

Chapter 55

Housing

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26. (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.^β

55.1 Introduction*

In addition to the housing rights provided for in FC s 26, FC ss 28(1)(c) and 35(2)(e) provide, respectively, for the rights of children to 'shelter'^β and the rights of prisoners to 'adequate accommodation'.^β

Until recently, most writing on housing law and policy, and FC s 26, has been undertaken either by legal academics or by housing practitioners. The former tend to focus on the jurisprudence of socio-economic rights and the Constitutional Court's seminal decision in *Grootboom*,^β while the latter tend to be preoccupied with the practical implementation of State housing policy, unaware of its nuanced legal interpretations. This chapter attempts to marry these two discourses, and in so doing, develop a more multifaceted treatment of housing law generally. For the lawyer, it contextualizes housing rights and litigation within the practical constraints and difficulties of government bureaucracy, financing and planning. For the housing practitioner, it views policy analysis through the lens of FC s 26's right to adequate housing.

Housing law is animated by a complex network of law, policy, social welfare, politics, international law, macro-economic planning, co-operative government and

□ Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ('FC' or 'Final Constitution').

□ See § 55.7 *infra*.

□ See § 55.8 *infra*.

□ *Government of the RSA & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('*Grootboom*').

finance. Today, housing is also about much more than simply providing shelter from the elements. It is about creating sustainable, integrated housing settlements, and generating wealth through asset creation. For the very poor or indigent, it is also about social welfare and access to basic services.

From 1 April 1994 until December 2005, the South African government subsidized the construction of 1 916 918 houses^β and in so doing, at an average of 4.1 people per household, provided housing to approximately 7 859 363 people in South Africa.^β As Kecia Rust points out:

* I would like to thank Geoff Budlender, Marie Huchzermeyer, Theunis Roux, Kecia Rust, Hendrik van Rensburg, Alison Wilson, Stu Woolman and David Zeffertt for comments on earlier drafts of this chapter. Any errors remain my own.

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South Africa has tackled issues of housing finance, social housing, and consumer protection. It has institutionalised the concept of 'people's housing', made space for women in the construction industry, and supported the role of emerging builders. It has built a single, non-racial department of housing out of a previously fragmented and inefficient system. And, perhaps most importantly, it has entrenched the right to adequate housing in its constitution. Each of these developments is a significant achievement. Their combination, especially given South Africa's history, is unparalleled.^β

Despite this glowing commendation, there remain a number of problems with housing policy and delivery in South Africa. This chapter will examine these problems in light of the constitutional right to adequate housing.

The chapter begins with a brief overview of South African housing policy since 1994. It then moves into a discussion of FC s 26(1) and (2) and the standards established by the *Grootboom* Court that determine the 'reasonableness' of the State's measures to realize progressively access to adequate housing. These standards are used, in the following section, to examine extant housing policy. The chapter then considers international law on housing. International law provides one of many critical perspectives on our courts' current housing jurisprudence. In the final sections of the chapter, eviction law and the protection afforded by FC s 26(3), a child's right to shelter in terms of FC s 28(1)(c), and a prisoner's right to adequate accommodation under FC s 35(2)(e) are assayed. These latter two provisions are not dealt with in detail as they are discussed more thoroughly elsewhere in this volume.^β

55.2 Overview of South African housing policy 1994–2000

□ These figures are the latest available up to December 2005: see <http://www.housing.gov.za> (accessed on 11 May 2006). The website also states that, as of December 2005, the government had approved 2 784 675 subsidies and 1 698 788 beneficiaries.

□ The average of 4.1 persons per household is based on the figure used by the Department of Housing. National Department of Housing *Ten Year Review* (2003).

□ K Rust 'No Shortcuts: South Africa's Progress in Implementing its Housing Policy, 1994–2002' (Unpublished paper prepared for the Institute for Housing of South Africa, 2003, on file with the author) 7. The Department of Housing has also provided secure tenure to approximately 500 000 families living in old public housing stock. See National Department of Housing *Breaking New Ground: The Comprehensive Plan for the Creation of Sustainable Settlements* (2004) ('*Breaking New Ground*') 4.

(a) Historical background

In order to chart the State's response to *Grootboom*, it is essential that one first come to grips with State housing policy from 1994 through to 2000.^β Indeed,

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housing policy, as it is currently conceived, actually antedates the new dispensation. Discussions about a new housing policy began with the establishment of the National Housing Forum in 1992. The findings of this 'multi-party non-governmental negotiating body'^β were used by the Government of National Unity in formulating South Africa's National Housing Policy. While the Forum's processes have been criticized for not giving effective voice to the homeless and poor,^β the primary purpose of the Forum was to reach a working consensus between different interest groups on key issues.^β It did exactly that — but at the cost of plastering over many unresolved contradictions in the aims and wishes of the various interest groups.^β In October 1994, a National Housing Accord (known as the 'Botshabelo Agreement') was signed by 'a range of stakeholders representing the homeless, government, communities and civil society, the financial sector, emerging contractors, the established construction industry, building material suppliers, employers, developers and the international community'.^β In December 1994, the government produced the White Paper on Housing^β and South Africa's first universal housing strategy.^β

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- For a general overview of the jurisprudence on socio-economic rights, see S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33. For a more detailed discussion of children's rights, see A Friedman & A Pantazis 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 47. For more on prisoner's rights, see F Snyckers & J Le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 51; D van Zyl Smit 'Sentencing and Punishment' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 49. Knowledge of this material is largely assumed in the writing of this chapter and duplication is avoided where possible.
 - For a good discussion of pre-1994 housing policy, see P Wilkinson 'Housing Policy in South Africa' (1998) 23 *Habitat International* 215, 216-24.
 - National Department of Housing *National Housing Code* (2000) 3UF.
 - See M Huchzermeyer 'Housing for the Poor? Negotiated Housing Policy in South Africa' (2001) 25 *Habitat International* 303, 305-11.
 - See F Khan 'Introduction' in F Khan & P Thring (eds) *Housing Policy and Practice in Post-Apartheid South Africa* (2003) 1, 12.
 - See MR Tomlinson 'South Africa's New Housing Policy: An Assessment of the First Two Years, 1994-96' (1998) 22 *International Journal of Urban and Regional Research* 137, 144. Some of these conflicts and contradictions are responsible for many of the problems experienced in implementing the housing programme to date, many of which are currently being addressed in *Breaking New Ground* — the Department's new housing policy.
 - *National Housing Code* (supra) at 4UF.

(b) Constitutional and legislative framework

The documents at the heart of contemporary housing policy are the Final Constitution, the Housing White Paper, the Housing Act^β and the *Housing Code*. Other influential documents are the Reconstruction and Development Programme (RDP), the Growth, Employment and Redistribution Strategy (GEAR), the Urban and Rural Development Frameworks, and various other white papers and legislation on local government and the public service.^β In September 2004, the Minister of Housing announced a refined and renovated housing policy:

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'Breaking New Ground': The Comprehensive Plan for the Creation of Sustainable Human Settlements. *Breaking New Ground* has significant implications for the Housing Act and the *Housing Code* as both the Act and the *Code* are being redrafted in light of this new policy document.^β

The Housing Act is the central piece of national legislation regulating housing policy. At the heart of the Act is the aim to 'provide for the facilitation of a sustainable housing development process'.^β 'Housing development' is defined as

the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to —

- (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and

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- National Department of Housing *White Paper: A New Housing Policy and Strategy for South Africa* (1994).
 - See S Gutto 'Housing' in *The Law of South Africa* 11 (First Reissue, 1998) 1, para 11. The Development Facilitation Act was also pivotal in bringing about the new approach to housing development. Act 67 of 1995. The Act aimed to 'facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land'. Preamble to the Development and Facilitation Act. See Gutto (*supra*) at paras 12-17.
 - Act 107 of 1997.
 - *National Housing Code* (*supra*) at 5UF.
 - Unfortunately, revised drafts of the Housing Act and the *National Housing Code* were not available at the time of writing this chapter. These amendments will be dealt with in future revisions of this chapter. *Breaking New Ground* has been considered, where possible, to indicate future development in housing policy. It should be noted, however, that housing policy is currently (mid-2006) in a state of revision and that caution should be used in relying on the information in this chapter as it may soon become outdated. For a discussion of the relationship between *Breaking New Ground* and other legislation and policy, see §55.4(b) *infra*. Readers are also advised that the national Department of Housing's website is frequently out of date (for example, *Breaking New Ground* is not available on the website) and that, if accurate information is required, they should contact the Department directly.
 - 'Long Title' of the Housing Act.

(b) potable water, adequate sanitary facilities and domestic energy supply.^β

The Housing Act lays down 'general principles' for housing development. These include prioritizing the needs of the poor (s 2(1)(a)), consulting with affected parties (s 2(1)(b)), and regulating affordable and sustainable housing development (s 2(1)(c)) through the principles of co-operative government set out in FC s 41.^β The Act describes in detail the powers and duties of the various spheres of government, and the ways in which they should interact and co-operate in order to give effect to FC s 26. It does not, however, contain a detailed account of actual housing policy. For instance, the Housing Act does not specify that housing delivery should be carried out through project-linked subsidies, or that individual ownership should be given precedence over communal ownership or rental options.

Instead, the Housing Act states that the Housing Minister must publish a *Housing Code* which contains national housing policy (s 4(2)(a)) that binds provincial and local spheres of government (s 4(6)). The content of the *Code* is

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determined wholly by the Minister. Moreover, the Minister is not obliged to engage in any deliberative or consultative process in determining national housing policy.^β The only requirement is that the Minister must publish updated lists of housing programmes and national institutions established in terms of the Act, in the Government Gazette 'from time to time' (s 3(6B)). Furthermore, 'new national housing policy applies notwithstanding that such a policy has not yet been included in a revision of the *Code*' (s 4(5)).

This framework raises two concerns. First, this requirement 'expressly sanctions the inversion of the usual relationship between policy and legislation'.^β The typical, and desirable, relationship is that policy documents should state the overall objectives of government strategy, while the detailed rules are set out in primary or secondary legislation. The authorization, by the Housing Act, for virtually all rules pertaining to housing to be contained in the *Housing Code* — whose terms can be altered by ministerial fiat — is undesirable. The current policy revision process is even more convoluted. *Breaking New Ground* — the State's new housing policy — is at odds with various provisions of the Housing Act and *Housing Code*. The latter two documents must now be amended so as to be consistent with the new policy.

The second, related concern involves the democratic and constitutional appropriateness of including most, if not all, of the housing development framework in policy rather than legislation. The Final Constitution mandates the State to take

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- Housing Act s 1.

 - For a general discussion of the principles of co-operative government, see S Woolman, T Roux & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 14.

 - The Act, however, does specify that the *Code* may contain 'administrative or procedural guidelines' regarding 'the effective implementation and application of national policy' or 'any other matter that is reasonably incidental to national housing policy' after consulting with the various provincial housing MECs as well as SALGA. Housing Act s 4(2)(b).

 - T Roux 'Background Report 2: Review of National Legislation Relevant to Informal Settlement Upgrading' (Unpublished paper written for the National Department of Housing, 2004, on file with the author) 1.

'reasonable *legislative* and other measures' (emphasis added) to realize the right of everyone to have access to adequate housing. A purposive interpretation of this injunction would mean that the most important principles and policy choices relating to housing delivery should be deliberated upon in Parliament.^β Of course, it is always open to government departments to include substantial portions of 'policy' in regulations, and pure 'policy documents', but the more important aspects of policy should be contained in legislation. At present, the *Housing Code* (and now *Breaking New Ground*) exhaust the universe of important policy concerns and render the Act superfluous in terms of determining how the State gives effect to the right to adequate housing. This situation arguably amounts to the abdication by Parliament of its constitutionally mandated role, and may, in addition, violate the principle of legality and the rule of law.^β

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Low-income housing development in South Africa is financed primarily through the housing subsidy, predominantly a once-off capital grant through which developers have developed housing for allocation to qualifying beneficiaries. For the poorest households, the housing subsidy was originally set at a maximum of R 16 000, which was then increased in 2002 to R 20 300, and in 2006 to R 36 528 per household.^β In order to qualify for a housing subsidy, the beneficiary must (1) be married or 'constantly living with another person', or, if single, must have 'proven financial dependents'; (2) be a South African citizen or a permanent resident; (3) be competent to contract and of sound mind; (4) have a (combined) monthly household income that does not exceed R 3 500; (5) not already have received a housing subsidy, either personally or through another member of his or her household; and (6) not previously have owned a house (with certain exceptions).^β Ideally (and according to the original intention of the policy), beneficiaries should also obtain credit to supplement the subsidy. In practice, however, very few beneficiaries have

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- *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 327.
 - For a general discussion of the content of the legality principle and the rule of law, see F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11.
 - Initially, there were different subsidy bands, depending on what the beneficiary household earns per month. Households earning over R 3 500 per month do not qualify for a subsidy. The new housing policy proposes collapsing the subsidy bands and providing a single subsidy for every household earning under R 3 500 per month, and providing financial assistance in obtaining bank loans to those earning between R 3 500 and R 7 000 per month. See *Breaking New Ground* (supra) at 8-9. A list of the various subsidies and the amounts granted are available on the Department of Housing website: <http://www.housing.gov.za>. Note that, at the time of writing, the figures on the website were out of date and the figures cited in this chapter were obtained directly from the Department.
 - This information was obtained from the Department of Housing website, <http://www.housing.gov.za> (accessed on 11 January 2006). Immediately noticeable is the restrictive scope of the beneficiary group. By comparison, the text of the Final Constitution extends the right to 'everyone'. For example, persons who are not in a relationship or with dependants are excluded, which would include many young and elderly people. This restrictive provision of housing benefits may be subject to challenge in the future, where, on the basis of the holding in *Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Minister of Social Development & Others*, the State would have to demonstrate that this restriction was reasonable or did not constitute unfair discrimination. 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) ('*Khosa*').

been able to access formal credit: in 1994 only six per cent of beneficiaries obtained credit, and by 2002, this figure had fallen to less than two per cent.^β

South African housing policy's primary aim is to deliver housing to the 'poor', defined as those earning under R 3 500 per month. In 1994, the poor accounted for 85 per cent of the population. Today, this percentage is substantially lower. The lowering of this percentage, however, is mostly due to inflation rather than a significant improvement in income in real terms.^β While the Department of Housing is committed to ensuring that the amount of the subsidy keeps pace with inflation, there is no similar commitment to moving the subsidy bands.

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Initially, housing development was carried out primarily by the private sector, with large, for-profit construction companies undertaking substantial government-subsidized projects on 'greenfields land'. This strategy enabled the State to deliver a significant number of houses. Developers used the housing subsidy to purchase land, build bulk infrastructure and develop a core or starter house. Approximately 46.8 per cent of the subsidy was spent on land and infrastructure.^β Due to the high costs of infrastructure, policymakers envisaged that beneficiaries would incrementally add to a core house that often consisted of little more than a slab of concrete, a roof on beams with one or two walls, a tap and a toilet.

Some notable shifts in policy have, however, occurred over the last few years. First, by the late 1990s, the State emphasized the delivery of better top-structures and completed houses.^β Second, the State's housing efforts were frustrated by both the failure to create a secondary market in RDP houses and the lack of proper valuation of the houses by the beneficiaries themselves. (A large number of RDP houses were sold for substantially less than the cost incurred in building them.) As a result, in April 2002, the State began to require beneficiaries to contribute either an amount of R 2 479^β or an equivalent amount of labour or 'sweat equity' to their houses. (Pensioners, the disabled, and those with proven health problems were not required to make this contribution, and, due to poor households' difficulty in making

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- See Rust (supra) at 10. Access to formal credit, however, is not solely a problem of financial institutions refusing to grant credit. Rather, there is a range of complex reasons for beneficiaries not wanting or not being able to afford formal credit, which arise independently of the subsidies. See I Melzer 'How Low Can You Go?: Charting the Housing Finance Access Frontier: A Review of Recent Demand and Supply Data' (Unpublished paper prepared for the FinMark Trust, 2006, on file with the author) 31-49, available at <http://www.finmarktrust.org.za> (accessed on 10 May 2006).
 - See Rust (supra) at 7.
 - The new housing policy, *Breaking New Ground*, envisages that the funding for the acquisition of well-located land should no longer come out of the housing subsidy, but should be financed through a separate fund. See *Breaking New Ground* (supra) at 14.
 - See S Charlton, M Silverman & S Berrisford *Taking Stock: Review of the Department of Housing's Programme, Policies and Practice (1994-2003)* (Unpublished paper prepared for the Department of Housing, 2003, on file with the author) 67. Minimum norms and standards for houses were also introduced on 1 April 1999.
 - This sum is calculated as the difference between what it actually costs to build a 30m² top-structure and the housing subsidy. See Department of Housing 'Memorandum: Adjustment of the Quantum of the Housing Subsidy' (2002).

these payments, *Breaking New Ground* later amended this to exclude those earning less than R 1 500 per month.) This requirement of 'own contribution' from beneficiaries reinforces the National Department of Housing's renewed emphasis on the 'people's housing process' — the notion that the dignity and responsibility that flow from and attach to home ownership must be matched by a commitment on the part of the beneficiaries themselves to the homes they build and the communities to which they belong. A third development is that the notion of secure tenure has been widened to include rental housing, resulting in increased interest in 'social housing' as a solution for providing low-cost rental stock for the poor.^β Lastly, local government has been granted a broader mandate for housing delivery, including informal settlement upgrading.^β

55.3 FC s 26(1) and (2)

A number of cases have engaged the meaning and the reach of FC s 26(1) and (2). One case alone, however, canvasses the vast majority of issues raised by the Final Constitution's commitment to adequate housing: *Grootboom*.

