South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?[1]

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> When we look at the issue of core obligations of states with regard to socio-economic rights, we need to push to the centre of the debate the concern that certain fundamental human needs should be non-negotiable.[2]

1 INTRODUCTION

The drafters of the Constitution clearly envisaged a far-reaching role for it in the transformation of post-apartheid society.[3] Among the key aims of the Constitution is to "improve the quality of life of all citizens and free the potential of each person".[4] This constitutional concern with the socio-economic well being of people is especially evident in the entrenchment of a wide range of justiciable socio-economic rights in the Bill of Rights.[5]

If the socio-economic rights in the Constitution are to amount to more than paper promises, they must serve as useful tools in enabling people to gain access to the basic social services and resources needed to live a life consistent with human dignity. This paper focuses on the role of the courts in promoting the realisation of socio-economic rights in South Africa.

The inclusion of socio-economic rights as *justiciable* rights indicates that the Constitution envisages an important role for the judiciary in their enforcement. The jurisprudence will define the nature of the state's obligations in relation to socio-economic rights, the conditions under which these rights can be claimed, and the nature of the relief that those who turn to the courts can expect. The evolving jurisprudence is not only significant for future litigation aimed at

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[2]Prof. Viviene Taylor, Programme Coordinator (Development), UN Commission on Human Security, New York in her closing address to the colloquium organised by the Community Law Centre, *Realising socio-economic rights in SA: Progress and challenges*, Cape Town, 17–19 March 2002.

[3]All references to 'the Constitution' in this article are to South Africa's final Constitution, Act No. 108 of 1996.

[4]Ibid. Preamble.

[5]The relevant socio-economic rights provisions are discussed in 2.2 below. Section 38 confers standing on a broad range of individuals and groups "to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights". The Constitutional Court is the highest court in all constitutional matters (s 167(3)).

enforcing socio-economic rights,[6] but also in guiding the adoption and implementation of policies and legislation by government to facilitate access to them. It is also important to the monitoring and advocacy initiatives by civil society, the South African Human Rights Commission (SAHRC) and the Commission for Gender Equality.[7]

The strategic importance of socio-economic rights as tools in anti-poverty initiatives will diminish if the courts interpret them as imposing weak obligations on government and fail to protect them as vigorously as they do the other rights in the Bill of Rights.[8] This paper's departure point is that socio-economic rights were included as justiciable rights in the Bill of Rights primarily to assist the poor to protect and advance their fundamental socio-economic needs and interests. These rights should therefore be interpreted in a way that promotes this purpose.

The paper commences with the background to the inclusion of socio-economic rights in the Constitution. Thereafter the Constitutional Court's evolving jurisprudence on socio-economic rights is reviewed through the three leading cases on these rights: *Soobramoney*,[9] *Grootboom*,[10] and *Minister of Health v TAC*.[11] In the latter two cases, the decisions of the trial courts are also discussed to highlight different interpretative approaches. In each case, the Court's jurisprudence is evaluated to determine to what extent it supports the struggle of ordinary individuals and civil society organisations against poverty. The paper also seeks to identify key areas where the jurisprudence can be developed to make it more responsive to the needs of the poor.

Although standing to litigate and effective remedies are clearly crucial to the successful use of the courts by the poor, they are not discussed in this paper, its main purpose being to evaluate the substantive jurisprudence of the

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[6]To achieve optimal effect, litigation should be strategically located within a broader campaign of social mobilisation around socio-economic rights. The strategic use of socio-economic rights litigation by the Treatment Action Campaign (hereafter 'the TAC') is an important case study in this regard. See Heywood 2001. Also see Pieterse & van Donk in this volume.

[7]The papers in this special edition illustrate how the jurisprudence of the courts on socio-economic rights can be used to assess progress by the state in realising various socio-economic rights and to identify key obstacles experienced by disadvantaged communities in accessing them. The SAHRC has been given an express constitutional mandate in s 184(3) of the Constitution to request information on an annual basis from relevant organs of state on the measures that they have taken towards realising the various socio-economic rights in the Bill of Rights. It also has the power to receive and deal with complaints of human rights violations, to conduct investigations, and to report and make recommendations to government on human rights: see s 184 of the Constitution and the Human Rights Commission Act 54 of 1994.

[8]As expressed by Karl Klare, "adjudication uniquely reveals ways in which law-making and, by extension, legal practices generally, are and/or could be a medium for accomplishing justice". Klare 1998: 147.

[9]*Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) (hereafter *Soobramoney*).

[10]*Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) (hereafter *Grootboom*).

[11]*Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) (hereafter the *TAC* case). These three cases deal primarily with the socio-economic rights protected in ss 26, 27 and 28(1)(c) of the Constitution.

Constitutional Court on socio-economic rights.[12]

2 INCLUDING SOCIO-ECONOMIC RIGHTS IN THE CONSTITUTION

2.1 Background

One of the major issues of debate around the drafting of the 1996 Constitution was whether socio-economic rights should be included in the Bill of Rights as justiciable rights.[13] A coalition of civil society organisations, including human rights and development NGOs, church groups, civics and trade unions campaigned vigorously for the full inclusion of socio-economic rights in the Bill of Rights. They argued that the struggle against apartheid was as much about access to socio-economic rights, such as the right to land, housing, education and health care, as it was about the right to vote and other civil liberties.

They articulated a two-fold justification for including justiciable socio-economic rights in the Bill of Rights. First, they argued that socio-economic rights would give disadvantaged communities tools to protect and advance their interests in the courts. Second, they would assist the new democratic government to give effect to its reconstruction and development programme by, for example, mandating redistributive social programmes, thereby shielding them from being struck down on the basis of vested property rights.[14]

The argument for full inclusion won the day in the Constitutional

[12]The leading case on public interest standing is the Supreme Court of Appeal decision in *Permanent Secretary, Department of Welfare, E Cape Provincial Government and Another v Ngxuza and Others* 2001 (10) BCLR 1039 (SCA). On the remedial approach of the Constitutional Court in the *Grootboom* and *TAC* cases, see Kameshni Pillay in this volume.

[13]There was a vigorous academic debate on the inclusion of socio-economic rights in the Bill of Rights. The parameters of the debate were articulated in a well-known set of articles published in the 1992 (8) SAJHR. Nicholas Haysom argued for the entrenchment of a minimum floor of socio-economic rights "that are necessary for survival at a minimum level of human dignity". He argued that by constitutionalising selected socio-economic rights, "society is elevating certain rights to a necessary condition for the existence of a minimum civic equality". This in turn would enrich democratic participation and the effective use of civil and political rights (Haysom 1992: 461). Dennis Davis argued that socio-economic rights should only be included in the Constitutions as directive principles where they can be used as "interpretative guides as well as basic principles of administrative review". He argued that the inclusion of a battery of specific social and economic rights would place too much power in the hands of the judiciary, which is not as accountable to the population as is the legislature or executive (Davis 1992 487, 489). Etienne Mureinik argued for the inclusion of socio-economic rights as justiciable rights in the Bill of Rights of a new South African Constitution. However, the role of the courts would be confined to judicial review of the justifiability of relevant policy and legislation and would not be to order the provision of specific services or resources to any individual or group. Only "dishonest or irrational means" chosen by the lawmakers or administrators to realise socio-economic rights would be set aside (Mureinik 1992: 471, 474). Few academic commentators argued for the complete exclusion of socio-economic rights from the Constitution.

[14]See the petition to the Constitutional Assembly by the Ad Hoc Committee for the Campaign for Social and Economic Rights, July 1995, reproduced in Pillay and Liebenberg 2000: 19 (full petition on file with author).

Assembly. International law, particularly the International Covenant on Economic, Social and Cultural Rights, 1966 (hereafter, the ICESCR), and the Convention on the Rights of the Child, 1989, were highly influential in the drafting of the relevant provisions.[15]

However, the inclusion of economic and social rights in the Bill of Rights was not uncontested. At the time of the certification of the final Constitution, certain groups in civil society objected to the inclusion of socio-economic rights in the Bill of Rights. They argued that socio-economic rights were inconsistent with the separation of powers doctrine because they would require the judiciary to encroach upon the terrain of the legislature and executive in policy and budgetary matters. They furthermore argued that the rights were not justiciable because of their extensive budgetary implications.[16]

The Constitutional Court overruled these objections in its first certification judgment.[17] It indicated that it would not endorse a rigid, formalistic interpretation of the doctrine of separation of powers that would preclude the courts from making orders with social policy or budgetary implications. The Court also signalled that, as a minimum, it would be prepared to enforce the negative duty on the state to refrain from interfering in people's access to socio-economic rights.[18]

2.2 Normative structure

The economic and social rights included in the South African Constitution follow three main drafting styles. The first category entrenches a set of 'basic' rights consisting of children's socio-economic rights,[19] the right of everyone to basic education, including adult basic education,[20] and the socio-economic rights of detained persons, including sentenced prisoners.[21] These rights are not qualified by reference to reasonable measures, progressive realisation or resource constraints. The second category of rights entrenches the right of "everyone" to "have access to" adequate housing, health care services, including reproductive

[15]On the drafting history of the provisions and the influence of international law, see Liebenberg 1998: 41, 3–4. Although South Africa signed the ICESCR on 3 October 2002, it was not ratified as at the date of writing. Nonetheless the Covenant is relevant to the interpretation of the socio-economic rights in the Bill of Rights: see s 39 (1)(a) and *S v Makwanyane* 1995 (3) SA 391 (CC), para. 35.

