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LNGPIA001

**The reasonableness approach of the South African Constitutional Court
– making the constitutional right of access to housing “real” or
effectively meaningless?**

LL.M.

Supervisor: Professor Pierre de Vos

Word Count: 24932

Research paper presented for the approval of Senate in fulfilment of part of the requirements for the LLM in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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‘The reasonableness approach of the South African Constitutional Court – making the constitutional right of access to housing “real” or effectively meaningless?’

Dr Pia A. Lange

I. INTRODUCTION

Unlike most constitutions, the South African Constitution¹ explicitly provides a justiciable right of access to housing.² In fact, South Africa is one of a few countries in which socio-economic rights are placed on equal terms with their civil and political counterparts and in which courts are given the power of judicial review of legislation and executive policies are taken in that regard.³ The constitutional inclusion of a right of access to housing as well as other social and economic rights was based on their potential to both reintegrate the formerly excluded citizens of South Africa within the new post-Apartheid nation and to overcome the denial of rights that was legacy of Apartheid.⁴

The relevant provision is section 26(1), which states that ‘everyone has the right to have access to adequate housing’. This statement is then tempered by section 26(2), which requires that: ‘the state must take reasonable legislative and other measures, within its available resources to achieve progressive realisation of this right.’ The third paragraph of section 26 of the Constitution provides a safeguard against arbitrary evictions.

Due to the exceptional circumstance of a justiciable constitutional guarantee, but especially because of the judicial enforcement of the right of access to housing by the Constitutional Court in the seminal *Grootboom* case⁵, South Africa has gained international recognition in terms of the justiciability of socio-economic rights. In the *Grootboom* case, the plaintiff, Mrs Irene Grootboom and other members of her community challenged the forced ‘reminiscent of apartheid-style’⁶ eviction of her community from their previous informal settlements. At the time of the application to the Court, the community of 390 adults and 510 children was forced to live on a sports

¹ Constitution of the Republic of South Africa Act 108 of 1996 (henceforth ‘the Constitution’).

² Section 26 of the Constitution.

³ Section 167 (4) and (5), 169 (a) and 172 of the Constitution.

⁴ Albie Sachs ‘Social and Economic Rights: Can they be made justiciable’ (2000) 53 *SMU Law Review* 1381-84.

⁵ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (‘*Grootboom*’).

⁶ *Ibid* para 10.

field, with nothing other than plastic sheeting to protect them from the elements.⁷ They instituted legal action against the government, demanding that the municipality fulfils its constitutional obligations laid down in Section 26 of the Constitution towards them, which they claimed would involve the provision of at least basic shelter. The High Court granted relieve to some of the plaintiffs. However, the government appealed against this decision to the Constitutional Court, arguing that the Constitution did not require the government actually to provide shelter.

In its judgment, the Constitutional Court confirmed that the right of access to housing creates both negative⁸ and positive⁹ obligations for the state. Regarding the latter, the state is obliged: (a) to take reasonable legislative and other measures; (b) within its available resources; (c) to achieve the progressive realisation of this right.¹⁰ While progressive realisation was given the same purport as under Article 11 para 1 of the International Covenant on Economic, Social and Cultural Rights¹¹ (ICESCR),¹² the Court did not adopt the concept of minimum core obligations into the South African Constitution which is used for the interpretation of socio-economic rights under the ICESCR.¹³ Instead, the Constitutional Court – based on the text of the provision of section 26(2) of the Constitution – used the test of reasonableness to consider whether the state had fulfilled its positive obligations to take appropriate steps to insure the right of access to housing.¹⁴ According to the Court, the test of reasonableness measures both the state’s plan and the implementation of this plan.¹⁵ Furthermore, the reasonableness of state actions in relation to the duty to provide access to housing has to be considered in its social, economic and historical context.¹⁶ Thereby, the availability of resources is an important factor in determining what is reasonable.¹⁷ Within this framework, the Court declared the government’s housing

⁷ *Grootboom and others v Oostenberg Municipality et al* 1999 (Case no 6826/99) High Court of South Africa (Cape of Good Hope Provincial Division) page 5-6.

⁸ *Grootboom* supra note 5 paras 20 and 34.

⁹ *Ibid* para 38.

¹⁰ *Ibid*.

¹¹ International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3 (entered into force 3 January 1976).

¹² *Grootboom* supra note 5 para 45.

¹³ *Ibid* para 33.

¹⁴ *Ibid* paras 38-44.

¹⁵ *Ibid* para 42.

¹⁶ *Ibid* para 43.

¹⁷ *Ibid* para 46.

programme unreasonable in that it had failed to provide shelter for the most needy such as Mrs Grootboom and her community.¹⁸

Grootboom and the subsequent cases on socio-economic rights are guided by this ‘reasonableness’ approach that has polarised opinion both within and beyond South Africa. Early responses to *Grootboom* were positive and the judgment remains widely regarded as a remarkable victory for the enforcement of socio-economic rights.¹⁹ However, in the ensuing years, the reasonableness approach has had its share of critics,²⁰ perhaps attributable to the fact that Mrs Grootboom died in 2008 only in her 40s and still housed in an inadequate shack despite the judgment won in her name. The most common criticism of the jurisprudence is that the reasonableness approach leads to a lack of normative content or an “emptiness” of the right of access to housing.²¹ The individual has a right, but only a right to demand that the state takes action to begin to address the housing needs of those individuals who cannot provide for themselves or who need assistance from the state before they would be able to gain access to adequate housing.²² Contrary to the minimum core concept, the reasonableness approach shifts the emphasis from the reasonableness of the solution to the reasonableness of the steps taken, moving away from a substantive right towards administrative oversight,²³ which makes – so the assumption goes – the constitutional right of access to housing effectively meaningless.

However, in this dissertation I will argue that it is not the reasonableness approach *per se* which hinders the implementation of the right of access to housing but rather the choice of remedy and the lack of (individual) access to the Court. In doing so, I will first show – as a precondition of my argument – that the Court by using the reasonableness approach is acting in accordance with the wording and the transformative character of the South African Constitution and its own institutional

¹⁸ Ibid para 69.

¹⁹ Cass R. Sunstein ‘Social and Economic rights? Lessons from South Africa’ (2001) 11 *Constitutional Forum* 123; Jeanne M. Woods ‘Justiciable Social Rights as a Critique of the Liberal Paradigm’ (2003) 38 *Texas International Law Journal* 763, 785-86; Pierre de Vos ‘*Grootboom*, The right of Access to Housing and Substantive Equality as Contextual Fairness’ (2001) 17 *S. Afr. J. on Hum. Rts.* 271.

²⁰ Danie Brand ‘The Proceduralisation of South African Socio-Economic Rights Jurisprudence or “What are Socio-Economic Rights for?”’ in Henk Botha et al. (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33; David Bilchitz ‘Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence’ (2003) 19 *S. Afr. J. on Hum. Rts.* 1; Marius Pieterse ‘Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited’ (2007) 29 *Human Rights Quarterly* 796.

²¹ David Bilchitz *Poverty and Fundamental Rights* (2007) 159-62.

²² *Grootboom* supra note 5 paras 94-95.

²³ Jessie Hohmann *The Right to Housing* (2014) 102; Danie Brand op cit note 20, 33.

role within the constitutional framework based on the separation of powers. Only afterwards, I will demonstrate that the effectiveness of the right of access to housing rather depends on the remedy granted by the Court and the possibility of access to the Court rather than on the approach reverted to by the Court.

The focus of the dissertation will thereby be only on the positive obligations that flow from the right of access to housing and not on the enforcement of negative duties, including those associated with Section 26(3) of the Constitution through the concept of meaningful engagement.²⁴

The outline of the dissertation is organized as follows: As the Constitutional Court in *Grootboom* compared the constitutional right of access to housing with Article 11 para 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its interpretation, the following chapter (II.) of the dissertation briefly introduces the right to housing under the ICESCR and most notably the ‘minimum core approach’ developed through the General Comments of the United Nations Committee on Economic, Social and Cultural Rights as the standard against which other standards for the enforcement of socio-economic rights are measured. In the next chapter (III.) I will summarise the highly controversial and contested implementation of the right of access to housing and other socio-economic rights as justiciable rights in the South African Constitution, before analysing in the main chapter (IV.) the *Grootboom* case and the application of the test of reasonableness. By dealing with the critics of the judgment, this chapter will also address the question whether the reasonableness approach is in accordance with the separation of powers doctrine and the transformative character of the Constitution. In the following the study will have a look beyond *Grootboom* and examine what is hindering the judicial enforceability of the right of access to housing. Finally, the dissertation will conclude with whether the reasonableness approach of the South African Constitutional Court is making the constitutional right of access to housing enforceable or illusory (V.).

²⁴ *Occupiers of 51 Oliva Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).

II. THE RIGHT TO HOUSING UNDER THE ICESCR AND THE MINIMUM CORE CONCEPT

The right to an adequate standard of living, including adequate food, clothing and housing, can be found in Article 11 para 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the treaty – together with the international Covenant on Civil and Political Rights (ICCPR)²⁵ and the Universal Declaration of Human Rights (UDHR)²⁶ – collectively known as the International Bill of Rights.²⁷ Article 11 para 1 states:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Although there are several other international instruments which address the different dimensions of the right to adequate housing as well,²⁸ Article 11 para 1 of the ICESCR can be considered to be the most comprehensive and perhaps the most important of the relevant provisions.²⁹ The wording and the structure of Article 11 para 1 of the ICESCR is clearly inspired by Article 25 of the UDHR. However, while the UDHR envisages the right to housing as one aspect of the right to an adequate standard of living, Article 11 para 1 of the ICESCR has been interpreted in a way that differentiates between the separate elements of the adequate standard of living. Under

²⁵ International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 UNTS 14668, adopted on 16 December 1966.

²⁶ Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

²⁷ Katie Boyle 'Reconceptualising socio-economic rights in the transitional justice discipline' (2016) 2 *Law, Social Justice & Global Development* 2.

²⁸ See, for example, Article 25 of the Universal Declaration of Human Rights (UDHR), Article 5 (e) (iii) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) or Article 14 (2) (h) of the Convention on the Elimination of All Forms of Discrimination Against Women.

²⁹ Matthew C. R. Craven *The International Covenant on Economic, Social, and Cultural Rights* (1995) 330; Scott Leckie 'The Right to Housing' in Asbjørn Eide & Catarina Krause & Allan Rosas (eds) *Economic, Social and Cultural Rights* (2001) 153; United Nations Committee on Economic, Social and Cultural Rights, The Right to Adequate Housing (Article 11 para 1): Committee on Economic, Social and Cultural Rights General Comment 4 (1991) E/1992/23 para 3.

the ICESCR the right to housing occurs as a separate right which ‘is thus derived from the right to an adequate standard of living’.³⁰

The understanding of the content of the right to adequate housing and the other socio-economic rights in the Covenant has been largely developed by the United Nations Committee on Economic, Social and Cultural Rights (‘the Committee’), the body in charge of monitoring the implementation of the ICESCR which was created in 1985.³¹ The Committee has released a number of General Comments that attempt to give content to the rights recognized in the Covenant and to assist the states parties in fulfilling their obligations.³² While the Committee’s General Comments are non-binding, they still have been highly influential in creating a common international understanding of the content of socio-economic rights.³³

The interpretation of the right to adequate housing is set out in General Comment No. 4, which was adopted by the end of 1991.³⁴ In this Comment, the Committee not only emphasizes that the right involves more than shelter, but – linking the right to adequate housing to human dignity – should be seen as a place to live somewhere in security, peace and dignity.³⁵ Moreover, it stresses that the reference in Article 11 para 1 of the Covenant must be read as referring not just to housing but to adequate housing.³⁶ Being ‘well aware that adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors’, the Committee ‘still believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context’.³⁷ These aspects that constitute the fundamentals of adequate housing are: (1) legal security of tenure; (2) availability of

³⁰ General Comment No. 4 supra note 29 para 1.

³¹ UN Economic and Social Council Res 1985/17 ‘Review of the composition, organisation and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights’ (28 May 1985) UN Doc S/RES/985/17. For the establishment and the composition of the Committee in detail see Matthew C. R. Craven op cit note 29, 35-105.

³² Yuval Shany ‘Stuck in a Moment of Time: The International Justiciability of Economic, Social and Cultural Rights’ in Daphne Barak-Erez and Aeyal M Gross (eds) *Exploring Social Rights, Between Theory and Practice* (2007) 83-85.

³³ Matthew C. R. Craven op cit note 29, 91 attributes them a ‘considerable legal weight’.

³⁴ General Comment No. 4 supra note 29. See also General Comment No. 7 which is dealing with forced evictions. United Nations Committee on Economic, Social and Cultural Rights, *The Right to Adequate Housing: Forced Evictions (Article 11 para 1): Committee on Economic, Social and Cultural Rights General Comment 7 (1997) E/1998/22. Annex IV.*

³⁵ General Comment No. 4 supra note 29 para 7.

³⁶ Ibid.

³⁷ General Comment No. 4 supra note 29 para 8.

materials, facilities and infrastructure; (3) affordability; (4) habitability; (5) accessibility; (6) location; and (7) cultural adequacy.³⁸

Each one of these elements are further defined in the Comment³⁹ and these definitions – determining the scope and content of the obligations imposed by the right – are, of course, highly debatable.⁴⁰ For the purposes of this dissertation, however, it is not necessary to further engage with the content of these definitions in detail. It is decisive that the approach of the Committee provides some content to the right to housing in the first place rather than looking at the exact details of this content. According to the Committee, each one of the stated elements, must be present in order to enjoy the right to adequate housing. The Committees’ approach is therefore to define adequacy through the realisation of the seven elements rather than to consider the concept of adequacy itself in any depth. Put differently, fulfilment of the requirements set out, will produce adequate housing.⁴¹ This approach has found some critics: By suggesting that adequate housing might be realisable through the seven elements, so the complaint goes, the Committee oversimplifies the not straightforward concept of adequacy.⁴² This might lead to some shortcomings in the objection to achieve adequate housing.⁴³ Nevertheless, despite this alleged weakness of the Committees approach, it offers the states parties a practical way to fulfil their obligations in respect of Article 11 para 1 of the Covenant. It is not without reason that General Comment No. 4 is considered to be ‘the single most authoritative legal interpretation of what the right to housing actually means in legal terms under international law.’⁴⁴

However, the so defined right to housing in Article 11 para 1 of the ICESCR is not absolute in nature, which makes the definition of the right and the obligations that it imposes on states even more intricate. First, as can easily be inferred from the wording of Article 11 para 1, the provision includes an internal limitation as it only obliges the States Parties to ‘take appropriate steps to ensure its realization of this right’, in concert with other states based on voluntary international cooperation.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ See Jessie Hohmann op cit note 23, 21-29.

⁴¹ Ibid at 21.

⁴² Ibid 21-29.

⁴³ Ibid.

⁴⁴ Centre on Housing Rights and Evictions, *Sources 4: Legal Resources for Housing Rights: International and National Standards*, 2nd ed (2000) 73.

Secondly, the right to adequate housing is shaped by the general definition of the nature of the obligations undertaken by states parties to the Covenant described in Article 2 para 1, a provision specifically drafted to reflect the need of states to allow for greater flexibility in the fulfilment of the rights of the Covenant⁴⁵:

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

Again, guidance to the interpretation of this ‘convoluted’ and ‘intractable’ provision⁴⁶ is offered by a statement of the Committee.⁴⁷ ‘General Comment No. 3: The Nature of States Parties Obligations’⁴⁸ contains the general principles upon which state action should be based. First it clarifies that a state needs only to ‘take steps’ but these steps must aim towards the progressive realisation of the right.⁴⁹ After the Covenant’s entry into force for the state concerned, steps towards this goal must be taken within a reasonably (short) time.⁵⁰ ‘Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant’.⁵¹ They should be as ‘expeditiously and effectively as possible’.⁵² The Covenant thus creates a duty to ‘move forward’. All deliberate regressive steps would compromise this obligation to move forward on the realisation of the rights. The Covenant thus also creates an obligation to avoid deliberately retrogressive measures (concept of non-retrogression).⁵³ This does not mean that any deliberate regressive steps are tantamount with a violation of the Covenant, but ‘[a]ny deliberately retrogressive measures [...] would require the most careful consideration and would

⁴⁵ Matthew C. R. Craven op cit note 29, 114.

