Socio-Economic Rights Project, CLC, UWC

SOUTH AFRICA'S EVOLVING JURISPRUDENCE ON SOCIO-ECONOMIC RIGHTS

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CONTENTS

1. Introduction

One of the distinguishing features of the South African Constitution[1] is its far-reaching commitment to economic, social and cultural rights. A substantial group of economic, social and cultural rights are integrated in the Bill of Rights, along with civil and political rights.[2] All the rights in the Bill of Rights, including the socio-economic rights, may be enforced in the courts.[3] This represents a far-reaching commitment at the domestic level to the interdependence and indivisibility of all human rights.[4]

2. The inclusion of socio-economic rights as justiciable rights in the Constitution

a. *Background*

During the drafting of the 1996 Constitution, South Africa's Constitutional Assembly ran an extensive public participation programme aimed at given ordinary people a voice in the process.[5] One of the major issues of debate was whether economic and social rights should be included in the Bill of Rights, along with civil and political rights, as justiciable rights. A coalition of civil society organisations, including human rights and development NGOs, church groups, civics and trade unions, campaigned 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 social and economic rights such as the right to land, housing, education and health care as it was about a right to vote and other civil liberties. The inclusion of social and economic rights in the Bill of Rights would give disadvantaged communities tools to protect and advance their interests in the courts. They would also assist the new democratic government in realising its reconstruction and development programme.[6]

As there were not many comparative national sources that the drafters of the Constitution could turn to for precedents in relation to socio-economic rights, they relied on international human rights treaties, particularly the International Covenant on Economic, Social and Cultural Rights, 1966 (hereafter, the ICESCR). The protection of economic and social rights in a range of international and regional human rights instruments was regarded as an important source of legitimacy for these rights.[7] It is inexplicable that, despite the signature of the ICESCR in October 1994, to date this remains the only major human rights treaty that South Africa has failed to ratify.[8]

However, the inclusion of economic and social rights in the Bill of Rights was not uncontested. There were vigorous debates in the media and academic journals[9] on whether they belonged in the Bill of Rights, and if so, in what form. At the time of the certification of the final

Constitution[10], certain groups in civil society objected to the inclusion of socio-economic rights in the Bill of Rights on the following grounds:

1. that they were not universally accepted fundamental rights,
2. that they were inconsistent with the separation of powers doctrine because the judiciary would encroach upon the terrain of the legislature and executive; and
3. that socio-economic rights were not justiciable, in particular because of the budgetary issues that their enforcement may raise.[11]

The Constitutional Court overruled these objections. In the first place, the Court held that the relevant Constitutional Principle permitted the Constitutional Assembly to supplement universally accepted fundamental rights with other rights not universally accepted. Secondly, the Court conceded that socio-economic rights may result in courts making orders which have direct implications for the budget. However, it observed that the enforcement of civil and political rights such as equality, freedom of speech and the right to a fair trial, would often also have such implications:

> "A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of separation of powers."[12]

Finally, the Court was of the view that socio-economic rights were "at least to some extent, justiciable." The mere fact that that rights had budgetary implications did not compromise their justiciability. It concluded by observing that "[a]t the very minimum, socio-economic rights can be negatively protected from improper invasion."[13]

b. *Separation of Powers*

The implication of the Certification judgment is that the Court does not accept 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. At the end of the day, the Court's primary constitutional duty is to uphold and protect the rights enshrined in the Bill of Rights. In the words of the UN Committee on Economic, Social and Cultural Rights:

> "The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society."[14]

Scholars have emphasised the need to develop a more flexible, 'co-operative model' of the relations between the different branches of government. This model would require continual interaction between the branches of government in defining and redefining their respective roles and powers in different contexts.[15] The Canadian academics, Craig Scott and Jennifer Nedelsky refer to this process of mutual interaction as a 'constitutional dialogue' between the different branches.[16] The primary purpose of the doctrine of separation of powers is to prevent a concentration of power in any one branch of government. Within this model, the judiciary has a role to play in the enforcement of social and economic rights. For example, the courts may prod the legislature into action to realise the rights while at the same time respecting the legislature's choice of means as to the most appropriate methods to advance the rights.

c. *Institutional competence of the courts*

Another objection that is frequently raised against the inclusion of economic and social rights as justiciable rights in a constitution is that the courts lack the institutional competence to enforce rights of this nature. Economic and social rights frequently involve complex policy choices with far-reaching socio-economic ramifications. For example, ordering the provision of expensive cardiac surgery is likely to affect not only other health-related expenditure (e.g. on primary health care), but also other portfolios in the national budget (e.g. housing).[17] Because judges are not economists or public policy experts, they are neither equipped to evaluate the most effective policy measures for realising the rights nor the impact of their decisions on other needs within a democratic society. Their task is made more difficult by the fact that the provisions protecting human rights are frequently formulated in a broad, open-ended way, leaving a large margin of interpretation to judges.

However, as we have noted above, all rights have social policy implications. The extent to which claims that come before the courts have unforeseen ramifications will also be a matter of degree. Where a positive order in relation to any right may have far-reaching knock-on effects, it is certainly appropriate for the judiciary to allow a broader margin of choice to the executive and legislature without abdicating responsibility for the enforcement of economic and social rights. The courts can place a burden on the executive and legislature to justify the reasonableness of their policy choices in the light of the constitutional commitment to economic and social rights.[18] Should they fail to discharge this burden of justification, the courts have a range of remedies at their disposal which can set the parameters for a constitutionally acceptable decision while still preserving sufficient 'space' for the exercise of a choice of means by the legislature and executive.[19]

Furthermore, the fact that the normative content of economic and social rights is less well-

developed than civil and political rights is more a reflection of their historical exclusion from adjudication procedures than their inherent nature. The content of rights develop over time through on-going judicial interpretation of their meaning in the context of concrete cases. The scope and content of various economic and social rights will also become clearer once they are subjected to systematic judicial enforcement. According to the Committee on Economic, Social and Cultural Rights, "there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions".[20]

3. The nature of the protection afforded to socio-economic rights

a. *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;[21] the right of everyone to basic education, including adult basic education;[22] and the socio-economic rights of detained persons, including sentenced prisoners.[23] These rights are not qualified by references to reasonable measures, progressive realisation or resource constraints. The second category entrenches the right of everyone to "have access to" adequate housing, health care, food, water and social security.[24] A second subsection expressly qualifies the state's positive obligations in relation to these rights:

> "The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights".[25]

The sections protecting environmental and land rights use similar phrases to those contained in sections 26 and 27 although there are important differences in the way they are formulated.[26] The third category is formulated negatively to suggest the imposition of a prohibition on the state, and also on private parties.[27] These include a prohibition on the eviction of people from their homes without an order of court made after considering all the "relevant circumstances", and on the refusal of emergency medical treatment.[28] Finally, the constitution also protects labour and cultural rights, although their formulation differs significantly from the above three categories. [29]

The Constitution places an overarching obligation on the State to "respect, protect, promote and fulfil the rights in the Bill of Rights."[30] This section suggests that all the rights in the Bill of Rights impose a combination of negative and positive duties on the State. Thus the duty 'to respect' implies that the State must refrain from law or conduct that would result in a deprivation of access to the rights (e.g. arbitrary forced evictions). The duty 'to protect' places a duty on the State to pass and implement legislation to prevent powerful private parties (e.g. landlords,

banks, and insurance companies) from undermining the rights of others. The duty 'to promote and fulfil' requires the State to take reasonable legislative and other measures to ensure that those persons who currently lack access to the rights gain access to them. These measures could include, for example, public awareness campaigns on how to access your rights, educational programmes, as well as the budgetary, legislative and administrative measures needed to implement social programmes. This typology provides a useful analytic framework for understanding the duties imposed by socio-economic rights.[31]

