

**THE PROTECTION OF THE RIGHT OF ACCESS TO
ADEQUATE HOUSING BY THE SOUTH AFRICAN
CONSTITUTIONAL COURT**

By
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Declaration

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

Signature:

Date:

Summary

The South African history of colonialism and apartheid created a massive housing crisis, and a basic service delivery deficit for the majority of people. Since the dawn of democracy, the current government has been trying to address this housing crisis and basic service delivery deficit. At the heart of the challenge created by this housing crisis, is the transformative vision of the Constitution and the proper role of courts, especially the Constitutional Court as the final arbiter of the rights protected and guaranteed in the Constitution.

The central objective of this thesis is to investigate the extent to which the Constitutional Court has given substantive content to the right of access to adequate housing, particularly in the context of the positive duties arising out of this right as entrenched in section 26(1) and (2) of the Constitution. To this end, the history and present state of housing for residents of informal settlements, and those in inadequate housing, including the challenges presented by housing delivery, are explored.

This thesis seeks to explore the concept of transformative constitutionalism, particularly its significance in relation to the right of access to adequate housing. The thesis goes on to trace the origins, strong and weak points of the reasonableness review model used by the Court to adjudicate the positive aspects of socio-economic rights, in the context of the right of access to adequate housing. This is followed by an examination of how housing as a human right has been interpreted and enforced in international, and comparative law. I then analyse the major housing jurisprudence of the Court, and suggest tentative solutions towards redressing some of the impediments standing in the way of a substantive interpretation of the right of access to adequate housing.

It is found that the Court has developed the substantive content of section 26(3) through the development of various procedural, and substantive protections of this right, including an expansive meaning of the requirement of justice and equity, requiring judicial oversight in all sales in execution against peoples' homes, creative remedies such as mediation, joinder of a relevant municipality in eviction cases, meaningful engagement, and alternative accommodation as components of the requirement of justice and equity that would have to be met for an eviction to be lawful. In contrast, in the context of the positive duties imposed by section 26, the Court has adopted the reasonableness

model of review without elaborating on the nature and scope of the right of access to adequate housing, and the values and purposes protected by this right in international law, and comparative law. Therefore, a relatively weak standard of judicial review is adopted by the Court when it adjudicates the negative duties of the right, as opposed to when it adjudicates the positive duties imposed by the right. This thesis proceeds to explore how the substantive interpretation of the right could be enhanced through following the methodology for interpretation of rights in the Bill of Rights prescribed in section 39(1) of the Constitution.

Opsomming

Die Suid-Afrikaanse geskiedenis van kolonialisme en apartheid het 'n massiewe behuisingskrisis, en 'n tekort aan basiese dienslewering vir die meerderheid van mense geskep. Sedert die aanvang van demokrasie, poog die huidige regering om die behuisingskrisis en tekort aan basiese dienslewering aan te spreek. Aan die hart van die uitdaging wat deur hierdie behuisingskrisis geskep is, is die transformerende visie van die Grondwet en die behoorlike rol van die hof, veral die Konstitusionele Hof as die finale arbiter van die regte wat in die Grondwet beskerm en gewaarborg word.

Die hoofdoel van hierdie tesis is om ondersoek in te stel na die mate waartoe die Konstitusionele Hof substantiewe inhoud gegee het aan die reg op toegang tot geskikte behuising, veral in die konteks van die positiewe verpligtinge wat voortspruit uit hierdie reg soos verskans in artikels 26(1) en (2) van die Grondwet. Om dit te bereik, word die geskiedenis en huidige stand van behuising vir inwoners van informele nedersettings, asook dié in ontoereikende behuising, ondersoek met inbegrip van die uitdagings wat deur die lewering van behuising gestel word.

Hierdie tesis poog om die begrip van transformerende konstitusionalisme te ondersoek, vernameam die belang daarvan met betrekking tot die reg van toegang tot geskikte behuising. Daarbenewens, ondersoek hierdie tesis die oorsprong, asook die sterk en swak punte van die Hof se model vir redelijkheidshersiening om die positiewe aspekte van sosio-ekonomiese regte te beoordeel, in die konteks van die reg op toegang tot geskikte behuising. Hierop volg 'n ondersoek na hoe behuising as 'n menslike reg in internasionale en vergelykende regs kontekste geïnterpreteer en afgedwing kan word. Ek analiseer ook die hoof behuisingsregspraak van die Hof ten einde voorlopige oplossings voor te stel met betrekking tot die regstelling van sommige van die hindernisse tot 'n substantiewe interpretasie van die reg op toegang tot geskikte behuising.

Ten slotte, word daar gevind dat die Hof substantiewe inhoud aan artikel 26(3) gegee het deur die ontwikkeling van die prosedurele en substantiewe beskerming van hierdie reg, insluitend 'n uitgebreide begrip van die vereistes van geregtigheid en billikheid wat geregtelike oorsig in sekere omstandighede vereis: alle verkope in eksekusie teen mense se huise, kreatiewe remedies soos bemiddeling, die noodsaaklike voeging van munisipaliteite tot uitsettings, sinvolle betrokkenheid, en die voorsiening

van alternatiewe akkommodasie as 'n komponent van die vereiste van geregtigheid en billikheid wat nagekom moet word vir 'n uitsettingsbevel om regmatig te wees. In teenstelling, met betrekking tot die positiewe verpligtinge wat deur artikel 26 opgelê word, het die Hof die model vir redelikheidshersiening aangeneem sonder om uit te brei op die aard en omvang van die reg op toegang tot geskikte behuising, en die waardes en doelwitte wat deur hierdie reg beskerm word in internasionale en vergelykbare regs kontekste. Gevolglik is 'n relatiewe swak standaard van geregtelike hersiening deur die Hof vasgestel wanneer dit die negatiewe verpligtinge van die reg beoordeel, in teenstelling met wanneer die positiewe verpligtinge van die reg beoordeel word. Hierdie tesis poog om vas te stel hoe die substantiewe interpretasie van die reg bevorder kan word ingevolge die metodologie vir die interpretasie van die regte in die Handves van Regte soos voorgeskryf in artikel 39(1) van die Grondwet.

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CHAPTER 1: INTRODUCTION

1.1 Background

The current government of the African National Congress inherited numerous service delivery challenges from the previous government of the National Party. Amongst the key challenges is the national housing backlog caused by colonialism and exacerbated by apartheid policies and laws.

One of the results of colonialism and apartheid was to deprive black people of not only access to land, but also access to dignified housing with land tenure.¹ This had the net result of relegating black people to informal settlements and inadequate buildings all over the country, even after the ushering in of democracy. In order to reverse this ominous position, the current government has adopted a number of policies and enacted much legislation.² Despite these attempts, the challenges posed by access to adequate housing post-1994 remain, partly because the housing issues facing the poor in South Africa are numerous. These include a housing backlog, corruption in the allocation of houses and problems related to the building of houses.³

¹ Plaatje S *Native Life in South Africa* (1916). Plaatje was the first author to eloquently capture the effects of apartheid and colonialism on black South Africans by documenting the humiliating manner in which black people were forcibly removed from their own land, and properties. See also: Bundy C “Land, Law and Power: Forced removals in the historical context” in Murray C and O’Regan C (eds) *No Place To Rest: Forced Removals History In South Africa* (1990) 3-11 at 3-5 and 6-9; Terreblanche S *A History of Inequality In South Africa: 1652-2002* (2002) at 6 and 299.

² Breaking New Ground Policy: A Comprehensive Plan for the Development of Sustainable Human Settlement (September 2004); Housing Act 107 of 1997; National Housing Code (2000, Revised in 2009); National Housing Programme: Housing Assistance in Emergency Circumstances (2004); Human Settlement Sector Strategy Plan 2009-2014 (2009).

³ National Development Plan (2030) Chapter 8 at 269 and 269-273. The National development Commission records a plan to upgrade 400 000 households in well-located informal settlements by year 2030. *The TimesLive Newspaper* (2010-18-05) reports that “the South African housing back-lock is 2.1 million units, affecting 12 million people, and that there are currently 2.700 informal settlements in the country.” This report and statistics were officially confirmed by the President of the Republic of South Africa, Mr. Zuma in the same article; The Department of Housing in its Human Settlement Sector Strategy 2009-2014 (Portfolio Committee on Human Settlements, 2 December 2009). The Human Settlement Ministry records in its 2009-2014 sector strategy that it aims to eradicate informal settlements by 2014, a commitment that is six years early than the proposed date in the United Nation’s Millennium Development Goals (MDGs). See also: Richards R *et al* “Measuring the quality of life in informal settlements in South Africa” (2007) 81 *Social Indicators Research Journal* 375-388; Misselhorn M “A new response to informal settlements” (2010) Afesis-Corplan, available online at <http://www.ngopulse.org/node/13699> (accessed on 30 March 2010). Misselhorn argues that a new strategy is needed in order to solve the housing crisis. Misselhorn argues for a parallel structure on housing delivery, which will be administered outside of the many policies and legislation on housing in order to respond urgently to the housing crisis. See also: *Statistics South Africa Report* (2011), available online at: <http://www.statssa.gov.za/Publications/P03014/P030142011.pdf> (accessed on 31 October 2012) pages 52-64. This

In addition, there are also social, political and human rights challenges. Barry and Heinz⁴ argue that the economic and social conditions in informal settlements are characterised by poverty and suffering of the worst kind, and difficulty in accessing channels within which to exercise human rights. This observation by Barry and Heinz seems to support the view that a comprehensive strategy is needed in order to address issues of access to adequate housing.

In the midst of these challenges is the constitutional commitment to ensure that everyone has access to adequate housing which is entrenched in section 26 of the Constitution of the Republic of South Africa, 1996 ('the Constitution'), and the question of the proper role of the judiciary in interpreting and enforcing this right. The Constitution has been described as transformative in academic literature and by our courts.⁵ Its stated purpose is to break away from the shackles of the past which were grounded in inequality and gross human rights violations, and to forge a new future for all

report notes a slight improvement in the number of informal settlements in that the number has decreased from 16.2% in 1996 to 13.6% in 2011, whereas the number of people living in formal housing has increased, while those living in traditional dwelling has almost halved. The report also shows a gradual improvement in the delivery of basic services overtime.

⁴ See Barry M and Heinz R "Data collection techniques for informal settlements upgrade in Cape Town, South Africa" (2005) 17 *URISA Journal* 43-52 at 43-46. Although this study focused on informal settlements in Cape Town, and surrounding areas, it is equally relevant to informal settlements across the country, as they share similar characteristics, and present similar challenges. The case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC) is an example. This case captured vividly the conditions of those living in inadequate housing in the inner City of Johannesburg.

⁵ Klare K "Legal culture and transformative constitutionalism" (1998) 14 *SAJHR* 146-188 at 150. Scholars, judges and lawyers have elaborated on and explored the implications of "transformative constitutionalism" in various areas of constitutional law. See for example: Albertyn C and Goldblatt B "Facing the challenges of transformation: Difficulties in the development of an indigenous jurisprudence of equality" (1998) 14 *SAJHR* 248-275; Van der Walt AJ "Tentative urgency: Sensitivity for the paradoxes of stability and change in the social transformation decisions of the Constitutional Court" (2001) 16 *SAPR/PL* 1-27; Mbazira C "You are the weakest link" In realising socio-economic rights: Goodbye-Strategies for effective implementation of court orders in South Africa" (2008) *Research Series* 3; Pieterse M "What do we mean when we talk about transformative constitutionalism?" (2005) 20 *SAPR/PL* 155-166; Van Marle K "Meeting the world half way "The limits of legal transformation (2004) 16 *Fla. J. Int'l L.* 651-665; Usher T "Adjudication of socio-economic rights: One size does not fit all" (2008) 1 *UCL Human Rights Review* 154-171; Van der Walt AJ "Legal history, legal culture and transformation in a constitutional democracy" (2006) 12 *Fundamina* 1-47; Liebenberg S "Needs, rights and transformation: Adjudicating social rights" (2006) 17 *Stell LR* 5-36; Davis DM "Transformation: The constitutional promise and reality" (2010) 26 *SAJHR* 85-101; Liebenberg S *Socio-Economic Rights Adjudication Under a Transformative Constitution* (2010) 23-76. See also: *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; *Hassam v Jacobs NO and Others* [2009] ZACC 19; 2009 (11) BCLR 1148 (CC) para 28; *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (3) BCLR 177 (CC) paras 47 and 55. For a critique of Klare's views on transformative constitutionalism, see: Roux T "Transformative Constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference" (2009) 20 *Stell LR* 258-285.

South Africans.⁶ The Constitution also aims to “dismantle systemic forms of disadvantage and subordination in our post-apartheid society.”⁷

According to Fraser, in order to achieve social justice, a society would have to address the glaring forms of status subordination based on - for instance - race, gender, and sexual orientation as well as systemic patterns of social and economic disadvantage.⁸ Fraser’s analysis is applicable to the South African society, as this is a society currently struggling to eliminate vast economic and status-based inequalities.

Paying special attention to the socio-economic rights of poor South Africans is critical to consolidating and deepening democracy. These rights can help in the attainment of the goals envisaged by the Constitution. All the institutions of democracy, namely: the executive, the judiciary, and the legislature have distinctive roles to play in fulfilling the constitutional mandate in respect of housing. Furthermore, non-governmental organisations (NGOs) and organised business must also strive to play their roles, by assisting the three arms of government to further their constitutionally mandated roles, and where necessary, to monitor and hold government to account.

Moreover, South Africa’s democracy depends on the proper functioning of the three arms of government. The judiciary has an important role to play in the interpretation and enforcement of socio-economic rights, but must fulfil this role with caution, taking into account the separation of powers concerns as well as the appropriate role of judicial deference. The judiciary should also ensure that the promises in the Constitution are not disregarded or taken lightly by the State, especially with regard to socio-economic rights.⁹

⁶ The Preamble to the Constitution states that the Constitution is the supreme law of the Republic, and was conceived so as to, amongst other objectives “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”

⁷ Liebenberg 2006 (note 5 above); Liebenberg S “Transformative constitutionalism and the interdependence between substantive equality and socio-economic rights” (2007) 23 *SAJHR* 335-361, 338.

⁸ See Fraser on the relationship between status subordination and distributional injustice, in Fraser N and Honneth A *Redistribution or Recognition? A Political-Philosophical Exchange* (2003) 1-269 at 7-70.

⁹ See Hoexter C “The future of judicial review in the South African administrative law” (2000) 117 *SALJ* 484-519, on the roles of courts in administrative law judicial review and issues of deference. For an analysis of the judicial role in relation to socio-economic rights, see McLean K *Constitutional Deference: Courts and Socio-Economic Rights In South Africa* (2009) 1-244 at 61-87 and 105-116; Liebenberg 2010 (note 5 above) at 36-42 and 131-223, on the limits of adjudication in relation to socio-economic rights in general and the duty of the courts to give substantive content to socio-economic rights.

The reason I focus on informal settlement residents and those in inadequate housing is because they are the most deeply affected by decisions of the courts which fail to give substantive content to the right of access to adequate housing. In addition, they represent the people who are in urgent need of access to adequate housing.

1 2 Research questions

In this thesis, the following four central research questions will be addressed:

1 2 1 What is the role of the courts in enforcing the socio-economic rights entrenched in the Constitution, and what are the main impediments which inhibit the courts from fulfilling this role?

1 2 2 What has been the Constitutional Court's ('the Court's) approach to the right of access to adequate housing?

1 2 3 How can the South African Constitutional Court be more effective in developing a jurisprudence which gives substantive content to the right of access to adequate housing as a human right?

1 2 4 How can the Court be more effective in adjudicating the positive duties imposed by socio-economic rights with reference to the right of access to adequate housing?

1 3 Hypothesis

This thesis is premised on the following four hypotheses, namely that:

1 3 1 The Constitution requires a more robust judicial role in the enforcement of socio-economic rights.

1 3 2 Housing as a human right protects a diverse and distinct set of values and purposes which can be derived from relevant international and comparative law as well as the human needs and purposes which housing protects in the South African context.

1 3 3 The Constitution requires the courts to engage seriously and systematically with the values and purposes protected by section 26(1) of the Constitution.

1 3 4 A model based on the development of the substantive content of housing as human right, can facilitate the development of a more effective model of adjudicating access to adequate housing.

1 4 Methodology and underlying assumption

The Constitution provides a framework for the improvement of the quality of life of all people in South Africa. This is evident in the preamble to the Constitution.¹⁰ Some of the relevant obligations placed upon the State are further expressed in sections 26,¹¹ and 28(1)(c)¹² of the Constitution, amongst other provisions.

Section 39(1) of the Constitution, specifically section 39(1)(a), requires “a court, tribunal or forum” to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom.” Section 39(1)(b) requires the courts to consider international law, and section 39(1)(c) permits them to consider foreign law in the interpretation of the Bill of Rights.

¹⁰ The relevant part of the Preamble provides that the Constitution is adopted in order to (amongst other objectives: [I]mprove the quality of life of all citizens and free the potential of each person ...”

¹¹ Section 26 of the Constitution provides that:

“(1) Everyone has the right to have access to adequate housing;

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

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

¹² Section 28(1)(c) provides that every child has the right:

“to basic nutrition, shelter, basic health care services and social services;”

Although the Constitution imposes certain obligations on the State, all members of society are nevertheless required to play their part. This includes organised business, courts, and ordinary people.¹³ Notwithstanding the imposition of these obligations and the passing of a reasonable period of time since the advent of democracy, the quality of life in South Africa has not improved much, especially for the poor and marginalised with inadequate housing. Instead, many in South Africa are still experiencing severe poverty which manifests itself in the shortage of employment, inadequate housing, and lack of access to water and sanitation services, to name but a few.¹⁴ Moreover, a wide gap between the poor and the rich in South Africa continues to exist. This is supported by recent studies into the economic conditions of the poor in South Africa.¹⁵

The research methodology adopted in this thesis consist of an analysis of literature, case law (South African, international law and comparative law), legislation, policy, regional human rights instruments and international human rights instruments.

¹³ Pieterse M “On ‘dialogue’, ‘translation’ and ‘voice’: Reply to Sandra Liebenberg” in Woolman S and Bishops M (eds) *Constitutional Conversations* (2008) 1-347 at 333-347 and 336-339. See also sections 8(2), (3) and 39(2) of the Constitution. Section 8(2) provides that the Bill of Rights binds natural and juristic persons alike, taking into account the nature of the right and the scope of any duty imposed. While section 8(3) gives courts powers to develop the common law in order to fill in gaps that may have been left by legislation and in order to give effect to the rights in question and provides for a limitation of rights through the common law, as long as that limitation complies with section 36(1) of the Constitution. Lastly, section 39(2) read with sections 8(2) and (3) instructs courts, forums, or tribunals to promote the spirit, purport and objects of our Bill of Rights when interpreting any legislation, and when developing the common law or customary law.

¹⁴ See *The Presidency of the Republic of South Africa Development Indicators* (2009) and Leibbrandt M *et al* “Trends in South African Income Distribution and Poverty Since the Fall of Apartheid” (2010) *OECD Social Employment and Migration Working Papers* No. 101 1-90 at 13-68. Leibbrandt M and others argues that more and more people are unemployed, do not have access to basic necessities with the net result that the poorest of the poor are getting worse-off with inequality in all spheres of everyday existence the order of the day. See also Mbeki M *Architects of Poverty: Why African Capitalism Needs Changing* (2009) chapters 2 and 3. Mbeki explains why African capitalism needs changing. He argues that African capitalism has only succeeded in creating parasitic political elites and black middle class, who consume without producing anything. This has had a negative effect of de-industrialisation in South Africa and Africa.

¹⁵ *The Presidency Development Indicators* (note 14 above) at 22-29. The findings of this study indicate that the number of people living in poverty has decreased, with reference to years 1999-2007. However, this decrease has been slow as inequality remains a challenge all over South Africa. See also Leibbrandt M *et al* (note 14 above) chapters 1 and 2. They state that that the poor are worse off than they were under apartheid and that inequality has increased.

1 5 Brief overview of the leading housing cases in the jurisprudence of the Constitutional Court and their relevance to the thesis

In this part, I provide a brief overview of the main housing cases, some of which will be discussed throughout this thesis, and indicate their relevance to my thesis.