⁴⁶ Ibid at 115.

⁴⁷ For the interpretation of the nature and the scope of the party obligations see also ‘The Limburg Principles on the Implementation of the International Covenant on Social, Social and Cultural Rights’ (1987) 9 Human Rights Quarterly 122 and Theo C. Van Boven & Cees Flinterman & Ingrid Westendorp (eds) *The Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights* (1989).

⁴⁸ United Nations Committee on Economic, Social and Cultural Rights, *The Nature of States Parties Obligations* (Article 2 para 1): Committee on Economic, Social and Cultural Rights General Comment 3 (1990) E/1991/23.

⁴⁹ Ibid para 2.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid para 9.

⁵³ David Bilchitz op cit note 21, 184.

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.’⁵⁴

Besides the obligation to take steps ‘by all appropriate means’, the Committee has adopted, perhaps most importantly, what is termed the “minimum core concept to socio-economic rights”.⁵⁵ The Committee found that a ‘minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party’.⁵⁶ Any failure of a state party to provide at least this minimum core is *prima facie* a violation of the rights.⁵⁷ For example, ‘a State party in which a significant number of individuals deprived [...] of basic shelter and housing [...] is, *prima facie* failing to discharge its obligations under the Covenant.’⁵⁸ According to the minimum core principle, every right should be at least realised to the extent that provides for the basic needs of every member of the society.⁵⁹

However, the minimum core obligation is not irrespective of resource considerations: ‘any assessment as to whether a State has discharged its minimum core obligation must [...] take account of resource constraints applying within the country concerned.’⁶⁰ Hence, the state’s availability of financial resources limits the minimum core obligation under Article 2 para 1 of the ICESCR. Even so, Article 2 para 1 does not intend to provide a mechanism for states to abrogate responsibility for the implementation of socio-economic rights.⁶¹ The Committee stresses that the limitations of Article 2 ‘must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question’.⁶² Accordingly, if a State

⁵⁴ Ibid. See also United Nations Committee on Economic, Social and Cultural Rights, The Right to Social Security (Article 9) General Comment 19 (2008) E/C.12/GC/19 para. 43.

⁵⁵ There are a lot of complexities associated with this concept, starting with the terminology: In the following the term ‘minimum core concept’ and ‘minimum core obligation’ are used synonymously. However, one can use the phrases with a somewhat different meaning. While the minimum core content is often defined as the nature or essence of a right, the term minimum state obligations focuses on the question what things must a state immediately do to realise the right. See Sage Russell ‘Minimum State Obligations: International Dimensions’ in Danie Brand & Sage Russell (eds) *Exploring the core content of socio-economic rights: South Africa and international perspectives* (2002) 14-15.

⁵⁶ General Comment No. 3 supra note 48 para 10.

⁵⁷ Ibid; Pierre de Vos ‘Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights In South Africa’s 1996 Constitution’ (1997) 13 *S. Afr. J. on Hum. Rts.* 98.

⁵⁸ General Comment No. 3 supra note 48 para 10.

⁵⁹ Matthew C. R. Craven op cit note 29, 141.

⁶⁰ General Comment No. 3 supra note 48 para 10.

⁶¹ Jessie Hohmann op cit note 23, 19.

⁶² General Comment No. 3 supra note 48 para 9.

party is not able ‘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.’⁶³ In paragraph 11 the Comment goes on to state that ‘[t]he Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances’.⁶⁴ Thus, the burden of proof rests with the member state if it claims that it cannot meet even the most minimal obligations.⁶⁵ The Comment ‘must be read as establishing a “presumption of guilt” independent of resource considerations.’⁶⁶ In later General Comments on other rights, the Committee has even adopted a less flexible position by insisting that the non-fulfilment of core obligations cannot be justified under any circumstances.⁶⁷

For the introduction of the minimum core concept, the Committee quotes two reasons: First of all, it mentions that it became aware of the necessity of the recognition of minimum core because of its experience in examining the reports of states concerning their compliance with the Covenant. Secondly, the Committee argues that the Covenant would be largely deprived of its *raison d’être*, if it would not at least establish a minimum core obligation.⁶⁸

This explanation⁶⁹ and the concept itself can certainly be considered problematic.⁷⁰ Regarding the concept itself, it is first and foremost questionable if it is possible to define a ‘minimum core’ for the right to housing and the other rights of the ICESCR that may be operated on an international level. The primary conceptual question for this purpose whether the standard of a minimum core is international or

⁶³ Ibid para 10.

⁶⁴ Ibid para 11.

⁶⁵ Sage Russell op cit note 55, 16. Yuval Shany op cit note 32, 90.

⁶⁶ Matthew C. R. Craven op cit note 29, 143.

⁶⁷ United Nations Committee on Economic, Social and Cultural Rights, The right to the highest attainable standard of health (Article 12): Committee on Economic, Social and Cultural Rights General Comment 14 (2000) E/C.12/2000 para 47 and United Nations Committee on Economic, Social and Cultural Rights, The right to water (Articles 11 and 12): Committee on Economic, Social and Cultural Rights General Comment 15 (2002) E/C.12/2002/11 para 40.

⁶⁸ General Comment No. 3 supra note 48 para 10.

⁶⁹ Whether this explanation of the Committee for introducing the idea of a minimum core obligation is persuasive is discussed in detail by David Bilchitz op cit note 21, 185-191.

⁷⁰ Katharine G. Young ‘The Minimum Core of Economic and Social Rights: A Concept in the Search of Content’ (2008) 33 *Yale Journal of International Law* 113; Matthew C. R. Craven op cit note 29, 143.

state-specific is still unanswered.⁷¹ Secondly, in placing the emphasis on ‘minimum’ core obligations the concept might be used by states and other relevant actors to take only the minimum steps associated by this concept rather than to work on the provision of adequate housing for everybody.⁷² What is more, the Committee will primarily direct its attention to the actions of developing States, leaving those beyond the reach who are facing material deprivation in the developed countries.⁷³ The concentration on the minimum core might also distract from the fact that the responsibility for poverty and deprivation in the world lies not with the individual states alone but rather with the rules of international trade and the economic world order.⁷⁴ Finally and more fundamental, doubts have been raised, if the standard of a ‘minimum core’ can supply any content to the rights under the ICESCR nor on a national level.⁷⁵

Despite these objections, the minimum core principle introduced by the Committee is still the standard against which the interpretation of the right to housing in other international and regional regimes and jurisdictions is measured. Whatever the scope and content of that concept exactly might be, at least it provides a clear understanding of the direction that the steps required by the state parties should follow. Unlike the reasonableness approach, it provides a degree to which the right to housing can be progressively realised or, metaphorically speaking, it provides a “minimum floor” of the socio-economic rights which – unless it can be shown not to be feasible – the states have a duty to address immediately.⁷⁶ Irrespective of whether this minimum core concept should be operated on the basis of individualised judicial enforcement where individuals can immediately claim particular goods from the state,⁷⁷ it offers a standard to measure governmental policy on substantive grounds.⁷⁸

Regarding the implementation of the right, even the richest countries regularly fail to provide the minimum core to their inhabitants.⁷⁹ This failure can often be attributed to a lack of political will combined or in addition to a lack of resources as the

⁷¹ Katharine G. Young *ibid* at 114-15.

⁷² Pierre de Vos ‘The Essential Components of the Human Right to Adequate Housing – a South African Perspective’ in Danie Brand & Sage Russell (eds) *Exploring the core content of socio-economic rights: South Africa and international perspectives* (2002) 33.

⁷³ Matthew C. R. Craven *op cit* note 29, 143-44.

⁷⁴ *Ibid* at 144.

⁷⁵ Katharine G. Young *op cit* note 70, 164-75.

⁷⁶ Pierre de Vos *op cit* note 72, 31.

⁷⁷ For this discussion see David Bilchitz *op cit* note 21, 203-206 and later in Chapter 4.

⁷⁸ Theunis Roux *The Politics of Principle* (2013) 397.

⁷⁹ Jessie Hohmann *op cit* note 23, 19.

implementation even of a minimum core could impose a heavy financial burden on a state. Furthermore, the insufficient implementation might also be attributed to the still existing distinction between socio-economic rights on the one hand and civil and political rights on the other and the traditional and still shared interpretation of socio-economic rights as non-enforceable rights linked to this distinction.⁸⁰

Finally, unlike the International Covenant on Civil and Political Rights, the ICESCR was missing any kind of judicial oversight – at least in form of an individual or complaints mechanism – for a long time. On 10 December 2008, the adoption of a new international instrument, the Optional Protocol to the ICESCR⁸¹ – which was entered into force in 2013⁸² – closed that legal protection gap by introducing an individual and collective communication mechanism, an inter-state communication procedure and an inquiry procedure.⁸³ The Committee has been calling for an Optional Protocol for this purpose since the early 1990s.⁸⁴ Despite the slow ratification process, the Optional Protocol eventually recognises the justiciability of economic, social and cultural rights in the international sphere and allows the Committee to refine the understanding of their content through interpreting their scope in the context of specific cases.

However, the Committee has developed the minimum core concept without the jurisdiction to hear individual or collective complaints. And even under the Optional Protocol, the Committee, having examined an individual or collective complaint, can only transmit its non-legally binding ‘views on the communication, together with its recommendations, if any, to the parties concerned’.⁸⁵ What is more, like other protocols appended to human rights treaties the Optional Protocol provides an opt-in mechanism which ensures that quasi-judicial supervision would not be imposed on

⁸⁰ For example, Michael J Dennis & David P Stewart ‘Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?’ (2004) 98 *American Journal of International Law* 462, 515.

⁸¹ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted on 10 December 2008 during the sixty-third session of the General Assembly by resolution A/RES/63/117.

⁸² The Protocol was open on signature and ratification on 24 September 2009. In accordance with Article 18 of the Optional Protocol, it entered into force on 5 May 2013 three months after the tenth state had signed and ratified the protocol. Until today only 22 states entered the treaty.

⁸³ For the different forms of supervision used in International Treaties Matthew C. R. Craven op cit note 29, 30-34.

⁸⁴ For the drafting procedure see Claire Mahon ‘Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2008) 8:4 *Human Rights Law Review* 617.

⁸⁵ Optional Protocol supra note 81 at Art. 8 f.

unwilling states. These circumstances and the specifics of international public law supervision in general should be kept in mind while examining the right to housing on a regional level.⁸⁶ It should not diminish the outcomes of the Committee in developing the definition of a minimum core of the right to housing and other socio-economic rights, but the missing possibility of actual enforcement of a right should not be underestimated. As Yuval Shany pointed out, none of the party states has ever actively protested against the establishment of the General Comments of the Committee and the introduction of the minimum concept,⁸⁷ yet the commitment to socio-economic rights does not take the states much effort as long as these rights are effectively not enforceable.

III. THE IMPLEMENTATION OF JUSTICIABLE SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA'S FINAL CONSTITUTION

The inclusion of socio-economic rights as part of an enforceable Bill of Rights in a Constitution requires much more effort of the state concerned than the commitment to socio-economic rights as required under the Covenant. Therefore, the manner in which socio-economic rights or so called 'second generation rights'⁸⁸ should be included in South Africa's final Constitution⁸⁹ was heavily debated in public and in academic writing prior to and during the drafting process.⁹⁰

⁸⁶ For similar arguing see Danie Brand 'The Minimum Core Content of the Right to Food in Context: A Response to Rolf Künnemann' in Danie Brand & Sage Russell (eds) *Exploring the core content of socio-economic rights: South Africa and international perspectives* (2002) 100.

⁸⁷ Yuval Shany op cit note 32, 104.

⁸⁸ The expressions of first, second and third generation rights focus on the age of the rights. The civil and political rights or 'first generation rights' were the earliest rights to be recognized as fundamental, while the constitutional recognition of social and economic or culture and environmental rights as so called 'second and third generation rights' is a relatively new phenomenon.

⁸⁹ In the interim Constitution of the Republic of South Africa 1993 one can already find provisions regarding educational (section 33), workers (section 27) and environmental (section 30) rights, but this document focused more on the transition.

⁹⁰ For background information about the debate see Theunis Roux op cit note 78, 265-273; Bertus de Villiers 'Social and Economic Rights' in Dawid van Wyk et al. (eds) *Rights and Constitutionalism* (1994) 599, 621. For the inclusion: Etienne Mureinik 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *S. Afr. J. on Hum. Rts.* 464; Nicholas Haysom 'Constitutionalism, majoritarian democracy and socio economic rights' (1992) 2 *S. Afr. J. on Hum. Rts.* 451; Craig Scott & Patrick Macklem 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) *University of Pennsylvania Law Review* 1. For the inclusion but only as directive principles: Dennis Davis 'The Case against the Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *S. Afr. J. on Hum. Rts.* 475; Hugh Corder & Steve Kahanovitz & John Murphy et al. *A Charter for Social Justice* (1992) 18-21. Against the inclusion of any positive obligations in regard of socio-economic rights: South African Law Commission, *Project 58: Group and Human Rights Interim Report* (1991) 500 ff.

Both parties to the argument posed the question as going to the very legitimacy of the bill of rights in particular and the constitution in general.⁹¹ For the proponents, the inclusion of socio-economic rights was essential as it only would put people in the position to exercise civil and political rights in the first place. They argued that at least a basic set of the most fundamental needs like food, water, shelter, health care and education must be secured, before one can even think about resorting to the ‘first generation rights’ traditionally protected in liberal constitutions. Without such basic resources political and civil rights cannot exist in a meaningful way as citizens would not be able to participate effectively in the democratic process.⁹² Put simply, it might be difficult to exercise the right to freedom of speech or the right to demonstrate for people who are starving. It has therefore been concluded that civil and political rights and economic and social rights are interdependent and indivisible.⁹³

According to the fears of the proponents of the inclusion, the constitution would hardly be considered as fundamental law if it would not recognize the pressing needs of the majority of the population.⁹⁴ Only the guarantee of socio-economic rights could legitimise the new democratic order and would ensure that democratic constitutionalism is promoted within the country. Conversely, a bill of rights that solely contains civil and political rights would be perceived to be a “charter of luxuries” and therefore would discredit its recognition as a charter of fundamental values.⁹⁵ A constitution without socio-economic rights could even be understood to be a document established in advance by a privileged white minority to defend the *status quo*, guarantee property rights and limit the capacity of a meaningful redistribution of wealth and thus amount to a “bill of whites” rather than a bill of rights.⁹⁶

This argument must be considered against the backdrop of the situation of the country during the late 1980s and early 1990s. Almost 90 percent of the country’s land area was reserved by law for whites only, including all the central business districts

⁹¹ Etienne Mureinik op cit note 90, 465.

⁹² Nicholas Haysom op cit note 90, 452.

⁹³ Pierre de Vos op cit note 57, 71. The idea that social and economic rights are indivisible from and interdependent with civil and political rights was recognized at the international conference on human rights in Vienna in 1993 for the first time. Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993, UN Doc A/CONF. 157/23 at page 5.

⁹⁴ Nicholas Haysom op cit note 90, 454.

⁹⁵ Etienne Mureinik op cit note 90, 465.

⁹⁶ Albie Sachs op cit note 4, 1382.

and leafy suburbs.⁹⁷ The state enforced racial separation which allowed for extensive accumulation of resources and power by a racially-defined minority what altogether led to a level and form of inequality and a lack of opportunity for the vast majority of the population incomparable to other countries.⁹⁸ Furthermore, the extreme social inequality was a direct result of the State policies under Apartheid.⁹⁹ Against this background, there was an urgent need for the new constitution to address and overcome the gross legacy of apartheid *inter alia* through the inclusion of socio-economic rights.¹⁰⁰

The necessity to address the legacy of apartheid was not denied by the opponents of the inclusion, however, they did not believe that socio-economic rights were the right tool to legitimise the constitutional project.¹⁰¹ Quite to the contrary, they thought that the inclusion of economic and social rights in the bill of rights would bring the whole document into disrepute. Based on the assumption that socio-economic rights are unenforceable, they argued that their constitutional inclusion as part of the bill of rights would promise something which cannot be delivered. From their point of view, this could be seen as a form of “constitutional fraud”.¹⁰² To call something a legal ‘right’ and consequently include it in a bill of rights, which in the end turns out to be unenforceable would undermine the law’s commitment to enforcing rights. Thereby, socio-economic rights would offset any ‘legitimation’ these rights confer and discredit the bill of rights as a whole.¹⁰³

The constitution should be honest regarding the satisfaction of the socio-economic needs of the population and treat them as political objectives rather than enforceable rights. Therefore, according to Dennis Davis,¹⁰⁴ the only way to incorporate socio-

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Nicholas Haysom op cit note 90, 454.

