Chapter 33
The Interpretation Socio-Economic Rights

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33.1 Introduction *

One of the distinguishing features of the final South African Constitution is its far-reaching commitment to the principle of the interdependency of all human rights — civil and political, as well as economic, social and cultural rights. This principle is explicitly endorsed in a number of human rights declarations and resolutions adopted by the international community.[1] It embraces the notion that human rights should be treated holistically in order to protect human welfare.[2] As Craig Scott writes:

1 See, for example, The Proclamation of Tehran 1968, Final Act of the International Conference on Human Rights, Tehran, UN doc A/Conf 32/41, art 13; The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, June 1993, UN doc A/Conf 157/23, part I, para 5.

The term *interdependence* attempts to capture the idea that values seen as directly related to the full development of personhood cannot be protected and nurtured in isolation.[3]

Socio-economic rights are concerned with the material dimensions of human welfare. Their recognition as human rights stems from an acknowledgement that without food, water, shelter, health care, education and social security, human beings cannot survive, live with dignity or develop to their full potential.

The principle of interdependency finds expression within human rights discourse both at a normative and an institutional level. The South African Bill of Rights gives full effect to this principle by delineating a broad array of social, economic and cultural rights[4]. The Constitution ensures that all these rights may be enforced by the courts.[5] Moreover, the Constitution has also created

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institutions designed to promote and protect these rights[6].

The danger exists that a Bill of Rights that privileges civil and political rights will become the exclusive instrument of the rich and powerful for protecting their vested interests.[7] The inclusion of socio-economic rights as justiciable rights in the South African Bill of Rights makes the redress of poverty a matter of fundamental constitutional concern.[8] A formalistic interpretation of the Constitution that privileges

2 Apart from being intrinsically valuable to the protection of human life and development, socio-economic rights are also necessary to enable the effective enjoyment of civil and political rights and full participation in society. See N Haysom 'Constitutionalism, Majoritarian Democracy and Socio-Economic Rights' (1992) 2 *SAJHR* 451 ('Constitutionalism'); See also T H Marshall *Citizenship and Social Class* (1959).

3 C Scott 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 *Osgoode Hall LJ* 769, 786 ('Interdependence').

4 These social, cultural and economic rights can be found in ss 22 (freedom of trade, occupation and profession), 23 (labour relations), 24 (environment), 25 (property and land) 26 (housing), 27 (health care, food, water and social security), 28 (children's rights), 29 (education), 30 (language and culture), 31 (the rights of cultural, religious and linguistic communities), and 35(2*)(e)* (the socio-economic rights of persons deprived of their liberty). Many of these rights illustrate that there is no watertight division between civil and political rights on the one hand, and socio-economic rights on the other. For example, the right to form and join a trade union and the right to form, join and maintain cultural, religious and linguistic associations are specific manifestations of the civil right to freedom of association (s 18 of the Bill of Rights).

5 In terms of s 38 of the final Constitution, 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.'

6 For example, the Human Rights Commission, the Commission for Gender Equality, the Public Protector, and the Auditor-General. See § 33.13 below (Human Rights Commission and Commission for Gender Equality).

negative liberty and existing distributions of power and wealth is foreclosed by this text.[9]

Since the last iteration of this chapter, the Constitutional Court has handed down the landmark decisions in *Government of the Republic of South Africa & others v Grootboom & others* ('*Grootboom*')[10] and *Minister of Health & others v Treatment Action Campaign & others* ('*TAC*')[11]. These cases laid the foundations for the Court's approach to the interpretation of the socio-economic rights in sections 26, 27 and 28(1)*(c)* of the Constitution. This chapter aims to elucidate and critique the evolving jurisprudence of the Constitutional Court on these socio-economic rights.[12]

33.2 The inclusion of socio-economic rights in the final constitution

(a) Drafting history

7 For example, civil and political rights may be invoked to undermine social reform legislation, as occurred in *Lochner v New York* 198 US 45 (1905) (maximum hours legislation for bakers declared unconstitutional). For an account of attempts to immunise agrarian and other social reform legislation against challenges based on the Fundamental Rights chapter of the Indian Constitution (Part III), see B P Jeewan Reddy & R Dhavan 'The Jurisprudence of Human Rights' in D M Beatty (ed) *Human Rights and Judicial Review: A Comparative Perspective* (1994) 175, 180.

8 The Preamble of the Constitution states that one of the aims of the adoption of the Constitution is to '[i]mprove the quality of life and free the potential of each person'. One of the most cogent arguments in favour of justiciable socio-economic rights is that their exclusion from the Bill of Rights would relegate the values and interests protected by this set of rights to the margins of constitutional and political concern. See C Scott and P Macklem 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 *U Penn LR* 1, 26 ('Ropes of Sand'). According to the UN Committee on Economic, Social and Cultural Rights (UNCESCR), excluding socio-economic rights from judicial protection 'would drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society'. General Comment ('GC') 9 (19th sess, 1998), UN doc.E/1999/22, para 10.

9 Karl Klare characterises the Constitution as 'social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its transformative role and mission'. K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146, 153. As Justice Kriegler has observed, 'We do not operate under a constitution in which the avowed purpose of the drafters was to place limitations on governmental control. Our constitution aims at establishing freedom and equality in a grossly disparate society.' *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) at para 147.

10 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

11 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC).

12 The focus of this chapter is on ss 26, 27 and 28(1)*(c)* and the interpretation of socio-economic rights generally. Forthcoming chapters in the 2nd Edition of *Constitutional Law of South Africa* will engage discrete provisions in the Bill of Rights, from ss 22 (freedom of trade, occupation and profession), 23 (labour relations), 24 (environment), 25 (property and land), 26 (housing), 27 (healthcare, food, water and social security), 28 (children's rights), 29 (education), 30 (language and culture), 31 (the rights of cultural, religious and linguistic communities), to 35(2)(e) (the socio-economic rights of persons deprived of their liberty).

The question whether socio-economic rights should be protected in the Constitution and if so, the appropriate form of their inclusion, was the subject of a great deal of academic and public debate in South Africa[13]. The debate was resolved in favour of their inclusion.[14]

During the negotiations process for the final Constitution most of the political parties supported the inclusion of socio-economic rights in some form in the Bill of Rights.[15] The background research relating to the inclusion of socio-economic rights in the Constitution by the Technical Committee advising the Constitutional Assembly on the Bill of Rights are found in their explanatory memoranda.[16]

A perusal of the relevant minutes and memoranda prepared during the drafting process reveals the strong influence of international law on the drafting of the

relevant sections protecting socio-economic rights. For example, the concepts of progressive realisation and resource availability in sections 26 and 27 were based on article 2 of the International Covenant on Economic, Social and Cultural Rights, 1966 (the ICESCR).[17] According to the Technical Committee, this formulation has the dual advantage of facilitating consistency between South Africa's domestic law and

13 See, for example, D Basson 'Economic Rights: A Focal Point in the Debate on Human Rights and Labour Relations in South Africa' (1989) *SAPL* 120; C R M Dlamini 'The South African Law Commission's Working Paper on Group and Human Rights: Towards a Bill of Rights for South Africa' (1990) *SAPL* 91; A Sachs 'Towards a Bill of Rights in a Democratic South Africa' (1990) 6 *SAJHR* 1; Haysom 'Constitutionalism' (supra) at 451; E Mureinik 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *SAJHR* 464 ('Charter of Luxuries'); D Davis 'The Case against Inclusion of Socio-economic Rights in a Bill of Rights Except as Directive Principles' (1992) 8 *SAJHR* 475; H Corder, S Kahanovitz, J Murphy, C Murray, K O' Regan, J Sarkin, H Smith & N Steytler *A Charter for Social Justice: A Contribution to the South African Bill of Rights Debate* (1992) 18; SA Law Commission Final Report on Group and Human Rights (Project 58, 1994) 180; B de Villiers 'Social and Economic Rights' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 599; S Liebenberg 'Social and Economic Rights: A Critical Challenge' in S Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 79.

14 The drafters of the Interim Constitution (Act 200 of 1993) (IC) followed a more minimalist approach by including only a limited number of socio-economic rights. See, for example, ss 25(1)*(b)* (conditions of detention), 26 (economic activity), 27 (labour relations), 29 (environment), 30(1)*(c)* (children), 31 (language and culture), and 32 (education).

15 A number of civil society organisations also strongly motivated for the inclusion of socio-economic in the Bill of Rights in written submissions to the Constitutional Assembly, and during the public hearing convened by the Constitutional Assembly on 1 August 1995 on the theme of socio-economic rights. For example, the Ad Hoc Committee for the Campaign on Social and Economic Rights, representing a number of respected South African NGOs, petitioned the Constitutional Assembly to include socio-economic rights in the Constitution (document on file with the author dated 19 July 1995). There were also powerful dissenting voices; for example, the Chamber of Mines, and the Institute of Race Relations. See the Memorandum prepared by the Technical Committee to Theme Committee IV entitled *Matters Arising from the Public Submissions* (7 March 1996).

16 Constitutional Assembly, Constitutional Committee Subcommittee, Draft Bill of Rights, Vol 1: *Explanatory Memoranda of Technical Committee to Theme Committee IV of the Constitutional Assembly* (9 October 1995). Based on a survey of international and comparative law, socio-economic rights such as the right to housing were included within the concept of 'universally accepted fundamental rights' for the purposes of Constitutional Principle (CP) II, IC Schedule 4. See Technical Committee (Theme Committee 4), Memorandum entitled The Meaning of 'Universally Accepted Fundamental Rights' in Constitutional Principle II, Schedule 4 to the Constitution of the Republic of South Africa Act 200 of 1993 (1995).

international human rights norms, and directing the courts towards a legitimate international resource for the interpretation of these rights.[18]

(b) Certification of the Constitution

During the certification process, objections were raised against the inclusion of socio-economic rights in the Bill of Rights.[19] The objections were that socio-economic rights were not 'universally accepted fundamental rights' for the purposes of Constitutional Principle (CP) II, that they were inconsistent with the separation of powers doctrine in CP VI, and were not justiciable. In rejecting these arguments the Constitutional Court held that although socio-economic rights are not 'universally accepted fundamental rights', 'CP II permits the Constitutional Assembly to supplement the universally accepted fundamental rights with other rights not universally accepted'.[20] Secondly, the fact that socio-economic rights have budgetary implications does not automatically result in a breach of the doctrine of separation of powers. The court pointed out that the enforcement of many civil and political rights such as equality, freedom of speech and the right to a fair trial also often have budgetary implications.[21]

As a consequence of finding that socio-economic rights are not 'universally accepted fundamental rights', the court held that CP II did not require them to be incorporated in the Bill of Rights as justiciable rights.[22] Nevertheless, it observed

that socio-economic rights 'are, at least to some extent, justiciable'. The fact that socio-economic rights will 'almost inevitably' give rise to budgetary implications is

17 See, for example, the Memorandum of the Panel of Constitutional Experts on the meaning of 'progressive realisation' in the Working Draft of the Constitution (6 February 1996); Technical Committee IV Memorandum on Sections 25 and 26 of the Working Draft of the Constitution (14 February 1996). Article 2 of the ICESCR reads as follows:

> Each State party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

18 Technical Committee IV Memorandum on Sections 25 and 26 of the Working Draft of the Constitution (14 February 1996) at 2.

19 See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification*') at paras 76–8. The main objectors were the SA Institute of Race Relations, the Free Market Foundation and the Gauteng Association of Chambers of Commerce and Industry. The Legal Resources Centre, the Centre for Applied Legal Studies and the Community Law Centre (UWC) ('CLC'), argued in favour of the inclusion of socio-economic rights at the certification hearings. (See Annexure 3 to the judgment.)

20 *First Certification* (supra) at para 76.

21 Ibid at para 77.

22 Ibid at para 78.

not 'a bar to their justiciability. At a minimum, socio-economic rights can be negatively protected from improper invasion.'[23]

Implicit in this reasoning is the distinction drawn between the positive and negative duties imposed by socio-economic rights, and an indication that the court would, at the very least, be prepared to enforce the negative duties flowing from the rights. The budgetary implications of enforcing socio-economic rights are not in themselves a reason for judicial abstention, but may influence the standard of review applied in particular cases.

(c) Overview of the relevant provisions protecting socio-economic rights

(i) Categories of socio-economic rights

The socio-economic rights found in the Bill of Rights follow three main drafting styles. The first category of rights entrenches the right of 'everyone' to 'have access to' adequate housing, health care services, including reproductive health care, sufficient food and water, and social security.[24] In respect of these rights, the State is explicitly required to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.[25] This first category can be loosely described as the 'qualified socio-economic rights'.

The second category entrenches a set of 'basic' rights consisting of children's socio-economic rights,[26] the right of everyone to basic education, including adult basic education,[27] and the socio-economic rights of detained persons, including sentenced prisoners.[28] These rights are not qualified by reference to reasonable measures, progressive realisation or resource constraints.

The third category of rights is articulated in sections 26(3) and 27(3). The former provides that '[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances'. It goes on to State that '[n]o legislation may permit arbitrary evictions'.

23 *First Certification* (supra) at para 78.

24 Sections 26(1) and 27(1).

25 Sections 26(2) and 27(2). The sections protecting environmental and land rights (ss 24 and 25(5)) use similar phrases to those contained in ss 26 and 27, although there are important differences in the way they are formulated.

26 Section 28(1)*(c)* gives every child the right to 'basic nutrition, shelter, basic health care services and social services'. A child is defined in s 28(3) as a person under the age of 18 years.

27 Section 29(1)*(a).*

28 Section 35(2)*(e)* confers the right 'to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment'.

The latter States that '[n]o one may be refused emergency medical treatment'. These rights are couched in the form of a prohibition against certain conduct by the State and, arguably, private parties.[29]

Like all the other rights in the Bill of Rights, the socio-economic rights are subject to the general limitations clause, section 36.

(ii) The duties to respect, protect, promote and fulfil socio-economic rights

The Constitution places an overarching obligation on the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.[30] Section 7 establishes that the rights in the Bill of Rights impose a combination of negative and positive duties on the State.[31]

The 'duty to respect' requires the State to refrain from law or conduct that directly or indirectly interferes with people's enjoyment of socio-economic rights, for example, refraining from arbitrary forced evictions of people from their homes. The 'duty to protect' places a duty on the State to take legislative and other measures, including the provision of effective remedies, to protect vulnerable groups against violations of their rights by more powerful private parties (e.g. landlords, banks and insurance companies). The 'duty to promote' is sometimes regarded as a dimension of the duty to fulfil socio-economic rights.[32] It embraces awareness-raising and educational measures concerning the rights, for example, on the available mechanisms for accessing the rights.[33] The duty 'to fulfil' requires the State to take positive measures to ensure that those persons who currently lack access to the rights gain access to them.

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29 See §§ 33.5*(c)* and 33.11 infra ('The socio-economic rights in sections 26(3) and 27(3)', and 'Horizontal application').

30 Section 7(2). This typology is based on the analysis by Henry Shue of the obligations imposed on States by human rights: *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980) 5. It is also used by the UNCESCR to analyse the duties imposed by various rights in the ICESCR: see, eg GC 12 (20th sess, 1999) The right to adequate food (art 11 of the Covenant*)* UN doc. E/2000/22 para 15; GC 14 (22nd sess, 2000) The right to the highest attainable standard of health (art 12 of the Covenant*)* UN doc. E/C.12/2000/4 paras 33–37; GC 15 (29th sess 2002) The right to water (arts 11 and 12 of the Covenant) UN doc. E/C 12/2002/11 paras 20–29. See also *Grootboom* (supra) at para 20.

31 For an exposition of these duties, see *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Comm 155/96 October 2001, African Commission on Human and Peoples' Rights ('*SERAC v Nigeria*') paras 44–47; The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998) 20 *Human Rights Quarterly* 691 at para 6; P de Vos 'Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67, 78 ('Pious Wishes'); S Liebenberg 'Violations of Socio-Economic Rights: The Role of the South African Human Rights Commission' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 405, 410 ('Violations').

32 See, for example, GC 15 (supra) at para 25.

33 *SERAC v Nigeria* (supra) at para 46. In GC 15 on the right to water, the UNCESCR refers to the duty on States parties to the Covenant 'to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimise water wastage' (supra) at para 25.

The UN Committee on Economic, Social and Cultural Rights (UNCESCR) has identified two aspects of the duty to fulfil. The first is a duty to enable and assist communities to gain access to socio-economic rights. This would include, for example, adopting enabling policies and legislation that facilitate and regulate access to the various goods socio-economic rights are designed to deliver. The second is a duty to provide these various goods directly whenever an individual or group is unable, for reasons beyond their control, to gain access to the right through the means at their disposal. The latter aspect of the duty to fulfil is thus targeted at groups in especially vulnerable situations.[34]

33.3 Introduction to the major cases

There are now three major Constitutional Court judgments dealing directly with the interpretation of the socio-economic rights in sections 26, 27 and 28(1)*(c)*.[35] To facilitate the discussion of the emerging socio-economic rights' jurisprudence, this section briefly describes the facts and decisions in these three cases.

Soobramoney was the first major Constitutional Court case to consider the enforceability of socio-economic rights.[36] The applicant, an unemployed man in the final stages of chronic renal failure, sought a positive order from the courts directing a provincial hospital to provide him with ongoing dialysis treatment and interdicting the provincial Minister of Health from refusing him admission to the renal unit of the hospital. Without this treatment the applicant would die, as he could not afford to obtain the treatment from a private clinic. He relied primarily on section 11 (the right to life), and section 27(3) (the right to emergency medical treatment). The application was dismissed in the High Court and was taken on appeal to the Constitutional Court. The Constitutional Court also considered the applicability of sections 27(1) and (2). It found no breach of the aforementioned sections and dismissed the appeal.

Grootboom concerned a group of adults and children who had moved onto private land from an informal settlement owing to the 'appalling conditions' in which they lived.[37] They were evicted from the private land. Following the eviction, they camped on a sports field in the area. However, they could not erect adequate shelters as most of their building materials had been destroyed during

the eviction. Accordingly, they found themselves in a precarious position where they had neither security of tenure nor adequate shelter from the elements.[38]

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34 See GC 12 (supra) at para 15; GC 14 (supra) at para 37; GC 15 (supra) at para 25.

35 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) ('*Soobramoney*'); *Grootboom* (supra); *TAC* (supra).

36 *Soobramoney* (supra).

37 In the words of Judge Yacoob in the Constitutional Court judgment: 'The root cause of their problems is the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing.' *Grootboom* (supra) at para 3.

They applied to the Cape High Court on an urgent basis for an order against all three spheres of government to be provided with temporary shelter or housing until they obtained permanent accommodation.[39] The High Court held that there was no violation of section 26, but found a violation of section 28(1)*(c)* (the right of children to shelter). On appeal, the Constitutional Court declared that the State's housing programme fell short of compliance with section 26(2), but found no violation of section 28(1)*(c).*

TAC involved a challenge to the limited nature of the measures introduced by the State to prevent mother-to-child transmission (MTCT) of HIV. Firstly, it was contended that the State unreasonably prohibited the administration of the antiretroviral drug, Nevirapine, at public hospitals and clinics outside a limited number of research and training sites. This drug was of proven efficacy in reducing intrapartum MTCT of HIV. Secondly, the State failed to produce and implement a comprehensive national programme for the prevention of MTCT of HIV. Both the High Court and the Constitutional Court (on appeal) held that the State's programme to prevent MTCT of HIV did not comply with its obligations in terms of sections 27(1) and (2). The Constitutional Court made both declaratory and mandatory orders against the Government.

33.4 General approach to the interpretation of socio-economic rights

(a) The justiciability of socio-economic rights

In the *First Certification* judgment, the Constitutional Court held that, '[a]t the very minimum, socio-economic rights can be negatively protected from improper invasion'.[40] This signalled the Court's willingness to enforce the negative duties imposed by socio-economic rights (the duty 'to respect' socio-economic rights). In *Soobramoney, Grootboom* and *TAC*, the Court was called upon to adjudicate the positive duties imposed by socio-economic rights. In *Grootboom*, the Court indicated that the justiciability of socio-economic rights had been put 'beyond question by the text of the Constitution as construed in the Certification judgment'.[41] The Court also referred to the duties on the State in section 7(2) of the Constitution in relation to the rights in the Bill of Rights, holding that 'the courts are

constitutionally bound to ensure that they are protected and fulifilled'.[42] The key issue was the method of enforcement of these rights in a given case. According to Yacoob J, '[t]his is a very difficult issue which must be carefully explored on a case-

38 *Grootbom* (supra) at paras 9-11.