The Constitutional Court first dealt with housing issues in the *Grootboom and Others v Government of the Republic of South Africa and Others* (hereafter ‘*Grootboom*’)¹⁶ but mainly focused on emergency housing.¹⁷

The *Grootboom* case was followed by *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)*¹⁸ which also dealt with emergency housing, arising from the flooding of an informal settlement, Alexandra Township, Johannesburg. The Jukskei River that runs through this township destroyed homes of the people living on the banks of the river.¹⁹ The next case was *Port Elizabeth Municipality v Various Occupiers* (hereafter ‘*PE Municipality*’).²⁰ This case concerned residents who built an informal settlement on privately owned land and were facing an eviction from the said land.²¹

The Court subsequently dealt with deprivation of the right of access to adequate housing (section 26(1) of the Constitution) in *Jaftha v Schoeman and Another, Van Rooyen Stoltz and Others* (hereafter ‘*Jaftha*’).²² The Court acknowledged in this case that it has yet to deal with the right of access to adequate housing in detail and that this issue was dealt with in *Grootboom* albeit not fully.²³ This is because, the *Jaftha* case was not about people in inadequate housing claiming access to adequate housing as envisaged in section 26(1) of the Constitution.

¹⁶ [2000] ZACC 14; 2001 (1) SA 46 (CC).

¹⁷ *Grootboom* (note 16 above) paras 3-5 and 5-12.

¹⁸ [2001] ZACC 19; 2001 (3) SA 1151 (CC).

¹⁹ *Kyalami Ridge* (note 18 above) paras 1-9.

²⁰ [2004] ZACC 7; 2005 (1) SA 217 (CC).

²¹ *PE Municipality* (note 20 above) paras 1-7.

²² [2004] ZACC 25; 2005 (2) SA 140 (CC) para 23.

²³ *Jaftha* (note 22 above) para 23.

The *Jaftha* case was followed by *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*²⁴ which dealt with the unlawful occupation of a farm belonging to a private juristic person.²⁵ This case is relevant to this study because it illuminates the Court's approach to the right of access to adequate housing where private land has been occupied by those with inadequate housing, and the duties of the State thereto. This case will be used to contrast the Court's approach to the right of access to adequate housing with the themes of this thesis.

Jaftha was followed by *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (hereafter '*Occupiers of 51 Olivia Road*')²⁶ which dealt with inner city evictions from buildings.²⁷ This case will be used to contrast the weak protection the Court gives to positive duties imposed by the right of access to adequate housing as opposed to the strong protection given to the negative duties of this right. *Occupiers of 51 Olivia Road* was followed by *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (hereafter '*Residents of Joe Slovo Community*')²⁸ which dealt with the issues of relocation of an informal settlement, so that houses could be built on the land in which the informal settlements were situated.²⁹ This case further developed the negative duties imposed by section 26(3).

Moreover, *Residents of Joe Slovo Community* was followed by *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others*.³⁰ This case dealt with a piece of provincial legislation that sought to subordinate the provisions of the Prevention of Illegal Evictions From and unlawful Occupation of Land Act, 19 of 1998. This case illuminates the robust approach of the Court where the positive duties arising out of section 26 are not implicated.

Lastly, *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* (hereafter '*Nokotyana*')³¹ which dealt with applicants who are members of the Harry Gwala Informal settlement, who approached the Court on appeal and claimed one ventilated pit latrine (toilet) per

²⁴ [2005] ZACC 5; 2005 (5) SA 3 (CC).

²⁵ *Modderklip* case (note 24 above) paras 1-9.

²⁶ [2008] ZACC 1; 2008 (3) SA 208 (CC).

²⁷ *Occupiers of 51 Olivia Road* (note 26 above) paras 1-8.

²⁸ [2009] ZACC 16; 2010 (3) SA 454 (CC).

²⁹ *Residents of Joe Slovo Community* case (note 28 above) paras 8-14 (Yacoob J).

³⁰ [2009] ZACC 31; 2010 (2) BCLR 99 (CC).

³¹ [2009] ZACC 33; 2010 (4) BCLR 312 (CC).

household as basic sanitation needs. In addition, they claimed high-mast lighting, pending the decision of the Member of the Executive Committee (MEC), Ekurhuleni Metropolitan Municipality (Johannesburg) as to whether to approve the settlement for upgrading in terms of chapter 13 of the National Housing Code.³²

The above-mentioned cases, *Grootboom*, *Residents of Joe Slovo Community*, *Abahlali Basemjondolo*; *PE Municipality*, *Modderklip*, and *Occupiers of 51 Olivia Road*, dealt with the nature of obligations imposed on organs of State and private landowners in the context of eviction applications. The positive obligations imposed in this context revolve primarily around the obligation to engage meaningfully with the affected occupiers and the provision of alternative accommodation to those evicted from their homes.³³

To date, the South African jurisprudence has not developed the substantive content of the right of access to adequate housing entrenched in section 26 (1) of the Constitution and therefore this right remains undeveloped. A possible explanation could be that the reasonableness review test, as applied by the Court, does not incorporate a consideration of the goals that housing as a human right are meant to advance.

The other problem might be that there are many impediments to the proper realisation of socio-economic rights and to the achievement of a more robust judicial role in the enforcement of socio-economic rights.³⁴ The first impediment one can identify is the Court's interpretation and application of the separation of powers doctrine and the notion of judicial deference. A second

³² *Nokotyana* (note 31 above) paras 1-5.

³³ See *PE Municipality* (note 20 above) paras 25 and 28-59, regarding the duty resting on organs of State and the duties resting on private landowners when pursuing eviction proceedings; See also *Occupiers of 51 Olivia Road* (note 26 above) paras 26, 42-43 and 46, regarding alternative accommodation duty; See also *Occupiers of 51 Olivia Road* paras 18-23, regarding the duty resting on organs of State to engage meaningfully with unlawful occupiers who would become homeless upon eviction. The Court held that meaningful engagement must occur prior to the institution of the eviction proceedings as required by section 26(3) of the Constitution and will constitute one of the factors taken into account by the court in assessing whether it is "just and equitable" to evict; See also *Residents of Joe Slovo Community* (note 28 above) paras 38, 42, 66 and 74 of Moseneke DCJ's concurring judgment, and paras 138-146 of Ngcobo CJ concurring judgment, both cases dealing with meaningful engagement and endorsing *Occupiers of 51 Olivia Road*. Lastly, see *Residents of Joe Slovo Community* (note 28 above) paras 104-117 concurring judgment of Yacoob J, in which he highlights and upholds *PE Municipality* case on the issue of alternative accommodation requirement.

³⁴ Such as the doctrine of separation of powers, judicial deference, and the failure of the Court to develop the potential of its earlier housing jurisprudence.

impediment concerns the failure of the Court to develop the potential of the *Grootboom* judgment in subsequent housing and socio-economic rights cases. I will seek to develop an argument that the failure of the Court to develop the purposes and values served by housing rights as outlined in the *Grootboom* case, has led to a static jurisprudence in the sphere of the right of access to adequate housing, particularly in relation to the positive duties imposed by this right. For the purposes of this thesis, I will focus on these impediments to the adjudication of socio-economic rights. I will further investigate whether the Court has been overly deferential in recent cases dealing with housing, such as in *PE Municipality*,³⁵ *Occupiers of 51 Olivia Road*,³⁶ and *Nokotyana*.³⁷

I will address my research questions and aims through a detailed analysis and evaluation of the following cases: *Grootboom*, *PE Municipality*, *Jaftha*, *Occupiers of 51 Olivia Road*, *Residents of Joe Slovo community*, *Joseph and Others v City of Johannesburg and Others*³⁸ and *Nokotyana*.

My tentative hypothesis is that the Court has been far more willing to develop the nature and content of the right of access to adequate housing in cases where the negative duties imposed by this right are at stake, or where a limited positive duty of emergency accommodation is affirmed. However, it has been far less willing to engage with the positive content of access to adequate housing in cases involving systemic and long-standing deprivation of adequate housing. This is particularly illustrated by its judgments in *PE Municipality*, *Jaftha*, *Occupiers of 51 Olivia Road*, *Residents of Joe Slovo Community* and *Nokotyana*.

1 6 Overview of structure and chapters

The purpose and composition of the study are outlined in this chapter, chapter 1 provides an overview of the key housing rights cases in the jurisprudence of the Constitutional Court and highlight the issues of relevance to my research aims and questions.

³⁵ *PE Municipality* (note 20 above).

³⁶ *Occupiers of 51 Olivia Road* (note 26 above).

³⁷ *Nokotyana* (note 31 above).

³⁸ [2009] ZACC 30; 2010 (3) BCLR 212 (CC).

In chapter 2, I proceed to investigate the role of the courts in enforcing the socio-economic rights in the South African Constitution. I will do so by examining the nature and scope of transformative constitutionalism in relation to the role of the courts in socio-economic rights adjudication. In addition, I will examine the three key impediments to the adjudication of socio-economic rights which I have identified.

In chapter 3, the potential of developing the substantive content of the right of access to adequate housing, is investigated. I do so by using the methodology specified in section 39(1)(a), (b) and (c) of the Constitution. First, I will examine the history and context of housing in South Africa.³⁹ I take this point of departure from the statement of the Constitutional Court in *Grootboom* that “rights need to be interpreted and understood in their social and historical context (...)”⁴⁰

Second, I will seek to elaborate on the purposes and values protected by the right of access to adequate housing.⁴¹ In this regard, I will analyse relevant international law, in particular the International Covenant on Economic, Social and Cultural Rights (hereafter ‘ICESCR’),⁴² the

³⁹ Plaatje (note 1 above). See also Bundy (note 1 above); Richards R *et al* (note 3 above); See also Misselhorn (note 3 above). The Constitution requires a reversal of the housing injustices of the past and a restoration of the human rights that were taken away by old order legislation and conduct, amongst other things. This is implicit in the transformative character of our Constitution; See also *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC) para 8; *Grootboom* (note 16 above) paras 24-25 and 82-83; *Occupiers of 51 Olivia Road* (note 26 above) paras 10 and 14; *Residents of Joe Slovo Community* (note 28 above) paras 62-63 of Moseneke DCJ’s concurring judgment and paras 90-108 of Ngcobo CJ’s concurring judgment.

⁴⁰ *Grootboom* (note 16 above) para 25.

⁴¹ See Liebenberg S and Goldblatt B “The interrelationship between equality and socio-economic rights under South Africa’s transformative Constitution” (2007) 23 *SAJHR* 335-360; Liebenberg S “The value of human dignity in interpreting socio-economic rights” (2005) 21 *SAJHR* 1-30; Van der Walt AJ “Exclusivity of ownership, security of tenure, and eviction orders: a model to evaluate South Africa’s land-reform legislation” (2002) *Journal of South African Law* 254-289; Wilson S “Breaking the tie: Eviction from private land, homelessness and a new normality” (2009) 126 *SALJ* 270-290; The jurisprudence has attempted, albeit in very broad terms, to identify some of the values and purposes protected by socio-economic rights. See, for example: *Soobramoney* (note 39 above) paras 42-51 and 56. However, the cases of *Soobramoney* and *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (3) BCLR 239 (CC), were instances in which the Constitutional Court did not develop in detail, the values and purposes underlying the relevant right by failing to give meaning to the implicated human rights; See also *Grootboom* (note 16 above) paras 1, 23, and 88; *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC) paras 40, 64, 85, 104 and 114; *Jaftha* (note 22 above) paras 23 and 28; *Residents of Joe Slovo Community* (note 28 above) paras 18, 31 and 33.

⁴² International Covenant on Economic, Social and Cultural Rights [adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966.

African regional human rights system,⁴³ the European regional human rights system,⁴⁴ and the Inter-American human rights system.⁴⁵ I will also examine the emerging international law norms and instruments and selected cases from foreign jurisdictions in which the substantive content of the right of access to adequate housing has been developed.

In chapter 4, the extent to which the Court has given substantive content to the right of access to adequate housing will be examined. Here, I will look at the selective jurisprudence of the Court which best illuminates its approach to the right of access to adequate housing. I will focus particularly on the following cases: *Grootboom*,⁴⁶ *Jaftha*,⁴⁷ *PE Municipality*,⁴⁸ *Occupiers of 51 Olivia Road*,⁴⁹ *Residents of Joe Slovo Community*⁵⁰ and *Nokotyana*.⁵¹

I focus on these cases as they represent a selection of the leading decisions of the Constitutional Court dealing with various aspects of section 26. They will enable me to analyse the extent to which the Constitutional Court has developed the substantive content of the right to adequate housing in various contexts. I will seek to identify both the positive and negative features of the relevant judgments from the perspective of my research aims.

The Court has a duty to elaborate the meaning of section 26(1) of the Constitution. I will develop an argument that this is essential for all cases falling within the ambit of s 26, whether the cases concern the reasonableness of the State's actions or omissions in terms of s 26(2), or the eviction of people from their home in terms of s 26(3).⁵² By doing this, the courts will not only have engaged

⁴³ The African Charter on Human and Peoples' Rights, the jurisprudence of the African Court of Human and Peoples' Rights and the African Commission Human and People' Rights. Most notably the *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Communication number 55/96.

⁴⁴ See Kapindu R *From Global to the Local: The Role of International Law in the Enforcement of Socio-economic rights In South Africa* (2009) 6 Research Series 1-50 at 23.

⁴⁵ Kapindu R (note 44 above) at 23-24.

⁴⁶ *Grootboom* (note 16 above).

⁴⁷ *Jaftha* (note 22 above).

⁴⁸ *PE Municipality* (note 20 above).

⁴⁹ *Occupiers of 51 Olivia Road* case (note 26 above).

⁵⁰ *Residents of Joe Slovo Community* (note 28 above).

⁵¹ *Nokotyana* (note 31 above). I will however, also focus on cases such as *Occupiers of 51 Olivia Road* and *Residents of Joe Slovo Community* which entail primarily the negative duties arising out of section 26 of the Constitution. I seek thereby to illustrate the contrast in how the Court approaches these cases compared to cases which concern mainly the positive duties arising out of the right of access to adequate housing.

⁵² See *Grootboom* (note 16 above) paras 34 and 44 where the court held that the subsections of section 26 are interrelated and should be read together. Furthermore, the Court reasoned that reasonableness review must be seen in

effectively with section 26 as a whole, but also started to develop the substantive content of section 26(1) for future cases concerning a failure to realise the right of access to adequate housing.

In chapter 4 of the thesis, I examine whether the Court's jurisprudence gives proper effect to the purposes and values of housing rights and relevant international human rights law. I will also examine whether relevant comparative law has been taken into account. Finally, I will give my overall assessment of how the Constitutional Court has approached the right of access to adequate housing as described in section 26(1) and (2) of the Constitution.

In chapter 5, I will suggest alternative approaches which could contribute to the development of a more substantive approach to housing in the South African Constitutional Court's jurisprudence. I will do so by suggesting ways of overcoming the impediments to the adjudication of socio-economic rights, by highlighting the importance of assessing the reasonableness review test in the context of the purposes and values promoted by the right of access to adequate housing. In addition, I will examine the implications of this approach for the development of the jurisprudence.

Chapter 6 of the thesis will be a summary of my findings and a conclusion.

light of the Bill of Rights as a whole. See also Liebenberg 2010 (note 5 above) chapter 2, 51-54 and chapter 4, 170-172.

CHAPTER 2: THE ROLE OF COURTS IN ENFORCING SOCIO-ECONOMIC RIGHTS UNDER SOUTH AFRICA'S TRANSFORMATIVE CONSTITUTION

2 1 Introduction

In this section, the significance as well as the theoretical and practical applications of transformative constitutionalism in the context of the adjudication of socio-economic rights under the Constitution of the Republic of South Africa, 1996 ('the Constitution'), will be explored. To this end, I will examine the history and meaning of transformative constitutionalism, its practicality in the South African context, and also criticisms of the concept.

In addition, I will consider how the concept of transformative constitutionalism contributes to conceptualising an appropriate role for courts in adjudicating socio-economic rights. To this end, I will explore the various theoretical underpinnings of the concept of transformative constitutionalism that have developed since the concept first appeared in our constitutional jurisprudence. The aim of this will be to put forward suggestions regarding the role of courts in enforcing socio-economic rights under South Africa's transformative constitutionalism as a foundation for the analysis of the particular role of the courts in the enforcement of the right to adequate housing in section 26 of the Constitution.

2 2 Transformative constitutionalism

2 2 1 Introduction

The transformation of the economy has received much attention since the dawn of our democracy in 1994. At the heart of this debate is the elimination of the vast economic and social inequalities that were inherited by the new government from the previous government.¹ This transformation debate

¹ See: Terreblanche 2003 (ch 1, n 1) for a comprehensive impact of colonialism and apartheid in creating the past and current inequalities on South Africa's population, especially black people; and Ramphela M *Laying Ghosts To Rest: Dilemmas of The Transformation In South Africa* (2008) 7-13 and 46-72. It is also well documented that these vast economic and social inequalities have more than doubled since 1994. In this regard see: *The Presidency of the Republic of South Africa Development Indicators* (2009) and Leibbrandt M *et al* (ch 1, n 14) 1-90.

has also put the spotlight on the South African judiciary, particularly regarding the role it is supposed to play in the pursuit of social justice when performing its duties under the Constitution.²

2 2 2 History and meaning of transformative constitutionalism

The term transformative constitutionalism originates from Klare's article, in which he described the South African Constitution as transformative in character and aspirations. He described transformative constitutionalism as:

...[A] long term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform,' but something short of or different from 'revolution' in any traditional sense of the word.³

Klare went on to describe the South African Constitution as "post-liberal," and as one that is committed to "...wide-ranging egalitarian social transformation."⁴ By this he means that the South African Constitution is different from the constitutions of other countries, such as the United States of America, because its design is towards an "...empowered model of democracy."⁵

Klare cautioned though that he would be prepared in another setting to contend that a post-liberal reading of the Constitution is the best reading of the Constitution, but this was not his design here, as other readings of the Constitution are still possible. His purpose was to add clarity to the problem created by concepts, so that a debate can take place about a "post-liberal, or neoliberal, or conservative or any other reading of the Constitution."⁶

² Klare at 150 and authors referred to in (ch 1, n 5).

³ Klare (ch 1, n 5) at 150-151.

⁴ Klare (ch 1, n 5) at 151-156.

⁵ Klare (ch 1, n 5) at 151-153.

⁶ Klare (ch 1, n 5) at 152.

In addition, Klare argues that there is a problem resting on the presumption prevalent in our legal culture that a liberal reading of the Constitution is a “legal” interpretation of the Constitution, whereas a “post-liberal” reading is a “political interpretation.”⁷ Klare holds that seeing issues in this light is wrong, as the traditional view of our legal culture is just as political as the post-liberal interpretation.⁸

Klare makes a case for his “post-liberal” reading of the South African Constitution, by arguing that the Constitution is:

social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission, as opposed to classical liberal documents.⁹

This means that the Constitution envisages a society in which political rights do not exist in isolation, but exist in ways that allow people to have the social resources to exercise their rights. This is in contrast to the classical liberal Bill of Rights, such as that of the United States of America, which pre-occupies itself with securing individual liberty and private property rights from interference by the government.¹⁰ Flowing from this, it is evident that the Constitution contains many provisions that make it clear that they are not self-executing, but are open-textured and must be interpreted and applied in their context.¹¹ This, according to Klare, is also evidence that the Constitution as a post-liberal document necessarily envisages new conceptions of judicial roles and responsibilities.¹²

Furthermore, Klare acknowledges the constraints of adjudication, and the limitations placed on all role players in the legal profession.¹³ In terms of traditional conceptions of the rule of law, judges are expected to leave their politics out of adjudication, by interpreting legal texts in ways devoid of

⁷ Klare (ch 1, n 5) at 151-156.

⁸ Klare (ch 1, n 5) at 151-156.

⁹ Klare (ch 1, n 5) at 153-156.

¹⁰ Klare (ch 1, n 5) at 153-156.

¹¹ Klare (ch 1, n 5) at 157.

¹² Klare (ch 1, n 5) at 155-156. See also: Moseneke D “The Fourth Bram Fischer Memorial Lecture” (2002) 28 *SAJHR* 309-319 at 314.

¹³ Klare (ch 1, n 5) at 149.

“personal or subjective views.”¹⁴ Lawyers too, struggle with interpretive problems when engaged in the functions of interpreting legal texts and materials, owing to the prevailing legal culture.¹⁵ This implies that enough space is left for judges and other role players in the legal profession to gradually give meaning to legal materials through interpretation of rights and the crafting of suitable remedies.