¹⁰⁰ Albie Sachs op cit note 4, 1382-84. The systematic violations of socio-economic rights which occurred during the apartheid era are described by Sandra Liebenberg *Socio-Economic rights, adjudication under a transformative constitution* (2010) 2-7.

¹⁰¹ Dennis Davis op cit note 90, 475.

¹⁰² Nicholas Haysom op cit note 90, 455.

¹⁰³ This form of systematic discrediting of the bill of rights could for example been observed in the German Democratic Republic and other former Soviet republics, where socio-economic rights were provided to a great extent but only existed on paper and did not lead to the satisfaction of the socio-economic needs of the population. However, the same was true for the guaranteed civil and political rights in these countries.

¹⁰⁴ Dennis Davis op cit note 90, 475. See also Hugh Corder & Steve Kahanovitz & John Murphy et al. op cit note 90, 18-21. While these authors rather focus on the institutional (in)competence of the judiciary to enforce those kind of rights, Davis is focusing more on the point that the enforcement would give the judiciary too much power and could thus erode the democracy.

economic ‘rights’ in the constitution would be as directive principles as it has been done, for instance, in India, Namibia or Ireland.¹⁰⁵ These directives of state policy can still function as interpretative guidelines for the legislature and executive as well as basic principles of judicial review, but, at the same time uphold the distinction between politics and rights.¹⁰⁶ Hence, implementing socio-economic ‘rights’ as directive principles in the constitution is appropriate to hold the government accountable for the fulfilment of the socio-economic needs of the population and thereby maximising the allocation of equal political power to the citizenry without amounting to a constitutional promise which cannot be kept.¹⁰⁷

The heart of the dispute was thus not whether socio-economic rights should be incorporated in the Constitution, but rather how they should be incorporated: As a justiciable part of the Bill of Rights or as mere directives of state policy.¹⁰⁸ Put differently, the difficulty with socio-economic rights lies not within their general recognition but in their justiciability.¹⁰⁹ It had been said for a long time that economic, social and cultural rights – unlike their civil and political counterparts – are not capable of being enforced by courts.¹¹⁰ With some variations, there are three major arguments against the justiciability of socio-economic rights.

First of all, it is said that the content of socio-economic rights is too vague and indeterminate and therefore cannot be tested in court.¹¹¹ This assumption is based on a comparison between the content of civil and political rights on the one hand, and socio-economic rights on the other. While the courts are capable to interpret the content of civil and political rights – for instance for the application of the right of freedom of expression by defining the term “expression” –, it should not be possible for the courts to give a similar sensible meaning to socio-economic rights, like health-care or housing, which can be used as a legal standard in a courtroom. This is because

¹⁰⁵ As a negative historical example one can add the Constitution of the Weimar Republic, where several socio-economic rights were included as directives of state policy, imposing affirmative duties on the state, but did not gain any binding influence on the legislature.

¹⁰⁶ *Ibid* at 486-90.

¹⁰⁷ *Ibid*.

¹⁰⁸ Albie Sachs *op cit* note 4, 1384.

¹⁰⁹ Iain Currie & Johann De Waal (eds) *The Bill of Rights Handbook* 6th ed (2013) para 26.2; Pierre de Vos & Warren Freedman (eds) *South African Constitutional Law in Context* (2014) 687.

¹¹⁰ Maurice William Cranston *What are Human Rights* (1993); Egbert Willem Vierdag ‘The Legal Nature of the Rights granted by the International Covenant on Economic, Social and Political Rights’ 1978 *Netherlands Yearbook of International Law* 103; Christian Starck ‘Europe’s Fundamental Rights in the Newest Garb’ 1982 *Human Rights Law Journal* 116.

¹¹¹ Joseph Joconelli *Enacting a Bill of Rights* (1980) 101 in regard of the right to work.

the fulfilment of these rights requires complex legislation and an elaborate administrative apparatus, and it obviously takes more than one political decision to create a functional health care system or an efficient governmental housing program. Judges should not be qualified to define how these political decisions should be taken and how the socio-economic right concerned should be realised.¹¹²

This argument is closely related to the second claim against the possibility of judicial enforcement of socio-economic rights: the so called ‘positiveness argument’.¹¹³ Civil and political rights emerged as individual liberties directed against (previously unlawful, later unjustified) state intervention. Traditionally, they impose negative duties on the state not to interfere unjustifiably in the content of the right. Thus, they perform a defensive or negative function of protecting the individual against the state and merely require the state to leave one alone. The relatively straightforward way of enforcement of these rights is done via constitutional review which strikes down any unjustified state interference in the content of these rights.¹¹⁴ Conversely, a social or economic right is a positive right which imposes a duty upon the state to provide certain resources and thereby requires the state to take positive action. However, the state can realize its duty in more than one way: The positive obligation created by socio-economic rights provides a meaningful scope of discretion to the legislature and the executive regarding the means to fulfil the right. Due to this fact, the judicial enforcement of socio-economic rights is more complicated than that of civil and political rights. The first obstacle faced by a court is to fashion remedies which can deliver the content of the socio-economic right at all.¹¹⁵ And even if the court is capable of fashioning such remedies, how should the court – which itself lacks democratic legitimacy – review the policy taken by the elected political branches of government in regard of the particular socio-economic right without practically legislating? Such involvement in matters of the legislature raises concerns with regard to the separation of powers.¹¹⁶

The third major objection against the enforceability of socio-economics rights is that their realisation is extreme costly. However, within the institutional framework of a democratic constitution, the allocation of the budget of a society is regularly vested

¹¹² Etienne Mureinik op cit note 90, 467, who raises the three claims in order to rebut them.

¹¹³ Ibid.

¹¹⁴ Bertus de Villiers op cit note 90, 602.

¹¹⁵ Etienne Mureinik op cit note 90, 467.

¹¹⁶ Christian Starck op cit note 110, 116; Ran Hirschl *Towards Juristocracy* (2004).

in the legislature which is democratically elected and the executive which holds a special expertise. Judges, on the other hand, lack the elements of, democratic legitimacy, special expertise and political oversight. Therefore, it should be inappropriate for judges to decide – trough the enforcement of socio-economic rights – how the budget of a society should be allocated.¹¹⁷ Due to the lack of democratic legitimacy and expertise, judges are ‘not qualified to evaluate how much is necessary to spend, nor how much society can afford, nor what its priorities are, or ought to be.’¹¹⁸ The political decision how socio-economic rights are to be realised and how the budgetary of the country is to be distributed should be placed in the governmental branches of the state. Here again, the objection is that judges are not qualified to take these political decisions.

Recapitulating the three major arguments, they all have the same quintessence: The fulfilment of socio-economic rights requires multiple political decisions and there will always be more than one possible way how to realise them. The best way of fulfilment will be a matter of political and economic controversy.¹¹⁹ This makes the judicial enforcement of socio-economic rights relatively complex, at least more complex than the regular judicial enforcement of civil and political rights. Due to this complexity, so the assumption, judges are ill-suited to enforce socio-economic rights as they miss not only expertise but also democratic accountability to choose between the different possible means to realise the right concerned.¹²⁰

However, Etienne Mureinik, who advised the Democratic Party during the constitutional negotiations process, presented a forceful counterargument against these objections. He demonstrated that socio-economic rights are no different from civil and political rights when it comes to their enforcement through judicial review.¹²¹ Hence, the argument against the judicial enforcement of socio-economic rights is, in essence, the same argument against judicial or constitutional review in general.¹²² Put differently, the idea of a judicially enforceable bill of rights is inherently counter-majoritarian irrespective if it only contains first generation rights or civil and political rights and socio-economic rights. In any event, it is not judicial review that appears to

¹¹⁷ Etienne Mureinik op cit note 90, 467.

¹¹⁸ Ibid.

¹¹⁹ Ibid at 467-68.

¹²⁰ Ibid at 468.

¹²¹ Ibid at 469-74.

¹²² David Bilchitz op cit note 21, 131.

be problematic but rather the intensity of this review. And, more importantly, in any case the reach and therefore the enforcement of a constitutional right is far from self-evident.¹²³ Reverting back to the exemplified right of freedom of expression for instance, it is not sufficient for the court to define the term “expression” to perform judicial review. Instead, the court needs to examine whether there is an infringement of the right by a state action and furthermore, if the particular state action can be justified in general or at least in the specific context.¹²⁴ For the question of justification, the right needs to be balanced with other constitutional values which should be achieved by the state action.¹²⁵ Hence, the enforcement of first-generation rights is not as straightforward as it appears to be in the first place. This fact becomes particularly apparent when it comes to the enforcement of equality rights, where the legislature – at least in the situation that the infringement of the right is based on beneficial state measures – has more than one possibility to cure the infringement of the right of equality; either to include the excluded group in the future or to eliminate the grant or subsidy altogether.

Nevertheless, when it concerns the traditional defensive or negative function of protecting the individual against interferences by the state, the enforcement of civil or political rights is still relatively straightforward. But apart from the fact that the development of fundamental rights went beyond this traditional negative function of protecting the individual against interferences by the state,¹²⁶ not all of the so called first-generation rights constitute negative (passive) obligations from the outset. Some of them also impose positive duties upon the state, such as the right to a fair trial, the right to vote or the right to legal representation, which cannot be enforced by striking down unjustified state interference. Therefore, the distinction between civil and political rights as “negative” rights on the one hand and social and economic rights as “positive rights” on the other, cannot be upheld.

Finally, the “expense” argument needs to be addressed. An argument to rebut the objection that judges lack the democratic legitimacy and institutional capacity to decide through the enforcement of socio-economic rights how the budget of a society

¹²³ Etienne Mureinik op cit note 90, 469.

¹²⁴ Pierre de Vos & Warren Freedman (eds) op cit note 109, 359-367.

¹²⁵ Ibid.

¹²⁶ For example, in a lot of countries, the fundamental rights also have some binding impacts (direct or indirectly) for private parties. For South Africa see sec. 8(2) of the Constitution. In Germany the “*Drittwirkung*” of the fundamental rights in private law has been introduced in the seminal *Lüth*-Case. German Federal Constitutional Court 7 BVerfGE 198, 205-206 (*Lüth*).

should be allocated, can again be generated through a comparison between civil and political rights and socio-economic rights: For example, the right to a fair trial requires the state to ensure that there is a court structure, independent judges, a police force as well as a prison system which makes a large claim on the resources of the society if it is to be adequately recognised and properly implemented.¹²⁷ Similarly, the right to vote requires the state to hold regular elections or to repeat the elections in case they are declared void, which can also lead to massive state expenditure. Even the enforcement of a typical political and civil right like the right to demonstrate for example can require the state to secure the demonstration route through the installation of roadblocks or to ensure that the participants of the right of assembly are protected against counter-demonstrations, which can give rise to state expense as well. Hence, the recognition and enforcement of fundamental rights is never for free and yet, despite the resource implications of their decisions, courts have never been criticised or been declared to be incapable of the enforcement of civil and political rights.¹²⁸ The question is, why the courts should not be capable of enforcing socio-economic rights as well, regardless of the budgetary consequences?

However, it has been argued that the important difference between the judicial enforcement of civil and political rights on the one hand and the affirmative aspect of social and economic rights on the other, lies within the size of the budgetary consequences.¹²⁹ Although David Bilchitz, for instance, questions that the enforcement of socio-economic rights will always be significantly higher than the enforcement of civil and political rights by comparing the expense involved in maintaining an electoral system that realizes the right to vote with the expenditure on a feeding scheme,¹³⁰ this argument cannot be totally dismissed. When it comes to the right of access to housing, which lies within the focus of interest of this study, it is beyond doubt that the expenses to provide every citizen access to housing are immense and it is most unlikely that the state will be able to provide necessary housing for the whole population on its own. Even in the City of Vienna during the 1920s, where the state put a lot of money and effort in state-owned social housing, only 10.8 per cent of the population ended up living in such accommodations before a change in

¹²⁷ Dennis Davis op cit note 90, 480.

¹²⁸ David Bilchitz op cit note 21, 129.

¹²⁹ Mark Tushnet 'Social Welfare Rights and the Forms of Judicial Review 82 (2004) *Texas Law Review* 1896.

¹³⁰ David Bilchitz op cit note 21, 129 fn. 98.

governmental leadership stopped the housing programmes in the early 1930s.¹³¹ Therefore, to fulfil the right of access to housing the state needs to cooperate with private persons and companies. Nevertheless, the costs of such cooperation will be immense as well. In Germany, for instance, the Constitutional Court has developed an individually enforceable fundamental right of each person to enjoy the guarantee of a subsistence minimum which is in line with human dignity stemming from Article 1 para 1 and Article 20 of the German Basic Law,¹³² including the right of access to housing,¹³³ the state spent almost 20 billion € in the year 2016 to fulfil this obligation only in regard of housing. By comparison, the costs for the whole judicial system amounted to 13 billion € in the same year.¹³⁴ Hence, the assumption that the fulfilment at least of the positive obligation of socio-economic rights will in general have more budgetary consequences than the fulfilment of civil and political rights is not completely misguided.

Be this as it may, ‘the size of the budget consequences’¹³⁵ still does not give rise to a difference of a decisive weight between civil and political rights and socio-economic rights when it comes to their enforcement through judicial review.¹³⁶ In any case, judges are not the ones determining the overall allocation of resources irrespective of which rights are getting reviewed.¹³⁷ Exercising judicial review does not entail that judges will decide how to draw up the budget themselves without regard to the expertise of the executive and the framework of the legislature.¹³⁸ The original decisions will be made by the democratically elected legislature and implied with the help of the expertise of the executive and these branches will be given a considerable leeway from the judiciary in case that it is necessary to uphold the separation of powers.¹³⁹ The judges will merely review these decisions, not making them whereby both civil and political rights and socio-economic rights function as the standard against which the respective state action is measured and in this way the state is held

¹³¹ Wolfgang Maderthaner ‘Kommunalpolitik im Roten Wien’ 25 (1985) *Archiv für Sozialgeschichte* 247.

¹³² Basic Law of the Federal Republic of Germany 1949.

¹³³ German Federal Constitutional Court 125 BVerfGE 175 (*Hartz-IV-legislation*).

¹³⁴ The figures are available at the website of the Statistisches Bundesamt at <https://www.destatis.de/DE/ZahlenFakten/ZahlenFakten.html>.

¹³⁵ Mark Tushnet op cit note 129, 1896.

¹³⁶ Etienne Mureinik op cit note 90, 469-74.

¹³⁷ David Bilchitz op cit note 21, 130.

¹³⁸ *Ibid* at 131.