(a) Overview of *Grootboom*^β

Grootboom began with an informal community's occupation of private land. The community named their new settlement 'New Rust' — and it was, all things being equal, an improvement upon the deplorable conditions of their previous settlement. The owner of the land, however, sought and obtained an order for the community's eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.^β The community then sought shelter on a municipal sports field. After requesting assistance, but receiving none, from the relevant local government authorities, the community sued the local municipality in the Cape High Court for an order granting temporary shelter. In so doing, they relied on FC s 26 and FC s 28. Davis J granted an order in terms of FC s 28(1)(c), instructing the State to provide shelter for the children in the community, as well as their parents. The State

□ See Rust (*supra*) at 9.

□ The significance of this mandate for the realization of housing rights is discussed in COHRE 'Any Room for the Poor? Forced Evictions in Johannesburg, South Africa' (Centre on Housing Rights and Evictions (COHRE), 2005) 98-99, available at http://www.cohre.org/store/attachments/Any_Room_for_the_Poor_8Mar05.pdf (accessed on 10 March 2009). For a discussion of informal settlement upgrading, see § 55.4 (c)(iii).

□ *Grootboom*'s impact on the evolving jurisprudence around interpretation and enforcement of socio-economic rights generally is discussed in considerable detail in Sandra Liebenberg's chapter. They will not be rehearsed here. See S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33. For the application of the *Grootboom* criteria to other socio-economic rights, see D Brand 'Food' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 56C; D Bilchitz 'Health' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 56A; M Swart 'Social Security' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 56D.

□ Act 19 of 1998.

appealed against this order to the Constitutional Court. After the intervention of an amicus curiae, the original claim based on FC s 26(1) and (2) was also reargued.^β

The Constitutional Court held that the rights in FC s 26 and FC s 28 did not entitle 'the respondents to claim shelter or housing immediately upon demand'.^β At the same time, the Court emphasized that socio-economic rights are justiciable and that the right to housing is enforceable.^β That enforcement, as a general matter, takes the form of direct regulation of State policy. Proper enforcement, according to the *Grootboom* Court, required the State to have in place a reasonable plan to realize the right to housing over time and within its budgetary constraints, including a plan to provide relief to those in desperate need. The declaratory order of the *Grootboom* Court reads as follows:

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- (a) Section 26(2) of the Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing.
- (b) The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.
- (c) As at the date of the launch of this application, the State housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements in para (b), 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.

(b) The relationship between FC s 26(1) and (2)^β

In *Grootboom*, the Constitutional Court was quick to point out that FC s 26(1) and (2) should be seen as one distinct right and that the two subsections 'must be read together'.^β Having said that, the *Grootboom* Court found that FC s 26(1) imposed a negative obligation on the State not to interfere with the right to housing^β and that FC s 26(2) delineated the State's positive duty to realize progressively the right of all

□ *Grootboom* (supra) at paras 3-16.

□ *Ibid* at para 95.

□ *Ibid* at para 94.

□ For further discussion of the relationship between subsections (1) and (2) of FC s 26 and 27, see Liebenberg (supra) at 33-17 — 33-19.

□ *Grootboom* (supra) at para 34.

□ *Ibid* at paras 34-37.

South Africans to adequate housing.^β FC s 26(1) does not provide a right to housing itself, but only a right to have access to adequate housing. Despite this narrow formulation, the wording of FC s 26(2) indicates that the State's obligation is more extensive than the duty merely to provide an enabling environment for everyone to realize the right to housing themselves. For example, a macro-economic strategy like GEAR alone would be insufficient. Indeed, FC s 26(2) points to a duty on the State to provide *housing* — either itself or through the private sector.

The Constitutional Court first addressed the nature of the relationship between subsections (1) and (2) of FC s 27 (and its cognate, FC s 26) in *Soobramoney*, where Chaskalson P wrote that:

What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.^β

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In this passage, the *Soobramoney* Court presses a conceptual connection between the obligations imposed on the State by FC s 26(2) and FC s 27(2) and the 'corresponding right'. While the obligations on the State are clearly circumscribed by available resources, it is not entirely apparent what the Court means when it states that the 'corresponding rights themselves are *limited* by reason of the lack of resources' (my emphasis). This sentence could be interpreted in three ways. The *Soobramoney* Court could be saying that the rights in FC s 26(1) and FC s 27(1) are 'limited' by the nature of the State's obligation. That is, while the content of the right (FC s 26(1)) might remain the same, any relief granted against the State will be contingent upon 'available resources' (FC s 26(2)). In other words, a claim against the State at Time 1 may be less likely to succeed than a similar claim against the State at (the later) Time 2 (because more resources are available at Time 2), but the 'right' remains the same. Alternatively, the *Soobramoney* Court could be saying that the ambit of the right itself must be restrictively interpreted, that is, 'available resources' truncates or delimits the scope of the right. This would mean that the scope of the right would change over time (or possibly between litigants), depending on available resources. Or, third, in Geoff Budlender's words, FC s 26(1) could create a general right, while FC s 26(2) and FC s 26(3) are best regarded as 'manifestations of the general right'.^β

One consequence of the first and third readings is that FC s 26(2) acts in the manner of an internal limitations clause with regard to FC s 26(1), in the same way

□ Ibid at paras 38–46. It may perhaps have been preferable for the Constitutional Assembly not to have separated FC s 26(1) and FC s 26(2), but to have drafted them as one right. Such a textual choice might have helped to prevent confusion regarding the relationship between FC s 26(2) and FC s 26(3). See, for example, *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) at para 7.3.

□ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) ('*Soobramoney*') at para 11.

□ G Budlender 'Justiciability of the Right to Housing — The South African Experience' in S Leckie (ed) *National Perspectives on Housing Rights* (2003) 207, 208.

that FC s 36 permits a justifiable limitation of a right. Hence, the 'content of the right is not limited to the duties in Section 26(2) or the prohibitions in Section 26(3)'.^β On the second (Hohfeldian) reading, the content of the right is *determined* by FC s 26(2) duties, which are, in turn, determined by issues such as available resources.

In *Grootboom*, the Constitutional Court accepted the approach adopted in *Soobramoney*, stating that the obligation in FC s 26(2) 'does not require the State to do more than its available resources permit'.^β Again, the *Grootboom* language is ambiguous and does not clarify the conceptual distinction between the nature of the duty and its relationship to the scope of the right. The same point was raised again in *Khosa* in relation to FC s 27. In summarizing the Court's previous jurisprudence, Mokgoro J states:

This Court has dealt with socio-economic rights on four previous occasions. What is clear from these cases is that section 27(1) and section 27(2) cannot be viewed as separate or discrete rights creating entitlements and obligations independently of one another. Section 27(2) exists as an internal limitation on the content of section 27(1) and the ambit of the

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section 27(1) right can therefore not be determined without reference to the reasonableness of the measures adopted to fulfil the obligation towards those entitled to the right in section 27(1).^β

Thus, while the content of the FC s 27(1) right is '*determined with reference*' to the duty placed on the State in FC s 27(2), the fact that some of the same factors may be used to determine the right and the duty does not mean that the right and the duty map onto each other in a strict one-to-one relationship. Subsequent paragraphs in the judgment indicate that the Court may still accept a conceptual distinction between the right and the duty and that the scope of the right may be more extensive than the duty. The *Khosa* Court writes:

[E]ven where the state may be able to justify not paying benefits to everyone who is entitled to those benefits under section 27 on the grounds that to do so would be unaffordable, the criteria upon which they choose to limit the payment of those benefits (in this case citizenship) must be consistent with the Bill of Rights as a whole.^β

This passage implies that it is possible to have entitlements under FC s 27 (presumably FC s 27(1)) while the State can justify not extending those benefits to everyone on the basis of budgetary limitations (presumably under FC s 27(2)). Thus, even though the same factors are taken into consideration in determining the right and the duty, these determinations remain discrete inquiries. While it is accepted that the text does not clearly or explicitly favour this interpretation, it is argued that

□ *Ibid.*

□ *Grootboom* (supra) at para 46.

□ *Khosa* (supra) at para 43 (footnotes omitted). The four judgments referred to are: *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 Judgment*'), *Soobramoney* (supra), *Grootboom* (supra), and *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) ('*TAC*').

□ *Khosa* (supra) at para 45.

the text is at least ambiguous, and that this interpretation is one which could reasonably be adopted from a reading of these passages.

The question that then arises is why anyone would want to make this conceptual distinction. A claimant would only be entitled to make a claim with respect to the duty imposed on the State by FC s 26(2) (or FC s 27(2)). It can be argued that there are three grounds for preferring this interpretation. First, it seems to be more jurisprudentially convincing to have a stable core interpretation of the right which is not contingent on available resources. The justification for any limitation of the core right then takes place in terms of either the internal limitations in FC s 26(2) or FC s 27(2) or through the general limitations clause in FC s 36. This approach would allow the courts to align interpretations of the scope of the right with international and comparative norms, rather than make the scope of the right entirely contingent on immediate exigencies. It also forces the State to justify any 'failure' to realize fully the right.^β In this sense, then, FC s 26 and s 27 are different from other 'internally-modified' rights in the Constitution, such as the right to freedom of expression, where the text of the right in FC s 16 indicates

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clearly that the scope of FC s 16(1) is curtailed by the internal modifiers found in FC s 16(2).^β A second reason for preferring this interpretation is that this approach seems to be consistent with the general approach to rights interpretation in the Bill of Rights where, if a right, such as the right to dignity, is limited by other rights, such as another's rights to free speech, it does not follow that the right to dignity is diminished or extinguished. Rather, a claimant may not be entitled to enforce her right to dignity because, on the merits of the case before the court, another right might be deemed to take precedence. Third, and perhaps most fundamentally, this distinction touches on what we think rights are. If we view rights as simply the corresponding correlation of what we can claim as a legal duty or obligation against the State, then there is no practical point in distinguishing between rights and duties. If, however, we adopt a wider socio-political understanding of rights, then rights can be understood as political or ethical claims against the State which stand, even where the State is not able to realize these rights fully.^β As the discussion in the following section demonstrates, this line of reasoning has important consequences for how the courts conceptualize the 'reasonableness' test currently used to evaluate the State's compliance with its constitutional obligations in socio-economic rights cases.

(c) The reasonableness standard in Grootboom^β

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- See E Mureinik 'A Bridge to Where?: Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31.
 - On the difference between internal limitations and internal modifiers, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.
 - For a more nuanced account of this proposition, see Bilchitz (supra) at 56A-31 — 56A-34.
 - See Liebenberg (supra) at 33-32 — 33-41 and Bilchitz (supra) at 56A-1 — 56A-13, for a fuller discussion of the reasonableness test in socio-economic rights jurisprudence. It should be noted, however, that when the chapter by Liebenberg was published, *Khosa* had not been handed down.

In *Grootboom*, the Court established what Cass Sunstein has described as an administrative law model of socio-economic rights. According to this approach, the courts accord a measure of deference to the executive where reasonable choices have been made to give effect to socio-economic rights.^β In *Khosa*, the Court expanded the reasonableness enquiry to include consistency with other rights in the Final Constitution and a range of factors usually considered under FC s 36.^β

This test has, so far, been used to assess all socio-economic rights claims made on the basis of FC ss 26 and 27. The test is clearly more generous than a *Wednesbury*-style^β standard, yet it is difficult to pinpoint its exact nature owing to the limited number of judgments handed down by the Court. *Soobramoney* and *TAC* are

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the least difficult judgments to explain, as the State action was clearly reasonable in the case of *Soobramoney* and clearly unreasonable in the case of *TAC*, on any standard of reasonableness which the Court could have devised. In *Grootboom*, the Court expanded the reasonableness test set out in *Soobramoney* to include the substantive requirement that the State's housing policy should provide relief for those in desperate need. In *Khosa*, the Court found that the enquiry into reasonableness should embrace consideration of other rights in the Bill of Rights. What is clear is that the extant reasonableness test allows the Court considerable freedom when assessing the constitutionality of State action.

Unfortunately, this flexible reasonableness test threatens the conceptual distinction which has been argued for between FC s 26(1) and FC s 27(1), on the one hand, and FC s 26(2) and FC s 27(2), on the other. By focusing solely on the reasonableness of State action, the Court has systematically failed to give substantive content to the rights to 'adequate housing', 'health care services' 'sufficient food and water' and 'social security'. The test is also sufficiently wide to allow the Court to engage in an analysis of subsection (1) on the grounds of reasonableness and to achieve (arguably — in the light of *Khosa*) any result it thinks just. In addition to the reasons given in the previous section for maintaining a conceptual distinction between the two subsections, there are three further reasons for maintaining the distinction for the reasonableness test, rather than collapsing the two subsections into a single reasonableness inquiry. First, it is difficult for a court to determine the reasonableness of State action intended to realize a right without having some point of reference regarding what the State is obliged to achieve. One would think that such a reference point would require that the Court first carve out some normative conception of the right. In *Grootboom*, however, the Court accepted the State's version of what adequate housing entails and then went on to assess the reasonableness of the State's measures in securing adequate housing in light of

□ See CR Sunstein *Designing Democracy: What Constitutions Do* (2001) 222, 234.

□ See *Khosa* (supra) at para 44.

□ The so-called *Wednesbury* test for unreasonableness arises from the oft-cited English case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. The *Wednesbury* Court makes the standard for (un)reasonableness of administrative action that which is so unreasonable that no reasonable person could have made it. This high threshold for unreasonableness (or low threshold for reasonableness) marks a willingness on the part of the Court to defer to the executive with respect to the legality of its actions.

these objectives.^β While the State's current understanding of adequate housing may make such deference — with respect to both means and ends — acceptable, one can easily imagine the difficulties that might present themselves were the State to set its sights considerably lower. (One could argue, for instance, that with respect to social security, such a low threshold already exists.^β) While a clearly defined ambit for the right to adequate housing will not determine the reasonableness of State action, it will provide a meaningful framework for undertaking the reasonableness enquiry. Second, without the clear articulation of the objective or the purpose of a socio-economic right, it is extremely difficult for the State to make an internal assessment as to whether its action

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(or inaction) would pass constitutional muster. Third, the failure to articulate clearly the objective or the purpose of a socio-economic right also leaves the courts with far too much discretion. Moreover, the absence of clear guidelines for judicial review of socio-economic rights complicates immeasurably the process by which lower courts assess constitutional challenges brought in terms of FC s 26. For all of these reasons, therefore, it would be preferable for the courts to distinguish conceptually between the nature of the right and the extent of the duty, as well as engage in some discussion of the substantive content of socio-economic rights.

55.4 Housing policy 2000–2006

Since 2000, and the decision in *Grootboom*, several shifts have occurred in housing policy. First, 'sustainability' has emerged as a key concept both internationally and within the national Department of Housing.^β Second, as the Medium Density Housing Programme reflects, *Grootboom* has been the catalyst for two significant policy developments: the recognition that the State must cater for 'all' housing needs (which resulted in the addition of Chapter 12 of the *Housing Code* 'Housing Assistance in Emergency Housing Circumstances' and Chapter 13 of the *Housing Code* 'Upgrading of Informal Settlements'); and the State's commitment to use both market-driven and non-market-driven mechanisms to diversify housing delivery.^β

(a) *Grootboom* criteria

Grootboom sets out the criteria by which the discharge of the duties imposed by FC s 26(1) and FC s 26(2) on the State will be determined. In particular, the State is obliged to adopt a coherent, coordinated programme which must be capable of

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- The requirements set out in *Grootboom* to assess the adequacy of State policy are discussed below in the chapter's analysis of current housing policy.
 - For more on the State's current understanding of its obligation to realize progressively the right to social security, see M Swart 'Social Security' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 56D.
 - See S Charlton, M Silverman & S Berrisford *Taking Stock: Review of the Department of Housing's Programme, Policies and Practice (1994–2003)* (Unpublished paper prepared for the Department of Housing, 2003, on file with the author) 31.
 - *Ibid.*

bringing about the realization of the right.^β While the State is given a measure of discretion in determining the details of the policy, the policy itself must be reasonable. In deciding this question, the Constitutional Court laid down a number of criteria which the policy must meet, namely: it must be adopted through both legislative and policy means; it must be reasonably implemented; it must be flexible and balanced; it must not exclude a significant segment of society; and finally, there must be a clear and efficient assignment of functions to the three spheres of government.

(b) Evaluation of the housing policy in terms of Grootboom criteria

(i) Reasonable legislation, policies and programmes

FC s 26(2) obliges the State to take reasonable legislative and other measures to ensure the realization of the right of access to adequate housing. The Constitutional Court has affirmed that this obligation requires both legislative measures and the adoption of 'well-directed policies and programmes implemented by the executive' to support that legislation.^β In order to determine whether housing legislation and policies are reasonable, regard must be had to the social, economic and historical context of housing in South Africa, as well as the capacity of the various institutions responsible for implementing housing programmes.^β In addition, reasonableness must be assessed within the context of the Bill of Rights and, in particular, in light of the values of dignity, freedom and equality.^β

On the whole, extant housing legislation and policy represents a well-considered and balanced response to achieving the right of access to adequate housing. That is not to say that there are not problems and gaps in housing policy, but these problems have largely been recognized and the National Department of Housing is attempting to address these concerns in its current legislative and policy-review process.