Even rights that are positively framed, such as the right of access to adequate housing in s 26 (1) imposes an implicit negative duty on the State and third parties to "desist from preventing or impairing the right of access to adequate housing."[32] Conversely, it can be reasoned that rights they are negatively framed, such as the prohibition on the refusal of emergency medical treatment in s 27(3), also impose positive duties on the State to ensure that the necessary emergency services and infrastructure are in place to guarantee the enjoyment of the right.[33]

b. *Limitations*

All the rights in the Bill of Rights—civil, political, economic, social and cultural—are subject to a general limitations clause. Any limitation to a right must be in terms of law of general application and is only permissible "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[34] The initial burden falls on the applicant to prove a violation of the particular right. If successful, the burden shifts to the state to show the reasonableness and justifiability of any limitation to the right.[35]

In the context of the qualified socio-economic rights in sections 26 and 27 a critical question relates to the burden of proof in respect of the positive duties imposed by these rights.[36] Does the duty fall on the State or the applicant to prove the reasonableness of the measures adopted by the State to realise the rights in accordance with the second subsection?[37] As the second subsection expressly places a positive duty on the State (albeit with qualifications), it is submitted that the burden should rest on the State to prove compliance with this duty once the applicants have established that they do not, as a matter of fact, have access to adequate housing. This approach finds support in the *Grootboom* decision where the State placed evidence before the Court of the legislative and other measures that they had adopted to give effect to the right of access to housing.[38] If the State fails to establish the reasonableness of the measures it has adopted in terms of the second subsection, it may seek to rely on a justifiable limitation of the right in terms of the general limitations clause.

c. *Horizontal application*

The possibility also exists under the South African Constitution for economic and social rights to have a degree of horizontal application (i.e. application in disputes between private parties). The Constitution provides that the Bill of Rights applies to all law and binds all organs of state.[39] A provision of the Bill of Rights also binds a natural or juristic (legal) person "if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right".[40]

Generally, it can be accepted that it would be inappropriate to impose extensive positive duties on private parties to realise the socio-economic rights of the general public (for example, to provide universal access to health care services). However, there may be circumstances where private parties, by virtue of a special relationship or a monopoly over the supply of a particular service, do have positive duties to facilitate access to the economic good in question. Examples that come to mind are duties on -

- parents to provide for the needs of their children[41];
- mining companies relying on migrant labour to provide decent housing to their employees; and
- multinational pharmaceutical companies holding exclusive patent rights over life-saving drugs to ensure their affordability to poor communities.

While the scope of the positive duties on private parties is highly speculative and undeveloped, it is settled that private parties are at least required to respect the negative duties imposed by socio-economic rights. For example, landlords should refrain from evicting people arbitrarily from their homes, insurance companies and private health care institutions should not discriminate unfairly against people in their access to insurance or health care services,[42] and industries should not cause an environment that is harmful to people's health.[43]

In *Grootboom*, the Constitutional Court affirmed that section 26 (1) of the Constitution imposes "at the very least, a negative obligation upon the state *and all other entities and persons* to desist from preventing or impairing the right of access to adequate housing" [emphasis added].[44]

In order to provide an effective remedy against private violations of economic and social rights, the courts "must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right".[45]

The fact that the South African Constitution provides for the direct horizontal application of certain rights in the Bill of Rights is relatively novel in comparative constitutional law. The horizontal application of socio-economic rights is significant in a global context where powerful private entities are increasingly controlling access to essential social services and resources.[46]

d. *Standing and Remedies.*

The accessibility and efficacy of constitutional rights depends on having generous provisions relating to the legal standing to enforce these rights in the courts as well as the power of the courts to grant speedy and effective remedies.

Standing

The South African Constitution has generous provisions on legal standing, allowing a broad range of individuals and groups to enforce the rights in the Bill of Rights. For example, it expressly confers standing on anyone acting on behalf of another person who cannot act in their own name, anyone acting as a member of, or in the interest of, a group or class of persons, as well as anyone acting in the public interest.[47]

The leading case on the above grounds of standing is *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* which concerned a challenge to the termination of the disability grants of large numbers of people in the Eastern Cape Province in violation of the principles of administrative justice. The applicants sought not only individual relief on behalf of themselves (the reinstatement of their grants), but also leave to institute representative, class action and public interest proceedings "on behalf of all people in the Eastern Cape Province who were in receipt of disability grants and who had such grants cancelled or suspended" within the relevant time frame.

Leave was given to the applicants to institute such proceedings with directions relating to the disclosure of members of the class, notification and the further conduct of the matter.

Froneman J gave the following justification for not adopting a restrictive approach to standing in public interest litigation:

> "The principle of legality implies that public bodies must be kept within their powers. There should, in general, be no reason why individual harm should be required in addition to the public interest of the general community. Public law litigation may also differ from traditional litigation between individuals in a number of respects. A wide range of persons may be affected by the case. The emphasis will often not only be backward-looking, in the sense of redressing past wrongs, but also forward-looking, to ensure that the future exercise of public power is in accordance with the principle of legality."[48]

The applicants decided to proceed with a class action under s 38(c). The Eastern Cape government appealed to the Supreme Court of Appeal against the leave given by the High Court to institute the class action (as well as the disclosure order given by the High Court). In dismissing the appeal, Cameron JA characterised the situation as "pattern-made" for class proceedings:

> "The class the applicants represent is drawn from the very poorest within our society – those in need of statutory social assistance. They also have the least chance of vindicating their rights through the legal process. Their individual claims are small: the value of the social assistance they receive – a few hundred rands every month – would secure them hardly a single hour's consultation at current rates with most urban lawyers. They are scattered throughout the Eastern Cape Province, many of them in small towns and remote rural areas. What they have in common is that they are victims of official excess, bureaucratic misdirection and unlawful administrative methods.
>
> It is the needs of such persons, who are most lacking in protective and assertive armour, that the Constitutional Court has repeatedly emphasised must animate our understanding of the Constitution's provisions. And it is against the background of their constitutional entitlements that we must interpret the class action provision in the Bill of Rights." [49]

Remedies

The Constitution furthermore gives the courts broad remedial powers. Legislation or conduct that is inconsistent with the Constitution must be declared invalid to the extent of its inconsistency. In addition, the courts may make any order that is "just and equitable", including an order suspending a declaration of invalidity on any conditions to allow the competent authority to correct the defect.[50]

Wim Trengove has identified a range of creative judicial remedies that are available to redress violations of economic and social rights. [51] These include, for example, an award of *preventative damages* against the state made in favour of an independent state institution (e.g. a Human Rights Commission) or non-governmental organisation with the necessary skills and programmes aimed at preventing future violations of the right in question. Another order that may be more appropriate than awarding monetary compensation is an order for *reparations in kind*. It is often difficult to quantify the harm done to an individual litigant arising from the long-term structural deprivation of services such as education or health care. The state may thus be ordered to provide appropriate remedial services for the benefit of a whole community that has suffered a long-term violation of their socio-economic rights.[52] Orders of this nature usually require on-going judicial supervision to ensure that they are properly implemented.

A critical debate in the enforcement of the positive duties imposed by socio-economic rights, particularly those subject to "progressive realisation", is whether and to what extent the court should exercise a *supervisory jurisdiction* over their implementation. In order to exercise this jurisdiction the State will usually be ordered to devise and present to court a plan of action to remedy the violation, and to report back to the court on its implementation at regular intervals. At both the stages of the approval and implementation of the plan, the applicant and other interested parties (including a possible independent 'court monitor') will be given an opportunity to comment. As Trengove points out, redressing systemic violations of socio-economic rights often requires far-reaching institutional and structural reforms over a period of time in a manner determined by the legislative and executive branches of government. They cannot be remedied by a single court order made once and for all. Such orders should strive to preserve the choice of means of the legislative and executive as to the precise manner in which to remedy the situation while not abdicating the court's responsibility to ensure that constitutional objectives are fulfilled.