39 *Grootboom v Oostenberg Municipality & others* 2000 (3) BCLR 277, 281–282 (C) ('*Grootboom I*'). Other relief sought by the applicants in terms of s 28(1)*(c)* was not pursued.

40 *First Certification* (supra) at para 78.

41 *Grootboom* (supra) at para 20.

42 *Grootboom* (supra) at para 20. See § 33.2*(c)*(ii) supra (on the duties to respect, protect, promote and fulfil rights).

by-case basis'.[43] Addressing this challenge requires a consideration of 'the terms and context of the relevant constitutional provisions' and their application to the circumstances of the particular case.[44]

(b) Interpreting socio-economic rights in context

In its judgments on socio-economic rights the Constitutional Court has emphasised that, in addition to their textual setting, the rights need to be interpreted in their social and historical context.[45]

In *Soobramoney*, Chaskalson P commences the judgment by recognising the circumstances of poverty and economic inequality that exist in our country. He notes that these conditions 'already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order'.[46] This passage is significant because it establishes the strong link between socio-economic rights and the foundational constitutional values of human dignity, equality and freedom.[47] Furthermore it affirms that the commitment to address these conditions of poverty and inequality and transform our society based on human dignity, equality and freedom is a central constitutional purpose. Finally, it acknowledges that as long as these conditions persist, 'that aspiration will have a hollow ring'.[48] Thus the Court recognises that giving meaningful effect to socio-economic rights is indispensable to the success of South Africa's constitutional democracy and to ensuring that the core constitutional values are meaningful to the whole population.

However, the Court gave an early indication in *Soobramoney* that its approach to the interpretation of the socio-economic rights provisions of the Constitution would be informed by the realities of limited resources, and the 'significant demands' on the State in the light of our historical legacy.[49] It thus held that the rights in sections 26 and 27 'are limited by reason of lack of resources' and that 'an unqualified obligation to meet these needs would not presently be capable of

43 Ibid.

44 Ibid.

45 *Grootboom* (supra) at paras 22 and 25; *TAC* (supra) at para 24.

46 *Soobramoney* (supra) at para 8.

47 See ss 1*(a)* and 7(1) of the Constitution.

48 *Soobramoney* (supra) at para 8.

49 Ibid at para 11.

being fulfilled'.[50] The Court's assessment of what is possible in the light of present circumstances informed both its rejection of the notion of a minimum core obligation and its formulation of the reasonableness standard of review.[51]

A key theme emphasised by the Court in *Grootboom* was the 'interconnectedness' of socio-economic rights. Socio-economic rights serve the foundational values of our society — human dignity, freedom and equality — and enable people to enjoy all other rights in the Bill of Rights.[52] Moreover, there is 'a close relationship' between the various socio-economic rights with the result that a right such as the right of access to adequate housing cannot be seen in isolation.[53] The Court went on to say:

> Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the State has met its obligations in terms of them.[54]

It is not clear how the interconnectedness of socio-economic rights will influence their interpretation. It probably implies, for example, that measures adopted by the State to give effect to the right of access to social assistance (section 27(1)*(c)*) are also relevant to assessing compliance with the obligations imposed by the right of access to sufficient food (section 27(1)*(b)*), and *vice versa*.[55] However, it is important to note that section 27(2) refers to the progressive realisation of 'each of these rights' (the rights in s 27(1)). This proviso suggests that while the measures taken to realise the rights will undoubtedly overlap to some extent, the specificity of each right must be taken into account in designing relevant programmes to give effect to it. The fact that the same measure may sometimes contribute to the realisation of more than one socio-economic right does not diminish the necessity to assess the realisation of each right individually against the criteria in sections 26(2) and 27(2).

(c) International law

The Court affirmed in *Grootboom* that international law, including non-binding international instruments, was an important guide to interpreting the rights in the

Bill of Rights.[56] However, the Court indicated that the weight to be attached to a particular principle or rule of international law would vary. Thus 'where a relevant principle of international law binds South Africa, it may be directly applicable'.[57]

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50 *Soobramoney* (supra) at para 11.

51 See, for example, *TAC* (supra) at para 35, *Grootboom* (supra) at para 43. See also §§ 33.5*(e)* (on minimum core obligations) and 33.5*(f)* (on reasonableness review) below.

52 *Grootboom* (supra). In addition, the Court observed (at para 23): 'The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.'

53 Ibid at para 24.

54 Ibid.

55 Ibid at paras 36 and 78.

The pre-eminent international treaty protecting economic and social rights is the International Covenant on Economic, Social and Cultural Rights (1966) (the ICESCR).[58] The ICESCR is the sister Covenant to the International Covenant on Civil and Political Rights (1966) (the ICCPR).[59] Although South Africa has ratified the ICCPR, and many other international human rights treaties protecting socio-economic rights[60], it has not yet ratified the ICESCR.[61] Thus the Covenant is neither binding on South Africa under international law nor does it have any direct legal effect in domestic law. However, it remains an important guide under section 39(1) *(b)* to interpreting the socio-economic rights provisions under our Constitution. As noted above, there are a number of similarities between the formulation of sections 26(2) and 27(2) of the Constitution and article 2(1) of the Covenant: both the Constitution and the ICESCR emphasise the taking of legislative measures, 'progressive realisation', and the limitation of available resources.[62]

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56 See *Grootboom* (supra) at para 26. The Court referred to its position developed in *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 35. Section 39(1)*(b)* of the Constitution requires a court, tribunal or forum to consider international law when interpreting the Bill of Rights.

57 Ibid at para 26. Sections 231(1)–(3) establish the procedures by which international agreements bind the Republic. Section 231(4) regulates the domestic legal effect of international agreements. Thus an international agreement has domestic legal effect when it is enacted into law by national legislation. However, a self-executing provision of an agreement that has been approved by Parliament is legally binding in domestic law 'unless it is inconsistent with the Constitution or an Act of Parliament'.

58 The ICESCR (1966) 999 UNTS 3 was adopted on 16 December 1966, and entered into force on 3 January 1976. As at 7 July 2003 there were 147 States parties to the ICESCR.

59 The ICCPR (1966) 999 UNTS 171 was adopted on 16 December 1966, and entered into force on 23 March 1976. As at 7 July 2003 there were 149 States parties to the ICCPR (Of these, 104 States have ratified its First Optional Protocol concerning individual communications, and 49 have ratified its Second Optional Protocol aiming at the abolition of the death penalty). For the history behind the adoption of two separate Covenants, one protecting civil and political rights, the other economic, social and cultural rights, see M C R Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) 16 ('ICESCR'); Scott 'Interdependence' (supra) at 791-814; S Liebenberg 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 *SAJHR* 359, 360 ('Implications of the ICESCR'*)*.

60 These include: The African Charter on Human and Peoples' Rights (1981) 21 ILM 59 (acceded to on 9 July 1996); African Charter on the Rights and Welfare of the Child (1990) OAU Doc. CAB/LEG/24.9/49 (ratified on 7 January 2000); the Convention on the Rights of the Child (1989) 28 ILM 1456 (ratified on 16 June 1995); the Convention on the Elimination of All Forms of Discrimination against Women (1979) 1249 UNTS 13 (ratified on 15 December 1995); the International Convention on the Elimination of All Forms of Racial Discrimination (1966) 60 UNTS 195 (ratified on 15 December 1995). The women's and race conventions deal with gender and racial equality respectively, but include a number of provisions specifically relating to the equal enjoyment of economic, social and cultural rights.

61 However, this treaty was signed on behalf of South Africa in October 1994. Through signature, South Africa has incurred an international obligation to refrain from 'acts which would defeat the object and purpose of the treaty.' Vienna Convention on the Law of Treaties (1969) 8 ILM 679, art 18.

62 See art 2 of the ICESCR.

That said, the Court highlighted in *Grootboom* the differences in the relevant provisions and indicated that they were 'significant in determining the extent to which the provisions of the Covenant may be a guide to an interpretation of section 26'.[63] These differences in relation to housing are:

(a) The Covenant provides for *a right* to adequate housing while section 26 provides for *a right of access* to adequate housing.

(b) The Covenant obliges States parties to take *appropriate* steps which must include legislation while the Constitution obligates the South African State to take *reasonable* legislative and other measures.[64]

These differences were identified prior to the Court's rejection of the arguments raised by the *amici* in relation to the concept of minimum core obligations endorsed by the UNCESCR.[65] However, the Court accepted the Committee's interpretation of the phrase, 'progressive realisation' as being 'in harmony with the context in which the phrase is used in our Constitution'.[66] It thus held that there 'is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived'.[67]

This confirms that the Court will not adopt concepts from non-binding international instruments that it regards as inconsistent with the text and context of the relevant constitutional provisions protecting socio-economic rights. However, international instruments and their interpretation by treaty bodies remain an important guide in interpreting relevant socio-economic rights provisions, particularly where it can be shown that the particular international jurisprudence is consistent with, if not identical to, our constitutional provisions and is appropriate in the South African context.[68]

Of course, the status of the ICESCR or any other international treaty containing socio-economic rights would change once it has been ratified and incorporated into domestic law. The courts would then be obliged to give effect to their provisions, and interpretations of its provisions by treaty-monitoring bodies would be of considerable authoritative weight.[69]

One of the problems in deriving interpretative guidance from international instruments protecting socio-economic rights has been the historical absence of individual complaints procedures generating international 'case law'.[70] The international community has consistently affirmed the equal status of economic and social rights and called for their equal protection. However, in reality the enforcement procedures for socio-economic rights have not been as effective as

63 *Grootboom* (supra) at para 28.

64 Ibid.

65 See § 33.5*(e)*(i) below (dealing with the minimum core argument in *Grootboom*).

66 *Grootboom* (supra) at para 45. See § 33.5*(g)* infra (on progressive realisation in *Grootboom*).

67 Ibid.

those available for civil and political rights. Treaties protecting civil and political rights usually make provision for an optional individual complaints procedure. This procedure allows individuals subject to the jurisdiction of a State party which has accepted the procedure (or the jurisdiction of the relevant court) to submit a complaint to an international committee or court, alleging a violation of their rights by the State party.[71]

In contrast, the supervision of States parties' obligations in respect of economic and social rights has generally been limited to a periodic reporting system. This development was due to the perceived difficulty of subjecting socio-economic rights to individual adjudication because they were thought to require extensive

68 The CESCR is responsible for supervising States parties' compliance with their obligations under the Covenant. The main sources for their interpretation of the relevant provisions of the Covenant are the official records of their review of States parties' reports under Part IV of the Covenant, and the General Comments adopted by the Committee. To date the Committee has adopted fifteen General Comments (GC): GC 1 (3rd sess, 1989) UN doc E/1989/22 Reporting by States parties; GC 2 (4th sess, 1990) UN doc E/1990/23 International technical assistance measures (art 22); GC 3 (5th sess, 1990) UN doc E/1991/23 The nature of States parties obligations (art 2(1)); GC 4 (6th sess, 1991) UN doc E/1992/23 The right to adequate housing (art 11(1)); GC 5 (11th sess, 1994) UN doc E/C 12/1994/13 Persons with disabilities; GC 6 (13th sess, 1995) UN doc E/1996/2 The economic, social and cultural rights of older persons; GC 7 (16th sess, 1997) UN doc E/C 12/1997/4 The right to adequate housing (art 11(1)) - forced evictions; GC 8 (17th sess, 1997) UN doc E/1998/22 The relationship between economic sanctions and respect for economic, social and cultural rights; GC 9 (19th sess, 1998) UN doc E/1999/22 Domestic application of the Covenant; GC 10 (19th sess, 1998) UN doc E/1999/22 The role of national human rights institutions in the protection of economic, social and cultural rights; GC 11 (20th sess, 1999) UN doc E/2000/22 Plans of action for primary education (art 14): GC 12 (20th sess, 1999) UN doc E/2000/22 The right to adequate food (art 11); GC 13 (21st sess, 1999) UN doc E/2000/22 The right to education (art 13); GC 14 (22nd sess, 2000) UN doc E/C.12/2000/4 The right to the highest attainable standard of health (art 12); GC 15 (29th sess, 2002) UN doc E/C.12/2002/11 The right to water (arts 11 and 12).

69 On the domestic application of the ICESCR, see M C R Craven 'The Domestic Application of the International Covenant on Economic, Social and Cultural Rights' (1993) XL (3) *Netherlands International LR* 367-404.

70 Although generally the interpretations of treaty provisions generated by international treaty-monitoring bodies (eg views on individual communications, concluding observations on States' periodic reports and general comments) are not legally binding *per se*, they carry weight as authoritative interpretations of the relevant treaty. On the status of the General Comments issued by the UNCESCR, see Craven 'ICESCR' (supra) at 91-2.

71 See, for example, the First Optional Protocol to the ICCPR (1966) 999 UNTS 171; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 23 ILM 1027, art 22; the International Convention on the Elimination of All Forms of Racial Discrimination (supra), art 14; the European Convention on Human Rights (1950) ETS 5, arts 25, 46, 48; the American Convention on Human Rights (1969) 1144 UNTS 123, arts 44-51 and ch VIII. Socio-economic benefits may receive indirect protection through the application of the provisions of these treaties in individual complaints procedures. For example, in the cases of *Zwaan-de Vries v The Netherlands* Comm 182/1984 and *Broeks v The Netherlands* Comm 172/1984 (decided under the First Optional Protocol of the ICCPR), the UN Human Rights Committee adopted the view that social security legislation enacted by the Netherlands violated art 26 of the Covenant (the right to equality, and the prohibition on discrimination). This legislation required married women to prove that they were either 'breadwinners' or permanently separated from their spouses in order to qualify for unemployment benefits. A similar burden was not imposed on married men. South Africa is a party to the First Optional Protocol to the ICCPR (by accession on 28 August 2002). It has also accepted the individual complaints procedure under the race and torture conventions.

positive obligations and resource implications. There can be little doubt that the absence of individual complaints procedures in relation to economic and social rights has tended to undermine their status as binding individual rights. It has also meant that the relevant treaty monitoring bodies have not had the opportunity to develop their normative content through application in concrete cases.[72] Efforts to provide more effective mechanisms in the ICESCR and other international instruments for the protection of socio-economic rights have gained momentum in recent years.[73] The general trend in international law is now towards providing complaints mechanisms in respect of treaties protecting socio-economic rights.[74]

Another important international treaty containing socio-economic rights of particular relevance to South Africa is the African Charter on Human and Peoples' Rights. Socio-economic rights appear along with civil and political rights in

the Charter,[75] and no distinction is made between the various rights in the Charter with regard to the submission of communications to the African Commission on

72 See P Alston 'No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant' in A Eide & J Helgesen (eds) *The Future of Human Rights Protection in a Changing World* (1991) 79; A R Chapman 'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 *Human Rights Quarterly* 23, 39 (recommending that the CESCR focus its efforts more closely on identifying and redressing violations of economic and social rights); S Leckie 'Another Step Towards Indivisibility: Identifying Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 81 ('Indivisibility').

73 The Vienna Declaration and Programme of Action, UN doc A/Conf 157/23 Part II paras 40 and 75 (encouraging the examination of optional protocols to the Convention on the Elimination of All Forms of Discrimination Against Women and the ICESCR). The CESCR has also gradually developed its mandate under the reporting procedure of the ICESCR to include quasi-judicial features in order to provide more effective protection for socio-economic rights. See M Craven 'Towards an Unofficial Petition Procedure: A Review on the Role of the UN Committee on Economic, Social and Cultural Rights' in K Drzewicki, C Krause & A Rosas (eds) *Social Rights as Human Rights: A European Challenge* (1994) 91 ('Towards an Unofficial Petition Procedure'). Also see K Arambulo *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects* (1999).

74 In 1995 an Additional Protocol was adopted to the European Social Charter (1961) providing for a system of collective complaints (European Social Charter and its Protocols, ETS 35, 128 and 142). This procedure allows trade unions and employers' organisations as well as certain non-governmental organisations to refer alleged breaches of the Charter to the Committee of Independent Experts, which monitors compliance with the Charter. Case law of the Committee can be accessed on-line at http://www.europarl.eu.int/experts/default_en.htm (accessed 16 May 2003). See also L Samuel *Fundamental Social Rights: Case Law of the European Social Charter* (1997). The Revised European Social Charter, which updates and complements the list of rights protected in the Charter, was opened for signature on 3 May 1996 and entered into force on 1 July 1999 (ETS 163). The Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights (1998) entered into force on 29 November 1999 (OAS Treaty Series 69). This Optional Protocol makes provision for individual petitions to the Inter-American Commission and Inter-American Court on Human Rights in respect of alleged breaches of trade union rights (art 8), and of the right to education (art 13). In 1999, an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women was adopted. It entered into force on 22 December 2000, and provides for both an individual communications procedure and inquiry procedure. In 2001, the UN Commission on Human Rights appointed an independent expert to examine the question of an Optional Protocol to the ICESCR. This was followed, at its 59th session, with the establishment of an open-ended working group with a mandate to consider options regarding the elaboration of an Optional Protocol to the ICESCR. This working group is further mandated to report to the Commission on Human Rights at its 60th session and to make specific recommendations on the Optional Protocol (Commission on Human Rights resolution 2003/18).

Human and Peoples' Rights.[76] There have been relatively few communications under the African Charter dealing specifically with socio-economic rights.[77] However, in 2001, the African Commission handed down its landmark decision, *SERAC v Nigeria*.[78] This communication concerned the destruction of Ogoniland natural resources by an oil consortium (in which a State oil company was a majority shareholder), and the destruction of the homes and livelihoods of the Ogoni communities. The Commission held that the State bears responsibility for protecting its populace against violations of socio-economic rights by both quasi-State and non-State entities. It found that Nigeria had facilitated the destruction of Ogoniland both through its direct actions and by failing to adequately protect the Ogoni people against exploitation by the oil consortium. It accordingly found that Nigeria was in violation of articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter. Significantly, the Commission found that certain socio-economic rights not expressly guaranteed in the Charter such as the rights to housing and food are implicitly protected through other provisions.[79]

Finally, socio-economic rights are also protected in specialised conventions concluded, for example, under the auspices of the International Labour Organisation (ILO) and the United Nations Educational, Scientific and Cultural Organisation.[80]

There are also a plethora of international declarations, resolutions and reports relevant to socio-economic rights.[81]

(d) Comparative law

Section 39(1)*(c)* of the Constitution also provides that the courts 'may consider foreign law' when interpreting the Bill of Rights. Although socio-economic rights are encountered in a number of national Constitutions, it is rare to encounter the South African commitment to a comprehensive range of socio-economic rights married to judicial enforcement. The absence of a commitment to judicial enforcement per

75 See, for example, arts 15 (work), 16 (health), 17 (education), and 18 (protection of the family, women, children, the aged and the disabled).

76 See arts 55-9.

77 For a discussion of the communications dealt with by the African Commission relating to economic, social and cultural rights, see C A Odinkalu 'Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights' in M D Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (2002) 178, 209.

78 Supra.

79 It derived the right to housing from a combined reading of the right to property (art 14), the right to health (art 16), and the right to the protection of the family (art 18(1)). The right to food was derived from the right to life (art 4), the right to health (art 16) and the right to economic, social and cultural development (art 22). For a discussion of this decision, see D M Chirwa 'A Fresh Commitment to Implementing Economic, Social and Cultural Rights in Africa' (2002) 3 (2) *ESR Review* 19.

80 See, for example, ILO Convention 117 concerning Basic Aims and Standards of Social Policy (1962) ILO Conventions and Recommendations Vol I 746; and the Convention Against Discrimination in Education (1960) 429 UNTS 93.

force diminishes their value. However, socio-economic rights are often indirectly protected through the application of various civil and political rights. For example, the right to equality is often employed to extend social benefits to vulnerable groups.[82] Another mechanism developed particularly by the Indian Supreme Court is to draw on directive principles of State policy[83] to give civil and political rights socio-economic content, for example, interpreting the right to life to include the right to a livelihood. Our Constitutional Court has relied on recent Indian jurisprudence in determining the ambit of the right to emergency medical treatment in section 27(3) of the Constitution.[84]

Given the relative novelty of the constitutional protection of socio-economic rights, the South African courts are likely to regard national case law dealing with socio-economic rights as valuable comparative experiences in interpreting our own constitutional provisions. However, they will naturally be mindful of the differing legal and socio-economic context of comparative case law.[85]

33.5 Interpreting the socio-economic rights in sections 26 and 27[86]

81 See, for example, the reports of the Special Rapporteurs appointed by the UN Commission on Human Rights on economic, social and cultural rights, accessible on-line at: http://193.194.138.190/html/menu2/2/liststudrepts.htm (accessed on 16 May 2003). To date the Commission has appointed special rapporteurs on the rights to education, housing, food, and health. The work of the following international agencies is of particular relevance to socio-economic rights: the World Health Organisation, the Food and Agricultural Organisation, and the United Nations Children's Fund. Important UN Declarations relevant to the achievement of basic socio-economic rights include: the Report and Declaration of Alma Ata adopted by the International Conference on Primary Health Care in 1978; the World Declaration on Education for All adopted in 1990 by the World Conference on Education for All; the World Declaration on Nutrition adopted in 1992 by the International Conference on Nutrition; and the Istanbul Declaration on Human Settlements adopted in 1996 by the Second United Nations Conference on Human Settlements (Habitat II).