It is important to note that where the State has taken measures to realize the right to adequate housing, the courts have been generally supportive of these steps, even where such measures potentially undermine other rights in the Bill of Rights, notably the right to property.^β In *Minister of Public Works v Kyalami Ridge Environmental Association*, for example, the State decided to establish emergency temporary housing on State-owned land to assist flood victims until permanent housing could be provided.^β The neighbouring residents (who were not consulted) challenged this decision on the grounds that it violated their rights to just administrative action. The State (together with one of the flood victims) contended

□ See *Grootboom* (supra) at para 41.

□ *Grootboom* (supra) at para 42.

□ Ibid.

□ Ibid at para 44.

□ See the general discussion of the State's housing policy, where the Constitutional Court is largely supportive of the State's measures. Ibid at paras 47-56.

that the State had a constitutional obligation to take reasonable measures to realize the right of everyone to adequate housing. The Constitutional Court, in deciding that the applicant's rights to just administrative action had not been violated, adopted a sympathetic stance to the State's steps to provide for the housing needs of those affected. In deciding that the applicants did not have a *right* that had been adversely affected (a precondition for a claim of unjust administrative action), the *Kyalami Ridge* Court rejected arguments based on possible loss of property value or a perceived negative effect on the character of the neighbourhood.^β

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(ii) Reasonable implementation

In addition to adopting reasonable legislative and policy measures, housing legislation and policy must be reasonably implemented.^β There are four major criticisms of the reasonableness of housing delivery or housing policy implementation: first, the poor location of housing development; second, the poor quality of many of the houses built; third, the lack of effective assistance in maintaining housing stock; and fourth, the failure of housing delivery to address the housing backlog.

First, most new housing developments are located far from the main economic centres. They also often fail to provide adequate 'settlements' and access to other social services, such as schools, clinics and work opportunities, thereby creating 'mono-functional settlements'.^β In addition, the developments generally lack vegetation, public spaces and other amenities required for a healthy environment.^β The primary reasons for this are the high cost of well-located land, the cost of developing leftover land (which has not been developed previously because it was found to be unsuitable), and finally, resistance from existing communities who fear the social and economic consequences of living adjacent to a low-cost housing development. The Department of Housing has identified an additional reason for the unsatisfactory location of developments as being the 'poor alignment of budgets and priorities between line function departments and municipalities responsible for providing social facilities in new communities'.^β The cruel irony of locating housing

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- See *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC).
 - *Ibid* at para 99.
 - *Grootboom* (supra) at para 42.
 - L Royston 'On the Outskirts: Access to Well-Located Land and Integration in Post-Apartheid Human Settlement Development' in F Khan & P Thring (eds) *Housing Policy and Practice in Post-Apartheid South Africa* (2003) 234, 234.
 - See W Smit *Expanding Socio-Economic Rights and Access to Housing* (Unpublished paper prepared for the Department of Housing by Urban Sector Network, 2003, on file with the author) 25-26.
 - National Department of Housing *Breaking New Ground: The Comprehensive Plan for the Creation of Sustainable Settlements* (2004) ('*Breaking New Ground*') 4.

developments in such far-flung areas is that it reinforces and perpetuates apartheid planning.^β This risk was anticipated in the *Housing Code* itself:

The complexity of our housing crisis requires much more than a straightforward approach to building houses. Our crisis is not just about an enormous backlog, but also about a dysfunctional market, torn communities and a strained social fabric, spatial as well as social segregation, and a host of other problems. Our response to this crisis must be innovative and diverse. If we respond only to the numbers that must be built, we risk replicating the distorted apartheid geography of the past.^β

The lack of affordable public transport exacerbates this problem, as beneficiaries who have employment often have to rent housing, or set up temporary shacks, close to places of work, leaving other members of their households at home. Poor location of housing may thus have the perverse effect of increasing the housing backlog.

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The State plans to respond to this problem by seeking to find better-located land and to create integrated settlements.^β Another key response is the emphasis on the creation of more rental housing stock, primarily through social housing schemes. The new housing policy, *Breaking New Ground*, also envisages the application of a 'multi-purpose cluster concept' to provide 'primary municipal facilities such as parks, playgrounds, sport fields, crèches, community halls, taxi ranks, satellite police stations, municipal clinics and informal trading facilities'.^β All of these responses, if implemented effectively, will help to create sustainable, integrated settlements.^β

The second major criticism of housing development to date has been the poor quality of the housing produced. Many low-cost houses fail to cope with even normal weather conditions and a number have developed serious cracking.^β The People's Housing Process envisages the improvement of the quality of housing stock through

□ See M Huchzermeyer 'Low Income Housing and Commodified Urban Segregation in South Africa' in C Haferburg & J Oßenbrügge (eds) *Ambiguous Restructurings of Post-Apartheid Cape Town: The Spatial Form of Socio-Political Change* (2003) 115 (Huchzermeyer 'Low Income Housing').

□ National Department of Housing *National Housing Code* (2000) part 1, 15.

□ See § 55.4 (b) *infra*, on *Breaking New Ground* policy. For a discussion of local government attempts to provide low-cost housing in well-located areas, see A Todes, C Pillay & A Kronje 'Urban Restructuring and Land Availability' in Khan & Thring (*supra*) at 256; S Charlton 'The Integrated Delivery of Housing: A Local Government Perspective from Durban' in P Harrison, M Huchzermeyer & M Mayekiso (eds) *Confronting Fragmentation: Housing and Urban Development in a Democratising Society* (2003) 263.

□ *Breaking New Ground* (*supra*) at 15.

□ See A Todes 'Housing, Integrated Urban Development and the Compact City Debate' in Harrison, Huchzermeyer & Mayekiso (*supra*) 109. (Critical discussion of urban compaction in South Africa.)

□ See Charlton, Silverman & Berrisford (*supra*) at 47.

beneficiary participation.^β A second way in which the State has sought to improve the quality of top structures is by extending the warranty provided by the National Home Builders Registration Council (NHBRC) to subsidized housing.^β

Third, the policy can be criticized for its lack of long-term sustainability in the provision of low-cost housing. The receipt of subsidized housing has not always resulted in poverty alleviation. In some instances, it has resulted in deepening poverty and debt, as beneficiaries have to pay for municipal services and increased transport costs.^β As Alan Gilbert puts it:

The government's success in providing housing for the very poor has produced ghettos of unemployment and poverty. Many of the new owners cannot afford to maintain the accommodation or pay the charges for their water and electricity... [As a result] many households have decided to move out.... Views differ as to the cause of this movement. While some criticise the new owners for trading in the subsidy for quick cash, others believe that the cause lies in the fact that the beneficiaries cannot actually afford to live in the new

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housing. Unlike many shack areas, all of the new housing is fully serviced and inhabitants are expected to pay for the services. Given the extraordinary high rates of unemployment in South African cities, many families simply cannot afford the sums involved.^β

While some (particularly the wealthier) municipalities have introduced indigent policies and free basic services, in the absence of real economic opportunities and job creation, it is simply unrealistic to expect beneficiaries to be able to afford to pay for services, over and above the free basic services offered (if any). It is also unclear, where government does provide subsidized transport and free basic services, whether this is sustainable in the long term, where one of the main contributors to this economic stress is the poor location of housing. Clearly, more consideration ought to be given to the long-term viability of service and housing provision, and more resources should be made available for the provision of free basic services.

Perhaps the most pervasive criticism of housing policy is that it has failed to deal adequately with the housing backlog. Despite the tremendous scale at which housing has been delivered in South Africa, the housing backlog has actually

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- See K Rust 'No Shortcuts: South Africa's Progress in Implementing its Housing Policy, 1994-2002' (Unpublished paper prepared for the Institute for Housing of South Africa, 2003, on file with the author) 10. See also People's Housing Process at § 55.2 (b) *supra*.
 - Despite this development coming into effect in April 2002, there are still substantial problems with the implementation of this policy.
 - See R Behrens & P Wilkinson 'Housing and Urban Passenger Transport Policy and Planning in South African Cities: A Problematic Relationship?' in Harrison, Huchzermeyer & Mayekiso (*supra*) 154, 161 (The authors cite, as an example of the inefficiency of the current system, the fact that, in 1999, the annual bus subsidy for one commuter in Cape Town was the equivalent of one-fifth of the full housing subsidy.)
 - A Gilbert 'Helping the Poor through Housing Subsidies: Lessons from Chile, Colombia and South Africa' (2004) 28 *Habitat International* 13, 31-32.

increased. An average of 200 000 more new housing units are required annually.^β In 2005, the backlog was 1.8 million housing units. The number of people living in shacks in informal settlements and backyard shacks in formal settlements has grown from 1.45 million in 1996 to 1.84 million in 2001.^β These figures are attributable to high levels of unemployment, an annual population growth of 2.1 per cent, decreasing average size of households from 4.5 people in 1996 to 3.8 in 2001, and rapid urbanization.^β The increase in the housing backlog may be the aspect of housing policy implementation that is most susceptible to constitutional challenge. The success of such a challenge would turn, in part, on the status of those bringing the application — that is, how long they had been on the housing waiting list — and the State's response in setting out reasonable time-frames for the provision of housing to the applicants.^β

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(iii) Flexibility

The third criterion laid down in *Grootboom* is that the housing 'programme must be balanced and flexible, and make appropriate provision for attention to housing crises and to short, medium and long term needs'.^β There are two major flaws in the housing policy in this regard.

The first flaw relates to the restricted choice of tenure options and housing types available to beneficiaries. For many beneficiaries of subsidized housing, one of the most significant benefits is secure tenure.^β Prior to *Breaking New Ground*, however, housing policy narrowly understood tenure security as individual ownership of freestanding homes. Many commentators have questioned the wisdom of having a housing policy driven solely by individual ownership — especially given such problems as poor location, population mobility and an inability to provide a sufficient

□ Ibid at 24.

□ See § 55.4 (c) (iii) *infra*, on the Informal Settlement Upgrading Programme.

□ See *Breaking New Ground* (*supra*) at 3–4.

□ In practice, it appears that many municipalities and provincial governments are moving away from the waiting-list system and delivering housing on a project-by-project basis to specific identified communities. See S Charlton 'An Overview of the Housing Policy and Debates, Particularly in Relation to Women (or Vulnerable Groupings)' (Unpublished report for the Gender Programme of the Centre for the Study of Violence and Reconciliation, 2004, on file with the author) 23, available at <http://www.csvr.org.za/docs/gender/overviewofhousing.pdf> (accessed on 10 March 2009) (Charlton 'Vulnerable Groupings'). Those who have been on the 'waiting list' for a substantial period of time and who are not set to benefit from any planned projects may have grounds to argue that they have a 'legitimate expectation' of housing within a reasonable period which has not and will not be met. Recently, however, it appears that the government is making renewed efforts to revive the waiting list. See Department of Housing 'Government Starts With the Updating and Verification Processes of the National Housing Waiting List in the City of Cape Town' (7 December 2005), available at <http://www.housing.gov.za> (accessed on 13 May 2006). The Department's website now also allows for a verification process so that potential beneficiaries can check whether they are on the list.

□ *Grootboom* (*supra*) at para 43.

□ See P Wilkinson 'Housing Policy in South Africa' (1998) 23 *Habitat International* 215, 224.

quantity of houses.^β Recent developments in policy have indicated a move away from this narrow conception of 'secure tenure' to one that embraces the creation of rental properties. This development is largely a response to the great demand for inner-city rental accommodation.^β As Wilkinson notes, the standard conception of a single house with a yard has

dominated public and private residential development throughout South Africa for most of the twentieth century and ... in the context of current patterns of urban growth, almost inevitably confines low income housing projects to the peripheries of urban centres.^β

Perceptions and expectations of adequate housing should be re-examined to ensure that sustainable housing solutions are not hindered by predefined notions of what people want or need with regard to housing types or tenure options. A related criticism concerns the inflexibility of housing options which arise from the supply-based, project-driven approach: although an individual, demand-side subsidy mechanism does exist as one of the subsidy options in the *Housing Code*, in reality, potential beneficiaries cannot access individual subsidies to build or buy a house of their own. Beneficiaries are therefore restricted, as a matter of practice, to the housing available in a developer-built project. This restriction is another instance of unreasonable implementation. For although the policy is in place to provide individual subsidies, which could potentially play a major role in delivering housing more quickly, existing institutional mechanisms are simply not accessible for this purpose.

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The second major criticism relating to the lack of flexibility in housing policy is that the current housing subsidy is too rigid in the provision of assistance through fixed subsidy bands. The housing subsidy is targeted at those who earn below R3 500 per household per month. This cut-off mark has not increased with inflation, with the result that the population group which stands to benefit from State assistance is shrinking. Many have pointed out that this ceiling may be too low, and that the policy should be extended to those earning up to R 7 000 per month.^β This rigidity in the benchmark for subsidies has had the effect of placing many of those

- See M Huchzermeyer 'Consent and Contradiction: Scholarly Responses to the Capital Subsidy Model for Informal Settlement Intervention in South Africa' (2001) 12 *Urban Forum* 71, 81-93; A Gilbert 'Some Observations on What Might be Done about Rental Housing in South Africa' in Khan & Thring (supra) at 367-377; Huchzermeyer 'Low Income Housing' (supra) at 26-28.

- This development is discussed in greater detail at § 55.4 (d) infra.

- Wilkinson (supra) at 224.

- In 2005, the Minister of Housing announced the introduction of a State-funded subsidy for households who managed to obtain finance from a commercial lender to buy a house, and whose combined monthly income is between R 3 500 and R 7 500. This initiative has yet to be implemented, but has the potential to assist significantly this income group's access to housing. See I Melzer 'How Low Can You Go?: Charting the Housing Finance Access Frontier: A Review of Recent Demand and Supply Data' (Unpublished paper prepared for the FinMark Trust, 2006, on file with the author) 26, available at <http://www.finmarktrust.org.za> (accessed on 10 May 2006). See also 'Statement by LN Sisulu, Minister of Housing, on the South African Programme of Implementation on the Resolution of the WSSD and the Johannesburg Plan of Implementation as it Relates to Human Settlements: A Ground Breaking Plan to Build Sustainable Communities' (7 September 2004, Johannesburg) available at <http://www.housing.gov.za> (accessed on 13 May 2006).

households earning between R 3 501 and R 7 000 in a worse-off position with respect to housing than their poorer counterparts.^β In this regard, commercial banks have a significant role to play in providing access to loans to this target group to enable them to access their own housing.^β

(iv) Vulnerable groups

Grootboom stipulates that a reasonable policy cannot exclude 'a significant segment of society' and that

[t]o be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.^β

In *Grootboom*, the Constitutional Court found that the National Housing Policy was unconstitutional to the extent that it did not establish policy measures 'to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations'.^β Although the judgment was handed down in 2000, the national Department of Housing only amended the *Housing Code* to introduce a chapter dealing with the provision of

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housing in emergency situations in 2004.^β The aim of the programme is to 'provide temporary assistance in the form of secure access to land and/or basic municipal engineering services and/or shelter in a wide range of emergency situations of exceptional housing need'.^β 'Exceptional housing need' is defined broadly and includes all those who find themselves in need of emergency housing and are living in dangerous conditions.^β The programme, however, fails to provide adequate short-term relief for those in crisis situations, and relies on a cumbersome set of procedures which do not allow for the immediate accommodation of those in need.^β

□ See Rust (*supra*) at 19.

□ See § 55.4 (c)(ii) *infra*, for discussion on private sector involvement in housing and the Financial Sector Charter.

□ *Ibid* at para 44.

□ *Ibid* at para 99.

□ See *National Housing Code* (*supra*) at Part 3: National Housing Programmes: Chapter 12 *Housing Assistance in Emergency Housing Situations*, available at <http://www.housing.gov.za> (accessed on 25 January 2006).

□ *Ibid* at 12.2.1. This programme is not restricted to those who would benefit from the usual housing subsidy scheme, and is applicable to anyone 'not in a position to address their housing emergency from their own resources or from other sources such as the proceeds of superstructure insurance policies.' *Ibid* at 12.3.2.

□ *Ibid* at 12.2.2.

