

Reviewing Implementation of Social and Economic Rights: An Assessment of the “Reasonableness” Test as Developed by the South African Constitutional Court

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“It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. 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.”¹

1. Introduction

South Africa is internationally renowned for its modern and progressive Constitution, which was adopted in 1996.² This constitutional document incorporates a comprehensive catalogue of human rights (Chapter 2), including civil and political rights, as well as social and economic rights. The present article intends to focus on the social and economic rights contained in the South African Constitution, in particular on those rights which impose positive obligations on the South African government to ensure their progressive realization.³ These provisions closely resemble those of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the main universal treaty dealing with this set of human rights. It is of particular interest that the realization or lack of realization of the social and economic rights contained in the South African Constitution is subject to scrutiny by the courts. This is unusual because in many legal systems the justiciability of social and economic rights has either not yet been accepted, is underdeveloped or is just starting to emerge.⁴

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¹ *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), para. 83.

² Act 108 of 1996.

³ See in particular Sections 26 on housing and 27 on health care, food, water and social security.

⁴ See the discussion by S. Liebenberg, *The Protection of Economic and Social Rights in Domestic Legal Systems*, in: A. Eide et al., *Economic, Social and Cultural Rights – A Textbook*, 2nd ed., 2001, 55-84.

The South African Constitutional Court has developed a standard of review for assessing compliance with constitutional obligations in the area of social and economic rights by the South African governmental authorities. This standard of scrutiny, the reasonableness test, allows for an assessment of the reasonableness of the measures taken by the government to realize social and economic rights within its available resources. This is a promising development, taking into account the difficulties related to reviewing implementation of positive obligations. One of the main issues in the debate and development of the justiciability of social and economic rights is the question of the extent to which a court may review, reverse or quash decisions and policies decided upon by democratically legitimated bodies, i.e. government and parliament. This touches upon constitutional issues concerning the separation of powers. The Constitutional Court in South Africa has struggled with this dilemma, and has developed the reasonableness test to address issues arising from this question. The present article focuses on what this reasonableness review entails, how it has been applied by the South African Constitutional Court in its case-law to date and its strengths and weaknesses. In addition, the present contribution compares aspects of this method of review with the approach adopted by the United Nations Committee on Economic, Social and Cultural Rights (hereafter the UN Committee or the Committee), the body charged with monitoring implementation of the ICESCR by state parties. Finally, an overall assessment will be made of this method of review, including the potential for cross-fertilization between domestic constitutional law and international human rights law in the area of social and economic rights.

2. The Protection of Social and Economic Rights in the South African Constitution

2.1. The Values Underlying the South African Constitution

Central to a proper understanding of the provisions for social and economic rights in the South African Constitution is to have a close look at the values underlying the Constitution. The Constitution must be viewed against the background of the past, in particular the era of Apartheid and its legacy, and the determination of the drafters of the Constitution to overcome this deplorable history and work towards a society based on democratic values, social justice and fundamental human rights.⁵ This development has been characterized as “transformative constitutionalism”, a process aimed at transforming a society in “a democratic, participatory and egalitarian direction”, in which large-scale social change is to be achieved through non-violent political processes based on the rule of law.⁶ The process of

⁵ See the Preamble of the Constitution.

⁶ K. Klare, Legal Culture and Transformative Constitutionalism, 14 South African Journal of Human Rights (SAJHR) (1998) 146, at 150.

building towards a more just society also implies a transformation of the existing unequal social and economic status quo, with a view to achieving a situation in which the dignity of people is guaranteed and their wellbeing cared for. This mission is reflected in the basic provisions of the Constitution which set out the values underlying the Bill of Rights. These values include human dignity, equality and freedom.⁷ The aims of overcoming the legacy of Apartheid and achieving a more humane, equal and just society has been explicitly recognized by the Constitutional Court. In the *Soobramoney* case, the Court stated:⁸

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.

In *Pretoria City Council v Walker*⁹, the Constitutional Court found that the equality provisions of the Constitution are

premised on a recognition that the ideal of equality will not be achieved if the consequences of those inequalities and disparities caused by discriminatory laws and practices in the past are not recognised and dealt with.

Social and economic rights constitute a manifestation of these values in order to achieve that people can live, work and develop to their fullest potential as human beings. They are also meant to correct the inequalities of the past. Consequently, the Constitution gives ample attention to the protection of those rights.¹⁰ The state must respect, protect, promote and fulfill all of the rights listed in the Bill of Rights.¹¹ These obligations imply both negative and positive duties for the state.¹²

2.2. The Provisions on Social and Economic Rights

In addition to civil and political rights, the Constitution contains extensive provisions on social, economic and cultural rights. These include sections on freedom of trade, occupation and profession, labor relations, the environment, property,

⁷ See Sec. 7(1) Constitution. See also Sec. 1, 9 and 10.

⁸ *Soobramoney v Minister of Health*, KwaZulu-Natal 1997 (12) BCLR 1696, para. 8.

⁹ *Pretoria City Council v Walker*, 1998 (2) SA 363 (CC), para. 46.

¹⁰ P. De Vos, *Grootboom*, The Right of Access to Housing and Substantive Equality as Contextual Fairness, 17 SAJHR (2001), 258-276, at 260-263.

¹¹ Section 7(2) of the Constitution.

¹² For an explanation and application of this typology of obligations, see F. Coomans, The *Ogomi* Case Before the African Commission on Human and Peoples' Rights, 52 ICLQ (2003), 749-760 and the General Comments of the UN Committee on the right to food, education, health and water (see note 87 *infra* for references to UN documents).

housing, health care, food, water and social security, social and economic rights of children, education, language and culture and cultural, religious and linguistic communities.¹³ The present subsection of this contribution will focus on those social and economic rights imposing clearly stated positive obligations on the state for their realization.¹⁴ Although the formulations used in these provisions vary somewhat, a few key categories can be identified.¹⁵ First, there are provisions on the basis of which “everyone has the right to have access to” adequate housing, health care services, sufficient food and water and social security.¹⁶ The state has an obligation to take “reasonable legislative and other measures, within its available resources, to achieve the progressive realization” of these rights.¹⁷ Due to inherent limitations on state resources, these rights may be characterized as “qualified” social and economic rights. Secondly, a number of “unqualified” social and economic rights can be identified. They are unqualified, because they do not contain references to reasonable measures, available resources and progressive realization. These include the right to basic nutrition, shelter, basic health care services and social services, as well as basic education, including adult basic education.¹⁸ Thirdly, subsections 3 of Sections 26 and 27 provide for protection against forced evictions and the refusal of emergency medical treatment respectively. They protect against both state conduct and conduct by private parties in such cases.

An important source of inspiration for drafting the constitutional provisions on social and economic rights was the ICESCR. This is obvious from a comparison of Sections 26 and 27 of the Constitution with the Covenant: they were clearly drafted with the Covenant in mind,¹⁹ in particular Article 2(1), which provides:

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

¹³ Sections 22-31.

¹⁴ Sections 26 on housing, 27 on health care, food, water and social security, 28 on children and 29 on education.

¹⁵ See S. Liebenberg, *The Interpretation of Socio-Economic Rights*, in: S. Woolman et al. (eds.), *Constitutional Law of South Africa*, 2nd ed., Juta, Cape Town – Lansdowne 2004, Vol. II, at 33-5.

¹⁶ Sections 26(1) reads: Everyone has the right to have access to adequate housing. Section 27(1): Everyone has the right to have access to –

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

¹⁷ Sections 26(2) and 27(2) are almost identical: The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right / of each of these rights.

¹⁸ Sections 28(1)(c) and 29(1)(a). Section 29(1)(b) lays down the right to further education, which the state, through reasonable measures, must make progressively available and accessible. This right does not have a reference to “available resources”.

¹⁹ Liebenberg, *supra* note 15, at 33-4, referring to the preparatory work of the Constitution.

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

Differences in formulation and meaning can also be noted. First, Sections 26 and 27 of the South African Constitution provide for the obligation of the state to take reasonable legislative and other measures, while Article 2(1) of the Covenant refers to "all appropriate means, including particularly the adoption of legislative measures". Second, concerning the input of resources, Sections 26 and 27 limit these to the resources available, while the Covenant requires an input to the maximum of the state's available resources. Third, Sections 26 and 27 aim at the progressive realization of the right to housing and health, while Article 2(1) of the Covenant aims at achieving progressively the full realization of the rights. While these differences may seem trivial, we will see later that certain elements have indeed been given a different meaning and interpretation by the Constitutional Court. For now it is sufficient to note that Article 2(1) of the Covenant seems to aim at the realization of an optimal situation in which there is full realization of all of the rights listed in the Covenant. Sections 26 and 27 of the South African Constitution, on the other hand, seem more modest and perhaps more realistic in this respect.