¹³⁹ *Ibid*.

accountable.¹⁴⁰ Hence, with the enforcement of socio-economic rights through judicial review judges are acting in a field where they are not missing expertise nor democratic accountability: ‘The application of human rights standards’.¹⁴¹

Mureinik’s arguments together with the ANC commitment to deal with the social and economic legacy of Apartheid¹⁴² eventually led to the inclusion of a wide range of social and economic rights in the final Constitution, the most important of which are sections 26 (housing) and 27 (health care, food, water and social security) and the explicit recognition of the positive and negative dimensions of fundamental rights in section 7(2) of the Constitution that requires that the state to ‘respect, protect, promote and fulfil’ the rights in the Bill of Rights.¹⁴³ The wording of section 26 and 27 of the Constitution closely follows the wording adopted in Article 11 para 1 and Article 2 para 1 of the ICESCR. The reason for that is twofold: One the one hand, this was done to create some degree of consistency between South Africa's domestic policies and laws and its international human rights obligations.¹⁴⁴ On the other hand, the UN Committee’s General Comments would provide a ready source of interpretation for the socio-economic right concerned.¹⁴⁵

However, despite great similarity of the provisions in the ICESCR and the Constitution, they are not identical, which was pointed out by the Constitutional Court in *Grootboom* and will be discussed in detail in the next chapter. At this point, I would like to draw the attention to another aspect in regard of the phrasing of the rights in the Constitution. Notwithstanding the clear declaration of the right of access to housing, health care, food, water and social security as directly enforceable constitutional rights, ‘an echo of the objection to their inclusion’,¹⁴⁶ which has been outlined above, remains in the way the positive obligations of these rights have been formulated. The state is only obliged to ‘take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each

¹⁴⁰ Etienne Mureinik op cit note 90, 472.

¹⁴¹ David Bilchitz op cit note 21, 131.

¹⁴² The ANC promoted the inclusion of socio-economic rights since the beginning of the constitutional negotiations. See Sandra Liebenberg op cit note 100, 7-14.

¹⁴³ A detailed analyses of the different dimensions is provided by Pierre de Vos op cit note 56, 78-91. The different obligations to ‘respect, protect, promote and fulfil’ were first introduced by Henry Shue *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980) 5.

¹⁴⁴ At that time South Africa had already signed and was expected soon to ratify the ICESCR. As a matter of fact, the ratification took place only in January 2015, 20 years later.

¹⁴⁵ Pierre de Vos op cit note 56, 76.

¹⁴⁶ Pierre de Vos & Warren Freedman (eds) op cit note 109, 688.

of these rights.’¹⁴⁷ Hence, the phrasing of the rights took account of the availability of resources and the issue of appropriate forms of enforcement of these rights.¹⁴⁸ In this regard, the ‘careful limitation of the scope and nature of the positive duties imposed by the qualified socio-economic rights [...] seems to be aimed at mediating some of the difficulties with the judicial enforcement of socio-economic rights that those opposed to their entrenchment have raised.’¹⁴⁹

Despite of the (academic) debates gone ahead, the amenability of socio-economic rights to adjudication and enforcement was confirmed early on by the Constitutional Court, although paired with a note of caution as well. In the first Certification judgment the Constitutional Court held:

It is true that the inclusion of socio-economic rights may result in the court making orders that have implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech or the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who were formerly 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 that it results in a breach of the separation of powers [...] We are of the view that these rights are to some extent justiciable [...] At the very minimum, socio-economic rights can be negatively protected from improper invasion.¹⁵⁰

Moreover, in this decision the Constitutional Court dismissed the objections that social and economic rights were not universally accepted, as required by Constitutional Principle II, and that their enforcement would inevitably lead to an infringement of the principle of the separation of powers.¹⁵¹ However, the Constitutional Court did remain silent about how (especially the affirmative dimension of) the socio-economic rights should be enforced. The remaining question thus was how the judiciary in South Africa should enforce those rights that are subject to ‘progressive realisation’ within

¹⁴⁷ Section 27(2) of the Constitution and identical in wording section 26(2) of the Constitution.

¹⁴⁸ Albie Sachs, *Advancing Human Rights in Africa* (1992) 115.

¹⁴⁹ Pierre de Vos & Warren Freedman (eds) *op cit* note 109, 688.

¹⁵⁰ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa* 1996 1996 (4) SA 744 (CC) para 77-8.

¹⁵¹ *Ibid* paras 76-8.

the states 'available resources'. Hence, the debate moved from the question whether to include socio-economic rights in the constitution towards the question how socio-economic rights can actually be adjudicated.¹⁵² This question should be addressed in the next chapter in regard of the right of access to housing in South Africa illustrated by the *Grootboom* case.

IV. JUDICIAL ENFORCEMENT: THE *GROOTBOOM* CASE AND THE REASONABLENESS APPROACH

As already mentioned in the introduction, the *Grootboom* case originated in the forced eviction of the community of Mrs Irene Grootboom by public authorities. Initially, the community – which consisted of 390 adults and 510 children – was based in an informal squatter settlement called Wallacedene which forms part of the Oostenberg municipality and lies on the eastern fringe of the Cape Metropolitan Area.¹⁵³ The residents of the settlement were extremely poor, a quarter of the households in Wallacedene had no income at all, and more than two-thirds earned less than R500 per month during the year 1997.¹⁵⁴ The conditions under which the residents of Wallacedene lived were described by the Constitutional Court as lamentable. 'They had no water, sewage or refuse removal services and only 5% of the shacks had electricity.'¹⁵⁵ Many of the residents had applied for subsidised low-cost housing from the municipality and had been on the waiting list for many years but without hope of being allocated such housing any time soon.¹⁵⁶

After heavy winter rainfall had left their part of the settlement waterlogged at the end of September 1998, the community of Mrs Grootboom decided to move out of Wallacedene onto an adjacent vacant property. The property was privately owned land which was earmarked for low cost housing.¹⁵⁷ On 8 December 1998, the landowner secured an order for an eviction in the Magistrates' court. The members of the community, however, remained on the land beyond the date by which they had been

¹⁵²Theunis Roux op cit note 78, 272; David Landau 'The Reality of Social Rights Enforcement' (2012) 53 *Harvard International Law Journal* 196.

¹⁵³ *Grootboom* supra note 5 para 7.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid para 8.

¹⁵⁷ Ibid.

ordered to vacate as their previous site in Wallacedene had by then already been filled by other persons and they had no other alternative place to go.¹⁵⁸

In March 1999, the landowner returned to court to renew the eviction order. Unlike in the first proceedings, the magistrate appointed an attorney to represent the community. Negotiations between the parties resulted in the grant of an order requiring the community of Mrs Grootboom 'to vacate the property and authorising the sheriff to evict them and to dismantle and remove any of their structures remaining on the land on 19 May 1999.'¹⁵⁹ The magistrate's order also included the negotiated agreement that the parties and the municipality would mediate to identify alternative land for the community, however, the municipality was not party of the proceedings which is why it remained unclear if the municipality was party to the settlement and the agreement to mediate.¹⁶⁰ In the end, no mediation took place and on 18 May 1999 the community was forcibly evicted on expense of the municipality. According to the Constitutional Court, the eviction had been carried out 'prematurely and inhumanely: reminiscent of apartheid-style evictions. The respondents' homes were bulldozed and burnt and their possessions destroyed. Many of the residents who were not there could not even salvage their personal belongings'.¹⁶¹

Rendered homeless, the community members took shelter on the sports field adjacent to the community centre of Wallacedene in the barest of shelters.¹⁶² The attorney acting on behalf of the community wrote to the municipality and described the intolerable conditions under which his clients were living and demanded temporary accommodation for them from the municipality, however, without any satisfying outcome.¹⁶³ Therefore, the community launched an urgent application in the High Court (Cape of Good Hope Provincial Division) and applied for an order requiring all three spheres of government to provide them with 'temporary shelter and/or housing' until they obtained permanent accommodation.¹⁶⁴ One can say that the violation of the negative side of the right to access to housing thus had triggered

¹⁵⁸ Ibid para 9.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid para 10.

¹⁶¹ Ibid para 10.

¹⁶² *Grootboom and others v Oostenberg Municipality et al* supra note 7 at page 5-6.

¹⁶³ *Grootboom* supra note 5 para 11.

¹⁶⁴ *Grootboom and others v Oostenberg Municipality et al* supra note 7 page 2. Initially, the community also applied for an order requiring government to provide them with 'adequate and sufficient basic nutrition, shelter, health and care services and social services', however, this relief was effectively abandoned and therefore not further dealt with in the judgment of the High Court.

positive demands in regard of the right of access to housing, which therefore became subject of the case.

The High Court – based on the guidelines set out in the *Soobramoney v The Minister of Health, Kwazulu Natal*¹⁶⁵ judgment, which was the first case where the Constitutional Court dealt with the enforcement of socio-economic rights – denied any obligation of the government in terms of section 26 of the Constitution and declared the government’s housing programme as rational.¹⁶⁶ However, the High Court held that the children and through them their parents are entitled under section 28(1)(c) of the Constitution to be provided with shelter if the parents are not able to provide shelter to their own children whereby it considered “shelter” to be something less than “housing”.¹⁶⁷ In this regard, the High Court considered ‘tents, portable latrines and a regular supply of water’ as the minimum to fulfil the constitutional obligations under section 28 of the Constitution.¹⁶⁸ The government – namely the municipality of Oostenberg, the Cape Metropolitan Area, the Province of the Western Cape and the national Government – immediately appealed to the Constitutional Court, which first issued an order putting the municipality on terms to provide certain rudimentary services and then addressed the broader issues in an unanimous judgment with a different result in regard of the right of access to housing.¹⁶⁹

(a) Judgment of the Constitutional Court

Before the Court turned to the interpretation of the scope and meaning of the right to access to housing and especially the state’s obligations engendered by section 26 of the Constitution, Yacoob J, writing for the Court, outlined the context in which socio-economic rights and the rights in the Bill of Rights in general need to be interpreted. Like all the other rights in the Bill of Rights, section 26 of the Constitution is subject to a contextual interpretation.¹⁷⁰ This contextual approach of interpretation requires

¹⁶⁵ *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC).

¹⁶⁶ *Grootboom and others v Oostenberg Municipality et al* supra note 7 page 13-4. For the question, which standard of scrutiny – reasonableness or rationality – actually was set out by the Constitutional Court in the *Soobramoney* case see Sandra Liebenberg op cit note 100, 140-41.

¹⁶⁷ *Ibid* at 14-23.

¹⁶⁸ *Ibid* at 24-5.

¹⁶⁹ *Grootboom* supra note 5. The Constitutional Court also reached a different result in regard of section 28 of the Constitution, however, I will focus on the right of access to housing in the following.

¹⁷⁰ *Ibid* para 21. The contextual interpretation by the Constitutional Court is discussed by Iain Currie & Johann De Waal (eds) op cit note 109, 140-45 and by Pierre de Vos ‘The right to housing’ in Danie Brand & Christof Heyns (eds) *Socio-economic rights in South Africa* (2005) 88-9.

the consideration of two different types of context. First, all rights in the Bill of Rights must be understood in their textual setting which requires a consideration of Chapter 2 (which contains the Bill of Rights) and the Constitution as a whole. Second, the rights must be understood in the social and historical context of the country.¹⁷¹ In this regard, the Court refers to the *Soobramoney*-case where Chaskalson P described the social and historical context in which the Bill of Rights is to be interpreted as follows:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.¹⁷²

In regard of the systematic interpretation of the right of access to housing within the Bill of Rights and the whole Constitution, the Court stressed that all the rights in the Bill of Rights are inter-related and mutually supporting and that there is no doubt that the foundational values of the Constitution – human dignity, freedom and equality – are denied to those who have no food, clothing or shelter.¹⁷³ The Court later relied on these values – especially human dignity – when it evaluated whether the community of Mrs. Grootboom is entitled to at least some (individual) relief in form of temporary housing.¹⁷⁴ Furthermore, the Court held that the right of access to housing must be construed in the context of the other socio-economic rights contained in the Constitution.¹⁷⁵

In the following, the Court considered international law – namely the ICESCR – as an interpretation-tool of the Bill of Rights. The consideration of international law when interpreting the Bill of Rights is required by section 39(1)(b) of the Constitution. Thereby, it did not matter that South Africa at the time of the judgment had not yet

¹⁷¹ *Grootboom* supra note 5 para 22.

¹⁷² *Soobramoney* supra note 165 para 8.

¹⁷³ *Grootboom* supra note 5 para 23.

¹⁷⁴ *Ibid* para 83.

¹⁷⁵ *Ibid* para 24.

ratified the Convention¹⁷⁶ as the term “international law” includes non-binding as well as binding law.¹⁷⁷ However, the fact that South Africa had not yet ratified the ICESCR meant that the country was not legally bound by the Convention rights, which limited its relevance for the interpretation of the constitutional rights.¹⁷⁸ The Court stated that in cases where the international law is not directly applicable in South Africa, it still functions as ‘a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary.’¹⁷⁹

The significance of the Covenant and the developed minimum core approach of the Committee for the interpretation of the positive obligation under section 26 of the Constitution was first and foremost emphasised by the Community Law Centre of the University of the Western Cape and the Human Rights Commission, who functioned as *amici curie* in the case.¹⁸⁰ The Court, however, stressed the differences between the relevant provisions of the Covenant and the South African Constitution in regard of the right to housing, which – in the eyes of the Court – limited the influence of the Covenant as an interpretation-tool.¹⁸¹ While the Covenant provides in Article 11 para 1 for a right to adequate housing, section 26 of the Constitution provides for the right of *access* to adequate housing. While the Covenant obliges the states parties to take appropriate steps which must include particularly the adoption of legislative measures, section 26(2) of the Constitution obliges the State to take reasonable legislative and other measures.¹⁸² Nevertheless, the Court did not dismiss the concept of minimum core obligations outright and even considered that there ‘may be cases where it may be possible and appropriate to have regard to the content of minimum core obligation to determine whether the measures taken by the state are reasonable.’¹⁸³ Hence, under particular circumstances, the minimum core concept might be relevant to reasonableness.¹⁸⁴ However, the Court noted critically that the

¹⁷⁶ The ICESCR was signed by South Africa on 3 October 1994. The ratification, however, took place only in January 2015. Nonetheless, the Department of Housing had at least endorsed the UN Committee’s approach in its definition of adequate housing in the National Housing Code, see Kirsty McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 140.

¹⁷⁷ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 35.

¹⁷⁸ Pierre de Vos op cit note 170, 91.

¹⁷⁹ *Grootboom* supra note 5 para 28.

¹⁸⁰ *Ibid* para 17.

¹⁸¹ *Ibid* para 28. However, the Court does not mention that Article 2 para 1 ICESCR obliges the states to take steps to the ‘maximum of its available resources’, while the Constitution only refers to ‘available resources’.

¹⁸² *Ibid*.

¹⁸³ *Ibid* para 33.

¹⁸⁴ Pierre de Vos op cit note 170, 101.

General Comment No. 3 of the Committee does not define what the minimum core actually means¹⁸⁵ and that the definition of a minimum core in the context of ‘the right to have access to adequate housing’ presents difficult questions, given the fact that different groups are differently situated and thus the fulfilment of the right may vary according to the different needs.¹⁸⁶ Unlike the Committee, the Court lacks the requisite information that would enable it to determine the content of minimum core obligations in the context of the South African Constitution and it regards itself unable to collect these information.¹⁸⁷ As can already be inferred from the above cited statement, the Constitutional Court rather considered the question whether the measures taken by the state to realise the right afforded by the state are reasonable as the “real question” in terms of the South African Constitution and thus did not further engage with a possible content of a minimum core in the context of section 26 of the Constitution.¹⁸⁸

Turning to the nature and scope of the state’s obligations engendered by section 26 of the Constitution, the Court first declared that subsections (1) and (2) are related and thus must be read together.¹⁸⁹ According to the Court, subsection (1) aims to delineate the scope of the right whereby the positive obligations of this right are further spelled out in subsection (2).¹⁹⁰ However, the content of the scope of the right to access to housing delineated in subsection (1) of section 26 of the Constitution – as outlined by the Court – remained very vague. Although the Court repeats the fact that the section 26(1) of the Constitution contains a right to access to housing in contrast to the right to adequate housing as it is encapsulated in the Covenant, the ‘significant difference’ between those two rights remains – at least in my opinion – unclear.¹⁹¹ According to the Court, it means that the right of access to housing

entails more than brick and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be dwelling.¹⁹²

¹⁸⁵ *Grootboom* supra note 5 para 30.

¹⁸⁶ *Ibid* para 32-3.

¹⁸⁷ *Ibid* para 32-3.

¹⁸⁸ *Ibid*.

¹⁸⁹ *Ibid* para 34.

¹⁹⁰ *Ibid* para 34 and 38.

¹⁹¹ See also Jessie Hohmann op cit note 23, 98.