82 See, for example, the Canadian Supreme Court decision in *Eldridge v British Columbia (Attorney General)* (1997) 151 DLR. (4th) 577 (SCC) (the extension of sign-language interpretation to deaf patients as part of a publicly funded scheme for the provision of medical care). For a commentary on this case, see B Porter 'Beyond *Andrews*: Substantive Equality and Positive Obligations after *Eldridge* and *Vriend*' (Spring 1998) 9 *Constitutional Forum* 71. For a recent Canadian case in which reduced welfare benefits were unsuccessfully challenged under sections 15 (equality) and 7 (security of the person), see *Gosselin v Quebec (Attorney-General)* 2002 SCC 84.

83 These directives are expressly declared to be unenforceable by any court in section 37 of the Indian Constitution .

84 See *Soobramoney* (supra) citing with approval *Paschim Banga Khet Mazdoor Samity & others v State of West Bengal & another* (1996) AIR SC 2426 ('*Paschim*') at para 18. For a critique of the Court's construal of this case, see C Scott & P Alston 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*'s Legacy and *Grootboom*'s Promise' (2000) 16 *SAJHR* 206, 237, 245–248 ('Transnational Context') See also § 33.5*(c)* infra (the socio-economic rights in sections 26(3) and 27(3)).

85 See, generally, S. Liebenberg, 'The Protection of Economic and Social Rights in Domestic Legal Systems' in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd Edition, 2001) 55 ('*Textbook*').

(a) The relation between the first and second subsections of sections 26 and 27

In *Grootboom*, the Court established its approach to the interpretation of section 26. Owing to the similar drafting style, this approach is also applicable to section 27. In the first instance, the Court observed that subsections (1) and (2) 'are related and must be read together'.[87] It held that the aim of the first subsection is to delineate the scope of the right. It applies to 'everyone including children'.[88] This first section also imposes an implied negative duty on the State.[89]

The second subsection 'speaks to the positive obligation imposed upon the State', requiring it 'to devise a comprehensive and workable plan to meet its obligations in terms of the subsection'.[90] The Court has emphasised that this positive duty is qualified in terms of three key elements: *(a)* the obligation to 'take reasonable legislative and other measures'; *(b)* 'to achieve the progressive realisation' of the right; and *(c)* 'within available resources'.[91] The second subsection thus both defines and limits the positive duties on the State.

(b) The negative duty 'to respect' socio-economic rights

The Court held that section 26(1) incorporates 'at the very least' an implied negative obligation 'placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing'.[92] The

phrase, 'preventing or impairing' access to the relevant socio-economic rights is broader than the standard international formulation of the duty to respect socio-economic rights. The international standard engages only a direct or indirect interference with people's enjoyment of socio-economic rights.[93] 'Preventing or impairing' access to a socio-economic right could well cover policies that constitute

86 This section is based primarily on the three major cases handed down by the Constitutional Court, interpreting sections 26 and 27. However, the principles enunciated in these three cases apply generally to socio-economic rights. How these principles engage particular rights will be dealt with in each of the chapters on specific socio-economic rights.

87 *Grootboom* (supra) at para 34.

88 Ibid.

89 See § 33.5*(b)* infra (negative duties).

90 *Grootboom* (supra) at para 38. The UNCESCR has emphasised the duty on the State to formulate and implement a national strategy and plan of action to fulfil socio-economic rights 'on the basis of a participatory and transparent process': GC 4 (supra) at para 12; GC 14 (supra) at para 43*(f).*

91 Ibid.

92 *Grootboom* (supra) at para 34. Later in the judgment, the Court observed that the manner in which the eviction had been carried out in *Grootboom* resulted in a breach of this negative obligation. Ibid at para 88.

93 See § 33.2*(c)*(ii) above (duty to respect, protect, promote and fulfil socio-economic rights).

a barrier to an individual or a group's attempt to secure access to socio-economic rights[94] — rather than the mere interference with their existing access to the rights.[95] Locating this negative obligation in sections 26(1) and 27(1) suggests that the qualifying phrases in the second subsection do not play a role in justifying the impairment of access to the relevant rights at the first stage of constitutional analysis.[96]

In *TAC*, the Court affirmed that the negative duty to refrain from preventing or impairing the relevant socio-economic rights, recognised in *Grootboom*, applied equally to section 27(1).[97] It indicated that this duty was 'relevant' to the challenges to the measures adopted by the government to combat MTCT of HIV.[98] This negative duty presumably related to the first leg of the challenge to Government's MTCT programme, namely, the prohibition of the administration of Nevirapine at public hospitals and clinics outside the research and training sites.[99] Unfortunately, the decision itself does not reflect such analytical precision. The Court's entire analysis was conducted in terms of section 27(2) — the qualified positive duty to take reasonable measures.

One interpretation of the Court's approach in *TAC* is that the negative duties imposed in the first subsections of sections 26 and 27 must be read as being subject to the qualifications in the second subsection. However, this reading runs counter to the widely accepted interpretation amongst commentators that negative violations of the duty to respect socio-economic rights are immediate and not subject to resource-based limitations (at least at the first stage of constitutional analysis). The duty to respect requires only State abstention or restraint.[100] It does

94 A good example would be *TAC*, where government's policy of restricting the use of Nevirapine for the prevention of MTCT of HIV to a limited number of research and training sites prevented many HIV-positive pregnant women from gaining access to the drug at public hospitals and clinics other than these designated sites. Only 10% of the population was catered for in terms of the test-site policy: *TAC* (supra) at para 119.

95 Budlender AJ has held that the disconnection of an existing water supply to consumers by a local authority is *prima facie* a breach of its constitutional duty to respect the right of (existing) access to water, and requires constitutional justification. *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) at para 27.1. See also paras 11–20.

96 See *Grootboom* (supra) at para 38. The Court indicates that the second subsection 'speaks to the *positive obligation* upon the State' [emphasis added]. It further states: 'The second [subsection] establishes and delimits *the scope of the positive obligation* imposed upon the State to promote access to adequate housing [emphasis added].' Ibid at para 21.

97 *TAC* (supra) at para 46.

98 Ibid.

99 As will be recalled the second leg of the challenge related to the State's failure to implement a comprehensive programme for the prevention of MTCT of HIV. See § 33.3 supra (introduction to the cases).

100 See, eg, Craven 'ICESCR' (supra) at 110–11.

not entail positive conduct or an investment of resources by the State. As Pierre de Vos argues, the internal limitations in the second subsections 'should never be interpreted by the courts as an invitation to water down the negative obligation engendered by the rights'.[101] If the courts accepted this characterisation of the limited insulation afforded negative obligations, it would clearly be to the advantage of litigants to frame their cases, where possible, in terms of a negative violation of socio-economic rights in the first subsection of sections 26 and 27.[102]

However, as *TAC* illustrates, the analysis of negative and positive duties are often closely intertwined, so much so that the Court often collapses the distinction between the two obligations. Classifying the facts of particular cases as a breach of the negative obligation under the first subsections of sections 26 and 27, or as a breach of the positive obligations under the second subsection, is thus likely to be contentious. The facts of *TAC* are a good illustration of this point. Was the prohibition on the prescription of Nevirapine to HIV-positive pregnant women throughout the public health sector a breach of the negative duty not to prevent or impair access to health care services, or of the positive duty to ensure reasonable access to health care services?[103] The Court made two orders relating to the first leg of the challenge to Government's prevention of MTCT policy. The first requires Government to 'remove the restrictions', an apparently negative obligation, that prevent Nevirapine from being made available at public hospitals and clinics that were not research and training sites. The second order places a positive duty on Government to '[p]ermit and facilitate' the use of Nevirapine and 'to make it available' where medically indicated.[104] The Court's order suggests that where effective access to the rights requires even a modest allocation of resources by the State, the Court will apply reasonableness review in terms of sections 26(2) and 27(2).[105]

(c) The socio-economic rights in sections 26(3) and 27(3)

Both sections 26 and 27 include a third subsection[106]. Neither of these subsections contain the qualifications or internal limitations found in subsections 26(2) and 27(2).

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101 De Vos 'Pious Wishes' (supra) at 93–4. See also E de Wet 'Recent Developments Concerning the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (1997) 13 *SAJHR* 514, 518.

102 In *Residents of Bon Vista Mansions* (supra), Budlender AJ did not apply the qualifications in s 27(2) to the violations of the negative duty to 'respect' the right of access to water in terms of s 27(1) *(b).* In accordance with the two-stage approach to constitutional interpretation, the burden shifted to the Council to justify the breach in terms of a law of general application. In this case, the applicable law was held to be s 4(3) of the Water Services Act. See paras 20–26.

103 The stage at which a case comes before court will often prove decisive. In *Grootboom,* the pleadings were framed in terms of non-fulfilment of the positive duty to ensure shelter to those who were homeless. However, if the original eviction from the private land had been challenged, the case could have revolved around the negative duty not to impair access to housing in terms of ss 26(1) or 26(3). See *Grootboom* (supra) at paras 88–90.

104 *TAC* (supra), orders 3*(a)* and *(b)*, at para 135.

105 *TAC* (supra) at paras 67–73 and 80–81. See § 33.5*(f)* below (discussion of the reasonableness test).

In *Grootboom*, the Court observed that the negative right that it read into section 26(1) 'is further spelt out in subsection (3) which prohibits arbitrary evictions'.[107] However, this section could also be the source of positive duties on the State to protect the rights in terms of section 7(2). It will be recalled that the duty to protect socio-economic rights requires the State to adopt and implement effective legislative and other measures to restrain third parties from violating the rights of others.[108] These measures would include, for example, legislation protecting people from arbitrary evictions and promoting their tenure security.[109]

The subsection (3) rights could also be the source of positive duties to fulfil the rights, for example, taking measures to establish and maintain sufficient emergency medical facilities in terms of s 27(3). Of course, if the subsection (3) rights were so extended, this positive duty would likely be subject to some kind of reasonableness test.

In *Soobramoney*, the Court held that the applicant's demand to receive renal dialysis treatment at a State hospital did not fall within the scope of the right against the refusal of 'emergency medical treatment' in section 27(3). It observed that the right is cast in negative terms. Its scope is thus restricted to a right to receive immediate remedial treatment that is 'necessary and available'[110] to avert harm in the case of a sudden catastrophe. It does not extend to the provision of ongoing treatment of chronic illnesses for the purpose of prolonging life.[111]

The restriction of the scope of the right to genuine medical emergencies seems appropriate. More problematic is the suggestion that the scope of section 27(3) is confined to *existing* services and facilities providing emergency medical treatment.

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106 Section 26(3) reads: 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.' Section 27(3) reads: 'No one may be refused emergency medical treatment.'

107 *Grootboom* (supra) at para 34.

108 See § 33.2*(c)*(ii) above (the duties to respect, protect, promote and fulfil socio-economic rights). In its GC 7 dealing with forced evictions (supra), the UNCESCR commented that legislation against forced evictions 'is an essential basis upon which to build a system of effective protection.' It went on to comment: 'Such legislation should include measures which *(a)* provide the greatest possible security of tenure to occupiers of houses and land; *(b)* conform with the Covenant; and *(c)* are designed to control strictly the circumstances under which evictions may be carried out? Moreover, in view of the increasing trend in some States towards the Government greatly reducing its responsibilities in the housing sector, States parties must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or bodies'. At para 10.

109 A range of legislation has been adopted to give effect to section 26(3) such as the Extension of Security of Tenure Act 62 of 1997, and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

110 *Soobramoney* (supra) at para 20.

111 According to the Court: 'The purpose of the right seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities'. Ibid.

It remains to be determined to what extent section 27(3) may be relied upon to argue for a positive duty on the State to establish emergency medical facilities where none previously existed. Similarly, it is an open question whether this provision can be relied on to challenge the closure of existing emergency facilities, for example, due to budgetary cutbacks. This possibility is particularly important in circumstances where the closure results in communities being denied any access to emergency medical treatment. A purposive reading of section 27(3) does not support a purely negative interpretation thereof, which limits its scope to a denial of access to *existing* emergency services or facilities.[112]

It is instructive to compare our Court's approach to that of the Indian Supreme Court in *Paschim*.[113] The Indian Supreme Court derived the right to emergency medical treatment from the right to life protected in article 21 of the Indian Constitution. However, the judgment did not confine itself to ordering compensation to the victim for the negative violation of his right. It also focused on the positive measures needed to ensure 'that proper medical facilities are available for dealing with emergency cases'.[114] The order of the Court included far-reaching positive duties on the State to improve emergency health care infrastructure and services. In this regard the Court considered it necessary for 'a time-bound plan for providing these services' to be drawn up and implemented.[115] This case illustrates that positive measures are essential to ensuring the effective enjoyment of the right to emergency medical treatment.[116]

(d) The right of 'access to' socio-economic rights

The Court in *Grootboom* held that there was a significant difference between the right of 'access to adequate housing' in section 26(1), and the right to adequate

112 On the contrary, as Scott & Alston point out, the purely negative interpretation given to s 27(3) would appear to make it a redundant right in the light of the negative duty on the State under s 27(1) to desist from preventing or impairing the right of access to health care services: 'Transnational Context' (supra) at 245–248. As discussed above, this negative duty was recognised in *Grootboom* in respect of s 26(1) (supra) at para 34. The concurring judgment of Sachs J suggests a more expansive interpretation of the values and purposes underlying s 27(3):

> The special attention given by section 27(3) to non-refusal of emergency medical treatment relates to the particular sense of shock to our notions of human solidarity occasioned by the turning away from hospital of people battered and bleeding or of those who fall victim to sudden and unexpected collapse. It provides reassurance to all members of society *that accident and emergency departments will be available* to deal with the unforeseeable catastrophes which could befall any person, *anywhere at any time.*
>
> [Emphasis added, footnotes omitted]; *Soobramoney* (supra) at para 51.

113 See *Soobramoney* (supra) at paras 18 and 20 (court discusses *Paschim*).

114 *Paschim* (supra) at para 15.

115 Ibid at para 16. For more on *Paschim*, see Scott & Alston 'Transnational Context' (supra) at 237, 245–248.

116 It remains to be seen whether the negative duty imposed by section 27(3) also binds private healthcare facilities. At least the negative duty not to turn away someone in need of emergency medical treatment is capable of application to private medical facilities (see s 8(2)).

housing protected in the ICESCR.[117] The significance attached by the Court to the formulation of 'access to' the right is twofold. First, it implies that the scope of the right extends beyond a physical structure:

> It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself.[118]

Second, the Court suggests that 'access to' implies that the State must empower private individuals and organisations to provide housing. Thus the Court states that 'it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing'.[119] As we have seen, the duty to protect socio-economic rights also implies that the State has a duty to take legislative and other measures to ensure that private parties do not prevent or impair vulnerable groups from enjoying access to socio-economic rights.[120] The significance of the differences in the formulation between our constitutional provisions protecting socio-economic rights and the ICESCR is more apparent than real. For example, the UN Committee reads similar obligations relating to enabling and protective strategies to facilitate access to private housing into the right to adequate housing protected in article 11 of the ICESCR.[121]

(e) Do sections 26 and 27 impose minimum core obligations on the State?

One of the most contentious issues in the development of South Africa's jurisprudence on socio-economic rights has been whether sections 26 and 27 impose minimum core obligations on the State. Crisply put, the Court has been asked to decide whether the socio-economic rights provisions in the Constitution entitle

individuals to a basic level of goods and services in particular circumstances or only a right to review the reasonableness of government's social programmes.

(i) Grootboom: Rejecting minimum core as a primary basis for adjudicating socio-economic rights

117 *Grootboom* (supra) at para 35.

118 Ibid. The UNCESCR has interpreted the right to adequate housing in art 11 of the ICESCR to incorporate the aforementioned elements, as well as legal security of tenure, the availability of services, materials, facilities and infrastructure and measures to ensure the affordability of housing. See GC 4 (supra) at para 8.

119 *Grootboom* (supra) at para 35.

120 See § 33.2*(c)*(ii) supra. Erika de Wet suggests that 'access to adequate housing' implies a duty to regulate the private housing sector (eg relations between landlords and tenants) to prevent excessive rents and other unacceptable practices from barring access to adequate housing: E de Wet *The Constitutional Enforceability of Economic and Social Rights* (1996) 118 ('Constitutional Enforceability'). An example of such legislation would be the Rental Housing Act 50 of 1999.

121 See, for example, GC 4 (supra) at paras 8*(e)*, 14, 17.

In *Grootboom*, the *amici curiae*[122] invited the Constitutional Court to endorse an interpretation of section 26 that would impose minimum core obligations on the State. Although the parties to the case had based their arguments on section 28(1) *(c),* the *amici* broadened the issues before the Court to include a consideration of section 26 of the Constitution.[123] They pointed to the unjust results of the reasoning of the Court *a quo*: namely the exclusion of adults without children from shelter in crisis situations while those with children obtained relief. A central concern of the *amici* was to advance an interpretation that would reconcile the qualified rights of 'everyone' to adequate housing in section 26 with the unqualified right of children to shelter in section 28(1)*(c).* They did so by arguing as follows:

1. Section 26(1) read with (2) imposes a minimum core obligation on the State to ensure that those who are truly homeless and in crisis situations receive some rudimentary form of shelter. The State has a burden to demonstrate that it has used all resources at its disposal to satisfy, as a matter of priority, its minimum core obligations. The *amici* derived support for this core obligation from the interpretation by the UNCESCR of the nature of States parties' obligations under the ICESCR.[124]

2. Section 28(1)*(c)* is a specific manifestation of this minimum core obligation, and places it beyond doubt that the basic socio-economic needs of children in especially vulnerable circumstances must be satisfied.

The *amici* located the core within a continuum of positive obligations imposed on the State in section 26(1) read with (2):

> This does not imply that only the 'core' is subject to adjudication, or that meeting the minimum core requirements would satisfy all of the obligations on the State? The 'core' provides a level of minimum compliance to which resources have to be devoted as a matter of priority. This duty clearly has to be balanced with the obligation to put into operation programmes aimed at full realisation of the right, and to move progressively towards full realisation.[125]

122 The *amici* were the South African Human Rights Commission and the Community Law Centre (University of the Western Cape) ('CLC'), represented by Geoff Budlender of the Legal Resources Centre. The written submissions are available on-line at: http://www.communitylawcentre.org.za/Court-Interventions%20/05grootboom-right-to-adequate-housing-the-rights-of-the-child/grootboom_heads_of_arguments.pdf.

123 *Grootboom* (supra) at para 18.

124 See GC 3 (supra) at para 10:

> The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party . . . In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

125 Heads of argument on behalf of the *amici curiae*, 10 September 2002 (supra) at para 27.

The Constitutional Court agreed that the foundational values of our society — human dignity, equality and freedom — are denied to those who lack access to socio-economic rights.[126]

Despite this point of departure, the Court was not prepared to endorse the notion of a minimum core obligation in relation to section 26. It rejected a minimum core largely on the grounds that it would be difficult to determine in the abstract what the minimum threshold should be for the realisation of the rights as the opportunities for fulfilling these rights varied considerably,[127] and needs were diverse.[128] The only role envisaged by the Court for the concept of minimum core obligations was possibly as a factor in assessing the reasonableness of the measures adopted by the State in particular cases (the standard of review ultimately adopted).[129] However, it would be necessary to place sufficient information before a court 'to enable it to determine the minimum core in any given context'.[130] In this particular context, the Court rejected the arguments of the *amici* to the effect that section 26(2) read with section 26(1) imposed a minimum core obligation on the State.

(ii) TAC: no minimum core obligation under section 27(1)

In *TAC,* two of the *amici curiae* adopted a different tack in attempting to persuade the Court to accept the notion of a minimum core.[131] They argued that every individual is entitled to a basic core of health care services comprising the minimum necessary for dignified human existence in terms of section 27(1) read with

the duty to fulfil the rights in section 7(2).[132] According to this line of argument, the core right is not subject to the limitations of resource constraints and progressive realisation under section 27(2). Over and above this minimum core entitlement, the

126 *Grootboom* (supra) at para 23. The Court also wrote that the State's constitutional obligations in relation to housing are 'of fundamental importance to the development of South Africa's new constitutional order'. Ibid at para 1.