He further insists that the great weakness in the traditional legal theory lies in its insisting on the strict separation between law and politics, and between “professionally constrained legal practices and strategic pursuit of political and moral projects.”¹⁶ This means that legal stakeholders are constrained by their legal training, and by extension, the accepted legal culture in a particular society, which leads them to interpreting legal materials in a particular way, and not in other ways.¹⁷ A prudent decision-maker cannot solve a case by simply resorting to her politics or morals, even if resort to external materials were regarded as prudent.¹⁸ This is because her ideological preconceptions are unlikely to provide her with guidance on how to deal with challenging legal precedents, even in cases where external resort was considered appropriate.¹⁹

Klare goes on to urge for the closing of the divide between law and politics in adjudication.²⁰ He identifies two primary reasons for this approach, namely that the interpretative work that judges, and other players in the legal field perform partially make up legal materials, and imbues them with “value-laden meanings” that consciously or unconsciously shape their sense of what materials are relevant to a certain question, and to fairness.²¹ Therefore, judges and advocates need to be aware of assuming that they are always constrained by legal materials,²² and need to understand and not underestimate the extent of the indeterminacy of legal materials.²³ This is because failure to do so

¹⁴ Klare (ch 1, n 5) at 157. Klare argues that traditional conceptions of the rule of law impose certain requirements on Judges to leave their politics outside of court.

¹⁵ Klare (ch 1, n 5) at 160-166.

¹⁶ Klare (ch 1, n 5) at 166-166.

¹⁷ Klare (ch1, n 5) at 166-172. Klare defines legal culture as the “professional sensibilities and prevailing habits in a particular legal system,” Klare at 166.

¹⁸ Klare (ch 1, n 5) at 161.

¹⁹ Klare (ch 1, n 5) at 161.

²⁰ Klare (ch 1, n 5) at 160-164.

²¹ Klare (ch 1, n 5) at 163 and 162-166.

²² Klare (ch 1, n 5) at 165.

²³ Klare (ch 1, n 5) at 165-166.

leads to denial of the choices and power that they wield through interpretive processes or adjudication.²⁴

Moreover, Klare argues that judges' political leanings and moral values form part of the interpretive processes and adjudication.²⁵ Therefore, the most prudent thing to do in that regard would be for judges and lawyers to acknowledge to the public their part in moulding the social order through interpretive and adjudicative tools, so that the public are aware of this in order to promote and uphold the democratic principles of openness and accountability.²⁶ This is not because judges are weak or easily give in to political temptation, but because the traditional divide maintained by the rule of law is impossible to uphold.²⁷ Reliance on available legal materials and ways in which things were done in earlier times may act as a limiting factor on constitutional interpretation. This could in turn limit the achievement of democratic transformation.²⁸ He argues that this is the risk that South Africa faces today, owing to the legal actors' blind reliance on "culturally available intellectual tools and instincts handed down from earlier times."²⁹

The implications of Klare's arguments are that the proponents of social justice, such as lawyers and judges may be working against social justice through their deployment of available legal materials without critically interrogating to what extent these legal materials act as constraints rather than aids to interpretation. This is because legal actors in a particular legal system are conditioned to accept certain legal arguments as convincing and others as not convincing.³⁰ It may be that the legal arguments that are accepted as more convincing are actually not advancing social justice or the transformative designs of the Constitution. For instance, in the field of socio-economic rights, it could be argued that lawyers and judges pre-occupy themselves unduly with court procedures and

²⁴ Klare (ch 1, n 5) at 165-166.

²⁵ Klare (ch 1, n 5) at 159-166.

²⁶ Klare (ch 1, n 5) at 159-166. Klare further justifies this proposition by comparing the South African legal system to the United States legal system, where the judiciary has openly acknowledged the politics of adjudication. He further reasons that this is "not because Judges are weak and give in to political temptation, but because the exclusion called for by the traditional rule-of-law ideal is quite simply impossible," Klare at 165. This is acknowledged by Moseneke (note 12 above) at 317-318, where he expresses agreement with the sentiments expressed by Klare that judges are influenced by their political and moral leanings in adjudication.

²⁷ Klare (ch 1, n 5) at 163-166. This is confirmed by Moseneke (note 12 above) at 317 where he argues that "... personal intellectual and moral pre-conceptions of judges do intrude into their adjudication (...)."

²⁸ Klare (ch 1, n 5) at 168.

²⁹ Klare (ch 1, n 5) at 168.

³⁰ Klare (ch 1, n 5) at 166-170.

formalistic concepts which may well be out of tune with the transformative designs of the Constitution. This could manifest itself in how courts approach concepts such as positive and negative duties, reasonableness review, separation of powers doctrine and judicial deference. These doctrinal approaches and concepts may have the negative effect of derailing social change and stopping the development of the law by blocking out substantive legal reasoning. An unduly limited or narrow perspective which is part of a certain legal culture shapes one's imagination and beliefs, and may exclude alternative legal arguments, but immersion in another legal culture may expose one to alternative arguments, and serve to dissolve one's legal culture, which may not be convincing anymore.³¹

Klare argues that the antidote to this is a constitutional duty resting on the judiciary and legal profession to search and critically examine the prevailing legal culture and its influences on interpretive practices and adjudication.³² Klare develops the above-mentioned arguments by pointing out that the democratic South Africa mandated a new, transformed legal culture.³³ However, it is hard to develop and grow a new legal culture using the tools and habits that were used before this new legal culture was ushered in.³⁴ Klare further argues that future generations will assess the Constitutional Court based on the contribution it has made to achieving equality, advancing social justice, and deepening the culture of democracy, multi-racialism, and respect for human dignity.³⁵ Klare argues therefore that "...how tightly the Court squares its arguments with textbook canons and maxims will be far less important at the end of the day."³⁶

Klare's idea of a transformative constitution has been adopted and elaborated upon in academic literature, and by the South African courts.³⁷ However, there remain many questions as to how precisely the courts should approach their role, particularly in the context of the interpretation and enforcement of socio-economic rights.

³¹ Klare (ch 1, n 5) at 167-168.

³² Klare (ch 1, n 5) at 167-68.

³³ Klare (ch 1, n 5) at 171.

³⁴ Klare (ch 1, n 5) at 171.

³⁵ Klare (ch 1, n 5) at 171-172.

³⁶ Klare (ch 1, n 5) at 172.

³⁷ See, for example, the sources cited in ch 1, n 5.

Liebenberg asserts that the Constitution is “backward-looking, as well as ‘forward-looking.’”³⁸ In addition, she develops this line of argument by contending that in order to achieve transformation, the focus must not only be on the apartheid past, but also on the future.³⁹ This is particularly instructive in adjudicating socio-economic rights to achieve social justice, because the complexity of socio-economic rights require that courts adjudicate in ways that are committed to addressing yesterday’s injustices and also contribute to guiding the post-democratic social changes.

Van Marle, on the other hand, questions the overzealousness of transformative constitutionalism based on laws’ limitations in driving substantive changes in “...politics, citizenship and community.”⁴⁰ She argues that, “[i]f the change encompasses nothing more than the transformation of the system by the system, the change amounts to evolution in contrast to transformation as defined”⁴¹ by Cornell. This means that the courts and everyone else would have to pursue social change in a way that radically changes the way in which we approach social justice. This would encompass examining ourselves and the current system and identifying the impediments it presents to social change, and ways in which this can be corrected, so that, with time, meaningful social change, especially in the field of socio-economic rights, can be achieved.

Roux⁴² offers a different reading of the Constitution based on another reading of Klare, grounded in Ronald Dworkin, in contrast to the Critical Legal Studies (CLS) school of thought. Dworkin’s method is based on the argument that political morality as informing the Constitution is often presented as an objective correctness of a particular view.⁴³ Roux’s reading of Klare and his suggested way of reading the Constitution, leads to the same conclusions that Klare reaches using

³⁸ Liebenberg 2010 (ch 1, n 5) at 25-28, she relies on Teitel R *Transitional Justice* (2000) 191 at 215.

³⁹ Liebenberg 2010. Moseneke (note 12 above) at 315 notes that “...few would contest that the imperative of the new legal order is the creation of a society different from our socially degrading and economically exploitative apartheid past (...).”

⁴⁰ Van Marle (ch 1, n 5) at 653-657. Van Marle here relies mainly on Richard Wilson, Emilios Christodoulidis, and Drucilla Cornell, Van Marle argues that “law and legal rules prevent flexibility and revisability and are based on a generality that precludes particularity,” Van Marle at 655. In other words, law and legal rules take time to adapt to a society that is moving at a very fast pace, and revision of the law and legal rules always lags behind these developments in society. In addition, law and legal rules do not particularise their responses and interactions to reflect the lived realities of those it is supposed to protect. Instead, everyone is put in the same basket. The implications of Van Marle’s argument are that we cannot look exclusively to the law as an instrument of social change; other avenues to transformation must be explored as well.

⁴¹ Van Marle (ch 1, n 5) at 656.

⁴² Roux (ch 1, n 5).

⁴³ Roux (ch 1, n 5) at 259, 262-273 and 273-283.

CLS, which is that the South African judiciary and its role players have to acknowledge the politics or political morality implicit in adjudication, in the interest of democratic principles of openness and accountability so that the public is aware of these factors.⁴⁴

The above discussion demonstrates the importance of transformative constitutionalism as a signpost provided by the Constitution to the courts in their search for social justice. Courts are mandated by the Constitution to interpret rights to advance the fundamental objectives and founding constitutional values set out in the preamble and section 1(a) of the Constitution.⁴⁵ These objectives and values have a manifestly transformative purpose. If transformative constitutionalism is interpreted and applied by the courts in line with the objectives and values of the Constitution, it has the potential to guide the courts towards developing a more substantive conception of socio-economic rights. This is because all facets of transformative constitutionalism suggest that, over time, there should be tangible improvements in the realisation of socio-economic rights, including the right of access to adequate housing. It implies further that the courts should play an active role in facilitating the achievement of socio-economic transformation in society.⁴⁶ The implications of transformative constitutionalism for the role of the courts is elaborated on in the following section.

2 2 3 Transformative constitutionalism and the role of courts in socio-economic rights adjudication

Transformative constitutionalism goes to the heart of the role of courts in adjudicating socio-economic rights cases. The courts, as one of these institutions of democracy, are enjoined by the Constitution to interpret and enforce the rights in the Bill of Right. In the context of socio-economic

⁴⁴ See Klare (ch 1, n 5) at 164-166. Roux's different approach to that of Klare on this account is based on a misunderstanding of Klare, because Klare acknowledged at the beginning of his article that there may be other interpretations of the South African Constitution. For another criticism of Roux, see: Davis Transformation (ch 1, n 5) at 100-101.

⁴⁵ Section 1(a) provides that:

“The Republic of South Africa is one, sovereign, democratic State founded on the following values:
Human dignity, the achievement of equality and the advancement of human rights and freedoms.
...”

⁴⁶ See Liebenberg 2010 (ch 1, n 5) chapter 4 at 163-173 and 173-198, who supports this proposition. In addition, arguments that transformative constitutionalism also implies openness to “value-based’ reasoning” as well as learning from comparative and international law experiences are covered under 2 2 3 below and also in more detail in chapter 3.

rights, this means that the courts, in adjudicating socio-economic rights, need to be more aware of the challenges facing the poor. In adjudicating socio-economic rights, courts must be guided by our unique South African history as well as by the constitutional goals set out in the preamble, namely those of building a future founded on “social justice,” an improvement in the “quality of life of all citizens,” and the “freeing of the potential of each person.”

Jackie Dugard argues that the post-apartheid South African judiciary, specifically the Constitutional Court, has failed to act as an “institutional voice for the poor,”⁴⁷ and has instead found refuge in “jurisprudential conservatism” It will be recalled that the apartheid judiciary was highly deferential to the executive and parliamentary branch, and its preferred style of legal interpretation was legal positivism.⁴⁸ According to Jackie Dugard, the current judiciary has adopted methods of adjudication steeped in legal conservatism, which are similar to the methods of adjudication that were used by the apartheid judiciary.⁴⁹ This constrains the judiciary from playing an active role in giving substantive content to socio-economic rights.

The call for the substantive approach to socio-economic rights has sparked fierce debates in academic literature⁵⁰ and in the courts, where the debate has turned on the appropriate standard of judicial review in socio-economic rights cases.⁵¹ This debate gained momentum in 1992, when Mureinik argued for the inclusion of socio-economic rights in the Constitution. Mureinik reasoned that a Bill of Rights which does not protect these rights can be viewed as “elevating luxuries over

⁴⁷ Dugard Jackie “Judging the judges: Towards an appropriate role for the judiciary in South Africa’s transformation” (2007) 20 *Leiden Journal of International Law* 965-981 at 966-969 and 969-980; Dugard Jackie “Courts and the poor in South Africa: A critique of systemic failures to advance transformative justice” (2008) 24 *SAJHR* 214-238 at 215-238.

⁴⁸ Jackie Dugard 2007 (note 47 above) at 966-980; Jackie Dugard 2008 (note 47 above) 214-234.

⁴⁹ Jackie Dugard 2007 (note 47 above) at 976-979.

⁵⁰ Mureinik E “Beyond a charter of luxuries: Economic rights in the Constitution” (1992) 8 *SAJHR* 464-475; Bilchitz D “Giving socio-economic rights teeth: The minimum core and its importance” (2002) 119 *SALJ* 484-489; Kende M “The South African Constitutional Court’s embrace of socio-economic rights: A comparative perspective” (2003) 6 *Chapman LR* 137-158; Davis 2006 (ch 1, n 5); Steinberg C “Can reasonableness protect the poor? A review of socio-economic rights jurisprudence” (2006) 123 *SALJ* 264-284; Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) (hereafter ‘*Bilchitz Poverty and Fundamental Rights*’) Pieterse M “In support of the minimum core, eating socio-economic rights talk in alleviating social hardships revisited” (2007) 29 *Human Rights Quarterly* 796-822; Young K “The minimum core and social rights: A concept in search of content” (2008) 33 *Yale J. Int’l L.* 113-174; Liebenberg 2010 (ch 1, n 5) 132-223.

⁵¹ *Soobramoney* (ch 1, n 39) paras 25, 42-44; *Grootboom* (ch 1, n 16) paras 39-44, 68 and 99; *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC) paras 78-79 and 123; *Mazibuko* (ch 1, n 41) paras 54-70 and 75-76; *Nokotyana* (ch 1, n 31) paras 22-24.

necessities.”⁵² This means that there is almost no point in protecting other rights, when the most fundamental rights, such as socio-economic rights are not protected in the Constitution, and are subject to judicial review.⁵³ Mureinik’s proposed model of review based on rationality and sincerity⁵⁴ arguably informed the model of reasonableness review adopted in socio-economic rights cases.⁵⁵ The Court has however, distinguished between rationality and the reasonableness review model it developed in earlier cases dealing with socio-economic rights. The Court in the *Khosa* case reasoned that “the test for rationality is a relatively low one. As long as the government purpose is legitimate, and the connection between the law and the government purpose is rational and not arbitrary, the test will have been met.”⁵⁶ This, continued the court, is not the test for determining constitutionality under the Constitution because section 27(2) of the Constitution lays down a standard of reasonableness which is higher than rationality.⁵⁷

This standard of review was elaborated upon and defined in clear terms in the *Grootboom* case.⁵⁸ The Court reasoned that the reasonableness review model is a standard of review used to review whether the government has complied with the positive duties imposed on it by socio-economic rights.⁵⁹ The criterion for determining whether the reasonableness review model has been met, is held to be that “the programme must be comprehensive, coherent, and coordinated; appropriate financial and human resources must be made available for the programme; it must be balanced and flexible, and make appropriate provision for short, medium, and long term needs; it must be reasonably conceived and implemented; it must be transparent and its contents must be made available to the public; it must provide relief to those whose situation is desperate and those who are in intolerable conditions or crisis situations.”⁶⁰

⁵² Mureinik (note 50 above) at 465-469.

⁵³ Mureinik (note 50 above) at 469-473.

⁵⁴ Mureinik (note 50 above) at 471-474.

⁵⁵ *Soobramoney* (ch 1, n 39) paras 25, 42-44; *Grootboom* (ch 1, n 16) paras 39-44, 68 and 99; *TAC2* (note 51 above) paras 78-79, and 123. For a distinction between rationality and the reasonableness review model, see: *Khosa* (ch 1, n 41) para 67.

⁵⁶ *Khosa* (ch 1, n 41) para 67.

⁵⁷ *Khosa* (ch 1, n 41) para 67.

⁵⁸ *Grootboom* (ch 1, n 16) para 41.

⁵⁹ *Grootboom* (ch 1, n 16) para 41. The court reasoned that the “...question will be whether the legislative and other measures taken by the State are reasonable (...).”

⁶⁰ Liebenberg 2006 (ch 1, n 5) at 111; *Grootboom* (ch 1, n 16) paras 39-44, 68 and 99. This was confirmed in *TAC2* (note 51 above) paras 78-79 and 123, a case which dealt with case section 27(1) of the Constitution.

The *Grootboom* and *TAC2* cases essentially elaborated on what the reasonableness review model entails and also affirmed this standard, as first formulated in *Sobramoney*, albeit in a different context. In addition, emphatic rejections of the minimum core concept were made in various socio-economic rights cases that came before the Court.⁶¹ The minimum core was rejected because it presented many difficulties to the Court, this was because the needs of the people in the context of the right of access to adequate housing are diverse, since some need land, while others need both land and houses, and still others need financial assistance.⁶²

There were also difficulties with the definition of the minimum core, and the availability of sufficient information to enable the Court to determine it.⁶³ However, the Court indicated that it would be willing to consider the minimum core in the reasonableness enquiry in certain cases in order to determine if the measures taken by the State are reasonable, provided enough information was placed before the Court on the nature and scope of the minimum core.⁶⁴ The Court's adoption of the reasonableness review and its refusal to embrace the minimum core in examining whether the positive duties imposed on the government by socio-economic rights have been fulfilled, has led to much criticism.⁶⁵ However, some authors have defended the reasonable review standard as currently applied by the Court.⁶⁶

Bilchitz argues that the court in *Grootboom* erred in rejecting the minimum core concept as presenting many difficulties, because the court misunderstood the concept of the minimum core.⁶⁷ This is because the arguments against the minimum core proffered by the Court show confusion as to the nature of the minimum core duties, which arises from failing to make a distinction between the different, universal standards that must be met in order to comply with the duties, and the

⁶¹ See *Grootboom* (ch 1, n 16) paras 30-33 and *TAC2* (note 51 above) paras 26-34. The minimum core concept is the idea that socio-economic rights embrace a certain threshold of the provision of essential goods and services, which the State must provide and cannot reduce. The whole concept of the minimum core originates from the United Nations Committee on Economic, Social and Cultural Rights' General Comment No 3 (1990) para 10. For recent cases raising the distinction between the reasonableness review standard and the minimum core concept, See: *Mazibuko* (ch 1, n 41) paras 52-55 and 59-76 and *Nokotyana* (ch 1, n 31) paras 54-56.

⁶² *Grootboom* (ch 1, n 16) para 33.

⁶³ *Grootboom* (ch 1, n 16) para 33.

⁶⁴ *Grootboom* (ch 1, n 16) para 33; *TAC 2* (note 51 above) para 34.

⁶⁵ Most notably: Bilchitz 2002 (note 50 above); Bilchitz *Poverty and Fundamental Rights* (note 50 above); Liebenberg 2010 (ch 1, n 5) at 173-186.

⁶⁶ Most notably: Kende (note 50 above); Steinberg (note 50 above).

