to what to-date has largely been a qualitative process for generating yearly reports based on questionnaire responses from government departments.

▶ **ICESCR reporting** – The methodology adopted by the project is capable of being aligned to the existing measurement and monitoring techniques recommended by the CESCR. It is therefore envisioned that the SER Monitoring Tool provide the framework for the multi-stakeholder monitoring and evaluation of the implementation of the ICESCR.

▶ **Civil society** – The project has engaged with a diverse range of civil society organisations throughout the life of the project. As the work developed, it became clear that right-specific reference teams which included civil society actors and sectoral-experts was essential to ensure broader ownership, more immediate access to existing work that can assist in leapfrogging some of the data challenges, and finally, who can operate as an on-going quality assurance for the development of indicators. The project is currently exploring how the tool can include and accommodate monitoring information from ordinary people and communities who seek to enforce their rights and ensure that the methods and outcomes meaningfully reflect the concerns, priorities and needs of people on the ground.

There already exist a number of community based monitoring initiatives from which there is much to be learnt and discussed in terms of the replicability and scalability of community monitoring tools.[38]

▶ **Parliament** – SPII has presented the methodology to the Parliamentary Research Unit (PRU) which has indicated that the tool could be very valuable given the anticipated data required by MPs for their oversight role. The project hopes to formalise and strengthen this relationship going forward.

▶ **DPME** and other *government* departments – SPII has developed a relationship with the Department of Performance, Monitoring and Evaluation (DPME) which focuses on the performance of government departments in achieving desired outcomes and ultimately, improving service delivery. This includes coherent priority setting, robust monitoring and evaluation related to the achievement of outcomes, institutional performance monitoring, and monitoring of frontline service delivery.[39] The SER Monitoring Tool views the role of the DPME as a constructive one with specific outcome agreements providing outcomes and targets which can be monitored and tracked overtime. The project does, however, highlight the limitations of focussing exclusively on 'performance outcomes' which do not always consider important human rights principles and considerations such as participation, non-discrimination and transparency. The tool could be used to provide government with information on the effectiveness of their policy programmes and the obligations on the state to ensure the implementation of SERs. It is hoped the relationship between the project and the DPME and specific government departments can be strengthened over time.

5. Conclusion

Too many people in South Africa continue to struggle every day to achieve a life of dignity, equality and opportunity. It is clear that the Constitution is the beginning of our struggle – not the marker of its end – and that we need to make real the promises that fuelled the fight for democracy in South Africa.[40] Central to this is ensuring the progressive realisation of socio-economic rights which cannot occur in the absence of sustained monitoring and evaluation.

This paper has argued that we need a comprehensive monitoring tool for the realisation of socio-economic rights in South Africa. We have outlined the various monitoring mechanisms and actors which currently exist in South Africa, and lastly we have described our 3-step methodology while discussing a number of the key challenges, lessons learnt and important questions this work needs to continue to ask as it develops.

The SER Monitoring Tool developed by SPII aims to increase knowledge and understanding of the content of SERs; build up empirical information on the status of these rights to allow policy-makers, the SAHRC, civil society and other actors to assess progress made to date; evaluate what is and isn't working and why, and therefore re-orientate state action if required. The tool also serves as a planning tool to assist policy makers in the evaluation and development of future programmes and policies to ensure alignment with their obligations under the Constitution and finally, to provide all progressive actors in South Africa's transformation with tools to give their demands renewed force.

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[38] See Dawson, Hannah 'Public participation and citizen-based monitoring in realising socio-economic rights' (2014) Studies in Poverty and Inequality Institute, Policy Brief 7. Available at: http://spii.org.za/wp-content/uploads/2014/10/Policy-brief-7-Community-Monitoring-Report.pdf.

[39] DPME Mission Statement, http://www.thepresidency-dpme.gov.za/about/Pages/default.aspx, (Accessed 11 June 2014)

[40] The People's Alternative Budget Speech 2014, p. 23, http://www.section27.org.za/wp-content/uploads/2014/02/BEMF-BudgetSpeechComplete-embargoed.pdf, (Accessed 24 July 2014)

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