127 'These will vary according to factors such as income, unemployment, availability of land and poverty.' Ibid at para 32.

128 '. . . [T]here are those who need land; others need both land and houses; yet others need financial assistance.' Ibid at para 33.

129 The Court wrote: 'There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable.' Ibid at para 33.

130 Ibid at para 33.

131 The CLC (UWC) and IDASA. The submissions of the *amici* are available on-line at: www.community lawcentre.org.za/ser/docs_2002/TAC_MTCT_Case_Heads_of_Arguments.doc.

132 The position of the *amici* was summarised as follows by the Court in *TAC* (supra) at para 28:

> This minimum core might not be easy to define, but includes at least the minimum decencies of life consistent with human dignity. No one should be condemned to a life below the basic level of dignified human existence. The very notion of individual rights presupposes that anyone in that position should be able to obtain relief from a court.

State is obliged, in terms of section 27(2), to take reasonable measures within its available resources to achieve progressively *the full* realisation of the relevant rights. In other words, section 27(2) is not exhaustive of the State's positive duties. Instead, it supplements the unqualified core duty in terms of section 27(1) to ensure basic levels of the relevant rights with a qualified obligation to achieve more extensive levels of enjoyment of the rights over time.[133]

They further argued that a purposive approach to the interpretation of socio-economic rights supported a core entitlement to a basic level of services consistent with human dignity.[134] A purposive approach meant that the courts must attend to the 'practical justiciability' of a right. That is, no provision should be interpreted in a way that makes its enforcement practically impossible. If section 27(2) is interpreted to be exhaustive of the State's positive duties, individual right holders have no direct right to claim anything specific from the State. They can only demand that the State take reasonable measures within its available resources in terms of section 26(2) and 27(2).[135] *Grootboom* made it clear that any cause of action under the latter provisions 'would almost always be a matter of such factual and legal complexity as to be beyond the capacity of individual right holders, even if they have the benefit of legal representation'.[136]

In the context of the case, the *amici* argued that the minimum core of health care services to which everyone is entitled to have access includes the provision of Nevirapine to pregnant women with HIV and to their newborn babies. The costs are relatively minor, the potential benefits to mother and child overwhelming.

Denying access to the drug to those who are too poor to afford it would be a failure to respect their dignity and intrinsic worth as human beings.[137]

The Constitutional Court rejected this entire line of argument. It held that neither the drafting of the relevant sections, nor a purposive approach to the interpretation of socio-economic rights supported the interpretation advanced by the *amici*. It reaffirmed that section 27(2) defines and limits the full extent of the positive obligations imposed by section 27(1).[138] There is no separate positive right under section 27(1).[139] This means that *all* positive obligations on the State from the most

133 Although the *amici* agreed that the two subsections of s 27 must be read together, they argued that they should 'not be conflated in a way that deprives subsection (1) of its normative content and reduces it to a mere definition used in the description of the duties imposed on the State in subsection (2).' [Submissions of the CLC and IDASA, April 2003, paras 14 and 23.]

134 Ibid at paras 30–31.

135 Ibid at para 26.

136 Ibid at para 31.

137 *Grootboom* (supra) at para 60. They also referred in support of the above to the core obligations identified by the UNCESCR in respect the right to health under art 12 of the ICESCR. See GC 14 (supra) at paras 43–4.

138 Thus the reference to 'this right' in s 26(2) and 'each of these rights' in s 27(2) refers to the rights in ss 26(1) and 27(1) respectively. See *TAC* (supra) at paras 29–31.

basic to more extensive levels of fulfilment will be subject to the qualifications in the second subsections of sections 26 and 27.[140]

According to the Court, a purposive reading of section 27 'does not lead to any other conclusion'. It is simply 'impossible to give everyone access even to a 'core' service immediately'.[141] All that can be expected from the State 'is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis'.[142] The Court confirmed the approach adopted in *Grootboom.* The minimum core might be relevant to the assessment of the reasonableness of the measures adopted by the State in particular cases, but did not constitute 'a self-standing right conferred on everyone under section 26(1)'.[143]

The Court was at pains to demonstrate that its interpretation of these provisions as developed in *Grootboom* was consistent with the institutional capabilities and functions of courts in a constitutional democracy. It wrote that courts are not 'institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum core standards?should be'.[144] Courts are also 'ill-suited to adjudicate upon issues where court orders could have

multiple social and economic consequences for the community'.[145] While determinations of reasonableness may have budgetary implications, they were not directly aimed at 'rearranging budgets'.[146]

(iii) Critiques of the Court's approach

The Court's rejection of the notion of minimum core obligations has attracted a substantial amount of criticism.[147]

Theunis Roux criticises the Court's failure to require the State to *prioritise* the basic needs of vulnerable groups in accordance with the approach of the UNCESCR

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139 Ibid at para 39.

140 According to the Court:

> Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the State to 'respect, protect and fulfil' such rights. The rights conferred by sections 26(1) and 27(1) are to have 'access' to the services that the State is obliged to provide in terms of sections 26(2) and 27(2). Ibid at para 39.

141 Ibid at para 35.

142 Ibid.

143 Ibid at para 34 referring with approval to *Grootboom* (supra) at para 33.

144 Ibid at para 37

145 *TAC* (supra) at para 38.

146 Ibid.

in relation to minimum core obligations.[148] He reads this approach as requiring the State to devote *all* the resources as its disposal *first* to satisfy its minimum core obligations. He thus argues that the Court failed to engage in 'priority-setting' in the strict sense of requiring the basic needs of vulnerable groups to be met before 'expending scarce resources on relatively privileged groups (temporal prioritisation)'.[149] Although the Court held that a government programme that did not cater for those in desperate need would fail the constitutional standard of reasonableness[150], Roux argues that the required standard is 'merely *inclusion*':

> Nothing is said about how the State ought to apportion its efforts between competing significant segments or, more importantly, between significant and not so significant segments of society.[151]

In sum, provided the State programme caters in some way for those in desperate need and a reasonable proportion of resources is made available to this

group, the programme will pass the reasonableness test even though the overall programme may provide greater benefits to more advantaged social groups.[152]

David Bilchitz takes issue with the Court's characterisation of the minimum core obligation in *Grootboom* as involving complex questions as to the definition of the obligation in the context of the diverse needs and opportunities for the enjoyment of socio-economic rights by different groups. He argues the Court fails to distinguish between 'the invariant, universal standard' that must be met in order for an obligation to be fulfilled, and the varied particular methods that can be adopted to fulfil this standard, and thus comply with a constitutional obligation.[153] He argues that the minimum core obligation represents 'the standard of socio-economic provision necessary to meet people's basic needs'. These needs consist of 'the

147 Prior to the *Grootboom* judgment, a number of scholars had argued in favour of an implied minimum core obligation in sections 26 and 27. See Scott & Maklem 'Ropes of Sand' (supra) at 77; De Vos 'Pious Wishes' (supra) at 97; G Van Buren 'Alleviating Poverty through the Constitutional Court' (1999) 15 *SAJHR* 52, 57; Scott & Alston 'Transnational Context' (supra) at 250. For an argument against the concept of a minimum core obligation, see De Wet 'Constitutional Enforceability' (supra) at 105–117.

148 T Roux 'Understanding *Grootboom* – A Response to Cass R Sunstein' (2002) 12 *Constitutional Forum* 41, 47 ('Understanding *Grootboom*'). See also C Sunstein 'Social and Economic Rights? Lessons from South Africa' (2001) 11 *Constitutional Forum* 123. Sunstein praises the Court's approach to the interpretation of socio-economic rights as developed in *Grootboom* for requiring Government to pay 'close attention to the human interests at stake, and sensible priority-setting, but without mandating protection for each person whose socio-economic needs are at risk'. Ibid at 123.

149 Roux 'Understanding *Grootboom*' (supra) at 46.

150 *Grootboom* (supra) at paras 44, 56, 66 and 68.

151 at 49.

152 Roux illustrates this point through a case study of the government's new land distribution policy (as amended in June 2000) which, it is argued, will have the inevitable consequence 'that resources will be diverted away from funding grants to the rural poor towards funding grants to the relatively well off'. Roux 'Understanding *Grootboom*' (supra) at 47-50.

universal preconditions necessary for human survival'.[154] The obligation to ensure that these needs are met thus represents the universal constitutional standard to which the State must conform. What varies is the ability of different groups in society to access these needs, and thus the measures required of the State to fulfil its obligations in concrete cases. Vulnerable groups 'who are less able to meet their needs from their own resources . . . require greater assistance from the State'.[155] In assessing whether there has been a violation of the minimum core obligation, the actual circumstances of the group affected is thus a relevant factor.[156] Vulnerable groups experiencing severe socio-economic deprivation would have a directly enforceable right to a basic level of material assistance from the State.[157]

Bilchitz views the minimum core obligation as one of two components of the duties imposed by the phrase, 'progressive realisation', in the second subsections of sections 26 and 27. This component requires the State to prioritise the fulfilment of the urgent survival needs of people. The second component refers to the more maximal interest people have in being able to live in 'an environment that is

conducive to their flourishing and development on physical, emotional and mental levels'.[158] In respect of the latter interest, the State's duty is to improve gradually over time the 'adequacy' (quality) of the basic standard of housing which was guaranteed to all under the first component.

Expanding on this interpretation in a later article, Bilchitz contends that the right in question gives rise to two obligations: 'the first is to realise a certain minimum level of provision without delay, and the second is to improve the level of provision beyond this lower threshold by taking reasonable measures to meet a higher threshold that must be attained if the right is to be fully realised'.[159]

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153 D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance' (2002) 118 *SALJ* 484, 487 ('Teeth').

154 Ibid at 488. He broadens this slightly (at 490) in his discussion of the basic interests that people have in housing to: '. . . an interest in being free from threats to one's survival, being free from severe physical suffering, and not being exposed to serious health risks that impair one's ability to act'.

155 Ibid at 489.

156 This is consistent with the interpretation of the UNCESCR of the duty to fulfil socio-economic rights: see GC 12 (supra) at para 15, and GC 14 (supra) at para 37. Another example of where the vulnerable status of the group in question is a factor in determining whether there has been a violation of a constitutional right is the contextual enquiry into whether discrimination is unfair in the circumstances. See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 112; *Harksen v Lane* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at paras 50–53.

157 See Scott & Macklem 'Ropes of Sand' (supra) at 77: 'In effect, a priority of attention is mandated for people who would not be able to meet the most basic of health, nutrition and housing needs without direct government assistance. People who would die or suffer serious consequences for their health if no assistance were immediately forthcoming fit in this category.'

158 Bilchitz 'Teeth' (supra) at para 490.

Finally, he takes issue with the Court's contention that a purposive reading of sections 26 and 27 does not support the minimum core obligation due to the impossibility of its fulfilment. According to Bilchitz, the minimum core approach 'is a means to specifying priorities'.[160] It requires the State to give priority to meeting the urgent survival needs of people:

> The approach thus does not expect an overnight solution to the problem of poverty; rather, it specifies a method by which the problem is to be dealt with. This method involves initially raising everyone to a position in which they have sufficient resources to survive and then developing the quality of the services and goods to which they are entitled to have access as resources permit.[161]

Bilchitz points out that the approach developed by the UNCESCR in GC 3 is not an absolute standard, but allows for a situation where fulfilment of core obligations may be genuinely impossible.[162] It places a burden on the State to show that it has marshalled 'all resources that are at its disposition in an effort to satisfy, as a matter of priority,' its minimum core obligations.[163] In other words, the State bears a heavy, but not impossible, burden of showing that resources are demonstrably inadequate to meet these needs.[164] In our own constitutional context, this can occur at the first stage of constitutional inquiry if the proviso in sections 26(2) and 27(2), 'within available resources', is read to apply also to minimum core obligations.[165] The State also has the possibility of relying on the general

limitation clause in section 36(1) to show that its failure to satisfy minimum core obligations is due to genuine lack of resources or capacity. In contrast to the approach of the UNCESCR, requiring proof from the State of its inability to fulfil minimum core obligations, the Constitutional Court simply accepts, without requiring

159 D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1 at 11 ('Laying the Foundations'*)*. He furthermore argues that the notion of a higher degree of protection for 'core' interests is not unique to the field of socio-economic rights, but also has application in the area of a civil right such as the right to privacy. Ibid at 14. This bears similarities with the argument presented by the *amici* in *Grootboom*. See § 33.5*(e)*(i) supra.

160 Bilchitz 'Laying the Foundations' (supra) at 15.

161 Ibid at 16.

162 Indeed, Bilchitz also criticises as overly rigid a later General Comment of the Committee, which states that 'a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations which are non-derogable'. GC 14 (supra) at para 47. See Bilchitz 'Laying the Foundations' (supra) at 17.

163 GC 3 (supra) at para 10.

164 In this context, it is clearly inadequate for the Court to confine its inquiry to existing budgetary allocations. These might have been made without proper consideration of constitutional priorities.

165 This approach accords more with the one adopted by the *amici* in *Grootboom*. Locating the minimum core in s 27(1) as argued by the *amici* in *TAC*, suggests that justification could only take place in terms of s 36.

evidence, that it would be impossible to give everyone access to basic services immediately.[166]

It could be argued that the Court has implicitly accepted the notion of minimum core through the component of the reasonableness test that requires short-term relief for those in desperate need.[167] However, an essential difference between the minimum core approach and the reasonableness test as developed in *Grootboom* is that reasonableness review does not appear to confer a right upon any individual to claim concrete goods and services from the State.[168] The right recognised in *Grootboom* is a right to demand that the State adopt a reasonable programme. Such a programme must include a component that ensures relief for a significant number of desperate people, although not all of them need receive it immediately.[169]

This distinction has practical implications for poor individuals or communities who want to use litigation as a tool to gain access to socio-economic rights. It means that they will not receive any direct individual relief, although they may indirectly benefit from a positive order handed down by the courts. As Scott and Alston point out, individual claimants 'will understandably wish to see something geared more to their own situation and are unlikely to wish to bring constitutional cases purely to serve as constitutional triggers for general policy processes'.[170]

Furthermore, individual claimants bear a heavy evidentiary burden to show that government's programmes are unreasonable. They will have to review a wide range of measures adopted by the State and to assess their reasonableness in the light of its available resources. In the context of section 26, litigants will

have to consider not only all aspects of the national housing programme, but also a wide range of social programmes adopted by the State.[171]

In contrast, under the minimum core approach, the burden of proof is in favour of the individual litigant seeking relief. The individual will establish a *prima facie* violation once she shows (1) that she lacks access to basic subsistence needs; and

166 In a country such as South Africa with its highly unequal distribution of income and resources, the State would be hard pressed to demonstrate that it is unable to afford ensuring that each person has essential survival levels of socio-economic rights. In fact it is arguable that State policy is committed to guaranteeing a core of certain basic services such as water to each person. See, for example, J de Visser, E Cottle & J Mettler 'Realising the Right of Access to Water: Pipe Dream or Watershed?' (2003) 7 *Law, Democracy & Development* 27, 33.

167 Bilchitz claims that that Yacoob J succeeds in reaching the conclusion he does 'by implicitly building the idea of a minimum core obligation into the notion of reasonableness'. Bilchitz 'Teeth' (supra) at 498.

168 See *Grootboom* (supra) at para 95: 'Neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand'. See also *TAC* (*supra*) at para 125. For a discussion of the implications of the Court's rejection of the concept of minimum core, see S Liebenberg 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?' 2002 6 *Law Democracy & Development* 159.

169 See *Grootboom* (supra) at paras 65 and 68, and the critique by Bilchitz 'Teeth' (supra) at 499: 'This is one of the prime reasons for the protection of socio-economic entitlements in the form of rights. Collective goals cannot outweigh protections for the most basic interests of individuals.'

170 Scott & Alston 'Transnational Context' (supra) at 254–255.

(2) that these basic needs (eg food) are neither physically nor economically accessible to her. The State then has the burden of showing that it has marshalled all available resources to satisfy its core obligations as a matter of priority.[172] In effect, it would be required to show that resource constraints make it impossible to provide access to essential levels of socio-economic rights for those who are unable by themselves to secure such access.[173]

There are ample constitutional mechanisms to ensure that the minimum core does not impose unrealistic demands on the State. First the State may advance convincing reasons as to why it should not be required to fulfil the minimum core in the circumstances raised by a case. If the minimum core obligation is derived from the second subsections of sections 26 and 27, the State can rely on a genuine shortage of resources to show that it is impossible to fulfil this core obligation. As noted, the State also has a further opportunity in terms of section 36 to justify a limitation to its obligation to fulfil core entitlements.

Moreover, an acceptance of the concept of minimum core obligations does not require the Court to define in abstract the basket of goods and services that must be provided. Instead. it could define the general principles underlying the concept of minimum core obligations in relation to socio-economic rights and apply these on a case-by-case basis. This approach also implies that a Court need not prescribe in exacting detail, in every case, the precise services that must be rendered to remedy the violation. A Court could do what the High Court did in *Grootboom*. It could indicate the broad parameters of what is required to remedy the breach, while leaving a margin of discretion to the State to decide on the most appropriate means of fulfilling its core obligations.[174] In a situation of a community facing starvation. this discretion would allow the State to choose between, for example, cash grants, food vouchers or the direct delivery of food parcels to the affected community.[175]

(iv) A future role for minimum core obligations?

As we have seen, the only role envisaged by the Court for minimum core obligations is as a factor in assessing the reasonableness of government measures.[176] This

171 Among the measures that the Court indicated would be relevant in promoting access to housing were steps 'to make the rural areas of our country more viable so as to limit the inexorable migration of people from rural to urban areas in search of jobs': *Grootboom* (supra) at para 34. It also indicated that social assistance programmes put in place under s 27 'would be relevant to the State's obligations in respect of other socio-economic rights'. Ibid at para 36.

172 GC 3 (supra) at para 10.

173 See, for example, GC 12 (supra) at para 17.

174 The High Court did this through the medium of a supervisory order: *Grootboom* (supra) 291– 294.

175 Both s 38 and s 172(1)*(b)* vest the courts with a wide discretion to formulate appropriate remedies and to make any order that is 'just and equitable'. Practical obstacles to providing immediate relief can thus be dealt with through formulating an appropriately flexible remedy, eg a supervisory order. For a discussion see Bilchitz of the application of a temporary suspension order in the context of minimum core obligations, 'Laying the Foundations' (supra) at 18–19.

176 *Grootboom* (supra) at para 33. See also *TAC* (supra) at para 34.

possible role of the minimum core does not relieve individuals of the formidable burden of establishing the unreasonableness of the State's social programmes, nor does it necessarily entitle them to direct individual relief. Nonetheless it does provide an important opportunity for asserting minimum core obligations as essential components of a reasonable government programme.

Supporters of the minimum core obligation could also argue that a failure to fulfil minimum core socio-economic rights obligations renders a government programme *prima facie* unreasonable. The burden would then shift to the State to show why a failure to fulfil core obligations is not unreasonable. This would go some way to improving the practical justiciability of socio-economic rights for disadvantaged groups.

(f) Opting for reasonableness review

(i) Soobramoney: The standard of rationality

Having dismissed the appellant's claim under section 27(3), the Court in *Soobramoney* proceeded to consider his claim under section 27(1)*(a),* read with (2).[177] The Court indicated that a large margin of discretion would be given to the setting of budgetary priorities by the provincial government, and the 'difficult decisions' made by the hospital administrators in the context of limited resources:

> A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibilities it is to deal with such matters.[178]

It held that there was no suggestion that the guidelines drawn up by the hospital authorities for determining which patients qualified for dialysis treatment were unreasonable, or that they had not been applied 'fairly and rationally' in the applicant's case.[179] The Court thus declined to order the provision of dialysis treatment.

This result heralded the Court's adoption of a model of reasonableness review in respect of socio-economic rights' claims under section 27 (and, by implication, section 26).[180] However, the real dispute was not whether the medical authorities

177 *Soobramoney* (supra) at para 22.

178 *Soobramoney* (supra) at para 29.