South Africa has signed but not yet ratified the ICESCR, and is therefore not yet a state party to the treaty. Nonetheless, Section 39(1)(b) of the Constitution requires courts to consider international law when interpreting the Bill of Rights. Section 233 also requires courts when interpreting legislation to give preference to any reasonable interpretation which is consistent with international law over any alternative interpretation which is not consistent with international law. Thus, although South Africa has not yet ratified the ICESCR, this treaty may still have an impact on the domestic legal order and may be used by the courts for interpretive guidance. The impact would be much greater however if South Africa were to ratify the treaty and incorporate it into its domestic law, because it would then give rise to binding legal obligations.²⁰

2.3. The Justiciability of Social and Economic Rights

Section 38 of the Constitution provides standing to a large group of claimants to approach a court and allege an infringement or threatened violation of a right laid down in the Bill of Rights. Such a court may grant appropriate relief. Constitutional matters may be dealt with by High Courts, the Supreme Court of Appeal and the Constitutional Court. However, the Constitutional Court is the highest court in all constitutional matters.²¹ When deciding a constitutional matter within its power, a court must declare that any law or conduct inconsistent with the Constitution is invalid to the extent of its inconsistency. In this respect, a court may

²⁰ On the delay in the process of ratification, see C. Heyns/F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, The Hague, 2002, at 546.

²¹ See Sections 165-172 Constitution.

make any order that is just and equitable.²² It would thus seem beyond doubt that social and economic rights are also justiciable and subject to protection by the courts. This was a serious matter of dispute when the new Constitution was subject to a certification procedure before the Constitutional Court. Objections to the inclusion of social and economic rights in the Constitution were supported by the argument that such rights would force the judiciary to encroach upon the domain of the legislature and the executive by dictating how the budget should be allocated.²³ The Court rejected these objections and held that,

it is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights, such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. (...) In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.²⁴

With respect to the justiciability of social and economic rights, the Court was of the opinion that,

these rights are, at least to some extent, justiciable. (...) The fact that socio-economic rights will almost inevitably give rise to such (budgetary) implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.²⁵

The Court thus accepts the justiciability of social and economic rights in principle, limited, as a minimum, to the enforceability of negative obligations, i.e. the obligation not to interfere with the free enjoyment of these rights, or, to put it differently, the obligation to respect these rights. In reference to the Certification Judgment in the *Grootboom* case, to be discussed in the next section, the Constitutional Court observed that since the justiciability of social and economic rights is beyond question, the key issue is how to enforce them in a given case, a difficult question requiring a case-by-case approach.²⁶ Overall it is clear that the courts have an important role to play in upholding the values of the Constitution and granting relief if a human right has been violated. What this means for the protection of social and economic rights will be analyzed in the next section.

²² Section 172(1).

²³ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC), para. 77.

²⁴ *Ibid.*

²⁵ *Ibid.* at para. 78.

²⁶ *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC). All judgments of the Constitutional Court are available at <www.concourt.gov.za>.

3. The Reasonableness Test as Developed by the Constitutional Court

3.1. The Relevant Cases

Before discussing the concept of reasonableness review, it is necessary to provide some information on the relevant cases in which the Court has been called to assess whether governmental authorities had complied with their constitutional obligation to take reasonable legislative and other measures, within their available resources, to achieve the progressive realization of specific social and economic rights. Up to mid 2004, the Court has dealt with four cases in which Sections 26 and 27 of the Constitution were the key provisions requiring interpretation.

The first was the case of *Soobramoney*.²⁷ The appellant was a 41-year-old diabetic man suffering from heart disease, cerebro-vascular disease and irreversible chronic renal failure. His life could be prolonged by means of regular renal dialysis. He sought dialysis treatment from a public hospital in Durban. He was refused this treatment, however, because the hospital did not have sufficient resources to provide dialysis treatment to all patients. Hospital guidelines admitted patients to dialysis treatment only if they were eligible for a kidney transplant. Only patients who were free from significant vascular or cardiac diseases were eligible for a kidney transplant. As Mr. Soobramoney was suffering from ischaemic heart disease and cerebro-vascular disease, he was not eligible for a kidney transplant and consequently also not for renal dialysis. He challenged this decision, relying on Section 27(3) of the Constitution which provides that no one may be refused emergency medical treatment.

The *Grootboom* case²⁸ concerned a group of squatters who had been evicted from a parcel of land in a village in the Western Cape province. As a result they were homeless and were camping on a sports field adjacent to a community centre at the time they filed their complaint. Their living conditions were extremely poor. They sought an order from the municipality where they lived to provide them and their children with adequate basic temporary shelter or housing in premises or on land owned or leased by the state, pending their obtaining permanent accommodation, and to provide sufficient basic nutrition, shelter, health and care services to all of the children of the squatters. Their complaint relied on Sections 26 and 28 of the Constitution, which they argued implied a duty on the part of the state to provide them with basic shelter. They contended that the inability of the state to provide immediate access to adequate housing did not justify failure to take steps to provide some form of temporary housing or shelter however inadequate during the

²⁷ *Supra* note 8. See paras. 1-7 of the Judgement for the facts of this case.

²⁸ *Supra* note 26. The facts of the case are described in the Judgment of the Cape High Court, dealing with this case in first instance, see *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C).

period in which the state implemented its program to provide access to adequate housing.

The third case is known as the *TAC* case,²⁹ named after the principal actor, the Treatment Action Campaign. This case concerned the policy of the South African government to respond to the HIV/AIDS pandemic, in particular with its program concerning mother-to-child-transmission of HIV at birth. For that purpose the government used Nevirapine as a drug. However, the drug was made available as part of a pilot project at only a limited number of research and training sites in the provinces, and consequently to only a limited number of mothers. The applicants contended that these restrictions were unreasonable when seen from the perspective of the South African Bill of Rights, in particular Sections 7(2), 27 and 28(1). The second issue was whether the state, under Sections 27 and 28, had an obligation to plan and implement an effective, comprehensive and progressive program for the prevention of mother-to-child-transmission of HIV throughout the country.

The final cases, known as the *Khosa* case, decided in March 2004, were initiated by a number of Mozambican citizens with permanent residence status in South Africa.³⁰ They were disqualified for social assistance under the Social Assistance Act of 1992 and the Welfare Laws Amendment Act because they are not South African citizens. The applicants contended that the exclusion of all non-citizens from the social assistance scheme was inconsistent with the obligations of the state under Section 27(1)(c) of the Constitution to provide social security to everyone. In addition they argued that their exclusion limited their right to equality under Section 9 of the Constitution and was unfair under that provision. Finally, they contended that their exclusion was unjustifiable under Section 36, which is the general limitations clause of the Bill of Rights.

3.2. The Development and Content of the Reasonableness Test

The main question facing the Constitutional Court in all of the cases mentioned above was how the courts in South Africa could enforce the positive obligations to fulfil incorporated in Sections 26 and 27 of the Constitution, and at the same time respect the constitutional separation of powers. Put differently, the challenge was to find a method of scrutiny of legislation and policy that acknowledges that policy choices and decisions, as well as decisions about the allocation of the budget, are within the competence of the legislative and executive branch of government, while at the same time acting as the institution of last resort to protect the rights contained in the Bill of Rights, including those that imply positive obligations for

²⁹ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC). See paras. 1-22 for the background of this case.

³⁰ *Khosa and Others v the Minister of Social Development and Others* (case CCT 12/03) and *Mablaule and Others v The Minister of Social Development and Others* (case CCT 13/03).

the state. The Court did not have a clear and fixed idea about this at the start, but developed its approach gradually.

In *Soobramoney*, decided in 1997, the Constitutional Court found that Section 27(3) concerning emergency medical treatment was not applicable in that case. However, it went on to analyze the claim of the applicant from the perspective of Sections 27(1) and 27(2).³¹ The Court held that the hospital guidelines on the basis of which Mr. Soobramoney was refused dialysis were not unreasonable, nor that they were applied in an unfair or irrational manner.³² With respect to the extra costs that dialysis for everyone in need would imply, the Court observed that this would require an increase in the health budget, while other needs for which the state was responsible would correspondingly receive fewer resources.³³ This brought the Court to the role of the judiciary in decisions and choices about public funding and spending. This role must be deferential to that of the political organs and the competent medical authorities:

These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.³⁴

The Court was thus not willing to interfere in decisions taken by the competent authorities, if these decisions are taken on rational grounds. This is a rather minimal and not very stringent form of review of the implementation of positive obligations by the state. If there is a rational basis for a decision in relation to its purpose, one that is not arbitrary or capricious, the courts should accept it.