⁶⁷ Bilchitz 2002 (note 50 above) at 486-488.

various specific methods that can be adopted in order to comply with a constitutional duty.⁶⁸ Bilchitz develops these arguments by pointing out that the minimum core concept must be understood with reference to a distinction that must be drawn between two interests that are protected by a right,⁶⁹ “basic needs and more general interests needed for human survival and flourishing.”⁷⁰ The minimum core represents certain basic needs that the government is obliged to protect and provide in accordance with its positive duties. These basic needs are essential for human survival, and cannot be reduced below a certain level.⁷¹

Kende, on the other hand, has argued that the Constitutional Court’s socio-economic rights jurisprudence from the *Grootboom*, to *TAC2* cases, and by implication its reasonableness review model is evidence of a careful balancing act on the Court’s part.⁷² Kende argues that the Court recognises the obligations imposed on the government by socio-economic rights, but allows government appropriate space to comply with these constitutional duties.⁷³ Other scholars, like Liebenberg, argue for a “substantive conception of the reasonableness review model.”⁷⁴ She argues that, although the reasonableness review model allows the courts “a flexible and context-sensitive basis for evaluating socio-economic rights claims,”⁷⁵ there is still a dire need for courts to develop the normative values and purposes against which the reasonableness of State’s acts or omissions can be tested and to engage in systematic evaluation of the evidence in socio-economic rights cases.⁷⁶ This she argues, is avoided by the conflation of “the two-stage approach to constitutional analysis”⁷⁷ in the Court’s application of the reasonableness review model. The first stage of constitutional analysis is concerned with the question of whether there has been a violation of a

⁶⁸ Bilchitz 2002 (note 50 above) at 487.

⁶⁹ Bilchitz 2002 (note 50 above) at 486.

⁷⁰ Bilchitz 2002 (note 50 above) at 486, and 487-489.

⁷¹ Bilchitz 2002 (note 50 above) at 487-489; Bilchitz *Poverty and Fundamental Rights* (note 50 above) at 188-189, for similar arguments.

⁷² Kende (note 50 above) at 142-156.

⁷³ Kende (note 50 above) at 142-156. For similar arguments, see Steinberg (note 50 above) at 269-276, where she argues that the reasonableness review standard adopted by the Constitutional Court is the appropriate standard of review for socio-economic rights as opposed to the minimum core. She argues that this concept of the minimum has the potential to “inhibit the proper functioning of the other branches of government.” Davis 2006 (ch 1, n 5) at 315 argues that the reasonableness review standard is appropriate for now, taking into account “the Constitutional Court’s awareness of the State’s economic policy and deference issues, and the fact that our democracy is too young to embrace a robust minimum core approach to socio-economic rights.”

⁷⁴ Jackie Dugard (note 47 above); Davis 2006 (ch 1, n 5); Pieterse 2007 (note 50 above).

⁷⁵ Liebenberg 2010 (ch 1, n 5) at 173-174.

⁷⁶ Liebenberg 2010 (ch 1, n 5) at 174-177.

⁷⁷ Liebenberg 2010 (ch 1, n 5) at 175.

right as protected in the Constitution. The second stage concerns the purposes of limiting the right in question, and the question of whether the limitation in question is justifiable in terms of section 36 of the Constitution, the general limitations clause.⁷⁸ The reasonableness review model makes no easily discernible difference between the determination of the reach of the right, concerning whether it has been violated or not, and the justification for the said violation, if any.⁷⁹

This conflation, according to Liebenberg, allows courts to avoid the “initial principled engagement” with the purpose and fundamental values of the right in question and the impact of the violation on the applicants.⁸⁰ As a result of this conflation, the courts fail to develop the substantive content of socio-economic rights, as much focus is directed at assessing whether the government programme in question complies with abstract standards of reasonableness in the model they develop.⁸¹ She argues that individuals are also entitled to “a standard of socio-economic rights provisioning which enables them to thrive and achieve their goals.”⁸² The fulfillment of the minimum core duties is urgent as people’s survival needs depends on it, because without it, the State’s duties to progressively achieve the full realisation of socio-economic rights, would be impossible.⁸³ The role of courts in adjudicating socio-economic rights becomes critical here, as the courts need to prioritise basic needs, by requiring the State to give convincing reasons for its failure to fulfil the basic needs of people in a particular case.⁸⁴

In response to the critics of this robust judicial role in adjudicating socio-economic rights, Liebenberg further argues that the reasonableness review model, particularly if substantively interpreted and applied, has substantial implications for the relationship between the courts and the other arms of government. Such implications are not dissimilar to those arising through an application of the minimum core approach.⁸⁵ This is because the reasonableness review model results in courts delivering orders which have far reaching implications for government policy, as

⁷⁸ Liebenberg 2010 (ch 1, n 5) at 175.

⁷⁹ Liebenberg 2010 (ch 1, n 5) at 175.

⁸⁰ Liebenberg 2010 (ch 1, n 5) at 175-179.

⁸¹ Liebenberg 2010 (ch 1, n 5) at 176-179.

⁸² Liebenberg 2010 (ch 1, n 5) at 165-173.

⁸³ Liebenberg 2010 (ch 1, n 5) at 165-173.

⁸⁴ Liebenberg 2010 (ch 1, n 5) at 165-173.

⁸⁵ Liebenberg 2010 (ch 1, n 5) at 165-168.

government is required to adjust its policies in compliance with these court orders.⁸⁶ She argues that this is not at odds with democratic values, as it serves the functions of judicial review in a constitutional democracy, and is in harmony with the carefully crafted interrelatedness of the functions of the three arms of government and the dialogic nature of this relationship.⁸⁷ An institutional dialogue between the three branches of government is necessary, but not enough to meet the transformative goals of the Constitution, owing to the challenges that each branch faces.⁸⁸

Contemporary legislatures are also subject to disadvantages, owing to lack of time, and resource scarcity in comparison to the executive, which has sound technical know-how and resources to meet and to perform its duties in terms of the Constitution.⁸⁹ Moreover, legislatures are susceptible to corruption by big business, and other influential interest groups.⁹⁰ These challenges in legislative roles and functions result in legislation which leaves out people who are politically, economically and socially marginalised.⁹¹ The implications of this are that the courts' role becomes critical in the interpretation and enforcement of constitutional guarantees in ways that protect the marginalised.

Lastly, Liebenberg argues that the argument suggesting that the quest for an uncontested standard to guide the prioritisation of socio-economic rights is misplaced. This is because there are no easy, incontestable answers⁹² since "the survival standard does not guarantee the clarity and certainty which is claimed for it in defining priority claims in socio-economic rights adjudication."⁹³ According to Liebenberg, survival needs should be handled in a way that fulfils people's immediate needs, as vital components of the positive duties imposed by socio-economic rights.⁹⁴ However, this should not mean that long-term needs are neglected. A balanced approach should apply in this regard,⁹⁵ requiring account to be taken of survival needs as well as needs which foster other constitutional values such as participatory democracy, equality, and human dignity.⁹⁶

⁸⁶ Liebenberg 2010 (ch 1, n 5) at 165-168.

⁸⁷ Liebenberg 2010 (ch 1, n 5) at 165-168.

⁸⁸ Liebenberg 2010 (ch 1, n 5) at 166-168.

⁸⁹ Liebenberg 2010 (ch 1, n 5) at 166-168.

⁹⁰ Liebenberg 2010 (ch 1, n 5) at 166.

⁹¹ Liebenberg 2010 (ch 1, n 5) at 166-168.

⁹² Liebenberg 2010 (ch 1, n 5) at 168.

⁹³ Liebenberg 2010 (ch 1, n 5) at 168.

⁹⁴ Liebenberg 2010 (ch 1, n 5) at 171-172.

⁹⁵ Liebenberg 2010 (ch 1, n 5) at 171-172.

⁹⁶ Liebenberg 2010 (ch 1, n 5) at 171-173.

Liebenberg links the above arguments on the minimum core and reasonableness review arguments with arguments for a reconception of the reasonableness review model developed by the Court.⁹⁷ She argues that although the model of reasonableness review is subject to criticism for not engaging substantively with the nature and content of the socio-economic rights entrenched in the Bill of Rights, it serves other important purposes.⁹⁸ She argues that infusing greater substance into the reasonableness model of review would incorporate a number of considerations peculiar to the applicants, such as “the nature of the service or resource in question, as well as the historical, economical and social context.”⁹⁹ The implications of this approach are that the assessment of whether the reasonableness standard has been met or not, is not performed in a normative vacuum.

The reasonableness review model avoids an inflexible position, and creates a continuous chance of challenging various socio-economic rights violations and deprivations.¹⁰⁰ This has enabled the courts to bring the government to book for its actions or inaction in the field of socio-economic rights, and also provides for an ongoing dialogue between all stakeholders.¹⁰¹ This has been evident in various cases in which the courts have dealt with socio-economic rights.¹⁰²

Liebenberg also laments the failure of the Constitutional Court to engage satisfactorily with relevant international human rights standards and comparative law on socio-economic rights.¹⁰³ According to Liebenberg, the aim of taking international law into account is to compare and extract interpretations of socio-economic rights, which best align with the transformative values of our Constitution, “not to uncritically import interpretations of socio-economic rights developed in other jurisdictions.”¹⁰⁴ She expands this proposition by arguing that considering international human rights and comparative law standards could allow us to see our own socio-economic rights jurisprudence in a new light.¹⁰⁵ The implication of this is that the courts need to take in account the

⁹⁷ Liebenberg 2010 (ch 1, n 5) at 173-186.

⁹⁸ Liebenberg 2010 (ch 1, n 5) at 173-186.

⁹⁹ Liebenberg 2010 (ch 1, n 5) at 174.

¹⁰⁰ Liebenberg 2010 (ch 1, n 5) at 174.

¹⁰¹ Liebenberg 2010 (ch 1, n 5) at 174.

¹⁰² Liebenberg 2010 (ch 1, n 5) at 174.

¹⁰³ Liebenberg 2010 (ch 1, n 5) at 178-179.

¹⁰⁴ Liebenberg 2010 (ch 1, n 5) at 179. She expands this proposition by arguing that considering international human rights standards and comparative law could allow us to see our own socio-economic rights jurisprudence in a new light.

¹⁰⁵ Liebenberg 2010 (ch 1, n 5)

values explicit in section 39 of the Constitution, which enjoins all courts to interpret the Bill of Rights and other provisions of the Constitution in light of the values espoused in the Constitution, and the provisions of section 39.

Others writers have variously praised and criticised the reasonableness review model for amounting to an administrative law model.¹⁰⁶ Thus Cass Sunstein has argued that the Court in *Grootboom* adopted an administrative law model of reasonableness to socio-economic rights adjudication.¹⁰⁷ This is because “administrative law, like constitutional law can be seen as a form of democracy-promoting minimalism”¹⁰⁸ which induces the State to give reasons for its decisions and conduct.¹⁰⁹ Sunstein concludes that reasonableness review enables the Court to attain an optimal balance between respecting the legislative and policy-making roles of the legislature and executive, whilst not abdicating its responsibility to ensure that the relevant priority-setting policy choices are reasonable.¹¹⁰ Steinberg disagrees with Sunstein’s understanding of the reasonableness review model. Steinberg argues that reasonableness review in the context of socio-economic rights has a “discrete character” despite being rooted in administrative law.¹¹¹ This is because reasonableness review in the context of socio-economic rights requires an intense assessment of government conduct, and the values of human dignity and equality are more heavily weighted in the proportionality exercise applied in socio-economic rights cases.¹¹² In contrast, the administrative law model of reasonableness is more rooted in rationality review.¹¹³

The points of similarity between the reasonableness review model in socio-economic rights and reasonableness review model found in administrative law are two-fold. Firstly, there is the principle that the government should give enough breathing space to the legislative and executive branches of government to choose ways of fulfilling their constitutional duties. Secondly, both standards are

¹⁰⁶ Sunstein CR “Social and economic rights? Lessons from South Africa” (2001) 11 *Constitutional Forum* 123-132 at 123-125, and 130-132; Davis 2006 (ch 1, n 5) at 304-305; Brand D “The proceduralisation of South Africa’s socio-economic rights jurisprudence or ‘What are socio-economic rights for?’” in Botha H, Van der Walt AJ and Van der Walt J (eds) *Rights and Democracy in A Transformative Constitution* (2003) 33-40.

¹⁰⁷ Sunstein (note 106 above) at 123-125, and 130-132.

¹⁰⁸ Steinberg (note 50 above) at 276-277.

¹⁰⁹ Sunstein (note 106 above) at 130-132.

¹¹⁰ Sunstein (note 106 above) at 130-132.

¹¹¹ Steinberg (note 50 above) at 276-282.

¹¹² Steinberg (note 50 above) at 276-283.

¹¹³ Steinberg (note 50 above) at 277-282.

described and applied contextually to a given set of facts.¹¹⁴ Steinberg seems to have a point on the nuanced differences and similarities between the reasonableness review model found in administrative law and that found in socio-economic rights.

Besides the differences and similarities highlighted by Steinberg, there are additional jurisdictional requirements when dealing with the application of administrative law, as opposed to socio-economic rights adjudication. For instance, if action or conduct does not qualify as administrative action as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), it is the end of the matter and there will be no assessment of the merits, and whether the said action is reasonable or not within the purview of administrative law.¹¹⁵ This should not mean that courts should not look to administrative law remedies to adjudicate socio-economic rights in appropriate cases, as administrative law could assist in providing the much needed substantive content of socio-economic rights.¹¹⁶

The other stark difference between the reasonableness review model and the administrative law reasonableness is that the administrative law inquiry does not factor in the constitutional values of human dignity, equality, and freedom in its assessment.¹¹⁷ Others, like Davis¹¹⁸ have adopted a cautious approach, by criticising the minimum core, while pointing out the weaknesses in the reasonableness review model. Davis argues that the Court's reasonableness review model should be commended for now.¹¹⁹ This is born out of the Court's awareness of the State's economic policies

¹¹⁴ Steinberg (note 50 above) at 277-282; Mbazira C *Litigating Socio-economic Rights In South Africa: A choice Between Corrective And Distributive Justice* (2009) 1-250 at 82.

¹¹⁵ Hoexter C *Administrative Law in South Africa* (2007) at 163-218. Section 1 and 2 of the PAJA sets out the definitions and jurisdictional ambit of the PAJA. If action is not administrative action as defined in section 1 of the PAJA read with section 2 (which deals with the application of the PAJA), then the PAJA does not apply.

¹¹⁶ See for example: *Joseph* (ch 1, n 38). In *Joseph*, the Court ordered the Johannesburg Municipality to immediately reconnect electricity to a block of flats that it disconnected due to non-payment, and also to give the residents of the said building an opportunity to make representations on a 14 days' pre-termination notice on why it should not disconnect the electricity to the said building. The *Joseph* case arguably represents a signpost of what the courts achieve with administrative law remedies to protect socio-economic rights, see in this regard: Lienbenberg S and Quinot G "Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa" (2011) 22 *Stell LR* 639-663 at 642-661.

¹¹⁷ Mbazira 2009 (note 114 above) at 82-86.

¹¹⁸ Davis 2006 (ch 1, n 5). For a substantially similar cautious approach see: Steinberg (note 50 above) at 273-275.

¹¹⁹ Davis 2006 (ch 1, n 5) at 315-316.

and deference issues, including the fact that our democracy is still too young to embrace a robust minimum core approach to socio-economic rights.¹²⁰

In spite of the various positions highlighted above on what would constitute a substantive approach to socio-economic rights, including the right of access to adequate housing,¹²¹ the Court has shown many signs of resistance to these proposals, most recently in the *Nokotyana*,¹²² and *Mazibuko*¹²³ cases. This resulted in the Court moving further away from embracing the transformative designs of the Constitution.

The most sensible way in which the Court could go about developing the substantive content of socio-economic rights, including the right of access to adequate housing, is to apply the reasonableness review model in ways that embrace the values and purposes which section 26 seeks to promote and achieve.¹²⁴ This would involve recognising that constitutional values such as human dignity and equality cannot be separated from socio-economic rights.¹²⁵ This conception of socio-economic rights, according to Liebenberg underscores that rights such as adequate and culturally appropriate housing are not simply commodities to meet basic needs, but enable people to fulfil their potential and to compete as equals in society.¹²⁶ The right of access to adequate housing in this context “is more than simply the provision of shelter from the elements, but enables people to fulfil a diverse range of psychological, social, cultural, and economic needs.”¹²⁷

What challenges stand in the way of the courts in advancing the transformative goals of the Constitution through a more robust interpretation of socio-economic rights? In the following section, I examine this question and the possible impediments which inhibit a more robust judicial role in the enforcement of socio-economic rights.

¹²⁰ Davis 2006 (ch 1, n 5) at 315-316.

¹²¹ See references to Liebenberg 2010 above.

¹²² *Nokotyana* (ch 1, n 31).

¹²³ *Mazibuko* (ch 1, n 41).

¹²⁴ Liebenberg 2010 (ch 1, n 5) at 177-179.

¹²⁵ Liebenberg 2010 (ch 1, n 5) at 177-179 and 206-213.

¹²⁶ Liebenberg 2010 (ch 1, n 5) at 177.

¹²⁷ Liebenberg 2010 (ch 1, n 5) at 177. Liebenberg relies on the description and meaning of the concept of home developed by Fox L “The meaning of home: A chimera concept or a legal challenge?” (2002) 29 *Journal of Law and Society* 580-610; Fox L *Conceptualising Home-Theories, Laws and Policies* (2007).

2 3 Impediments to the adjudication of socio-economic rights

2 3 1 Introduction

The doctrine of separation of powers and judicial deference have constantly been relied on by the Court as a justification of its reasoning and orders in most, if not all, cases of socio-economic rights, including the right of access to adequate housing. In these sections, I will briefly recall the importance and theoretical foundation of the doctrine of separation of powers and judicial deference, and how they operate to impede a transformative interpretation of socio-economic rights as a precursor to the more detailed arguments pertaining to the application of the doctrine of separation of powers and judicial deference in the context of the right of access to adequate housing developed in chapter 5.

2 3 2 The separation of powers doctrine as an impediment

The separation of powers doctrine originates from the early writings of Montesquieu in the 17th century.¹²⁸ Montesquieu reasoned that the purpose of the separation between the three arms of government was “...so that there may be no abuse of power, it is necessary that, through the disposition of things, power be stopped by power”¹²⁹ This then, over time, became known as the separation of powers doctrine. However, others expressed great doubt about this doctrine, since it was not easy to define and differentiate between the the three arms of government.¹³⁰ Madison highlighted the difficulties attendant in trying to dissect a straightforward and precise doctrine of separation of powers, which is easily applicable in practice, with clearly defined roles for the three arms of government. This is because the roles of the three arms of government overlap and intersect in many respects.

¹²⁸ Montesquieu *The Spirit of The Laws* in Cohler A, Miller B and Stone H (eds) XLViii-757. See further: Gerrans P “The disposition of things: Spontaneous order in the *Esprit des Lois*” (2004) 9 *The European Legacy* 751-765.

¹²⁹ Montesquieu *Esprit des Lois* XI (note 128 above).

¹³⁰ Madison J *The Federalist Papers No 51* chapter 10 at 347-53, available online at <http://press-pubs.uchicago.edu/founders/documents/v1ch10s16.html> (accessed on 30 June 2010). Although Madison was writing in the context of the United States of America, his remarks are equally applicable to the separation of powers debate in other countries, such as South Africa. See also Kurland P B “The rise and fall of the ‘doctrine’ of separation of powers” (1986) 85 *Michigan Law Review* 592-613 at 592-593.

The Constitution serves as a good example of this fact, as it does not expressly provide for a doctrine called the separation of powers. However, a careful examination of its provisions reveals that this doctrine is implied in its provisions.¹³¹ In addition, the Court has held in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996*,¹³² that the principle of separation of powers reflects our historical situation and recognises the separation of functions and the independence of the branches of government, and that this doctrine allows the intrusion by one branch of government into the domain of another branch, where the Constitution allows.¹³³ The Court has given effect to the doctrine of separation of powers in many forms, subject to the checks and balances imposed by the Constitution.¹³⁴

Jackie Dugard argues that the Court has taken excessive refuge in the separation of powers doctrine and that this has contributed to the Court's failure to develop the substantive content of socio-economic rights.¹³⁵ Liebenberg and Pieterse advocate for the reconceptualisation of the separation of powers debate in the context of socio-economic rights, Pieterse locates his examples using the *TAC2* case to fortify his views.¹³⁶ He argues that the *TAC 2* case is testament that the evolving South African model of separation is radically different from that espoused by Locke and Montesquieu because of its transformative orientation, and concern with preserving flexibility in policy decisions, so that the executive is able to adapt policy to the changing needs of society.