179 Ibid at para 25.

180 This model of review is similar to the one proposed by Etienne Mureinik in his seminal article in the *SAJHR* arguing for the inclusion of socio-economic rights in the Bill of Rights. See: 'Beyond a Charter of Luxuries' (supra) at 472-474. According to Danie Brand, this amounts to a 'means-end justificatory model' which asks the basic question whether a particular policy or programme can be justified and 'it will be justified if it is reasonably related to the constitutionally prescribed goal of providing access to' the various socio-economic rights. Within this justificatory model, the Court may use a different 'standard of scrutiny' to interrogate the link between the policy measure and the goal. Thus, in *Soobramoney,* he argues that the standard used was one of simple rationality: the court 'simply asked whether the policy was rationally conceived and applied in good faith.' D Brand 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence or "What are Socio-Economic Rights for?"' in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2004) 33 at 40.

had devised rational guidelines for rationing access to the dialysis treatment that was currently available, but whether sufficient funds had been allocated to provide dialysis treatment to those persons in the appellant's position.[181] A key factor in the Court's reasoning was clearly the degree of interference in social and budgetary policies that an order requiring the State to provide dialysis treatment to the applicant and to all other persons similarly situated would require. The principle would have to be applied not only to all persons suffering from chronic renal failure, but also 'to all patients claiming access to expensive medical treatment or expensive drugs'.[182] This in turn would require the health budget 'to be dramatically increased to the prejudice of other needs which the State has to meet'.[183] While indicating that a wide latitude would be afforded to the State in setting its social and budgetary priorities, scant guidance was provided on the standard of 'rationality review' to be applied and the nature of the circumstances in which the Court would be prepared to intervene.[184] While *Soobramoney* judgment was critiqued for the thinness of its analysis, few took issue with the ultimate finding of the Court that there was no universal right to kidney dialysis treatment under present conditions.[185]

(ii) Grootboom: Developing the principles of 'reasonableness review

The High Court in *Grootboom* held that there was no violation of section 26. According to the court, the respondents had produced 'clear evidence' of a 'rational' housing programme 'designed to solve a pressing problem in the context of scarce financial resources'.[186] It went on, however, to decide in favour of the applicants on the basis of the unqualified right of children to shelter in section 28(1)*(c)*.[187]

On appeal, the Constitutional Court decided the case on the basis of section 26. Having rejected the notion of a minimum core obligation, the Constitutional Court pronounced that the relevant inquiry with regard to the positive duties imposed by section 26 is whether the legislative and other measures taken by the State to realise the rights are reasonable.[188] It emphasised that reasonableness

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181 *Soobramony* (supra) at para 23.

182 Ibid at para 28.

183 Ibid.

184 For, example, classic rationality review generally requires that the Court do no more than inquire whether the relevant policy or legislation bears a rational connection to a legitimate government purpose. This is the standard applied in relation to the first stage of the discrimination inquiry under section 9(1) of the Final Constitution: see *Harksen v Lane* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at paras 50-53.

185 See, for example: D Moellendorf 'Reasoning about Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims' (1998) 14 *SAJHR* 327 ('Reasoning about Resources'); Scott & Alston 'Transnational Context' (supra) at 233-256. For a discussion of the application of the right to life in the *Soobramoney* judgment, see M Pieterse 'A Different Shade of Red: Socio-Economic Dimensions of the Right to Life in South Africa' (1999) 15 *SAJHR* 372, 380–385.

186 *Grootboom I* (supra) at 286H–I. The High Court relied on the *Soobramoney* judgment in support of its application of the rationality review standard.

187 See § 33.7 infra (on children's socio-economic rights).

review does not entail a court substituting its view as to what constitutes a reasonable measure to realise socio-economic rights. Government has the latitude to adopt any particular policy choice it deems fit provided it meets the requirement of reasonableness.[189]

The Court proceeded to flesh out the standard of reasonableness to be applied in assessing the State's compliance with its positive obligations to realise socio-economic rights. It identified a number of factors that it would consider in reviewing the reasonableness of a government programme in the context of socio-economic rights:

1. The programme must be a comprehensive and co-ordinated one, which clearly allocates responsibilities and tasks to the different spheres of government and ensures that 'the appropriate financial and human resources are available'.[190] Although each sphere of government is responsible for implementing parts of the programme, national government has the overarching responsibility for ensuring that the programme is adequate to meeting the State's constitutional obligations.[191]

2. The programme 'must be capable of facilitating the realisation of the right'.[192]

3. Policies and programmes must be reasonable 'both in their conception and their implementation'.[193]

4. The programme must be 'balanced and flexible and make appropriate provision for attention to housing crises and to short-, medium- and long-term needs'. A reasonable programme cannot exclude 'a significant segment of society'.[194]

5. The programme must include a component that responds to the urgent needs of those in desperate situations. Thus a reasonable programme, even though it is statistically successful in improving access to housing, cannot 'leave out of

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188 *Grootboom* (supra) at para 33.

189 The *Court* wrote:

> A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met. *Grootboom* (supra) at para 41.

190 Ibid at para 39.

191 Ibid at para 40.

192 Ibid at para 41.

193 Ibid at para 42.

194 Ibid at para 43.

account the degree and extent of the denial of the right they endeavour to realise'.[195] Elsewhere in the judgment more detail is provided on what this component requires. Thus the State must 'plan, budget and monitor the fulfilment of immediate needs and the management of crises'.[196] According to the Court:

> This must ensure that *a significant number* of desperate people in need are afforded relief, though not all of them need receive it immediately.[197]

The Court justified this central component of a reasonable programme on the basis that we value human beings and the Constitution requires us to treat everyone with 'care and concern'.[198] A society based on human dignity, equality and freedom 'must seek to ensure that the basic necessities of life are provided to all'.[199]

It was on the basis of this final criterion that the government's housing programme was faulted. After a comprehensive evaluation of the State's housing programme, the Court concluded that it represented 'a major achievement'[200] and 'a systematic approach to a pressing social need'.[201] However, it failed to meet the Constitutional test of reasonableness in that it was focused only on medium- and long-term objectives and did not include measures to provide short-term relief to those in desperate need.[202] The Court declared that the State housing programme did not comply with section 26(2):

> . . . in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.[203]

The Court did not leave the State entirely to its own devices in designing a suitable remedy. It made express reference to the Accelerated Managed Land Settlement Programme (which had been drafted, but not implemented by the Cape Metropolitan

195 Ibid at para 44.

196 Ibid at para 68.

197 *Grootboom* (supra) at 68.

198 Ibid at para 44.

199 Ibid. See also para 83 of the judgment on the relationship between human dignity and assessing the reasonableness of the State's conduct in terms of s 26.

200 Ibid at para 53.

201 Ibid at para 54.

202 Ibid at para 69.

203 Ibid at para 99 (the order, 2*(c)*).

Council). It was cited as the kind of measure that would be deemed to be appropriate for this type of short-term relief.[204]

(iii) TAC: Applying the 'reasonableness' test

The TAC and the other applicants alleged that the State programme for preventing MTCT transmission of HIV was unreasonable in two respects. In the first place, it unreasonably prohibited the administration of Nevirapine at public hospitals and clinics outside the limited number of research and training sites (two in each province). Secondly, the State had failed to formulate and implement a comprehensive national programme to prevent or reduce MTCT of HIV. In granting the orders sought by the applicant in substantially the terms sought, the High Court (Transvaal Provincial Division) followed the reasoning in *Grootboom*.[205]

The High Court (per Botha J) held that the policy prohibiting the use of Nevirapine outside the 18 pilot sites in the public health sector constituted 'an unjustifiable barrier to the progressive realisation of the right to health care'.[206] It breached the negative duty to desist from impairing the right to health care.[207] The High Court further held that the State's current MTCT-prevention programme failed the reasonableness test as it did not constitute a comprehensive and co-ordinated plan to prevent or reduce the MTCT of HIV. The State was not prepared to give an 'unqualified commitment to reach the rest of the population in any given time or at any given rate'.[208] According to Botha J, a programme that is 'open-ended and that leaves everything for the future cannot be said to be coherent, progressive and purposeful'.[209]

A bold feature of the judgment is the rejection of the State's arguments that the availability of resources would determine whether there would be a further roll out of a national MTCT-prevention programme. According to Botha J, the obligation to formulate a coherent plan to roll out such a national programme existed independently of the availability of resources. Only once such a plan existed could 'will it be possible to obtain the further resources that are required for a nationwide programme, whether in the form of a reorganisation of priorities or by means of further budgetary allocations'.[210] The availability of resources could only have an

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204 Ibid at paras 99 (the order, 2*(b)*). See also paras 60–61, and 67.

205 *Treatment Action Campaign & others v Minister of Health & others* 2002 (4) BCLR 356 (T) ('*TAC (High Court*)').

206 *TAC High Court* (supra) at 384E.

207 Ibid. In this respect the Court applied the negative duties recognised in *Grootboom* (supra) at para 34. See § 33.5*(b)* above (the negative duty 'to respect' socio-economic rights).

208 *TAC High Court* (supra) at 385D–E.

209 Ibid at 385F.

210 Ibid at 386C.

influence on *the pace* of the extension of the MTCT programme, not on the obligation to devise and implement such a plan.[211]

On appeal, the Constitutional Court considered and rejected the range of reasons advanced by the government for restricting the administration of Nevirapine to the research and training sites.[212] These justifications ranged from doubts about the efficacy of Nevirapine where 'a comprehensive package of care' could not be made available[213], the development of resistance to the drug, the drug's safety, to technical and administrative capacity and budgetary concerns.[214]

The Court found that the policy of restricting the provision of Nevirapine impacted seriously on a significant group of HIV-positive mothers and children who did not have access to the research sites. As they were too poor to purchase Nevirapine, they were effectively deprived of access to a 'simple, cheap and

potentially life-saving medical intervention'.[215] This restrictive policy was unreasonable because it was inflexible[216] and did not take into account the needs of a particularly vulnerable group.[217] The Court also held that it was implicit that 'a policy of waiting for a protracted period before taking a decision on the use of Nevirapine beyond the research and training sites' was also unreasonable.[218] Government was thus ordered 'without delay' to 'remove the restrictions' that prevent the use of Nevirapine in the reduction of MTCT of HIV at public hospitals and clinics, and to 'permit and facilitate' its use.[219] It was specifically ordered to make the drug available for this purpose at hospitals and clinics where this is medically indicated, 'which shall if necessary include that the mother concerned has been appropriately tested and counselled'.[220]

211 Ibid at 386B–C.

212 *TAC* (supra) at paras 48–66.

213 This package would include counselling, provision of formula milk as a substitute for breastfeeding, antibiotic treatment, vitamin supplements, and monitoring, during bottle-feeding, the mother and children who have received Nevirapine. Ibid at para 49.

214 Ibid at paras 51–66.

215 *TAC* (supra) at para 73.

216 Ibid at para 80.

217 The Court considered poverty to be an important indicator of the vulnerability of the group in question: 'There is a difference in the positions of those who can afford to pay for services and those who cannot. State policy must take account of these differences.' Ibid at para 70.

218 Ibid at para 81.

219 Ibid at para 135 (orders 3*(a)* and 3*(b)*).

220 Ibid.

In relation to the second prong of the attack on government policy (the failure to adopt and implement a comprehensive MTCT-prevention plan), the Court held that the rigidity of government's policy regarding the restrictive use of Nevirapine affected its whole policy on MTCT of HIV.[221] At the time of the commencement of the proceedings a comprehensive policy for testing and counselling HIV-positive pregnant women was in place, but it was not implemented uniformly.[222] The Court held that the training of counsellors should now include training for counselling on the use of Nevirapine. In addition, government was ordered to take reasonable measures to extend the testing and counselling facilities at public hospitals and clinics throughout the public health sector 'to facilitate and expedite' the use of Nevirapine for the purposes of reducing the risk of MTCT of HIV.[223]

Unlike the High Court, the Constitutional Court declined to make an order relating to the provision of formula milk. In the Court's view it raised 'complex issues', and there was not sufficient evidence to justify an order that formula feed 'be made available by the government on request and without charge in every case'.[224]

A welcome feature of the judgment is the addition of the requirement of transparency to the constitutional requirement of reasonableness.[225] It held that

the enormous challenge that HIV/AIDS poses to all sectors of society could only be met if there is 'proper communication, especially by government'. In order for a programme to be 'implemented optimally' its contents must be made known to all stakeholders. In this context, the Court regretted the fact that national government and six provinces had not disclosed any programme to extend access to Nevirapine treatment to prevent MTCT of HIV.[226]

The *TAC* case illustrates how the *Grootboom* jurisprudence of reasonableness review can be used strategically to support a broader campaign to advance access to socio-economic rights. The TAC had the organisational resources and capacity to demonstrate the unreasonableness of government's policies relating to MTCT of HIV. They were able to produce an impressive array of expert medical, public health and economics evidence to support their case.

(iv) Evaluating 'reasonableness review'

221 Ibid at paras 82, 95.

222 Ibid at para 90.

223 Ibid at paras 95 and 135 (orders 3*(c)* and *(d)*).

224 Ibid at para 128. The complexities referred to include the risks to the infant of using formula milk when the mother does not have easy access to clean water or the ability to bottle feed safely because of her personal circumstances.

225 The Court reasoned 'Indeed, for a public programme such as this to meet the constitutional requirement of reasonableness, its contents must be known appropriately.' Ibid at para 123.

226 *TAC* (supra) at para 123.

Theunis Roux has observed that the standard of reasonableness review developed by the Court in *Grootboom,* although it incorporates 'means-end rationality' as a minimum requirement, is a stricter standard.[227] Although the Court will not require Government to adopt a particular social programme to give effect to socio-economic rights, it will embark on a substantive review of the measures taken by the State. Thus the Court will evaluate whether the programme is capable of facilitating the realisation of the right, whether it is both reasonably formulated and implemented, and whether it includes reasonable measures to provide immediate relief for those in desperate circumstances.[228]

In both *Grootboom* and *TAC* the outcome of the Court's exercise of its review function was that the State was required to extend social benefits to groups that were excluded from the relevant housing and health programmes. In *Grootboom*, the State's housing programme had to be modified to include reasonable measures to provide short-term relief for those in desperate need of land and housing. The State was opposed to making provision for people in desperate need on the basis that it 'would detract significantly from integrated housing development as

defined in the [Housing] Act'.[229] In *TAC*, the State was required to take reasonable measures to expand a programme reducing MTCT of HIV, including the provision of Nevirapine, throughout the public health sector. As a result, the government had to amend its firmly held policy of confining the provision of Nevirapine to the limited number of test sites catering for only 10% of all births in the public sector.[230]

According to Roux, the reasonableness test developed by the Court in *Grootboom* 'undoubtedly requires the Court to substitute its view of what the Constitution requires — the inclusion of the excluded group — for that of the political branches'.[231] However, he goes on to observe that the test stops short 'of a full-blown proportionality test':

> The Court's assessment is thus not directed at such issues as whether the State might have adopted less restrictive measures in pursuing the programme in question, but at whether the claimant group has *an equal or better claim* to inclusion relative to other groups that *have* been catered to.[232]

227 T Roux 'Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court' (2003) 10 *Democratisation* (forthcoming) ('Legitimating Transformation').

228 Danie Brand observes that taken together the factors referred to by the Court in *Grootboom* for assessing the reasonableness of a government programme require government to show 'a much stronger link between the policy at issue and its constitutionally mandated goal than in *Soobramoney*'. It narrows 'the range of policy options that it would be legitimate for government to choose from and thinks about the relative efficiency of different policy options'. Brand 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence' (supra) at 41.

229 *Grootboom* (supra) at para 64.

230 *TAC* (supra) at para 62.

231 Roux 'Legitimating Transformation' (supra) at 7.

In this way, Roux claims that the Court has struck a skilful balance in its socio-economic rights jurisprudence between the deferential standard of means-end rationality, and the more intrusive standard of a full-blown proportionality test.[233]

It is debatable whether the description of 'relative inclusion' best describes the Court's jurisprudence in relation to the positive duties imposed by sections 26 and 27. It suggests that the State has already adopted a policy to extend a particular socio-economic right, which includes some, but excludes others. This is consistent with the facts of *Grootboom* where the State had adopted a housing policy geared towards advancing access to housing for all in the medium- to long-term. The programme was faulted on the basis that it excluded those in desperate need from short-term relief. However, in *TAC*, an important element of the applicant's claim was that the government had not adopted a comprehensive national programme to prevent or reduce MTCT of HIV.[234] The relief sought was not solely directed at the inclusion of an excluded group from an otherwise coherent policy, but rather that Government adopt such a policy. This is in effect what the Court ordered the government to do, although it stopped short of requiring all elements of a comprehensive MTCT-prevention programme as requested by the TAC.[235]

One can envisage any number of situations where the central issue will not be the exclusion of significant groups from an otherwise coherent social programme, but rather the failure of the State to adopt such a programme. In these cases, the aim of litigation will be to seek to compel Government to initiate such a programme. It is important to bear in mind that this does not automatically entail the Court prescribing particular policy choices to Government. It has remedial mechanisms at its disposal to allow Government an appropriate measure of discretion in its choice of policies to remedy the unconstitutionality.[236]

Consistent with the paradigm of reasonableness review, the *TAC* Court cautioned that its findings did not mean 'that everyone can immediately claim access to such treatment'.[237] The State's duty was to make 'every effort' to extend access to this treatment 'as soon as reasonably possible'.[238]

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232 Ibid. As the Court wrote in *TAC* of Government's MTCT policy: 'We have held that its policy fails to meet the constitutional standards because it excludes those who could reasonably be included where such treatment is medically indicated to combat mother-to-child transmission of HIV.' *TAC* (supra) at para 125.

233 The standard of proportionality, which is applied under the general limitations clause (s 36), permits the court in reviewing the justifiability of limitations to the rights in the Bill of Rights to consider 'less restrictive means' available to the State to achieve its purposes.

234 See *TAC* (supra) at para 8.

235 As noted above, the order includes extending testing, counselling and training facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for reducing MTCT of HIV. However, it excludes the provision of formula feed as ordered by the High Court.

236 Davis J observed in *Grootboom I*: 'Sections 38 and 172 of the Constitution empower a court to issue an order which identifies the violation of a constitutional right and then defines the reform that must be implemented while affording the responsible State agency the opportunity to choose the means of compliance.' *Grootboom I* (supra) at 292H-I.

The reasonableness test has been criticised for being vague and offering inadequate guidance to the State on its obligations in respect of socio-economic rights. According to Bilchitz, the vagueness of the reasonableness test is partially a consequence of the failing to integrate the first and second subsections of sections 26 and 27. The reasonableness enquiry focuses entirely on the second subsection without providing a role for the first subsection in terms of defining the content of the right concerned.[239] Bilchitz suggests that the Court should first determine the ambit or content of the right. Only then 'should it engage in the enquiry of determining whether the measures adopted by the government were reasonable methods of progressively realising the right'.[240] He persuasively argues that an application of the reasonableness test in the context of a particular case, requires 'a prior understanding of the general obligations government is under by virtue of having to realise the rights in question'.[241]

I have argued that the Court does not escape the interpretative difficulties of clarifying the State's obligations in relation to socio-economic rights by rejecting the notion of minimum core obligations in favour of reasonableness review. The review standard of 'reasonable measures' endorsed by the Court does not readily lend itself to easy definition or application. For example, in the context of high

levels of poverty, it is not easy to identify those groups who should qualify for short-term relief because of their desperate need and intolerable living conditions.[242]

A better approach would be to recognise that the right in the first subsection of sections 26 and 27 gives rises to two types of duties that are delineated in the second subsection. First, the State must ensure that everyone has access to essential levels of goods and services (the minimum core obligation). This requirement would give individuals who are unable to gain access to these essential needs an enforceable claim against the State for basic forms of material assistance. Second, the State must over time, improve the quality of socio-economic rights to which individuals have access. In respect of this second-tier duty, the standard of reasonableness review would be appropriate given that issues of survival will not be at stake.[243]

237 *TAC* (supra) at para 125.

238 Ibid.

239 Bilchitz 'Laying the Foundations' (supra) at 9.

240 Ibid.

241 Ibid at 10.

242 For a further discussion of this issue in the context of the right to social assistance: see S Liebenberg 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) 17 *SAJHR* 232, 234–237 ('Social Assistance').

243 This approach is similar to that adopted by the *amici* in *Grootboom* and the one proposed by Bilchitz 'Teeth' (supra) at 493 and Bilchitz 'Laying the Foundations' (supra) at 11– 13.