¹⁹² *Grootboom* supra note 5 para 35.

The Court thus seems to take the view that the right to access to adequate housing in the Constitution offers or protects more than the right to adequate housing in the Convention. One suggestion is that the ‘right to adequate housing’ primarily concentrates on the provision of affordable housing by the state, while the ‘right of access to housing’ also emphasises the necessity to regulate the relationship between private owners and tenants.¹⁹³ One can even interpret the Court’s view in a broader sense, namely in the sense that the state has an obligation to ensure that it is possible for people to get access to housing, which requires from the state much more than just to build houses. It requires from the state to put in place a legal framework which enables people to build houses.

Apart from that, Yacoob J only emphasised that the fulfilment of this right may require different measures in regard of different living situations of people and therefore highly depends on the context. The state’s obligation to provide access to adequate housing ‘may differ from province to province, from city to city, from rural to urban areas and from person to person.’¹⁹⁴ Nevertheless, with the above cited passage, the Court at least assigned some – very relative and context-specific – content to the right of access to adequate housing under section 26(1) of the Constitution.

However, as mentioned above, ‘[s]ubsections (1) and (2) are related and must be read together.’¹⁹⁵ This means that the content – in regard of the positive state’s obligations – is subject to the limitations of subsection (2) of the Constitution. According to the Court, ‘subsection (2) makes it clear that the obligation imposed upon the state is not an absolute or unqualified one.’¹⁹⁶ The extent of the positive state’s obligation is rather defined by three key elements: ‘The state is obliged: (a) to take reasonable legislative and other measures; (b) within its available resources; (c) to achieve the progressive realisation of the right.’¹⁹⁷

In this respect, the Court followed the path of the *Soobramoney*-judgment¹⁹⁸ and departs from the classical two-stage approach, which it regularly applies in regard to the limitation of the rights in the Bill of Rights.¹⁹⁹ Under the two-stage approach, the

¹⁹³ Erika de Wet ‘The Constitutional Enforcement of Economic and Social Rights’ (1996) 118.

¹⁹⁴ *Ibid* para 37.

¹⁹⁵ *Ibid* para 34.

¹⁹⁶ *Ibid* at 38.

¹⁹⁷ *Ibid* para 21 and 38.

¹⁹⁸ *Soobramoney* *supra* note 165 para 11, 22. See thereto Sandra Liebenberg *op cit* note 100, 141.

¹⁹⁹ Pierre de Vos & Warren Freedman (eds) *op cit* note 109, 354-55.

‘first question to be asked is whether the provision in question infringes the rights protected by the substantive clauses of the Bill of Rights. If it does, the next question that arises will be whether that infringement is justified.’²⁰⁰ Hence, the two-stage approach requires a court first to examine the content of a right in order to determine whether the right was limited. Only afterwards the court needs to explore whether the limitation of the right can be justified, regularly under the general limitation clause of section 36 of the Constitution.²⁰¹ However, when it comes to the enforcement of the positive obligations of socio-economic rights which are subject to ‘progressive realisation’ within the states ‘available resources’, the Court conflates the two stages into one and treats the internal limitations set out in section 26(2) of the Constitution as part of the determination of the scope of protection of the right.²⁰² As a result, the scope of the positive obligations imposed upon the state under section 26(1) is *a priori* confined through the three elements of section 26(2) of the Constitution. The core enquiry the Court undertakes is thus examining whether the measures taken by the state to realise the right to access to housing were reasonable to achieve the progressive realisation of the right within its available resources.²⁰³

In doing so, Yacoob J stated that ‘reasonable legislative and other measures’ must be determined in light of the fact that the Constitution creates different spheres of government. Therefore, a reasonable programme to achieve access to housing must clearly allocate responsibility to the different tiers of government and create a co-ordinated and comprehensive policy which is adequate to meet the state’s section 26 obligations.²⁰⁴ As the state is required to take ‘reasonable and other measures’, mere legislation is not sufficient.²⁰⁵ National and provincial government must rather ensure that the executive obligations imposed by legislation are met. Hence, policies and programmes must be reasonable in both their conception and their execution.²⁰⁶

²⁰⁰ *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) para 18.

²⁰¹ Pierre de Vos & Warren Freedman (eds) *op cit* note 109, 355.

²⁰² This position was underlined in the *Minister of Health v Treatment of Action Campaign (No. 2)* 2002 (5) SA 721 (CC) para 30 (hereafter referred to as ‘TAC’), where a unanimous Court held that the two subsections of section 27 of the Constitution must be read together as defining the scope of the right and the corresponding obligation on the state.

²⁰³ *Grootboom* *supra* note 5 para 38.

²⁰⁴ *Ibid* para 39-40.

²⁰⁵ *Ibid* para 42.

²⁰⁶ *Ibid* paras 40, 42.

Overall, the state's 'programme must be capable of facilitating the realisation of the right.'²⁰⁷

To determine whether the measures taken by the state are reasonable, it will also '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.'²⁰⁸ It must balance short, medium and long-term needs and must be flexible in this regard.²⁰⁹ Most importantly, '[a] programme that excludes a significant segment of society cannot be said to be reasonable.'²¹⁰ At this point of the judgment, the Court considers the context of the Bill of Rights as a whole and the interpretation clause of section 39(1)(a) of the Constitution for the interpretation of reasonableness. The result of this consideration is not equated with the minimum core obligation; however, it requires from the state to provide at least some form of relief for those desperately in need of access to housing:

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 it most in peril, must not be ignored by the measures aimed at achieving 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. [...] If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.²¹¹

All in all, the Court offered several elements, which need to be taken into account, when measuring the reasonability of the state's action taken to fulfil the right of access to housing. Although the Court did not provide a comprehensive definition of reasonableness and states that '[r]easonableness must be determined on the facts of each case'²¹², it outlined the notion of reasonableness through these elements. Nevertheless, the vagueness of these elements creates a wide range rather than a

²⁰⁷ Ibid para 41.

²⁰⁸ Ibid para 43.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid para 44.

²¹² Ibid para 92.

precise point for the legislature and the executive when it comes to the progressive realisation of the right within the state's available resources. Moreover, Yacoob J emphasised the discretion of the democratic legislature and the executive in regard of the decision which measures should be adopted for realisation of the right. The concept of reasonableness allows the legislature and executive to decide on the measures that need to be taken in realising the right to access to housing, as long as it falls within the wide latitude of reasonableness as outlined by the Court:

A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.²¹³

In regard of the phrase 'progressive realisation', which was taken identical in wording from Article 2 para 1 of the ICESCR, the Court highlighted 'that it was contemplated that the right could not be realised immediately'.²¹⁴ However, the state must take steps to achieve the goal that the basic needs of all members of the society are effectively met.²¹⁵ In contrast to the minimum core concept of the United Nations Committee, which adoption was essentially rejected by the Court, for the definition of the term 'progressive realisation', the Court relied directly on para 9 of the General Comment No. 3, which imposes an obligation on the state parties to move as expeditiously and effectively as possible towards the full realisation of the Convention Rights and introduces the concept of non-retrogression.²¹⁶ This meaning was explicitly endorsed by Yacoob J as the meaning is 'in harmony with the context in which the phrase is used in our Constitution.'²¹⁷

Finally, the Court considered the last element of section 26(2) of the Constitution – 'within the available resources' – and found that the state is not required to do more to achieve the realisation of the right than its available resources permit.²¹⁸ Like

²¹³ Ibid para 41.

²¹⁴ Ibid para 45.

²¹⁵ Ibid para 46.

²¹⁶ General Comment No. 3 supra note 48 para 9 and page 8 above.

²¹⁷ *Grootboom* supra note 5 para 45.

²¹⁸ Ibid para 46.

Chaskalson P observed in the *Soobramoney* judgement, '[w]hat is apparent from these provisions is that the obligations imposed on the State [...] are dependent upon the resources available for such purposes, that the corresponding rights themselves are limited by reason of the lack of resources.'²¹⁹ Hence, the availability of resources limits the scope of the right of access to housing from the outset. Beyond that and interestingly enough, the availability of resources is also an important factor in determining what is reasonable. Both the content of the right as well as the reasonableness of measures employed to achieve the realisation of the right are governed by the availability of resources.²²⁰

Within this framework, the Court went on and evaluated whether the housing programme that had been adopted by the state was reasonable.²²¹ It found that the state had created a coherently and comprehensive housing programme whose 'medium and long term objectives cannot be criticised'.²²² However, the state's housing programme – at the national level – did not contain any component providing for those in desperate need like Mrs Grootboom and her community in the short term.²²³ 'The absence of such a component may have been acceptable if the nationwide housing programme would result in affordable houses for most needy people within a reasonably short time.'²²⁴ Since it was foreseeable that this was not going to happen, the Court found that the absence of such a component was unreasonable:

The nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the state must provide for relief for those in desperate need. They are not to be ignored in the interests of an overall programme focussed on medium and long-term objectives. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.²²⁵

²¹⁹ *Soobramoney* supra note 165 para 11.

²²⁰ *Grootboom* supra note 5 para 46.

²²¹ *Ibid* paras 47-69.

²²² *Ibid* para 64.

²²³ *Ibid* paras 52, 63, 65, 66.

²²⁴ *Ibid* para 65.

²²⁵ *Ibid* para 66.

Hence, the state's housing programme was declared to be unconstitutional.²²⁶ However, this did not mean that Mrs Grootboom and the other members of her community were automatically entitled to individual relief. Section 26 of the Constitution obliges the state to provide access to housing, but – as outlined above – it does only oblige the state to take reasonable measures within available resources to progressively achieve the realisation of the right. Consequently, the individual has a right, but only a right to demand that the state takes reasonable action to address the housing needs of those individuals who cannot provide for themselves or who need assistance from the state before they would be able to gain access to adequate housing.²²⁷ Section 26 of the Constitution, however, does not entitle any person to claim shelter or housing immediately upon demand.²²⁸

Nevertheless, the Court considered whether the respondents are entitled to at least some relief in form of temporary housing because of their special situations and the governments conduct towards them.²²⁹ At this point, Yacoob J stressed again the importance of the inherent dignity of human beings for the evaluation of the reasonableness of state action. 'The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity.'²³⁰ However, at the hearing of the Court in May 2000 the government had offered some temporary accommodation that was accepted by Mrs. Grootboom and her community, which is why eventually the Court did not need to decide about the question whether the community should be entitled to some relief in form of temporary housing.²³¹ In the end, the Court issued a declaratory order, which required from the state to devise and implement within its available resources a comprehensive and coordinated housing programme, including measures which provide relief for people in desperate need to

²²⁶ The Court held also – rather casually – that the manner in which the eviction was carried out resulted in a breach of the negative obligations of the states as contained in section 26(1) and (3) of the Constitution. Ibid at 88.

²²⁷ Pierre de Vos op cit note 19, 271.

²²⁸ *Grootboom* supra note 5 para 95.

²²⁹ Ibid paras 80-92.

²³⁰ Ibid para 83.

²³¹ Ibid para 91. In regard of this settlement agreement, the Court actually later made a former order which sought to deal specifically with the plight of the community in Wallacedene because of the government's failure to live up to the agreement. See *Grootboom v Government of the Republic of South Africa* CCT 38/00. In this respect Kameshni Pillay 'Implementing Grootboom. Supervision needed' 3(1) (2002) *Economic and Social Rights Review* 13 and Sandra Liebenberg op cit note 100, 400-2.

progressively achieve the right of access to adequate housing.²³² The Court indicated that these measures should be similar, ‘but not necessarily limited to those contemplated in the Accelerated Managed Land Settlement Programme’²³³, which was drafted by the local authority, but was not in force when the case commenced.²³⁴ The monitoring of the fulfilment of the obligations of the judgement and the section 26 obligations in general, however, were left to the Human Rights Commission, which – according to section 184(1)(c) of the Constitution – ‘monitor[s] and assess[es] the observance of human rights in the Republic’.²³⁵

(b) Early praise and emerging criticism – reasonableness between separation of powers and the transformative character of the South African Constitution

The body of literature on the *Grootboom*-case and the reasonableness approach of the South African Constitutional Court appears practically infinite. I will thus focus on the main streams that came up after the judgement. On the one hand, early responses to the judgment inside and outside of South Africa were positive and *Grootboom* was hailed as a victory for the enforcement of the affirmative dimension of socio-economic rights. After the highly controversial discussion concerning the inclusion and justiciability of socio-economic rights before and during the constitutional making process and the somehow disappointing outcome of the *Soobramoney*-case, the Constitutional Court’s judgement reassured the proponents of socio-economic rights that it was willing to adjudicate the positive dimension flowing from these rights. Moreover, the Court was celebrated for setting out an approach that provides a meaningful historically, and textually-conscious content to the right to access to housing without, at the same time, unduly interfering in the sphere of the legislature and executive and thus upholding the separation of powers doctrine.²³⁶ On the other hand, and certainly against the backdrop of South Africa’s continuing situation of housing rights deprivation, but also because of the “stronger” forms of enforcement of socio-economic rights by other constitutional courts later on²³⁷, the judgement and especially the rejection of the minimum core principle attracted criticism. The

²³² *Grootboom* supra note 5 para 99.

²³³ *Ibid.*

²³⁴ *Ibid* para 60.

²³⁵ *Ibid* para 97.

²³⁶ Cass R. Sunstein; Jeanne M. Woods op cit note 19.

²³⁷ David Landau op cit note 152, 230-237.

reasonableness approach was considered to deprive the socio-economic rights of any content and thereby being unable to live up to the transformative promises of the South African Constitution.²³⁸

Looking at the different arguments, one can definitely state that they mirror and continue the discussion which accompanied the inclusion of socio-economic rights in the first place and demonstrate that the duty to facilitate or promote rights, which need only to be realised progressively with reasonable measures and in accordance with available resources, gives rise to the greatest difficulties when it comes to determining breaches and the appropriate standard of judicial scrutiny that should be applied.²³⁹ Regarding the positive responses to the judgment first, it was a scholar from outside South Africa and a former opponent of the inclusion of socio-economic rights into constitutions, Cass Sunstein, who considered the Court's ruling as a 'distinctive and novel approach to socio-economic rights, requiring not shelter for everyone, but sensible priority-setting, with particular attention to the plight of those who are neediest.'²⁴⁰ In his opinion, the approach was respectful of democratic prerogatives and the simple fact of limited budgets and thus offered a middle course between the entitlement of an individually enforceable right and complete non-justiciability of socio-economic rights.²⁴¹ This "weak" form of judicial review²⁴² in regard of the enforcement of socio-economic rights was also praised by Jeanne Woods who saw the decision as an evidence of the possibility of judicial restraint, which at the same time sets out stringent criteria by which the courts can measure states' compliance to socio-economic rights.²⁴³ According to Woods, the Court highlighted the priority status of the right to housing and the plight of those deprived of that right, but left the legislature the ultimate policy decision of how much of the state's resources should be committed to the right to housing and thus found an appropriate way of judicial enforcement of socio-economic rights.²⁴⁴

²³⁸ Dennis Davis 'Transformation: The Constitutional Promise and Reality' 26 (2010) *S. Afr. J. on Hum. Rts.* 85, 94-97. The notion of transformative constitutionalism in regard of South Africa was first introduced by Karl E. Klare 'Legal culture and transformative constitutionalism' 14 (1998) *S. Afr. J. on Hum. Rts.* 146.

²³⁹ Elli Palmer *Judicial Review, Socio-Economic Rights and the Human Rights Act* (2007) 24.

²⁴⁰ Cass R. Sunstein op cit note 19, 127.

²⁴¹ Ibid at 127, 131.

²⁴² For the term see Mark Tushnet *Weak Courts, Strong Rights* (2008) and Tushnet 'New Forms of Judicial Review and the Persistence of Rights- and Democracy based worries' 38 (2003) *Wake Forrest Law Review* 138.

²⁴³ Jeanne M. Woods op cit note 19, 768.

²⁴⁴ Ibid.