In *Grootboom* the Court developed its reasonableness test. In an analysis of Section 26(2), the Court explained its approach to evaluate whether legislative and other measures taken in relation to the housing policy of the government and the situation of the squatters in the case under review were reasonable:³⁵

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.

Thus a court will not engage in choices and decisions that belong to the competence of the legislature and the executive. Furthermore, a great variety of measures could pass the reasonableness test. The Court went on to lay down the criteria or elements of the reasonableness test. First, a reasonable program must allocate tasks and responsibilities among different spheres of government (national, provincial,

³¹ *Soobramoney*, *supra* note 8, para. 21, 22.

³² *Ibid.*, para. 25.

³³ *Ibid.*, para. 28.

³⁴ *Ibid.*, para. 29.

³⁵ *Grootboom*, *supra* note 26, para. 41

local) and provide them with the necessary financial and human resources to carry out their respective legal obligations created by (housing) legislation.³⁶ Secondly, although legislation will often be required, it is in itself not enough. Legislation must be complemented by policies and programs that are reasonable in conception and implementation. These should be coordinated, coherent and comprehensive. Such policies and programs must be capable of facilitating the realization of a right.³⁷ Thirdly, reasonable measures must take into account the social, economic and historical context and background of the situation which the policy aims to address. In addition, a program must be flexible and cater for the alleviation of (housing) needs over the short, medium and long term. A reasonable program must not exclude a significant segment of society.³⁸ Furthermore, it is essential that for measures to be considered reasonable,³⁹

measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realize. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realization 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 advantage in the realization of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.

Thus the question whether the measures provide for the (housing) needs of the most desperate is crucial in order for the measures to be considered reasonable. The Court explained that “a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately”.⁴⁰ This argument of the Court should be understood from the perspective of the importance the Constitution gives to the inherent dignity of all human beings. This value must be taken into account in the evaluation of the reasonableness of state action.⁴¹ As for the evaluation of state conduct in the case of the *Grootboom* squatters, the Court ruled that the state housing program in the area of the Cape Metropolitan Council fell short of the requirements of reasonable measures, because the program failed to make reasonable provision for people in this area who have no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.⁴² On the basis of the criteria set out by the Court in *Grootboom*, the following example of measures may pass the reasonableness test: a program laying down the benchmarks for the achievement of low-budget housing for people living in

³⁶ Ibid., paras. 39, 40.

³⁷ Ibid., paras. 41, 42.

³⁸ Ibid., para. 43.

³⁹ Ibid., para. 44.

⁴⁰ Ibid., para. 68.

⁴¹ Ibid., para. 83.

⁴² Ibid., para. 99(c); see also paras. 69 and 95.

slums; a framework law on the right to food;⁴³ a program introducing free basic medical care for people who have no regular income.

In the *TAC* case, the Constitutional Court applied the reasonableness test to the policy of the government to combat mother-to-child-transmission of HIV. First the Court observed that the policy of limiting the provision of Nevirapine to a number of training and research sites failed to address the needs of mothers and their babies who do not have access to such sites. The fact that the policy of the government was meant to develop a comprehensive program for the whole country on the basis of the experiences of pilot projects, did not necessarily imply that Nevirapine must be withheld from mothers and children who do not have access to the pilot sites until the best program had been drafted and the necessary funds and infrastructure for the implementation of that program were available.⁴⁴ This is particularly so because the administration and provision of Nevirapine is a simple, cheap and potentially lifesaving medical treatment.⁴⁵ Consequently, the Court found this part of governmental policy inflexible and exclusionary and thus in breach of the state's obligations under Section 27(2) read in conjunction with the right of everyone to have access to health care services (Section 27(1)(a)). The Court also considered the government's policy of waiting before taking a definitive decision on a comprehensive program for the whole country unreasonable within the meaning of Section 27(2).⁴⁶

As to the question whether the state, under Sections 27 and 28, complied with the obligation to plan and implement an effective, comprehensive and progressive program for the prevention of mother-to-child-transmission of HIV throughout the country, the Court held that the rigidity of the government's approach with respect to the pilot sites affected its policy as a whole.⁴⁷ This implied that the policy of the government fell short of that obligation because doctors at public hospitals and clinics other than at the pilot research and training sites were not enabled to prescribe Nevirapine, even when it was medically indicated and adequate facilities existed for the testing and counseling of pregnant women. In addition, the policy failed to make provision for counselors to be trained in counseling for the use of Nevirapine hospitals and clinics other than at the pilot sites.⁴⁸

In its judgment the Court formulated an additional element of reasonableness review. Given the magnitude of the HIV/Aids problem and the need for a comprehensive national plan of prevention, counseling and treatment, proper communication to the public at large was considered to be essential. Consequently, a national health program must be made known to all concerned. This need for trans-

⁴³ See F. Coomans/K. Yakpo, A Framework Law on the Right to Food – An International and South African Perspective, 4 African Human Rights Law Journal (2004), 17-33.

⁴⁴ *TAC*, *supra* note 29, paras. 67, 68.

⁴⁵ *Ibid.*, para. 73.

⁴⁶ *Ibid.*, paras. 80, 81 and 125.

⁴⁷ *Ibid.*, para. 95.

⁴⁸ *Ibid.*, para. 135(2).

parency, information and communication is an additional requirement of the reasonableness test.⁴⁹

In the *Kbosa* judgment, the Constitutional Court introduced a proportionality test as an additional element of reasonableness review. In considering whether the exclusion of Mozambican nationals living as permanent residents in South Africa from social security benefits was reasonable, the Court considered it relevant to have regard to three things: the purpose served by social security, the impact exclusion had on permanent residents and the relevance of the citizenship requirement to that purpose. In addition, the Court also looked at the impact of the exclusion on other rights, in particular on the right to equal protection and benefit of the law and non-discrimination (Section 9).⁵⁰

The state relied on financial and immigration considerations for limiting social security grants to citizens. In addition, the state argued that while non-citizens have no legitimate claim of access to social security, they could under exceptional circumstances apply for naturalization and thereby obtain access to a social security grant after a period of five years. Thus, in the view of the government, the exclusion was only of a temporary nature. However, no further justification was given for denying the right to permanent residents during this five-year period.⁵¹ These arguments had to be tested against the standard of reasonableness. In the view of the Court, the exclusion of all non-citizens from social security failed to distinguish between those non-citizens who live in South Africa on a permanent basis, have become part of society and have found employment and made their homes in the country on the one hand, and temporary or illegal residents on the other hand. Such a distinction would have been fair.⁵²

Next, the question was whether the discrimination between citizens and non-citizens was unfair.⁵³ Decisive for such a test is the impact of the discrimination on the person being discriminated. The Court reasoned as follows:

We are dealing, here, with intentional, statutorily sanctioned unequal treatment of part of the South African community. This has a strong stigmatising effect. Because both permanent residents and citizens contribute to the welfare system through the payment of taxes, the lack of congruence between benefits and burdens created by a law that denies benefits to permanent residents almost inevitably creates the impression that permanent residents are in some way inferior to citizens and less worthy of social assistance. (...) As far as the applicants are concerned, the denial of the right is total and the consequences of the denial are grave. They are relegated to the margins of society and are de-

⁴⁹ Ibid., para. 123.

⁵⁰ *Kbosa*, *supra* note 30, para. 49.

⁵¹ Ibid., paras. 50, 55, 56, 60-65.

⁵² Ibid., paras. 58, 59.