[16]The objectors were the South African Institute of Race Relations, the Free Market Foundation and the Gauteng Association of Chambers of Commerce and Industry. Organisations that made submissions supporting the inclusion of socio-economic rights were the Legal Resources Centre, the Centre for Applied Legal Studies and the Community Law Centre (Univeristy of the Western Cape).

[17]*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa, 1996*, 1996 (4) SA 744 (CC) at paras. 76–78.

[18]"At the very minimum, socio-economic rights can be negatively protected from improper invasion." Ibid. para. 78.

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

[20]Section 29(1)(a).

[21]Section 35 (2)(e) confers the right "to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment".

health care, sufficient food and water, and social security.[22] A second subsection requires the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights".[23] This second category can be loosely described as the "qualified" socio-economic rights. The third category is located in sections 26(3) and 27(3). The former provides that "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". The latter states that "no one may be refused emergency medical treatment". These provisions are phrased in the passive tense with no duty holder specified. Like all the other rights in the Bill of Rights, the socio-economic rights are subject to the general limitations clause, section 36.

The Constitution places an overarching obligation on the state to "respect, protect, promote and fulfil the rights in the Bill of Rights".[24] This section establishes that the rights in the Bill of Rights impose a combination of negative and positive duties on the state.[25] Thus the duty to respect requires the state to refrain from law or conduct that would interfere in people's access to the rights. The duty to protect places a duty on the state to take legislative and other measures to protect vulnerable groups against violations of their rights by more powerful private parties (e.g. landlords, banks and insurance companies). The duty "to promote and fulfil" requires the state to take positive measures to ensure that those persons who currently lack access to the rights gain access to them.[26] The UN Committee on Economic, Social and Cultural Rights (CESCR) has identified two aspects of the duty to fulfil. The first is a duty to enable and assist communities to gain access to socio-economic rights. This would include, for example, adopting framework policies and legislation that facilitate and regulate access to socio-economic rights. The second is a duty to provide the right directly, whenever an individual or group is unable, for reasons beyond their control, to gain access to the right through the means at their disposal. The latter aspect of the duty to fulfil is thus clearly targeted at groups in especially

[22]Sections 26(1) and 27(1).

[23]Sections 26(2) and 27(2). The drafting of this provision was clearly influenced by article 2(1) of the ICESCR, which describes the nature of states parties' obligations in relation to the rights recognised in the Covenant. The sections protecting environmental and land rights (ss 24 and 25(5)–(9)) use similar phrases to those contained in ss 26 and 27, although there are important differences in the way they are formulated. See, for example, the paper by Lahiff and Rugege in this volume.

[24]Section 7(2). This typology is based on the analysis by Henry Shue, 1980, of the obligations imposed on states by human rights. It is also used by the UN Committee on Economic, Social and Cultural Rights (CESCR) to analyse the duties imposed by various rights in the ICESCR: see, e.g. General Comment No. 12 (Twentieth session, 1999), *The right to adequate food (art 11 of the Covenant)* UN doc. E/2000/22, para. 15; and General Comment No. 14 (Twenty-second session, 2000) *The right to the highest attainable standard of health (art 12 of the Covenant)* UN doc. E/C.12/2000/4, paras. 33–37.

[25]As Justice Kriegler has observed: "We do not operate under a constitution in which the avowed purpose of the drafters was to place limitations on governmental control. Our constitution aims at establishing freedom and equality in a grossly disparate society." *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC), para. 147.

[26]De Vos 1997: 78–91; Liebenberg 2001: 410–420.

vulnerable situations.[27]

3 SOOBRAMONEY: "A COURT WILL BE SLOW TO INTERFERE"

Soobramoney was the first major Constitutional Court case to consider the enforceability of socio-economic rights.[28] The applicant, an unemployed man in the final stages of chronic renal failure, sought a positive order from the courts directing a state hospital to provide him with ongoing dialysis treatment, and interdicting the provincial Minister of Health from refusing him admission to the renal unit of the hospital. Without this treatment the applicant would die, as he could not afford to obtain the treatment from a private clinic. He relied primarily on section 27(3) of the Constitution, the right against the refusal of emergency medical treatment. He also argued that section 27(3) should be construed consistently with the right to life in section 11 of the Constitution. The application was dismissed in the High Court and was taken on appeal to the Constitutional Court.

Chaskalson P commenced the judgment with an oft-quoted passage, recognising the circumstances of poverty and economic inequality that exist in our country.[29] This passage is significant, first, because it establishes the strong link between socio-economic rights and the foundational constitutional values of human dignity, equality and freedom.[30] Second, it affirms that the commitment to address these conditions of poverty and inequality and transform our society based on human dignity, equality and freedom is a central constitutional purpose. Finally, it acknowledges that as long as these conditions persist, "that aspiration will have a hollow ring". In other words, realising socio-economic rights is indispensable to the success of South Africa's constitutional democracy and to ensuring that the core constitutional values are meaningful to the whole population of the country. This perspective suggests the development of a bold and robust jurisprudence on socio-economic rights. However, the judgment reveals a Court anxious to establish a restrained role for itself in their enforcement.

The Court decided that the applicant's demand to receive renal dialysis treatment at a state hospital did not fall within the scope of the right against the refusal of "emergency medical treatment" protected in section 27(3) of the Constitution. It observed that the right is cast in negative terms. Its scope is thus

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[27] See General Comment No. 12, *supra* note 24, para. 15; General Comment No. 14, *supra* note 24, para. 37.

[28] *Soobramoney*, *supra* note 9.

[29] "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring" (para. 8).

[30] See s 1(a), and s 7(1) of the Constitution.

restricted to a right to receive immediate remedial treatment that is "necessary and available" to avert harm in the case of a sudden catastrophe. It does not extend to the provision of ongoing treatment of chronic illnesses for the purpose of prolonging life.[31]

The restriction of the scope of the right to genuine medical emergencies seems appropriate. More problematic is the suggestion that the scope of section 27(3) is confined to *existing* services and facilities providing emergency medical treatment. It remains to be determined to what extent section 27(3) may be relied on to argue for a positive duty on the state to establish emergency medical facilities where none previously existed. Similarly, it is an open question whether this provision can be relied on to challenge the closure of existing emergency facilities, for example, due to budgetary cutbacks. This possibility would be particularly important in circumstances where the closure results in communities being denied any access to emergency medical treatment. There is no obvious textual or purposive basis for a purely negative interpretation of section 27(3), which limits its scope to a denial of access to existing emergency services or facilities.[32]

It is instructive to compare the approach of the Indian Supreme Court in the case which the Court relied on to support its interpretation of the scope of emergency medical treatment, *Paschim Banga Khet Mazdoor Samity and Others v State of West Bengal and Another*.[33] The Supreme Court derived the right to emergency medical treatment from the right to life protected in article 21 of the Indian Constitution. However, the judgment did not confine itself to ordering compensation to the victim for the negative violation of his right, but also focused on the positive measures needed to ensure "that proper medical facilities are available for dealing with emergency cases".[34] The order of the Court included far-reaching positive duties on the state to improve emergency health care infrastructure and services. In this regard the Court considered it necessary for "a time-bound plan for providing these services" to be drawn up and implemented.[35]

Having dismissed the appellant's claim under section 27(3), the Court then proceeded to consider Mr. Soobramoney's claim under section 27(1)(a), read with (2).[36] In considering this claim, the Court indicated that a large margin of discretion would be given to the setting of budgetary priorities by the provincial government, and the "difficult decisions" made by the hospital administrators in

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[31]"The purpose of the right seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities" (para. 20).

[32]On the contrary, as Scott & Alston point out, the purely negative interpretation given to s 27(3) would appear to make it a redundant right in the light of the negative duty on the state under s 27(1) to desist from preventing or impairing the right of access to health care services (2000: 245–248). This negative duty was recognised in *Grootboom* in respect of s 26 (1) (*supra* note 10, para. 34). Furthermore, it remains to be tested whether the negative duty imposed by s 27(3) also binds private health care facilities.

[33](1996) AIR SC 2426 (see *Soobramoney*, *supra* note 9, para. 18).

[34]Ibid. para. 15.

[35]Ibid. para. 16. See the discussion by Scott & Alston of this case, 2000: 237 and 245–248.

[36]The qualified right of access to health care services.

the context of limited resources:

> A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibilities it is to deal with such matters.[37]

It held that there was no suggestion that the guidelines drawn up by the hospital authorities for determining which patients qualified for dialysis treatment were unreasonable, or that they had not been applied "fairly and rationally" in the applicant's case.[38] The Court thus declined to order the provision of dialysis treatment.