As I noted earlier, despite the Court's rejection of the minimum core concept as a source of individual entitlement to subsistence requirements, it remains possible to argue that a minimum core of a particular service should be taken into account in assessing the reasonableness of the measures adopted by the State.[244]

(g) Progressive realisation

The second subsection of sections 26 and 27 refers to the duty on the State to 'take legislative and other measures, within its available resources, to achieve the progressive realisation' of the relevant rights. The concept of 'progressive realisation' was clearly borrowed from article 2 of the International Covenant on Economic, Social and Cultural Rights. As the Court implicitly acknowledged in *Grootboom,* 'progressive realisation' has a dual function.[245] It acts as a limitation on the pace of fulfilment by the State of its positive duties in that it recognises that the full realisation of socio-economic rights cannot occur immediately.[246] At the same time, it imposes certain duties of conduct on the State. The State must actually take 'legislative and other measures' towards progressively realising the rights. The Court wrote:

> . . . accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.[247]

Government's progress in dismantling the range of obstacles that impede access to socio-economic rights will thus be a factor in assessing the reasonableness of its programmes. The Court did not refer to a possible qualitative interpretation of 'progressive realisation'. This qualitative dimension would require not only that a greater number of people have access to housing over time, but also that there are progressive improvements in the standard of housing to which disadvantaged groups have access. A qualitative dimension is included in the scope of the right through the phrase 'adequate housing' in section 26(1).[248]

Proponents of minimum core obligations argue that 'progressive realisation' should not mean 'that some receive housing now, and others receive it later; rather, it means that each is now entitled to basic housing provision, which the government is required to improve gradually over time'.[249]

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244 See § 33.5*(e)*(iv) supra (A future role for minimum core obligations?).

245 See further in this regard, Liebenberg 'Social Assistance' (supra) at 252.

246 *Grootboom* (supra) at para 45.

247 Ibid. According to the UNCESCR, progressive realisation 'imposes an obligation to move as expeditiously and effectively as possible towards the goal of full realisation of the rights in the Covenant'. GC 3 (supra) at para 9.

248 The *amici* in *Grootboom* argued that the phrase progressive realisation 'imposes a duty to adopt an incremental approach both as to numbers, and as to what is provided'. Heads of Argument (supra) at para 58.2. The UNCESCR has identified a number of qualitative factors to be taken into account in assessing the 'adequacy' of housing provision. See GC 4 (supra) at para 8.

(i) A national strategy and plan of action

The UNCESCR has repeatedly emphasised the importance of formulating a transparent, participatory national strategy and plan of action for the progressive realisation of the relevant socio-economic rights. Any such plan should include targets, indicators and benchmarks, which enable the public, institutions such as Human Rights Commissions, and Government itself to monitor progress. Particular attention should be given to vulnerable or marginalised groups in the process of formulating the plan and its implementation.[250] The duty to formulate a co-ordinated, comprehensive housing programme was the first feature of a reasonable programme in terms of section 26 identified by the Constitutional Court in *Grootboom*.[251] It is also implicit in the Constitutional Court's approval of most

aspects of the national housing programme in *Grootboom*.[252] The High Court judgment in *TAC* endorsed the duty of the State to formulate a comprehensive, coherent and time-bound plan for a roll-out of the MTCT- prevention programme.[253] The Constitutional Court also engaged the question whether the government had a comprehensive plan to combat MTCT of HIV.[254]

The duty on the State to formulate a transparent national plan of action for the realisation of socio-economic rights promotes public accountability and participation in the realisation of socio-economic rights. It also lays the foundation for targeted, purposeful action by the State towards the realisation of these rights.

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249 Bilchitz 'Teeth' (supra) at 493.

250 See, for example, GC 4 (The right to adequate housing) (supra) at para 12; GC 12 (The right to adequate food) (supra) at paras 21– 30; GC 14 (The right to the highest attainable standard of health) (supra) at para 43*(f)* [Here the duty to formulate a national health plan is regarded as one of the core obligations of States parties]; GC 15 (The right to water) (supra) at paras 37*(f),* 46–54. The latter two General Comments also refer to the importance of 'framework legislation' 'as a major instrument' in the implementation of the relevant national strategy for realising the right: GC 12 (supra) at para 29; and GC 15 (supra) at para 50. See, in this regard, *Grootboom* (supra) at para 40. On the role of targets, indicators, benchmarks in monitoring the progressive realisation of socio-economic rights, see GC 15 (supra) at paras 53–5. See also: K Tomaševski 'Indicators', A Eide 'The Use of Indicators in the Practice of the Committee on Economic, Social and Cultural Rights'; and A Eide 'Obstacles and Goals to be Pursued' in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd Revised Edition) at 531, 545 and 553 respectively. See also Leckie 'Indivisibility' (supra) at 93–94.

251 *Grootboom* (supra) at paras 39–41. The Court wrote: 'The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to housing within the State's available means. The programme must be capable of facilitating the realisation of the right.' Ibid at para 41.

252 The Court observed: 'Allocation of responsibilities and functions has been coherently and comprehensively addressed. The programme is not haphazard but represents a systemic response to a pressing social need.' *Grootboom* (supra) at para 54. The shortcoming of the programme, as has been discussed, was the failure to include short-term measures of relief for those in desperate need.

253 See *TAC* (supra) at 385C–J and 387C–F (paras 3 and 4 of the order).

254 *TAC* (supra) at paras 82–89. See also para 123.

(ii) Retrogressive measures

A significant aspect of the *Grootboom* judgment is the Court's endorsement of the views of the UNCESCR relating to an implicit duty on the State to avoid retrogressive measures.[255] According to the Committee:

> . . . any deliberate retrogressive measures. . . would require the most careful consideration and would need to be *fully justified* by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources' [emphasis added].[256]

The General Comment suggests that measures that have the effect of reducing pre-existing levels of access to socio-economic rights are *prima facie* incompatible with the Covenant and require justification by the State.[257] In the South African context such justification would most appropriately take place in the context of the general limitations clause.[258] Scott and Macklem argue that this approach:

> . . . creates a kind of ratchet effect in that lowering the fulfilment level of a right is presumptively prohibited once that level has been achieved. Existing levels of provision can thereby be used as a baseline, adding further precision to the judicial task.[259]

An example of a possible retrogressive measure would be an amendment to the regulations under the Social Assistance Act, 1992, raising the eligible age limit for the child support grant from 7 years to 10 years.[260] This change would have the effect of reducing the number of impoverished children entitled to the child support grant. It is not clear whether a similar burden of justification would apply to measures that reduce the quality or level of benefit that people enjoy.[261]

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255 *Grootboom* (supra) at para 45.

256 GC 3 (supra) at para 9. The Court in *Grootboom* wrote: 'The meaning ascribed to the phrase ['progressive realisation' by the Committee] is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.' Ibid.

257 The Maastricht Guidelines on Violations of Economic Social and Cultural Rights (1998) 20 *Human Rights Quarterly* 691-705 give the following examples of violations under the ICESCR: '*(e)* The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed; *(g)* The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone' (paras 14*(e)* and *(g)*). The Maastricht Guidelines are non-binding, but influential, interpretations of the obligations imposed by the ICESCR adopted by a group of experts in international law.

258 See § 33.10 infra (Limiting socio-economic rights).

259 Scott and Macklem 'Ropes of Sand' (supra) at 80.

260 The child support grant is a social assistance benefit. The right of access to social assistance is protected in FC s 27(1)*(c)* read with 27(2).

261 For example, reducing the quantum of the child support grant from R160 per child to R100 per child while not altering the age cohort. This may depend on the recognition of a qualitative dimension to 'progressive realisation' as argued for above. See § 33.5(9) above.

(h) Within available resources

The State's positive obligations to fulfil the rights are qualified by reference to its 'available resources' in sections 26(2) and 27(2). Like 'progressive realisation', this phrase imposes both a duty on the State and allows the State to raise a defence to a claim alleging that its progress in realising the rights is unreasonable. The Court in *Grootboom* indicated that a reasonable programme to realise socio-economic rights must 'ensure that the appropriate human and financial resources are available'.[262] But the resources available for social programmes will be an important factor in assessing the reasonableness of the measures adopted by the State. This means that:

> . . . both the content of the obligation in relation to the rate at which is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.[263]

Two interrelated questions flow from this conclusion. First, how will the

availability of resources be assessed?[264] Will the Court's scrutiny be confined to pre-existing budgetary allocations by the relevant spheres of government or will it be prepared to examine the policy decisions underlying budgetary allocations?[265] Second, how stringently will the Court scrutinise the State's allegations that the relevant social programme is reasonable in the light of its resource constraint?

In *Soobramoney*, the Court considered the claim in terms of section 27(1) and (2) within the context of the budget of the provincial health department in KwaZulu-

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262 *Grootboom* (supra) at para 39. Later in the judgment, the Court says that the effective implementation of programmes 'requires at least *adequate budgetary support* by national government'. A nation-wide housing programme must recognise immediate needs and this requires national government 'to plan, *budget* and monitor the fulfilment of immediate needs and the management of crisis' [emphasis added]. Ibid at para 68.

263 Grootboom (supra) at para 46. Further on, the Court writes:

> There is a balance between goals and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.

Ibid. In *Soobramoney*, the Court indicated that as the rights in sections 26 and 27 are resource dependent, 'the corresponding rights themselves are limited by reason of the lack of resources'. *Soobramoney* (supra) at para 11.

264 As Darryl Moellendorf observes:

> 'Available resources' is, however, ambiguous as it has both narrow and broad senses. It may mean those resources that a ministry or department has been allotted and has budgeted for the protection of the right. Alternatively, it may mean any resources that the State can marshal to protect the right. These are the two extreme senses of the terms. To be sure, between the narrowest interpretation and the broadest lie other senses. 'Reasoning about Resources' (supra) at 330.

265 This issue is relevant, for example, to claims against local and provincial governments relating to those socio-economic rights falling within their functional areas of competence. As s 214(1)*(a)* of the Constitution indicates, national government has an important role in ensuring 'the equitable division of revenue raised nationally among the national, provincial and local spheres of government'.

Natal.[266] Nowhere did the Court suggest that it would be prepared to scrutinise the budget allocation of health resources by the national sphere of government to the provincial sphere.[267] Moreover, as discussed above, the Court applied a very deferential standard of rationality review in respect of the political and medical decisions at issue in the case.[268] However, as Darryl Moellendorf has pointed out, if the scope of the rights in sections 26 and 27 is determined by the State's pre-existing budgetary choices, socio-economic rights could provide no meaningful guide to policy.[269]

As discussed above, the High Court in *TAC* held that the duty to draw up a coherent, nationwide plan to advance socio-economic rights exists independently of resource considerations.[270] The Constitutional Court in *TAC* found that resource constraints were not an issue in relation to the first leg of the challenge — the restriction on prescribing Nevirapine in public health facilities where capacity existed to do so. The manufacturers of Nevirapine had offered to make it available to the government free of charge for a period of five years for the purposes of reducing the risk of MTCT of HIV.[271] Government's concern related to the costs of providing the infrastructure and training for the testing and counselling facilities as well as other elements of the optimal package of treatment for HIV-positive pregnant women and their new-born infants.[272] The Court found that

these resource-related concerns were relevant to the provision of a comprehensive package of care, but not to the provision of Nevirapine at those hospitals and clinics where testing and counselling facilities were *already* in place. Accordingly, it found that its order on this aspect of the claims 'will not attract any significant additional costs'.[273] The uncontested nature of the availability of resources was clearly a

266 This is evident, for example, from *Soobramoney* (supra) at paras 24 and 29.

267 This was perhaps precluded by the fact that the only respondent was the provincial Minister of Health, KwaZulu-Natal. National government was accordingly not a party to the proceedings.

268 See § 33.5*(f)*(i) above (*Soobramoney*: The standard of rationality).

269 See Moellendorf 'Reasoning about Resources' (supra) at 332: 'A broader sense of "available resources" must be employed if socio-economic rights are to guide policy rather than depend on it.'

270 *TAC High Court* (supra) at 386B–C. See also § 33.5*(f)*(iii) above (*TAC*: Applying the reasonableness test). This is consistent with the views of the UNCESCR: 'The obligation to monitor the extent of realisation, or more especially of the non-realisation, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.' GC 3 (supra) at para 11.

271 *TAC* (supra) at para 19.

272 Ibid at para 49.

273 *TAC* (supra) at para 71.

significant factor in the Court's finding that the State's blanket policy to limit Nevirapine to research and training sites was unreasonable.[274]

In relation to extending the MTCT programme, the Constitutional Court found that although a comprehensive policy for testing and counselling of HIV-positive pregnant women existed, the policy was not implemented uniformly.[275] The Court also found that it would not be a major burden for government to extend the training of counsellors based at public hospitals and clinics (other than the research sites) to include the use of Nevirapine in reducing the risk of MTCT of HIV.[276] The provincial health authorities responsible for implementing the testing and counselling programme claimed that they faced both financial and capacity constraints in extending the programme. The TAC and the other respondents argued that it was cost-effective to implement a comprehensive policy for the use of Nevirapine, which included testing and counselling. The TAC argued that such a policy would result in 'significant savings' for the State in later years, as it would reduce the number of HIV-positive children who would have to be treated in the public health system.[277]

The Court took the view that it was not necessary to deal with the cost-effectiveness argument, because there had been a significant change in conditions since the proceedings were implemented. Some provinces – such as Gauteng and KwaZulu-Natal — were in the process of expanding their provision of Nevirapine at public health facilitates beyond the test sites.[278] According to the Court, these developments demonstrated that substantial progress could be made 'provided the requisite political will is present'.[279] Moreover, the Court had been informed during the hearing of the appeal that the government has made 'substantial additional funds' available for the treatment of HIV, including the reduction of MTCT.[280] The Court drew the unassailable conclusion that budgetary

constraints were 'no longer an impediment', and that it should now 'be possible to address any problems of financial incapacity that might previously have existed'.[281] The State was thus required to 'take reasonable measures to extend the testing and

274 The Court wrote:

> A potentially lifesaving drug was on offer and where testing and counselling facilities were available it could have been administered *within the available resources* of the State without any known harm to mother or child. [Emphasis added.] *TAC* (supra) at para 80.

275 Ibid at para 90.

276 Ibid at paras 83 and 95. Its' order on this aspect is in sub-para 3*(c)* thereof (at para 135).

277 Ibid at para 116.

278 Ibid at para 118.

279 Ibid at para 119.

280 Ibid at para 120.

281 *TAC* (supra) at para 120.

counselling facilities to hospitals and clinics throughout the public health sector beyond the test sites to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV'.[282]

We can only speculate as to how the Court would have dealt with the resource constraints argument had the positive political developments that occurred just prior to the hearing not occurred. A serious engagement with the cost-effectiveness arguments raised by the TAC would have drawn the Court into a more direct evaluation of resource allocation decisions, a form of review the Court is clearly reluctant to undertake.

Although sections 26 and 27 clearly allow resource constraints to be raised by the State in defending the reasonableness of its measures, the courts should not simply accept unsubstantiated allegations regarding resource shortages. The Court's role is to scrutinise the validity of this defence. As Justice O' Regan has argued in relation to the *Soobramoney* decision:

> . . . government is under an obligation to show that it acted *bona fide* and rationally in the circumstances. This carries an evidentiary burden. State officials are required to place evidence before the Court of their policy regarding the rationing of scarce dialysis equipment and their budgets.[283]

The courts are unlikely to be receptive to a direct challenge to Government's macro-economic and budgetary decision-making processes. However, both the *Grootboom* and *TAC* decisions illustrate that the orders of the Constitutional Court enforcing socio-economic rights may have indirect budgetary implications. The Court in *TAC* reasoned that while:

> [D]eterminations of reasonableness may in fact have budgetary implications, [they] are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.[284]

33.6 Defending state assistance to vulnerable groups

The principles established in *Grootboom* can also assist the State to defend coming to the aid of vulnerable groups against challenges by powerful private groups. This is illustrated by the case of *Minister of Public Works & others v Kyalami Ridge Environmental Association & others*.[285] In defending its decision to establish a transit camp to house people from Alexandra Township who had been displaced by severe

282 Ibid at para 95. Its order on this aspect is in sub-para 3*(d)* thereof (ibid at para 135).

283 O'Regan 'Introducing Socio-Economic Rights' (1999) 1 (4) *ESR Review* 2.

284 *TAC* (supra) at para 38. Roux makes the following comments on the above quote from the *TAC* decision:

> According to this sense of things, the motive behind the intrusion into politics is all-important. If the motive for 'rearranging budgets' is to substitute the Court's view on how resources should be allocated for that of the political branches, the intrusion cannot be justified. However, if the primary motive is rights-enforcement, the political branches should (as a matter of constitutional law) and will (as a matter of practical politics) accept the resource-allocation effects of the Court's decision as an inevitable and necessary element of the constitutional compact.
>
> 'Legitimating Transformation' (supra) at 9 (unpublished manuscript on file with author).

floods, the State relied on its constitutional obligation (as affirmed in *Grootboom*) to assist people in crisis situations.

A neighbouring residents' association challenged this decision on the grounds that there was no legislation authorising the government to establish the transit camp and that the decision was unlawful in that it contravened a town planning scheme as well as land and environmental legislation. The Constitutional Court held that none of the laws relied on by the association excluded or limited the government's common law power to make its land available to flood victims pursuant to its constitutional duty to provide them with access to housing.[286]

The Court held that the fact that property values may be affected by a low cost housing development on neighbouring land is a factor that is relevant to the way in which government discharges its duty to provide everyone with access to housing. However, in the circumstances of the present case this factor did not outweigh the constitutional obligation of the government to address the needs of homeless people and to use its own property for that purpose.[287]

Finally, procedural fairness did not require government to do more in the circumstances than it had undertaken to do: namely to consult with the Kyalami residents in an endeavour to meet to meet any legitimate concerns they might have as to the manner in which the development will take place. The Court observed:

> To require more, would in effect inhibit the government from taking a decision that had to be taken urgently. It would also impede the government from using its own land for a constitutionally mandated purpose, in circumstances where legislation designed to regulate land use places no such restriction on it.[288]

33.7 Children's socio-economic rights

The children's socio-economic rights in section 28(1)*(c)* are neither described as a right of 'access to' the relevant rights, nor are they qualified in a similar form to the second subsections of sections 26 and 27.[289] This absence of qualification has

led many commentators (including this author) to conclude that these rights imposed a direct duty on the State to ensure that those children who lacked these basic necessities of life are provided with them without delay. The commentators inferred that the scope of the rights was confined to a rudimentary or 'basic' level of the various social goods referred to in section 28(1)*(c)*.[290] The more direct nature of the duty owed by the State to children was justified on the basis that children living in poverty are particularly vulnerable and not in a position to meet their own socio-

285 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) ('*Kyalami Ridge*').

286 *Kyalami Ridge* (supra) at para 51.

287 Ibid at para 107.

288 Ibid at para 109.

289 Section 28(1)*(c)* reads: 'Every child has the right . . . to basic nutrition, shelter, basic health care services and social services.'

economic needs. Arguments relating to resource and capacity constraints as a justification for not meeting these basic obligations towards children were appropriately raised in terms of section 36. This interpretation gives rise to the difficulty that vulnerable children have a direct claim to material assistance under the Constitution while equally vulnerable adults (for example, persons living with disabilities and the elderly) do not. As discussed above, the *amici* in *Grootboom* attempted to resolve this difficulty by the recognition of a minimum core obligation owed to everyone in need under sections 26 and 27. On this reading, section 28(1)*(c)* is a specific manifestation of the minimum core obligations under sections 26 and 27. Its purpose is to place beyond doubt the core socio-economic entitlements due to vulnerable children.[291]

Having assessed the State's housing programme in terms of section 26, the Constitutional Court in *Grootboom* considered the applicability of the right of children to shelter in terms of s 28(1)*(c).* According to the Court, the 'carefully constructed constitutional scheme for the progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the State on demand'.[292] It went on to

hold that section 28(1)*(b)* and *(c)* must be read together. The former provision defines those responsible for giving care, while the latter 'lists various aspects of the care entitlement'.[293] Thus the primary duty to fulfil a child's socio-economic rights rests on that child's parents or family:

290 See, for example, P de Vos 'The Economic and Social Rights of Children and South Africa's Transitional Constitution' (1995) 10 (2) *SA Public Law* 233, 255 (although not identical, s 30(1)*(c)* of the Interim Constitution is in similar form to s 28(1)*(c)* of the Final Constitution); De Vos 'Pious Wishes' (supra) at 87–88.