⁵³ Subsection 9(3) provides: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, culture, language and birth." With a reference to earlier case-law, the Court held that differentiation on the grounds of citizenship is analogous to those listed in section 9(3) and therefore discriminatory. *Kbosa*, para. 71.

prived of what may be essential to enable them to enjoy other rights vested in them under the Constitution. Denying them their right under section 27(1) therefore affects them in a most fundamental way. In my view this denial is unfair.⁵⁴

The Court concluded by recalling that Section 27(1) of the Constitution provides that everyone has the right to have access to social security. The exclusion of resident non-nationals from the social security scheme is disproportionate and has a severe impact on the dignity of persons. For the reasons given above, the Court was of the view that the importance of providing social assistance to all who live permanently in South Africa and the impact a denial has upon life and dignity far outweigh the reasons given by the state to deny a claim to social security. Therefore, this exclusion was found not to constitute a reasonable measure as provided for in Section 27(2).⁵⁵

The Court observed that although there may be a rational relationship between the means of excluding non-South African permanent residents from social assistance and the purposes of immigration and financial policies, this is not sufficient. What is required is scrutiny of the reasonableness of the measure, which is a higher standard than mere rationality.⁵⁶ In this case a proportionality test was applied to scrutinize the reasonableness of the measure, an assessment in which the dignity of people and equality among people as constitutional values requiring protection played a crucial role.⁵⁷

3.3. Reasonableness and the Availability of Resources

Sections 26(2) and 27(2) provide that the state must take reasonable legislative and other measures “within its available resources”. The Constitutional Court interpreted this clause in the *Grootboom* judgment. The state is not obliged to do more than what its available resources permit. This means “that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources”.⁵⁸ Moreover, the Court endorsed the interpretation of the UN Committee that the notion of progressive realization must be understood to impose an obligation to move as expeditiously and effectively as possible towards the full realization of rights.⁵⁹ The Court had already noted in *Sobramoney*, that both rights and obligations are limited by the availability of resources: “given this lack of resources and the significant demands on them (...), an unqualified obligation to

⁵⁴ *Khosa*, paras. 74, 77 (footnote omitted). Judge M o k g o r o who wrote the majority opinion.

⁵⁵ *Ibid.*, para. 82.

⁵⁶ *Ibid.*, para. 67.

⁵⁷ *Ibid.*, para. 85.

⁵⁸ *Grootboom*, para. 46. The Court added: “There is a balance between goals and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.”

⁵⁹ *Grootboom*, para. 45, quoting General Comment no. 3, para. 9 of the UN Committee.

meet these needs would not presently be capable of being fulfilled.”⁶⁰ The Court thus seems to be of the view that neither rights nor obligations have an independent meaning, but that they are subject to and ultimately determined by the availability of resources. This is crucial for the courts in assessing the reasonableness of a measure. In any case, a reasonable program must ensure that the appropriate financial and human resources are available and become part of the budget to cater for a specific need.⁶¹ The Court also addressed financial issues in *TAC*. First it observed that the producers of Nevirapine had offered to provide the drug free of charge to the South African government for a period of five years, so providing it to mothers and children would clearly have been within the available resources of the state.⁶² In addition, in the course of the appeal procedure it became clear that the government had made substantial additional funds available for the treatment of HIV. From this the Court concluded that “the budgetary constraints (...) are no longer an impediment” and that “problems of financial incapacity” could now be addressed.⁶³ In *Khosa*, the Court did not explicitly address the question whether the additional costs of granting permanent residents a social security allowance was within the state’s available resources. However, it stated that on the basis of information provided by the government, the cost of including permanent residents in the system “will be only a small proportion of the total cost”.⁶⁴ This means that the Court gives an opinion about the relative weight of the cost of social grants for permanent residents compared to the total expenditure for social grants. The Court would seem to imply that the additional costs are within the available resources.

3.4. The Ideas Underlying Reasonableness Review

From the drafting history of the social and economic rights in the Constitution, it is clear that Article 2(1) ICESCR was an important source of inspiration. However, the ideas underlying reasonableness review have their roots, at least to some extent, in an influential article written by Prof. Etienne Mureinik, at that time Professor of Law at the University of Witwatersrand in Johannesburg, and published in the *South African Journal of Human Rights*.⁶⁵ Professor Mureinik made a case for the inclusion of social and economic rights in the South African

⁶⁰ *Soobramoney*, para. 11.

⁶¹ *Grootboom*, paras. 39, 68.

⁶² *TAC*, paras. 19, 80.

⁶³ *Ibid.*, para. 120.

⁶⁴ *Khosa*, para. 62.

⁶⁵ E. Mureinik, “Beyond a Charter of Luxuries: Economic Rights in the Constitution”, 8 *SAJHR* (1992), 464-474. Mureinik’s influence on the decision to include social and economic rights in the Constitution, on the drafting of Sections 26 and 27 and on the Constitutional Court’s approach about how to respond to objections that positive social rights are not justiciable, has been confirmed by Frank Michelman. See his contribution “The Constitution, Social Rights and Reason: A Tribute to Etienne Mureinik”, 14 *SAJHR* (1998), 499-507, at 501.

Constitution, and argued that judicial review of these rights is similar to traditional review of civil and political rights: “standards against which to measure the justification of laws and decisions”.⁶⁶ The crucial issue in the review of social and economic rights, however, is who is to make the final decision about the multiple choices involved in realizing these rights: the legislative and executive branch, or the courts?⁶⁷ In Mureinik’s view, the government has a duty to make an honest and reasonable effort to realize social and economic rights. He suggested judicial review for the sincerity and rationality of governmental action. In case of doubt the courts should defer to any decision by the government for which a plausible justification could be offered. Only dishonest or irrational means, that is action which could not be justified, would be set aside.⁶⁸ Sections 26 and 27, however, do not contain a reference to rationality, but to reasonableness. This concept was suggested by Professor Sandra Liebenberg, at that time working at the Community Law Centre of the University of the Western Cape and involved in the drafting of the Constitution.⁶⁹ It was her idea to include a higher standard of review than mere rationality, and this was finally adopted.⁷⁰ In addition to being rational, a measure must have reasonable effects, meaning capable of contributing to an effective realization of social and economic rights. Reasonableness therefore operates as a standard for the government to conduct policy and draft legislation, and as a standard of scrutiny for the courts to assess governmental conduct. It thus includes a consideration of the merits of a case by a court, and not only scrutiny of the way the policy was designed and carried out. Reasonableness review by the courts fits in well with the system of the separation of powers, because it requires a court to defer to the other branches of government if a matter of policy options and choices and decisions about how much to spend comes up.

3.5. Rejection of the Minimum Core Obligations Approach

Before developing the reasonableness test in *Grootboom*, the Court dealt with the suggestion put forward by the *amici curiae*⁷¹ that the right to adequate housing should be interpreted in accordance with the General Comments adopted by the UN Committee.⁷² In particular the *amici curiae* argued that the Court should declare that each state party to the ICESCR has a core obligation to satisfy, at the very least, a minimum essential level of each of the rights listed in that treaty, as the

⁶⁶ Mureinik, at 474.

⁶⁷ Ibid., at 466.

⁶⁸ Ibid., at 474.

⁶⁹ Sandra Liebenberg served as a convener of the Technical Committee advising the Constitutional Assembly during the drafting process of the Bill of Rights in the 1996 Constitution.

⁷⁰ Communication by Prof. Liebenberg to the present author. On file with the author.

⁷¹ The South African Human Rights Commission and the Community Law Centre of the University of the Western Cape.

⁷² *Grootboom*, paras. 27-29.

Committee did in its General Comment no. 3. A state in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is in violation of its obligations under the Covenant.⁷³ The Court did not accept this approach. It said that it understood the minimum core obligation to refer to the needs of the most vulnerable group of people. The Court observed that the needs and opportunities for the enjoyment of a social and economic right vary to a great extent according to income, (un)employment, availability of land and poverty. They also depend on the economic and social history and circumstances of a country. Therefore, detailed information is required to determine the needs and opportunities for the enjoyment of a right. This kind of detailed information is not available for determining what the minimum core obligation in the context of the South African Constitution would entail.⁷⁴ What is decisive in the South African context is whether the positive measures taken to realize a right are reasonable. There may be cases, said the Court, where “it may be possible and appropriate to have regard to the content of a minimum core obligation” to determine whether the measures taken by the state were reasonable. Use of the minimum core approach was thus not completely ruled out for future cases, provided that sufficient detailed information is available to determine the minimum core in a given context.⁷⁵ As a result of this reasoning, the Court concluded that Section 26 of the Constitution does not grant a right to shelter or housing to be provided immediately on demand.⁷⁶

The *amici curiae* argued in the *TAC* case that Section 27(1) of the Constitution has an independent status, giving rise to a minimum core to which everyone in need is entitled. Although this minimum core might be difficult to define, it would include provision of basic services to live a life consistent with human dignity. This minimum level would not be subject to available resources or progressive realization.⁷⁷ The Court rejected this interpretation, holding that the socio-economic rights of the Constitution do not entitle everyone to demand that the minimum core be provided to them.⁷⁸ According to the Court, it is impossible to give everyone access even to a “core” service immediately. Section 27(1) does not entitle to a self-standing, positive and enforceable right, independent of the qualifications listed in Section 27(2).⁷⁹ All that is possible, and all that can be expected of the State, is that it acts reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.⁸⁰ It added that the courts “are not institutionally equipped to make the wide-ranging factual and political enquir-

⁷³ General Comment no. 3, para. 10.