Of course, the real dispute was not whether the medical authorities had devised reasonable guidelines for rationing access to the dialysis treatment that was currently available, but whether sufficient funds had been allocated to provide dialysis treatment to those in the appellant's position.[39] A key factor in the Court's reasoning was clearly the degree of interference in social and budgetary policies that an order requiring the state to provide dialysis treatment to the applicant and to all other persons similarly situated would require. The principle would have to be applied not only to all persons suffering from chronic renal failure, but also "to all patients claiming access to expensive medical treatment or expensive drugs".[40] This in turn would require the health budget "to be dramatically increased to the prejudice of other needs which the state has to meet".[41]

Soobramoney was clearly an unfortunate first test case for the enforcement of socio-economic rights. It entailed a claim for expensive, tertiary level care with no reasonable hope of curing Mr. Soobramoney's condition. The judgment signalled that the Court would proceed with caution in developing its jurisprudence on socio-economic rights. The political and administrative organs of state would be afforded a wide latitude in realising socio-economic rights, particularly in relation to setting social and budgetary priorities. Already at this stage the Court's aversion to recognising an individual right to a particular social service, such as emergency health care, can be discerned through its restrictive interpretation of section 27(3). The Court indicated that it would intervene under section 27(1) read with (2) only in situations were policies or legislation were irrational in their formulation or implementation. However, scant guidance was provided on the standard of 'irrationality' to be applied and the nature of the circumstances in which the Court would be prepared to intervene.

Few took issue with the ultimate finding of the Court that there was no universal right to kidney dialysis treatment under present conditions. However, criticisms were voiced of the Court's reasoning.[42] The deferential signals sent by the Court were not conducive to litigating socio-economic rights issues. It was almost two years before the next major test case on socio-economic rights,

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[37] Ibid. para. 29.
[38] Ibid. para. 25.
[39] Ibid. para. 23.
[40] Ibid. para. 28.
[41] Ibid.
[42] See, for example: Moellendorf, 1998; Scott & Alston 2000. Also see the discussion of the application of the right to life in the *Soobramoney* judgment by Pieterse 1999: 380–385.

Grootboom, came before the courts.

4 GROOTBOOM: OPTING FOR 'REASONABLENESS' REVIEW

4.1 The High Court judgment

This case concerned a group of adults and children who had moved onto private land from an informal settlement owing to the "appalling conditions" in which they were living.[43] They were evicted from the private land that they were unlawfully occupying. Following the eviction, they camped on a sports field in the area. However, they could not erect adequate shelters as most of their building materials had been destroyed during the eviction. Accordingly, they found themselves in a precarious position where they had neither security of tenure, nor adequate shelter from the elements.

They applied to the Cape High Court for an order against all three spheres of government to be provided with temporary shelter or housing until they obtained permanent accommodation. [44]

The High Court held that there was no violation of section 26 as the respondents had produced "clear evidence" of a "rational" housing programme "designed to solve a pressing problem in the context of scarce financial resources".[45]

It then turned to consider the argument under section 28(1)(c), which gives every child an unqualified right to shelter. While accepting that the primary obligation to maintain a child rests on its parents, it held that the state incurs an obligation to provide rudimentary shelter for children when their parents are unable to do so.[46] It went on to hold that the parents enjoyed a derivative right to be accommodated with their children in the aforesaid shelter, based on a joint reading of sections 28(1)(b), 28(1)(c) and 28 (2). According to Davis J, it would not be in children's best interests to break up the family unit without justification:

> This would penalise the children and indeed their parents who, to a considerable extent owing to the ravages of apartheid, are unable to provide adequate shelter for their own children.[47]

The Court refrained from being prescriptive as to the precise solution to be adopted to give effect to the right, but indicated provisionally that "tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum".[48] The Court undertook a supervisory jurisdiction, ordering the respondents to report back to it on the implementation of the order and giving the

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[43] In the words of Judge Yacoob in the Constitutional Court judgment: "The root cause of their problems is the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing." *Grootboom*, *supra* note 10, para. 3.

[44] *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C).

[45] Ibid. 286 H–I.

[46] Ibid. 288 B–C.

[47] Ibid. 289 C–D.

[48] Ibid. 293 A.

applicants an opportunity to deliver their commentary on the state's report.

The High Court was thus prepared to impose a direct duty on the government to provide certain tangible commodities to individuals in defined circumstances. This duty existed when parents were unable to secure shelter for themselves and their children as a result of their extremely vulnerable socio-economic circumstances. The Court clearly perceived the *Soobramoney* judgment to preclude anything other than a deferential standard of 'rationality review' in relation to section 26. It thus relied on the unqualified obligation imposed by section 28(1)(c) to afford relief to the *Grootboom* community.

4.2 The Constitutional Court judgment

4.2.1 A minimum core obligation?

On appeal, the Constitutional Court was squarely faced with the question of whether to endorse an interpretation of socio-economic rights that would give individuals the right to claim tangible services from the state in particular circumstances. The issue was raised pertinently in the arguments presented by the *amici curiae* in the case.[49]

Although the parties to the case focused their arguments on section 28(1)(c), the *amici* successfully broadened the issues to include a consideration of section 26 of the Constitution. They pointed to the unjust results of the reasoning of the Court *a quo*, which would exclude adults without children from shelter in crisis situations while those with children obtained relief. A central concern of the *amici* was to advance an interpretation that would reconcile the qualified rights of "everyone" to adequate housing in section 26 with the unqualified right of children to shelter in section 28(1)(c). They did so by arguing as follows:

1. Section 26(1) read with (2) imposes a minimum core obligation on the state to ensure that those who are truly homeless and in crisis situations receive some rudimentary form of shelter. The state has a burden to demonstrate that it has used all resources at its disposal to satisfy, as a matter of priority, its minimum core obligations. They derived support for this core obligation from the interpretation by the CESCR of the nature of states parties' obligations under the ICESCR.[50]
2. Section 28(1)(c) is a specific manifestation of this minimum core obligation, and places it beyond doubt that the basic socio-economic needs of children in especially vulnerable circumstances must be satisfied.

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[49]The South African Human Rights Commission and the Community Law Centre (University of the Western Cape), represented by Mr. Geoff Budlender of the Legal Resources Centre.

[50]General Comment No. 3 (Fifth session, 1990) *The nature of states parties obligations (art 2(1) of the Covenant)* UN doc. E/1991/23:

> The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party… In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations" (para. 10).

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

> This does not imply that only the 'core' is subject to adjudication, or that meeting the minimum core requirements would satisfy all of the obligations on the State…The 'core' provides a level of minimum compliance, to which resources have to be devoted as a matter of priority. This duty clearly has to be balanced with the obligation to put into operation programmes aimed at full realisation of the right, and to move progressively towards full realisation.[51]

The Constitutional Court affirmed that the foundational values of our society – human dignity, equality and freedom – are denied to those who lack access to socio-economic rights. Furthermore, socio-economic rights are necessary "to enable" people to enjoy the other rights in the Bill of Rights, and are also "key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential".[52]

Given this perspective on the critical importance of socio-economic rights to the development of South Africa's new constitutional order, one expects the Court to be sympathetic to an approach that argues that no one should fall below a basic 'floor' of social provisioning. However, despite its point of departure, the Court was not prepared to endorse the notion of a minimum core obligation in relation to section 26. It did so largely on the basis that it would be difficult to determine in abstract what the minimum threshold should be for the realisation of the rights as the opportunities for fulfilling these rights varied considerably,[53] and needs were diverse.[54] The only role envisaged by the Court for the concept of minimum core obligations was possibly in assessing the reasonableness of the measures adopted by the state in particular cases (the standard of review ultimately adopted). However, it would be necessary to place sufficient information before a court "to enable it to determine the minimum core in any given context".[55]

4.2.2 Analysing section 26

In analysing section 26, the Court held that subsections (1) and (2) are related and must be read together. Subsection (1) delineates the scope of the right. First, the Court read into subsection (1) an implied negative obligation "placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing".[56] Locating this negative obligation in

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[51] Heads of Argument on behalf of the *Amici Curiae*, 10 September 2002, para. 27.

[52] *Grootboom*, *supra* note 10, para. 23 (per Yacoob J). Also see para. 1 of the judgment (the state's constitutional obligations in relation to housing are "of fundamental importance to the development of South Africa's new constitutional order").

[53] "These will vary according to factors such as income, unemployment, availability of land and poverty." (Ibid. para. 32.)

[54] "…there are those who need land; others need both land and houses; yet others need financial assistance." (Ibid. para. 33.)

[55] Ibid. para. 33.

[56] In the context of housing rights, this negative right "is further spelt out in subsection (3)

section 26(1) is significant as it suggests that resource arguments and the latitude of "progressive realisation" cannot play a role in justifying the deprivation of access to housing rights at the first stage of constitutional analysis. It is also noteworthy that the Court affirmed the horizontal application of the negative duty not to prevent or impair people's access to housing.