A further difficulty with the emergency housing policy is the failure of many municipalities to put the policy into practice.^β *City of Cape Town v Rudolph* serves to demonstrate this systemic weakness.^β The facts of *Rudolph* are similar to *Grootboom*. Both involved an attempt to evict a group of illegal occupiers from State-owned land by the Cape Town municipality.^β Both groups were living with 'no access to land, no roof over their heads ... in intolerable conditions' or crisis situations.^β *Rudolph*, however, was decided almost three years after *Grootboom* and Selikowitz J took great care to apply the holding of the *Grootboom* Court to the facts of *Rudolph*. The *Rudolph* Court found that 'despite the clear statement by the Constitutional Court, applicant has still not implemented the AMLSP [Accelerated Managed Land Settlement Programme] or any equivalent programme' and

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that 'applicant has displayed and continues to display, an unacceptable disregard for the order of the Constitutional Court — and therefore the Constitution itself.'^β It is, however, the order in *Rudolph* that is most striking:

The circumstances and, in particular, the attitude of denial expressed by applicant in failing to recognise the plight of respondents as also its failure to have heeded the order in *Grootboom* ... makes this an appropriate situation in which an order, which is sometimes referred to as a structural interdict, is 'necessary', 'appropriate' and 'just and equitable'.^β

The *Rudolph* Court then handed down a far-reaching order requiring the City of Cape Town to deliver a report within four months which outlined the 'steps it has taken to

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- In order to apply for relief in terms of this programme, a municipality must investigate and make an application to the relevant provincial housing department, which then collaborates with the municipality in submitting an application to the Emergency Housing Steering Committee in the national Department of Housing. If the Emergency Housing Steering Committee approves the application, it transfers funds to the relevant provincial housing department, which then assists the municipality in implementing the programme. No time frames are established for this process, apart from the 21-day deadline which the Emergency Housing Steering Committee must take to assess the application. Ibid at 12.4. For a discussion of this aspect of the policy, see *City of Cape Town v Rudolph & Others* (Unreported decision of the Cape High Court, 5 December 2005) ('*Rudolph II*') 5.
 - See *The City of Johannesburg v Rand Properties (Pty) Ltd & Others* 2007 (1) SA 78 (W), [2006] 2 All SA 240 (W) at paras 47, 53 (Discussion of the City of Johannesburg's failure to put in place an emergency housing programme.)
 - *City of Cape Town v Rudolph & Others* 2004 (5) SA 39 (C), 2003 (11) BCLR 1236 (C), [2003] 3 All SA 517 (C) ('*Rudolph I*').
 - In *Rudolph I*, the primary application was for eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 by the Cape Town Metropolitan Municipality. The respondents brought a counter-application for an order by the Court that the applicants were in breach of their constitutional and statutory duties. *Rudolph I* (supra) at 547.
 - *Grootboom* (supra) at para 52; *Rudolph I* (supra) at 552.
 - *Rudolph I* (supra) at 553, 554.
 - Ibid at 558.

comply with its constitutional and statutory obligations'.^β After this, the respondents were to be afforded an opportunity to respond and the applicants, a further opportunity to reply. A second judgment was recently handed down by Selikowitz J in this matter. The second judgment reveals that the City of Cape Town has generated four reports since the original 2003 judgment and that 'on each occasion when it has reported, the City has shifted its ground in respect of its policy and its implementation of the orders.'^β Initial reports continued to deny the existence of an obligation on the part of the State to cater specifically and adequately for the applicants. Only the fourth report acknowledged that the city was obliged to take clear steps to house the applicants and that it had fulfilled part of its obligations by providing basic municipal services in a nearby emergency housing project. The City of Cape Town had not, however, adopted a temporary housing programme and it tendered no evidence that it had implemented or had planned to implement this policy. As a result, Selikowitz J issued a declaration that the City of Cape Town had failed to comply with his earlier order, but declined to issue a further structural interdict because the applicants had finally acknowledged their constitutional obligations.

Grootboom focuses largely on the recognition of the poor as a 'vulnerable group'.^β The general class of persons who might qualify as poor is, however, made up of any number of different sub-classes of persons. Each of these sub-classes — for example, those with physical disabilities, those with HIV/AIDS, and those incarcerated by the State,^β women, and children^β— have distinct needs. The current policy does cater for the needs of these vulnerable groups to some extent: those with physical disabilities are provided with physical modifications to their contractor-built house;^β and those persons with physical disabilities or those persons with 'health stricken problems' (which would

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presumably include those in the late stages of HIV/AIDS) — and are therefore not able to contribute physically to the building of their own homes — and who earn less than R 1 500 per month, are not required to make a financial contribution to the housing subsidy and receive the full subsidy of R 36 528.

Difficulties remain, however, with the linking of subsidies to nuclear households. This link between subsidy and family structure may not be sufficiently flexible to deal with fluid household formation^β or to counter systemic gender power imbalances within households. It may compel many women to remain in relationships that they would otherwise leave, say, for reasons of domestic violence.

□ Ibid at 560.

□ *Rudolph II* (supra) at 2.

□ *Grootboom* (supra) at para 36.

□ See § 55.8 infra, for a discussion of prisoners' housing rights.

□ See § 55.7 infra, for a discussion of children's housing rights.

□ Disability subsidies appear, however, to be infrequently provided. As of June 2003, only 160 disability grants had been approved. See Charlton 'Vulnerable Groupings' (supra) at 16.

Such compulsion could occur even where the title deed is registered in the name of both parties. While South African housing policy is not expressly discriminatory, studies have shown that some women find it considerably more difficult to access housing or to secure tenure.^β Moreover, older women and men, who do not have dependants, are not eligible for a housing subsidy. The same is true for those under 21 with children. This criterion deleteriously affects young women because women under 21 account for more than half of pregnant women in South Africa.^β The United Nations Committee for Economic Social and Cultural Rights has made it clear that the right to housing ought not to be framed solely as a 'family' or household right, and a strong argument could be made that FC s 26 read with FC s 9 requires that the State make provision for the rights of *individuals* to adequate housing, rather than conferring the benefit on households.^β

Many social practices also ensure that women are marginalized with respect to housing rights. Customary succession laws, for instance, may result in women losing their ownership or tenure rights when their male partner dies. Several courts have shown a willingness to interpret legislation so that it will not result in women losing their homes as a consequence of customary law succession rules. In *Nzimande v Nzimande*, for instance, the Court found that the Director-General of Housing had the discretion to consider the discriminatory effects of the succession rules in the Black Administration Act.^β In so doing, it overturned a pre-constitutional certificate giving housing rights to the appellant (the brother of the deceased) and granted them to the respondent (the former customary-wife of the deceased).^β In coming to this conclusion, the Court construed this Act and the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 in

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light of the 'spirit, purport and objects' of the Bill of Rights (FC s 39(2)) and the right to access to adequate housing in FC s 26(1).^β

While some steps clearly have been taken by the Department of Housing to cater for vulnerable groups,^β more needs to be done to ensure that there is sufficient flexibility and commitment within housing policy to ensure that the needs of

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- See Huchzermeyer 'Low Income Housing' (supra) at 127.
 - See Minister of Housing, Minister Mabandla 'Promoting Access for Women in Housing' (8 August 2003), available at <http://www.housing.gov.za> (accessed on 13 May 2006).
 - See C Marx 'Supporting Informal Settlements' in F Khan & P Thring (eds) *Housing Policy and Practice in Post-Apartheid South Africa* (2003) 299, 306-07.
 - See MCR Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (1995) 334.
 - Act 38 of 1927.
 - See *Nzimande v Nzimande & Another* 2005 (1) SA 83 (W), [2005] 1 All SA 608 (T) ('*Nzimande*').
 - See *Nzimande* (supra) at paras 43, 63.

vulnerable groups are met.^β The courts are particularly well placed to evaluate and to assist the State in developing a rights-based approach to housing policy that adequately caters for the most vulnerable members of society.^β

(v) Co-operative government and local government^β

The final criterion laid down in *Grootboom* for ensuring a reasonable housing policy is a clear and an efficient assignment of functions to the three spheres of government:

What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government.... The Constitution allocates powers and functions amongst these different spheres emphasising their obligation to co-operate with one another in carrying out their constitutional tasks. In the case of housing, it is a function shared by both national and provincial government. Local governments have an important obligation to ensure that services are provided in a sustainable manner to the communities they govern. A reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.^β

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The White Paper on Housing, discussing Schedule 6 of the Interim Constitution, argues that, while national and provincial governments are given concurrent legislative capacity, '[t]he intent ... is clearly that appropriate housing functions and

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- See, for example, the following reports: Charlton 'Vulnerable Groupings' (supra); National Department of Housing 'HIV/AIDS: Framework Document' (2003); CSIR 'Integrating Gender in Housing and Human Settlements' (Unpublished report for the National Department of Housing, 2003, on file with the author). A section-21 company has also been established to promote women in the construction industry. See <http://www.womenforhousing.org.za> (accessed on 13 May 2006).
 - See *Housing Indaba: Social Contract for Rapid Housing Delivery* (2005) 2.5.d. This document only discusses the needs of vulnerable groups as an aspect of the commitment of civil society organizations to meet housing needs, and makes no mention of the State's role. The Department of Housing appears to have assumed that the responsibility for providing for vulnerable groups is the responsibility of other departments, in particular, the Department of Social Development. A rights-based approach to this issue, however, would indicate that, while it is highly desirable for departments to co-operate with each other where the needs of vulnerable groups are not being met, it is the responsibility of each department to ensure that vulnerable groups are catered for as far as possible.
 - See M Wesson '*Grootboom* and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court' (2004) 20 *SAJHR* 284.
 - For a fuller, although now somewhat dated, account of co-operative government and housing provision, see K McLean 'Housing Provision through Co-operative Government in Post-Apartheid South Africa' in G Mhone & O Edigheji (eds) *Governance in the New South Africa* (2003) 146. See also D Pottie 'Challenges to Local Government in Low-Income Housing Delivery' in Khan & Thring (supra) at 429. For a more general statement of the law on co-operative government, see S Woolman, T Roux & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 14.
 - *Grootboom* (supra) at para 39 (footnotes omitted).

powers should be devolved to the maximum possible extent, to the provincial level.^{1β} By the time the Housing Act was promulgated, however, the State had begun to include local government in housing delivery. In so doing, it was following the new paradigm laid down in the White Paper on Local Government and the Development Facilitation Act in establishing 'development principles' to be followed by all spheres of government.^β This 'new' position is set out in the *National Housing Code* as follows:

A critical policy challenge for the governance of housing is to facilitate the maximum devolution of functions and powers to provincial and local government spheres, while at the same time, ensuring that national processes and policies essential to a sustainable national housing development process are in place. The Housing Act, No. 107 of 1997, determines roles in respect of such devolution, and defines key national and provincial responsibilities with respect to empowerment at the provincial and local spheres of government.^β

This 'shift in policy' mostly legitimates an existing situation. Larger metropolitan governments have thus already recognized, and begun to act upon, the socio-political imperative to build low-cost housing. Housing is understood by local government politicians as an essential service and, therefore, necessary for the development of credibility and 'electability'.

In 2002 a 'new procurement regime' — in line with the accreditation process initiated in the Housing Act — shifted the obligation to initiate and to develop housing projects down to local government. *Breaking New Ground* states that municipalities should lead the process of locating new housing developments because they are better placed to ensure that such developments meet the needs of the beneficiaries.^β While *Breaking New Ground* envisages the ultimate accreditation of all municipalities over the next ten years,^β the national government has been criticized for failing to appreciate fully the financial implications for local government of engaging in housing delivery. In addition to the financial burden of administering a housing programme, the municipalities will bear the

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brunt of ongoing maintenance, service and increased infrastructure costs. For smaller municipalities, non-payment for municipal services already results in substantial debt.^β The 2003 Public Service Commission Report noted that:

In spite of the evidently high levels of severe poverty in many HSS [housing subsidy schemes] projects local authorities continue to expect payment for rates and services.

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- National Department of Housing *White Paper on Housing* (1994) at para 5.2.1.1. See *Western Cape Provincial Government and others: In re DVB Behuising v North West Provincial Government & Another* 2001 (1) SA 500 (CC), 2000 (4) BCLR 374 (CC) at para 17 (Court held that there is no presumption in favour of national or provincial competencies.)
 - Act 67 of 1995.
 - National Department of Housing *National Housing Code* (2000) Part 1, 8.
 - National Department of Housing *Breaking New Ground: The Comprehensive Plan for the Creation of Sustainable Settlements* (2004) ('*Breaking New Ground*') 10.
 - *Ibid* at 21.

Only the larger metros have developed indigent policies that allow the poorest households a basic lifeline of water and/or energy supply, and also zero rating for rates payments. Poorly resourced small town municipalities face up to 80 or 90% default on rates or services but appear not to have the means, or the national or provincial support, to be able to put in place appropriate indigent policies. This affects the social and economic viability not just of the housing projects but also of these small municipalities.^β

The Constitutional Court has instructed that a 'reasonable programme must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available' in order to pass constitutional muster. To ensure that it discharges its constitutional duties, the State must give further consideration to the long-term financial sustainability of municipal housing and service provision, particularly in poorer areas with high rates of unemployment and payment default.^β The recent 'Accreditation Framework for Municipalities to Administer National Housing Programmes' (2006) goes some way towards ensuring that municipalities will have the capacity to carry out the housing function by allowing for 'progressive delegation' before full accreditation. As with many of the initiatives introduced or carried forward in *Breaking New Ground*, it is too early at this stage to make a meaningful assessment of the assignment process.

(c) 'Breaking New Ground'

The national Department of Housing's new policy statement — *Breaking New Ground* — responds to a number of problems already identified within the housing sector.^β In so doing, the document makes many important contributions. In particular, it requires the Department of Housing to focus on the entire residential housing market in order to help bring about 'increased integration between the

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primary and secondary housing market'.^β *Breaking New Ground* also emphasizes the sustainability of human settlements, the involvement of the private sector and the upgrading of informal settlements. This section briefly discusses three of the more

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- See M Huchzermeyer 'Low Income Housing and Commodified Urban Segregation in South Africa' in C Haferburg & J Oßenbrügge (eds) *Ambiguous Restructurings of Post-Apartheid Cape Town: The Spatial Form of Socio-Political Change* (2003) 115 (Huchzermeyer 'Low Income Housing') 126. See also *Breaking New Ground* (supra) at 4 (Problem is acknowledged.)
 - Public Service Commission *Report on the Evaluation of the National Housing Subsidy Scheme* (2003) 101. For further discussion on the problems experienced with local government housing delivery, see W Smit *Expanding Socio-Economic Rights and Access to Housing* (Unpublished paper prepared for the Department of Housing by Urban Sector Network, 2003, on file with the author) 27-29.
 - For a more detailed discussion of the financial implications of local government housing delivery, see McLean (supra) at 166-71.
 - *Breaking New Ground* was announced by the Minister of Housing on 2 September 2004 after receiving Cabinet approval on 1 September 2004. The new policy has a fairly complex relationship with existing policy. See § 55.2(b) supra. In brief, the existing legislation and the *National Housing Code* are being redrafted to conform to the new developments set out in *Breaking New Ground*. Current legislation and policy is therefore in a state of flux.
 - *Breaking New Ground* (supra) at 8.

important developments set out in the new policy which were not covered in the previous discussion of housing policy.

(i) Sustainable human settlements

Sustainability is part of an international trend. States have committed themselves to it in a range of documents: Agenda 21 (1992), Habitat Agenda (1996), the UN Millennium Goals (2000) and the World Summit on Sustainable Development (2002). Sustainable development is defined as a commitment to

pursue development especially for the improvement of quality of life and standard of living for all (especially those in poverty and high levels of vulnerability) while being mindful and responsive to the environmental and resource limits as defined through scientific evaluations and monitoring.^β

The new housing policy, *Breaking New Ground*, defines sustainable human settlements as

well managed entities in which economic growth and social development are in balance with the carrying capacity of the natural systems on which they depend for their existence and result in sustainable development, wealth creation, poverty alleviation and equity.^β

To further ensure sustainability, the Department of Housing is promoting the integration of previously excluded communities into existing urban areas.^β By emphasizing such integration, *Breaking New Ground* recognizes the limitations of a policy based primarily on (poorly located and poorly serviced) single-stand housing.^β

(ii) Private sector involvement

While the involvement of the private sector in housing provision is not new (it was already envisaged in the White Paper), *Breaking New Ground* forges a new type of partnership — one which is negotiated and demand-led.^β *Breaking New Ground*

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suggests that the State can attract private-sector involvement in housing provision in a number of ways: (1) revision of the housing subsidies to promote public-private partnerships in construction; (2) expansion of the subsidy band to allow medium-

- S Charlton, M Silverman & S Berrisford *Taking Stock: Review of the Department of Housing's Programme, Policies and Practice (1994-2003)* (Unpublished paper prepared for the Department of Housing, 2003, on file with the author) 31.
- *Breaking New Ground* (supra) at 11.
- Ibid at 12.
- Ibid at 8. For a general discussion on the concept of sustainability in housing policy in South Africa, see DK Irurah & B Boshoff 'An Interpretation of Sustainable Development and Urban Sustainability in Low-Cost Housing and Settlements in South Africa' in P Harrison, M Huchzermeyer & M Mayekiso (eds) *Confronting Fragmentation: Housing and Urban Development in a Democratising Society* (2003) 244.
- See 'Press Statement by LN Sisulu Minister of Housing on the Public Unveiling of the New Housing Plan' (Pretoria, 2 September 2004), available at <http://www.housing.gov.za> (accessed on 13 May 2006).

income households to access formal finance; (3) funding to provide social housing and risk-sharing with the private-sector lenders; (4) developing mechanisms to counter volatile interest rates and the creation of a functioning residential property market; (5) skills-transfer from the private to the public sector in construction and project management; and (6) employer involvement in housing provision for its employees.^β

At the same time as *Breaking New Ground* looks forward to a revived role for the private sector, the *Financial Sector Charter* is an exciting reciprocal development on the part of commercial lenders, committing South African financial institutions to the provision of greater access to credit for low-income housing.^β As part of the Charter, financial institutions have committed to providing R 42 billion worth of finance to households earning between R 1 500 and R 7 500 by the end of 2008.^β In 2005, a 'Memorandum of Understanding' signed by the four major South African banks and the Minister of Housing created mortgage-finance products targeted at this group, with State assistance for the insurance or underwriting of these loans.^β While the final details of this arrangement have yet to be hammered out, three of the four major banks have recently started offering mortgage products for this group. A number of other institutions also offer similar loans.^β This partnership between the formal financial sector and the government promises to open up significant opportunities for those within the target group to enter the property market.