Another (positive) understanding of the judgment was offered by Pierre de Vos by inferring from it that socio-economic rights and the right to equality are particularly close together.²⁴⁵ He argues that the reasonableness approach of the Constitutional Court manifests a particular understanding of the role of the Bill of Rights as a transformative document aimed at addressing the deeply entrenched social and economic inequality in the South African society.²⁴⁶ In this understanding, the right to equality and the social and economic rights are two sides of the same coin, which both try to achieve the creation of a society where all people can achieve their full potential as human beings.²⁴⁷ Therefore, when interpreting the social and economic rights of the Constitution, the Court – like in *Grootboom* – has to pay attention to the different social and economic circumstances in which different groups find themselves.²⁴⁸ The fact that the government's housing programme did not provide relief for those in desperate need of access to housing made it unreasonable, and hence an infringement of section 26 of the Constitution. The same result – so argued by De Vos – could have been reached under section 9(3) of the Constitution as the unreasonable exclusion of one whole sector of the society strongly indicated that this exclusion also constituted unfair discrimination.²⁴⁹ Even if one does not concur with the interpretation that the *Grootboom* judgement is centred around substantive equality,²⁵⁰ the identified proximity between the right to equality and the socio-economic rights is certainly undeniable. At least as long as (financial) resources are limited – which is the case in every state – the supply with housing, health care, education etc. is always related to questions of equitable distribution and thus to substantive equality. With the adjudication of these rights, under the notion of unfair discrimination or under reasonableness – one can say – the Court facilitates the transformative character of the Constitution.

However, in the ensuing years, the reasonableness approach has encountered criticism which was probably triggered by the continuing housing deficiencies in South Africa and the fact that the obligations set out in *Grootboom* had been poorly implemented by the government. Two years after the judgment, Kameshni Pillay

²⁴⁵ Pierre de Vos op cit note 19, 258.

²⁴⁶ Ibid at 259.

²⁴⁷ Ibid at 265.

²⁴⁸ Ibid at 267.

²⁴⁹ Ibid at 270.

²⁵⁰ Ibid at 270.

stated that ‘there has been little tangible or visible change in housing policy so as to cater for people who find themselves in desperate need crises situations.’²⁵¹ Most significantly for the public, the judgement failed to change the living conditions of the litigants. In July 2002, the community of Mrs. Grootboom still found itself on the sports field in makeshift shelters.²⁵² Even in the following years the government failed to fully comply with its constitutional obligations flowing from the judgement.²⁵³ Eventually in 2008, Mrs. Grootboom died being only in her 40s while still waiting for formal housing.²⁵⁴ It seemed like the reasonableness approach ‘gives the state such wide latitude that maybe everyone will get the bare minimum in 20 or 30 years. In the meantime, people will live and die with their constitutional rights in their hands.’²⁵⁵ Although research shows that the *Grootboom* judgement actually had not remained without effect on the housing policy of the government and that the reasonable assessment forms part of policy calculations,²⁵⁶ the impression was created that the reasonableness approach was widely unable to protect the poor.

Considering the critique in some more detail, its central argument is that the reasonableness approach failed to develop a substantive interpretation of the right of access to housing due to the lack of engagement with section 26(1) of the Constitution and is thus unable to protect those who are deprived of even a minimum essential level of housing.²⁵⁷ The alleged failure to develop the normative content of the right to access to housing has been criticised based on different arguments. First, it was contested that section 26(1) of the Constitution, which, on its face, is only qualified through the word ‘adequate’ should merely entitle the individual to positive state

²⁵¹ Kameshni Pillay op cit note 231, 13-14.

²⁵² Claire Bisseker ‘Nought for their Efforts’ *Financial Mail* 5 July 2002.

²⁵³ The development in detail is outlined by Malcom Langford ‘Housing Rights Litigation’ in Malcom Langford & Ben Cousins & Jackie Dugard & Tshepo Madlingozi (eds) *Socio-Economic Rights in South Africa. Symbols or Substance?* (2014) 195-198.

²⁵⁴ Christopher Mbazira ‘Non-Implementation of Court Orders in Socio-Economic Rights Litigation in South Africa: Is the Cancer Here to Stay?’ 9(4) (2008) *Economic and Social Rights Review* 3.

²⁵⁵ This is the arguing of the *amici curie* in the *TAC* case. The *amici* were the Community Law Centre (UWC) and the Institute for Democratic Alternatives in South Africa (IDASA). Quoted in Jonny Steinberg ‘Obeying letter rather than spirit of the law?’ *Business Day* 8 May 2002.

²⁵⁶ Malcom Langford op cit note 253, 199-204. The positive impacts has also been acknowledged by the critics of the decision. For instance, David Bilchitz op cit note 20, 22 and Danie Brand op cit note 20, 33-4.

²⁵⁷ Danie Brand; David Bilchitz; Marius Pieterse op cit note 20; Dennis Davis op cit note 238; David Bilchitz op cit note 21; Marius Pieterse ‘Coming to terms with judicial enforcement of socio-economic rights’ (2004) 20 *S. Afr. J. on Hum. Rts.* 383; Craig Scott & Philip Alston ‘Adjudicating constitutional priorities in a transnational context: A comment on *Sobramoney*’s legacy and *Grootboom*’s promise (2000) 16 *S. Afr. J. on Hum. Rts.* 206; David Bilchitz ‘Giving socio-economic rights teeth: The minimum core and its importance’ (2002) 118 *SALJ* 484.

actions which are limited through subsection (2). According to the *amici curiae* in the *Treatment Action Campaign* case, section 26(1) of the Constitution should rather entitle to a self-standing right, which imposes independent obligations in form of a minimum core obligation on the state.²⁵⁸ The Court, however, held that the textual formulation of section 26 (and section 27) of the Constitution did not support this interpretation of a self-standing right.²⁵⁹ As emphasised in the *Grootboom* judgement, section 26(1) and section 26(2) of the Constitution ‘are related and must be read together’.²⁶⁰ Hence, there is no self-standing right provided by section 26(1) of the Constitution imposing positive obligations on the state beside the positive obligations limited through section 26(2) of the Constitution.

Although the Constitutional Court by reasoning in this way offers one plausible textual reading of section 26 of the Constitution, one can certainly criticize the consequences the Court draws from this systematic interpretation. As mentioned above, the Court not only reads the two subsections together, it also conflates the two stages of the approach – which it regularly applies in order to examine whether a limitation of a right of the Bill of right is justified, the threshold stage and the justification stage – into one. Instead of (neatly) outlining the content of the right of access to housing before examining the justification of its limitation, the Court rather took section 26(2) of the Constitution and the reasonableness approach as a starting point for its enquiry, the provision which concerns itself with the limitations on government’s obligations. In doing so – so the allegation goes – the deference owed to the government in defining reasonable measures is unduly expended to the state in defining the content of the right itself – a manoeuvre which is unsupported by the wording of section 26 of the Constitution.²⁶¹ As David Bilchitz points out, the word ‘reasonable’ refers to the word ‘measures’ in section 26(2) of the Constitution and not to the right itself.²⁶² Hence, the Court is obliged first to define the content of the right and only afterwards proceed to an evaluation of the reasonableness and the government’s progressive realisation of the right.²⁶³ ‘The *measures* the government adopts must be reasonable in relation to the objective it seeks to achieve, which is to

²⁵⁸ *TAC* supra note 202 paras 26-9.

²⁵⁹ *Ibid* paras 30-2.

²⁶⁰ *Grootboom* supra note 5 para 34.

²⁶¹ David Bilchitz op cit note 21, 143; Jessie Hohmann op cit note 23, 100. Also critical in regard of the deferential approach of the Court Kirsty McLean op cit note 176, 210-11.

²⁶² David Bilchitz op cit note 21, 143.

²⁶³ David Bilchitz op cit note 20, 10.

realise the right of access to adequate housing. This enquiry requires the specification of some content to the right, independently of the notion of reasonableness'.²⁶⁴ The Court by applying the reasonableness approach treats the internal limitations set out in section 26(2) of the Constitution in regard of the measures as part of the determination of the content of the right and thus mingles means and objection.

However, the differentiation between means and content of the right is not an easy task when it comes to the enforcement of affirmative duties of the state. As far as the negative dimension of a fundamental right is concerned, the enquiry of reasonableness including proportionality regularly functions as a limitation of state power in order to protect the individual rights bearer. Put differently, the state is not allowed to use means which unduly infringe the right, which is measured *inter alia* by the standard of reasonableness.²⁶⁵ Conversely, in section 26(1) and (2) of the Constitution where the positive dimension of the right of access to housing is concerned, reasonableness functions as a description and yet limitation of the state's obligations in order to fulfil the right. The state must (only) use reasonable measures to fulfil the right, no more and no less. Although it is related to the term 'measures', reasonableness thus indirectly functions as a limitation of the right as well as the term 'within its available resources' and the 'progressive realisation'.

As long as one will not follow the suggestion of the *amici curiae* in the *TAC* case and assume that section 26(1) gives a free-standing right unattached from section 26(2) of the Constitution, there is, however, still one other interpretative way to prevent that reasonableness and the other limitations is "eating away" the content of the right to access to housing: Section 26(1) of the Constitution must entitle the individual at least to a minimum core consistent with the maintenance of human dignity, which cannot be limited through subsection (2). Following this interpretation, section 26(1) and 26(2) of the Constitution may still be read together, however, the limitations set out in subsection (2) must be construed under consideration of the minimum core obligations. Although the concept has had its share of critics as well,²⁶⁶ which *inter alia* objected that the minimum core concept creates the danger that courts will

²⁶⁴ David Bilchitz op cit note 21, 143.

²⁶⁵ Ultimately the standard is proportionality. See Pierre de Vos & Warren Freedman (eds) op cit note 109, 349-354.

²⁶⁶ The criticism is summarised in Sandra Liebenberg op cit note 100, 165-73 and in Liebenberg 'Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate' in Stu Woolman & Michael Bishop *Constitutional Conversations* (2008) 303, at 310-19.

transgress the boundaries of their institutional legitimacy and competence and thus would undermine the separation of powers doctrine,²⁶⁷ the minimum core approach is – in the eyes of its proponents – better suited than the reasonableness approach to provide content to the right to access to housing and thereby to protect those who are deprived of even a minimum essential level of housing. According to its proponents, most prominently David Bilchitz, the minimum core shifts the emphasis to the development of the normative content of the right to access to housing and away from the disproportionate focus on the limitation of the right.²⁶⁸

Under the minimum core concept, the state should be obliged to ensure that individuals are not exposed to the general conditions that threaten their survival ('minimum interest').²⁶⁹ In regard of the right of access to adequate housing this would, according to Bilchitz, 'amount to having at least minimal shelter from the elements such that one's health and thus one's ability to survive are not compromised.'²⁷⁰ This would require 'that individuals can at all times have access to accommodation that offers protection from the elements, sanitary conditions, and access to basic services such as sanitation and running water.'²⁷¹ In addition to that minimum core, section 26(1) of the Constitution should also entitle individuals to a form of accommodation that puts them in a position to flourish and achieve their goals (maximum interest).²⁷² This could, for instance, be achieved by a standard of housing which meets the requirements of adequate housing identified by the United Nations Committee in General Comment No. 4.²⁷³ However, while the fulfilment of this maximum interests ensured by section 26(1) of the Constitution must only be realised progressively, the fulfilment of the minimum core must be addressed as a matter of urgency.²⁷⁴ Only the full realisation of the right should thus be subject to the reservation of progressive realisation in section 26(2) of the Constitution.²⁷⁵ The same

²⁶⁷ Murray Wesson 'Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court' (2004) 20 *S. Afr. J. on Hum. Rts* 284; Albie Sachs 'The judicial enforcement of socio-economic rights' (2003) 56 *Current Legal Problems* 594-596; Mark S Kende 'The South African Constitutional Court's construction of socio-economic rights: A response to the critics' 19 (2003-2004) *Connecticut Journal of International Law* 617.

²⁶⁸ David Bilchitz op cit note 20, 8-9.

²⁶⁹ David Bilchitz op cit note 21, 188.

²⁷⁰ *Ibid* at 187.

²⁷¹ *Ibid* at 188.

²⁷² *Ibid*.

²⁷³ General Comment No. 4 supra note 29 para 8 and page 6 above.

²⁷⁴ David Bilchitz op cit note 21, 193-94.

²⁷⁵ *Ibid*.

should obviously apply for the term ‘reasonable measures’.²⁷⁶ In regard of the term ‘available resources’, the non-fulfilment of the minimum core obligation should also be limited by resource constraints, yet putting a heavy burden of justification on the state to clearly show it had prioritised all its available resources to ensure the fulfilment of its core obligations.²⁷⁷ Hence, the level of scrutiny under the minimum core principle is significantly stricter.²⁷⁸ When defining the state’s available resources, it is even considered to include privately held resources that lie within the control of the state.²⁷⁹ The implications for adjudication are that a court must require particularly weighty reasons by way of justification from the state for a failure to fulfil the minimum core obligations.²⁸⁰

In this way, the minimum core concept should assign a meaningful content to the right of access to housing unlike reasonableness. Rather than only knowing that ‘there must be land, there must be services, there must be dwelling’²⁸¹ in order to fulfil the right, the minimum core concept should offer a more specific standard from which the extent of the citizens’ socio-economic entitlements and the state’s obligations can be measured and adjudicated.²⁸² Moreover, opposed to the reasonableness approach, which has been deemed as an “administrative law model”²⁸³ – although there are some significant differences between the ways reasonableness is applied in administrative law and in the context of socio-economic rights²⁸⁴ – the minimum core concept puts a

²⁷⁶ The question, if and to what degree this term might at least indirectly limit the minimum core obligations is not further discussed as the notion of reasonableness is considered to be only related to the measures. David Bilchitz op cit note 21, 143.

²⁷⁷ Sandra Liebenberg op cit note 100, 149.

²⁷⁸ David Bilchitz op cit note 21, 193-94.

²⁷⁹ Ibid at 229-30.

²⁸⁰ Ibid at 208-213.

²⁸¹ *Grootboom* supra note 5 para 35.

²⁸² Marius Pieterse op cit note 257, 407.

²⁸³ Cass R. Sunstein op cit note 19, 13 introduced this notion. See also Dennis Davis op cit note 237 and Dennis Davis ‘Adjudicating the socio-economic rights in the South African Constitution: Towards ‘Deference Light?’ (2006) 22 *S. Afr. J. on Hum. Rts.* 314, who traces the application of the administrative law instrument back to the conservative legal culture prevailing in South Africa.

²⁸⁴ In administrative law, reasonableness is the standard of scrutiny reserved for the review of administrative action (sec. 33 of the Constitution and sec. 6(2) (h) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA)) which involves rationality and proportionality. While rationality solely requires a rational connection between the achieved purpose and the means, the purpose of proportionality is described as ‘to avoid an imbalance between the adverse and beneficial effects [...] of an action and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end’. See Cora Hoexter ‘Standards of Review of Administrative Action: Review for Reasonableness’ in Jonathan Klaaren (ed) *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (2006) 64. The test of reasonableness in the context of the enforcement of socio-economic rights on the other hand is rather a means-ends-effectiveness-test with a somehow shifting standard of scrutiny. See de Vos, Pierre & Freedman, Warren (eds) op cit note 109, 710. The differences between the administrative law standard

focus on the interests of those whose life circumstances fall below the minimum core level.²⁸⁵ While the reasonableness approach only considers the reasonableness of the steps taken, which leads to a ‘proceduralisation of the socio-economic rights’²⁸⁶, the minimum core concept prioritises the interests of the poor and vulnerable sector of society and thus offers a substantive approach. Phrased *vice versa*, the reasonableness approaches’ only concern seems to be ‘whether government acts in a manner consistent with procedural good governance standards in its attempts to realise socio-economic rights’²⁸⁷ (“input-perspective”) and not whether the outcome of government’s policies will actually provide basic shelter for people (“output-perspective”). Eventually, that leaves the constitutional right of access to housing more or less empty. Under the minimum core concept, conversely, the individual should be entitled to have its basic needs fulfilled instantly with a corresponding obligation imposed on the state. Consequently, the minimum core concept should be better suited to judicially facilitate the right of access to housing and, in addition to that, be in line with international law – namely the ICESCR²⁸⁸ –, the transformative character of the South African Constitution, and especially human dignity.