Second, the Court indicated that it would give a substantive interpretation to the phrase, "access to adequate housing". Thus it is not enough that there are no formal barriers to accessing housing for those that can afford it. The state must put in place programmes that are targeted towards assisting the poor to gain access to socio-economic rights.[57]

The second subsection of section 26 defines the *positive* obligations imposed upon the state.[58] As will be recalled, the Court rejected the notion of a minimum core obligation on the state to provide to a basic level of services to every individual in need. Instead, it held that the real question in a challenge based on a failure to fulfil the positive duties under section 26(2) was whether the legislative and other measures taken by the state were "reasonable".[59] The Court was at pains to emphasise that it would not be prescriptive as to which particular policy choices were more desirable in realising socio-economic rights. It recognised that there could be a range of policy choices that met the standard of reasonableness. Provided the state could show that its choices met the standard, the Court would not interfere. [60]

4.2.3 Establishing the principles of reasonableness review

The Court then proceeded to flesh out the standard of reasonableness in the context of assessing the state's positive obligations to realise socio-economic rights. The following criteria for a reasonable government programme to realise socio-economic rights can be distilled from the judgment:

1. The programme must be a comprehensive and coordinated one, which clearly allocates responsibilities and tasks to the different spheres of government and ensures that "the appropriate financial and human resources are available".[61] Although each sphere of government is responsible for implementing parts of the programme, national government has the overarching responsibility for ensuring that the programme is adequate to meeting the state's constitutional obligations.[62]
2. The programme "must be capable of facilitating the realisation of the right," albeit on a progressive basis and within the state's available means.[63]
3. Policies and programmes must be reasonable "both in their conception

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which prohibits arbitrary evictions". (Ibid. para. 34.)

[57] Ibid. paras. 35 and 36.
[58] Ibid. para. 38.
[59] Ibid. paras. 33 and 41.
[60] Ibid. para. 41.
[61] Ibid. para. 39.
[62] Ibid. para. 40.
[63] Ibid. para. 41.

and their implementation".[64]

4. The programme must be "balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs" (sic). A reasonable programme cannot exclude "a significant segment of society".[65]
5. The programme must include a component that responds to the urgent needs of those in desperate situations. Thus a reasonable programme, even though it is statistically successful in improving access to housing, cannot "leave out of account the degree and extent of the denial of the right they endeavour to realise".[66] Elsewhere in the judgment more detail is provided on what this component requires. Thus the state must "plan, budget and monitor the fulfilment of immediate needs and the management of crises". According to the Court:

> This must ensure that *a significant number* of desperate people in need are afforded relief, though not all of them need receive it immediately [emphasis added].[67]

The Court justified this latter component on the basis that we value human beings and the Constitution requires us to treat everyone with "care and concern". Furthermore, a society based on human dignity, equality and freedom strives to ensure that the basic necessities of life are provided to all.[68] One can discern a distinct tension in the Court's reasoning. The individual rights perspective suggested by the latter justification implies that each person who cannot secure his or her own basic needs is entitled to direct state assistance (akin to the minimum core obligation notion). On the other hand, the passage quoted above indicates that the state's duty is to adopt and implement a reasonable programme that includes measures aimed at providing relief for a significant number of people in desperate need. However, no individual is entitled to claim immediate access to particular goods or services. The implications of this approach will be discussed further below.

It was on the basis of the last aspect of the reasonableness test that the government's housing programme was faulted. After a comprehensive evaluation of the state's housing programme, the Court concluded that it represented "a major achievement" and "a systematic approach to a pressing social need".[69] However, it failed to meet the Constitutional test of reasonableness in that it was focussed only on medium- and long-term objectives and did not include measures to provide short-term relief to those in desperate need.[70] In its order, the Court declared that the state housing programme did not comply with section 26(2):

> …in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to

[64] Ibid. para. 42.
[65] Ibid. para. 43.
[66] Ibid. para. 44.
[67] Ibid. para. 68.
[68] Ibid. para. 44.
[69] Ibid. paras. 53–54.
[70] Ibid. para. 69.

> land, no roof over their heads, and who were living in intolerable conditions or crisis situations.[71]

Reference was made to the Accelerated Managed Land Settlement Programme, which had been drafted but not implemented by the Cape Metropolitan Council, as an example of the type of measure that would be appropriate to provide emergency relief.[72]

4.2.4 Interpreting "progressive realisation" and resource availability

The Court interpreted the phrase "progressive realisation" in section 26(2) to impose a duty on the state to examine "legal, administrative, operational and financial hurdles" and, where possible, to lower these over time. Housing should be made accessible "not only to a larger number of people but to a wider range of people as time progresses".[73]

No mention was made of a possible qualitative interpretation of "progressive realisation". This would imply not only that a greater number of people have access to the rights over time, but also that there are progressive improvements in the standard of housing to which disadvantaged groups have access. This is regrettable given that a qualitative dimension is imported into the scope of the right through the phrase "adequate housing" in section 26(1).[74] However, the Court's endorsement of the CESCR's views on "retrogressive measures" is likely to prove significant.[75] According to the Committee:

> ...any deliberate retrogressive measures...would require the most careful consideration and would need to be *fully justified* by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources [emphasis added].[76]

The state's positive obligations to fulfil the rights in sections 26(2) and 27(2) are qualified by reference to its "available resources". According to the Constitutional Court, this means that:

> …both the content of the obligation in relation to the rate at which is achieved as well as the reasonableness of the measures employed to achieve the result *are governed by* the availability of resources [emphasis added].[77]

The Court thus left little doubt that the resources available for social programmes would be a determining factor in the assessment of the reasonableness of the measures adopted by the state.

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[71] Ibid. para. 99.

[72] Ibid. paras. 60, 61, and 67.

[73] Ibid. para. 45.

[74] According to the *amici*, the phrase 'progressive realisation' "imposes a duty to adopt an incremental approach both as to numbers, and as to what is provided". (Heads of Argument, para. 58.2.) The CESCR has identified a number of qualitative factors to be taken into account in assessing the "adequacy" of housing provision: General Comment No. 4 (Sixth session, 1991) *The right to adequate housing (art.11(1))* UN doc. E/1992/23, para. 8.

[75] See *Grootboom*, *supra* note 10, para. 45.

[76] General Comment No. 3, *supra* note 50, para. 9.

[77] *Grootboom*, *supra* note 10, para. 46.

4.2.5 Children's socio-economic rights

Turning to a consideration of the unqualified socio-economic rights of children in section 28(1)(c), the Constitutional Court found no violation of the right of children to shelter. The Court read section 28(1)(b) and (c) together, holding that the former provision defined those responsible for giving care, while the latter "lists various aspects of the care entitlement".[78] Thus the primary duty to fulfil a child's socio-economic rights rests on that child's parents or family. It is only when a child lacks family care that the state incurs the obligation to provide shelter to her.[79] As the children in this case were in the care of their parents or families, they were not entitled to any relief in terms of section 28(1)(c).

According to the Court, 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".[80]

This further illustrates the Court's reluctance to interpret even the unqualified socio-economic rights provisions in the Constitution to include an individual claim for direct material assistance from the state. A direct entitlement to the provision of shelter under section 28(1)(c) only arises in the limited circumstances of children who, for example, have been orphaned, abandoned or removed from parental care.[81] The claims of children in families who are too poor to provide them with the basic necessities of life fall to be determined in terms of sections 26 and 27. As noted, these sections do not impose any direct obligation on the state to provide socio-economic goods and services to anyone, only a qualified obligation to adopt a reasonable programme.

4.3 Evaluating *Grootboom*

4.3.1 The rejection of minimum core obligations

The *Grootboom* judgment represents a landmark in the development of the jurisprudence on socio-economic rights. In a much more substantial judgment than that delivered in *Soobramoney*, the Court elaborated in detail its approach to the interpretation of these rights.

A profound development in the evolution of its jurisprudence on socio-economic rights is the refusal to read a minimum core obligation into section 26 (and, by implication, section 27). The Court's justification for rejecting the minimum core obligation on the basis of its complexity is unconvincing. Similar interpretative problems arise in relation to determining what falls within the scope of rights in the Bill of Rights, such as the right to human dignity, life, freedom and security of the person, and fair labour practices.[82] An acceptance of the concept of minimum core obligations does not require the Court to define in abstract the precise basket of goods and services that must be provided. Instead it could

[78] Ibid. para. 76.
[79] Ibid. para. 77.
[80] Ibid. para. 71.
[81] See further in this regard, Sloth-Nielsen in this volume.
[82] See ss 10, 11, 12, 23(1).

define the general principles underlying the concept of minimum core obligations in relation to socio-economic rights, and apply these contextually on a case-by-case basis.

The standard for determining the minimum core obligation should be informed by its underlying purpose: the desire to protect vulnerable people from serious social and economic threats to their survival, health, and basic functioning in society. Without a recognition of this basic standard, the enjoyment of all other rights is imperilled and the foundational constitutional values of human dignity, equality and freedom will, to borrow the memorable phrase from *Soobramoney,* "have a hollow ring".[83] The minimum core protects the survival interests of human beings,[84] and provides a basic platform for enabling their participation in society.[85]

It is also important to note that the minimum core obligation does not necessarily imply universal access to free basic services, although government could certainly elect to fulfil its minimum core obligations through programmes of this nature.[86] When people can satisfy their own basic needs because of the resources they command, the state has no obligation to provide them with free access to socio-economic rights. As the Court acknowledged in *Grootboom,* the minimum core obligation "is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question".[87] In assessing whether there has been a violation of the minimum core obligation, the actual circumstances of the group affected is thus a relevant factor.[88] Vulnerable groups experiencing severe socio-economic deprivation would have a directly enforceable right to a basic level of material assistance from the state.

It is also unnecessary for a Court to be prescriptive in every case as to the precise services that must be rendered to remedy the violation. It could do what the High Court did in *Grootboom*, and indicate the broad parameters of what is required to remedy the breach, while leaving a margin of discretion to the state to decide on the most appropriate means of fulfilling its core obligations.[89] In a situation of a community facing starvation this could include, for example, cash grants, food vouchers or the direct delivery of foodstuffs to the affected

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[83] *Soobramoney*, *supra* note 9, para. 8, Also see *Grootboom*, *supra* note 10, para. 23.