The downside is that the courts are increasingly burdened with the minutiae of public administration, and are drawn into making policy choices that are normally made by elected representatives and government officials. The potential for an on-going tussle between the courts and the government is ever present. However, if remedies for socio-economic rights violations are to be effective and meaningful the assumption by the courts of a supervisory jurisdiction in the types of cases described above appears unavoidable. This is particularly so in the context of poor litigants who are unable to access legal representation to institute on-going litigation to enforce their rights. The inevitable tensions that result should not be viewed as a threat to the constitutional order, but rather part of the process of 'constitutional dialogue' described above.

It is noteworthy that there have in fact been a number of cases to date where the court has granted orders involving the exercise of a supervisory jurisdiction.[53]

4. Reviewing the evolving jurisprudence on socio-economic rights

Although the jurisprudence on the socio-economic rights in the Bill of Rights is still in its infancy, the number of cases coming before the courts is gathering momentum. The *Grootboom* judgment handed down in October 2000 represents a landmark in socio-economic rights enforcement in South Africa. Its implications will be discussed in some detail below.

a. *Enforcing the duty to respect socio-economic rights*

As has been noted, the Constitutional Court signalled in the certification judgment that the negative duty to respect the economic and social rights in the Bill of Rights can be subject to judicial enforcement. For example, the courts have declared that old apartheid legislation that permitted landowners to summarily demolish informal structures on their property without an order of court was in conflict with section 26(3) of the Constitution.[54] This legislation was widely used to prevent black people from settling and residing in so-called 'white' areas. In a number of cases, the courts have ruled that the suspension or cancellation of social security benefits without affording beneficiaries a hearing or following fair procedures violates the right to just administrative action.[55] They have also indicated that arbitrary administrative action that deprives beneficiaries of their social grants may violate the right of access of social security in section 27(1)(c).[56] Budlender AJ has held that the disconnection of an existing water supply to consumers by a local authority, is *prima facie* a breach of its constitutional duty to respect the right of (existing) access to water, and requires constitutional justification.[57]

A decision handed down by the High Court (Cape Provincial Division) in 2000 held that the prohibition against arbitrary evictions in section 26(3) of the Constitution altered established common law principles relating to the pleadings and onus of proof in eviction proceedings brought by the owner of property.[58] Accordingly, it is no longer sufficient for the owner of the property simply to allege in pleadings that it is the owner of the property in question and that the defendant is in unlawful possession (the principle laid down in *Graham v Ridley* 1931 TPD 476). The owner is required to allege and prove the "relevant circumstances" that would justify an order for the eviction of the defendants from their home.[59] Although the court did not decide the exact nature of these relevant circumstances, it indicated that some guidance could be obtained from legislative provisions, specifically the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 (PIE).[60] The special protection to be accorded in the context of evictions to the elderly, children, persons with disabilities and households headed by women was considered particularly relevant.[61]

The *Ross* judgment was subsequently overruled by the full bench decision in *Ellis v Viljoen* 2001 (4) SA 795.[62] The Court concluded that the right of ownership as recognised before the Constitution has not been affected by s 26(3) at least insofar as it did not place a duty on the owner of property to allege and prove the relevant circumstances that would entitle a court to issue an eviction order. Thus the normal common law rules of pleadings and proof apply where the owner seeks the eviction of an unlawful occupier from his or her property:

> "…in the absence of legislative interference and postulating that nothing more is known than that the plaintiff is the owner and that the defendant is in possession, it is right and proper that an owner

should be granted an ejectment order against a defendant who has no business interfering with the plaintiff's possession of his own property. If those are the only 'relevant circumstances' placed before the Court, surely the owner must be entitled to an eviction order. If there are other 'relevant circumstances' upon which the defendant wishes to rely in justifying his continued occupation, the *onus* must, on all the recognised principles of pleadings and evidence, rest on him to allege and prove them, whatever they may be." [63]

The Court held that these principles were "eminently consonant" with the property rights protected in s 25 (1) of the Constitution.

The decision still appears to leave open the question of the scope of the circumstances that will be considered "relevant" by a court if raised by the defendant in pleadings. The *Ellis* decision suggests that the court will only consider those circumstances that are relevant in terms of the pre-constitutional common law applicable to eviction proceedings brought by owners of property.[64] If this interpretation were adopted, it would effectively render s 26 (3) nugatory. It would accord more with the ethos of human dignity and social justice pervading the Constitution if s 26 (3) were interpreted to place a duty on the courts to at least consider the circumstances of vulnerable groups facing the loss of their home through eviction proceedings.[65] At least in cases where PIE and the Extension of Security of Tenure Act 62 of 1997 (ESTA) are applicable, the courts must ensure that the stringent requirements of procedural fairness in the legislation[66] have been followed as well as consider substantive factors before granting an eviction order.[67]

b. *Enforcing the positive duties imposed by unqualified "basic" socio-economic rights*

The courts have demonstrated a clear willingness to enforce the positive duties imposed by the first category of 'basic' rights (those unqualified by express references to reasonable measures, progressive realisation, and resource constraints). Thus 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".[68]

The High Court (CPD)) has directed the Minister of Correctional Services and other respondents to supply two HIV-positive applicants with prescribed anti-viral medication (a combination of AZT and ddl) in fulfilment of their right to be provided with "adequate medical treatment" at state expense.[69] The positive order by the Court followed a finding that the Ministry had failed to make out a case that they could not afford the relevant treatment.[70]

In another case concerning prison conditions, the High Court (WLD) ruled that the applicant and the other occupants of the Maximum Security Section of Johannesburg Prison have the right to have access to electricity in their cells. Schwartzman J ruled that, given the circumstances in which high security prisoners are held ("spending 18 ½ hours of each day of what remains of their lives or a substantial portion thereof in what is in effect solitary confinement"), access to electricity was not a mere comfort or diversion, but could make the difference between mental stability and derangement:

> "To deprive them entirely and in perpetuity of this prospect could also result in their being 'treated and punished in a cruel or degrading manner' (section 12(1)(c) of the Constitution) or their being detained in conditions that are inconsistent with human dignity (section 35 (2) of the Constitution)."[71]

The clear implication of the Constitutional Court's reasoning in *Grootboom* relating to the children's socio-economic rights in s 28(1)(c) is that children who are orphans, abandoned or not in the care of their families for other reasons have a direct claim against the State to be provided with shelter, basic nutrition, basic health care services and social services. The justifiability of any limitations imposed by the State on these positive duties would fall to be considered under the general limitations clause, section 36.

c. *Enforcing the duty to fulfil qualified socio-economic rights*

The Soobramoney Case

Soobramoney v. Minister of Health, KwaZulu-Natal[72] was the first major Constitutional Court case to consider the enforceability of the category of socio-economic rights which are qualified by the availability of resources and progressive realisation. 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 on-going dialysis treatment, and interdicting the provincial Minister of Health from refusing him admission to the renal unit of the hospital. Without this treatment the appellant would die, and he could not afford to obtain the treatment from a private clinic.

On appeal the Constitutional 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. According to the Court, this right is a negative right not to be refused remedial medical treatment that is "necessary and available" to avert harm in the case of a sudden catastrophe.[73] It does not extend to the provision of ongoing treatment of chronic illnesses for the purpose of prolonging life.