However, the reasonableness approach – at least in the way the Court applied it in *Grootboom* – can hardly be considered to violate international law or the Constitution either.²⁸⁹ First, the allegation that the Court did not provide *any* content to the right of access to housing is simply not correct. The Court assigned at least *some* content to the right under section 26(1) of the Constitution, even though this content did not adopt the minimum core concept nor the sophisticated definition of ‘adequate housing’ given by the UN Committee.²⁹⁰ Nevertheless, the Court made it quite clear that the right to access to housing involves more than shelter: ‘It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing

and the application of reasonableness in the *Grootboom* case are pointed out by Murray Wesson op cit note 267.

²⁸⁵ David Bilchitz op cit note 21, 144-46.

²⁸⁶ Danie Brand op cit note 20, 33.

²⁸⁷ Ibid at 49.

²⁸⁸ Since South Africa has finally ratified the ICESCR in January 2015, this argument has gained even more importance. However, the signature of the Optional Protocol to the ICESCR which introduces an individual and collective communication mechanism, an inter-state communication procedure and an inquiry procedure has neither been signed nor ratified yet.

²⁸⁹ To evaluate the application of the reasonableness approach in the other Constitutional Court cases (*Soobramoney*, *TAC* and *Khosa*) lies beyond the scope of this dissertation.

²⁹⁰ See General Comment No. 4 supra note 29 and above at page 6.

of all of these, including the building of the house itself.’²⁹¹ The development of this content, however, took place without consideration of the underlying values of the Constitution, namely human dignity, equality and freedom and thus indeed still leaves room for further engagement.²⁹² Moreover, the content only needs to be achieved progressively within the available resources through reasonable legislative or other measures. The question therefore is, if reasonableness diminishes the content which the Court assigned to section 26(1) of the Constitution, leaving it blank in the end. However, this allegation is – at least regarding reasonableness as applied in *Grootboom*, which can certainly be considered to be ‘arguable the farthest reaching of the Court’s socio-economic rights decisions’²⁹³ – equally unfounded. While it is true that the Court found that section 26 of the Constitution only gives a right to demand that the state takes reasonable action to address peoples’ housing needs in general, it still emphasised the need for the state to elevate the plight of those in desperate circumstances while evaluating reasonableness.²⁹⁴ In doing so, the Court did not expressly introduce a minimum core into reasonableness, however, the result almost creates the same ‘net effect’ despite of the remaining dogmatic differences between the two approaches.²⁹⁵ The state is required to provide at least some form of relief for those desperately in need of access to housing.²⁹⁶ In certain situations and under the consideration of human dignity this might even lead to the grant of a fairly instant claim for shelter.²⁹⁷ Hence, it seems as if the basic normative idea behind the formulation of a minimum core content that certain basic needs should enjoy preference over more advanced elements of the right to housing and should thus be addressed as a matter of urgency, can easily be incorporated in the reasonableness approach.²⁹⁸ Thus it can be argued that reasonableness also protects those who are deprived of even a minimum essential level of housing and in this way ensures the (normatively) necessary respect for human dignity. Such ‘[a] jurisprudence which is

²⁹¹ *Grootboom* supra note 5 at para 35.

²⁹² Sandra Liebenberg op cit note 100, 173-227.

²⁹³ Stuart Wilson & Jacki Dugard ‘Constitutional Jurisprudence, The First and the Second Waves’ in Malcom Langford & Ben Cousins & Jackie Dugard & Tshepo Madlingozi (ed) *Socio-Economic Rights in South Africa. Symbols or Substance?* (2014) 41.

²⁹⁴ *Grootboom* supra note 5 at para 66.

²⁹⁵ Sandra Liebenberg ‘South Africa’s evolving jurisprudence on socio-economic rights: An effective tool in changing poverty?’ 6 (2002) *Law, Democracy & Development* 176-77.

²⁹⁶ *Grootboom* supra note 5 para 66.

²⁹⁷ *Ibid* para 83. Stuart Wilson & Jacki Dugard op cit note 293.

²⁹⁸ Danie Brand op cit note 86, 108. See also the discussion in Pierre de Vos & Warren Freedman (eds) op cit note 109, 715-16.

based on a principle that the poorest must be given priority is not a development that should be discarded as being unhelpful to the vision of the Constitution.’²⁹⁹ Therefore, the reasonableness approach is legally defensible and cannot be rejected in the first place from a constitutional point of view. Moreover, the reasonableness approach, at least in the way it was outlined in *Grootboom*, is not ‘entirely toothless’³⁰⁰ and thus not *per se* making the right of access to housing effectively meaningless. Due to its flexibility, it rather enables the Court to enforce even significant changes to social and economic policy.³⁰¹ To answer the research question, it is therefore necessary to have a closer look at some aspects of the judicial review of the right of access to housing other than the approach to the content of the right and to examine whether these aspects hinder the facilitation of the right.

(c) Beyond Grootboom and beyond South Africa – is reasonableness hindering the judicial enforceability of the right of access to housing or are we barking up the wrong tree?

In order to evaluate whether the reasonableness approach makes the right to access to housing “real” or effectively meaningless, in the last part of this chapter, I will have a closer look on the judicial review of the right of access to housing. Though I am well aware that judicial review is by no means the only way that fundamental rights are upheld and, maybe it is not even the most effective one, it is the way that matters in the context of the alleged shortcomings of reasonableness and thereby in the context of this study. What is more, the great value that the Constitution itself attributes judicial enforcement can be inferred from the fact that the South African Constitution – like numerous other constitutions and declarations throughout the world – provides in section 34 the right to access to the courts.

Judicial review regularly serves the facilitation of fundamental rights in two ways: On the one hand, by granting individual relief to the litigant, judicial review has the effect that the rights of an individual in a particular case are upheld (subjective function). On the other, and perhaps more importantly, the judicial review of fundamental rights in a specific case always has a spill-over effect in such a way that the protection of fundamental rights of the individual simultaneously fosters the

²⁹⁹ Dennis Davis, op cit note 283, 318.

³⁰⁰ Theunis Roux op cit note 78, 292.

³⁰¹ Ibid.

validity of the rights in a broader sense (objective function). By deciding the particular case, the courts vindicate the Constitution in general and, by setting out the constitutional standards, they provide guidance to the legislative and executive and thus deter future infringements of the Constitution.

Prerequisites for the fulfilment of both functions are, however, twofold: First, litigants must have access to the Court in the first place or, speaking metaphorically, the door for judicial review by the Constitutional Court has to stand (procedurally) open. Secondly, the Court's rulings need to be effectively implemented. Since courts have no power to execute or implement their own decisions themselves, the effective implementation highly depends on the readiness of the two other branches to follow the Court's rulings. However, the Court can at least influence the implementation of its decisions with the remedy it fashions in a particular case. The awarded remedy can be pivotal for the implementation of a Court's ruling.

In this regard, the *Grootboom* case has been criticised as well. Although the Constitutional Court considered whether Mrs. Grootboom and her community by virtue of their human dignity should be entitled to at least some form of relief,³⁰² it eventually did ultimately not decide this question due to the achieved agreement between the parties.³⁰³ Hence, the Court abstained from ordering any individualised remedy.³⁰⁴ Moreover, the Court – unlike the High Court in the previous procedure in regard of section 28 of the Constitution³⁰⁵ – also abstained from issuing any form of a so called structural or supervisory remedy.³⁰⁶ If the Court had issued such a remedy, it would have meant the Court would be getting involved in monitoring government's compliance with the constitutional requirements outlined in its judgement.³⁰⁷ Such a structural remedy, however, would have additionally required the Court to outline in more detail in its judgement (for example by giving a timeframe) how exactly the government should come to terms with its constitutional obligations flowing from the right of access to housing. Instead, the Court opted for a relatively “weak” form of enforcement by awarding a simple declaratory order, leaving the remedy of the

³⁰² *Grootboom* supra note 5 at paras 80-92.

³⁰³ *Ibid* para 91.

³⁰⁴ Sandra Liebenberg op cit note 100, 400.

³⁰⁵ *Grootboom and others v Oostenberg Municipality et al* supra note 7 at page 26-7.

³⁰⁶ See in this respect Wim Trengove ‘Judicial remedies for violations of socio-economic rights 1(4) (1999) *Economic and Social Rights Review* 9-10.

³⁰⁷ Pierre de Vos & Warren Freedman (eds) op cit note 109, 721.

constitutional defect in its housing programme entirely to the state.³⁰⁸ The Court merely stated that the political branches had the obligation to devise and implement a coherent, coordinated programme including measures which provide relief for people in desperate need to progressively achieve the right of access to adequate housing.³⁰⁹ Furthermore, the supervision of the fulfilment of these obligations was left to the Human Rights Commission, which had promised to ‘monitor and, if necessary, report in terms of these powers on the effort made by the state to comply with its section 26 obligations in accordance with this judgement’.³¹⁰

Whether this statement by the Constitutional Court constituted an actual order or not is disputed.³¹¹ Nevertheless, the Human Rights Commission reported on the implementation. On 14 November 2001, the Commission made a report to the Court concerning the dispute between branches of government over responsibility of implementation and the lack of the clarity over the content of the declaratory order.³¹² The Court, however, refused to further engage with it, declining that it possessed an ongoing oversight role.³¹³ The supervision of the Human Rights Commission eventually did not lead to a satisfactory outcome, at least for the community of Mrs. Grootboom, as shown above.³¹⁴ Consequently, scholars argued that this weak form of enforcement of the positive dimension of the right of access to housing in *Grootboom* was a failure.³¹⁵ Therefore, the idea emerged that in order to be effective, the remedy in socio-economic rights cases needed to be constituted a little less “weak”.³¹⁶

Assessing the socio-economic rights adjudication outside of South Africa and the academically discussed proposals, essentially it is assumed that the two above-mentioned remedies would provide a “stronger” form of socio-economic rights enforcement: First of all, an individualised form of enforcement where the court grants individual relief to the plaintiffs, whose rights are not fulfilled. This form of enforcement is for instance practised by the Colombian Constitutional Court –

³⁰⁸ Ibid, at 721-22.

³⁰⁹ *Grootboom* supra note 5 para 99.

³¹⁰ Ibid para 97.

³¹¹ Sandra Liebenberg op cit note 100, 402-3.

³¹² Malcom Langford op cit note 253, 194.

³¹³ Ibid.

³¹⁴ See above page 37.

³¹⁵ Kameshni Pillay op cit note 231, 13-14.

³¹⁶ Rosalind Dixon ‘Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited’ (2007) 5 *International Journal of Constitutional Law* 391; Dennis Davis op cit note 283, 318.

procedurally applied through an individual complaints mechanism.³¹⁷ Secondly, the application of a structural or supervisory remedy, where the court itself closely monitors and supervises the fulfilment of the rights by the legislative and executive.

In principle, both of these remedies are available in the South African Constitutional Court's 'toolbox': With regard to the violation of the Bill of Rights, section 38 of the Constitution determines that courts must provide 'appropriate relief, including a declaration of rights' in such matters, while section 172 obliges courts to declare invalid any law or conduct inconsistent with the Constitution and also empowers them to provide any order that is 'just and equitable'. These provisions thus give the Court a wide mandate when crafting a constitutional remedy, which would even allow the Court to design new remedies where necessary to 'protect and enforce the Constitution.'³¹⁸ Some guiding principles on how to make use of this mandate were set out by the Constitutional Court in the *Fose* case, dealing with the purpose of constitutional remedies.³¹⁹ According to this judgement, the object of awarding a remedy is not merely to grant relief to the litigant before the court but also to vindicate the Constitution, and to deter its further infringement.³²⁰ Vindication is necessary because harm to constitutional rights, if not addressed, diminishes public's faith in the Constitution. 'The defence of the Constitution – its vindication – is a burden imposed not exclusively, but primarily on the judiciary.'³²¹ It follows from this purpose of constitutional remedies that in general, they 'are forward-looking, community-oriented and structural rather than backward-looking, individualistic and corrective or retributive.'³²² However, one important consideration for the Court in exercising its discretion is that the remedies it provides need to be effective.³²³

Against this backdrop, the question arises, whether the Constitutional Court should rely on one of the two above mentioned "stronger" remedies in its socio-economic rights adjudication in order to make the right of access to housing "real". Regarding the possibility of an individualized enforcement first, instantly two objections spring to mind. Although individual relief is not necessary related to an

³¹⁷ See in this respect the field study provided by David Landau op cit note 152, 202-29.

³¹⁸ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 19.

³¹⁹ *Ibid.*

³²⁰ *Ibid* para 96.

³²¹ *Ibid.*

³²² Iain Currie & Johann De Waal (eds) op cite note 110, 181.

³²³ *Fose* supra note 318 at para 69. See also Iain Currie & Johann De Waal (eds) op cite note 109, 181-83 were the other important factors relevant to the award of constitutional remedies are listed.

individual complaint mechanism – like the way it exists in Colombia or in Germany with a constitutional complaint allowing citizens relatively easy and inexpensive access to the Constitutional Court³²⁴ –, it seems to fit more naturally in the context of these instruments. The second, certainly more important objection is that the South African Constitutional Court in *Grootboom* expressly stated that section 26 of the Constitution, does not entitle any person to claim shelter or housing immediately upon demand³²⁵ and thus regularly does not entitle to any form of individual relief. The individual has a right, but only a right to demand that the state takes reasonable action in order to fulfil the right.³²⁶ Granting individual relief to the plaintiff is somehow diametral to this approach, because the state's duty is not to immediately provide each and every person with housing, but rather to devise and implement a comprehensive and coordinated plan that will achieve this goal over time.³²⁷ Hence, it seems like the possibility of an individualised judicial enforcement of the right of access to housing is inextricably linked to the fact that the right confers a claim to the individual rights bearer.³²⁸

However, as mentioned above, the Constitutional Court did not rule out the possibility that reasonableness – under certain conditions – could entitle the individual to at least some form of relief.³²⁹ Nevertheless, the granting of an individual remedy fits better to the minimum core concept, which entitles the individual to 'having at least minimal shelter from the elements such that one's health and thus one's ability to survive are not compromised',³³⁰ and thus gives a claim. Surprisingly, the proponents of the minimum core concept – at least their most prominent representative David Bilchitz – do not draw the conclusion that the individual should always be entitled to individualised relief.³³¹ Even if the courts find in favour of the individual because the state is in breach of its minimum core obligations, it should not in any case mean that the courts will grant an order requiring the government to provide the minimum core of the socio-economic right concerned to the individual.³³² On the

³²⁴ See Article 93 para 1(4a) of the Basic Law and Article 86 of Colombia's Constitution of 1991.

³²⁵ *Grootboom* supra note 5 at para 95.

³²⁶ Pierre de Vos op cit note 19, 271.

³²⁷ Pierre de Vos op cit note 169, 98.

³²⁸ For the relationship between (socio-economic)rights and remedies see in detail Christopher Mbazira *Litigating Socio-Economic Rights in South Africa* (2009) 122-130.

³²⁹ *Grootboom* supra note 5 at paras 80-92.

³³⁰ David Bilchitz op cit note 21, 187.

³³¹ *Ibid* at 203.

³³² *Ibid*.

contrary and quite similar to the reasonableness approach of the Constitutional Court, the minimum core concept should entitle to individual relief only under exceptional circumstances.³³³ To someone coming from a constitutional background like in Germany where all subjective public rights and especially the fundamental rights not only entitle to a claim, but also to individualised relief,³³⁴ this is quite remarkable. How is the minimum core concept supposed to ‘give socio-economic rights teeth’³³⁵ if it does not entitle the plaintiff to individualised relief? Effectively, one could argue in the same way as the *amici curiae* in the *TAC* case that a right which eventually does not lead to individual relief for the plaintiffs is a ‘right to nothing at all’,³³⁶ irrespective if it’s content is defined by a minimum core or reasonableness. In this regard, it seems that even the proponents of the minimum core concept – despite of the special emphasis they put on the fact that the Bill of Rights does not distinguish between first and second-generation rights – give way to a different treatment of socio-economic rights. Even if rejected at the rights stage, there seems to exist a double standard in the treatment of socio-economic rights on the remedial level.³³⁷ After all, this seems like an evident acknowledgement of the limited resources of the state, which eventually leads to a different treatment of the right to access to housing and, for instance, the right of freedom of expression when it comes to the remedies.