(iii) Informal settlements and backyard shacks

Current statistics indicate that there are approximately one million backyard shacks in South Africa. Until recently, the State appeared to have assumed that, as a result of the massive housing delivery drive, most people living in shacks in informal settlements and back yards would eventually be housed in State housing. *Breaking New Ground* acknowledges that, despite massive delivery, there has been a

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steady growth of households living in shacks.^β The policy therefore suggests a shift in attention — one that recognizes the intractability of the problem of informal settlements and backyard shacks and seeks to address them. The new Informal Settlement Upgrading Programme provides for interim servicing of informal settlements. Planning is still underway for a more comprehensive approach to

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- *Breaking New Ground* (supra) at 8-11.
 - *Financial Sector Charter* (2003) at paras 2.27.3 read with 2.22, 2.34.3 and 8.3.2. The *Financial Sector Charter* is available at http://www.treasury.gov.za/comm_media/press/2003/2003101701.pdf (accessed on 10 March 2009).
 - See Melzer (supra) at 8. This group is said to comprise about 4 million households, or 12 million persons aged over 16. Ibid at 10.
 - See 'Access Housing' (April 2006, Issue 1) 2, available at <http://www.finmarktrust.org.za> (accessed on 10 May 2006).
 - See Melzer (supra) at 22-30. (Discussion of the products offered.) Other institutions which provide finance to the target group include the National Housing Finance Corporation, the Mpumalanga Housing Finance Company, Ithala Limited, Beehive, Masakeni Credit Corporation, Real People Housing, and Greenstart Home Loans (Pty) Ltd. Ibid at 23.

informal settlements and backyard shacks.^β As part of the new interim programme, a single municipality in each province has been charged with the upgrading of informal settlements on a pilot-scheme basis.^β The best practices that emerge will be used to inform the new programme. It is, as yet, too early to make any meaningful assessment of these schemes.^β

(d) Social Housing

In addition to so-called 'RDP housing', funded through the project-linked capital subsidy, the dominant subsidy scheme to date, another housing type provided and funded through the institutional subsidy is social housing. Social housing is defined as '[a] rental or co-operative housing option for low income persons at a level of scale and built form which requires institutional management and which is provided by accredited social housing institutions or in accredited social housing projects in designated restructuring zones'.^β Social housing projects have generally been well located and rentals are subsidized through State and donor funding.^β

Since 2001, the State has rekindled interest in rental housing as a mechanism for fulfilling the housing needs of the poor at the same time as it regenerates urban areas and creates sustainable settlements.^β This new development has come

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about for a number of reasons: first, the national Department of Housing has broadened its interpretation of 'secure tenure' to include rental housing; second, the

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- See 'Speech by LN Sisulu Minister of Housing at the Occasion of the Tabling of the Budget Vote for the Department of Housing for the 2004/05 Financial Year' (National Assembly, 10 June 2004), available at <http://www.housing.gov.za> (accessed on 15 May 2006). See also Minister of Housing, Minister Sisulu, 'Speech Regarding Millennium Development Goals at the 13th session of the UN Commission on Sustainable Development, Committing African Governments to the Eradication of Slums in African Cities' (20 April 2005), available at <http://www.housing.gov.za> (accessed on 13 May 2006).
 - The Programme was introduced through an amendment to the *Housing Code* to include a new Chapter 13 'National Housing Programme: Upgrading of Informal Settlements' (2005). At the time of writing, the final version of the new chapter was still not available on the Department's website.
 - See *Breaking New Ground* (supra) at 12.
 - See M Huchzermeyer 'The New Instrument for Upgrading Informal Settlements in South Africa: Contributions and Constraints' in M Huchzermeyer & A Karam (eds) *Informal Settlements — A Perpetual Challenge at the Local and Policy Level* (forthcoming 2006, on file with the author)(Offers a preliminary discussion of this new policy.)
 - National Department of Housing *Social Housing Policy for South Africa: Towards an Enabling Environment for Social Housing Development* (2005)(*'Social Housing Policy for South Africa'*) 8. Note that although the policy itself states that it is still a draft, it has apparently been adopted as the final policy.
 - See M Fish 'Social Housing' in Khan & Thring (supra) at 404.
 - See F Khan & C Ambert 'Preface' in Khan & Thring (supra) at iv and xvi. For a general discussion on the use and desirability of public rental housing internationally, see A Gilbert 'Some Observations on What Might be Done about Rental Housing in South Africa' in Khan & Thring (supra) at 367.

Department has recognized the demand, particularly for those earning between R 2 500 and R 3 500 per month, for well-located rental accommodation; and third, rental housing is able to achieve integrated development in ways which 'RDP housing' has not done to date.^β Unfortunately, social housing, with its emphasis on the provision of well-located rental stock, still does not take into account the needs of the poorest of the poor. As Charlton, Silverman and Berrisford note:

To date an engagement with the idea of rental, and mobility, by the National Department of Housing seems to have narrowed to a focus on social housing. ... [S]ocial housing appears to have an inappropriate over-emphasis ... given its limited ability to contribute to housing the poor, the complexities associated with its management, and the competitive alternatives offered by a range of private sector rental options.^β

The very poor will continue to be forced to the urban periphery. Despite this, *Breaking New Ground* places great importance on social housing, or 'medium-density' housing, for enhancing mobility and promoting urban integration.^β A range of social housing types are envisaged in the new policy, including:

[M]ulti-level flat or apartments options [sic] for higher income groups (incorporating beneficiary mixes to support the principle of integration and cross-subsidization); cooperative group housing; transitional housing for destitute households; communal housing with a combination of family and single room accommodation with shared facilities and hostels.^β

Social housing will, the State argues, 'contribute to urban regeneration, ... to urban efficiency' and to urban integration of previously excluded groups of people.^β *Breaking New Ground* envisages the promulgation of a Social Housing Act^β that will provide a comprehensive framework for mixed-used projects and increase subsidies for social housing to levels substantially above those allocated to RDP housing.

To date, the high cost of social housing has been borne by donors. These high costs have, up until recently, contributed to the general instability and non-sustainability of the social housing sector.

55.5 International law of housing

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- See K Rust 'No Shortcuts: South Africa's Progress in Implementing its Housing Policy, 1994-2002' (Unpublished paper prepared for the Institute for Housing of South Africa, 2003, on file with the author) 15.
 - Charlton, Silverman & Berrisford (*supra*) at 84.
 - See *Breaking New Ground* (*supra*) at 18.
 - *Ibid* at 18. See also 'Business Plan 4: Social (Medium-Density) Housing Programme' in *Breaking New Ground*.
 - *Social Housing Policy for South Africa* (*supra*) at 4.
 - The timing for the new Social Housing Act is still uncertain, but it is planned to be submitted to and adopted by Parliament by the end of 2006.

FC s 39(1)(b) provides that when courts, tribunals or forums interpret the Bill of Rights they must consider international law.^β This body of law embraces international agreements that South Africa has ratified, those which it has not,^β and customary international law.^β International law has influenced both the courts' and the government's understanding of South Africa's obligations to realize the right to housing. South Africa's *National Action Plan for the Protection and Promotion of Human Rights*, submitted to the United Nations in 1998, identifies the primary international law documents which inform South Africa's approach to the rights to housing and shelter as art 25 of the Universal Declaration of Human Rights (UDHR), art 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),^β and the United Nations Habitat's Global Urban Observatory programme and Habitat Agenda.^β Of particular importance is the Habitat Agenda 'Istanbul Declaration on Human Settlements' in which South Africa 'reaffirm[ed] ... [its] commitment to the full and progressive realization of the right to adequate housing'.^β

The central international instruments for the interpretation of the right to housing are the ICESCR and the Committee for Economic, Social and Cultural

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- For more on the relationship between international law, constitutional law, and municipal law, see H Strydom & K Hopkins 'International Law and International Agreements' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 30.
 - *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 35.
 - FC s 232.
 - (1966) 993 UNTS 3, U.N. Doc. A/6316 (signed by South Africa on 3 October 1994, but not yet ratified).
 - Available at <http://www.unhabitat.org/programmes/guo/default.asp> and <http://www.unhabitat.org/unchs/english/hagenda/> (accessed on 11 May 2006). In addition to these documents, there are a number of international and regional treaties which are relevant to the international right to housing. The International Convention Relating to the Status of Refugees (1951) 189 UNTS 150 (acceded to by South Africa on 12 January 1996)(Provides for refugee housing rights on the same level as that of nationals); The International Convention on the Elimination of All Forms of Racial Discrimination (1965) UN Doc A/6014, 660 UNTS 195 (ratified by South Africa on 10 December 1998)(Provides for equality in recognizing the right to housing); The Convention on the Elimination of All Forms of Discrimination Against Women (1979) UN Doc A/34/46 (ratified by South Africa on 15 December 1995)(Prohibits discrimination against women in rural areas in the enjoyment of the right to housing); The African Charter on Human and People's Rights (1981)(ratified by South Africa on 9 June 1996)(Has been read as containing an implied right to housing); The Convention on the Rights of the Child (1989) UN Doc A/44/49 (ratified by South Africa on 16 June 1995)(Provides for children's housing rights); The African Charter on the Rights and Welfare of the Child (1990)(ratified by South Africa on 7 January 2000)(Contains children's housing rights.)
 - Habitat Agenda 'Istanbul Declaration on Human Settlements', available at <http://www.unhabitat.org/declarations/ist-dec.htm> (accessed on 16 January 2006). See also Agenda 21 (1992), adopted by the United Nations Conference on Environment and Development, available at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> (accessed on 16 January 2006).

Rights' (CESCR) General Comments 3 (GC 3),^β 4 (GC 4),^β and 7 (GC 7).^β On 3 October 1994, the then President of South Africa, Nelson Mandela, signed the ICESCR and the International Covenant on Civil and Political Rights (ICCPR).^β By doing so, he signalled the new government's commitment to be bound by international human rights norms and South Africa's commitment to protecting economic, social and cultural rights. Unfortunately, South Africa has not yet ratified the ICESCR, so it is not yet bound by the Covenant. Nevertheless, South Africa does incur certain obligations under the Vienna Convention on the Law of Treaties (Vienna Convention) in the period between signature and ratification: South Africa must refrain from 'acts which would defeat the object and purpose of the treaty';^β it should use the interim period to review its laws for consistency with the ICESCR; and it incurs a general duty to act in 'good faith' and cannot use domestic law as a justification for failure to ratify the Convention.^β

Article 2(1) of the ICESCR governs the State's general obligations relating to substantive rights in the Covenant and provides that:

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 realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Article 2(1) is the primary clause — the 'linchpin' according to Matthew Craven^β— that deals with the obligations placed on States Party to the Covenant. It sets out the nature of the duties assumed by member States, namely that the rights in the Covenant are to be realized progressively, subject to the available resources of the States Party. This obligation reflects a compromise between two groups — those of which wished to create a fully binding obligation on member States, and those of which recognized the need for greater flexibility in creating an obligation where member States vary greatly in economic means.^β

□ See General Comment 3 'The Nature of States Parties' Obligations' (Article 2 of the Covenant)(5th session, 1990) UN Doc. E/1991/23 ('GC 3').

□ See General Comment 4 'The Right to Adequate Housing' (Article 11 of the Covenant)(6th session, 1991) UN Doc. E/1992/23 ('GC 4').

□ See General Comment 7 'The Right to Adequate Housing: Forced Evictions' (16th session, 1997) UN Doc. E/1998/22 ('GC 7'). GC 7 is discussed in detail at § 55.6 (d) infra.

□ (1966) 999 UNTS 171 (ratified by South Africa on 10 December 1998).

□ Article 18 of the Vienna Convention on the Law of Treaties ('Vienna Convention').

□ Articles 26 and 27 of the Vienna Convention.

□ See MCR Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (1995) 106.

□ Ibid at 150-51.

Under the ICESCR, member States are not required to realize all of the rights in the Covenant immediately; rather, they are under a duty to realize the rights progressively, depending on their available resources. Available resources are to be interpreted broadly and objectively to include all resources available, rather than just the resources allocated to a particular domain by the State.^β Thus, the obligation of each State Party 'to take steps' was chosen in preference to the duty 'to promote', since the former locution is viewed as a less onerous obligation on member States. Nevertheless, the obligation to 'take steps' is immediate, while the obligation to realize the full right may be implemented progressively.^β There are two ways to describe the nature of the obligations imposed by the ICESCR.

The first description involves a distinction between obligations to respect, to protect and to fulfil a right.^β The duty to respect places an obligation on States Party to ensure that the State does not interfere with the rights of individuals and is, in this sense, a 'negative' right. The duty to protect places an obligation on States Party to ensure that others do not interfere with the rights of individuals.^β The duty to fulfil (or promote) requires States Party to take such steps as are necessary to enable the individual to satisfy the right where he or she is unable to do so without assistance. These latter two duties are 'positive' in that they require the State to undertake affirmative action to protect and to fulfil the rights in the Covenant.

A second way to describe the obligations imposed by the ICESCR is to look at the nature of the obligation entailed. It is often said that civil and political rights give rise to 'obligations of result' and socio-economic rights give rise to 'obligations of conduct'.^β An obligation of result is one in which the party has an obligation to achieve a particular result and the means of achieving that result is left to the discretion of the party; an obligation of conduct, on the other hand, is where a particular course of action is mandated to achieve a specific goal. This distinction between socio-economic and civil and political rights is not especially helpful, as both sets of rights give rise to a range of obligations. The duties to respect and protect are primarily obligations of result — the obligation on States

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- See Craven (supra) at 137.

 - The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights UN Doc E/CN.4/1987/17 Annex, reproduced in (1987) 9 *Human Rights Quarterly* 122 ('The Limburg Principles') at para 16; P Alston & G Quinn 'The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156, 166.

 - Today, this formulation is usually attributed to Henry Shue. H Shue *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd Edition, 1996). But it also appears in a slightly different form elsewhere. See A Eide *Right to Adequate Food as a Human Right* (1989); GJH van Hoof 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views' in P Alston & K Tomaševski (eds) *The Right to Food* (1984) 97.

 - See *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) at paras 31-34 (Constitutional Court described obligation in *Jaftha* as an instance of protecting a negative right.) See § 55.6 infra for further discussion.

 - See Alston & Quinn (supra) at 185.

Party is to ensure that the rights in the ICESCR are respected and protected, and the States Party are given a wide measure of discretion on how to achieve this. The obligation in art 2(1) to 'take steps' 'progressively' to achieve the right, on the other hand, has been said to constitute primarily an obligation of conduct.^β As Alston points out, however, the duty is also partly an obligation of result, as 'states must match their performance with their objective capabilities'. Only where the text specifies steps to be undertaken by States Parties would Alston describe the obligation as being solely one of conduct.^β Nonetheless, the clear objective set out in art 2(1) is the 'full realization of the rights recognized in the present Covenant' and it is important for States Party not to get too caught up with measuring their progressive realization and to lose sight of the ultimate aim of the Covenant. As Craven notes: 'The compliance of a State with its obligations ultimately is to be measured not merely by compliance with some notion of "due process", but by the degree to which it has achieved the full realization of the rights.'^β

The jurisprudence of the ICESCR and the GCs is referred to extensively in *Grootboom*. FC s 26(2) places a duty on the State to take 'reasonable legislative and other measures' towards the realization of the right in FC s 26(1) and thereby echoes the language of the ICESCR. FC s 26(2)'s obligation is qualified in two main ways: it must be within the State's 'available resources' and it must be progressively realized. Again, the Final Constitution rehearses the words of the ICESCR. In interpreting 'reasonable measures', the Committee on Economic, Social and Cultural Rights has held that this means that the State must show that it has taken steps which are 'deliberate, concrete and targeted as clearly as possible' towards fulfilling that right.^β The CESCR's gloss on 'reasonable measures' resonates with the *Grootboom* Court's understanding of 'reasonableness'.

(a) 'Adequate' housing

GC 4 is the most comprehensive and authoritative analysis of the meaning of 'adequate housing' in international law. The CESCR begins its analysis by stating that the right to housing should not be interpreted narrowly to refer only to shelter, but should be understood to encompass the right to live in 'security, peace and dignity'.^β The Committee then goes on to emphasize that housing must be *adequate* and explains this concept through identifying a number of aspects which should be taken into account when determining adequacy of housing. Specifically, adequate housing should (1) provide legal security of tenure which does not necessarily include ownership and which must provide 'protection

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against forced eviction, harassment and other threats'; (2) provide the 'facilities essential for health, security, comfort and nutrition', such as water and power; (3) be

□ For a contrary view, see Craven (*supra*) at 107-09.

□ See Alston & Quinn (*supra*) at 185.

□ Craven (*supra*) at 109.

□ GC 3 (*supra*) at para 2.

□ GC 4 (*supra*) at para 7.

affordable such that 'the attainment and satisfaction of other basic needs are not threatened or compromised'; (4) be habitable, that is, housing should provide 'the inhabitants with adequate space ... protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors'; (5) be accessible to all groups, including disadvantaged groups which should be given a 'degree of priority consideration'; (6) be located to provide 'access to employment options, health-care services, schools, childcare centres and other social facilities' and should not be located in areas hazardous to health; and (7) express the cultural identity and diversity of those who inhabit it.^β

In *Grootboom*, Yacoob J initially distinguishes the right to 'access to adequate housing' in FC s 26(1) from the right to 'adequate housing' found in the International Covenant on Economic, Social and Cultural Rights (ICESCR) by emphasizing the phrase 'access to':

The right delineated in s 26(1) is a right of 'access to adequate housing' as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. 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. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in s 26. 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. The State must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.^β

The *Grootboom* Court thus recognized that the State's obligation must be context-sensitive: its policy must cater for both those who can afford to pay for adequate housing themselves, and those who require State assistance. Consideration must also be given as to whether the person requiring assistance lives in a rural environment or an urban area — and there may be differences across provinces and cities. The Court's reluctance to follow the CESCR's interpretation of the ICESCR stands in stark contrast to the national government policy laid

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down in the *Housing Code*, which expressly accepts the CESCR's interpretation of the ICESCR. In explaining what the word 'adequate' means in FC s 26(1), the *Code* states that

[t]he wording of the housing right provision corresponds with the International Covenant on Economic, Social and Cultural Rights (1966). In that context, 'adequate housing' is measured by certain core factors: legal security of tenure; the availability of services; materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy. South Africa's housing policy concurs with this concept of housing.^β

□ GC 4 (supra) at para 8.