291 See § 33.5*(e)*(i) above (discussion of *amici's* minimum core argument in *Grootboom*). For a similar approach, see: G van Bueren 'Alleviating Poverty Through The Constitutional Court' (1999) 15 *SAJHR* 52, 57. According to Scott & Alston, 'While such core content would exist by necessary implication within s 26 were s 28 not there, s 28 makes certain that there is no chance of the core entitlements of children being lost in the interpretative evolution of the Bill of Rights'. 'Transnational Context' (supra) at 260. The High Court in *Grootboom* adopted a different approach by holding that a joint reading of ss 28(1)*(b), (c)* and (2) creates a derivative right for parents to shelter with their children. The Court reasoned as follows:

> As the family must be maintained as a unit parents of the children who are granted shelter should also be entitled to such shelter. The bearer of the right now becomes the family. The justification for such a conclusion is that a failure to recognise the parents would prevent the children from remaining within the family fabric. This would penalise the children and indeed their parents who, to a considerable extent owing to the ravages of apartheid, are unable to provide adequate shelter for their own children.
>
> *Grootboom I* (supra) at 289C–D.

As argued above, the difficulty with this approach is that adults without children (no matter how vulnerable) are not entitled to direct assistance.

292 *Grootboom* (supra) at para 71.

293 *Grootboom* (supra) at para 76.

> It follows that section 28(1)*(c)* does not create any primary State obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families.[294]

This statement implies that a direct entitlement by children to the provision of the socio-economic rights in section 28(1)*(c)* only arises when children lack family care: that is, if they have been orphaned, abandoned or removed from their family's care. As the children in *Grootboom* were in the care of their parents or families, they were not entitled to any relief in terms of section 28(1)*(c)*.[295]

The Court held that the State nevertheless incurred certain obligations towards children who are being cared for by their parents or families. In the first place, the State is obliged to 'provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28'.[296] This obligation would 'normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children mentioned in section 28'.[297] Secondly, the Court referred to the State's obligation under sections 25, 26 and 27 to provide access to the relevant socio-economic rights protected by these sections 'on a programmatic and co-ordinated basis, subject to available resources'.[298] It mentioned the provision of maintenance grants and other material assistance to families in need as '[o]ne of the way in which the State would meet its section 27 obligations'.[299]

The Court's reasoning suggests that the socio-economic claims of children living in families who are too poor to provide them with the basic necessities of life fall to be determined in terms of sections 26 and 27. As previously noted, these sections do not impose any direct obligation on the State to provide socio-economic goods and services to anyone. They only require a qualified obligation to adopt a reasonable programme.[300] The Court's analysis illustrates quite starkly its

reluctance to interpret the socio-economic rights provisions in the Constitution to invite individual claims for direct material assistance from the State.[301]

In *TAC*, the Court clarified that the State's duties to provide children's socio-economic rights were not only triggered when children were physically separated

294 Ibid at para 77.

295 Ibid at para 79.

296 Ibid at para 78.

297 Ibid.

298 Ibid.

299 Ibid.

300 For a discussion of the implications of such reasoning, see: J Sloth-Nielsen 'The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*' (2001) 17 *SAJHR* 210, 227–230 ('The Child's Right').

from their families. Thus children are entitled to the protection contemplated by section 28 'when *the implementation of the right to parental or family care is lacking*' [my emphasis].[302] The Court went on to say:

> Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the State to make health care services available to them.[303]

This approach suggests that the State's direct duties to provide the socio-economic rights in s 28(1)*(c)* are also triggered when parents are too poor to provide for their basic needs. Unfortunately, the Court in *TAC* adhered to its reasoning in *Grootboom* and did not conclude that children had a direct, individual entitlement to basic health care services in circumstances where their parents were too poor to afford these services. Instead the Court relied on the right of children to basic health care services in section 28(1)*(c)* to support its finding that government's rigid, restrictive policy on Nevirapine was unreasonable because the policy excluded and harmed a particularly vulnerable group.[304] This conclusion was consistent with the Court's central enquiry throughout the case: namely whether the constitutional standard of reasonableness in section 27(2) had been met.[305]

The current jurisprudence has not resolved whether children have direct entitlements to the socio-economic services in section 28(1)*(c)*. *Grootboom* and *TAC* can be read to suggest that the State is under a direct duty to provide these rights in circumstances where family care is lacking either in a physical or economic sense.

However, the Court has preferred to decide the two cases under discussion on the basis of reasonableness review under sections 26 and 27.[306]

33.8 The other unqualified socio-economic rights

The Constitutional Court has not yet decided a case that directly concerns the scope of the positive duties imposed by the right to 'basic education, including adult basic

301 Sloth-Nielsen argues that 'where children's neglect stems from poverty alone' a directly enforceable claim to material support for family preservation can be derived from section 28(1)*(d)* (the right of the child to be protected from maltreatment, neglect, abuse or degradation). She argues for this interpretation on the basis of the close links between parental poverty and child abuse and neglect in South Africa. 'The Child's Right' (supra) at 230–231.

302 *TAC* (supra) at para 79.

303 Ibid.

304 The Court described their precarious position as follows:

> Their needs are "most urgent" and their inability to have access to Nevirapine profoundly affects their ability to enjoy all rights to which they are entitled. Their rights are "most in peril" as a result of the policy that has been adopted and are most affected by a rigid and inflexible policy that excludes them from having access to Nevirapine.
>
> Ibid at para 78.

305 Ibid at para 93.

education' in section 29(1)*(a)* or the socio-economic rights of detained persons, including sentenced prisoners in section 35(2)*(e).* These provisions are not qualified in terms similar to the second subsection of sections 26 and 27.

In *Gauteng School Education Bill*, the Constitutional Court held that the Interim Constitution's section 32*(a)* 'creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education'.[307] This right was specifically contrasted with section 32*(c),* which creates a freedom to establish educational institutions based on a common culture, language and religion. The latter is a 'defensive right' that does not generate a positive claim against the State to establish such institutions.[308]

There have been a number of High Court decisions in which positive orders have been made against the State to provide socio-economic amenities to prisoners in terms of section 35(2)*(e).* In *B & others v Minister of Correctional Services & others*,[309] the High Court directed the respondents to supply two HIV-positive applicants with anti-viral medication which had been prescribed for them in fulfilment of their right to be provided with 'adequate medical treatment' at State expense.[310] The positive order by the Court followed a finding that the Ministry had failed to make out a case that they could not afford the relevant treatment.[311]

In another case concerning prison conditions, the High Court ruled in *Strydom v Minister of Correctional Services* that the applicant and the other occupants of the Maximum Security Section of Johannesburg Prison have the right to have access

to electricity in their cells. Schwartzman J ruled that access to electricity was not a mere comfort or diversion, but could make the difference between mental stability and derangement given the circumstance in which high security prisoners are held. Noting that they spend 18 hours of each day of what remains of their lives, or a substantial portion thereof, in what is in effect solitary confinement, he held:

306 Kenneth Creamer has suggested that a 'higher standard of reasonableness' review is appropriate in assessing the State's programmes impacting on children socio-economic rights. He argues for this higher standard on the basis of a reading of the Constitution that requires children's needs to be prioritised. The higher standard of reasonableness review should include such factors as the rapid implementation of relevant programmes and 'the requirement that the programmes are effectively constructed to reach all children in need.' K Creamer 'The Impact of South Africa's Evolving Jurisprudence on Children's Socio-Economic Rights on Budget Analysis' (2002) IDASA Occasional Paper, unpublished.

307 *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) at para 9 ('*Gauteng School Education Bill')*.

308 Ibid. See further in this regard R Kriel 'Education' in M Chaskalson et al *Constitutional Law of South Africa* (1st Edition, RS 5, 1999) Chapter 38.

309 1997 (6) BCLR 789 (C) at paras 61–6 ('*B & others*').

310 Section 35(2)*(e).*

311 *B & others* (supra) at paras 56, 60.

To deprive them entirely and in perpetuity of this prospect could also result in their being 'treated and punished in a cruel or degrading manner' (section 12(1)*(c)* of the Constitution) or their being detained in conditions that are inconsistent with human dignity (section 35(2) of the Constitution).[312]

It remains to be seen whether the Constitutional Court will interpret these provisions to confer substantive entitlements on individuals.

33.9 Burden of proof

Generally, the party claiming a constitutional violation bears the burden of proving an infringement of a right in the Bill of Rights. If a *prima facie* infringement is established at this first stage of constitutional analysis, the party seeking to uphold the provision may seek to invoke the general limitations clause to justify the infringement of the right. The burden of showing that the requirements of section 36 are met rests on the party who seeks to rely on it.[313]

In cases relating to an alleged breach by the State of its positive duties in terms of sections 26(2) and 27(2), the party claiming a constitutional violation would have to establish a *prima facie* case that the measures taken are unreasonable because they violate one or more of the criteria laid out in *Grootboom*.[314] The State would seek to rebut the applicant's case by leading evidence of the legislative measures and other programmes it has adopted and attempting to persuade the court that its programme is reasonable in the context of historical factors as well as its current resource and capacity constraints.[315]

An important question that arises in this context is where the evidentiary burden lies in respect of the qualifying phrase, 'within its available resources'. It would be unreasonable to expect ordinary litigants to identify and to quantify all

the resources available to the State for the realisation of particular socio-economic rights. If the State wishes to rely on a lack of available resources to order to rebut an allegation that it has failed to take reasonable measures, it should bear the burden of proving the alleged unavailability of resources. Relevant organs of state are clearly best placed to adduce this type of evidence.[316]

If the applicant succeeds in establishing a breach of the State's duty to taken reasonable measures under sections 26(2) and 27(2), the State could ostensibly

312 *Strydom v Minister of Correctional Services & others* 1999 (3) BCLR 342 (W) at para 15 (353A–E).

313 *S v Zuma & others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 21; *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at paras 100–102. See S Woolman and H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

314 See *Soobramoney* (supra) at para 36. See also *TAC* (supra) at para 25: 'The question is whether the applicants have shown that the measures adopted by the government fall short of its obligations under the Constitution.'

315 See *Grootboom* (supra) at para 47: 'In support of their contention that they had complied with the obligations imposed on them by section 26, the appellants [the State] placed evidence before this Court of the legislative and other measures they had adopted.' See also *Grootboom* (supra) at para 43.

argue that it has justifiably limited the right in terms in terms of the general limitations clause.[317]

The application of the accepted two-stage approach to constitutional analysis is more straightforward in the case of the unqualified socio-economic rights.[318] The applicant bears the onus of proving a violation of the right at the first stage. This showing requires that he or she is a legitimate bearer of the relevant right (e.g. a detained person), and that the duties imposed by the right have not been fulfilled. For example, a prisoner may show that the State has failed to provide him with adequate nutrition as required by section 35(2)*(e).* If the applicant succeeds in establishing a *prima facie* violation of these rights, the State would bear the burden of proof in respect of the general limitations clause.

The position is similar with regard to a negative violation of the duty not to prevent or impair access to the relevant socio-economic rights.[319] The applicant bears the onus of establishing a breach of this duty at the first stage of constitutional analysis, The State bears the burden in respect of the general limitations clause. This analysis is premised on the argument that the qualifying phrases in the second subsections of sections 26 and 27 do not apply to these negative duties.[320]

33.10 Limiting socio-economic rights

(a) Justifying limitations to socio-economic rights

Section 36(1) establishes that the rights in the Bill of Rights may be limited. Any limitation to a right must be in terms of law of general application and is only permissible 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[321]

The general limitations clause serves an important purpose in relation to all the rights in the Bill of Rights, including socio-economic rights. Should the State decide to limit its obligations in respect of socio-economic rights, the fact of the limitation

316 See S Liebenberg 'Housing' in D Davis, H Cheadle & N Haysom (eds) *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 350-1. See also the discussion in De Vos 'Pious Wishes' (supra) at 92–4.

317 For a discussion of the difficulties in applying s 36 to a breach of the positive duties in ss 26(2) and 27(2), see § 33.10 infra.

318 Sections 28(1)*(c),* 29(1)*(a)* and 35(2)*(e).* This conclusion is based on the assumption that these provisions confer a direct entitlement on individuals in appropriate circumstances to claim the specified goods.

319 *Grootboom* (supra) at para 34.

320 See § 33.5*(b)* supra (negative duty to respect rights). For an application of this approach, see *Residents of Bon Vista Mansions v Southern Metropolitan Council* 2002 (6) BCLR 625 (W) at paras 20–26.

321 Section 36(1). See further, in this regard, Woolman 'Limitations' (supra) at § 12.2.

and its nature and extent would have to be publicly defined and justified. This exercise promotes public accountability in support of the constitutional commitment to advance access to socio-economic rights.[322]

The relationship between the qualified positive duties of the State in sections 26(2) and 27(2) and the general limitations clause is complex. As we have seen, the State's positive duties are defined in terms of the adoption of *reasonable* measures. Should it be established at the first stage of the constitutional inquiry that the State's conduct or omissions are unreasonable, it is difficult to conceive of situations where it may nevertheless succeed in establishing a reasonable limitation of the right under section 36. Perhaps there are, at the margins, justifications for the measures not captured by the unreasonableness criteria articulated in *Grootboom*. At the limitations stage of constitutional analysis the justificatory requirements are ostensibly stricter.[323]

In the absence of a law of general application, the State is precluded from relying on the general limitations clause. This situation could arise where, for example, the unreasonableness at the first stage of the inquiry under sections 26 and 27 was found to be a failure to adopt legislation necessary to give effect to the particular right.

(b) Resource-based reasons for limiting socio-economic rights

Resource constraints are likely to be the most common justification raised by the State for limiting socio-economic rights. Under sections 26(2) and 27(2), the State is expressly permitted to rely on a lack of available resources as a factor in defending the reasonableness of its measures.[324] If the State does not successfully rely on a lack of available resources at the first stage of constitutional inquiry, it is difficult to imagine how it could succeed on this ground in terms of the general limitations clause. As we have seen, the socio-economic rights of children and detained persons are not expressly qualified by the phrase, 'within available

resources'. The question therefore arises whether resource constraints can be relied on to justify a limitation of these positive rights under section 36.

The proposition that costs and administrative burdens will *generally* not constitute valid reasons for limiting rights has found favour in South African academic writing.[325] However, a court cannot rule out resource-related considerations when assessing whether a limitation to the positive duties imposed by rights is justifiable.

322 Etienne Moreinik regarded this 'culture of justification' as one of the primary purposes of entrenching a justiciable Bill of Rights in a Constitution. See Mureinik 'Charter of Luxuries' (supra) at 471–3.

323 See specifically the factors in s 36(1)*(a)–(e).* See further, in this regard, Liebenberg 'Violations' (supra) at 405, 423–4.

324 *Grootboom* (supra) at para 46 ('the availability of resources is an important factor in determining what is reasonable'). See also § 33.5*(h)* supra ('Within available resources').

325 See S Woolman and H Botha 'Limitations' (supra). See also *In Re Singh and Minister of Employment and Immigration* (1985) 17 DLR 422, cited by D Davis et al *Fundamental Rights in the New Constitution* (supra) at 311.

In *Eldridge*[326], cost-related justifications were expressly considered in the limitations enquiry under section 1 of the Canadian Charter of Rights and Freedoms. The Canadian Supreme Court found that the failure of the Medical Services Commission of British Columbia to provide sign language interpretation for deaf patients constituted a *prima facie* violation of their right to equal benefit of the law without discrimination under section 15(1) of the Charter. The Court held that s 15(1) imposed a positive duty on the government to make 'reasonable accommodation' of disadvantaged groups 'adversely affected by a facially neutral policy or rule'. However, this duty extended only to the point of 'undue hardship'. Reasonable limitations to the positive duties inherent in section 15(1) fell to be determined under section 1 of the Charter and 'should not be employed to restrict the ambit of s 15(1)'.[327] During its section 1 (limitations) enquiry, the Court found that the government had 'manifestly failed to demonstrate that it had a reasonable basis for concluding that a total denial of medical interpretation services for the deaf constituted a minimum impairment of their rights'.[328] A key consideration was the 'relatively insignificant sum' that was required to continue and extend the service ($150 000 or 0,0025 % of the provincial health budget of British Columbia).[329] The government raised the argument that the recognition of the appellants' claim would have 'a ripple effect throughout the health care field, forcing governments to spend precious health care dollars accommodating the needs of a myriad disadvantaged persons'.[330] The Court responded as follows:

> The respondents have presented no evidence that this type of accommodation, if extended to other government services, will unduly strain the fiscal resources of the State. To deny the appellants' claim on such conjectural grounds, in my view, would denude s 15(1) of its egalitarian promise and render the disabled's goal of a barrier-free society distressingly remote.[331]

Eldridge was concerned with the positive duties that arise in respect of the right to equality and non-discrimination. The positive duties imposed by socio-economic rights are more far-reaching, given that the State is required to do more than simply guarantee equal access to existing services. It must in fact initiate social programmes to give effect to socio-economic rights as an essential component of the duties imposed by these rights. The mere fact that the fulfilment of a socio-economic right will require an investment of resources by the State is not in itself a

326 *Eldridge v British Columbia (Attorney General)* (1997) 151 DLR (4th) 577 (SC) ('*Eldridge*').

327 *Eldridge* (supra) at paras 77-80. The concept of reasonable accommodation to the point of undue hardship is common in human rights (anti-discrimination) legislation in Canada. See, for example, the Ontario Human Rights Code, s 11 (Constructive discrimination).

328 *Eldridge* (supra) at para 87. The Court found that 'Other options, such as the partial or interim funding of the program offered by the Western Institute for the Deaf and Hard of Hearing, or the institution of a scheme requiring users to pay either a portion of the cost of interpreters or the full amount if they could afford to do so, were either not considered or were considered and rejected.' Ibid at para 93.

329 Ibid at para 87.

330 Ibid at para 91.

331 Ibid at para 92.

sufficient reason for limiting the right. If this were so, it would defeat the purpose of including socio-economic rights in the Bill of Rights. The State is expected to factor the resource requirements of all constitutional rights into the budgetary process.

Nevertheless, the reasoning in *Eldridge* implies that resource considerations may be a relevant purpose in a limitations inquiry pertaining to the positive duties imposed by constitutional rights. The standard of 'undue hardship' applied in *Eldridge* could be considered as a basis for evaluating the costs-related reasons for limiting socio-economic rights should the analysis reach the general limitations clause. The State must be required to demonstrate convincingly that the costs implications of fulfilling a socio-economic right will impose an 'undue hardship' on its fiscal resources and prejudice the other legitimate needs it is required to meet in a democratic society. The elements of the proportionality test will also have to be satisfied by demonstrating that the right is limited only to the extent required to avoid an undue strain on the State's resources.

33.11 The horizontal application of socio-economic rights

The possibility exists under the South African Constitution for socio-economic rights to apply horizontally (that is, in disputes between private parties).[332] The Constitution provides that the Bill of Rights applies to all law and binds all organs of State.[333] A provision of the Bill of Rights also 'binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.[334] In order to provide an effective remedy for violations of socio-economic rights by private parties, the courts 'must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right'.[335] The horizontal application of socio-

economic rights is significant in a global context where powerful private entities are increasingly controlling access to essential social services and resources.[336]

(a) Negative duties

In *Grootboom*, the Constitutional Court affirmed that section 26 (1) of the Constitution imposes 'at the very least, a negative obligation upon the State *and all other entities and persons* to desist from preventing or impairing the right of access

332 On horizontal application generally see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds)*Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

333 Section 8(1).

334 Section 8(2).

335 Section 8(3). The court may also 'develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)'. On the development of common-law remedies to give effect to socio-economic rights, see De Vos 'Pious Wishes' at 100–101.

336 See further in this regard, C Scott 'Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights' in A Eide et al (eds) *Textbook* (supra) at 563.

to adequate housing' [emphasis added].[337] Private parties are thus at least required to respect the negative duties imposed by socio-economic rights. For example, landlords should refrain from evicting people arbitrarily from their homes, insurance companies and private health care institutions should not discriminate unfairly against people in their access to insurance or health care services,[338] and industries should not cause an environment that is harmful to people's health.[339] The nature of this duty is capable of application to private parties. It is also appropriate to recognise the horizontal application of this duty given the need to afford effective protection to more vulnerable social groups against being deprived of access to socio-economic rights by powerful social actors.

(b) Positive duties

In contrast to the negative duties, the scope of the positive duties on private parties in relation to socio-economic rights is highly speculative and undeveloped. Sections 26(2) and 27(2) place the duty to take positive measures to improve access to socio-economic rights squarely on the State. The question that arises is whether there are circumstances under which certain private bodies bear positive duties to extend access to the relevant socio-economic rights.[340] This duty may

arise by virtue of a special relationship or when the body in question has the power to control access to a particular service. Possible examples are duties on —

- parents to provide for the needs of their children[341];
- companies relying on migrant labour to provide decent housing to their employees; and

337 *Grootboom* (supra) at para 34. See § 33.5*(b)* above (the negative duty 'to respect' socio-economic rights).