⁷⁴ *Grootboom*, paras. 31-33.

⁷⁵ *Ibid.*, para. 33.

⁷⁶ *Ibid.*, para. 95.

⁷⁷ *TAC*, paras. 26, 28.

⁷⁸ *Ibid.*, para. 34.

⁷⁹ *Ibid.*, para. 39.

⁸⁰ *Ibid.*, para. 35.

ies necessary for determining what the minimum core standards (...) should be, nor for deciding how public revenues should most effectively be spent”.⁸¹ The Court thus confirmed the interpretation given in *Grootboom*. It showed deference to the other branches of government in matters of policy choices and the financial implications these may have.

4. By Way of Comparison: Some Elements of the Approach of the UN Committee on Economic, Social and Cultural Rights

Due to the fact that the provisions on social and economic rights in the South African Constitution have been inspired by the provisions of the ICESCR, and that the Constitutional Court refers to the General Comments of the Committee in its judgments, it is appropriate to highlight some of the elements of the approach followed by the UN Committee in assessing performance of states parties to the ICESCR. Does the Committee apply a standard of review of state reports that is similar to the reasonableness review approach of the South African Constitutional Court? Of course, the Committee is not a judicial body, it cannot give binding judgments and it does not stand in a constitutional relationship to a legislature and an executive branch of government. The Committee is a treaty-body⁸² and it can only adopt recommendations to states parties in the form of General Comments and Concluding Observations on the examination of state reports. However, the Committee does have a role in assessing the implementation and realization of social and economic rights by states parties to the Covenant.

In its General Comments and Concluding Observations the Committee has adopted an approach that reflects a determination to promote an effective implementation of social, economic and cultural rights by states and to hold states accountable for their performance. Once a state becomes a party to the Covenant, it is required to take steps to realize the rights and move as expeditiously and effectively as possible towards that goal. Such measures should be “deliberate, concrete and targeted”.⁸³ States have a considerable degree of latitude and flexibility in deciding which measures are most appropriate for the realization of the rights, but the Committee expects them to report on the reasons underlying the choice for the specific measures taken.⁸⁴ What is decisive is that the measures taken “should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State Party”.⁸⁵ In addition, states have an obligation

⁸¹ Ibid., para. 37.

⁸² To be more precise: the Committee is a subsidiary body of ECOSOC. See ECOSOC res. 1985/17.

⁸³ General Comment no. 3 (1990) on the Nature of States Parties Obligations, paras. 2, 9, contained in UN Doc. E/1991/23.

⁸⁴ General Comment no. 3, para. 4 and General Comment no. 9 (1998), the Domestic Application of the Covenant, UN Doc. E/C.12/1998/24, para. 1.

⁸⁵ General Comment no. 9, para. 5.

to permanently monitor the process of realization of the rights and the problems encountered, and to devise strategies and programs for their implementation, such as detailed plans of action, with special attention for the vulnerable and disadvantaged groups in society.⁸⁶

Seen from the perspective of the progressive realization of the rights, as provided for in Article 2(1) ICESCR, the Committee is of the view that “any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources”.⁸⁷ In its Concluding Observations, however, there are very few references to retrogressive measures and the need to justify them. This is caused by a lack of information about such measures available to the Committee and problems relating to having insufficient knowledge and expertise to identify such measures and consequently make a fair assessment of a national situation.⁸⁸

In its General Comments and in the Concluding Observations the Committee pays considerable attention to the need to protect the most vulnerable members of society in times of severe resource constraints caused by domestic or external factors, such as an economic recession or austerity agreements concluded with the IMF. It emphasizes the adoption of low-cost targeted programs and social safety nets for these groups.⁸⁹

The Committee is of the view that each state party has a minimum core obligation to ensure the satisfaction of minimum essential levels of each of the rights listed in the Covenant. This obligation applies even in times of resource constraints: a state must do its utmost to satisfy as a matter of priority these core obligations.⁹⁰ The Committee has specified these core obligations for individual rights in a number of General Comments on substantive rights.⁹¹

It has been suggested by Sepúlveda that state parties have the burden of proving that the measures taken are reasonable. Reasonableness in this context would mean that the specific national circumstances are taken into account by the Com-

⁸⁶ General Comment no. 3, para. 11 and General Comment no. 1 (1989), Reporting by States Parties, paras. 3-4, contained in UN Doc. E/1989/22. Supervision by the Committee of the obligation to monitor and the obligation to devise detailed plans of action can clearly be seen from an analysis of the Concluding Observations. See about this M. Sepúlveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights*, Antwerpen/Oxford/New York, 2003, at 362-365.

⁸⁷ General Comment no. 3, para. 9. See also General Comment no. 13 on the Right to Education, UN Doc. E/C.12/1999/10, para. 45, General Comment no. 14 on the Right to Health, UN Doc. E/C.12/2000/4, para. 32 and General Comment no. 15 on the Right to Water, UN Doc. E/C.12/2002/11, para. 19. It is interesting to note that the Constitutional Court in *Grootboom* adopts the interpretation of the “progressive realization” clause by the Committee in General Comment no. 3. See *Grootboom*, para. 45.

⁸⁸ Sepúlveda, *supra* note 86, at 324-332.

⁸⁹ See for example, General Comment no. 3, para. 12 and Sepúlveda, *supra* note 86, at 218-222.

⁹⁰ General Comment no. 3, para. 10 and Sepúlveda, *supra* note 86, at 365-370.

⁹¹ See for example General Comment no. 14 on the Right to Health, paras. 43-44.

mittee. For example, the Committee expects higher levels of protection of rights in developed states compared to standards in developing states where the lack of resources often is a constraint to the full realization of rights.⁹² Thus the Committee may use more and less strict levels of scrutiny depending on the national circumstances. A lack of economic and financial expertise among Committee members to assess complex issues relating to the implementation of the Covenant,⁹³ and a lack of detailed indicators about the availability of resources and the actual level of realization in state parties occasionally lead to a cautious and reticent approach in the Concluding Observations, however.⁹⁴

It is doubtful whether the Committee, moreover, is able to challenge the decisions taken by democratic institutions in states about the allocation of resources for Covenant-related matters. However, on the basis of the General Comments and the treaty obligation of progressive achievement of the full realization of rights, it may be said that each state party, as a matter of priority, has an obligation to realize certain minimum obligations. Because the burden of proof of meeting these obligations is on the state, the Committee can very well assess the observance, or lack of observance, of these obligations.⁹⁵

Overall, the approach of the Committee seems to focus on whether a state is successful in achieving higher levels of realization of economic, social and cultural rights and the problems encountered in this process. The focus is thus more on the output of this process and less on the input side, such as the nature of the measures taken and the policy-actors involved. This is understandable given that Article 2(1) ICESCR and the General Comments aim at achieving an optimum situation. The Committee has implicitly adopted some elements in its supervisory approach which fit with the notion of reasonableness review. These include the emphasis on the need to include the vulnerable members of society in the measures taken, and the requirement to take measures which contribute to an expeditious and effective realization of rights. Unlike the South African Constitutional Court, the Committee is not part of a system of separation of powers and checks and balances. Consequently, it does not have to show deference to another branch of government when assessing a state's performance. This may help to explain that the Committee occasionally takes positions in its Concluding Observations that are not always perceived as realistic at the national level. On the other hand, a state-reporting procedure is a weak form of human rights supervision and the outcome cannot be enforced. At the very best it can have a persuasive effect. However, the General Comments of the Committee can play a significant role in the progressive development of international human rights law and can influence the case law of national courts, as the South African cases show.

⁹² Sepúlveda, *supra* note 86, at 318, 337.

⁹³ See M. Dowell-Jones, The Committee on Economic, Social and Cultural Rights: Assessing the Economic Deficit, 1 *Human Rights Law Review* (2001), 11-33.

⁹⁴ Sepúlveda, *supra* note 86, at 316-317.

⁹⁵ Sepúlveda, *supra* note 86, at 334.