□ *Grootboom* (supra) at para 35.

□ National Department of Housing *National Housing Code* (2000) Part 1, 7 (footnotes omitted).

Thus Yacoob J's interpretation of what constitutes adequate housing is more restrictive than the interpretation adopted by the national Department of Housing. Of course, courts are free to set a lower constitutional standard than that adopted in State policy. In light of the express adoption of the ICESCR definition by the State, however, the Court's lower standard reflects two things. First, it reveals the Court's inadequate assessment of the policy before it. It is particularly important for the Court to have an accurate and a balanced understanding of what State policy is before it decides whether it is reasonable or not.^β Second, the Court's rejection of the CDESCR definition says less about differences in wording between the Final Constitution and the ICESCR, and more about the Court's refusal to engage in a discussion over the substantive meaning of FC s 26(1).^β

(b) Progressive realization

The term 'progressive realization' was introduced into the ICESCR in order to account for the existing differences in States' abilities to realize socio-economic rights and to allow all States to adhere to the obligations imposed by the Covenant, irrespective of their social and economic development. Those opposed to the use of the term argued that it would enable States to escape their obligations and act as a limitation on the right.^β Despite the obligation to realize rights progressively, States Party have an obligation to 'take steps' immediately, since this obligation is not subject to budgetary constraints or any other qualifications. In the CDESCR's words:

[W]hile the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations in the Covenant.^β

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In interpreting the term 'progressive realization', the Court in *Grootboom* referred to GC 3 of the ICESCR Committee and found that the phrase in the Final Constitution has the same meaning as that in the Covenant. The *Grootboom* Court noted that this provision did not mean the State could take as long as it liked in realizing the right, and that it must 'move as expeditiously and effectively as possible towards that goal'.^β

Article 2(1) does not indicate what steps should be taken and merely states that steps should be taken 'by all available means'. While this gives States a large measure of discretion, the Committee has indicated that it will make 'the ultimate

- Of course, this point could be used to bolster the argument that courts, due to institutional limitations, are poorly placed to assess social and economic policy. This is not, however, the point which is being made here. The Court is well placed to assess whether State housing policy is consistent with international norms and, in order to do so, greater and better evidence should be put before the Court with regard to the nature and content of State policy. If this is not done, the Court should call for more detailed evidence or research the area itself.
- See § 55.3 (b) *supra*.
- See Alston & Quinn (*supra*) at 172-75; Craven (*supra*) at 130-31.
- GC 3 (*supra*) at para 2. See also Limburg Principles (*supra*) at para 21.
- GC 3 (*supra*) at para 9, cited in *Grootboom* (*supra*) at para 45.

determination as to whether all appropriate measures have been taken'.^β Despite the text of art 2(1), the Committee states that while legislation, as a general rule, is not mandatory, it is 'highly desirable and in some cases may even be indispensable'.^β New legislation would, however, be required where existing legislation conflicted with the obligations imposed under the Covenant.^β Legislative measures alone, however, are 'by no means exhaustive of the obligations of States parties',^β and member States are required to take other methods necessary to secure the progressive realization of the right.

In addition, the obligation to realize rights *progressively* has been interpreted by the Committee to contain a general prohibition on what it calls 'retrogressive measures', that is, any action which would undermine the existing provision of social, economic and cultural rights under the ICESCR. Any such retrogressive measure would have to be justified in the context of the overall provision of rights:

Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.^β

States Party would therefore bear the justificatory burden of demonstrating that any retrogressive measure was economically necessary or was aimed at improving the overall provision of rights contained in the Covenant. Moreover,

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as Craven argues, a retrogressive measure would constitute a limitation and will therefore have to comply with the provisions of the limitations clause in art 4 of the ICESCR.^β The prohibition on retrospective measures was accepted by the Constitutional Court in *Grootboom*.^β

(c) Within available resources

□ GC 3 (supra) at para 4.

□ Ibid at para 3; Craven (supra) at 125.

□ See Limburg Principles (supra) at para 18; Alston & Quinn (supra) at 167; Craven (supra) at 126.

□ GC 3 (supra) at para 4.

□ Ibid at para 9.

□ See Craven (supra) at 132.

The financial cost to the State of realizing social and economic rights is one of the primary reasons given for distinguishing between these rights and civil and political rights. While this difference is often overstated, social and economic rights do raise significant budgetary concerns.^β These concerns may make it difficult for most States Party to commit to immediate, full realization of the rights in the Covenant. For this reason, art 2(1) obliges States to take measures 'to the maximum of its available resources' so that the obligation to realize the rights progressively is dependent on individual member States' financial position. In deciding what resources to allocate in fulfilling its socio-economic rights obligations, a State has a large measure of discretion. Such discretion cannot, however, be completely unfettered, as this would undermine the rationale behind the obligation itself.^β Indeed, the State's grounds for exercising discretion in a manner that leaves it short of the goal of fulfilling the rights must be open to judicial interrogation. Alston and Quinn sum up the position as follows:

[A] plea of resource scarcity *simpliciter*, if substantiated, is entitled to deference especially where a state shows adherence to a regular and principled decision-making process. In the final resort, however, such a plea remains open to some sort of objective scrutiny by the body entrusted with responsibility for supervising states' compliance with their obligations under the Covenant.^β

While it is clear from the text of the ICESCR that budgetary constraints are the most important limitation on the provision of social and economic rights, the *travaux préparatoires* also indicate that that this limitation is meant to operate only for countries which do not have sufficient resources. For countries that do have

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sufficient resources, the State incurs an obligation to fulfil the rights in the Covenant immediately. This interpretation has not, however, been followed by the CESCR, which has interpreted the obligation on developed countries to be the same as that of developing countries — progressive implementation subject to budgetary restrictions.^β

Article 2(1) requires a State to take steps 'to the maximum of its available resources'. It is clear from the *travaux préparatoires* that 'available resources' does

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- *Grootboom* (supra) at para 45. In addition to the general requirement in art 2(1) to take steps, certain of the substantive provisions in Part III of the Covenant set out specific steps that States Party are required to take. See arts 6(2), 11(2), 12(2), 13(2) and 15(2) of the ICESCR. In terms of steps which the ICESCR obliges member States to take, the *travaux préparatoire* indicate that the drafters of the Covenant considered it unnecessary for States Party to provide domestic judicial remedies for violations of the rights under the Covenant. See Alston & Quinn (supra) at 169–70. In practice, however, many States have provided for judicial remedies for many of the rights, and a growing number of countries have included social and economic rights in their domestic constitutions with varying degrees of enforceability and influence.
 - As is frequently noted, civil and political rights may also raise significant budgetary concerns. See, eg, *August v Electoral Commission* 1999 (3) SA 1 (CC); *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC).
 - See Alston & Quinn (supra) at 177–80; Craven (supra) at 137.
 - Alston & Quinn (supra) at 181.
 - See Craven (supra) at 132–33.

not simply refer to the resources allocated to a particular sector. Nor should the phrase be interpreted to refer solely to the resources available to the State — it must include international resources as well.^β While developed country member States may have some sort of obligation to assist developing States in realizing the social, economic and cultural rights in the Covenant, the nature of such a duty to provide assistance to poorer countries, as Craven points out, remains unclear. The 'general consensus' is that developing countries are 'entitled to ask for assistance', but they cannot 'claim it as a legal right'.^β

The qualification in FC s 26(2), that the State need only fulfil the right to adequate housing within 'available resources', is notably different from the wording in art 2(1) of the ICESCR. The ICESCR provides that a State must take steps 'to the *maximum* of its available resources'.^β Thus the duty imposed by the Final Constitution to realize the right is less onerous than the duty imposed by the ICESCR. South Africa is, therefore, unlikely to follow the jurisprudence of the CDESCR in determining its financial obligations to realize the right to adequate housing.

(d) Minimum core^β

Finally, the CDESCR has made it clear that States are to provide for the basic needs of their citizens through the provision of the 'minimum core' of each of the rights in the ICESCR. The notion of a minimum core is not expressly included in the ICESCR. The CDESCR introduced the notion in General Comment No 3:

[T]he 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. Thus, for example, a State party in which any significant number of individuals

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is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps 'to the maximum of its available resources'. In order for a State party to be able to attribute its failure to meet at least its minimum core

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- Ibid at 137–38, 144–50; Alston & Quinn (supra) at 179; Limburg Principles (supra) at para 26.
 - See Craven (supra) at 145, 149; Limburg Principles (supra) at paras 29–34.
 - Article 2(1) of the ICESCR states that '[e]ach 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 realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'
 - See S Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33, 33-22 — 33-32; and D Bilchitz 'Health' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 56A, 56A-28 — 56A-37 (Offers a fuller discussion of the minimum core in socio-economic rights jurisprudence.)

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.^β

The minimum core notion thus shifts the obligation on to the State Party to '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'.^β It does not, however, oblige States Party to satisfy the minimum core where resource constraints prevent them from doing so.^β The notion of a minimum core also prohibits countries from prioritizing among the rights in the ICESCR where doing so would undermine the minimum core of non-prioritized rights.^β

Whether the minimum core approach constitutes a 'universal' standard, or whether there is room for local interpretation is a difficult question. Often the answer will depend on the degree of specificity which the minimum core is given. For example, if a party defines the minimum core of housing as a brick house of 100 square metres of at least four rooms, with electricity, a television, running hot and cold water and heating, such a standard is unlikely to be adopted as an appropriate universal standard. The minimum core of the right to housing could, however, be said to encompass: security of tenure to ensure protection from 'forced eviction, harassment and other threats'; access to 'services, materials, facilities and infrastructure'; adequate space and protection 'from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors'; and 'a location which allows access to employment options, health-care services, schools, childcare centres and other social facilities'.^β Such a flexible

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standard, capable of catering for local needs, is a more likely and compelling candidate for adoption as a universal benchmark by which the CESCR and States Party can assess whether the minimum core of the rights has been met.

The question as to whether the minimum core should be incorporated into the interpretation of FC ss 26 and 27 has been the subject of intense academic discussion in South Africa. The Constitutional Court in *Grootboom* rejected the minimum core approach on two grounds: significant differences in the wording of the two provisions, and insufficient evidence before the Court to justify adoption of the standard.^β These two reasons lack purchase. First, the *Grootboom* Court should have

□ GC 3 (supra) at para 10.

□ Ibid.

□ See Craven (supra) at 142-44. Craven interprets this obligation differently. Where a State Party has not discharged its minimum core obligations, this establishes a 'presumption of guilt', and budgetary restrictions are then used as the basis for a limitation of the minimum core obligation. This, he notes, stands in contradiction to the general approach adopted in art 2(1), where budgetary restrictions are used to carve out the extent of the member State's obligation.

□ See Craven (supra) at 141.

□ GC 4 (supra) at para 8 (Discussing the content of 'adequate housing'.)

□ *Grootboom* (supra) at para 32.

taken into consideration the fact that national housing policy has already demonstrated a willingness to conform to the norms laid down by the ICESCR. Second, the issue of evidence is a red herring. The Committee of the ICESCR has laid down a minimum standard in interpreting the meaning of adequate housing, which could be applied irrespective of local conditions.^β The minimum core obligation is not meant to be a flexible standard, but to 'describe the minimum expected of a State in order to comply with its obligation under the Covenant'.^β

Despite these criticisms of the Court's reasoning, it must be recognized that adopting the minimum core approach at the domestic level raises a number of concerns. The concept of a minimum core was developed by the CESCR in order to create a set of standards by which the Committee could evaluate meaningfully reports submitted to it by member States, and not as a justiciable standard to which a *court* should hold a government accountable.

Both the ICESCR and the Final Constitution were born out of a realization that social justice is indispensable to a sustainable democracy. Nevertheless, the interpretation and the enforcement of these two texts operate in different contexts and fulfil different political functions. States voluntarily submit reports to the CESCR, which then engages in a 'constructive dialogue' with States Party to the ICESCR regarding the extent to which State policies are aimed at meeting its obligations under the ICESCR. The CESCR is thus able to engage in a more far-reaching discussion over fundamental questions of policy, such as privatization and the impact of free-market economics on the vulnerable and disadvantaged within a community.^β The South African Constitutional Court, on the other hand, is located within an adversarial judicial system, where the Court assesses whether and to what extent the State has complied with its constitutional obligations. The Court then makes a judgment which is binding on the State and which could oblige the State to change its policy or resource allocation.

The CESCR and the Constitutional Court thus differ in their adjudicative processes in four critical respects. First, the nature of the adjudication is different: States Party to the ICESCR submit periodic reports to the CESCR to engage in a

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dialogue over their progress in realizing the rights in the Covenant; while the South African government is brought, generally unwillingly, before the Constitutional Court to have its policies assessed in an adversarial forum. Second, the extent to which the CESCR and the Constitutional Court can examine fundamental choices of policy differs: the CESCR is able to engage in a far-reaching discussion over fundamental questions of policy, while the Court, for reasons of institutional comity and separation of powers, cannot undertake a top-to-bottom review of policy choices and is left with the more modest task of assessing the reasonableness of a particular set of State actions. Third, the Constitutional Court is able to grant remedies which may have far-reaching policy and budgetary implications. It must thus be careful about how it crafts its remedies; the CESCR, by contrast, may make broad, sweeping findings about State compliance with the provisions of the ICESCR. Lastly, the level

□ See GC 3 (*supra*) at para 10.

□ *Grootboom* (*supra*) at para 31.

□ See Craven (*supra*) at 122.

of scrutiny to which State policies are subject will usually differ. The Constitutional Court must attempt to do justice to the parties to a particular dispute and its findings are generally confined to the facts brought before it. The Court will undertake a detailed review of the specific problem raised by a party alleging a constitutional violation. The CESCR is free, on the other hand, to engage in a broad review of the State's entire socio-economic policy, and need not worry about the results of its findings in specific sets of circumstances.

These differences are illustrative of the different political functions which socio-economic rights play at the international level and in the domestic context. In the international arena, they serve to establish a higher ideal to which States Party to the ICSECR subscribe and desire to commit themselves for future achievement. The South African Constitution, however, establishes a standard to which the South African government must be held accountable immediately, or be found in breach of its constitutional obligations. While the two sets of institutional imperatives clearly do not need to map directly onto each other, the conclusions drawn by each institution — the decisions of the Constitutional Court and the General Comments of the CESCR — will be valuable in informing the approach of the other.

55.6 FC s 26(3): Evictions

FC s 26(3) 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. No legislation may permit arbitrary evictions.'

The clause contains three notable features. First, the provision relates to the eviction from one's *home*.^β 'Home' is intended to distinguish the occupant facing eviction from occupants on land or property who do not have their home on that land, but engage in some other activity, say farming or another commercial

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pursuit.^β Second, FC s 26(3) includes a duty on the State not to enact legislation which allows for 'arbitrary' evictions. FC s 26(3) does not, however, prohibit evictions, even where such an eviction results in the loss of a home.^β And third, FC s 26(3) must also be understood within the context of the right to housing as a whole. In *Jaftha v Schoeman*, the Constitutional Court wrote:

[S]ection 26 of the Constitution must be read as a whole. Section 26(3) is the provision which speaks directly to the practice of forced removals and summary eviction from land and which guarantees that a person will not be evicted from his or her home or have his or her home demolished without an order of court considering all of the circumstances relevant to the particular case. The whole section, however, is aimed at creating a new dispensation in which every person has adequate housing and in which the state may not interfere with such access unless it would be justifiable to do so.^β

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- On the meaning of 'home', see I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 587 (Authors argue that '[i]n order to qualify as a "home" an intention to occupy a dwelling for residential purposes permanently or for a considerable period of time is probably required.')
 - See *Pareto Ltd & Others v Mythos Leather Manufacturing (Pty) Ltd* 2000 (3) SA 999 (W)(Common law used in an application for ejection of a business.)
 - See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC)(*'Port Elizabeth Municipality'*) at para 21.

The *Jaftha* Court went on to interpret the protection against eviction from one's home as part of the negative aspect of the right to housing. It held that 'any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1)',^β and must therefore be justified under the general limitations clause of the Final Constitution.

(a) The impact of FC s 26(3) on the common law of evictions

The common law pleading requirements for an action for ejectment are set out in *Graham v Ridley*^β and *Chetty v Naidoo*.^β According to these two judgments, a plaintiff need only allege and prove two facts: first, that he is the owner of the land, and, second, that the defendant is in occupation. The defendant, if she wishes to oppose the eviction, must plead that the occupation is lawful in terms of a contractual or statutory right. If the plaintiff wishes to succeed, he must obviously counter this plea in his replication, alleging the unlawfulness of the occupation.

The Interim Constitution contained no provision equivalent to FC s 26(3). It was therefore only after the coming into force of the Final Constitution that courts were obliged to consider whether the common law gives adequate effect to constitutional imperatives relating to the granting of an order for eviction.^β Early High

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Court decisions differed on this issue.^β In *Ross v South Peninsula Municipality*,^β for example, the Court held that the plaintiff has an onus to allege and prove those circumstances that would justify the granting of an order for the eviction of the defendant from her home. While the *Ross* Court declined to list exactly what those circumstances might be, it held that 'guidance' could be sought in the factors set out in PIE.^β By contrast, in *Betta-Eiendomme (Pty) Ltd v Ekple-Epoh*,^β Flemming DJP interpreted FC s 26(3) as a 'never again' provision and restricted its application to instances where the ejectment order was sought under apartheid-style legislation.