However, reverting back to the objectives of constitutional remedies under the South African Constitution, individualised enforcement does not seem to be the right path for the adjudication of the right of access to housing. As pointed out by the Constitutional Court, it is the painful reality that hundreds of thousands of people live in deplorable conditions throughout the country comparable to those of the community of Mrs. Grootboom.³³⁸ Due to that fact, the entitlement of individual relief would after all prioritise those individuals who are able and willing to bring their claims to court.³³⁹ Although the Court clearly stated that in the *Grootboom* case there was no evidence whatsoever that the community of Mrs. Grootboom ‘moved out of the Wallacedene settlement and occupied the land earmarked for low-cost housing development as a

³³³ Ibid at 205.

³³⁴ Werner Heun *The Constitution of Germany* (2011) 144-46.

³³⁵ David Bilchitz op cit note 257, 484.

³³⁶ Quoted in Jonny Steinberg op cit note 255.

³³⁷ Kent Roach ‘The Challenges of Crafting Remedies for Violations of Socio-economic Rights’ in Malcom Langford (ed) *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law* (2008) 46, 58.

³³⁸ *Grootboom* supra note 5 at para 81.

³³⁹ David Bilchitz op cit note 21, 203.

deliberate strategy to gain preference in allocation of housing resources³⁴⁰, individualised relief might generally encourage such behaviour. By granting individual relief in socio-economic right cases, the courts would effectively reward “queue jumpers” and would render them better off than others facing the same situation. As a matter of fact, individualised enforcement of socio-economic rights thus tends to disproportionately benefit middle and upper-class groups rather than the poor³⁴¹ and thus has a problematic equality-dimension. Moreover, if the courts make several separate orders which require the provision of access to housing to particular individuals, the government will be prevented from developing any coherent policy in regard of the provision of access to housing for the society as a whole.³⁴² While individually considered the remedy might thus be effective, the enforcement of the right of access to housing in general will be worse off. Hence, individualised enforcement in general seems to be inappropriate for the adjudication of the right of access to housing under the South African Constitution. As the Constitutional Court rightly determined in *Grootboom*, only exceptional circumstances in a particular case could justify to grant individual relief to the plaintiff, for example, if the delayed relief would have a serious impact on the plaintiff.³⁴³ Given the fact that constitutional remedies should be ‘forward-looking, community-oriented and structural rather than backward-looking, individualistic and corrective or retributive’³⁴⁴, in any case, immediate individual relief for the litigants needs to be combined with a more general group-based and systematic remedy.³⁴⁵

Therefore, I will now turn to the other form of “strong enforcement”, the so called structural or supervisory remedies – where the court itself closely monitors and supervises the fulfilment of the right by the legislative and executive – in order to examine whether this form is better suited for the adjudication of the right of access to housing in the South African constitutional context.³⁴⁶ Whereas this remedy in regard of the judicial enforcement of socio-economic rights is vividly discussed in academics,³⁴⁷ it has been barely practised by constitutional courts around the world

³⁴⁰ *Grootboom* supra note 5 at para 81.

³⁴¹ David Landau op cit note 152, 230.

³⁴² David Bilchitz op cit note 21, 203.

³⁴³ Sandra Liebenberg op cit note 100, 408.

³⁴⁴ Iain Currie & Johann De Waal (eds) op cite note 109, 181.

³⁴⁵ Kent Roach op cit note 337, 57.

³⁴⁶ In detail Christopher Mbazira op cit note 328, 198-225.

³⁴⁷ David Landau op cit note 152, 235 is even calling it ‘the pipe dream of academics’.

with the Indian Supreme Court being the only exception.³⁴⁸ The reason for that is twofold: First, it is contested whether constitutional courts possess the sufficient capacity to issue such an order as the supervision of a structural remedy is time-consuming, expensive and certainly demands a tremendous amount of legal and political skills from the judiciary.³⁴⁹ This claim, no doubt, is valid, but it does not disqualify structural remedies in principle. How much of the court's capacities will be tied up by monitoring government's compliance with the constitutional requirements, will rather depend on the specific content of the structural order. Hence, the court itself can influence how time-consuming and expensive the supervision of the fulfilment of the judgement will be. However, in order to make the structural injunction effective, the frequency and the detail of the court's supervision cannot be too lax. As a minimum requirement, the order needs to contain a concrete timeframe, making clear as to when the government needs to tackle the constitutional requirements elaborated in the respective judgment.³⁵⁰

The second concern, which is somehow related to the first, is that the courts lack the legitimacy to issue a supervisory order. However, as mentioned above, sections 38 and 172 of the Constitution empower a court to issue any order which is 'just and equitable' and thereby give the Court an extremely wide mandate when crafting a constitutional remedy. Hence, the Court is constitutionally mandated not only to identify the violation of a constitutional right but also to define the steps that must be implemented in order to cure this violation as long as the order leaves the responsible state agency the opportunity to choose the means of compliance.³⁵¹ As the Constitutional Court itself stated in the *TAC* judgment: 'Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. [...] Where necessary this may include [...] the exercise

³⁴⁸ Supreme Court of India *People's Union for Civil Liberties v. Union of India & Others* Writ petition no 196 of 2001 (May 8, 2002). See also the structural remedy of Davis J made in the High Court judgement in the *Grootboom* case. *Grootboom and others v Oostenberg Municipality et al* supra note 7 at page 26-7. The High Courts of South Africa have actually granted supervisory orders in various cases.

³⁴⁹ David Landau op cit note 152, 236.

³⁵⁰ For the different forms of structural remedies see Christopher Mbazira op cit note 328, 176-92.

³⁵¹ Wim Trengove, 'Judicial remedies for violations of socio-economic rights 1(4) (1999) Economic and Social Rights Review 9.

of supervisory jurisdiction.³⁵² Worries about the Constitutional Court's legitimacy in regard of the possibilities to fashion a supervisory order are therefore misplaced.³⁵³

When critics raise doubts about the court's institutional legitimacy, however, they do not only refer to the preservation of the separation of powers doctrine, but also to the preservation of the institutional independence of the Constitutional Court. This takes note of the fact that constitutional courts are political or strategic actors and operate in a political context which imposes significant constraints on their ability to adjudicate cases (only) according to law.³⁵⁴ As Theunis Roux has shown for the South African context, especially constitutional courts in a completely new established or even a young democracy find themselves in a very vulnerable position.³⁵⁵ In order to ensure their institutional independence and their continued existence, they can neither risk to place themselves in a direct collision course with the government nor to act completely against the public opinion.³⁵⁶ However, considering the progressive way in which the South African Constitutional Court recently tries to ensure that the legislature retains some autonomy from the ANC's internal decision-making bodies,³⁵⁷ it is safe to say that today the Court is beyond that stage and finds itself in a secured institutional position. There is no reason to assume that the Court would put its institutional position into jeopardy if it adjusted its socio-economic rights adjudication on the remedial stage by using structural remedies. As long as the Constitutional Court stays within its constitutional mandate and leaves the actual implementation of the judgment to the democratic process, it is capable to fashion a "strong" remedy and safeguard its own constitutional role at the same time.

³⁵² TAC supra note 202 at para 106.

³⁵³ David Bilchitz op cit note 21, 166.

³⁵⁴ Theunis Roux op cit note 78, 397. See also Ran Hirschl & Evan Rosevear 'Socio-economic rights and Political Realities' in Tom Campbell & Keith Ewing & Adam Tomkins *The Legal Protection of Human Rights. Sceptical Essays* (2011) 207, 223-28.

³⁵⁵ Theunis Roux op cit note 78, 105-8.

³⁵⁶ A striking example in this regard is the Hungarian Constitutional Court which put itself in the direct line of fire against the government through a very progressive social rights jurisprudence in the late 1990s and is nowadays facing a lot of political pressure including a limitation of the Court's jurisdiction. More instances of this kind of backlash are listed by Ran Hirschl & Evan Rosevear op cit note 354 at 224-25.

³⁵⁷ For example, *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC); *United Democratic Movement v Speaker of the National Assembly and Others* 2017 (5) SA 300 (CC) and most recently *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* (CCT76/17) [2017] ZACC 47, where Mogoeng JC in his dissenting vote, however, is calling the majority judgement 'a textbook case of judicial overreach' (para. 223 of the judgement).

The big advantage of a structural order is the Court's retention of jurisdiction over the case even after the judgment has been passed, which makes it likely to be more effective than purely declaratory orders.³⁵⁸ Moreover, by asking the state to report back to the Court at a later stage, the Court could assist the government to comply with the requirements set out in the judgment. This should not encourage the Court to hand down a vague judgement in the first place, which only becomes concrete through the Court's explanations during the implementation process.³⁵⁹ However, the continuous supervision of the Court provides for both parties the possibility of reassurance and clarification over the content of the judgement, which eventually could secure the complete and correct fulfilment of the order. When fashioning the structural order, the Court should, nevertheless, bear in mind its own institutional capacities and especially try to prevent to get involved in a protracted battle with the legislative and executive over the content of the judgement. As mentioned above, this will require a skilled and careful fashioning of the remedy.³⁶⁰ Despite these challenges, supervisory remedies should not be regarded as last resort when dealing with the violation of the right of access to housing. Because of the outlined advantages over a simple declaratory order, they should rather be applied on a regularly basis in order to make the judicial enforcement of the right more effective since the outcome of the declaratory order in *Grootboom* has been rather disappointing.³⁶¹ Additionally, in cases where delayed systematic relief will have a serious impact on the plaintiffs, the structural order should be combined with some form of immediate and perhaps interim relief.³⁶²

Unlike the judicial enforcement through a purely individualised approach, the enforcement of the right of access to housing through structural remedies does not equally depend on a steady stream of incoming cases. Their peculiar feature is rather – as mentioned above – that the Court retains jurisdiction over the case even after the judgment has been passed. However, it is still necessary that new cases reach the Court periodically to allow the Court the steady facilitation of the right through judicial review. In this regard, it is conspicuous that after *Grootboom* barely any other cases – where the positive dimension of the right had to be examined – came before the

³⁵⁸ Christopher Mbazira op cit note 328, 181-83.

³⁵⁹ In this direction Murray Wesson op cit note 267, 307. Critical in this regard David Bilchitz op cit note 21, 164-65.

³⁶⁰ David Landau op cit note 152, 236.

³⁶¹ Murray Wesson op cit note 267, 307.

³⁶² Pleading for such a two-track remedial strategy Kent Roach op cit note 337, 57.

Constitutional Court. In the cases where the positive dimension and the reasonableness approach played a role, it was always in the context of the violation of the negative side of the right of access to housing (section 26(3) of the Constitution) through upcoming evictions which invoked the question whether the state was obliged to provide alternative accommodation.³⁶³ The cases, however, did not deal directly with a state's programme, or measures, to realise progressively the right of access to adequate housing.³⁶⁴

According to David Bilchitz, the explanation for this lack of occurring cases in which the plaintiffs claim directly access to housing lies within the reasonableness approach.³⁶⁵ Its "amorphous standard"³⁶⁶, which does not prescribe any content to the right of access to housing, so the allegation, makes it particularly difficult for individual plaintiffs to claim their affirmative constitutional right of access to housing.³⁶⁷ However, the question is, whether the number of cases occurring before the Constitutional Court would be significantly higher, if the Court reverted to the minimum core concept as the standard of scrutiny since numerous other factors equally hinder broader access to the Court.³⁶⁸ Given South Africa's courts structure where the Magistrates' courts – although they are the closest to the people – do not have general jurisdiction over human rights cases, the cost of litigation, and the limited resources available to those who might bring cases dealing with the right of access to housing, it is more likely that an interplay of these factors places an obstacle in the way of ordinary citizens who wish to enforce their right of access to housing through litigation.

For the Constitutional Court, however, it would be procedurally possible under section 167(6) of the Constitution to grant direct access and consequently spare the plaintiff to go through the multiple layers of appeal. Yet, so far, the Court has been very reserved in making use of the direct access mechanism, which would often be the

³⁶³ See for example *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes, Minister for Housing and Minister of Local Government and Housing, Western Cape* 2010 (3) SA 454 (CC) and recently *City of Johannesburg v Blue Moonlight Properties 39 (PTY) LTD and Occupiers of Saratoga Avenue* 2012 (2) SA 104 (CC).

³⁶⁴ Ibid.

³⁶⁵ David Bilchitz 'Expanding Access to Justice for Socio-Economic Rights Complaints in South Africa. Which Direction Should We Head in?' *Völkerrechtsblog* 24 July 2017, available at <https://voelkerrechtsblog.org/expanding-access-to-justice-for-socio-economic-rights-complaints-in-south-africa/>, accessed on 7 January 2017.

³⁶⁶ David Bilchitz op cit note 21, 162.

³⁶⁷ David Bilchitz op cit note 367.

³⁶⁸ These other factors are also identified by Bilchitz, *ibid.*

only way for poor people to benefit the justice system at all.³⁶⁹ In order to increase the low number of cases in which the positive dimension of the right of access to housing plays a role, the Court's strict approach to applications for direct access thus needs to be eased to allow poor litigants to bypass expensive lower-court litigation processes.³⁷⁰ This does not mean that the Constitutional Court should concentrate on safeguarding individual justice in its jurisprudence, which would lie beyond its institutional capacities. However, by granting direct access to cases with principle structural importance, the Court could make the judicial enforcement of the right of access to housing more effective without changing its review standard.³⁷¹

V. CONCLUSION

Since *Grootboom* the reasonableness approach can be considered settled case-law when it comes to the enforcement of the positive duties imposed by the right of access to housing provided in section 26 and the other socio-economic rights provided in section 27 of the Constitution which are subject to 'progressive realisation' within the states 'available resources'. Despite all the criticism against reasonableness and the strong promotion of the minimum core concept, it seems highly unlikely that the Constitutional Court will change its review standard any time soon even though South Africa ratified the ICESR in January 2015. Nevertheless, this does not mean that the right of access to housing is condemned to be effectively meaningless. As it has been shown – at least in the way applied in *Grootboom* and despite some conceptional shortcomings – the reasonableness approach protects those who are deprived of even a minimum essential level of housing. In this way, the reasonableness approach ensures respect for human dignity. Even the basic normative idea behind the formulation of a minimum core content that certain basic needs should enjoy preference over more advanced elements of the right to housing and should be addressed as a matter of urgency can be incorporated in the reasonableness approach as well. The reasonableness approach in itself is thus not only constitutionally

³⁶⁹ Jacki Dugard 'Court of First Instance? Towards a pro-poor jurisdiction for the South African Constitutional Court' (2006) 22 *S. Afr. J. on Hum. Rts.* 261.

³⁷⁰ Theunis Roux op cit note 78, 393.

³⁷¹ Whether a more relaxed approach to applications for direct access would require additional financial and human resources and maybe even some institutional innovations within the Court cannot be further examined here.

defensible but also bears the potential to make the right of access to housing “real” and effective for the individual.

However, in order to realise its full potential, it is necessary that the Constitutional Courts adjust its adjudication of the right of access to housing procedurally and on the remedial stage. Procedurally, the Court should mitigate its strict approach to applications for direct access to allow poor litigants to bypass expensive lower-court litigation processes. More access would bring more structurally important cases before the Court and thus allow permanent judicial review of the government’s efforts to implement the right of access to housing. The progressive realisation of the right could also be monitored by using structural remedies, which would allow the Court to ensure the effectiveness of its once made decisions in a longer term. If crafted in a carefully manner, it seems highly unlikely that the Court, by using this form of “stronger” remedies, would risk its sustainable institutional role. In doing so, the Constitutional Court could reach a broader facilitation of the right of access to housing. However, the mere judicial enforcement itself will never be sufficient to provide the right of access to housing for the poor and disadvantaged if the political branches are at the same time unwilling to do so. Eventually it is up to the legislative and executive branches to live up to the transformative promise of the Constitution and to make the constitutional right of access to housing real.

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