¹³¹ See in this regard the different parts of the Constitution which establishes the three branches of government and assigns specific but, partially overlapping, functions to each one of them. For example, see chapters 4 and 5 which deal with Parliament, the President and the national executive. Each chapter designates specific functions to each branch of government. However, co-operation is needed between Parliament, the President and the National Executive. For instance, the processes involved in the introduction and passing of Bills, involves co-operation between Parliament, national executive and the President who ultimately has to sign the said Bill into law. The judiciary can be involved in this whole process, should there be a challenge to any of the processes involved in the passing of legislation, such as the 'tagging of Bills'. For an example of a case on 'tagging of Bills', see: *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* [2010] ZACC 10; 2010 (6) SA 214 (CC).

¹³² See paras *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996]; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) paras 77-78 and 109-113. The relevant constitutional principle is Constitutional Principle VI (separation of powers), which the Court held that it was not violated by the inclusion of socio-economic rights in the Constitution. See also: *Doctors For Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 SA (CC) para 199, the Court in this case confirmed what it held in the *Certification Judgment*; also see *City Council of Pretoria v Walker* [1998] ZACC 1; 1998 (2) SA 363 (CC).

¹³³ *Certification Judgment* (note 132 above) paras 109-113.

¹³⁴ *Certification Judgment* (note 132 above) para 111.

¹³⁵ See Jackie Dugard 2008 (note 47 above) at 234-238.

¹³⁶ Pieterse M "Coming to terms with judicial enforcement of socio-economic rights" (2004) 20 *SAJHR* 383-41 at 406-411; McLean 2009 (ch 1, n 9) at 111-114.

Liebenberg argues for a conception of the separation of powers doctrine that seems to be in line with the conception of separation of powers of Madison.¹³⁷ This is clear from Liebenberg's acknowledgement of a system of "mutual control" between the three branches of government.¹³⁸ This resonates with the point made by Madison, albeit in a different context, to the effect that it is difficult to dissect a straightforward and precise doctrine of separation of powers.¹³⁹ In Liebenberg's view, this doctrine should not be used by courts to stifle transformation and social justice.¹⁴⁰ Socio-economic rights adjudication requires a break-away from many essential components of the classic liberal constitutional theory, by requiring the courts to closely scrutinise policy and social issues, and to adjudicate socio-economic rights in a manner that brings significant changes to social and policy issues where necessary.¹⁴¹ The Constitution imposes an obligation on the State to redistribute resources in a way that ensures that everyone has access to the socio-economic rights promised by the Constitution.¹⁴²

According to Liebenberg, the doctrine of separation of powers serves two purposes. Firstly, it allows for the task of governance, law-making and law enforcement to be performed by the appropriate institution of government.¹⁴³ Secondly, it guards against the abuse of power which may arise when too much power is placed at the disposal of one of the branches of government by dividing power amongst the three branches of government.¹⁴⁴ The significance of this allocation of powers to the different branches of government is vital to the transformative purpose of the Constitution.¹⁴⁵ Each branch of government is allocated functions that it is able to perform, and a system of checks and balances is created which leads to accountability, responsiveness and openness.¹⁴⁶

¹³⁷ Madison (note 130 above).

¹³⁸ Liebenberg 2010 (ch 1, n 5) at 66-67.

¹³⁹ Madison (note 130 above).

¹⁴⁰ Liebenberg (ch 1, n 5) at 67-78.

¹⁴¹ Liebenberg 2010 (ch 1, n 5) above at 67.

¹⁴² Liebenberg 2010 (ch 1, n 5) at 67; McLean 2009 (ch 1, n 9) at 119-166; Pieterse 2004 (note 136 above) at 406-411.

¹⁴³ Liebenberg 2010 (ch 1, n 5) at 67.

¹⁴⁴ Liebenberg 2010 (ch 1, n 5) at 67; McLean 2009 (ch 1, n 9); Pieterse 2004 (note 136 above).

¹⁴⁵ Liebenberg 2010 (ch 1, n 5) at 67-71.

¹⁴⁶ See generally, sections 1(c), 40-41, 42-59, 151-154, 165, Chapter 9 and section 195 of the Constitution.

There is a danger that lurks within the separation of powers doctrine, and this danger can become critical when the separation of powers doctrine is relied upon to stifle transformation. This happens when a strict division of functions and roles between the three branches of government is assumed and when courts use this to abdicate their mandate of protecting and enforcing constitutional rights, instead of fostering responsiveness and holding government to account. According to Liebenberg, this danger is particularly acute when courts adjudicate socio-economic rights, because these rights challenge many vital components of the classic liberal constitutional theory by requiring State intervention in the redistribution of resources.¹⁴⁷

The adoption of a flexible approach grounded in a dialogic model of the doctrine of separation of powers, which upholds the principles of checks and balances is appropriate to promoting the transformative vision of the Constitution.¹⁴⁸ This means that courts should step in through consistent prodding of the legislature and the executive to protect and promote the substantive realisation of socio-economic rights in a situation where these branches of government are failing to fulfill their constitutional mandate in relation to these rights.¹⁴⁹ This would not violate the separation of powers doctrine because the courts would still be acting within their constitutional mandate.

The separation of powers doctrine is not an impediment in itself to the proper realisation of socio-economic rights, including the right of access to adequate housing. It only becomes an impediment to its realisation when the courts engage it in a manner that does not advance the transformative designs of the Constitution, such as advancing social justice. When the courts use it as a shield with which they avoid their constitutionally mandated judicial functions, which include giving concrete meaning to the rights in the Bill of Rights, they fail to hold government accountable for the fulfillment of socio-economic rights, including the right of access to adequate housing.

¹⁴⁷ Liebenberg 2010 (ch 1, n 5) at 67-68.

¹⁴⁸ Liebenberg 2010 (ch 1, n 5) at 71; Pieterse 2004 (note 136 above) at 386-389; McLean 2009 (ch 1, n 9) at 106-108.

¹⁴⁹ Liebenberg 2010 (ch 1, n 5) at 69-71; Pieterse 2004 (note 136 above) at 401-403.

2 3 3 Judicial deference as an impediment

The other aspect of the debate on the proper role of courts in adjudicating socio-economic rights is judicial deference, which has generated much interest from academic writers and courts alike.¹⁵⁰ In certain cases, the courts have not expressly mentioned judicial deference, but clearly deference or respect¹⁵¹ for the institutional role and competencies of the other branches of government were key considerations in the judicial decision-making process.¹⁵²

The issue of deference frequently arises in judicial review of conduct, legislation and policy for compliance with constitutional norms. At the centre of the concept of deference is the courts' understanding of its role in relation to the roles of the other branches of government.¹⁵³ The courts in this context are usually faced with a number of questions and challenges, ranging from whether they should entertain cases in which they would be required to pronounce on the correctness of the conduct, legislation and policy of government functionaries, to the standard of review to be applied in the particular case. Questions also arise as to how much deference should be afforded to the government functionary involved.

McLean argues that deference “is comprised of three intersecting principles, namely: the court’s views on the democratically legitimate role of a court in a constitutional democracy; the court’s views on its appropriate role, given its institutional limits; and the nature of the dispute before the court.”¹⁵⁴ In addition, McLean argues that there is a need for a further “free standing principle of judicial deference,”¹⁵⁵ derived from the separation of powers doctrine and accepted as a general principle of constitutional adjudication. She calls this latter concept, “constitutional deference.”¹⁵⁶ She argues that her approach to deference counters the criticisms levelled against judicial deference

¹⁵⁰ See Hoexter 2000 (ch 1, n 9); Hoexter C “Judicial policy revisited: Transformative adjudication in administrative law” (2008) 24 *SAJHR* 281-299; McLean 2009 (ch 1, n 9); Davis 2006 (note 50 above); Jackie Dugard (note 47 above); *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC) para 107; *National Coalition For Gays and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC) para 66.

¹⁵¹ *Bator Star* (ch 1, n 5) para 46.

¹⁵² See *Walker* (note 132 above); *Du Toit v Minister of Safety and Security and Another* [2009] ZACC 22; 2009 (12) BCLR 1171 (CC); *Doctors for Life International* (note 132 above).

¹⁵³ McLean 2009 (ch 1, n 9) at 61-62.

¹⁵⁴ McLean 2009 (ch 1, n 9) at 61-64.

¹⁵⁵ McLean 2009 (ch 1, n 9) at 62-63.

¹⁵⁶ McLean 2009 (ch 1, n 9) at 62-63.

by Trevor Allan, who argues that there is no need for a further free-standing doctrine of deference since the separation of powers doctrine already serves similar uses.¹⁵⁷ McLean counters this by arguing that the constitutional deference principle that she proposes integrates the existing theoretical approaches to deference into “a principled doctrine of separation of powers.”¹⁵⁸ This, McLean argues, allows the discussion of constitutional deference to be used to examine the reasons underlying the Court’s deferential position in selecting a lower standard of review in particular cases.¹⁵⁹

McLean’s approach is different from the approach that focuses on the theory of deference that preoccupies itself with questions of when courts should defer and when courts should not defer to the other branches of government.¹⁶⁰ Her approach focuses more on the reasons for the particular deferential approach adopted by the court.¹⁶¹ Furthermore, McLean argues that although deference issues and separation of powers raise vital issues on the balance of powers between the three arms of government, it does not automatically constitute an obstacle in the enforcement of socio-economic rights. This is because there is no one-size-fits-all model of deference. The courts’ approach to deference will depend on a number of contextual factors as well as prevailing attitudes of the bench.¹⁶² This includes the nature of the matter before the court, the pre-existing attitudes of the judges and judicial culture.¹⁶³ This means that courts should craft a principled approach to deference that balances the various competing interests, functions and roles of the other arms of government.¹⁶⁴ Deference in this context will depend on the particular circumstances and context of a case before the courts.¹⁶⁵ The implications of this are that courts will generally defer on issues of policy and issues which the other branches of the government are well placed to address because of

¹⁵⁷ McLean 2009 (ch 1, n 9) at 62.

¹⁵⁸ McLean 2009 (ch 1, n 9) at 62-64.

¹⁵⁹ McLean 2009 (ch 1, n 9) at 62.

¹⁶⁰ McLean 2009 (ch 1, n 9) at 62-63.

¹⁶¹ McLean 2009 (ch 1, n 9) at 62-64.

¹⁶² McLean 2009 (ch 1, n 9) at 81-88.

¹⁶³ McLean 2009 (ch 1, n 9) at 86-88.

¹⁶⁴ McLean 2009 (ch 1, n 9) at 81-88.

¹⁶⁵ McLean 2009 (ch 1, n 9) at 81-88.

the expertise they possess. However, this will depend on the facts of each case and does not give the other branches of government unlimited margin to violate constitutional rights with impunity.¹⁶⁶

Hoexter emphasises the need for courts and potential litigants to be aware of the limits and challenges posed by judicial review.¹⁶⁷ Hoexter cautions that the litigants must be constantly aware that courts are limited to scrutinising process and procedure when engaging in judicial review, and must not cross over to appeal.¹⁶⁸ Fuller argues that courts are not appropriate forums to determine “polycentric problems,”¹⁶⁹ as doing so would violate the separation of powers.¹⁷⁰ Polycentric disputes and decision are issues that are many-centred and give rise to unpredictable situations.¹⁷¹

Allison criticises Fuller’s position on polycentric issues as too vague to use as a principle of adjudication because Fuller fails to explain the alternatives to judicial resolution of polycentric matters.¹⁷² Dworkin on the other hand contends that courts are perfectly capable of deciding polycentric issues, and that judicial review enhances democracy. Accordingly, a Dworkian judge would not defer to the other arms of government on issues of the enforcement of fundamental rights.¹⁷³ Liebenberg argues that the challenges posed by polycentricism are not limited to adjudication of socio-economic rights, but affect the adjudication of all rights.¹⁷⁴ She gives an example of a case involving the abolition of the death penalty, which she argues requires the re-sentencing of prisoners on death row, and the building and maintenance of prison facilities to accommodate all those whose sentences have been commuted from death sentences to some other

¹⁶⁶ McLean 2009 (ch 1, n 9) at 82-87. See also: *Bator Star* (ch 1, n 5) para 47-48, especially para 48 (majority judgment of O’Regan J), in which the Court reasoned that “A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.”

¹⁶⁷ Hoexter 2000 (ch 1, n 9) at 488-494, although Hoexter dealt with judicial deference in the context of administrative law, her insights are helpful in the context of socio-economic rights in understanding the different approaches of the courts on deference. For an exposition of the debates on the limitations of adjudication, see also: Fuller L “The forms and limits of adjudication” (1978) 92 *Harvard Law Review* 353-409 at 393-409; Allison JWF “Fuller’s analysis of polycentric disputes and the limits of adjudication” (1994) 53 *Cambridge Law Journal* 367-383 at 369-383. For further criticism of Fuller’s approach to polycentricism, see: Dworkin R *Taking Rights Seriously* (1977) 1-369 at 90-100 and 171-177; Pieterse 2004 (note 136 above) at 392-396.

¹⁶⁸ Hoexter 2000 (ch 1, n 9) at 485-494.

¹⁶⁹ Fuller (note 167 above) at 371, and 393-404.

¹⁷⁰ Fuller (note 167 above) at 393-409.

¹⁷¹ Liebenberg 2010 (ch 1, n 5) at 73-75.

¹⁷² Allison (note 167 above) at 369-383.

¹⁷³ Dworkin (note 167 above) at 171-177.

¹⁷⁴ Liebenberg 2010 (ch 1, n 5) at 73-75.

sentence.¹⁷⁵ These arrangements have many effects on the administration of justice and the system of justice as a whole, as the government will have to allocate or adjust budgets in order to deal with this scenario.¹⁷⁶ This illustrates that the problem of polycentricism and budgetary constraints also arise in cases that are traditionally regarded as falling within the ambit of civil and political rights.

Furthermore, polycentric cases are not beyond the reach of adjudication. This is because even Fuller admits that issues such as those involving the economic market which by their nature are polycentric issues because they involve "...the making of rules that will make the market function well," remain suitable for adjudication.¹⁷⁷ It is not polycentric issues in themselves that are problematic for Fuller, but polycentric decision-making in cases involving social welfare that is problematic.¹⁷⁸ Liebenberg argues that this shows "...the general bias in classic liberal legal theory against the judicial enforcement of welfare rights."¹⁷⁹

The Court's approach to socio-economic rights has not always been biased against the interpretation and enforcement of these rights. The *TAC2*¹⁸⁰ and *Khosa* matters serve as examples of cases in which the Court did not use judicial deference as an excuse for refusing to give content to socio-economic rights.¹⁸¹ However, the same cannot be said of the overly deferential approaches in *Mazibuko*¹⁸² and *Nokotyana*.¹⁸³

According to Hoexter, certain functions which require resources and expertise should be left to the arms of government that have those resources and expertise, as they are the appropriate functionaries to perform such functions.¹⁸⁴ Furthermore, the failure to leave certain functions to the appropriate arm of government may create undesirable friction between the arms of government and may impede social transformation.¹⁸⁵ However, this does not mean that the courts should not

¹⁷⁵ Liebenberg 2010 (ch 1, n 5) at 73.

¹⁷⁶ Liebenberg 2010 (ch 1, n 5) at 73.

¹⁷⁷ Liebenberg (ch 1, n 5) at 73.

¹⁷⁸ Liebenberg 2010 (ch 1, n 5) at 73.

¹⁷⁹ Liebenberg 2010 (ch 1, n 5) at 73.

¹⁸⁰ *TAC2* (note 51 above).

¹⁸¹ *Khosa* (ch 1, n 41).

¹⁸² *Mazibuko* (ch 1, n 41).

¹⁸³ *Nokotyana* (ch 1, n 31). These and other issues are taken up in more detail in chapters 4 and 5.

¹⁸⁴ Hoexter 2000 (ch 1, n 9).

¹⁸⁵ Hoexter 2000 (ch 1, n 9) at 499-505; Jackie Dugard (note 47 above) at 979-980 and 234-238.

intervene where administrative agencies, and other branches of government fail to comply with their constitutional duties, and human rights.¹⁸⁶

Both McLean and Hoexter acknowledge the roles played by the separation of powers doctrine and judicial deference in regulating the relationship between the three arms of government. They both accept, however, that judicial deference does not represent an automatic constraint to the courts exercising robust review functions in particular cases. Much will depend on the specific facts of the relevant case, including the interests at stake and the role and justifications provided by the relevant organ of state. Where vital constitutional rights – such as socio-economic rights – are at stake, courts must not hesitate to hold the government to account where it fails to fulfill the guarantees contained in the Constitution.

I now turn to examine the South African Constitutional Court's failure to develop the substantive content of the right of access to adequate housing.

2 3 4 The South African Constitutional Court's failure to develop the substantive content of the right of access to adequate housing

In order to fully understand the Court's failure to develop the substantive content of the right of access to adequate housing, an understanding of what constitutes a substantive approach to socio-economic rights must be developed. This issue must be explored in the specific context of the right of access to adequate housing which is the specific focus of this thesis. As the above analysis has indicated, the key criticism of the Court's socio-economic rights jurisprudence is that the Court has not developed a sufficiently substantive interpretation of the relevant rights. Linked to this is the question of what such a substantive interpretation should entail in light of the transformative requirements of the Constitution.¹⁸⁷ The Court adjudicates the right of access to adequate housing,

¹⁸⁶ See also *Doctors for Life International* (note 132 above) para 199. The Court held that the separation of powers doctrine is not absolute, and that any intrusion into the domain of the other branches of the government is mandated by the Constitution. I would argue that this also applies to issues of judicial deference as well, although the Court in *Doctors for Life International* did not say so. This could reasonably be implied from the reasoning deployed in this judgment. See also: *Bato Star* (ch 1, n 5) paras 46-50.

¹⁸⁷ *Soobramoney* (ch 1, n 39); *Grootboom* (ch 1, n 16); *TAC2* (note 51 above); *Khosa* (ch 1, n 41); see for example: Jackie Dugard (note 47 above); Liebenberg 2010 (ch 1, n 5), and discussion in the above sections.

and other socio-economic rights using the reasonableness review model.¹⁸⁸ This model of review has a lot of potential to propel the Court to develop the substantive content of this right as evidenced by the *Grootboom* case, provided the Court applies it in the light of the transformative vision of the Constitution. However, to date the Court has failed to follow its own guidelines on the right of access to adequate housing, as indicated above.¹⁸⁹ In the remainder of this thesis, how the courts could go about infusing substantive content in the interpretation of the right to adequate housing is explored, as well as the implications of this approach for the adjudication of housing rights.

2.4 Conclusion

In the above sections, the concept of transformative constitutionalism has been examined, by exploring its history, significance, and specific role in the context of the adjudication of socio-economic rights. In addition, the theoretical foundations of the doctrine of separation of powers and judicial deference were laid with the aim of demonstrating how the separation of powers doctrine and judicial deference serve important purposes in the adjudication of socio-economic rights and other rights when used appropriately. However, it was noted that they can also undermine the transformative goals of the Constitution when they are used formalistically as a shield for the judiciary to shirk its constitutional duties in adjudicating socio-economic rights.

In the next section, the aim is to investigate the potential of developing the substantive content of the right of access to adequate housing. I do so by using the methodology specified in section 39(1)(a), (b) and (c) of the Constitution for the interpretation of rights in the Bill of Rights.

¹⁸⁸ See 2.2.3 above for full discussion.

¹⁸⁹ See *Joseph* (ch 1, n 38). In *Joseph*, the applicants argued that electricity was part of the right of access to adequate housing, but the Court left this question undecided. See also: *Nokotyana* (ch 1, n 31). The *Nokotyana* case is discussed in more detail in chapter 4 along with issues raised here. The *Nokotyana* case represents a perfect example of a case in which the Court failed to give substantive content to the rights of access to adequate housing and other rights in the Bill of Rights. This is a decisive break away from the guidelines laid down by the Court in earlier cases on socio-economic rights, such as those laid down in the *Grootboom* case, where the Court stated that those in desperate and emergency situation must be protected through the provision of emergency housing and basic services.

CHAPTER 3: DEVELOPING THE CONTENT OF HOUSING AS A HUMAN RIGHT

3 1 Introduction

In this section, the potential for developing the substantive content of the right of access to adequate housing will be investigated. This will be done through the methodology provided in section 39(1) (a), (b) and (c) of the Constitution as expanded by case law. I will first examine the history and context of housing in South Africa. Secondly, I will seek to elaborate on the purposes and values protected by the right of access to adequate housing, within the context of the Constitution. I will rely on the theoretical foundations and cases elaborating on the purposes and values protected by socio-economic rights, and then deal with the purposes and values protected by the right of access to adequate housing.