The Court drew support for this interpretation of emergency medical treatment from the judgment of the Indian Supreme Court in *Paschim Banga Khet Mazdoor Samity and Others v State of West Bengal and Another*. In this case the right to emergency medical treatment was derived this right from the right to life protected in article 21 of the Indian Constitution.[74] However, it should be noted that this judgment gave a more generous interpretation of the right to emergency medical treatment than the one advanced by the Constitutional Court to the effect that access to existing facilities should not be frustrated by bureaucratic and other formalities. For example, the Indian Supreme Court directed the State government to formulate a blue print for primary health care with particular reference to ensuring the timely treatment of patients during an emergency.[75]

The Court then proceeded to consider Mr. Soobramoney's claim under section 27(1) read with section 27(2).[76] 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 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".[77]

It found that the guidelines drawn up by the hospital authorities for determining which patients qualified for dialysis treatment were reasonable, and there was no suggestion that they had not been applied "fairly and rationally" in the applicant's case.[78] The Court thus declined to order the provision of dialysis treatment.

This case suggests that the courts will allow a wide latitude to the political and administrative organs in relation to the positive dimensions of those socio-economic rights subject to progressive realisation and resource availability (the duty 'to fulfil').

The Grootboom case

The *Grootboom* case referred to above arose from the following facts. The applicants, including a number of children, had moved onto private land from an informal settlement owing to the "appalling conditions" in which they were living.[79] 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.

They applied to the Cape High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. The High Court ruled that the appropriate organ or department of state was obliged in terms of section 28(1)(c) of the Constitution to provide shelter to homeless children. It also declared that the parents were entitled to be accommodated with their children in the aforesaid shelter. Although the parents did not have an independent right to shelter, they enjoyed a derivative right based on the constitutional stipulation that a child's best interests are "of paramount importance in every matter concerning the child". 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."[80] All three spheres of government (national, provincial and local) appealed to the Constitutional Court against this order of the High Court.

The South African Human Rights Commission and the Community Law Centre (University of the Western Cape) intervened as *amici curiae* in the case. Although the parties to the case focused their arguments on section 28(1)(c) (the right of every child to shelter), the *amici* successfully broadened the issues to include a consideration of section 26 of the Constitution. They essentially argued that all members of the community, including adults without children, were entitled to shelter by reason of the minimum core obligation incurred by the State in terms of section 26.[81]

According to the Court, the question was not whether socio-economic rights were justiciable under the Constitution, "but how to enforce them in a given case." This could not be decided in abstract, but would have to be "carefully explored on a case-by-case basis."[82] This suggests that the extent to which it is possible and appropriate for the courts to make orders enforcing socio-economic rights depends on a contextual evaluation of the facts of the case. A factor not explicitly mentioned in the judgment, but nonetheless likely to play an important role is the potential for obtaining effective redress through other democratic institutions.[83] The Court also affirmed that all the rights in the Bill of Rights are "inter-related and mutually supporting." As expressed by Yacoob J:

> "There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2 [of the Bill of Rights]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential."[84]

The Court started by delineating the scope of the right of "access to adequate housing" in section 26(1). It held that housing "entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have "access to" adequate housing all of these conditions must be met: there must be land, there must be services, there must be a dwelling." A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of housing, "but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing." The state's duty is to "create the conditions for access to adequate housing for people at all economic levels of our society." [85]

The Court then proceeded to analyse the provisions of section 26 and the obligations that they impose on the State. It held that section 26(2) of the Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing. Responsibilities and tasks must be clearly allocated to the different spheres of government, and appropriate financial and human resources must be made available for the implementation of the programme.[86] The Court left no doubt as to the overall responsibility of the national government "for ensuring that laws, policies, programmes and strategies are adequate to meet the State's section 26 obligations."[87]

In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), "the question will be whether the legislative and other measures taken by the state are reasonable."[88] The court emphasised that it would not enquire "whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent.":

> "It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met." [89]

The housing programme must include measures that are "reasonable" both in their conception and their implementation: "An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations."[90] This is a critical passage in the judgment, paving the way to challenge laws and policies that do not meet their objective of facilitating access to various socio-economic rights due to a range of causes such as inadequate resource allocations, bureaucratic inefficiency and incapacity, and a lack of infrastructure. [91]

The Court articulated the following criteria for assessing the "reasonableness" of the measures adopted by the State:

> "In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long-term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review. Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test."[92]

The Court interpreted the phrase "progressive realisation" in section 26(2) to impose a duty on the state to progressively facilitate the accessibility of housing by examining legal, administrative, operational and financial hurdles and, where possible, lowering 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."[93] The UN Committee on Economic, Social and Cultural Right's interpretation of the duty of "progressive realisation" in article 2 of the Covenant was cited with approval by the Court. In commenting on the concept of "progressive realisation" in Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, the Committee said the following:

> "...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].[94]

According to the Court, this interpretation of 'progressive realisation' was "in harmony with the context in which the phrase is used in our Constitution and "there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived." [95]

This paves the way for future challenges to the repeal of legislation or programmes that guarantee people's enjoyment of economic and social rights. It suggests that the State is under a duty to justify any retrogressive measures that undermine people's economic and social rights. Retrogressive measures that make access to the rights more difficult should be subject to heightened scrutiny by the courts. At the very least the state should be required to put in place alternative programmes that guarantee an equivalent or improved level of enjoyment of the rights.

As noted above, the *amici* argued that, in interpreting section 26, the Court should impose a "minimum core obligation" on the State to satisfy minimum essential levels of the socio-economic rights, including the right to adequate housing. This was based on the concept of a "minimum core obligation" developed by the UN Committee on Economic, Social and Cultural Rights.[96] The Court adopted the view that it is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing "without first identifying the needs and opportunities for the enjoyment of such a right." [97] However, according to the Court, the "real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable." While a court could have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable, sufficient information would have to be placed before it to enable this determination to take place. In any event, the Court held that it was not necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core content of a right.[98]

The State's positive obligations to fulfil the rights in sections 26 and 27 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."[99]

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."[100] However, it failed to meet the Constitutional test of reasonableness in that it did not include a component that met the duty "to devise, fund, implement and supervise measures to provide relief to those in desperate need."[101] The overall housing programme was focussed only on medium and long-term objectives, and left out of account "the immediate amelioration of the circumstances of those in crisis."[102] 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 land, no roof over their heads, and who were living in intolerable conditions or crisis situations."[103]

The Constitutional Court found no violation of the right of children to shelter in terms of s 28(1)(c) holding that that the State incurs an immediate obligation to provide shelter only in respect of those children who are removed from their families. The primary duty to fulfil the children's socio-economic rights in section 28(1)(c) rests on the parents or family and only, failing such care, on the State.[104] As the children in this case were under the care of their parents or families, the Constitutional Court did not grant any relief on the basis of section 28(1)(c). However, the court emphasised that this did not mean that the state incurred no obligation to children who were being cared for by their families. The state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28. In addition, the state is required to fulfil its obligations to provide families with access to land in terms of section 25, access to adequate housing in terms of section 26 as well as access to health care, food, water and social security in terms of section 27. These sections require the state to provide this access through "on a programmatic and coordinated basis, subject to available resources." [105]

Evaluation of the Grootboom judgment

In its judgment, the Court clarified key aspects of the scope of the right of access to adequate housing in section 26 and the obligations it imposes on the state.

The standard of review applied by the Constitutional Court in this case is more substantive and less deferential to the State than the 'rationality' standard adopted in the *Soobramoney* case. It gave flesh to the 'reasonableness' standard of review in adjudicating socio-economic rights claims. In doing so, it sought to give practical effect to the proposition that human rights are interrelated and equally important. Thus it is "fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings."[106]

The *Grootboom* case demonstrates how even the tertiary duty to fulfil those economic and social rights that are made subject to available resources and progressive realisation may be subjected to judicial scrutiny. Thus government legislation, policies and programmes may be reviewed for their reasonableness. In this case, the South African Constitutional Court has identified at least one situation where a State programme will be regarded as unreasonable - where it fails to meet the basic shelter needs of people in crises situations or living in intolerable conditions.