5. Assessment of the Reasonableness Test

5.1. Strength

The main advantages of the reasonableness test as a standard of review relate to providing a flexible tool for assessing realization of social and economic rights that takes into account the characteristics of the domestic situation and local context. In this sense it is a realistic standard of review. It recognizes the key responsibility of the legislative and executive branches of government for the implementation of social and economic rights and the supervisory role of the judiciary. The government is granted a considerable degree of latitude. The reasonableness test acknowledges that the government is not required to do the impossible; however, the Constitutional Court clearly holds the view that the government has constitutional obligations to realize social and economic rights. These rights go much further than mere aspirations or good intentions. The threshold level is the requirement to adopt and implement measures that provide for the needs of people that are most intolerable and urgent.⁹⁶ Such measures must contribute to tackling structural inequalities in society with a view to the constitutional commitment to substantive equality.⁹⁷ The government will be held accountable for its performance in this area. In addition, this judicial approach provides a strong impetus for the government to fully justify its policy in order to be reasonable. In this sense, the standard of review is also strict and concrete, because the government is supposed to indicate which specific legislative and policy measures it has taken to comply with its constitutional obligations. Seen from this perspective, the elements of the reasonableness test perform the role of a touchstone and checklist for governmental action or inaction. The emphasis is on the concrete steps governmental authorities have taken as part of the process of realizing social and economic rights. Are these reasonable in terms of providing an acceptable justification and/or good reasons for poor compliance or non-compliance? A “culture of justification” is intended.⁹⁸ This method of review clearly helps to make monitoring of the implementation of the constitutional qualified provisions on social and economic rights more tangible. In this sense it also contributes to enhancing the justiciability of social and economic rights. It does away with the frequently heard argument that courts are ill-placed to assess realization of social and economic rights due to separation of powers issues and the alleged lack of judicial tools to assess compliance. Compared to the standard of rationality applied in *Soobramoney*, the South African Constitutional Court is more willing to question and critically assess the latitude and conduct of governmental

⁹⁶ See S. Liebenberg, *Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review*, unpublished paper [2004], at 7-8, on file with the present author.

⁹⁷ De Vos, *supra* note 10, at 272.

⁹⁸ E. Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 SAJHR (1994), at 31-32.

authorities from the perspective of the constitutional value of human dignity and the needs of people in desperate need.

5.2. Comments

5.2.1. Vagueness of the Reasonableness Concept

Although the reasonableness test as developed by the South African Constitutional Court has been welcomed by commentators,⁹⁹ some critical observations can be made relating to some of its characteristics from the perspective of providing effective protection of social and economic rights. It can be argued that the concept of reasonableness is inherently vague. What is reasonable depends on context. Is it possible to identify the programs that governmental authorities are supposed to set up and implement in order to satisfy the needs of separate vulnerable groups? Reasonableness is an elastic concept that can be given different interpretations according to one’s position. The government may be inclined to “sell” its policy, arguing that it is acting reasonably. It has been said, however, that “reasonableness seems to stand in for whatever the Court regards as desirable features of state policy. (...) [T]here have been fears that the Court will overstep its legitimate role by prescribing policy decisions to the government.”¹⁰⁰ This may raise issues of the separation of powers between the various branches of government. I think the Court itself is well aware of this risk, and it is cautious not to engage in decisions about political and budgetary choices.¹⁰¹ What is typical, according to one commentator, is that the Court failed to identify the content of the right to housing and health and the resulting state obligations arising from sections 26 and 27 of the Constitution which should serve as a legal basis for assessing reasonableness.¹⁰² One may agree with Bilchitz, adding that such a principled legal foundation for the content of rights and obligations may be found, at least at a general level, in the General Comments of the UN Committee on substantive rights.¹⁰³

5.2.2. No Individual Relief

Another characteristic of the reasonableness test is that this method of review seems to shy away from granting (immediate) individual relief in the cases brought to the Court. Although rights are justiciable under the Constitution, as-

⁹⁹ See C. R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11:4 Constitutional Forum (2001), at 123. See also *De Vos*, *supra* note 10, at 258, 259.

¹⁰⁰ D. Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence*, 19 SAJHR (2003), 1-26, at 10.

¹⁰¹ *TAC*, paras. 37-38.

¹⁰² Bilchitz, *supra* note 100, at 6-10.

¹⁰³ See, for example, General Comment no. 14 on the Right to Health, UN Doc. E/C.12/2000/4.

sessing whether the policy of the government was in conformity with its positive obligations under Sections 26 and 27, the Court has not recognized an individually enforceable right to claim access to housing or health care on demand. An individual may enforce from the state a duty to act to meet the obligations imposed on it on the basis of Sections 26(2) and 27(2). In addition, state action in this respect must provide for the needs of those people that are in desperate need.¹⁰⁴ The right that is recognized in *Grootboom* is a right to demand that the state adopt a reasonable program.¹⁰⁵ From the perspective of the claimant, this is disappointing because in most cases it will not help him/her. This is particularly so, because Section 172(1) Constitution provides in principle for the possibility of making an order by a court in a constitutional matter that is “just and equitable”. However, due to great difficulties in realizing socio-economic rights in South Africa, and the constraint of remaining within available resources in complying with constitutional obligations, the Court is of the view that such rights cannot be realized immediately.¹⁰⁶ Instead, a court could play a role in monitoring whether the governmental authorities comply with a court order to begin without delay to implement measures that cater for the needs of the vulnerable, by setting, for example, a time-limit for governmental action.¹⁰⁷

5.2.3. Rejection of the Core Obligations Approach

Granting immediate relief for individuals would have been possible if the Constitutional Court had adopted the minimum core obligations approach as developed by the UN Committee. It should be noted that the Constitutional Court, at least in my view, appears in the *Grootboom* judgment to have misunderstood the core content approach. The Court held that before determining the core of a right in a given context, one must first identify the needs of people and the opportunities for the enjoyment of a right.¹⁰⁸ This implies that the people’s needs and the available opportunities would determine the core content of a right, rather than starting with the right itself. In fact, this would make implementation of a right dependent on the outcome of a process of political bargaining that would entail the identifica-

¹⁰⁴ *Grootboom*, paras. 94-96.

¹⁰⁵ See S. Liebenberg, South Africa’s Evolving Jurisprudence on Socio-economic Rights: An Effective Tool in Challenging Poverty?, 6 *Law, Democracy and Development* (2002), 159-191, at 176. De Vos, *supra* note 10, at 271-272.

¹⁰⁶ *Grootboom*, para. 94.

¹⁰⁷ In *City of Cape Town v Neville Rudolph and Forty Nine Others*, the Cape High Court ordered the City of Cape Town to deliver a report under oath within four months after the judgment, stating what steps it has taken to comply with its constitutional and statutory obligations in the field of housing, what future steps it will take in that regard, and when such steps will be taken. Judgment of 7 July 2003, Case no. 8970/01, available at <<http://law.sun.ac.za>>. See on the potential of continued judicial scrutiny once a judgment has been given, D. Davis, Socio-economic Rights in South Africa – The Record of the Constitutional Court After Ten Years, 5:5 *ESR Review* (2004), 3-7.

¹⁰⁸ *Grootboom*, paras 31-33.

tion of the needs of the people along with the opportunities that are desirable and feasible. This would result in the abandonment of a rights-based approach. Instead, guidance about the (core) content of a right should come from international sources, such as the General Comments of the UN Committee. Such a core should be translated or operationalized at the national, regional and local levels into carefully targeted policies and programs that duly implement obligations.¹⁰⁹ Consequently, it may be argued that, if human dignity is the central concept of human rights, then this must have consequences for the protection of the rights of vulnerable groups. This implies that certain core elements of a right must be guaranteed under all circumstances and that governmental authorities have core obligations accordingly. The question may then be raised whether a governmental program can be reasonable if it does not provide for the realization of the core elements of a right. In case the program does not, it may be said that a right would lose its meaning as a human right. Human dignity would thus become the underlying value of reasonableness review, with which the Constitutional Court would seem to agree.¹¹⁰ One may therefore support the view that “reasonableness is assessed in terms of whether a government has complied with its minimum core obligations in terms of the right”.¹¹¹

Adoption of a core obligations approach does not require a court to define *in abstracto* the precise basket of goods and services that must be provided to people, as has been rightly observed by Liebenberg.¹¹² Expert knowledge may be used to lay down minimum packages of housing facilities and health services. One can agree with Scott and Alston who have submitted that

from the perspective of ICESCR jurisprudence, South African courts should start from a universal core minimum as the absolute bottom-line requirement and respond accordingly to individual and group claims which demonstrate that such a standard has not been met. However, despite vast poverty, the core minimum in South Africa will almost certainly be higher than the universal minimum given the overall level of per capita wealth of the society in comparison to many other countries.¹¹³

It is submitted that reasonableness review requires that a court first determine the content of a right and the resulting government obligations. Next, if a governmental policy or program fails to fulfill a minimum core obligation resulting from the core content of a right, such governmental action would be *prima facie* unreasonable. The government would then be required to demonstrate why such gov-

¹⁰⁹ See F. Coomans, In Search of the Core Content of the Right to Education, in: D. Brand/S. Russell (eds.), *Exploring the Core content of Socio-Economic Rights: South African and International Perspectives*, Protea Book House, Pretoria, 2002, at 180.