Thirdly, I explore international human rights law pertaining to the right to housing, focusing on the purposes and values protected by the right of access to adequate housing within relevant regional and international human rights law instruments. This examination will focus on the major international instruments protecting economic, social and cultural rights, the International Covenant on Economic, Social and Cultural Rights (hereafter ‘the ICESCR’), housing rights in other international human rights treaties, as well as the African regional human rights system, the European human rights system, and the Inter-American human rights system. In addition, I will briefly examine some emerging international law norms and instruments pertaining to housing rights. Fourthly, I will briefly examine selected cases from foreign jurisdictions in which aspects of the substantive content of the right to adequate housing have been developed. I conclude by summarising the key normative components of housing as a human right as developed from the above analysis.

3 2 History and context of housing in South Africa

3 2 1 Introduction

The Court in *Soobramoney v Minister of Health (KwaZulu-Natal)*,¹ held that the context against which the Bill of Rights must be interpreted and applied is the “deep social and economic inequality that pervades our society, and that these deep social and economic inequalities already existed when our Constitution was adopted.”² Furthermore, the Court in *Soobramoney* reasoned that our Constitution, in particular the preamble, enjoins us to address these deep seated inequalities, and this is to be found in different provisions of the Constitution, such as sections 26 and 27.³

The history of housing and social inequality in South Africa will in the period prior to 1994,⁴ and in the period after 1994 will be considered.⁵ Naturally the latter period is profoundly influenced by the legacy of colonialism and apartheid in the former period. This history is characterised by the close relationship that existed and still exists between power, land and human capital.⁶ Terreblanche documents that the South African white farmers and colonial powers unfairly enriched themselves using the indigenous population, mainly black people from the mid-17th century until the late 20th century, through the creation of an exploitative economic and political structure.⁷ This system was managed through the enforcement of a battery of racist laws and brutal force applied in the rural and urban areas.

3 2 2 The rural land tenure of black people post 1910

The rural land tenure of black people post Union was governed by the Natives’ Land Act 27 of 1913 (hereafter ‘the Natives’ Land Act’). The Natives’ Land Act strengthened an already existing plethora of racist laws that were passed prior to the Union. The purpose of the Natives’ Land Act was to identify and regulate the reserve land put aside for the exclusive occupation, and purchase by

¹ *Soobramoney* (ch 1, n 39) paras 8-9; *Grootboom* (ch 1, n 16) para 22.

² *Soobramoney* (ch 1, n 39) paras 8-9;

³ *Soobramoney* (ch 1, n 39) para 9

⁴ Plaatje (ch 1, n 1). See also Bundy (ch 1, n 1) at 3-5; Claassens A “Rural land struggles in the Transvaal in the 1980s” in Murray C and O’Regan C (eds) *No Place To Rest: Forced Removals History In South Africa* (1990) 27-65; Marcus G “Section 5 of the Black Administration Act: The case of the Bakwena ba Mogopa” in Murray C and O’Regan C (eds) *No Place To Rest: Forced Removals History In South Africa* (1990) 12-26; Terreblanche 2003 (ch 1, n 1).

⁵ Terreblanche 2003 (ch 1, n 1).

⁶ Terreblanche 2003 (ch 1, n 1) at 6.

⁷ Terreblanche 2003 (ch 1, n 1) at 6-7 and 260-264.

natives.⁸ The consequence of the Natives' Land Act was that the 4 500 000 million natives were to purchase, hire and live on the small parts of land reserved for them.

The living conditions in the reserves or Bantustans were deplorable, since black people and other people did not have basic services and access to other necessities. In addition, the resultant shortage of land, housing and escalating poverty led to mushrooming informal settlements near urban areas, as people searched for employment and a way to make a living in these areas.⁹

3 2 3 The urban land tenure of black people post 1910

The urban areas were also heavily regulated by the Union Government, through the policies and legislation of separate development for different racial groups.¹⁰ These policies were given effect mainly through the Group Areas Act 36 of 1966, but also through other related legislation. Section 49 of the Group Areas Act of 1966 repealed the Group Areas Act 77 of 1977, which in turn repealed the original Group Areas Act 41 of 1950.¹¹ The objects of the Group Areas Act were to introduce separate development according to race, and to control the use, occupation and ownership of land and all immovable property in urban areas, and in the racially designated areas.¹²

Housing for black people in urban areas consisted of hostel accommodation, and later native or black townships, alongside informal settlements which surrounded them.¹³ This was still a continuation of the policies of segregation by the apartheid government. Townships houses and

⁸ See section 1(1) (a) and (b) read with section 1(2) of the Natives' Land Act. The reserve land put aside for black people and other racial groups first amounted to 8.3% of the total land under the Native Land Act of 1913, later expanded to 13%. See also: Khunou SF "Traditional leadership and independent Bantustans of South Africa: Some milestones of transformative constitutionalism beyond apartheid" (2009) 12 *PER* 81-360 at 84-90.

⁹ May J and Rankin S "The differentiation of the urbanization process under apartheid" (1991) 19 *World Development* 1351-1365. See also: Khunou 2009 (note 8 above). This system was merely a sub-system of governance under the control of the apartheid government. This is because the Bantustan authorities worked for the apartheid government, and in turn received salaries and other benefits such as positions within these Bantustans.

¹⁰ Schoombee JT "Group areas legislation – the political control of ownership and occupation of land" (1985) *Acta Juridica* 77-118; Maylam P "Explaining the apartheid city: 20 years of South African urban historiography" (1995) 21 *Journal of Southern African Studies* 19-38 at 19, 27-34; Gassama IJ "Reaffirming faith in the dignity of each human being: The United Nations, NGOs, and apartheid" (1995) 19 *Fordham International Law Journal* 1464-1541 at 1477-1478.

¹¹ Schoombee 1985 (note 10 above) at 77.

¹² Schoombee 1985 (note 10 above) at 78-82.

¹³ May and Rankin 1991 (note 9 above) at 1353; Maylam 1995 (note 10 above) at 22-33 and 33-35.

accommodation were arranged according to racial groups: black, Indian and coloured groups had their own separate townships. However, black townships were further divided into different slots according to languages and culture.¹⁴ This was to ensure that black people of different cultural heritage never united with each other or with Indians and coloureds.

The housing and living conditions in these black or native townships were very poor, and still are in many parts. The housing consists of low-quality bizarre rows of houses joined together, with inadequate living space inside and outside.¹⁵ Furthermore, these houses were situated a great distance from the cities, making it hard to access certain services such as household necessities, quality healthcare, payment of rates, quality education, employment, and other basic services.¹⁶ This social and economic history of South Africa, which includes the housing history as detailed above, demonstrates the historical primary causes of the current housing crisis in South Africa.

What are the housing conditions of black people post 1994?

3 2 4 The social and policy context of housing in South Africa

The effects of the housing crisis caused by colonialism and apartheid, has continued to be keenly felt in the democratic South Africa. Concerted action from the current government in order to deal with this crisis was needed, taking into account the debilitating nature of this crisis coupled with worsening poverty levels.¹⁷ The current government has to date adopted various policies,¹⁸ laws¹⁹ and other strategies to gradually reverse the impact of these past policies and laws.

¹⁴ Maylam 1995 (note 10 above) at 22-33.

¹⁵ Maylam 1995 (note 10 above) at 30-36; Parnell S “South African cities: Perspectives from the ivory tower of urban studies” (1997) 891-906, available online at <http://usj.sagepub.com/content/34/5-6/891> (accessed on 28 June 2011).

¹⁶ Maylam 1995 (note 10 above); Parnell 1997 (note 15 above).

¹⁷ See *Presidency Development Indicators* (ch 1, n 14) and Leibbrandt M *et al* (ch 1, n 14) at 13-68. Leibbrandt M and others argue that more and more people are unemployed, and do not have access to basic necessities, with the net result that the poorest of the poor are becoming worse-off with inequality in all spheres of everyday existence being the order of the day. However, the *Statistics SA Census Report* (2011) (ch 1, n 3) shows slight improvement.

¹⁸ White Paper on Housing: A new housing and strategy for South Africa (1994); People’s Housing Process (1998); Breaking New Ground Policy (2004), Inclusionary Housing Policy (2007); National Housing Code (2000, revised in 2009); Department of Human Settlement Sector Strategy (2009-2014) on 2 December 2009. For a full account of housing policies, laws, see: Tissington K “A resource guide to housing in South Africa 1994: Legislation, policy, programmes and practice” (2011) available at: http://www.serisa.org/index.php?option=com_content

Despite the best efforts of the government to adopt legislative and other measures to address the housing situation in South Africa, the majority of people, mainly black people, still reside in informal settlements and in inadequate housing or buildings across the country.²⁰ In addition, the Department of Human Settlements estimates the number of informal settlements to be more than 2 700 in year 2010, while the national housing backlog stands at 2.1 million housing units.²¹ The living conditions of informal settlement residents are grim, since most people who reside in these informal settlements have limited to no access to basic services such as water, healthcare services, electricity, basic sanitation, and other amenities, the amenities that are available are of poor quality.²²

The living conditions of people residing in a number of dilapidated buildings in Johannesburg, and other cities are no better and cannot be described as adequate housing either. The people in these buildings live in overcrowded rooms, with limited to no basic services such as water, electricity, and basic sanitation. This is compounded by the fact that many people who live in these buildings are either low-income workers or unemployed people, who are preyed on by unscrupulous slumlords.²³

3 3 The purposes and values protected by the right of access to adequate housing

&view=article&id=17&Itemid=29 (accessed on 10 June 2011) at 57-59. These discussions were dominated by debates concerning who would bear the primary responsibility for providing housing, and what the respective roles of other stakeholders would be in the provision of housing in the democratic South Africa.

¹⁹ The main housing provision is section 26 of the Constitution. This section is then given effect by various pieces of legislation and policies, such as: Housing Act 107 of 1997 as amended, Prevention of Illegal Eviction From and Unlawful Occupation of land Act 19 of 1998; Rental Housing Act 50 of 1999 as amended; National Norms and Standards for the Construction of Stand Alone Residential Dwellings Financed Through National Housing Programmes (2007); Social Housing Act 16 of 2008.

²⁰ “South African President pledges urgent action to mitigate human settlements needs” *Cities Alliance Report 18-05-2011* available online at: <http://www.citiesalliance.org/ca/node/2043> (accessed on 20 June 2011); National Development Plan (2030).

²¹ National Development Plan (2030) (ch 1, n 3); Tissington resource guide 2010 (note 18 above) at 25-40, for more on the housing backlog and other challenges facing housing delivery in South Africa from 1994-2010.

²² Richards R, O’Leary B and Mutsonziwa K “Measuring the quality of life in informal settlements in South Africa” (2007) 81 *Social Indicators Research Journal* 375-388.

²³ IRIN “South Africa: Slumming it in Jo’burg” *Mopanitree Report 8-06-2011*, available at: <http://www.mopanitree.com/content/1638-south-africa-slumming-jo-burg.html> (accessed on 25 June 2011). It is reported that there are about 1500 slum buildings in Johannesburg which were abandoned by their owners in early 1994 during the emigration of white people. These buildings have now been ‘hijacked’ by slumlords who charge rent but do nothing to maintain the buildings.

3 3 1 Introduction

Before turning to examining the particular purposes and values protected by the right of access to adequate housing, it is useful to briefly explore the reasons for the inclusion of socio-economic rights in the Constitution, in order to conceptualise the debate on the values and purposes protected by these rights. Secondly, I intend to explore the purposes and values underpinning the socio-economic rights in general as guaranteed in the Constitution, since all socio-economic rights are underpinned by a number of specific purposes and values which can be found in the Constitution and in case law.²⁴

The reasons for the inclusion of socio-economic rights in the Constitution can be traced back to the political and legal history, and the transition to democracy in South Africa. The political and legal history entailed a complex web under which the majority of black people were deprived of their civil and political rights by the then government, which took over from colonial powers and built on the infrastructure they had created. In addition, the majority of the people were also denied socio-economic necessities through colonial and apartheid racist policies and laws that operated to arrogate the lion's share of the country's economic resources and opportunities to the minority, the white people.²⁵

Furthermore, the inclusion of socio-economic rights was influenced by the material changes to the political and legal structure of South Africa following multi-party negotiations.²⁶ This resulted in a move away from parliamentary sovereignty that dominated under apartheid to a system that entrenched judicial review, and guaranteed a number of rights in the Constitution, including socio-

²⁴ The preamble to our Constitution is the starting point in this regards, and it provides thus:

“... Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

...

Improve the quality of life of all citizens and free the potential of each person; and

....”

Section 1(a) of the Constitution provides that our democracy is one founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.

²⁵ See: Terreblanche 2003 (ch 1, n 1) at 25-45; 371-400.

²⁶ Terreblanche 2003 (ch 1, n 1) at 95-138. For an account of South Africa's transition to democracy, see: Spitz R and Chaskalson M *The Politics of Transition: The Hidden History of South Africa's Negotiated Settlement* (2000).

economic rights.²⁷ In particular, the African National Congress and the Pan-Africanist Congress argued forcefully during the multi-party negotiations for the inclusion of socio-economic rights in the Constitution, probably because they shared an understanding of the debilitating economic results of past policies and laws on the majority of the people, and the need to protect and promote a culture of human rights.

Moreover, academics also argued for the inclusion of socio-economic rights in the Constitution.²⁸ Mureinik stressed the need to constitutionally guaranteed socio-economic rights in order to entrench a culture of justification under South African law. By this he meant that legislation and government action or inaction should be subject to judicial review for “sincerity and rationality” in the same way other rights not classified as economic rights are reviewed, because economic rights raised the same difficulties as other rights.²⁹ Other academic writers opposed the inclusion of socio-economic rights in the Constitution, suggesting that socio-economic rights should be protected as Directive Principles of State Policy following the example of the provisions of the Indian Constitution. These directives would not be directly justiciable in courts, but would merely influence our jurisprudence.³⁰ According to Davis, vesting unelected and unaccountable judges with powers to enforce socio-economic rights would give judges too much power and this would disturb the carefully balanced roles of each sphere of government to the detriment of the other two branches of government and civil society.³¹

The arguments in favour of including socio-economic rights in the Constitution were later adopted by the Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* (hereafter *Certification*

²⁷ Dugard J *Human Rights and the South African Legal Order* (1978); Jackie Dugard 2007 (ch 2, n 47) at 967-969. The legal system under apartheid was corrupted by the then government of the National Party through the appointment of judges sympathetic to its grand apartheid policies and laws, and through placing crude restrictions on judicial review, thereby impairing judicial independence and placing severe restrictions on the accountability of parliament.

²⁸ Mureinik 1992 (ch 2, n 50).

²⁹ Mureinik 1992 (ch 2, n 50) at 469-471.

³⁰ Davis DM “The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles” (1992) 8 *SAJHR* 475-490 at 486-487. Davis, however, subsequently became a supporter of a more substantive approach to the adjudication of socio-economic rights under the Constitution. See in this regard: Davis 2006 (ch 2, n 50); Davis 2010 (ch 1, n 5).

³¹ Davis 1992 (note 30 above) at 486. According to Davis, judges would become social engineers if socio-economic rights were included in the Constitution.

Judgment'), and other cases.³² The Court in the *Certification judgment* reasoned that socio-economic rights gave rise to the same concerns as civil and political rights, because a court enforcing civil and political rights such as freedom of speech, equality, and fair trial, would have separation of powers and budgetary consequences.³³ The reasoning of the Court in this regard was upheld in the *Grootboom* case.³⁴

The combined implications of the *Certification Judgment* and *Grootboom* cases put an end to the debate on the inclusion of socio-economic rights in the Constitution, and questions regarding their enforcement. The attention then shifted to what were the most appropriate models of review and enforcement of socio-economic rights in particular cases. The acknowledgment of the justiciability of socio-economic rights by the Constitutional Court represents an awareness of the role of socio-economic rights in redressing the political and legal injustices of the past that operated to strip the majority people of their human dignity, equality and freedom.

Section 39(1)(a) of the Constitution places a duty on courts, tribunals and forums when interpreting the Bill of Rights to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom.” In addition, courts, tribunals and forums are required by the Constitution when performing their constitutionally mandated duties, to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and developing the common law or customary law.³⁵ Liebenberg argues that section 39(1)(a) of the Constitution confirms the focal role given by the Constitution to the values of “democracy, human dignity, equality and freedom in the interpretation of the rights in the Bill of Rights (...).”³⁶ In addition, sections 7(1) and 39(1)(a) of the Constitution mandates the courts, tribunals and forums to take all the necessary steps to promote the values underpinning the rights in the Constitution. Liebenberg further argues that section

³² *Certification Judgment* (ch 2, n 132) paras 76-78; *Soobramoney* (ch 1, n 39); *Grootboom* (ch 1, n 16) para 20.

³³ *Certification Judgment* (ch 2, n 132) para 77-78. The Court dismissed the objections and held that these socio-economic rights were to be regarded as justiciable rights.

³⁴ *Grootboom* (ch 1, n 16) para 20.

³⁵ See section 39 (2) of the Constitution; Liebenberg S “The value of freedom in interpreting socio-economic rights” (2008) *Acta Juridica* 149-176 at 149-150.

³⁶ Liebenberg 2010 (ch 1, n 5) at 97.

39(1)(a) is indicative that the Constitution is mainly concerned with positive as opposed to negative constitutionalism, and to redress past injustices.³⁷

The implications of this, according to Liebenberg, are that the constitutional values of human dignity, equality, freedom and other values “illuminate[s] important dimensions of socio-economic rights and are interlinked.”³⁸ This means that all these constitutional values can be invoked to interpret and adjudicate socio-economic rights in a particular case. Depending on the facts of a the particular case, one or more of these values may be more relevant.

3 3 2 The purposes and values underpinning section 26

The Court in *Grootboom*³⁹ endorsed and elaborated on the *Soobramoney*⁴⁰ case with regard to the purposes and values protected by socio-economic rights under the Constitution. The Court reasoned that the Constitution guaranteed both civil and political rights, and that the rights in the Bill of Rights are inter-related, mutually sustaining and protect certain values and purposes.⁴¹ The Court also held that foundational values of human dignity, equality and freedom are denied to those who do not have food, clothing or shelter.⁴²

The implications of this are that the rights in the Bill of Rights must be interpreted and applied holistically and not in isolation, and must be interpreted and applied by our judiciary in ways that embrace the foundational values of human dignity, freedom and equality. This means that socio-economic rights, including the right of access to adequate housing must act as a vehicle for our

³⁷ Liebenberg 2010 (ch 1, n 5) at 98.

³⁸ Liebenberg 2010 (ch 1, n 5) at 44-54 and 98-101.

³⁹ *Grootboom* (ch 1, n 16) paras 1-2, and 23-24 and 83.

⁴⁰ *Soobramoney* (ch 1, n 16) paras 8-9.

⁴¹ *Grootboom* (ch 1, n 16) para 23. The other emerging constitutional value that informs the interpretation of rights in the Bill of Rights, such as socio-economic rights, including the right of access to adequate housing, is the constitutional value of *ubuntu*, see: English R “Ubuntu: The quest for an indigenous jurisprudence” (1996) 12 *SAJHR* 641-648; Mokgoro JY “Ubuntu and the law in South Africa” (1998) 4 *Buffalo Human Rights Law Review* 15-24; Mokgoro JY “Ubuntu, the Constitution and the rights of non-citizens” (2010) 21 *Stell LR* 221-229; Cornell D & Marle V “Exploring ubuntu: Tentative reflections” (2005) 5 *African Human Rights Law Journal* 195-220; Metz T “Towards an African moral theory” (2007) 15 *Journal of Political Philosophy* 321-341; Roederer C & Moellendorf D *Jurisprudence* (2007) 1-653 at 441-462; Keevy I “Ubuntu versus the core values of the South African Constitution” (2009) 34 *Journal of Juridical Science* 19-58; Tshoose CI “The emerging role of the constitutional value of ubuntu for informal social security in South Africa” (2009) 3 *African Journal of Legal Studies* 12-19.