The *Grootboom* case paves the way for judicial intervention in respect of important dimensions of the realisation of socio-economic rights. The first is a lack of reasonableness in the implementation of laws, policies and programmes. The second relates to retrogressive measures that reduce the number of people who have access to a particular benefit, and arguably also those measures that diminish the quality or level of benefit that people enjoy. An example would be a measure that reduced the amount of the child support grant or the eligible age cohort.

It is possible that the South African courts may also be prepared to intervene in situations where the relevant allocation of resources is manifestly unreasonable or in bad faith. This may occur, for example, where resources are prioritised in favour of privileged groups at the expense of meeting the social needs of disadvantaged groups.[107] However, Theunis Roux has pointed out that the Constitutional Court's reasoning in *Grootboom* is not in fact conducive to challenging the expenditure of scarce resources on relatively privileged groups provided that some provision is made for meeting the immediate needs of groups in desperate situations. The Court did not say that the minimum core needs of disadvantaged groups must be met *first* before improvements are made to the social benefits enjoyed by relatively more advantaged groups.[108]

Large question marks also remain regarding the definition of those who are living in intolerable conditions or crisis conditions especially in the South African context of deep and large-scale systemic poverty[109], as well as the nature of the relief to which they are entitled. Even the proposition that those in desperate need must receive some form of immediate relief is not without its ambiguities in the judgment. Thus the judgment requires only that "a significant number" of desperate people in need are afforded relief, "though not all of them need receive it immediately."[110] This reasoning does not assist in establishing an entitlement to relief in individual cases.

The Court 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'? It is also a pity that the judgment implies that the available resources of the State will play a key role in determining the reasonableness of government programmes as opposed to affirming that the allocation of resources must be reasonable and capable of facilitating the fulfilment of socio-economic rights. The resources available for social spending are not objective, scientific facts,

but a product of political decisions and choices in the spheres of macro-economic, revenue and budgetary policies. If these decisions, or at least the processes through which they are made, are regarded as unassailable, the State will in effect be allowed to determine the extent of its own obligations under the constitution. [111]

Finally, the *Grootboom* case leaves open the question of how prescriptive a court will be in holding that the rights in ss 26 and 27 require provision of a particular programme, service or treatment within the overall context of facilitating access to the rights. The Court was careful to recognise that a wide range of possible measures could be adopted by the State to meet its obligations, and the Court would not express preferences provided that the reasonableness standard was met. However, in certain circumstances, a particular service or treatment may be the only reasonable and effective measure to realise a socio-economic right. In these cases, the courts are surely constitutionally mandated to make a prescriptive order that could include the immediate provision of a service or a detailed plan of action for the provision of the service.

The *Grootboom* judgment seeks to strike an appropriate balance between the constitutional responsibility of the courts to enforce the duties imposed by socio-economic rights, and the role of the legislature and the executive in a democracy to make and implement laws and policies. Thus while the legislature and executive have a wide discretion to formulate laws and policies that impact on socio-economic rights, the courts under the South African constitution retain the ultimate discretion to review the reasonableness of these measures. In this way a relationship of accountability, transparency and responsiveness is fostered between the judiciary, legislature and executive.

Post-Grootboom

There have been two important cases dealing directly with socio-economic rights that have been decided by the courts in the aftermath of the *Grootboom* judgment.

In *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*, the State relied on its duty (established in *Grootboom*) to assist victims of flooding to defend its decision to establish a transit camp on its land in order to house people from Alexander Township who had been displaced by severe floods. 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 and land and environmental legislation. The High Court upheld the arguments of the residents' association and set aside the decision. The government appealed successfully

to the Constitutional Court. The 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.[112]

Another major socio-economic rights test case is the application by the Treatment Action Campaign and others to compel the State to devise an implement an effective national programme to prevent or reduce mother to child transmission (MTCT) of HIV, including the provision of voluntary counselling and testing and, where appropriate, Nevirapine, or other appropriate medicine, as well as formula milk for feeding. The relief sought also includes a declaration and mandamus obliging the State to make Nevirapine available to pregnant women giving birth in public health facilities where this is medically indicated in the judgment of the attending medical officer. In granting the orders sought by applicant in substantially the terms sought, the High Court (TPD) relied extensively on the reasoning in *Grootboom*. [113]

In the first place, the court was of the view that the policy prohibiting the use of Nevirapine outside the 18 pilot sites in the public health sector was not reasonable and constituted an unjustifiable barrier to the progressive realisation of the right to health care. It breached the negative obligation (see paragraph 34 of the *Grootboom* judgment) to desist from impairing the right to health care. Secondly, it held that the State's current MTCT programme failed the reasonableness test in *Grootboom* as it did not constitute a comprehensive and co-ordinated plan for a roll-out of the MTCT programme. 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." 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."[114]

A welcome 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 programme. According to Botha J the obligation to formulate a coherent plan to roll out a national MTCT 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.[115]

The State's application for leave to appeal against Botha J's decision to the Constitutional Court directly raises the issue of the degree to which the courts should be prescriptive on particular treatments or services within the broader context of the right of access to health

care services.[116] What is clear is that the case cannot be about whether courts can make policy decisions. It is surely trite that policy decisions infringing or threatening any of the rights entrenched in chapter 2 of the Constitution are reviewable. The key challenge, as Yacoob J reminds us in *Grootboom*, is how to enforce socio-economic rights in a given case. This cannot be determined in abstract, but must be "carefully explored on a case-by-case basis."[117] The Court's decision in the TAC case will be critical to the future course of socio-economic rights litigation.

Finally, there have been a series of cases dealing with the application of the right to equality and right to just administrative action in the rationalisation of education resources.[118]

5. Conclusions and identifying key challenges

The above analysis of South African constitutional jurisprudence indicates that the courts are carving out an important role for themselves in the protection of socio-economic rights.

In the first place, they have clearly indicated their willingness to enforce the negative duty to respect socio-economic rights. They have also applied socio-economic rights horizontally, thereby signalling that these rights impose duties on private parties. It is not difficult to envisage that, in appropriate circumstances, the courts will impose positive duties on the State to protect socio-economic rights, for example, by enacting and enforcing environmental protection legislation.[119]

At the tertiary level of the duty to fulfil socio-economic rights, the *Grootboom* case illustrates how even those rights that are subject to the qualifications of progressive realisation and the availability of resources may be justiciable. Thus the Constitutional Court has indicated that it will review government action or inaction for its reasonableness in advancing the progressive realisation of socio-economic rights.

The case paves the way for advocacy by civil society aimed at ensuring that the government applies the principles articulated in the judgment, not only in relation to the right to housing, but also to the other socio-economic rights in the Constitution. In this way the *Grootboom* case also promotes public participation in the policy-making and legislative process.

A number of key challenges in the development of South African's jurisprudence on socio-economic rights can be identified. In the first place, the application of the separation of powers

doctrine and the extent to which the courts are willing to intervene in socio-economic policy matters remains highly contested terrain. Undoubtedly a delicate balance will have to be struck on a case by case basis which preserves the spirit of the constitutional dialogue discussed above. While respecting the choice of means of the legislature and executive to give effect to socio-economic rights, it is vital that the courts do not abdicate their responsibility to hold government to account for the realisation of socio-economic rights,

Related to the above is the challenge of developing a coherent jurisprudence on the qualification of the availability of resources in sections 26 and 27. As argued above, it is vital that the courts do not defer absolutely to government's policy choices determining the availability of resources. At the end of the day, the central test remains whether the measures taken to realise socio-economic rights are reasonable in the circumstances. If economic measures, especially those in which public participation is limited, are immunised against this reasonableness review, government will effectively be in a position to determine the extent of its own obligations and the principle of constitutional supremacy will be undermined.