338 In addition to prohibiting unfair discrimination by the State (s 9(3)), the South African Constitution expressly provides that '*no person* may unfairly discriminate directly or indirectly against anyone' on a range of grounds such as race, gender, sexual orientation, disability and language (s 9(4)). The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 has been enacted to give effect to s 9(4) of the Constitution. Additional grounds of prohibited discrimination recognised in the Act in the form of directive principles include HIV/AIDS status and socio-economic status (s 34). The ground of 'socio-economic status' has a far-reaching potential for challenging the exclusion of the poor from access to social services and resources by both public and private entities. See in this regard: S Liebenberg 'Advancing Equal Access to Socio-economic Rights: The New Equality Legislation' (1999) 2 (1) *ESR Review* 12–13.

339 Section 24*(a)* of the Constitution.

340 It has been argued that the positive duties imposed by socio-economic rights are not applicable to private actors. See, for example: H Cheadle & D Davis 'The Application of the 1996 Constitution in the Private Sphere' (1997) 13 *SAJHR* 44. However, other academics have argued in favour of the application of section 8 to socio-economic rights. See Woolman 'Application' (supra).

341 As discussed above, the Court has held that the duties imposed by children's socio-economic rights in s 28(1)*(c)* are primarily binding on the parents and families of children. See *Grootboom* (supra) at paras 70–79, *TAC* (supra) at paras 74–79, and the discussion on children's socio-economic rights in § 33.7 above.

- multinational pharmaceutical companies holding exclusive patent rights over life-saving drugs to ensure their economic accessibility to poor communities.[342]

An important nexus exists between the duty of the State 'to protect' the socio-economic rights of more vulnerable members of society against powerful private actors,[343] and the imposition of a direct constitutional duty on private actors. In most circumstances the State will be bound to enact and enforce the necessary legislation to regulate the conduct of private actors in socio-economic spheres.[344] Examples of legislation designed to protect people against practices of private parties that could prevent or impair their access to socio-economic rights abound, for example, the Medical Schemes Act 131 of 1998, the Rental Housing Act 50 of 1999 and the Home Loan and Mortgage Disclosure Act 63 of 2000. Litigants will usually seek to enforce such legislation or, where protective legislation is lacking, may seek to compel the State to take the necessary legislative measures. However, as I have attempted to demonstrate, the possibility exists under the Constitution of seeking to hold private actors directly accountable for violations of both the negative and, in certain circumstances, the positive duties imposed by socio-economic rights. In the absence of legislation, the courts must apply, or if necessary develop, the common law to give effect to the relevant socio-economic right.[345]

(c) Development of the common law

Section 8(1) of the Constitution applies to 'all law'. All law is generally understood to encompass common law disputes between private parties.

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342 See in this regard, S Ellman 'A Constitutional Confluence: American 'State Action' Law and the Application of South Africa's Socio-Economic Rights Guarantees to Private Actors' in P Andrews & S Ellman (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 444, 459–469. Danwood Chirwa has suggested using the 'State action' doctrine to determine the circumstances in which private actors should be bound by the positive duties imposed by socio-economic rights:

> This benchmark could be used to differentiate the positive obligations of various private actors depending on the right and the nature of the obligations involved. For example, a private actor carrying out the functions of the State would be responsible to bear the relevant socio-economic rights obligations that the State would have borne. Similarly, a private actor not linked to the State but exercising power akin to or more than that of the State should be bound by as much positive obligations as the State would have in the specific area of dominance. The 'State action' test could be extended to hold private actors who, however, small, hold positions in society that can result in serious denials or violations of socio-economic rights, responsible for the relevant positive socio-economic rights obligations.

D M Chirwa, Obligations of Non-State Actors in Relation to Economic, Social and Cultural Rights under the South African Constitution' (2002) Research Series of the Socio-Economic Rights Project, Community Law Centre (UWC) at 25.

343 See § 33.2*(c)*(ii) supra (duties to respect, protect, promote and fulfil).

344 The Court in *Grootboom* noted (at para 35):

> A right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing.'

345 See s 8(3)*(a)*of the Constitution.

An illustration of the potential for socio-economic rights to influence the development of the common law is the application of section 26(3) to common law eviction proceedings. In *Ross v South Peninsula Municipality*, the Cape High Court held that the prohibition against arbitrary evictions in section 26(3) of the Constitution altered established common law principles relating to the pleadings and onus of proof in eviction proceedings brought by the owner of property.[346] The Court held that it was no longer sufficient for the owner of the property simply to allege in pleadings that it is the owner of the property in question and that the defendant is in unlawful possession. [347] The owner is now required to allege and prove the 'relevant circumstances' that would justify an order for the eviction of the defendants from their home.[348] Although the court did not decide the exact nature of these relevant circumstances, it indicated that some guidance could be obtained from legislative provisions, specifically the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). The special protection to be accorded in the context of evictions to the elderly, children, persons with disabilities and households headed by women was considered particularly relevant.[349]

In *Brisley v Drotsky*[350], the Supreme Court of Appeal held that the 'relevant circumstances' in section 26(3) are those that are *legally* relevant, rather than the personal circumstances of the person facing eviction.[351] The Court affirmed that section 26(3) was not only of vertical, but also of horizontal application.[352] However, in terms of the *Brisley* decision, a court will only consider those circum-

stances that are relevant in terms of the common law applicable to eviction proceedings brought by owners of property. In the absence of a statutory

346 *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C).

347 This principle was laid down in *Graham v Ridley* 1931 TPD 476.

348 Since the Constitution only protects eviction from a 'home', the onus to allege and prove relevant circumstances would not apply in the case of eviction from, for example, business premises.

349 *Ross* (supra) at 599B. The *Ross* judgment was subsequently overruled by the full bench decision in *Ellis v Viljoen* 2001 (4) SA 795 (C). The *Ellis* Court concluded that the right of ownership as recognised before the Constitution has not been affected by s 26(3) at least insofar as it did not place a duty on the owner of property to allege and prove the relevant circumstances that would entitle a court to issue an eviction order. Thus the normal common law rules of pleadings and proof apply where the owner seeks the eviction of an unlawful occupier from his or her property (at 805B—E). *Ross* was also criticised by Flemming DJP in *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W).

350 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA).

351 Ibid at paras 41–45. In his concurring judgment, Olivier JA held that the phrase, 'all relevant circumstances' in s 26(3) enjoined the Court to have regard to considerations of humanity before ordering the summary eviction of tenants following the termination of a lease. In appropriate circumstances, reasonableness and fairness could permit a court at least to suspend the execution of an eviction order for a reasonable period. Ibid at para 87.

352 Ibid at para 40. In this respect, the Court held that *Betta Eiendomme* (supra) was wrongly decided. Ibid at para 82 (Olivier JA).

discretion[353], a court has no discretion in terms of section 26(3) to refuse an eviction order where the lessee is not entitled to occupation of the property under the common law.

The SCA's narrow rendering of 'relevant circumstances' effectively means that s 26(3) will provide little consolation to persons facing eviction or demolition in the absence of statutory protection. The purpose of section 26(3) must surely have been to place a duty upon the courts to consider the impact of an eviction on the right of access to adequate housing of particularly vulnerable persons and to fashion an order that would take these circumstances into account. Such an order might take the form of staying the execution of the eviction order for a limited period.[354] In certain cases, it may be apparent that evicted persons would find themselves in a crisis situation 'with no roof over their heads'. In these circumstances, relevant organs of State are under a constitutional obligation to assist these persons by providing access to a reasonable programme that provides relief to those in desperate need.[355] In cases where PIE and the Extension of Security of Tenure Act (ESTA) 62 of 1997 are applicable, the courts must ensure that the stringent requirements of procedural fairness in the legislation have been followed.[356] They must also consider substantive factors before granting an eviction order.[357]

An unavoidable consequence of including socio-economic rights in the Constitution is that the complex array of arguments in favour of both property rights and socio-economic rights must be surfaced, and a candid analysis of the competing interests undertaken.[358] Our Constitution should not be read in such a way as to artificially suppress arguments in favour of the socio-economic rights at stake in particular cases.

33.12 Remedies

The Constitution gives the courts broad remedial powers.[359] Law or conduct that is inconsistent with the Constitution must be declared invalid to the extent of its inconsistency.[360] In addition, the courts may make any order that is 'just and

353 See, for example, the discretion conferred in s 8 of the Extension of Security of Tenure Act 62 of 1997.

354 For example, the judgment by Olivier JA in *Brisley* (supra).

355 *Grootboom* (supra) at paras 52 and 88–90.

356 See, for example, *Cape Killarney Property Investments v Mahamba & others* 2000 (2) SA 67 (C). The Supreme Court of Appeal dismissed the appeal against this judgment: *Cape Killarney Property Investments v Mahamba & others* 2000 (2) SA 67 (SCA).

357 See, for example, ss 4(6) and (7) of PIE; and ss 8(4), 10(2) and 11(2) of ESTA.

358 See, in this regard, Woolman 'Application'.

359 In terms of s 38 of the Constitution, a court may grant 'appropriate relief' in respect of an infringement of threatened infringement of a right in the Bill of Rights.

360 Section 172(1)*(a).*

equitable', including an order suspending a declaration of invalidity on any conditions to allow the competent authority to correct the defect.[361] In *Fose v Minister of Safety and Security* [362], the Constitutional Court held that '[a]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution'.[363] It went on to say that the courts 'may even have to fashion new remedies to secure the protection and enforcement of these all-important rights'.[364]

Wim Trengove has identified a number of unique features of litigation relating to socio-economic rights 'which call for the development and creation of new and more effective remedies'.[365] Among the innovative remedies he proposes are an award of *preventative damages* against the State made in favour of an independent State institution (eg a Human Rights Commission) or non-governmental organisation with the necessary skills and programmes aimed at preventing future violations of the right in question. Another order that may be more appropriate than awarding monetary compensation is an order for *reparations in kind*. The motivation for this kind of order is that it is often difficult to quantify the harm done to an individual litigant arising from the long-term structural deprivation of services such as education or health care. The State may thus be ordered to provide appropriate remedial services for the benefit of a whole community that has suffered a long-term violation of their socio-economic rights.[366] Orders of this nature usually require on-going judicial supervision to ensure that they are properly implemented.

A critical issue in the enforcement of the positive duties imposed by socio-economic rights (particularly those subject to 'progressive realisation') concerns the circumstances under which the courts should grant mandatory relief, including the assumption by the court of supervisory jurisdiction over their implementation. In terms of such an order, the State will usually be ordered to devise and present to court a plan of action to remedy the violation, and to report back to the court on its implementation at regular intervals. At both the stages of the approval and implementation of the plan, the applicant and other interested parties (including a possible independent 'court monitor') will be given an opportunity to comment.[367] Trengove points out that redressing systemic violations of socio-economic rights often requires far-reaching institutional and structural

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361 Section 172(1)*(b).*

362 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC).

363 Ibid at para 19.

364 Ibid.

365 See W Trengove, 'Judicial Remedies for Violations of Socio-economic Rights' (1999) 1(4) *ESR Review* 8.

366 Trengove cites *Milliken v Bradley II* (1977) 433 US 267 as an example where the US Supreme Court approved an order requiring the State to provide remedial education to the victims of past race discrimination in the Detroit school system. Ibid at 9.

367 See the discussion of 'structural interdicts' by J Klaaren 'Remedies' M Chaskalson et al *Constitutional Law of South Africa* (1st Edition, RS 5, 1999) 9-15–9-16.

reforms over a period of time in a manner determined by the legislative and executive branches of government. They cannot be remedied by a single court order made once and for all. Such orders should strive to preserve the choice of means of the legislative and executive as to the precise manner in which to remedy the situation while not abdicating the court's responsibility to ensure that constitutional objectives are fulfilled.[368] The Court thus retains jurisdiction over the enforcement of the order.

In *Grootboom*, the Constitutional Court confined itself to making a declaratory order.[369] In *TAC* the Court confirmed its wide remedial powers, including the granting of mandatory relief with or without the exercise of some form of supervisory jurisdiction.[370] The Courts should be guided by '[t]he nature of the right infringed and the nature of the infringement as to the appropriate relief in a particular case'.[371] The critical consideration is what would constitute an *effective* remedy in the circumstances of the case.[372] Although the *TAC* Court made both declaratory and mandatory orders against the State, it declined to exercise a supervisory jurisdiction as it was invited to do by the applicants. It held that there were no grounds for believing that the government would not respect and execute the orders of the Court.[373] The High Courts have granted supervisory orders in a number of of socio-economic rights cases.[374]

33.13 The role of the human rights commission and the commission for gender equality

368 Trengove (supra) at 9.

369 *Grootboom* (supra) at para 99. This order has attracted criticism. See K Pillay 'Implementation of *Grootboom*: Implications for the Enforcement of Socio-economic Rights' 2002 (6) *Law Democracy & Development* 255. For a recent case concerning the non-compliance by a local authority with its housing obligations as laid down in *Grootboom*, see *City of Cape Town v Rudolph & others* 2003 (11) BCLR 1236 (C).

370 *TAC* (supra) at paras 104–106. In this respect the Court rejected the State's contention that the Court's power in the present case was confined to issuing a declaratory order. The State argued that the doctrine of separation of powers precluded the courts from making orders 'that have the effect of requiring the executive to pursue a particular policy.' Ibid at para 97. The power of the Court to make 'supervisory orders' was specifically recognised in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 96. An order of this nature was made in *August & another v Electoral Commission & others* 1993 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC). In the latter case, the Electoral Commission was ordered to make all the necessary and reasonable arrangements for prisoners to exercise their right to vote coupled with an injunction to submit a detailed plan for scrutiny.

371 *TAC* (supra) at para 106.

372 Ibid at para 102 (citing Ackermann J in *Fose* (supra), para 106, and paras 112–113).

373 Ibid at para 129. In this regard the court indicated that supervisory orders should not be made unless they are necessary to secure compliance with a court order. For a criticism of the Court's reluctance to make a supervisory order in the circumstances of this case, see Bilchitz 'Laying the Foundations' (supra) at 23–26.

The Human Rights Commission has been given a general mandate under the Constitution to promote human rights and to monitor and assess their observance in South Africa.[375] To this end it has been given the powers to investigate and report on the observance of human rights, to take steps to secure appropriate redress where human rights are violated, to carry out research, and to educate.[376] The Constitution also imposes a special duty on the Commission in relation to socio-economic rights. Each year it must 'require relevant organs of State to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment'.[377] The Commission has thus a specific information-gathering mechanism at its disposal in relation to socio-economic rights. It can use this information for a variety of purposes related to its general mandate to promote, monitor and assess the observance of human rights.[378] The Commission can use the information generated through this process for the following purposes: (1) reporting to Parliament and the President on the observance of socio-economic rights; (2) making recommendations on policy or legislation to the relevant organs of State; (3) attempting to secure appropriate redress for victims of violations of socio-

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374 In *Grootboom I* (supra), the High Court found a violation of s 28(1)*(c)* of the Constitution. In the first part of its order, the Court declared in broad terms that the appropriate organ or department of State is obliged to provide the applicant children, and their accompanying parents, with shelter until such time as the parents are able to shelter their own children. The second part of the order directs the respondent to present under oath reports to the Court on the implementation of the order within a period of three months from the date of the order. The applicants are given an opportunity to deliver their commentary on the aforegoing reports (at 293H-J–294A-C). See also *Strydom v Minister of Correctional Services & others* 1993 (3) BCLR 342 (W) (respondents ordered to report to court setting out a timetable within which the electrical upgrading of the maximum security section of Johannesburg Prison would be commenced and completed); and *TAC* High Court judgment (supra) at 386J–387H. Perhaps the proximity of the High Courts to the actual circumstance of the applicants makes them more appropriate venues for supervisory orders. The responsibility for supervisory orders in other jurisdictions often falls on the court of first instance.

375 Section 184(1).

376 Section 184(2). These powers are further regulated in terms of the Human Rights Commission Act 54 of 1994.

377 Section 184(3). For an analysis of the monitoring of socio-economic rights by the Human Rights Commission, see DG Newman 'Institutional monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda' (2003) 19 *SAJHR* 189.

378 The UNCESCR has developed creative and innovative approaches to its mandate to supervise States parties' reports under the ICESCR. The Commission could usefully draw on aspects of its work in carrying out its mandate under s 184(3). See Craven 'Towards an Unofficial Petition Procedure' (supra); B Borter 'Socio-Economic Rights Advocacy — Using International Law' (1999) 2 (1) *ESR Review* 1–6; GC 1 Reporting by States parties (1989) (supra); and GC 10 The role of national human rights institutions in the protection of economic, social and cultural rights (1998) (supra). For an approach arguing against the international reporting system as an appropriate model for the Commission in relation to socio-economic rights, see J Klaaren 'A Second Look at the South African Human Rights Commission, Access to Information and the Promotion of Socio-Economic Rights' (2004) (unpublished paper on file with author).

economic rights;[379] and (4) identifying issues requiring further research and investigation.[380]

The Commission can play an especially valuable role in support of the judicial

enforcement of socio-economic rights.[381] The Commission can monitor the progressive realisation of socio-economic rights, identify structural patterns of inequality and provide evidence, where necessary, of the link between State policies and the constitutional violations experienced by disadvantaged groups. The information generated through the monitoring process and the Commission's annual assessment of the progress made by relevant organs of State may also assist in the preparation of appropriate cases for litigation. De Vos points out that through co-operating with the Commission, organs of State may be in a better position to defend a claim that they have failed to make reasonable progress in realising the rights.[382] At the same time, the information generated by the Commission also provides a source of information for litigants and *amici* in preparing socio-economic rights cases.[383]

There is, furthermore, scope for building a co-operative relationship between the Commission and the courts in the enforcement of orders relating to socio-economic rights. For example, the courts may wish to involve the Commission in the supervision and enforcement of its decisions and orders in respect of socio-economic rights.[384] This potential synergy exists particularly with regard to the supervisory orders discussed above.[385]

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379 In terms of the Human Rights Commission Act, the Commission can use alternative dispute resolution mechanisms (mediation, conciliation and negotiation) to attempt to resolve disputes and rectify violations of human rights (s 8). It can also take cases to court in its own name, or on behalf of a person or a group or class of persons (s 7(1)*(e)*).

380 The power of the Commission to conduct investigations is contained in s 9 of the Human Rights Commission Act.

381 Despite the extensive provisions in the Constitution protecting socio-economic rights, it is noteworthy that in the seven years since the adoption of the 1996 Constitution, there has been only a handful of socio-economic rights cases. This indicates the need for a body such as the Commission to play an active role in both the promotion and protection of socio-economic rights.

382 De Vos 'Pious Wishes' (supra) at 100.

383 For example, in their joint *amici* submissions in *Grootboom,* the Commission and the CLC (UWC) relied on the information submitted by relevant organs of State to argue that the relevant government departments (housing and welfare) had not adopted adequate measures to give effect to their obligations in terms of ss 26 and 28(1)*(c).*

384 In *Grootboom*, the Human Rights Commission undertook to monitor and report on the State's compliance with its s 26 obligations in accordance with the judgment *Grootboom* (supra) at para 97.

385 See § 33.12 supra ('Remedies'). See also C Albertyn 'Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D.

Apart from attempting to obtain redress for victims of violations through the courts, the Commission can bring systemic abuses of socio-economic rights to the attention of government and the public. By involving both government officials and civil society organisations in the information gathering and dissemination process, the Commission can gain a greater understanding of the impact of government programmes on disadvantaged communities and whether they are, in fact, being reasonably implemented.[386]

The importance of developing a national strategy and plan of action for the progressive realisation of socio-economic rights cannot be underestimated.[387] The Commission can contribute to the formulation of such plans, drawing on the

experience is has gained in monitoring socio-economic rights. Although the Commission for Gender Equality does not have an express mandate in relation to socio-economic rights, it has a vital role to play in developing the gender dimensions of these rights. The Commission for Gender Equality and the Human Rights Commission should collaborate closely to ensure that the impact of gender factors are fully integrated in the monitoring of socio-economic rights.[388]

386 On the requirement that government programmes must be reasonably implemented, see *Grootboom* (supra) at para 42.

387 See § 33.5*(g)*(i) supra (plans of action).

388 The functions and powers of the Commission for Gender Equality are contained in s 187 of the Constitution, and in the Commission for Gender Equality Act 39 of 1996. See in this regard, K Pillay 'The Commission for Gender Equality: What is its Role?' (1998) 1(3) *ESR Review* 13–15. See also Albertyn 'Commission for Gender Equality' (supra).