[84] See the discussion by Bilchitz 2002 of the interests that the minimum core obligation is designed to protect.

[85] See Haysom, *supra* note 13.

[86] See the evaluation of government's policy of free basic water services in de Visser, Cottle & Mettler in this volume.

[87] *Grootboom*, *supra* note 10, para. 31. Also see para. 36, "The poor are particularly vulnerable and their needs require special attention".

[88] This is consistent with the interpretation of the CESCR of the duty to fulfil socio-economic rights: see above note 27 and accompanying text. Another example where the vulnerable status of the group in question is a factor in determining whether there has been a violation of a constitutional right is the contextual enquiry into whether discrimination is unfair in the circumstances: see *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC), para. 112; *Harksen v Lane* 1997 (11) BCLR 1489 (CC), paras 50–53.

[89] The High Court did this through the medium of a supervisory order. See Trengove 1998: 9.

community.[90]

The Court does not escape the interpretative difficulties of clarifying the state's obligations in relation to socio-economic rights by rejecting the minimum core obligation. The review standard of "reasonable measures" endorsed by the Court does not lend itself to easy definition or application. The needs and opportunities for enjoying rights are surely also relevant to an assessment of the reasonableness of the measures adopted by the state. The component of the reasonableness test requiring government programmes to provide relief for those in desperate need and living in intolerable conditions is vague and leaves many questions unanswered. In the South African context of extreme and widespread poverty, how does one define the groups that government programmes must specifically cater for, and what precise forms of relief must be provided?[91] The obvious response is that greater normative clarity will be developed through a process of application of the *Grootboom* principles to the facts of particular cases. A similar response can be made to concerns about the indeterminacy of minimum core obligations. As I have argued, the underlying purpose of recognising minimum core obligations can guide the evaluation of whether, in concrete cases, a particular service or resource must be provided by the state to the applicants.[92]

A possible rejoinder could be that the very component of the *Grootboom* reasonableness test that requires specific measures to cater for the urgent needs of vulnerable groups, achieves the same net effect as that desired by proponents of the minimum core obligation. However, there are three crucial points of difference between the minimum core approach and the reasonableness test as developed in *Grootboom*.

In the first instance, as noted, the *Grootboom* judgment does not confer a right upon any individual to claim anything tangible from the state. The right recognised in *Grootboom* is a right to demand that the state adopts a reasonable programme. Such a programme must include a component that ensures relief for a significant number of desperate people, although not all of them need receive it immediately. This has enormous practical implications for poor individuals or communities who want to use litigation as a tool to protect their socio-economic rights. It means that they will not receive any direct individual relief, although they may indirectly benefit from a positive order handed down by the courts. As Scott & Alston point out, public interest groups are likely to bring socio-economic rights cases if they result in changes to policies and legislation that make them more responsive to the needs of disadvantaged groups. This is certainly an important

[90]Both s 38 and s 172(1)(b) vest the courts with a wide discretion to formulate appropriate remedies and to make any order that is "just and equitable". Practical obstacles to providing immediate relief can thus be dealt with through formulating an appropriately flexible remedy e.g. a supervisory order. See the discussion by Bilchitz of the application of a temporary suspension order in the context of minimum core obligations (forthcoming, 2003).

[91]See further in this regard, Liebenberg 2001: 234–237.

[92]Over time it is inevitable that certain aspects of the minimum core obligation will crystallise in relation to the various socio-economic rights, for example, a right to be immunised against major infectious diseases as a core entitlement of the right to health care services. See, for example, General Comment No. 14, *supra* note 24, para. 44 (b).

and valuable outcome for socio-economic rights litigation. However, individual claimants "will understandably wish to see something geared more to their own situation and are unlikely to wish to bring constitutional cases purely to serve as constitutional triggers for general policy processes".[93]

A second difference relates to the failure of the Court to require that the "intolerable conditions" of vulnerable and disadvantaged groups be alleviated as a matter of priority. As Theunis Roux has pointed out, the Court did not say that providing relief for those in desperate need must occur *before* improvements are made to the social benefits enjoyed by relatively more advantaged groups (temporal prioritisation). He argues that the jurisprudence in *Grootboom* is not conducive to challenging the expenditure of scarce resources on relatively privileged groups provided that the state makes some provision for ameliorating the situation of those in desperate need.[94] It may be permissible for the state to ensure minimum core obligations within an integrated programme, which also ensures higher levels of provisioning.[95] However, what should be prohibited is for the state to improve the social position of advantaged social groups *without* meeting its minimum core obligations towards vulnerable groups. Moreover, as the *amici* emphasised, the state's obligations are not restricted to the minimum core. It also has a duty to devise and implement reasonable programmes that will enable it to achieve full realisation of the rights over time.

A third difference relates to the burden of proof on litigants seeking to use the courts to enforce their socio-economic rights. In terms of *Grootboom*, litigants who allege a violation of their socio-economic rights under sections 26 or 27 bear the burden of proving that government has acted, or failed to act, reasonably. This requires litigants to review government's policies, programmes and legislation within the national, provincial and local spheres of government. The Court also indicated that it would take into account the "interconnectedness of rights" in assessing whether the state had fulfilled its obligations.[96] This compounds the difficulties that vulnerable groups will face in mounting a successful challenge based on section 26. Not only will they have to review all aspects of the housing programme, but also the entire panoply of social programmes adopted by the state.[97] The Court also made it clear that reasonableness would be assessed in the light of the "available resources" of the state. This will require litigants to identify and quantify the resources available to the state for the purposes of the relevant socio-economic rights and then to determine whether the measures in fact taken are reasonable in the light of those

[93]Scott & Alston 2000: 254–255.

[94]Roux, 2002: 117–118.

[95]In many contexts, the most effective way of meeting basic needs is through adopting an integrated, holistic social programme, which includes basic and tertiary services: for example, primary health care within an integrated health system.

[96]*Grootboom*, *supra* note 10, para. 24

[97]Among the measures that the Court indicated would be relevant in relation to promoting access to housing were steps to make the rural areas of our country more viable so as to limit the migration of people from rural to urban areas in search of jobs (*Grootboom*, *supra* note 10, para. 34). It also indicated that social assistance programmes put in place under s 27 "would be relevant to the state's obligations in respect of other socio-economic rights" (para. 36).

available resources.[98]

In contrast, in terms of the minimum core approach, an individual will succeed in establishing a *prima facie* violation if she can show:

1. that she lacks access to basic subsistence requirements; and
2. that these basic needs are neither physically nor economically accessible to her.

The burden will then shift to the state to show that "every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations".[99] Moreover, the state has the further possibility of attempting to justify its failure to fulfil minimum core obligations in terms of the general limitations clause (section 36).

4.3.2 The opportunities and challenges of *Grootboom*

Despite the above concerns regarding the rejection of the concept of minimum core obligations, the judgment creates a number of important opportunities for socio-economic rights litigation.

In the first place, it recognises the negative duty to respect access to socio-economic rights under the first subsections of sections 26 and 27. This will facilitate direct challenges to measures that "prevent or impair" people's access to socio-economic rights, unfettered by the complications of the second subsection. The Court's formulation of this negative obligation is broad, and potentially includes a range of situations. Classifying the facts of particular cases as a breach of the negative obligation under sections 26(1) or 27(1), or as a breach of the positive obligations under the second subsection, is likely to be contentious.[100] A further significant aspect is that this negative duty is binding not only on the state, but also on private persons and entities.

Grootboom is significant in comparative constitutional and international law as it illustrates that the positive duties imposed by qualified socio-economic rights can be enforced by the courts.[101] In contrast to the thin standard of rationality review of *Soobramoney*, the Court developed a set of detailed, substantial criteria for evaluating the reasonableness of government programmes in relation to socio-economic rights.

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[98] This critique of the *Grootboom* judgment was made on behalf of two *amici* in the TAC case: see submissions of the Community Law Centre and the Institute for Democracy in Africa (Idasa), April 2002, paras. 31.1–31.4.

[99] General Comment No 3, *supra* note 50, para. 10; General Comment No 12, *supra* note 24, para. 17.

[100] The facts of the *TAC* case discussed in 5 below are a good illustration of this point. Was the prohibition on the prescription of Nevirapine to HIV positive pregnant women throughout the public health sector a breach of the negative duty not to prevent or impair access to health care services, or of the positive duty to ensure progressive access to health care services? The stage at which a case comes before court is also likely to be significant. The *Grootboom* case was framed in terms of non-fulfilment of the positive duty to ensure shelter to those who were homeless. However, if the original eviction from the private land had been challenged, the case could have revolved around the negative duty not to impair access to housing in terms of ss 26(1) or 26(3): see *Grootboom*, *supra* note 10, paras. 88–90. This raises the further issue of the apparent overlap between the latter provisions.

[101] See Sunstein 2001.

This paves the way for judicial intervention in important situations where socio-economic rights may be violated. Three particular situations are worth highlighting. The first is when government programmes are designed to meet socio-economic needs over the medium- or long-term, and exclude short-term measures of relief for those in desperate situations and living in intolerable conditions.