⁴² *Grootboom* (ch 1, n 16) para 23.

society to achieve substantive and meaningful social justice. The Court further reasoned that taking into account the values protected by socio-economic rights, including the right of access to housing was not merely a theoretical construct, but was critical in the adjudication of socio-economic.⁴³

Academic writers⁴⁴ including Liebenberg elaborated and endorsed the views of the Court in this regard in the context of positive duties imposed on the government by socio-economic rights, the purpose being to facilitate and provide access to social benefits.⁴⁵ She argues that the value of human dignity as a relational value and its respect requires us to focus especially on the “conditions of material disadvantage and its impact on different groups in our society.”⁴⁶ In addition, human dignity requires us to respect personal independence and choices.⁴⁷ Furthermore, Liebenberg fortifies these arguments by arguing that seeing the value of human dignity in this light does not mean the adoption of an inflexible constitutional value. It means viewing human dignity as an evolving constitutional value which changes with the socio-economic conditions in society where necessary.⁴⁸ This means that the government should intervene where necessary to limit liberties of some people in society in order to fulfil the socio-economic rights constitutional guarantees, however, such interference by the government should not unduly take away their “basic human capabilities.”⁴⁹

The implications of this are that human dignity as a value is important in the interpretation and application of the rights guaranteed in the Bill of Rights, including socio-economic rights. There are however, challenges placed on human dignity by the availability of resources in society and this needs to be addressed by the government and others. Resource availability and challenges should not be used by government as an excuse to escape its constitutional duty to fulfil and protect socio-

⁴³ *Grootboom* (ch 1, n 16) para 83.

⁴⁴ Liebenberg S “The value of human dignity in interpreting socio-economic rights” (2005) 21 *SAJHR* 1-31; Liebenberg S and Goldblatt B “The interrelationship between equality and socio-economic rights under the South Africa’s transformative Constitution” (2007) 23 *SAJHR* 335-360; McLean 2009 (ch 1, n 9) at 138-143; Mbazira 2009 (ch 2, n 114) at 135-137.

⁴⁵ Liebenberg 2005 (note 44 above) at 4-5.

⁴⁶ Liebenberg 2005 (note 44 above) at 9-11.

⁴⁷ Liebenberg 2005 (note 44 above) at 9.

⁴⁸ Liebenberg 2005 (note 44 above) at 9-11.

⁴⁹ Liebenberg 2005 (note 44 above) at 10-11.

economic rights, because human dignity is inherent in all human beings.⁵⁰ The resource challenges should instead make government conscious of the need to make priority decisions in order to respond to those individual or group needs that are most urgent, in the sense that they are needed for human survival.⁵¹ This is because we are somehow not complete as a society if others are bereft of the ability to function as equals in the social and economic life of society.⁵²

To this end, the current model of reasonableness review developed by the Court for interrogating whether the government has complied with its positive duties imposed by socio-economic rights must place human dignity at the centre of its enquiry.⁵³ This would require the Court to interrogate with a varied scrutiny the reasons proffered by the government for its failure to fulfil its positive duties imposed by socio-economic rights, depending on the nature of the claims at issue. If the claims at issue concern the failure by the government to protect, promote and fulfil access to resources needed for survival and participation in society, then the standard of judicial scrutiny in this context should be intense, otherwise our democracy would be in danger of becoming meaningless.⁵⁴

Liebenberg and Goldblatt have further developed these arguments in the context of the constitutional value of equality.⁵⁵ They argue that the approach that the courts, especially the Constitutional Court should embrace in its equality jurisprudence in the context of socio-economic rights, is one that embraces substantive equality.⁵⁶ They argue that when the Court interrogates whether the particular government policy complies with the reasonableness review model, the Court should ask itself whether the particular government policy advances substantive equality.⁵⁷ This approach to equality “requires full acknowledgment of the racial, gender, social, economic, cultural

⁵⁰ Kant I *Fundamental Principles of the Metaphysic of Morals*, trans. by Thomas Kingsmill Abbott (Second Section: Transition From Popular Moral Philosophy To The Metaphysic Of Morals) (2010); *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC) paras 34-35; *Grootboom* (ch 1, n 16) para 83.

⁵¹ For a detailed discussion of the duties of courts to distinguish between urgent basic needs and general basic needs, see: Bilchitz 2002 (ch 2, n 50) at 486-489.

⁵² Liebenberg 2005 (note 44 above) at 11-13.

⁵³ Liebenberg 2005 (note 44 above) at 21-30.

⁵⁴ Liebenberg 2005 (note 44 above) at 21-30.

⁵⁵ Liebenberg & Goldblatt 2007 (note 44 above) at 340-348 and 348-360.

⁵⁶ Liebenberg & Goldblatt 2007 (note 44 above) at 340-448 and 348-360.

⁵⁷ Liebenberg 2005 (note 44 above) at 14-21; Liebenberg & Goldblatt 2007 (note 44 above) at 340-348 and 348-360.

and other differences between groups in society.”⁵⁸ In addition, this approach to equality also requires a contextual approach which is capable of identifying the “real situations of disadvantages experienced by various groups in the light of our history, as well as current social, economic, political and gender relations.”⁵⁹ This is because the search for equal worth or dignity is not a quest for uniformity, but a quest to obliterate the disadvantages and inferior status that attach to membership of particular groups.⁶⁰

Bilchitz, on the other hand, argues that societies should not strive to ensure equal treatment of individuals, but should instead focus on what it can do to create conditions conducive to individuals affected by its rules, so that these individuals can live a good life on their own terms.⁶¹ This means that society must not seek to achieve equality through socio-economic rights but must seek it through the recognition of the equal importance of each individual’s life, by ensuring that it provides each individual with the necessary tools to live a meaningful life. The danger inherent in Bilchitz’s approach to the values underpinning socio-economic rights is that they may lead to jurisprudential and policy approaches which are not effectively designed to redress the structural inequalities that exist in South Africa as a result of the economic and political history of South Africa. The beneficiaries of apartheid for instance, who continue to benefit from the past injustices could by the application of this theory of equality, be provided with more tools to acquire more economic resources, resulting in even more inequality in South Africa.⁶²

The other constitutional value which is critical to the interpretation and adjudication of socio-economic rights, is the constitutional value of freedom.⁶³ Liebenberg endorses and elaborates on the arguments of Jennifer Nedelsky by arguing that the value of freedom has the potential to lead us

⁵⁸ Liebenberg 2005 (note 44 above) at 14-21; Liebenberg & Goldblatt 2007 (note 44 above) at 340-348 and 348-360. See also: Chenwi L and McLean K “‘A woman’s home is her castle?’ –poor women and housing inadequacy in South Africa” (2009) 25 *SAJHR* 517-545 at 527-529.

⁵⁹ Liebenberg 2005 (note 44 above) at 14-21; Liebenberg & Goldblatt 2007 (note 44 above) at 340-348 and 348-360; Bilchitz *Poverty and Fundamental Rights* (ch 2, n 50) at 57-74.

⁶⁰ Liebenberg 2005 (note 44 above) at 14.

⁶¹ Bilchitz *Poverty and Fundamental Rights* (ch 2, n 50) at 64-65.

⁶² For a discussion of an individual-based and group based conceptions of equality, see: Albertyn and Goldblatt 1998 (ch 1, n 5) at 257-258. What Bilchitz advocates for would only work after the group-based economic inequalities and denial of human dignity have been dealt with comprehensively.

⁶³ Liebenberg 2008 (note 35 above); Liebenberg 2010 (ch 1, n 5) at 97-101. For a different view, see: Bilchitz *Poverty and Fundamental Rights* (ch 2, n 50) at 57-74.

to the substantive content of socio-economic rights.⁶⁴ Liebenberg further argues that the reasonableness review model developed by the Court has to be applied in the light of the value of freedom as well, so as not to restrict the development of people's capacity for self-determination.⁶⁵ The implications of taking the value of freedom into account are that socio-economic rights need to be adjudicated in the light of the freedoms implicated by the particular claims. This will not only propel the courts towards the substantive content of socio-economic rights, but will also allow the ordinary people involved to participate in decisions that affect their socio-economic conditions, and to be able to choose freely what they want to do with their own lives.

The other very useful and often overlooked constitutional value that has emerged recently,⁶⁶ is the constitutional value of *ubuntu*. The constitutional value of *ubuntu* is critical in the interpretation and adjudication of the rights in the Bill of Rights, such as socio-economic rights, including the right of access to adequate housing because of its potential to contribute to the substantive conception of socio-economic rights and other rights. The constitutional value of *ubuntu* has been often overlooked and under-analysed because of the misunderstanding that surrounds it.⁶⁷

Ubuntu has been defined as:

⁶⁴ Liebenberg 2008 (note 35 above) at 149-151.

⁶⁵ Liebenberg 2008 (note 35 above) at 154-157 and Liebenberg 2010 (ch1, n 5) 165-173.

⁶⁶ See: *S v Makwanyane* 1995 (6) BCLR 665 (CC) paras 223, 263 and 307-308; *Hoffmann v South African Airways* 2001 (1) SA (1) (CC) para 38; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37; *Bhe v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) paras 45 and 163; *City of Johannesburg v Rand Properties (Pty) Ltd and Others* [2006] 2 All SA 240 (W) paras 62-3; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) paras 68-69 and 113-121. Academic writers have also attempted to explain and analyse the constitutional value of *ubuntu*, see: English 1996 (note 41 above); Mokgoro 1998 (note 41 above) Mokgoro 2010 (note 41 above); Cornell & Marle 2005 (note 41 above); Metz 2007 (note 41 above); Roederer & Moellendorf 2007 (note 41 above); Tshoose 2009 (note 41 above).

⁶⁷ I argue elsewhere that the courts, including the Constitutional Court and academic writers have misunderstood the constitutional value of *ubuntu* by conflating it with the value of human dignity, and by failing to account for the components that make up the popular maxims that have erroneously been held to constitute the value of *ubuntu*. See Radebe S "Ubuntu and the law: Deconstructing and claiming back *ubuntu*" (2011) unpublished article by author. I argue that *ubuntu* is the African way of living, and embraces certain components that make up the maxims such as *umuntu ngumuntu ngabantu* or *motho ke motho ka batho ba bangwe*, and is related to human dignity but not the same.

African philosophy, which covers humanness, respect for humanity, moral virtue, interconnectedness, compassion, group solidarity and group-centered individualism, prioritising the interests of the most vulnerable, amongst other aspects of the idea of *ubuntu*.⁶⁸

Ubuntu has also been defined in terms of popular African maxims such as *umuntu ngumuntu ngabantu* or *motho ke motho ka batho ba bangwe* (in IsiZulu and Sesotho translations).⁶⁹ These phrases can be roughly translated to mean a person is a person because of other people.

The courts have underscored the importance of the constitutional value of *ubuntu* in a variety of contexts such as the right to life,⁷⁰ evictions,⁷¹ and discrimination, amongst others. The Court has held that the process of evictions must be undertaken in the light of the spirit of *ubuntu*. The Court further developed the constitutional value of *ubuntu* in *Hoffmann*, when it reasoned in the context of its unfair discrimination jurisprudence using the constitutional value of *ubuntu* as an interpretive tool, that people who are living with the HIV virus must be “treated with compassion and understanding, we must show *ubuntu* towards them.”⁷²

It can therefore be argued that *ubuntu* is a critical interpretive tool in the context of socio-economic rights, and that the right of access to adequate housing and its potential has yet to be realised. *Ubuntu* can act as a catalyst in the search for the substantive content of these rights. *Ubuntu* in this light is very useful, because it emphasises active community responsibility and solidarity in the alleviation of poverty, homelessness, hunger, and other social ills, in contrast to other constitutional values such as human dignity with their close associations with liberal individualism.

Viewing *Ubuntu* in this context would also mean that *ubuntu* shuns the idea of someone going hungry, be it a neighbour or a random man in the street, *ubuntu* also disapproves of the normalisation of the crude reality of people living in homelessness or inadequate housing, with no access to affordable health, clean water, and other basic necessities which they need in order to live as human beings. For example, it is not unusual for a traditional healer to heal someone in African

⁶⁸ Mokgoro 2010 (note 41 above) at 224-226.

⁶⁹ Mokgoro 2010 (note 41 above) at 225.

⁷⁰ *Makwanyane* (note 66 above) paras 130-131.

⁷¹ *Rand Properties* (note 66 above) paras 62-63; *PE Municipality* (note 66 above) paras 37 and 43.

⁷² *Hoffmann* (note 66 above) para 38.

societies, and to allow for payment later when the person is in a better position to pay for the services rendered. This is because the health and life of a person in African societies is sacred and has always been put above profits or personal gain. *Ubuntu* also disapproves of the abuse of women and children in whatever form.⁷³ African societies are steeped in the idea of sharing things with the less fortunate, be it salt with the neighbour or water and shelter with a lost or passing stranger.

Ubuntu can act as a useful interpretive tool for the Court to use when giving substantive content to the right of access to adequate housing. The provision of adequate housing could also be achieved through community and government partnerships to build houses for residents of informal settlements or those in inadequate housing. The government could provide financial and other resources to supplement what is contributed by the community concerned. This would be consonant with the component of *ubuntu* that shuns the idea of human suffering of whatever kind.

Housing in this context of *ubuntu* would depend on the location of the community, the culture of that community, the size of the family, and what is generally regarded as habitable housing by the community concerned. This means that if the community decided to assist an individual family with the building of a house, that house would look more or less similar to houses in the same community, and would take into account the culture of the community. The size of the house would depend on the size of houses occupied by families of similar size in that community.

Habitability is also important, but the family cannot lay claim to a house with electricity when other houses in the community do not have electricity, and cannot lay claim to a house with a water tap when the whole community relies on other means to source water, nor can it lay claim to a brick

⁷³ Women are very important in African societies, not because of their potential as caregivers, but because it has always been understood that societies would not survive long without them. This is where maxims such as *umama wesizwe* (mother of the nation) originate. Similarly with children, a child was and still is regarded in many African communities as belonging to the community, not only because the family lineage survives through him or her, but for other reasons as well. These included caring for the child, which entailed disciplining the child when the said child misbehaved. In the absence of his or her biological parents, any adult in the community would remonstrate with the child. In addition, when a child needed help in situations where his or her parents were not around, any adult or parent in the community would voluntarily step in and assist the child, see in this regard: Tydesley J *Nefertiti-Egypt's Sun Queen* (1998) 1-232; Nafukho MF "Ubuntu worldview: A traditional African view of adult learning in the workplace" (2006), available at: <http://adh.sagepub.com/content/8/3/408.full.pdf> (accessed on 30 June 2011) 408-415 at 412-413; Familusi OO "The Yoruba culture of ASO EBI (Group Uniform) in socio-ethical context" (2010) *Lumina* 1-11 at 6.

house when the community as a whole does not have brick houses. The focus of *ubuntu* is not only the well-being of the individual, but the whole community.

In the next section, I examine how the purposes and values protected by the right to housing have been developing within an international and regional law context.

3 4 Relevant international human rights law

3 4 1 Introduction

The Constitution contains various provisions that place duties on courts, forums or tribunals to consider international law in adjudication.⁷⁴ These duties have also been elaborated upon and endorsed by our courts, especially by the Court.⁷⁵ In doing so, courts, forums or tribunals are also required to promote the spirit, purport and objects of the Bill of Rights.⁷⁶ The Court in *Makwanyane* reasoned that international law and foreign sources are important in the interpretation of the Constitution, because they provide useful insight into how similar legal problems are dealt with outside of the local system.⁷⁷ The Court further defined international law that was relevant for the interpretation of the rights in the Bill of Rights in terms of section 39(1)(b), as including both binding and non-binding instruments, reports, and law generated by various human rights bodies under the United Nations, and through the regional human rights system.⁷⁸

⁷⁴ Sections 39(1)(b), 37(4)(b)(i) and 233 of the Constitution. The combined reading of these sections also means that South Africa follows the dualist tradition as opposed to the monist tradition. For more on this see: International Commission of Jurists “Courts and the legal enforcement of economic, social and cultural rights: Comparative experiences of justiciability” (2008) International Commission of Jurists Report *Human Rights and the Rule of Law Series*: No 2, available online at http://www.icj.org/dwn/img_prd/ESCR1.pdf (accessed on 30 March 2011) 1-116 at 19.

⁷⁵ *Makwanyane* (note 66 above) paras 33-39; *Azanian Peoples Organization (Azapo) and Others v President of the Republic of South Africa and Others* [1996]; ZACC 16; 1996 (4) SA 672 (CC) paras 26-32; *Certification Judgment* (ch 2, n 132) para 91; *Grootboom* (ch 1, n 16) paras 26-30; *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; 2008 (2) SA 24 (CC) paras 56-57; *Kaunda and Others v President of the Republic of South Africa* [2004] ZACC 5; 2005 (4) SA 235 (CC) paras 33-35; *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC) (hereafter ‘*Glenister 2*’). See also: Liebenberg 2010 (ch 1, n 5) at 101-118.

⁷⁶ See section 39 (1) read with 39 (2); Liebenberg 2010 (ch 1, n 5) at 102-104.

⁷⁷ *Makwanyane* (note 66 above) para 34 and 36.

⁷⁸ *Makwanyane* (note 66 above) para 35; *Glenister 2* (note 75 above).

The South African government signed the International Covenant on Economic, Social and Cultural Rights in 1994,⁷⁹ but has not ratified this covenant to date. It has however signed and ratified the International Covenant on Civil and Political Rights (1966) ('ICCPR'), which protects civil and political rights, and many other important United Nations treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women (1979), Convention on the Rights of the Child (1989), Convention on the Elimination of All Forms of Racial Discrimination (1965).⁸⁰ I proceed to analyse these treaties and their specific implications for the right to adequate housing in the sections which follow.

3 4 2 The International Covenant on Economic, Social and Cultural Rights

The protection of the right to housing and other social rights is now widely recognised in international human rights.⁸¹ The ICESCR, along with the Universal Declaration of Human Rights (1948),⁸² the International Convention on the Elimination of All Forms of Racial Discrimination (1965),⁸³ the Convention on the Right of the Child (1989),⁸⁴ the Convention on the Elimination of All Forms of Discrimination Against Women (1979),⁸⁵ the Convention on the Rights of Persons with Disabilities (2006),⁸⁶ the Convention Relating to the Status of Refugees (1951),⁸⁷ and the International Labour Organisation recognise economic, social and cultural rights.⁸⁸ Article 11(1) of

⁷⁹ International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966 (entered into force on 3 January 1976) 993 NTS 3.

⁸⁰ Pieterse 2004 (ch 2, n 136) at 883.

⁸¹ The discussion of the ICESCR in this section focuses in the main on the right to housing or the right to adequate housing as found in Article 11(1) of the ICESCR, and elaborated upon by the Committee on Economic, Social and Cultural Rights in its General Comments and its reports and concluding observations on State reports under the periodic reporting system in articles 16-19 and 21-22. The protection of the right to adequate housing in other treaties is mentioned in passing to show the growing protection of this right in other areas. The focus is therefore on the ICESCR and relevant regional human rights systems because of the relatively evolved jurisprudence under these systems.

⁸² Article 25 of the Universal Declaration on Human Rights.

⁸³ Article 5(iii) read with article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination.

⁸⁴ Articles 16(1) and 27(3) of the Convention on the Right of the Child.

⁸⁵ Article 14(h) of the Convention on the Elimination of All Forms of Discrimination Against Women.

⁸⁶ Articles 9(1)(a) and 28(1)(d) of the Convention on the Rights of Persons with Disabilities.

⁸⁷ Article 21 of the Convention Relating to the Status of Refugees.

⁸⁸ Articles 2 and 5(2) of the International Labour Organisation (ILO) Convention No. 117 Concerning Basic Aims and Standards of Social Policy (1962); article 88(1) of the International Labour Organisation (ILO) Convention No.110 Concerning Conditions of Employment of Plantation Workers (1958); International Labour Organisation (ILO) Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989). The other international human rights law instruments that protect the right to housing are: article 17 of the International

the ICESCR imposes duties on State Parties to improve the living standards of their people, and to take appropriate legislative and other measures to realise housing and other rights.⁸⁹ Article 11(1) of the ICESCR provides that:

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

Article 11(1) of the ICESCR has been elaborated upon by the United Nations Committee on Economic, Social and Cultural Rights (hereafter ‘the Committee’) in its General Comments and concluding observations on State Parties’ reports under the ICESCR.⁹⁰ The Committee’s General Comments seek to provide clarity on the normative content of the rights and the nature of obligations imposed on States’ Parties to the Covenant. In addition, concluding observations on State reports in terms of the reporting procedures in Part IV of the Covenant encourage State Parties to remedy the non-compliance with the ICESCR. They follow a dialogue between the State Party and the Committee during the consideration of the State Party’s report that sometimes leads to the identification of clear violations of the ICESCR and recommendations.⁹¹

Covenant on Civil and Political Rights (1966); articles 43(1)(d) and (3) International Convention on the Protection of the Rights of All Migrant Workers and their Families (1990); articles 49, 53, 85 and 134 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949).