As Theunis Roux has argued the *Grootboom* judgment represents an important, but not very far-reaching challenge to the distribution of resources and setting of priorities by government. For advocates of pro-poor policies, it will be important to articulate a vision of socio-economic rights which goes beyond government granting relief to those in desperate need, but requires the needs of the poor to be *prioritised* in formulating policies and distributing resources.

The area of retrogressive measures in relation to socio-economic rights also has a large amount of untapped potential in our constitutional jurisprudence on these rights.

Children's rights advocates will undoubtedly seek to distinguish some of the reasoning in *Grootboom* relating to the unqualified children's socio-economic rights in section 28(1)(c). It seems anomalous in a context of international and national law favouring the principle of family preservation that poor children residing with their families should not be able to claim direct relief on the basis of section 28 (1)(c). The primary horizontal interpretation of the rights in section 28(1)(c) does not make sense in relation to those rights such as health care services and social services that are clearly services rendered by State, and not parents. The integration of the principles of substantive gender equality in measures designed to realise socio-economic rights is an important challenge not only in policy-formulation, but also in developing an inclusive, gender-sensitive jurisprudence on these rights.

South Africa's inexplicable non-ratification of the International Covenant on Economic, Social

and Cultural Rights is a major challenge for both government and civil society. Not only does it undermine our commitment to socio-economic rights at an international level, but deprives South Africans of the opportunity to measure ourselves against the leading international instrument in this area. If we are to participate fully in the global movement to promote greater accountability in the area of economic, social and cultural rights, it is necessary that South Africa become a full party to the Covenant without further delay.

Finally, although this paper has focussed on the role of the courts in enforcing socio-economic rights, it is critical that legal strategies be located within a broader context of mobilisation for social justice and development.

BIBLIOGRAPHY

Corder H *et al*, 1992, *et al A Charter For Social Justice: A contribution to the South African Bill of Rights debate* (University of Cape Town, Cape Town).

Davis D, 1992, 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles" 8 *SAJHR*.

De Villiers B, 1994, 'Social and Economic Rights' in van Wyk, Dugard, De Villiers and Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (Juta, Cape Town).

De Vos P, 1997, 'Pious wishes or directly enforceable human rights: Social and economic rights in South Africa's 1996 Constitution' 13 *SAJHR*.

Ebrahim H, 1998, *Soul of the Nation: Constitution-making in South Africa* (Cape Town: Oxford University Press).

Fuller, L, 1978, 'The Forms and Limits of Adjudication' 92 (2) *Harvard Law Review*.

Haysom N, 1992, 'Constitutionalism, Majoritarian Democracy and Socio-Economic Rights' 8 *SAJHR.*

Klaaren J, 1998, 'Judicial Remedies' in M. Chaskalson et al. (eds.), *Constitutional Law of South Africa* (Revision Service 3, Juta & Co).

Liebenberg S, 1995a, 'Social and Economic Rights: A Critical Challenge' in Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (The Community Law Centre, UWC, in association with David Philip Publishers, Cape Town).

Liebenberg S, 1995b, 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' 11 (3) *SAJHR*.

Liebenberg S, 1998, *Socio-economic Rights*, Ch. 41, Chaskalson et al *Constitutional Law of South Africa* (Revision Service 3, Juta & Co).

Liebenberg S and Pillay K (eds), 2000, *Socio-Economic Rights in South Africa: A Resource Book* (Community Law Centre, University of the Western Cape).

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1987, UN doc. E/CN.4/1987/17; reproduced in 1987 (9) *Human Rights Quarterly*.

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1998, 20 *Human Rights Quarterly.*

Mashava L, 2000, 'Time to ratify the International Covenant on Economic, Social and Cultural Rights' 2 (3) *ESR Review*.

Minow, M, 1990, *Making All the Difference: Inclusion, Exclusion and American Law*.

Mureinik E, 1992, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' 8 *SAJHR*.

O'Regan K, 1998, 'Introducing Socio-Economic Rights' 1 (4) *ESR Review*.

Reddy B P J and Dhavan R, 1994, 'The Jurisprudence of Human Rights' in D M Beatty (ed.), *Human Rights and Judicial Review: A Comparative Perspective* (Dordrecht/Boston/ London: Martinus Nijhoff Publishers).

Roux, T, 2001 - 2002, 'Understanding Grootboom – A Response to Cass R. Sunstein' 12 *Constitutional Forum* (forthcoming).

Scott C and Nedelsky J, 1992, 'Constitutional Dialogue', in: J. Bakan and D. Schneiderman (eds.), *Social Justice and the Constitution: Perspectives on a Social Union for Canada*.

Scott C and Macklem P, 1992, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' 141 *University of Pennsylvania Law Review*.

Scott C and Alston P, 2000, 'Adjudicating constitutional priorities in a transnational context: A comment on *Soobramoney's* legacy and *Grootboom's* promise.' 16 *SAJHR*.

Scott C, 2001, 'Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights' in C. Krause *et al* (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edition, Kluwer).

Shue H, 1980, *Basic Rights, Subsistence, Affluence and U.S. Foreign Policy*.

South African Law Commission, 1994, *Final Report on Group and Human Rights* (Project 58).

Sloth-Nielsen J, 2001, 'The child's right to social services, the right to social security and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*' 17 (2) *SAJHR*.

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

UNDP (principal author: V Taylor), 2000, *South Africa: Transformation for Human Development*.

Moellendorf D, 1998, 'Reasoning about resources: *Soobramoney* and the future of socio-economic rights claims' 14 *SAJHR*.

Notes

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

[2] It should be noted, however, that not all socio-economic rights recognised in international instruments such as the International Covenant on Economic, Social and Cultural Rights are included in the Bill of Rights. Rights not explicitly recognised are, for example: the right to work (art 6 of the Covenant), the right of protection and assistance to the family (art 10), and aspects of the cultural rights included in article 15 of the Covenant (e.g. art 15(1)(c)). The Bill of Rights also includes so-called 'participation and process' rights such as the right of access to information (s 32), and the right to just administrative action (s 33).

[3] 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)).

[4] Few other national Constitutions have gone as far as the South African Constitution in entrenching a comprehensive list of economic, social and cultural rights as directly justiciable rights. More common is to include one or two social rights (e.g. the right to education) in the Bill of Rights, or to recognise these rights in the form of directive principles of state policy which are not directly justiciable. Educational rights are included, for example, in the Canadian Charter of Rights and Freedoms, the Namibian, Ghanaian and Ugandan Constitutions. Public interest litigation in India has acted as a catalyst for the courts to develop a richly textured jurisprudence on economic and social rights. This has been achieved through drawing on the directive principles of state policy in Part IV of the Constitution to enlarge and enrich the meaning of the 'fundamental rights' in Part III (such as the right to life): see Reddy & Dhavan, 1994, 175; Liebenberg, 1998, 21 – 24.

[5] For more details on this programme, see Ebrahim, 1998, chapter 13.

[6] See: petition to the Constitutional Assembly by the 'Ad Hoc Committee for the Campaign for Social and Economic Rights', July 1995, reproduced in: Liebenberg and Pillay, 2000, 19.

[7] See the Opinion of the Technical Committee (Theme Committee 4), *The meaning of 'universally accepted fundamental rights'* in Constitutional Principle II, Schedule 4 to the Constitution of the Republic of South Africa Act 200 of 1993 (1995) [on file with author].

[8] Liebenberg, 1995b, 359 – 378; Mashava, 2000, 18 – 20.

[9] Haysom, 1992, 451; Mureinik, 1992, 464; Davis, 1992, 475; Liebenberg, 1995a, 79; Corder, 1992,18; Scott & Macklem, 1992, 1; De Villiers, 1994, 599; South African Law Commission,1994, 179.