Second, litigants can challenge the unreasonable implementation of laws, policies and programmes as a breach of sections 26 or 27. This poses particular challenges to public interest organisations and lawyers to monitor and evaluate the practical impact of government programmes. A range of factors may contribute to unsatisfactory implementation of a government programme, including insufficient funding from national government, a lack of capacity among government officials, overly complex regulations, or a lack of awareness by beneficiaries of the procedures to access government services.[102] The challenge will be to accurately identify which aspects of the implementation of relevant government programmes are unreasonable and to propose suitable remedies. This will require interdisciplinary collaboration between human rights activists and lawyers, affected communities, public policy experts, public health practitioners, economists and the like.

The third area where the Court's jurisprudence in *Grootboom* is helpful is in challenging retrogressive measures that have the effect of reducing access to socio-economic rights and, arguably, also those measures that reduce the quality or level of benefit that people enjoy. As noted above, the Court expressly endorsed the view of the CESCR that retrogressive measures require strong justification by the state.[103]

The role of resource limitations will continue to be highly contested terrain in the developing jurisprudence on socio-economic rights. *Grootboom* indicated that the availability of resources would be an important factor in determining what is reasonable. However, the Court did not indicate how it would assess the availability of resources. Would it accept, without question, the budgetary allocations by the three spheres of government, or would these also be subject to review for their 'reasonableness'?

The Court indicated that a reasonable government programme must "ensure that the appropriate human and financial resources are available".[104] However, it did

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[102]On the problems in implementing social assistance programmes in South Africa, see Liebenberg 2001: 241–247.

[103]The Maastricht Guidelines on Violations of Economic Social and Cultural Rights give the following examples of violations under the ICESCR:

"The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed;

The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone" (paras. 14(e) and (g)).

The Maastricht Guidelines are non-binding but influential interpretations of the obligations imposed by the ICESCR by a group of experts in international law.

[104]*Grootboom*, *supra* note 10, para. 39. Later on in the judgment, the Court says that the effective implementation of programmes "requires at least *adequate budgetary support* by national government". A nationwide housing programme must recognise immediate needs and

not unequivocally affirm that the allocation of resources to relevant government programmes must be reasonable and capable of facilitating the realisation of socio-economic rights. This would perhaps have constituted too open an invitation to directly challenge resource allocation decisions. The Court is not averse to its decisions having budgetary implications, but is unlikely to be receptive to a direct challenge to budgetary priority setting.[105] The critical question is the extent to which its decisions will be allowed to impact on budgets, especially in situations where litigants challenge the absence of a programme that they contend is essential to the realisation of a particular socio-economic right. The state is likely to argue that resources are not available for the particular programme. Time will tell how deferential the Court will be in scrutinising the validity of this claim.[106]

The *Grootboom* principles also enable government to assist vulnerable groups, and to defend its actions against challenges by more powerful private groups. This is illustrated in the case of *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*. In defending its decision to establish a transit camp to house people from Alexandra Township who had been displaced by severe floods, the state relied on its constitutional obligation (as affirmed in *Grootboom*) to assist people in crisis situations. A neighbouring residents' association challenged this decision on the grounds that there was no legislation authorising the government to establish the transit camp and that the decision was unlawful in that it contravened a town planning scheme as well as land and environmental legislation. The Constitutional Court held that none of the laws relied on by the association excluded or limited the government's common law power to make its land available to flood victims pursuant to its constitutional duty to provide them with access to housing.[107]

Finally, the *Grootboom* judgment can make an important contribution to initiatives, other than litigation, aimed at promoting the realisation of socio-economic rights. The detailed criteria for a reasonable programme can guide government in designing, implementing, and evaluating its social programmes, the SAHRC in monitoring the realisation of socio-economic rights, and civil society in its research and advocacy to promote these rights.

5 *MINISTER OF HEALTH V TAC*: A STRATEGIC VICTORY

The third in the trilogy of socio-economic rights decided by the Constitutional Court concerned the application by the Treatment Action Campaign and others to

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this requires national government "to plan, *budget* and monitor the fulfilment of immediate needs and the management of crisis" (para. 68) (emphasis added).

[105]See Roux, 2002 (unpublished).

[106]If resource allocation decisions are insulated from judicial scrutiny, the state will in effect be permitted to determine the extent of its own constitutional obligations in relation to socio-economic rights. See further in this regard, Moellendorf 1998: 332.

[107]Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others 2001 (7) BCLR 652 (CC).

compel the state to devise an implement an effective national programme to prevent or reduce mother-to-child transmission (MTCT) of HIV. This included the provision of voluntary counselling and testing and of the anti-retroviral drug, Nevirapine.

5.1 The High Court judgment

In granting the orders sought by applicant in substantially the terms sought, the High Court (Transvaal Provincial Division) relied extensively on the reasoning in *Grootboom*.[108]

In the first place, the court held that the policy prohibiting the use of Nevirapine outside the 18 pilot sites in the public health sector constituted an unjustifiable barrier to the progressive realisation of the right to health care. It breached the negative to desist from impairing the right to health care.[109] Second, the state's current MTCT prevention programme failed the reasonableness test as it did not constitute a comprehensive and coordinated plan to prevent or reduce the MTCT of HIV. The state was not prepared to give an "unqualified commitment to reach the rest of the population in any given time or at any given rate".[110] According to Botha J, a programme that is "open-ended and that leaves everything for the future cannot be said to be coherent, progressive and purposeful".[111]

A bold feature of the judgment is the rejection of the state's arguments that the availability of resources would determine whether there would be a further roll out of a national MTCT prevention programme. According to Botha J the obligation to formulate a coherent plan to roll out such a national programme existed independently of the availability of resources. Only once such a plan existed could further resources be found "whether in the form of a reorganisation of priorities or by means of further budgetary allocations". He suggested that the availability of resources could only have an influence on *the pace* of the extension of the programme, not on the obligation to devise and implement such a plan.[112]

This judgment was appealed to the Constitutional Court.

5.2 The Constitutional Court judgment

5.2.1 No minimum core obligation under section 27(1)

As will be recalled, the Court in *Grootboom* rejected the arguments of the *amici* to the effect that section 26(2) read with section 26(1) imposed a minimum core obligation on the state.

Using a different interpretative route, two of the *amici curiae* in the *TAC* case again attempted to persuade the Court to impose minimum core obligations

[108] *Treatment Action Campaign and Others v Minister of Health and Others* 2002 (4) BCLR 356 (T).

[109] See *Grootboom*, *supra* note 10, para. 34.

[110] *Supra* note 108, 385 D–E.

[111] Ibid. 385 F.

[112] Ibid. 386 B–C.

under section 27.[113] They argued that every individual is entitled to a basic core of health care services comprising the minimum necessary for dignified human existence in terms of section 27(1) read with the duty to fulfil the rights in section 7(1). This core right is not subject to the limitations of resource constraints and progressive realisation under section 27(2). Over and above this minimum core entitlement, the state is obliged, in terms of section 27(2), to take reasonable measures within its available resources to achieve progressively *the full* realisation of the relevant rights. In other words, section 27(2) is not exhaustive of the state's positive duties. Instead, it supplements the unqualified core duty in terms of section 27(1) with a qualified obligation to achieve the full realisation of the rights over time. Subsection (2) thus speaks to those positive dimensions of the rights that cannot be realised immediately without excluding the core duty to fulfil those aspects that can.[114]

They also argued that a purposive approach to the interpretation of the relevant socio-economic rights provisions supported a core entitlement to a basic level of services consistent with human dignity. [115] 'Practical justiciability' was a key constitutional purpose. Accordingly, the relevant provisions should not be interpreted in a way that makes enforcement practically impossible. If section 27(2) is interpreted to be exhaustive of the state's positive duties, individual right holders have no direct right to claim anything specific from the state. They can only demand that the state take reasonable measures within its available resources in terms of section 26(2) and 27(2).[116] *Grootboom* made it clear that any cause of action under the latter provisions "would almost always be a matter of such factual and legal complexity as to be beyond the capacity of individual right holders, even if they have the benefit of legal representation".[117]

In the context of the case, they argued that the minimum core of health services to which everyone is entitled to have access includes the provision of Nevirapine to pregnant women with HIV and to their newborn babies. The costs are relatively minor, the potential benefits to mother and child overwhelming. Denying access to the drug to those who are too poor to afford it would be a failure to respect their dignity and intrinsic worth as human beings.[118]

The Constitutional Court rejected this line of argument. It held that neither the drafting of the relevant sections, nor a purposive approach to the interpretation of socio-economic rights supported the interpretation advanced by the *amici*. It reaffirmed that section 27(2) defines and limits the full extent of the positive obligations imposed by section 27(1).[119] There is no separate positive

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[113]The Community Law Centre (UWC) jointly with Idasa.

[114]Although the two subsections of s 27 must be read together, they "must also not be conflated in a way that deprives subsection (1) of its normative content and reduces it to a mere definition used in the description of the duties imposed on the state in subsection (2)". Submissions of the Community Law Centre and Idasa, April 2003, paras 14 and 23.

[115]Ibid, para. 30–31.

[116]Ibid. paras 26.

[117]Ibid. para. 31. See the evaluation of the *Grootboom* judgment in 4.3 above.

[118]Ibid. para. 60.