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- *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) ('*Jaftha*') at para 28 (footnote omitted).
 - *Ibid* at para 34.
 - *Graham v Ridley* 1931 TPD 476, 479.
 - *Chetty v Naidoo* 1974 (3) SA 13 (A), 20A-E.
 - For a discussion of possible interpretations of FC s 26(3), written prior to the handing down of *Brisley v Drotzky*, see G Budlender 'Justiciability of the Right to Housing — The South African Experience' in S Leckie (ed) *National Perspectives on Housing Rights* (2003) (Budlender 'Justiciability') 211-12.
 - For a fuller discussion of the High Court jurisprudence, see T Roux 'Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) of the Constitution on South African Law' (2004) 121 *SALJ* 466 (Roux 'Continuity and Change').
 - *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) ('*Ross*').
 - *Ibid* at 596H-J. See § 55.6(b)(ii) *infra* for a discussion of the relevant considerations listed in PIE.

On this reading, FC s 26(3) did not apply to 'ordinary trespass, whether in the form of squatting or holding over or otherwise' and, furthermore, only applied where the State was the plaintiff.^β According to the *Betta-Eiendomme (Pty) Ltd* Court, FC s 26(3) had no impact on the existing common-law position on evictions.

The exact extent of FC s 26(3)'s effect on the common law was eventually dealt with by the Supreme Court of Appeal in *Brisley v Drotzky*.^β In *Brisley*, the Court found that the only 'relevant circumstances' were those that were 'legally relevant', rather than any social or personally relevant circumstances facing the defendant.^β As a result, FC s 26(3) does not confer discretion on a court to refuse to grant an eviction order where it would be granted under the common law or statute. *Brisley* has been criticized for rendering 'nugatory' the impact of FC s 26(3) on the common law and for embodying a non-transparent 'policy choice in favour of the legislature's power to give content to [FC] s 26(3) as against the judiciary's power to develop the common law'.^β To a large extent, however, the consequences of *Brisley* have been overcome or circumvented by the High Courts' general reluctance to grant eviction orders in the absence of alternative accommodation.^β

This general reluctance is consistent with the Constitutional Court's recent findings in *Jaftha v Schoeman*. The *Jaftha* Court found that the provisions in the Magistrates' Courts' rules which allowed for the granting of an order for sale in execution of immovable property by the clerk of the court were unconstitutional because they failed to provide for judicial oversight of the order. In this case, both appellants had been recipients of State subsidies, and both would have had no alternative accommodation if they had been evicted in consequence of the sale of

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their property.^β While the Magistrates' Court Act contains measures designed to protect vulnerable defendants, the *Jaftha* Court found that many defendants are not aware of or are unable to approach a court to avail themselves of this protection. The *Jaftha* Court held that the sale of homes in execution constituted an infringement of the negative right to adequate housing in FC s 26(1).^β The Court concluded that the provisions of the Magistrates' Court Act did not constitute a

- *Betta-Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) at para 7.2.
- *Ibid* at paras 7.2 and 7.3. Flemming DJP then went on to hold that where 'relevant circumstances' are to be considered, these will include 'the unfairness of causing loss to the owner so that the impertinence of land grabbing can stand', and the rights of landowners. *Ibid* at paras 12.1-12.3.
- *Brisley v Drotzky* 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA) ('*Brisley*').
- *Ibid* at para 42.
- For a detailed discussion of *Brisley*, see Roux 'Continuity and Change' (supra) at 485, 486.
- See § 55.6(c) infra.
- See *Jaftha* (supra) at para 12.
- *Ibid* at para 34.

justifiable limitation in terms of FC s 36 because they did not give a court a meaningful opportunity 'to consider all the relevant circumstances of a case to determine whether there is good cause to order execution'.^β The Magistrates' Court rules were accordingly amended by reading in provisions that ensured that courts would, in future, possess such an opportunity.^β

'The precise ambit of the *Jaftha* decision has been refined in subsequent court decisions. In *Nedbank Ltd v Mortinson*, the Court held that where execution is sought against immovables which have been specifically hypothecated in order to secure the debt, there has been no abuse of the court procedure, and the debt exceeds that of the Magistrates' Court's jurisdiction, a creditor may seek default judgment from the High Court Registrar.^β The Court did, however, amend its practice directions to require the creditor to file an affidavit setting out a number of relevant considerations which would enable a Registrar to decide whether the application should be heard in open court. Similarly, in *Standard Bank of South Africa v Saunderson*, the Supreme Court of Appeal held that where immovable property had been hypothecated to secure a debt, FC s 26 was not implicated.^β It did, however, order a practice direction such that defendants should be made aware of their right to raise FC s 26 issues. An appeal against the *Saunderson* decision was dismissed by the Constitutional Court.^β

(b) Legislative impact on the common law of evictions

Substantial reform of the common law of evictions has occurred as a result of two pieces of legislation that give effect to FC s 26: (1) PIE; and (2) the Extension of Security of Tenure Act (ESTA).^β ESTA extends protection against eviction to rural occupiers whose occupation was based upon consent and was initially lawful. PIE extends protection against eviction to certain categories of unlawful occupiers in both rural and urban areas.

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(i) ESTA

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- *Ibid* at para 54.
 - Unfortunately, it appears that persons benefiting from RDP housing are still having their homes sold in execution for minor debts, despite a 2001 amendment to the Housing Act prohibiting the sale of RDP houses for eight years. See F Rank 'Residents Fight to Salvage Home from Debt Collectors' in *The Herald On-Line* available at <http://www.theherald.co.za> (accessed on 20 February 2006).
 - *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) at para 33.
 - *Standard Bank of South Africa v Saunderson & Others* (Unreported decision of the Supreme Court of Appeal, 15 December 2005).
 - *The Campus Law Clinic (University of KwaZulu-Natal Durban v Standard Bank of South Africa Ltd & Another* 2006 (6) SA 103 (CC), 2006 (6) BCLR 669 (CC).
 - Act 62 of 1997.

ESTA was enacted to give effect to FC s 25(6) and FC s 26(3).^β The Act protects a class of 'occupiers'^β— which would clearly include those residing in their 'home' for the purposes of FC s 26(3) — from arbitrary eviction. It also regulates the relationship between owners and occupiers. ESTA thereby amends the common law of eviction where a landowner seeks to evict an 'occupier' and extends the legal protection promised in FC s 26(3) to that statutorily-designated group.

Under ESTA, a court may only grant an eviction order where the rights of residence are terminated on lawful grounds and where 'such termination is just and equitable, having regard to all relevant factors', including 'the fairness of any agreement' on which the plaintiff relies, the 'conduct of the parties', the comparative 'interests of the parties', 'the existence of a reasonable expectation of the renewal of the agreement', and the 'fairness of the procedure followed' in terminating the agreement to reside on the land by the plaintiff.^β ESTA thus grants courts considerable latitude in determining whether granting an eviction order would be just and equitable.

(ii) PIE

PIE is commonly regarded as the companion statute to ESTA. Whereas ESTA protects lawful occupiers, PIE extends statutory protection to unlawful occupiers. Like ESTA, PIE provides that certain factors are to be considered by a court before an eviction order is granted and thereby extends considerable benefits to those facing eviction from their home by requiring a court to take into account a welter of socio-economic circumstances.^β The factors to be considered will depend on the length of time that the defendant has been in occupation. If the defendant has been in occupation less than six months, a court may grant an eviction order only if it is 'just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.'^β

□ See ESTA, Preamble.

□ An occupier is defined as a person residing on land which belongs to another and who had consent to do so, but does not include a person residing on land and using it for commercial purposes, or a person who earns more than R 5 000 per month. The definition of occupier therefore includes the rural poor who live on land as their 'home'. ESTA, s 1. See *Robertson v Boss* (unreported, LCC Case No 6R/98 30 September 1998)(On the meaning of 'residing on land', which the Court interpreted as meaning residing in a permanent home.)

□ ESTA, s 8(1).

□ An interesting recent judgment illustrates the courts' powers to adopt a more inquisitorial approach to determining relevant circumstances under PIE. See *Ritamor Investments (Pty) Ltd & Others v The Unlawful Occupiers of Erf 62, Wynberg & Others* (Unreported decision of the Witwatersrand Local Division, 27 January 2006). Bertelsmann J, apparently frustrated with the lack of cooperation from the City of Johannesburg and Gauteng MEC for Housing (two of the respondents) and their refusal to provide relevant information to the Court, ordered those two respondents to return to court at a later date to provide oral evidence, subject themselves to examination and cross-examination, and provide information specified by the Court, including information on the availability of alternative accommodation and reasons for the failure to comply with the earlier requests from the Court regarding this information. Unfortunately, at the time of writing this chapter, the final judgment had not yet been handed down.

□ PIE, s 4(6).

Where the defendant has been in occupation for more than six months, a court may grant an order for

eviction only 'if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of State or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.'^β In addition, the Constitutional Court has held that PIE, when read with FC s 26(3), requires a court to consider, as a further relevant circumstance, whether the parties have engaged in mediation to resolve the matter.^β

The term 'unlawful occupier, is defined in PIE as meaning:

[A] person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996).

The ambiguity of the term 'occupies' led to some confusion. It could be interpreted to apply to the initial act of occupation (such as a 'land invasion' or where people 'squat' on land). It could also, however, be interpreted to apply to a current state of illegal occupation where the initial act of occupation may have been legal (such as in instances of 'holding over'^β). The High Court handed down conflicting decisions on this matter^β before it was finally resolved by the Supreme Court of Appeal in *Ndlovu v Ngcobo*. The *Ndlovu* Court found that the Act does indeed extend to instances of 'holding over': that is, it extends to instances in which the initial occupation may have been lawful, but subsequently became unlawful.

The Department of Housing, evidently unhappy with this interpretation, has tabled the Prevention of Illegal Eviction From and Unlawful Occupation of Land Amendment Bill, 2005^β ('PIE Amendment Bill'). According to the draft bill, it was never Parliament's intention to extend the reach of PIE to tenants and to

□ PIE, s 4(7).

□ See *Port Elizabeth Municipality* (supra) at para 45.

□ 'Holding over' is defined as the continued occupation of property where a contract of lease has expired, or where the occupier has defaulted on her mortgage bond repayments. See *Currie & de Waal* (supra) at 590.

□ See, for example, *ABSA Bank Ltd v Amod* [1999] 2 All SA 423 (W)(Court found that PIE did not extend to cases of holding-over.) This decision was followed in *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C); *Cape Killarney Property Investments (Pty) Ltd v Mahamba & Others* 2000 (2) SA 67 (C); *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter & Others* 2000 (2) SA 1074 (SE); *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W); and *Van Zyl NO v Maarman* 2001 (1) SA 957 (LCC), [2000] 4 All SA 212 (LCC). But see *Bekker & Another v Jika* [2001] 4 All SA 573 (SE)(Court held that PIE does apply to mortgage defaulters.) For a discussion of these cases, see AJ van der Walt 'Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law' (2002) 18 *SAJHR* 371, 385-90; *Ndlovu v Ngcobo*; *Bekker & Another v Jika* 2003 (1) SA 113 (SCA)('Ndlovu') at paras 51-64.

mortgagors. Proposed amendments to s 2 of PIE make this intention clear. The PIE Amendment Bill is, however, still under discussion — and the State must also now take account of the conclusions reached by the Constitutional Court in

Modderklip.^β At the time of writing, the final form of the PIE Amendment Bill had yet to be determined.^β

(c) The reach of FC s 26(3)

As a result of ESTA, PIE and *Ndlovu*, the common law will apply to very few evictions.^β The dispute in *Brisley*, for example, would, in light of *Ndlovu*, be decided under PIE.^β As Theunis Roux points out, the real benefit of FC s 26(3) has not been to alter directly the common law, but to provide a constitutional justification for legislation protecting people from arbitrary and unjust evictions.^β FC s 26(3) has therefore had a profound impact on the law of evictions in South Africa and extended both procedural and substantive benefits to those facing eviction from their homes. These benefits do not, of course, preclude eviction, but they do mean that those living in South Africa are less likely to face the threat of arbitrary, inhumane or unjust evictions in the future.^β

As has already been noted, recent case law indicates that courts are increasingly reluctant to grant eviction orders in the absence of alternative accommodation. Indeed, as Geoff Budlender points out, courts have now developed a general principle that 'in the absence of special justification, an eviction which would

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- Available at <http://www.pmg.org.za/docs/2005/050525hanli.htm> (accessed on 8 February 2006) (Latest available draft of the Bill.)
 - *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others, Amici Curiae)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) ('*Modderklip CC*').
 - See, for example, the minutes of the meeting of the Housing Portfolio Committee on 1 June 2005 discussing this matter, available at <http://www.pmg.org.za/viewminute.php?id=5916> (accessed on 8 February 2006).
 - Whereas PIE will apply to all unlawful occupiers, ESTA only applies to lawful occupiers in rural areas who earn under R 5 000 per month. Thus, where lawful occupiers reside in an urban area, irrespective of their income, or where they reside in a rural area and earn over R 5 000 per month, ESTA will not apply to any application for their eviction. In both instances, however, an application for eviction will either be dealt with under the law of contract, the Interim Protection of Informal Land Rights Act 31 of 1996 or the Land Reform (Labour Tenants) Act 3 of 1996.
 - Clearly, the proposed amendments to PIE would reverse this situation. See § 55.6(b) (ii) *supra*, on the proposed amendments of PIE.
 - See Roux 'Continuity and Change' (*supra*) at 469–70. See also Budlender 'Justiciability' (*supra*) at 210.
 - Of course, this statement is based on the premise that, in eviction proceedings, ESTA and PIE are properly placed before the court and argued. There is, unfortunately, much evidence that this is not the case in undefended applications in magistrates' courts, particularly where ESTA should be applied. See, for example, *Skhosana & Others v Roos t/a Roos se Oord & Others* 2000 (4) SA 561 (LCC); *Pitout v Mbolane* [2000] 2 All SA 377 (LCC).

otherwise result in homelessness or deprivation of access to housing and shelter is not permitted by the Constitution *unless alternative accommodation is available*.^β Budlender identifies three sets of circumstances which would, according to the courts, constitute 'special justification' for the granting of an eviction in the absence of alternative accommodation: (1) where the eviction is required to

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reverse a 'land invasion' undertaken with the purpose of forcing the State to provide housing; (2) where not granting the eviction would result in the denial of State-assisted housing to another group who were to be allocated housing on the land in question; and (3) where an eviction is necessary as a result of an immediate and dangerous situation.^β

President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd adds another layer to the constitutional development of the law of evictions in South Africa. In this case, the respondent sought and obtained an eviction order against 40 000 illegal occupiers under PIE. The cost of evicting the illegal occupiers, however, exceeded the value of the land.^β For this reason, the respondent approached the State for assistance to evict the illegal occupiers; alternatively, it sought to have the State purchase the property. After receiving no assistance, the respondent turned to the courts for relief.^β The Supreme Court of Appeal found that the failure of the State either to purchase the property or to find alternative accommodation for the illegal occupiers amounted to a breach of the illegal occupiers' FC s 26(1) rights.^β The Constitutional Court, on the other hand, decided the matter based on an expansive interpretation of the principle of the rule of law in FC s 1(c) read with FC s 34's right of access to courts. In particular, the Constitutional Court found that the failure of the State to assist with the evictions or to purchase the land threatened the social fabric and was a 'recipe for anarchy'.^β It accordingly ordered the State to compensate the respondents for the use of the land by the illegal occupiers, and to

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- G Budlender 'The Right to Alternative Accommodation in Forced Evictions' in J Squires, M Langford & B Thiele (eds) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (2005)(Budlender 'Alternative Accommodation') 127, 131. See also *Jaftha* (supra) at para 34 (Constitutional Court held that 'any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1). Such a measure may, however, be justified under section 36 of the Constitution.') See, eg, *The City of Johannesburg v Rand Properties (Pty) Ltd & Others* 2007 (1) SA 78 (W), [2006] 2 All SA 240 (W) at para 67 (Court interdicted the City of Johannesburg from evicting the respondents until the municipality developed a coherent programme to cater for the respondents, which must also include alternative accommodation for the respondents.)
 - See Budlender 'Alternative Accommodation' (supra) at 130-31.
 - *Modderklip CC* (supra) at paras 8-9.
 - *Ibid* at paras 9-10.
 - *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa & Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA), 2004 (8) BCLR 821 (SCA) at para 52.
 - *Modderklip CC* (supra) at paras 43, 45.

purchase the land for settlement by the occupiers or to provide alternative accommodation to the illegal occupiers before evicting them.

(d) International law of evictions

Numerous international instruments condemn the practice of forced evictions.^β GC 7 of the CESCR contains a general prohibition on forced evictions, which it defines as 'the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection'.^β FC s 26(3) should, when interpreted in the light of GC 7, effectively prohibit forced evictions, since, under FC s 26(3), no person may be evicted from their home without a court order 'made after considering all the relevant circumstances'.