[10] Before the final Constitution (Act 108 of 1996) could come into effect, the Constitutional Court was required to certify that the text complied with a set of 34 'Constitutional Principles' appended to the interim Constitution (Schedule 4, Act 200 of 1993). These principles were wide-ranging and included a stipulation that the final Constitution protect 'all universally accepted fundamental rights, freedoms and civil liberties' by entrenched and justiciable provisions (Principle II). The Constitutional Court declined to certify the final Constitution in the first certification judgment. An amended text of the Constitution was certified on 4 December 1996. *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*, 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) (second certification judgment). The 1996 Constitution was amended by the Constitutional Assembly on 11 October 1996, and came into force on 4 February 1997.

[11] The objectors were: the SA Institute of Race Relations, the Free Market Foundation, and the Gauteng Association of Chambers of Commerce and Industry. Organisations who filed submissions supporting the inclusion of socio-economic rights were: the Legal Resources Centre, Centre for Applied Legal Studies and Community Law Centre (UWC).

[12] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa, 1996*, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), at paras. 76–78 (first certification judgment).

[13] Ibid.

[14] General Comment No. 9 (1998) on the domestic application of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/1999/22 para. 10. This Committee is responsible for supervising States Parties' obligations under the Covenant.

[15] Minow, 1990, 361–362.

[16] Scott & Nedelsky, 1992, 59.

[17] These are what professor Lon Fuller describes as 'polycentric disputes'. Fuller, 1978, 353–409. See the discussion of polycentric schemes and Fuller's article in the minority judgment of Mokgoro and Sachs JJ in *Bel Porto School Governing Body and Others v The Premier of the Province, Western Cape and Another*, Case

CCT 58/00 (decided on 21 February 2002, unreported at the date of writing), paras 175 – 177.

[18] Mureinik, 1992, 464 – 474; O'Regan, 1999, 2 – 3.

[19] Scott & Macklem, 1992, 146 – 147.

[20] General Comment No. 9 (1998) on the domestic application of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/1999/22, para. 10.

[21] The right to 'basic nutrition, shelter, basic health care services and social services' (s. 28(1)(c)). In addition, every child has the right 'to be protected from maltreatment, neglect, abuse or degradation' (s. 28(1)(d)), and 'to be protected from exploitative labour practices' (s. 28(1)(e)). A child is defined in section 28(3) as a person under the age of 18 years.

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

[23] 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' (s. 35(2)(e)).

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

[25] 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.

[26] Section 24; sections 25 (5) – (9). For example, the environmental rights clause (s 24) does not refer to resource constraints or progressive realisation. The "access to land" clause in s 25(5) does not refer to progressive realisation, but rather a duty on the State to "foster conditions" which enables equitable access to land.

[27] As we will see, the Constitution allows for a degree of horizontal application of the rights in the Bill of Rights.

[28] Sections 26(3) and 27(3).

[29] Sections 23, 30 and 31.

[30] 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 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) UN doc. 12/1999/5, para. 15; and General Comment No. 14 (Twenty-second session, 2000) 'The right to the highest attainable standard of health' (art. 12) UN doc. E/C.12/2000/4, paras. 33 - 37.

[31] De Vos, 1997, 67.

[32] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) [hereafter, 'the *Grootboom* case' or *Grootboom*], para 34.

[33] See the discussion of the *Soobramoney* case below.

[34] Section 36(1). In considering whether a limitation is reasonable and justifiable, a court must take into account all relevant factors, including:

a)the nature of the right;

b)the importance of the purpose of the limitation;

c)the nature and extent of the limitation;

d)the relation between the limitation and its purpose; and

e)less restrictive means to achieve the purpose.

[35] *S v. Zuma & others*, 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), at para. 21; *S v. Makwanyane & another*, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), at paras. 100–102.

[36] With regard to the negative duties, it is submitted that where a breach of the duty to respect the relevant socio-economic right has been established by the applicant, the onus shifts to the State t to justify this violation in accordance with the general limitations clause.

[37] De Vos, 1997, 92 – 94. Liebenberg, 1998, 50 - 51

[38] *Grootboom*, para 47.

[39] Section 8(1).

[40] Section 8(2).

[41] This duty was explicitly confirmed by the Constitutional Court in *Grootboom.* The Court held that the positive children's socio-economic rights in s 28(1)(c), specifically the right to shelter, are primarily binding on the parents and families of children. The State only incurs a default obligation to provide shelter directly to children when they do not enjoy family care, for example, when they are orphaned and abandoned: see paras 70 – 79. For an analysis of the implications of this reasoning for children, see Sloth-Nielsen, 2001, 210.

[42] In addition to prohibiting unfair discrimination by the state (s. 9(3)), the South African Constitution expressly provides that '*no person* may unfairly discriminate directly or indirectly against anyone' on a range of grounds such as race, gender, sexual orientation, disability and language (s. 9(4)). The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 has been enacted to give effect to s 9(4) of the Constitution. Additional grounds of prohibited discrimination recognised in the Act in the form of a directive principle include "HIV/AIDS status" and "socio-economic status" (s 34). The ground of "socio-economic status" has a far-reaching potential for challenging the exclusion of the poor from access to social services and resources by both public and private entities.

[43] Section 24(a) of the Constitution.

[44] Grootboom, para. 34.

[45] Section 8(3). On the development of common law remedies to give effect to socio-economic rights, see De Vos, 1997, 100–101.

[46] Scott, 2001.

[47] Section 38 (b), (c), and (d).

[48] *Ngxuza and Others v Secretary, Dept. of Welfare, Eastern Cape Provincial Government and Another* 2000 (12) BCLR 1322 (E), at 1327E.

[49] *Permanent Secretary, Depart Welfare, E Cape Prov Government and Another v Ngxuza and Others* 2001 (10) BCLR 1039 (SCA), paras 11 and 12.

[50] Section 172(1) of the 1996 Constitution. Klaaren, 1998, Ch.9.

[51] For a more detailed discussion of these novel remedies in the field of socio-economic rights, see Trengove, 1999, 8 – 11.

[52] Trengove cites *Milliken v. Bradley II*, (1977) 433 US 267 as an example where the US Supreme Court approved an order requiring the state to provide remedial education to the victims of past race discrimination in the Detroit school system.

[53] This was the nature of the order given by the High Court in *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C). The High Court found a violation of section 28(1)(c) of the Constitution. The remedy granted by the High Court requires the Court to exercise a supervisory jurisdiction in respect of the right of children to shelter. In the first part of its order, the Court declared in broad terms that the appropriate organ or department of state is obliged to provide the applicant children, and their accompanying parents, with shelter until such time as the parents are able to shelter their own children. The second part of the order directs the respondent to present under oath reports to the Court on the implementation of the order within a period of three months from the date of the order. The applicants are given an opportunity to deliver their commentary on the aforegoing reports. However, on appeal, the Constitutional Court declined relief in terms of s 28, and granted only a declaratory order in terms of section 26. The South African Human Rights Commission, which was one of the *amicii* in the case, was given the task to monitor and report on the compliance by the state of its section 26 obligations in accordance with the judgement (para 97). Also see: *August and another v Electoral Commission and Others* 1993 (3) SA 1 (CC) (order to make all the necessary and reasonable arrangements for prisoners to exercise their right to vote); *Strydom v Minister of Correctional Services and Others* 1993 (3) BCLR 342 (W) (Respondents ordered to report to court setting out a timetable within which the electrical upgrading of the maximum security section of Johannesburg Prison would be commenced and completed); *Treatment Action Campaign and Others v Minister of Health* (respondents ordered to "plan an effective comprehensive national programme to prevent or reduce the mother-to-child transmission of HIV, including the provision of voluntary counselling and testing, and where appropriate, Nevirapine or other appropriate medicine, and formula milk for feeding, which programme must provide for its progressive implementation to the whole of the Republic, and to implement it in a reasonable manner").