[119]Thus the reference to this "this right" in s 26(2) and "each of these rights" in s 27(2) refers to the rights in ss 26(1) and 27(1) respectively: *TAC*, *supra* note 11, paras 30–31.

right under s 27(1). According to the Court a purposive reading of section 27 "does not lead to any other conclusion" as it is "impossible to give everyone access even to a 'core' service immediately". All that can be expected from the state is that it acts reasonably to advance access to socio-economic rights on a progressive basis.[120]

The Court was also at pains to demonstrate that its interpretation of these provisions as developed in *Grootboom* was consistent with the institutional capabilities and functions of courts in a constitutional democracy. Thus courts were not "institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum core standards…should be".[121] Courts were also not the appropriate forum for adjudicating disputes where court orders "could have a multitude of unforeseen social and economic consequences for the community".[122] While determinations of reasonableness may have budgetary implications, they were not directly aimed at "rearranging budgets".[123] Having disposed of the minimum core argument, the Court proceeded to apply the principles of reasonableness review.

5.2.2 The negative duty under section 27(1)

The Court affirmed that the negative duty to refrain from preventing or impairing the relevant socio-economic rights, which it recognised in *Grootboom*, applied equally to the section 27(1).

It will be recalled that the logical implication of locating the negative duty in the first subsection is that it is a directly enforceable right, which is not limited by reference to resource availability or progressive realisation. However, apart from indicating that this duty was "relevant" to the challenges to the measures adopted by the government to combat MTCT of HIV, the main thrust of the Court's analysis is in terms of section 27(2) – the qualified positive duty to take reasonable measures.

5.2.3 Applying the 'reasonableness' test

The TAC and the other respondents alleged that the state programme for combating MTCT of HIV was unreasonable in two respects. First, it unreasonably prohibited the administration of Nevirapine at public hospitals and clinics outside the research and training sites. Secondly, the state failed to implement a comprehensive programme for the prevention of MTCT of HIV.

The Court considered and rejected the range of reasons advanced by government for restricting the administration of Nevirapine to the research and training sites. These included doubts about the efficacy of Nevirapine where "a comprehensive package of care"[124] could not be made available, the

[120] Ibid. para. 35
[121] Ibid. para. 37
[122] Ibid. para. 38.
[123] Ibid.
[124] This would include counselling, provision of formula milk as a substitute for breast-feeding, antibiotic treatment, vitamin supplements, and monitoring, during bottle-feeding, the mother and children who have received Nevirapine. Ibid. para. 49.

development of resistance to the drug, safety, and capacity and budgetary concerns.[125]

It found that the policy of restricting the provision of Nevirapine impacted seriously on a significant group of HIV positive mothers and children who did not have access to the research sites. As they were too poor to purchase Nevirapine, they were effectively deprived of access to a "simple, cheap and potentially life-saving medical intervention".[126] This restrictive policy was unreasonable in that it was inflexible and did not take into account the needs of a particularly vulnerable group.[127] Government was thus ordered "without delay" to "remove the restrictions" that prevent the use of Nevirapine in the reduction of MTCT of HIV at public hospitals and clinics, and to "permit and facilitate" its use. It was specifically ordered to make the drug available for this purpose at hospitals and clinics where this is medically indicated, "which shall if necessary include that the mother concerned has been appropriately tested and counselled".[128]

Turning to the second prong of the attack on government policy (the failure to adopt and implement a comprehensive MTCT prevention plan), the Court held that the rigidity of government's policy regarding the restrictive use of Nevirapine affected its whole policy on MTCT of HIV.[129] At the time of the commencement of the proceedings a comprehensive policy for testing and counselling HIV positive pregnant women was in place, but it was not implemented uniformly.[130] The Court held that the training of counsellors should now include training for counselling on the use of Nevirapine. In addition, government was ordered to take reasonable measures to extend the testing and counselling facilities to all public hospitals and clinics "to facilitate and expedite" the use of Nevirapine for the purposes of reducing the risk of MTCT of HIV".[131]

Unlike the High Court, it declined to make an order relating to the provision of formula milk as it raised "complex issues", and there was not sufficient evidence to justify an order that formula feed be provided free of charge by the government in every case.[132]

Consistent with the paradigm of reasonableness review, the Court cautioned that its findings did not mean "that everyone can immediately claim access to such treatment".[133] The state duty's was to make "every effort" to extend access to this treatment "as soon as reasonably possible".[134]

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[125]Ibid. paras. 51–66.

[126]Ibid. para. 73

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

[128]Ibid. para. 135.

[129]Ibid. paras. 82, 95.

[130]Ibid. para. 90.

[131] Ibid. para. 95.

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

[133]Ibid. para. 125.

[134]Ibid.

5.2.4 The additional requirement of transparency

A welcome feature of the judgment is the addition of the requirement of transparency to the constitutional requirement of reasonableness. It held that the enormous challenge that HIV/AIDS posed to all sectors of society could only be met if there is "proper communication, especially by government". In order for a programme to be "implemented optimally" its contents must be made known to all stakeholders. In this context, the Court regretted the fact that national government and six provinces had not disclosed any programme to extend access to Nevirapine treatment to prevent MTCT of HIV. [135]

5.2.5 Children's rights

In considering the application of section 28(1)(c), the Court was at pains to emphasise that *Grootboom* should not be interpreted to imply that the state incurred "no obligation" in respect of children cared for by parents who were too poor to afford health care services.[136]

However, consistent with its *Grootboom* reasoning, the Court did not find that children had a direct entitlement to basic health care services in circumstances where their parents were too poor to afford these services. Instead it relied on the right of children to basic health care services in section 28(1)(c) to support its finding that government's rigid, restrictive policy on Nevirapine was unreasonable in that it excluded a particularly vulnerable group with severe implications for them.[137]

This was consistent with the Court's central enquiry throughout the case – whether the constitutional standard of reasonableness in section 27(2) had been met.[138]

5.2.6 Resource constraints

The Court held that resource constraints were not an issue in relation to the first leg of the challenge – the restriction on prescribing Nevirapine in public health facilities where capacity existed to do so. The manufacturers of Nevirapine had offered to make it available to the government free of charge for a period of five years for the purposes of reducing the risk of MTCT of HIV.[139] Government's primary concern related to the costs of providing the infrastructure for the testing and counselling facilities and other elements of the optimal package of treatment

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[135] Ibid. para. 123.

[136] Ibid. para. 77.

[137] "Their needs are 'most urgent' and their inability to have access to Nevirapine profoundly affects their ability to enjoy all rights to which they are entitled." Ibid. para. 78.

[138] Ibid. para. 93. In *Grootboom* the Court indicated that the state's duties to fulfil the socio-economic rights of children who are being cared for by their parents or families are essentially two-fold. First, the state must provide the legal and administrative infrastructure to guarantee that children receive the protection contemplated by s 28. Second, it must fulfil the qualified socio-economic rights in terms of ss 25, 26 and 27 by extending families' access to them "on a programmatic and coordinated basis, subject to available resources" (para. 78). Nowhere in the *TAC* decision is it suggested that s 28(1)c confers on children who are being cared for by their families any direct entitlement to these socio-economic rights.

[139] Ibid. para. 19.

of HIV positive pregnant women and their newborn infants.[140] However, the Court held that these resource-related concerns were relevant to the provision of a comprehensive package of care, and not to the provision of Nevirapine at those hospitals and clinics where testing and counselling facilities were *already* in place. Accordingly, it held that its order on this aspect of the claims "will not attract any significant additional costs".[141]

In relation to extending the MTCT programme, the Court found that it would not be a major burden for government to extend the training of counsellors based at public hospitals and clinics (other than the research sites) to include the use of Nevirapine in reducing the risk of MTCT of HIV.[142] In addition, the state was ordered to take, without delay, "reasonable measures" to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector "to facilitate and expedite" the use of Nevirapine.[143]

The provincial health authorities responsible for implementing the testing and counselling programme claimed that they faced both financial and capacity constraints. The TAC and the other respondents argued that it was cost-effective to adopt such a treatment plan. It would result in "significant savings" for the state in later years, as it would reduce the number of HIV positive children who would have to be treated in the public health system.[144]

The Court took the view that it was not necessary to deal with the cost-effectiveness argument, as there had been a significant change in conditions since the proceedings were implemented. Thus some provinces like Gauteng and KwaZulu-Natal were rapidly expanding their provision of Nevirapine at public health facilitates beyond the test sites.[145] According to the Court these developments demonstrated that substantial progress could be made "provided the requisite political will is present".[146] However, more importantly, the Court had been informed at the hearing of the appeal that the government has made "substantial additional funds" available for the treatment of HIV, including the reduction of MTCT.[147] This conveniently allowed the Court to conclude that budgetary constraints were "no longer an impediment," and that it should now "be possible to address any problems of financial incapacity that might previously have existed".[148]

It would be interesting to speculate how the Court would have dealt with the resource constraints argument had the positive political developments just prior to the hearing not occurred. A serious engagement with the cost-effectiveness arguments raised by the TAC would have drawn the Court into a more direct evaluation of resource allocation decisions, something it is clearly reluctant to do.