¹¹⁰ In *Grootboom*, the Court said that “It is fundamental to an evaluation of the reasonableness of State action that account be taken of the inherent dignity of human beings.” See *Grootboom*, para. 83.

¹¹¹ Bilchitz, *supra* note 100, at 12. See also Liebenberg, *supra* note 15, at 33-32.

¹¹² Liebenberg, *supra* note 105, at 174.

¹¹³ C. Scott/Ph. Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney’s Legacy and Grootboom’s Promise*, 16 SAJHR (2000), 206-268, at 250.

ernmental conduct is not unreasonable.¹¹⁴ In addition, when the core elements of a right are at stake in a case, a higher degree of justification should be required from the government to justify non-implementation. In such a case, it would also be legitimate for a court to apply a higher, or more strict degree of scrutiny.

5.2.4. Priority-Setting

It has been argued that the standard of reasonableness review is difficult to define and apply in practice, for example with respect to the deplorable situation in which people live and the urgency of the relief required.¹¹⁵ Although the Constitutional Court has held that a reasonable program must cater for the needs of those people in desperate situations, it has not ruled that such needs must be met on a priority basis, that is, take precedence in time over the (housing) needs of other segments of society. However, the UN Committee has emphasized that a state must use all resources at its disposal in order to satisfy, as a matter of priority, its minimum core obligations.¹¹⁶ In *Grootboom* the Court applied the standard of inclusion of all social groups in a governmental program, but rejected the core obligations approach. It may be argued, however, that the constitutional values of human dignity and substantive equality imply that a reasonable governmental program must include provision to cater for the (housing or health) needs of vulnerable and needy groups on a priority basis. It would then be logical to say that a court order should entail the same priority-setting.¹¹⁷ If this could not be ensured, the right to housing or health would lose its meaning as human rights for large parts of the population. However, the Court in *Grootboom* was not prepared to go that far, due to its rejection of the core obligations approach and deference observed to the other branches of government. In this respect the method of reasonableness review disappoints, failing to provide adequate protection to those most in need.

5.2.5. Availability of Resources

It may be recalled that in determining the reasonableness of a program in the view of the Court, the availability of resources will be an important factor.¹¹⁸ However, the Court did not indicate whether, and if so in what way, it would assess the availability of resources. Liebenberg, for example, has argued that it is unfortunate that the Court in *Grootboom* did not clarify that the test of reason-

¹¹⁴ Liebenberg, *supra* note 15, at 33-32. De Vos, *supra* note 10, at 273.

¹¹⁵ Liebenberg, *supra* note 15, at 33-40.

¹¹⁶ General Comment no. 3, para. 10.

¹¹⁷ See Th. Roux, Understanding *Grootboom* – A Response to Cass R. Sunstein', 12:2 Constitutional Forum (2002), 41-51, at 50.

¹¹⁸ *Grootboom*, para. 46.

ableness would apply to all policies and processes that determine the overall availability of resources, the allocation of resources between the local, provincial and national spheres of government, as well as the level of resources allocated to particular spheres of government.¹¹⁹ In addition, who determines the level of resources available and for what purpose in relation to other legitimate governmental goals? Where do resources come from? Do the constitutional provisions on social and economic rights oblige a reallocation of resources from one sector of the domestic budget to another, for instance from military expenditure to social services, or from transport to housing? It is also possible to move resources from one sector within a governmental department to another, for example from higher education to primary education. Another option would be to move resources among social welfare budgets, say more resources for housing, less for social assistance. According to Moellendorf, a broad definition of available resources must be used "if socio-economic rights are to guide policy rather than depend on it".¹²⁰ It is obvious that government and parliament are the main actors involved in these kinds of decisions. However, the Court has reserved a role for the judiciary by holding that judicial scrutiny of social and economic rights may have budgetary implications.¹²¹ When governments face severe resource constraints, international human rights law seems to prioritize the protection of the social and economic rights of the vulnerable members of society, especially their subsistence rights.¹²² Thus, when performing its reviewing function, the Court should be led by the constitutional value of human dignity, meaning that governmental programs should be scrutinized from the standard whether priority (meaning the temporal order) was given to safeguarding the social and economic rights of the most vulnerable segments of society. This should have consequences for the allocation of resources.

It should be recalled that the Court in *Soobramoney* and *Grootboom* held that the content of the obligations and the corresponding (social and economic) rights are dependent upon available resources.¹²³ This is questionable because it would mean an erosion of the content of rights and obligations. One could say that the availability of resources affects the rate and the extent to which a right can be realized in practice, and that this process is subject to the test of reasonableness. The

¹¹⁹ S. Liebenberg, *The Right to Social Assistance: The Implications of Grootboom for Policy Reform in South Africa*, 17 SAJHR (2001), 232-257, at 255.

¹²⁰ D. Moellendorf, *Reasoning about Resources: Soobramoney and the Future of Socio-Economic Rights Claims*, 14 SAJHR (1998), 327-333, at 332.

¹²¹ TAC, para. 38.

¹²² General Comment no. 3, *supra* note 80, para. 12. See also "The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights", 9 HRQ (1987), 122-135. Principle no. 28 reads: "In the use of the available resources due priority shall be given to the realization of rights recognized in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services." See also Principle no. 25: "States parties are obligated regardless of the level of economic development, to ensure respect for minimum subsistence rights of all." See also Bilchitz, *supra* note 100, at 15-16 who refers to those interests that relate to the survival of people.

¹²³ *Soobramoney*, para. 11; *Grootboom*, para. 46.

content of rights, however, as well as the content of obligations resulting from the rights exist independently of the availability of resources; they cannot be subject to reasonableness review. Otherwise one would risk stepping onto a downward slope.

5.2.6. Limitation of Rights

In *Khosa* the question was briefly discussed whether Section 36(1) of the Constitution – the general limitations clause of the Bill of Rights – can also be applied to social and economic rights.¹²⁴ Since Sections 26(2) and 27(2) contain “internal limitations”, or qualified obligations, the Court raised the question whether reasonable measures within the context of those provisions mean the same or something else than a reasonable limitation within the meaning of Section 36.¹²⁵ The Court did not elaborate on this, but noted that this issue had been subject of academic debate. It found an extensive treatment of the issue for the case at hand not necessary. It concluded, however, that the exclusion of the permanent residents from the scheme for social assistance was neither reasonable, nor justifiable within the meaning of Section 36.¹²⁶ This brief reference to Section 36(1) raises the much broader issue of whether social and economic rights that are subject to progressive realization on the basis of reasonable measures and available resources can be limited. Due to the fact that these rights to a large extent imply qualified positive obligations for the state, it has been argued that a limitation of this (positive) dimension of such a right is problematic and complicated.¹²⁷ However, judicial review of a Section 36 limitation of the right to housing (S. 26(1)) and health (S. 27(1)) on the basis of an interference with the negative obligation to respect would very well be possible.¹²⁸ Such an approach would fit in well with the different levels of state obligations recognized in the Constitution and in international human rights law.¹²⁹

¹²⁴ Section 36(1) reads as follows:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

¹²⁵ *Khosa*, para. 83.

¹²⁶ *Ibid.*, para. 84.

¹²⁷ See P. De Vos, “Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa’s 1996 Constitution, 13 SAJHR (1997), 67-101, at 92. M. Pieterse, Towards a Useful Role for Section 36 of the Constitution in Social Rights Cases?, 120 SALJ (2003), 41-48, at 42-43.

¹²⁸ Pieterse, at 44, 46.

¹²⁹ Compare Section 7(2) of the Constitution and recent General Comments of the UN Committee.