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GC 7 also sets out the limited circumstances under which forced evictions are permissible and the conditions under which they may be carried out. First, the right to be protected against 'arbitrary or unlawful interference' with one's home is also given recognition in the ICCPR and is therefore not subject to the internal limitation 'available resources'.^β This reading is consistent with the interpretation of FC s 26(3) adopted by the Constitutional Court in *Jaftha*.^β Second, in order to give effective protection to the prohibition against forced eviction, States must enact legislation providing security of tenure and which control the circumstances in which evictions may be carried out.^β Again, these requirements are largely satisfied by ESTA, PIE, the Interim Protection of Informal Land Rights Act and the Land Reform (Labour Tenants) Act. Third, GC 7 outlines a number of procedural and due-process measures which must be observed when undertaking a forced eviction. These measures include: (1) giving those affected adequate notice; (2) consulting with those affected prior to the evictions; (3) where possible, identifying alternative land or housing; (4) providing information on the evictions; (5) offering legal remedies and, where possible, legal aid to persons who need it; (6) clear identification of those carrying out eviction; (7) a requirement that eviction should not take place at night or in bad weather; and (8) the presence of government officials where a large group of people is to be evicted.^β

Finally, GC 7 provides that evictions should not result in those evicted 'being rendered homeless or vulnerable to the violation of other rights' and that a State Party 'must take all appropriate measures, to the maximum of its available

□ See, eg, Agenda 21 (1992), adopted by the United Nations Conference on Environment and Development, available at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> (accessed on 10 March 2009) at paras 7.6 and 7.9(b) and the Habitat Agenda (supra) at para 40(n).

□ GC 7 (supra) at para 3.

□ See ICCPR art 17(1); GC 7 (supra) at para 8.

□ *Jaftha* (supra) at para 31.

□ GC 7 (supra) at para 9.

□ *Ibid* at para 15.

resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available'.^β The Constitutional Court has recently confirmed that the obligation under PIE to consider the availability of suitable alternative accommodation is 'not an inflexible requirement' and that a court may still grant an eviction order even where there is no alternative accommodation.^β Nevertheless, the Constitutional Court has written that 'a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available'.^β Despite these caveats, the South African jurisprudence on evictions falls short of two ICESCR requirements: (1) that the State is obliged to provide alternative accommodation 'to the maximum of its available resources' and (2) that the State's obligation extends, not solely to 'relatively settled occupiers', but to all those facing eviction.

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55.7 Children's right to shelter^β

There are two textual sources for children's right to shelter or housing: FC s 26 and FC s 28. FC s 28(1)(c) provides that every child has the right to basic shelter.

The High Court in *Grootboom*, relying on the precedent established by the Constitutional Court in *Soobramoney*, found that the respondents had 'produced clear evidence that a rational housing programme has been initiated at all levels of government and that such programme has been designed to solve a pressing problem in the context of the scarce financial resources'.^β As such, the application based upon FC s 26 had to fail.

The High Court then considered the alternative claim based on FC s 28(1)(c) and found that, while the primary obligation to maintain and shelter children rests on their parents, when parents are unable to provide such shelter there is an obligation on the State to do so.^β In coming to this conclusion, Davis J noted the textual difference between the two provisions and interpreted this textual difference as according a stronger right of shelter to children:

□ Ibid at para 16.

□ See *Port Elizabeth Municipality* (supra) at para 28.

□ Ibid.

□ For a discussion of children's right to shelter, see A Friedman & A Pantazis 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 47, 47-6-47-14; S Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33, 33-48-33-52. Since this topic is already considered in detail in these two chapters, the discussion in this chapter will not be lengthy.

□ *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277, 286 (C) ('*Grootboom HC*').

□ Ibid at 288.

Accordingly the question of budgetary limitations is not applicable to the determination of rights in terms of section 28(1)(c). ... The right is conferred upon children. That right has not been made subject to a qualification of availability of financial resources.^β

In making this finding, Davis J was quick to point out that this did not mean that the right would be enforceable on demand by all children. All claims would have to be evaluated on their individual merits and the merit of each claim would have to be assessed in terms of the Final Constitution as a whole.^β For this reason, Davis J went on to hold that:

A parsimonious interpretation of section 28(1)(c) which denied shelter to 276 infants as well as other children would be incongruent with a constitutional instrument which envisages the establishment of a society based on freedom, equality and dignity. To implement the right in this case so that shelter will be provided for the children in circumstances where they will be denied the psychological comfort and social support of their parents would be to permit the breakup of family life of a kind which the new Constitution is determined to prevent. In my view such a conclusion cannot be justified and hence the relief given must allow the parents to move with their children to the shelter provided to the latter as the bearers of such a right.^β

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FC s 28(1)(c), on Davis J's reading, means that children have an unconditional right to shelter. Whether this right is, in fact, enforceable against the State will depend on the circumstances of a given case. In this case, the parents of the applicant children were unable to provide shelter for them and therefore the children had a claim against the State. Moreover, since it was in the best interests of the children that they remain with their parents, the parents of the applicant children had a derivative right to shelter.

As already discussed, the Constitutional Court in *Grootboom* focused on FC ss 26(1) and (2). In so doing, it rejected the argument that FC s 28(1)(c) provides an unqualified socio-economic right to children to adequate shelter. In the view of the Constitutional Court, the High Court's reasoning 'produces an anomalous result':

People who have children have a direct and enforceable right to housing [note the use of the word *housing* rather than *shelter*] under s 28(1)(c), while others who have none or whose children are adult are not entitled to housing under that section, no matter how old, disabled or otherwise deserving they may be. The carefully constructed constitutional scheme for 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. Moreover, there is an obvious danger. Children could become stepping stones to housing for their parents instead of being valued for who they are.^β

There are five primary problems with the *Grootboom* Court's reasoning in this passage. First, the Court conflates shelter and housing, finding that there is no 'real

□ ¹ Ibid at 291.

□ ² Ibid.

□ ³ Ibid.

□ ⁴ *Grootboom* (supra) at para 71.

distinction' between the two.^β It contends that on the High Court's account, parents are accorded two overlapping rights — a right to housing, subject to available means and progressive realization, in FC s 26, and a right to *housing* on demand in FC s 28(1)(c). Yet the constitutional drafters clearly intended there to be a difference in meaning between shelter and housing — that intention is reflected in the difference in the language of FC s 26 and FC s 28(1)(c). Second, as Yacoob J himself points out, the *Grootboom* Court's reading undermines the construction for progressive realization in FC s 26 in a way that the High Court judgment does not. Third, the *Grootboom* Court's reasoning is based on an inexplicably narrow reading of FC s 28(1)(c). In consequence of the Court's decision, that provision must now be understood to apply only to children who are not in the care of their parents or immediate family. This reading is neither justified by the text nor is it consistent with the constitutionally entrenched 'best interests of the child' principle. Fourth, the Court focuses on the rights of the parents rather than the child, thereby subsuming children's rights under general socio-economic provisions. This subordination of children's rights is reflected in the *Grootboom* Court's conclusion that

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[t]he obligation created by s 28(1)(c) can properly be ascertained only in the context of the rights and, in particular, the obligations created by ss 25(5), 26 and 27 of the Constitution. ... There is an evident overlap [in content] between the rights created by ss 26 and 27 and those conferred on children by s 28. Apart from this overlap, the s 26 and 27 rights are conferred on everyone including children while s 28, on its face, accords rights to children alone. This overlap is not consistent with the notion that s 28(1)(c) creates separate and independent rights for children and their parents.^β

The *Grootboom* Court then purports to solve this 'problem' by reading FC s 28(1)(b) and (c) together. FC s 28(1) provides that: 'Every child has the right — ... (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; (c) to basic nutrition, shelter, basic health care services and social services.' The *Grootboom* Court, reading these two sections together, concludes that 'appropriate alternative care' in FC s 28(1)(b) is what is outlined in FC s 28(1)(c). This reading means that when children are in the care of their families, they are entitled to basic nutrition, shelter, basic health care services and social services from their parents, and it is only when they are not in family or parental care that they are entitled to these social goods from the State. Where children are in the care of their parents but their parents are unable to provide these social goods to their children, the children can have no claim against the State. Again, this reading is not justified by the text, and results in a watering down of children's rights. The conclusion is particularly disturbing in a country where a large proportion of parents cannot afford to provide adequate care for their children. This state of affairs cannot be in the best interests of children. This rather harsh position seems, however, to have been somewhat ameliorated in *Treatment Action Campaign (TAC)*. In *TAC*, the Constitutional Court considered the relevance of FC s 28(1)(c) to the applicant's contention that it was unreasonable for the State to restrict the provision of Nevirapine to two pilot sites per province. The *TAC* Court found that its interpretation of FC s 28(1)(b) and (c) in *Grootboom* did not mean that the State had no obligation to care for children who were still in the care of their families. It held, to the contrary, that '[t]he State is obliged to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the

□ *Ibid* at para 73.

□ *Grootboom* (*supra*) at para 74.

right to parental or family care is lacking.^{1β} Although difficult to square this last line of reasoning with the interpretation placed by the *Grootboom* Court on FC s 28(1)(c), the *TAC* Court used FC s 28(1)(c) to bolster conclusions already reached under FC s 27.^β Indeed, the *TAC* Court's analysis suggests, in a manner consistent with *Grootboom*, that the socio-economic rights articulated in FC s 26 and FC s 27 have priority over those socio-economic rights to found in FC s 28.

The final criticism of the *Grootboom* Court's reasoning on children's socio-economic rights is that the Court fails to appreciate that, according to the current

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housing subsidy scheme programme, only adults (over 21 years of age) can apply to benefit from low-cost housing. Children are therefore effectively denied housing under FC s 26 where they have no parent or guardian to provide housing on their behalf, and where they do not already have access to adequate housing. Child-headed households, which are increasing significantly in number as a result of the ravages of HIV/AIDS, are often not, in practice, under the care of the State, and are therefore not able to claim housing or shelter under either FC s 26 or FC s 28.

55.8 Prisoners' right to adequate accommodation^β

Section 35(2)(e) of the FC provides that every detained person has 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'. Like the children's right to shelter in FC s 28(1)(c), prisoners' right to 'adequate accommodation' is not qualified by a provision equivalent to FC s 26(2). It may, of course, be limited under the general limitations clause in FC s 36.

The most striking aspect of this right is the seemingly carefully crafted wording of the right of prisoners to 'adequate accommodation'. The term 'adequate accommodation' must be contrasted with children's rights to 'shelter' and everyone's rights to 'access to adequate housing'. Clearly, the constitutional drafters intended to introduce a subtle distinction between these rights. A sensible heuristic framework would interpret a child's 'right to shelter' as merely affording protection against the elements, a prisoner's 'right to adequate accommodation' to permanent accommodation and access to services for the duration of imprisonment, and everyone's 'right to access to adequate housing' to actual housing, subject to the provisos of progressive realization and available resources.

To date, there has been no case law on prisoners' rights to adequate accommodation.^β The High Court's decision on prisoners' rights to medical treatment in *Van Biljon v Minister of Correctional Services*, however, sheds some light on the meaning of 'adequate accommodation'.^β *Van Biljon* concerned an application based on FC s 35(2)(e) for adequate medical treatment at State expense. The dispute

□ *TAC* (supra) at para 79 (footnotes omitted).

□ *Ibid* at paras 74-79.

□ See D Van Zyl Smit 'Sentencing and Punishment' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 49, 49-31 — 49-35.

turned on whether the applicants, who were HIV-positive and 'who [had] reached the symptomatic stage of the disease and whose CD4 counts [were]

less than 500/ml,^β were entitled to have prescribed and to receive at State expense appropriate anti-viral medication'. In deciding this matter, Brand J considered carefully the standard of 'adequate medical treatment' set by FC s 35(2)(e).^β The respondents contended that the right in FC s 35(2)(e) means that detained persons are only entitled to the medical treatment that they would have received at provincial hospitals, had they not been incarcerated.^β It was common cause that patients in provincial hospitals in the same position as the applicants would not be entitled to anti-retroviral drugs at State expense.^β The respondents contended that the Court should not scrutinize provincial health policy regarding HIV-positive patients as this policy is 'dictated by budgetary considerations which is a matter of polycentric nature and, therefore, non-justiciable by this Court.'^β

The applicants countered this argument by contending that the State could not rely on budgetary constraints as a legitimate reason to refuse adequate medical treatment.^β The *Van Biljon* Court accepted this argument, but then went on to find that budgetary considerations were nevertheless relevant in determining what constitutes 'adequate medical treatment'. The Court reasoned as follows:

In principle, I agree ... that lack of funds cannot be an answer to a prisoner's constitutional claim to adequate medical treatment. Therefore, once it is established that anything less than a particular form of medical treatment would not be adequate, the prisoner has a constitutional right to that form of medical treatment and it would be no defence for the prison authorities that they cannot afford to provide that form of medical treatment. I do not, however, agree with the proposition that financial conditions or budgetary constraints are irrelevant in the present context. What is

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- At the time of writing this chapter, there was, however, one case pending in the Cape High Court: *Prison Care & Support Network & Another v Government of the Republic of South Africa* (Case No 9188/05). This case was recently reportedly postponed *sine die*. See W Roelf 'Prison Overcrowding Case Postponed' available at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=qw1145452143638B263 (accessed on 23 April 2006).
 - *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C), 1997 (6) BCLR 789 (C) ('*Van Biljon*').
 - CD4 is a type of white blood cell or lymphocyte involved in fighting infection. The Centre for Disease Control measures the progression of the Human Immunodeficiency Viral (HIV) infection using a CD4 count since the further the disease has progressed, the lower the CD4 count and the less likely the patient is to be able to fight off infection.
 - *Van Biljon* (supra) at para 41.
 - *Ibid* at para 43.
 - *Ibid* at para 44.
 - *Ibid* at para 45.
 - *Ibid* at para 48.

'adequate medical treatment' cannot be determined *in vacuo*. In determining what is 'adequate', regard must be had to, *inter alia*, what the State can afford. If the prison authorities should, therefore, make out a case that as a result of budgetary constraints they cannot afford a particular form of medical treatment or that the provision of such medical treatment would place an unwarranted burden on the State, the Court may very well decide that the less effective medical treatment which is affordable to the State must in the circumstances be accepted as 'sufficient' or 'adequate medical treatment'.^β

The *Van Biljon* Court then went on to find that the 'respondents did not make out a proper case that the medical treatment claimed by applicants [was]

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unaffordable^β since the respondents only referred to the level of care available in provincial hospitals. The appropriate test was whether the Department of Correctional Services — and not the provincial hospitals via the Department of Health — could afford such services. Furthermore, the Court found the respondent's case flawed because it was based on a premise that the State did not owe a higher duty of care to those in detention. It suggested that the State may well have such a duty because prisoners who are kept in detention under existing conditions are made more vulnerable to opportunistic infections. For all these reasons, the Court ordered the respondents to supply the applicants with the anti-retroviral medication that had been prescribed for them, concluding as follows:

Applicants have, therefore, established, in my view, that anti-viral therapy is at present the only prophylactic. The benefits of this treatment — in the form of extended life expectancy and enhanced quality of life — are such that this treatment must be provided for the unfortunate sufferers of HIV infection if at all affordable. As I have already stated, respondents have failed to make out a case that the Department of Correctional Services cannot afford to provide HIV infected prisoners in the stated category with the combination anti-viral therapy claimed by applicants. In these circumstances, I believe that the medical treatment claimed by applicants must be regarded as no more than the 'adequate medical treatment' to which they are entitled in terms of s 35(2)(e) of the Constitution. It follows that the failure to provide applicants with this treatment amounts to an infringement of applicants' constitutional rights.^β

In short, the *Van Biljon* Court held that, since the State had failed properly to make out a case that it could not afford the medical treatment claimed by the applicants, budgetary considerations could not be taken into account in determining *adequate* medical treatment. If the State had made out such a case, the Court implied, its assessment of what constituted adequate medical treatment might have been different.

The reasoning in this judgment has been set out at length because it has a direct bearing on the more immediate question of what constitutes 'adequate accommodation' for prisoners. Thus, while budgetary considerations are relevant to the type and quality of accommodation which is provided to prisoners, lack of

□ *Ibid* at para 49 (footnote omitted).

□ *Van Biljon* (*supra*) at para 50.

□ *Ibid* at para 60.

funding could not be used to justify the absence of accommodation to prisoners or accommodation which is inconsistent with their right, say, to dignity.^β

A strong argument could be made that the current overcrowding in prisons undermines prisoners' right to dignity and, consequently, does not constitute adequate accommodation.^β There are currently 238 operational public prisons in South Africa which were intended to accommodate 114 000 prisoners. As of

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March 2004, these prisons were accommodating 187 640 prisoners. 53 876 were awaiting-trial.^β On average, prisons are approximately 65 per cent overcrowded. The 10 most overcrowded prisons are, however, between 285 to 386 per cent over capacity. This situation is clearly intolerable and, as Justice Fagan notes in his 2004 report, amounts to an on-going breach of prisoners' rights to adequate accommodation.^β

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- For more on dignity, see S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.
 - See *Kalashnikov v Russia* (2003) 36 EHRR 34 (European Court of Human Rights found that the overcrowding and poor conditions in Russian prisons amounted to degrading treatment in violation of the European Convention on Human Rights and awarded damages to the applicant.)
 - See Judicial Inspectorate of Prisons *Annual Report for the Period 1 April 2003 to 31 March 2004* available at <http://judicialinsp.pwv.gov.za/Annualreports/2004a.pdf> (accessed on 16 February 2006) 22. This figure was reduced in April and May 2005 by the release of certain prisoners and prisons are currently accommodating approximately 160 000 inmates. See MP Ntsobi *Privatisation of Prisons and Prison Services in South Africa* (Unpublished Masters thesis submitted to School of Government Faculty of Economic and Management Sciences University of the Western Cape, November 2005, on file with the author) 78.
 - Judicial Inspectorate of Prisons *Annual Report* (supra) at 21.