[54] Section 5B of the *Prevention of Illegal Squatting Act* 52 of 1951: see *Despatch Municipality v Sunridge Estate and Development Corporation (Pty) Ltd.* 1997 (8) BCLR 1023 (SE). Section 26(3) reads as follows: "No-one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[55] *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape and Another* 2000 (7) BCLR 728 (E); 2000 (2) SA 849 (E); *Nomala v Permanent Secretary, Dept of Welfare and Another* 2001 (8) BCLR 844 (E). The right to just administrative action is protected in s 33 of the Constitution.

[56] *Ngxuza and Others v Secretary, Dept. of Welfare, Eastern Cape Provincial Government and Another* 2000 (12) BCLR 1322 (E), at 1330J.

[57] *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* High Court (Witwatersrand Local

Division) Case No: 01/12312 (unreported at the date of writing) at para 27.1. Also see paras 11 –20.

[58] *Ross v. South Peninsula Municipality* 2000 (1) SA 589.

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

[60] However, the Court followed Schwartzman J's decision in *ABSA Bank Ltd v Amod* [1999] 2 B All SA 423 (W) that the Act did not apply in situations (like a landlord and tenant agreement) where a person had an initial contractual right to occupy property, but subsequently became an unlawful occupier. It only applied where the unlawful occupier "is a person who has without any formality or right moved on to vacant land of another and constructed or occupied a building or structure thereon." There are a series of conflicting High Court judgments on this issue. A discussion of this case law is beyond the scope of this article.

[61] At 599 B.

[62] The *Ross* case was also strongly criticised by Flemming DJP in *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W).

[63] *Ellis v Vijoen* at 805 B – E.

[64] See 806 – 807.

[65] "The Constitution is not only concerned with protecting individuals from the State but it expressly concerns itself too, in certain circumstances, with controlling what may be termed superior social power in private relationships through Sec 8 (2) and through Sec 39 (2)." (per Plasket, A J in *Bekker and another v Jika*, Case No. 1286/01, High Court, SECLD (unreported at the date of writing). He also referred to Mahomed J's description of the Constitution's "democratic, universalistic, caring and aspirationally egalitarian ethos" *S v Makwanyane* 1995 (6) BCLR 665 (CC) at para. 262.

[66] See, for example, *Cape Killarney Property Investments v Mahamba and Others* 2000 (2) SA 67. The appeal against this judgment was dismissed by the Supreme Court of Appeal: *Cape Killarney Property Investments v Mahamba and Others* 2001(2) SA 67.

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

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

[69] *B and others v. Minister of Correctional Services and Others*, 1997 (6) BCLR 789 (C), at paras. 61–66. Adequate medical treatment is one of the rights enjoyed by everyone who is detained, including every sentenced prisoner (s. 35(2)(e)).

[70] Paras. 56, 60.

[71] *Strydom v Minister of Correctional Services and Others* 1999 (3) BCLR 342 (W), para 15 (353 A – E). There are signs that litigation advancing socio-economic claims by prisoners will increasingly find their way before the courts: see the report in the *Cape Argus* (20 February 2002), *Pollsmoor health nightmare: Inmate sues over 'filth'*.

[72] 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC).

[73] Para. 20.

[74] (1996) AIR SC 2426. *Soobramoney*, para. 18.

[75] See the discussion by Scott & Alston of this case, 2000, 207 at 237 and 245 –248..

[76] *Soobramoney*, para. 22. The relevant portions of section 27 read as follows:

(1)"Everyone has the right to have access to -

(a)health care services, including reproductive health care

...

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

[77] *Soobramoney,* para. 29.

[78] Soobramoney, para. 25.

[79] 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" (para. 3).

[80] *Grootboom v Oostenberg Municipality and Others* 2000(3) BCLR 277(C), 289 C – D.

[81] Section 26(1) and (2) reads as follows:

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

(2) The state must take reasonable legislative and other measures, within its available resources, to

achieve the progressive realisation of this right."

As has been noted this section is closely modelled on article 2 of the ICESCR. However, as the Constitutional Court also observed its judgment, there are important differences in formulation (at para. 28).

[82] *Grootboom*, para. 20.

[83] Also see the observations by Froneman J in: *Ngxuza and others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2000(12) BCLR 1322 (E) at paras.1333 I – J and 1334G: "The nature and extent of a court's assessment of the justiciability of a constitutional issue is, I think, intimately related to the extent to which it judges that those issues can adequately and better be dealt with by other democratic means."

[84] *Grootboom*, para. 23.

[85] *Grootboom*, para. 35.

[86] *Grootboom*, para. 39.

[87] *Grootboom*, para 40.

[88] *Grootboom*, para. 41.

[89] Ibid.

[90] *Grootboom*, para. 42.

[91] See, for example, the discussion of the problems besetting the reasonable implementation of social security rights in S. Liebenberg, 2001, 241 –247.

[92] *Grootboom*, paras. 43 - 44.

[93] *Grootboom*, para. 45.

[94] General Comment No. 3 (1990) on the nature of States parties obligations (article 2(1) of the Covenant), UN doc. E/1991/21, para. 9. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights give as one of the examples of violations of economic and social rights through acts of commission: "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 every-one" (para. 14(g)), 1998, 691–705. Also see the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1987, 122–135.

[95] *Grootboom*, para. 45.

[96] General Comment No. 3 (1990) on the nature of States parties obligations (article 2(1) of the Covenant), UN doc. E/1991/21, para. 10: "…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." [emphasis added].

[97] *Grootboom*, para. 32.

[98] *Grootboom*, para. 33.

[99] *Grootboom*, para. 46.

[100] *Grootboom*, paras 53 – 54.

[101] *Grootboom*, para. 96.

[102] *Grootboom*, para. 64.

[103] Ibid.

[104] *Grootboom*, para. 77.

[105] *Grootboom*, para. 78.

[106] *Grootboom*, para. 83.

[107] The UN Committee on Economic, Social and Cultural Rights has commented that: "States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consider-ation. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others". General Comment No. 4 (1991) on the right to adequate housing (article 11(1) of the Covenant), UN doc. E/1992/23, para. 11.

[108] T Roux, 2001 – 2002.

[109] For example, a recent United Nations Development Programme report on SA estimates that 18 million people, representing 45% of the population, live below the poverty line using an absolute measure of poverty, pegged at an income per adult of R353 per month. Of these, 10 million people live in 'ultra-poor' households earning less than R193 per month per adult: UNDP, 2000, 55.

[110] *Grootboom*, para 68.

[111] See in this regard, Moellendorf, 1998, 332.
[112] 2001 (7) BCLR 652 (CC).
[113] *Treatment Action Campaign and Others v Minister of Health and Others* (High Court, TPD), Case no: 21182/2001 (unreported at the date of writing).
[114] p. 61.
[115] pp. 62 – 63.
[116] See para. 1.8 and 1.10 of the Notice of application for leave to appeal, 21 December 2001.
[117] *Grootboom*, para. 20.
[118] See Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools, Eastern Tvl 1999 (2) BCLR 151 (CC) (decided before the *Grootboom*); *Permanent Secretary Dept of Education, Eastern Cape v Ed-U-College (PE) Inc* 2001(2) BCLR 118 (CC) (post-*Grootboom*); *Bel Porto School Governing Body and Others v The Premier of the Province, Western Cape and Another*, Case CCT 58/00 (decided on 21 February 2002, unreported at the date of writing).
[119] See section 24(b) of the Constitution.