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[140]Ibid. para. 49.
[141]Ibid. para. 71.
[142]Ibid. sub-para. 3(c) of the Order (para. 135), and para. 83.
[143]Ibid. sub-para. 3(d) of the Order (para. 135).
[144]Ibid. para. 116.
[145]Ibid. para. 118
[146]Ibid. para. 119.
[147]Ibid. para. 120.
[148]Ibid.

It is a pity that the Constitutional Court did not follow the High Court in affirming that resource constraints do not excuse a failure on the part of the state to formulate a comprehensive plan to improve access to health care services. In the current case this would consist of a national treatment plan to reduce the risk of MTCT of HIV tied to concrete goals and time frames.[149] The recognition of such a duty would promote great public participation and accountability in the realisation of socio-economic rights. It would also lay the basis for targeted, purposeful action by the state towards the realisation of these rights.

5.3 Evaluation of *TAC*

The *TAC* case illustrates how the *Grootboom* jurisprudence can be used strategically to support a broader campaign to advance access to socio-economic rights. The TAC had the organisational resources and capacity to demonstrate the unreasonableness of government's policies relating to MTCT of HIV. They were able to produce an impressive array of expert medical, public health and economics evidence to support their case. The successful outcome of the case reinforced the organisational gains that the TAC had made.[150]

The judgment firmly entrenches reasonableness review for interpreting the socio-economic rights in sections 26 and 27. The Court was unequivocal that these provisions do not confer any right on individuals to demand goods and services directly from the state.

The rejection of minimum core obligations is inconsistent with the notion that human rights vest in every human being by virtue of their humanity and inherent dignity.[151] It is significant that sections 26 and 27, consistent with the overall conferral of individual rights in the Bill of Rights, commence with a freestanding right of "everyone" to have access to the relevant rights. In *Soobramoney*, the Court indicated that at times it would be required "to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society".[152] This clearly establishes a distinction in the treatment of socio-economic rights. In relation to civil and political rights, "a holistic approach" to the needs of society can only be relied upon to limit individual rights under the general limitation clause.

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[149]This is consistent with the approach of the CESCR: "The obligation to monitor the extent of realisation, or more especially of the non-realisation, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints". General Comment No 3, *supra* note 50, para. 11. In its General Comment No. 14 on the right to health, the Committee views the obligation to adopt a national public health strategy and plan of action as part of the "core obligations" of states parties. General Comment No. 14, *supra* note 24, para. 43 (f).

[150]As observed by Geoff Budlender, the attorney for the TAC, "In some ways, the final judgment of the Constitutional Court was simply the conclusion of a battle which TAC had already won outside of the courts, but with the skilful use of the courts as part of a broader struggle". *Mail & Guardian* 2002.

[151]The preambles of both the International Covenant on Civil and Political Rights, 1966 and the ICESCR, 1966, state that the rights protected "derive from the inherent dignity of the human person".

[152]*Soobramoney*, *supra* note 9, para. 31 (cited with approval in the *TAC* case, *supra* note 11, para. 37).

Certainly the drafting of sections 26 and 27 signal that resource constraints are a relevant factor in assessing compliance with the state's constitutional duties. Nevertheless it is possible to interpret these provisions in a way that is consistent with the high degree of protection generally accorded to individual rights. As has been argued, a presumption of violation can be found where vulnerable individuals lack access to the basic necessities of life. The state would then be placed under a strong burden of justification to show that it is unable to provide direct assistance to the applicants due to a serious shortage of resources. The standard of scrutiny would be high, and a court would not accept pre-existing budgetary allocations as determinative of resource availability without further justification. Moreover, the state retains the option of invoking the general limitations clause to justify its non-compliance with minimum core obligations.[153] These possibilities of justification meet the Court's concern that it is allegedly impossible to give everyone access to a "core" service immediately.[154] Reliance on the general limitations clause would have the added advantage that, when the state does limit its minimum core obligations, the fact of the limitation and its nature and extent would have to be publicly defined and justified. This would ensure public accountability in support of the constitutional commitment to ensure that everyone has access to an essential level of social services.

The Court criticised the minimum core obligation as being ill-suited to its institutional role and capacities. In fact, there is little principled difference between imposing a minimum core obligation and upholding a duty that the state must "plan, budget and monitor" to ensure that "a significant number of desperate people in need are afforded relief".[155] Both duties require a process of interpretation in order to assess whether the relevant obligations have been fulfilled and both have implications for the state's distribution of resources.

However, recognising an individual entitlement to such relief would be of immense practical benefit to litigants who seek the courts' assistance in situations of severe socio-economic deprivation. They would not be required to review a wide range of measures adopted by the state and to assess their reasonableness in the light of its available resources. Instead they would enjoy the benefit of a presumption that placed the burden on the state to justify why it is unable to provide direct relief. Furthermore, it would ensure that, in appropriate circumstances, they are entitled to direct individual relief. Finally, the state is likely to act with more seriousness and purpose to fulfil an obligation that can be individually enforced, than an ill-defined obligation to take reasonable measures to provide relief to significant numbers of those in desperate need.[156]

When dealing with more extensive levels of social provisioning, beyond minimum core obligations, the standard of reasonableness review as developed in *Grootboom* and the *TAC* case would be appropriate.

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

[154]This is in any event a contentious statement, requiring evidence and justification.

[155]*Grootboom*, *supra* note 10, para. 68.

[156]See the account by Pillay in this volume of the difficulties experienced in giving effect to the *Grootboom* orders.

6 CONCLUSIONS

The above analysis of the constitutional jurisprudence indicates that the Constitutional Court is carving out an important role for itself in the enforcement of socio-economic rights. In the first place, it has created the possibility of challenging state or private action that prevents or impairs access to socio-economic rights – the negative duty "to respect" the rights. Secondly, the principles of reasonableness review provide the basis for challenging the state for not giving effect to the positive duties imposed by socio-economic rights. Thus social programmes can be challenged for being poorly coordinated, unreasonably implemented or for not providing short-term relief for those in desperate need. The Court's endorsement of the views of the CESCR that retrogressive measures require special justification is also likely to prove significant in challenging measures that reduce access to socio-economic rights.

The degree of deference that the Court should accord to the state in assessing the availability of resources will undoubtedly be contested terrain. In order for reasonableness review to be an effective tool in challenging poverty, it is vital that government's resource allocation decisions are not shielded from scrutiny. A key challenge will be developing an appropriate balance between judicial oversight and preserving a reasonable measure of discretion to the legislature and executive in making economic policy choices.

The Court has unequivocally established reasonableness review as the basis for enforcing the qualified socio-economic rights in sections 26 and 27. The detailed criteria provided by the court for a reasonable government programme to realise socio-economic rights is likely to prove a useful tool, not only in future litigation, but in guiding the adoption, implementation and monitoring of policies and legislation. The requirement of transparency, recognised in the *TAC* judgment, will facilitate the monitoring of socio-economic rights by civil society and the SAHRC.

However, by rejecting the concept of minimum core obligations under sections 26 and 27, the Court has limited the circumstances in which individuals can directly claim socio-economic goods and services from the state. It has also been averse to recognising such positive entitlements under section 28(1)(c) (children's socio-economic rights).[157] A claim to direct relief under the latter provision will only be countenanced when children are separated from their families. However, this creates an important space for litigation and advocacy aimed at ensuring direct access to basic socio-economic rights by AIDS orphans and child-headed households. It will be instructive to observe how the Court approaches the interpretation of unqualified socio-economic rights, such as the right to basic education in section 29(1)(a),[158] or prisoners' socio-economic rights

[157]In *Soobramoney*, *supra* note 9, there are indications that the scope of s 27(1)(c) (emergency medical treatment) is confined to the denial of access to existing facilities. This would be a very narrow interpretation of the right. It remains to be tested whether this interpretation will be broadened in future decisions.

[158]The Constitutional Court has affirmed that the right to basic education "creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education". *Ex parte*

in section 35(2)(e).[159] If the Court does recognise an individual right to the basic services conferred by these sections, there would be little principled basis for maintaining its objections to the recognition of minimum core obligations under sections 26 and 27.

The TAC case illustrates that strong organisations will be able to use the jurisprudence of reasonableness review to make strategic gains in challenging social programmes that are not responsive to the needs of the poor. However, the Court's rejection of the notion of minimum core obligations will make it very difficult for individuals living in extreme poverty to use litigation as a strategy to get immediate relief. There is also a danger that the state will fail to prioritise the basic socio-economic needs of vulnerable groups without the Court affirming this constitutional obligation.

The only role envisaged by the Court for minimum core obligations is possibly as a factor in assessing the reasonableness of government measures. This does not relieve individuals of the formidable burden of establishing the unreasonableness of the state's social programmes, nor does it entitle them to direct individual relief. Nonetheless it provides an important opportunity for asserting minimum core obligations as essential components of a reasonable government programme. Ideally a failure to fulfil minimum core socio-economic rights obligations should render a government programme *prima facie* unreasonable.

While the Court has developed clear and useful criteria for a reasonable government programme to realise socio-economic rights, it is regrettable that it has unnecessarily limited the potential of these constitutional rights to contribute to a better quality of life for all.

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[159]The High Courts have already demonstrated a willingness to enforce the positive duties imposed by this section: see *B and Others v Minister of Correctional Services and Others* 1997 (6) BCLR 789 (C); *Strydom v Minister of Correctional Services and Others* 1999 (3) BCLR 342 (W).

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