Returning now to the *Khosa* case, through this judgment the Court in fact introduced elements of Section 36 scrutiny into the reasonableness test adopted in *Grootboom* by applying a proportionality test to the exclusion of the permanent residents from access to the social security scheme. The Court therefore implicitly confirmed that Section 36 can be applied in social rights cases. This proportionality review adds to the reasonableness requirements developed in *Grootboom* and reinforces the need for justification of governmental conduct in the field of constitutional rights implementation. It shows that the criteria of Section 36 may have a meaning beyond the limitations clause.¹³⁰

Another, related question in this respect is whether resource constraints can be invoked to justify non-realization of a right by using limitation language. In other words, can non-realization of a right due to a lack of resources be justified by using the limitations clause? International human rights law may provide some guidance here. In a general sense, it has been argued with respect to the ICESCR, that a reduction in the level of enjoyment of a right would not be a limitation under Article 4 ICESCR.¹³¹ However, if a government would characterize such a reduction as a limitation of a right, then the criteria of Article 4 would apply.¹³² Article 4 would have a protective function in such a case, in the sense of serving as a safeguard against improper interference in the enjoyment of rights, rather than being permissive of state action. In addition, Article 4 may not be used to introduce limitations on rights which affect the subsistence, survival or integrity of a person.¹³³ State obligations in this domain would belong to the core obligations.¹³⁴

5.2.7. Retrogressive Measures

It is submitted that a failure by a government to devote the maximum of its available resources to progressively achieve the realization of social and economic rights does not constitute a limitation in the sense of Article 4. However, retrogres-

¹³⁰ Compare Pieterse, *supra* note 127, at 47 and Scott/Alston, *supra* note 113, at 240, footnote 87.

¹³¹ Article 4 ICESCR reads as follows: “The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

¹³² See Ph. Alston/G. Quinn, The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights, 9 HRQ (1987), 156-229, at 205-206. Alston and Quinn base their interpretation on an analysis of the *travaux préparatoires* of the Covenant.

¹³³ Limburg Principles, *supra* note 122, Principle no. 46 and 47.

¹³⁴ The UN Committee has stipulated that core obligations arising from the right to health are non-derogable. See General Comment no. 14, para. 47. This is contrary to the view of the Committee in General Comment no. 3, that “any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints within the country concerned” (para. 10).

sive measures may require a stricter and higher level of justification and scrutiny. General Comment no. 3, of the UN Committee provides that “any deliberately retrogressive measures in that regard [in respect of the full realization of the rights, FC] would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources”.¹³⁵ This interpretation of the element of progressive realization was adopted by the Constitutional Court in *Grootboom*.¹³⁶ With respect to the South African context it is therefore suggested that elements of the proportionality test be included in and applied to reasonableness review of retrogressive measures. Such elements may be derived from Section 36(1) and the *Khosa* judgment, such as the need for the government to show that the retrogressive measure does not affect the nature of a right and that no other less drastic measures are available. Other justification requirements would include the need for the government to demonstrate that the retrogressive measure does not have a discriminatory effect that is unfair and does not affect the dignity of the persons who will face the effects of the measures taken. The need to protect the rights of the vulnerable segments of society must always serve as a protective guide whenever such retrogressive measures are considered, for example by taking compensatory measures or alternative programs providing protection.¹³⁷

6. Concluding Remarks

Reasonableness review is a useful tool for courts to assess the implementation or lack of implementation of social and economic rights at the domestic level. It therefore strengthens the justiciability of these rights. It also provides guidance to governmental authorities in the sense that it forces these authorities to justify their policies as they are drafted, implemented and reviewed. The major weakness of this method of review, however, is that it does not provide for the minimum core obligations element. Can a governmental program be reasonable when it does not provide for effective implementation of the most essential elements of a right for those people whose situation is most urgent and intolerable? In my view, such a program would be a poor one if measured against the overarching value of human dignity. One cannot ignore the fact that people have expectations about the provision of social and economic rights that may simply be unrealistic when the different needs of people, limited resources and competing claims for these resources are taken into account.¹³⁸ Seen from this angle, reasonableness review has brought less than what some of the drafters of the Constitution may have hoped for.

¹³⁵ General Comment no. 3, para. 9.

¹³⁶ *Grootboom*, para. 45.

¹³⁷ See also Liebenberg, *supra* note 96, at 10 and General Comment no. 3, para. 12.

¹³⁸ This was highlighted by Judge Chaskalson on the eve of the *Grootboom* judgment of the Constitutional Court, when he warned against such expectations: “Too many of us are concerned about what we can get from the new society [of the future, FC], too few with what is needed for the

It has been argued that the method of review developed in *Grootboom* is in fact the application of administrative law standards of rationality and fair procedures based on the concept of reasonableness, rather than an intrusive form of scrutiny to undo a violation and uphold a constitutional social right.¹³⁹ It may be true that reasonableness review originated in administrative law concepts and contains some procedural elements derived from this field of law. It was given a substantive rights-based content through the emphasis on the value of human dignity as the guiding principle and the requirement to provide short-term relief to the desperate and needy. But it should be admitted that the standard of reasonableness review does not grant individual relief, that is, an entitlement to claim immediate access to housing or health services. The core obligations dimension is the missing element in this respect. Providing for such a form of immediate relief would be the right decision in cases of serious destitution. One may see this standard of review as a first step in an ongoing process of holding governments accountable for their record in social and economic rights implementation. This method should be developed further, as the Constitutional Court itself did in the *TAC* and *Khosa* cases.¹⁴⁰ In this connection, it should also be recalled that the Court in *Grootboom* left the door ajar for a possible role of the minimum core obligations approach in determining the reasonableness of governmental measures.¹⁴¹

Reasonableness review can be important from the perspective of cross-fertilization between international human rights law and national constitutional systems: international human rights law as an aid in interpreting domestic law, and domestic legal developments as a guide for the interpretation and progressive development of international human rights law. According to Scott and Alston, a transnational order of human rights protection may evolve:

As courts increasingly interpret international human rights obligations as part of interpreting their own constitutions and statutes, they help gradually to build up a transnational consensus that can be ‘received’ into the international legal order, both in terms of persuasive reasoning that international bodies see fit to embrace and, more formally, in terms of general principles of law with their own status as international law. In this way,

realization of the goals of the Constitution.” See A. Chaskalson, Human Dignity as a Foundational Value of Our Constitutional Order, 16 SAJHR (2000), 193, at 205.

¹³⁹ I. Hare, Social Rights as Fundamental Human Rights, in: B. Hepple (ed.), *Social and Labour Rights in a Global Context*, Cambridge 2002, 153-181, at 167, 180.

¹⁴⁰ For example, in a recent judgment the Constitutional Court held that even an obligation to abstain from interference, such as the obligation not to evict people from their home (Sect. 26(3)), may give rise to positive obligations. The Court stated that in considering whether it is just and equitable to make an eviction order under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (1998), the responsibilities that municipalities bear in terms of Section 26 of the Constitution are relevant. Where the need to evict people arises and before seeking an eviction order from a court, a municipality has to show that it had responded reasonably to the dire situation of the occupiers of the land, for instance by actively investigating whether suitable alternative accommodation is available or by another appropriate solution. See *Port Elizabeth Municipality v Various Occupiers*, case CCT 53/03, decided on 1 October 2004, paras. 30, 56-61. See for a discussion of this judgment, K. Pillay, Property v Housing Rights: Balancing the Interests in Evictions Cases, 5:5 ESR Review (2004), 16-18.

¹⁴¹ *Grootboom*, para. 33.

domestic legal processes can influence the progressively evolving interpretations of the international human rights treaty bodies.¹⁴²

We have seen that the drafting of the social and economic rights provisions in the South African Constitution was inspired by the provisions of the ICESCR. The Constitutional Court has adopted some of the elements of the UN Committee's interpretation of the nature of the general state obligation under Article 2(1) ICESCR, but it has rejected others. It is possible that reasonableness review will become a useful tool for some of the human rights treaty bodies when they monitor realization of social and economic rights. Examples include the African Commission on Human Rights and Peoples' Rights, the Inter-American Commission on Human Rights, the Committee on the Elimination of All Forms of Discrimination Against Women, and the UN Committee on Economic, Social and Cultural Rights. Such a method of review could be helpful when the competent bodies examine individual complaints. However, the reasonableness test could also become part of the examination of state reports by treaty bodies, provided that sufficient and detailed information is available. Such reporting procedures inherently provide for flexibility, which is also an essential element of reasonableness review. Finally, reasonableness review has the potential of becoming an appropriate tool for judicial bodies in (monist) constitutional systems in which the domestic application of treaty norms on social and economic rights fails due to a rejection of the self-executing nature of these treaty norms. In such systems, reasonableness review may act to bypass the hurdle of the self-executing character of treaty standards on social and economic rights and provide for a form of review of legislation and policy. In other (dualist) constitutional systems, the reasonableness test may be applied by judicial bodies to assess whether governmental authorities effectively implement constitutional provisions, statutes and/or subsidiary legislation on social and economic rights. Both ways would contribute to strengthening the justiciability of these rights.

¹⁴² Scott/Alston, *supra* note 113, at 213 (footnotes omitted).