⁸⁹ Article 11(1) of the ICESCR. State Parties’ obligations in respect of article 11 and the other rights protected in the Covenant are also encoered in article 2 of the ICESCR. See also: United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 3 (Fifth Session, 1990) *The Nature of State Parties Obligations (art 2(1) of the Covenant)* UN doc E/1991/23. General Comment No. 3 provides detailed guidelines on the nature and scope of State Parties’ obligations under the ICESCR.

⁹⁰ See: United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 4 (Sixth Session, 1991) *Article 11(1): The right to adequate housing*, UN doc E/C 12/13/1991. Article 11 (1) of the ICESCR read with General Comment No. 4 and UN Committee on Economic, Social and Cultural Rights, General Comment No.7 (Sixteenth Session, 1997) *Article 11(1) of the Covenant: Forced evictions*, UN doc E/C 20/05/1997. General Comment No.7 makes provision for the “right to adequate housing” in evictions. The Committee consists of eighteen independent experts on economic, social and cultural rights issues, whose mandate is to assist the United Nations Economic and Social Rights Council to perform its functions on the implementation of the ICESCR. The Committee also monitors State Parties’ compliance with their obligations under the Covenant through a reporting procedure, and generates interpretive guides in the form of General Comments.

⁹¹ Riedel E “Economic, Social and Cultural Rights” in Krause C and Scheinin M (eds) *International Protection of Human Rights: A Textbook* at 142-143. It is noteworthy that General Comments and concluding observations of treaty bodies like the Committee are not legally binding, but are very influential in the assessment of human rights compliance in countries, See in this regard: O’Flaherty M “The concluding observations of United Nations Human

General Comment No. 4 notes that many people in both developing and developed countries live in inadequate houses, and that some are homeless.⁹² As General Comment No 4 notes, there are many reasons for this stark reality. They include challenges faced by State Parties in securing the right to adequate housing, and the provision of insufficient information on the nature and scope of these difficulties by State Parties.⁹³ General Comment No.4 provides an elaborate set of criteria regarding what would constitute adequate housing within the scope of the ICESCR, and how this right should be interpreted.⁹⁴

Housing in this context should be seen as constituting more than a roof over one's head, but also as "a place to live somewhere in peace, security and dignity."⁹⁵ It must also be adequate in the sense that it provides the following elements: adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regards to work and basic facilities – all at a reasonable cost.⁹⁶ The right to housing in this context places justifiably onerous positive duties on State Parties, and recognises the critical role that housing plays in people's lives. In addition, the Committee notes further that in order for shelter to be adequate, it must take into account certain factors, in particular legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy.⁹⁷ Despite these detailed guidelines on housing, people living within many State Parties' borders are still struggling to access housing owing to many challenges faced by State Parties. However, the Committee itself had been unable to appreciate the full nature of these difficulties owing to incomplete information from the State Parties.⁹⁸ This is also illustrated by the Committee's concluding observations on the right to adequate housing.⁹⁹ For example, the Committee concluded against the Zimbabwean government when it noted that the provision of

Rights treaty bodies" (2006) 6 *Human Rights Law Review* 27-52; Low JE "Engaging with the United Nations treaty bodies: A fruitful dialogue?" (2006) 13 *Austl. Int'LLJ* 57-96.

⁹² General Comment No. 4 (note 90 above) para 4.

⁹³ General Comment No. 4 (note 90 above) para 5.

⁹⁴ General Comment No. 4 (note 90 above) paras 7-10.

⁹⁵ General Comment No. 4 (note 90 above) para 7.

⁹⁶ General Comment No. 4 (note 90 above) para 7.

⁹⁷ General Comment No. 4 (note 90 above) para 8.

⁹⁸ General Comment No. 4 (note 90 above) para 5.

⁹⁹ See: *Concluding Observations of the CESCR: Zimbabwe*, UN Doc. E/C. 12/1/Add.12 (1997) paras 13; *Concluding Observations of the CESCR: Argentina*, UN Doc. E/C. 12/1/Add.38 (1999) paras 35-36; *Concluding Observations of the CESCR: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories*, UN Doc. E/C. 12/GBR/CO/5 (2009) paras 16 and 29-31.

shelter by the extended family prevented the homelessness of some people in Zimbabwe, but housing provision remained inadequate, with many people living in illegal structures or unauthorised housing in Zimbabwe.¹⁰⁰

According to the Committee, the right to adequate housing applies equally to both genders, despite the reference to “himself and his family” in article 11(1) of the ICESCR.¹⁰¹ In addition, the right to adequate housing must apply free of discrimination as to age, economic status, group, as mentioned in article 2(2) of the ICESCR, which prohibits discrimination on listed grounds.¹⁰² Furthermore, the Committee has observed that the right to adequate housing should be interpreted in a generous and wide manner.¹⁰³ This means that this right must not be seen as just a roof over one’s head or a commodity, but that account should be taken of other practical factors such as cultural suitability, size, location, and materials used to build the house.¹⁰⁴

The Committee further notes that there are certain steps that must be taken immediately to secure the right to adequate housing, regardless of the State’s level of development.¹⁰⁵ These steps may include the government’s non-interference with existing housing rights, and the creation of an enabling environment for people to help themselves in the promotion and protection of their right to adequate housing.¹⁰⁶ States Parties must seek international assistance and co-operation in accordance with articles 11(1), 22 and 23 of the ICESCR where the steps that are required to realise the right to adequate housing are beyond the State Parties’ maximum available resources.¹⁰⁷ The implications of this are that States are not required to exhaust their public purse in the realisation of the right to adequate housing at the expense of other rights like the right to health, but must seek assistance when they need more resources.

¹⁰⁰ *Concluding Observations of CESCR: Zimbabwe* (note 99 above) para 13. The Zimbabwean government was urged to take measures aimed at correcting this situation in line with the Covenant.

¹⁰¹ General Comment No. 4 (note 90 above) para 6.

¹⁰² General Comment No. 4 (note 90 above) para 6.

¹⁰³ General Comment No. 4 (note 90 above) para 7.

¹⁰⁴ General Comment No. 4 (note 90 above) para 7.

¹⁰⁵ General Comment No. 4 (note 90 above) para 10.

¹⁰⁶ General Comment No. 4 (note 90 above) para 10.

¹⁰⁷ General Comment No. 4 (note 90 above) para 10.

Finally, the Committee observed that the steps that State Parties are required to take in order to achieve the full realisation of the right to adequate housing will differ from state to state, and the Covenant requires each State Party to take whatever steps necessary to achieve the full realisation of the right to adequate housing.¹⁰⁸ The taking of these steps will still be in line with the ICESCR since any steps can be taken by the States for this purpose. However, the said steps must be comprehensive and democratic.¹⁰⁹ This means that State Parties to the Covenant have a wide discretion on which measures to adopt for the purposes of ensuring the right to adequate housing, as long as these measures are consistent with a democratic society which respects the human rights and the guidelines set out in this General Comment.

The Committee also elaborated on Article 11(1) of the ICESCR in the context of evictions in General Comment No.7. The Committee notes that evictions are not compatible with the provisions of the ICESCR. The Committee also notes the seriousness of forced evictions, and impresses upon State Parties the need to take all the necessary steps to ensure security of tenure through legal protection for all people against forced evictions. In addition, the Committee notes that human rights must be taken into account whenever evictions are considered, and that State Parties need to comply with the obligations imposed by the Covenant on State Parties,¹¹⁰ by ensuring in this context that where evictions are inevitable, alternative accommodation is provided to those about to be affected by evictions.¹¹¹

Leckie notes that State Parties have often relied on the loose formulation of article 2 to attempt to justify their non-compliance with the obligations imposed by the ICESCR.¹¹² The broad formulation of article 2 does not imply that the Covenant does not impose concrete duties on State Parties. These duties have been interpreted through the General Comments of the Committee to establish important principles pertaining to the realisation of social rights, including the minimum essentials that State Parties are required to provide.¹¹³ State Parties' duties have further been

¹⁰⁸ General Comment No. 4 (note 90 above) para 12.

¹⁰⁹ General Comment No. 4 (note 90 above) para 12.

¹¹⁰ Such as those imposed on State Parties by Article 2(1) of the ICESCR.

¹¹¹ General Comment No.7 (note 90 above) paras 1-16

¹¹² Leckie S "The human right to housing" in Eide, Krause C and Rosas A (eds) *Economic, Social and Cultural Rights: A Textbook* (2001) 149-168 at 154.

¹¹³ Leckie 2001 (note 112 above) at 154.

elaborated upon by the Committee to deal with justifications based on a lack of available resources.¹¹⁴

State Parties to the ICESCR have an obligation in terms of article 2(1) of the ICESCR to realise the rights protected in the ICESCR, including the right to adequate housing, progressively through legislation, as well as a wide array of other measures. State Parties' duties to progressively realise the rights in the ICESCR have been elaborated upon by the Committee in General Comment No. 3.¹¹⁵ Progressive realisation in this context means the taking of steps to achieve the full realisation of these rights, but State Parties are in addition to this, required to prioritise their resources to achieve the minimum core in the immediate and short term.¹¹⁶ This, according to the Committee, means that a State Party that has a large number of people living without basic shelter and housing, is failing to meet its duties under the ICESCR.¹¹⁷

The other way in which the Committee has assisted in clarifying the State Parties' duties arising from the Covenant in relation to the right to adequate housing, is through classifying the obligations arising out of ICESCR into three sets of obligations - the obligation to respect, protect, promote, and fulfill.¹¹⁸ The obligation to respect in the context of housing has been said to require the State and all its agents to refrain from interfering in any manner with the individual's enjoyment or

¹¹⁴ General Comment No. 3 (note 89 above) para 10; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, see Guide No. 10. The Maastricht Guidelines elaborates on the Limburg Principles with regard to the nature and scope of the violations of economic, social and cultural rights, and provide guidelines on the suitable responses and remedies to the violations of these rights. To this end, Guide No. 10 provides that compliance with the duties imposed by economic, social and cultural rights can be achieved with relative ease, and without sizeable resource implications, in many cases and countries. However, in other cases, the full realisation of these rights may depend on the availability of resources. Despite this, resource scarcity does not excuse States from certain minimum duties with regard to the implementation of economic, social and cultural rights, as provided in the Limburg Principles 25-28 and the evolving jurisprudence of the Committee on Economic, Social and Cultural Rights. See also Leckie 2001 (note 112 above) at 154-155.

¹¹⁵ General Comment No. 3 (note 89 above) paras 9-10.

¹¹⁶ General Comment No.3 (note 89 above) paras 9-10. The minimum core obligation of State Parties is ensuring the satisfaction of at least the minimum essential of each right protected in the ICESCR.

¹¹⁷ General Comment No. 3 (note 89 above) para 10; Leckie 2001 (note 112 above) at 155.

¹¹⁸ Leckie 2001 (note 112 above) at 155. Leckie unlike Eide, see: Eide A "Economic, Social and Cultural Rights as Human Rights" in Eide A, Krause C and Rosas A (eds) *Economic, Social and Cultural Rights: A Textbook* (2001) 9-28 at 23-28, who mentions four sets of obligations, namely: the obligation to respect, to protect, to promote, and to fulfil. Eide makes mention of only three sets of obligations, namely: the obligation to respect, protect and fulfil. Section 7(2) of the South African Constitution mentions four obligations, namely the obligation to respect, protect, promote, and fulfil.

fulfillment of this right.¹¹⁹ The duty to protect in the context of housing, obliges the State and its organs to prevent the contravention of these rights by any other person or non-state person.¹²⁰ In addition, the duty to promote in the context of housing requires the State to take certain steps to make sure that no actions or conduct is taken to intentionally undermine the right to adequate housing.¹²¹ This also requires the State to take various measures, legislative and policy measures, to make sure that this right is promoted and not undermined.¹²²

In the context of widespread homelessness and inadequate shelter, a critical obligation is that of the State to fulfil the right of everyone to adequate housing. This obligation requires the State to take positive steps to progressively fulfill the right to adequate housing. These steps may involve the allocation of public funds and other measures such as “government regulation of the economy and land market, housing subsidies, monitoring rent levels and other housing costs, the provision of public housing, basic services, taxation and subsequent redistributive economic measures.”¹²³

The ICESCR has recently been strengthened by the adoption of the Optional Protocol to the ICESCR.¹²⁴ The Optional Protocol to the ICESCR makes provision for an individual complaints and inquiry procedure before the Committee. This procedure allows individuals or groups to submit complaints to the Committee and for complaints or communications to be submitted on their behalf, with good justification.¹²⁵ Once this Protocol enters into force, it will add significant impetus to the protection and promotion of economic, social and cultural rights and the mandate of the Committee.

How does the ICESCR apply to the right of access to adequate housing? Liebenberg argues that the ICESCR is critical in the interpretation of sections 26, 27 and 29 of the Constitution because the

¹¹⁹ Leckie 2001 (note 112 above) at 156.

¹²⁰ Leckie 2001 (note 112 above) at 157.

¹²¹ Leckie 2001 (note 112 above) at 156.

¹²² Leckie 2001 (note 112 above) at 156.

¹²³ Leckie 2001 (note 112 above) at 157-158.

¹²⁴ United Nations Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc. (A/RES/63/117), adopted by the General Assembly on 10 December 2008, 66th Plenary Meeting, opened for signature on 24 September 2009. This Protocol makes provision for an individual complaint and inquiry procedure before the Committee on Economic, Social and Cultural Rights. This Optional Protocol is not yet in force though, since it needs 10 ratifications of State Parties to come into force. As of 7 March 2012, there were 41 signatories, and eight ratifications, namely: those of Argentina, Bosnia and Herzegovina, Bolivia, Ecuador, El Salvador Mongolia and Spain. See in this regard: Doc.A/63/435;C.N.869.2009.TREATIES-34 of 11 December 2009.

¹²⁵ Preamble to the Optional Protocol to the ICESCR, and Articles 2, 11-12 of the Optional Protocol.

ICESCR played a major role in the drafting of these sections as a source of inspiration for their drafting.¹²⁶ This is illustrated by the reference in the Constitution and the ICESCR to concepts of “the taking of reasonable legislative and other measures,” “progressive realisation, and the limitations imposed by “available resources”¹²⁷

The Court in *Grootboom* reasoned that there were differences between the provisions of the Constitution and the ICESCR with regard to the socio-economic rights formulations, and that these differences were important in interpreting the ICESCR provisions and in determining their influence on the Constitution, in particular the right of access to adequate housing.¹²⁸ The Court reasoned further that these differences were that the ICESCR made provision for “a right to adequate housing whereas the Constitution made provision for the right of “access to adequate housing, section 26(1).”¹²⁹ The other difference between the ICESCR and the Constitution was noted as the requirement under the Constitution, which “obligates the State to take reasonable legislative and other measures while the ICESCR required ...state parties to take appropriate steps which must include legislation.”¹³⁰ The implication of this has been a great deal of uncertainty on the overall relationship between the ICESCR and the Constitution, despite the Court accepting the ‘progressive realisation’ concept as consonant with that found in the Constitution.¹³¹

The ICESCR remains a very important reference point in the interpretation and enforcement of the right of access to adequate housing, despite the Court’s distinguishing between the Constitution and the right to adequate housing in the ICESCR. I now turn to examine the regional human rights system.

3 4 3 The African regional human rights system

3 4 3 1 Introducing the African Charter on Human and Peoples’ Rights

¹²⁶ Liebenberg 2010 (ch 1, n 5) at 107. See also: General Comment No. 4 (note 90 above); General Comment No.7 (note 90 above).

¹²⁷ Liebenberg 2010 (ch 1, n 5) at 107.

¹²⁸ *Grootboom* (ch 1, n 16) para 28.

¹²⁹ *Grootboom* (ch 1, n 16) para 28.

¹³⁰ *Grootboom* (ch 1, n 16) para 28.

¹³¹ Liebenberg 2010 (ch 1, n 5) at 108.

Civil and political rights, as well as socio-economic rights, are also protected in regional human rights systems. Of particular relevance to South Africa is the African regional human rights system.¹³² Economic, social and cultural rights are fully enforceable together with other human rights in the African Charter on Human and Peoples' Rights ('the African Charter'). This is abundantly clear from the provisions of the African Charter, which does not draw a distinction between economic, social and cultural rights, and civil and political rights.¹³³ This means that the rights in the African Charter are indivisible, as confirmed by the African Commission's jurisprudence.¹³⁴

The African Charter also does not make compliance and fulfilment of any duties imposed on State Parties, dependent on the available resources, as far as economic, social and cultural rights are concerned, a huge deviation from the provisions of the ICESCR. This deviation by the African Charter from the ICESCR was soon corrected by the African Commission, when it imported the idea of taking into account available resources in fulfilling socio-economic rights. This was done because of the African Commission's awareness of the pressing poverty levels and inappropriate allocation of resources in the region which made it difficult to meet the challenges posed by economic, social and cultural rights.¹³⁵ The African Commission also imported from the ICESCR the principle that State Parties retain the core duties to take meaningful, targeted and non-discriminatory steps in complying with the obligations imposed by the African Charter.¹³⁶

It is noteworthy that there is a limited number of economic, social and cultural rights in the African Charter, due to the minimalist approach that was adopted when it was drafted. The consequences of

¹³² See African Charter on Human and Peoples' Rights, concluded on 27 June 1981, and entered into force: 21 October 1986, 1520 UNTS 217 available online at http://www.africa-union.org/official_documents/treaties_%20Conventions_%20Protocols/banjul%20charter.pdf (accessed on 10 January 2011). See also: Kapindu R *From Global To The Local: The Role of International Law In The Enforcement of Socio-Economic Rights In South Africa* (2009) 6 *Research Series* 18-23; Ouguergouz F *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003) at 49-72, and 485-542; Juma D "Access to the African Court on Human and Peoples' Rights: A case of the poacher turned gamekeeper" (2007) 4 *Essex Human Rights Review* 1-21; Chirwa DM "African regional human rights system: The promise of recent jurisprudence on social rights" in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 323-338; Viljoen F "The African regional human rights system" in Krause C and Scheinin M (eds) *International Protection of Human Rights: A Textbook* (2009) 503-527.

¹³³ Viljoen 2009 (note 132 above) at 521.

¹³⁴ Viljoen 2009 (note 132 above) at 521. The African Commissions' jurisprudence is discussed in detail below.

¹³⁵ Viljoen 2009 (note 132 above) at 521.

¹³⁶ Viljoen 2009 (note 132 above) at 521.

this minimalist approach have been omissions of crucial human rights, such as the right to social security, the right to an adequate standard of living, including adequate food, clothing, and housing, and the right to the progressive improvement of living conditions.¹³⁷ However, the omission of these crucial human rights was corrected by the African Commission through its adoption of the implied rights theory.¹³⁸ The African Commission arguably developed the implied rights theory, a theory that implies the existence of other rights through the combined reading and interpretation of expressly guaranteed rights by applying Article 60 of the African Charter.¹³⁹

The preamble to the African Charter affirms the values of equality, justice and dignity, as well as freedom as critical to the achievements of the goals and aspirations of the African people. In addition, it confirms its interconnectedness to the international human rights regime through the confirmation of the importance of co-operation between States regionally and internationally, and taking account of the UN Charter and the Universal Declaration of Human Rights in the quest for a better life for the African people.¹⁴⁰

The African Charter guarantees a number of economic, social and cultural rights, such as the right to work,¹⁴¹ right to health,¹⁴² right to education,¹⁴³ and the right to a general and satisfactory environment.¹⁴⁴ However, the African Charter does not expressly guarantee the right to housing, the right to social security, and the right to food. This has attracted criticism from academic commentators.¹⁴⁵ However, some of these gaps in the African Charter, and criticisms have since been addressed by the African Commission in its interpretation of various provisions of the African Charter in its individual communications procedure.¹⁴⁶

¹³⁷ Viljoen 2009 (note 132 above) at 521.

¹³⁸ Viljoen 2009 (note 132 above) at 521.

¹³⁹ Article 60 allows the African Commission to draw inspiration from the international human rights, in particular, the Charter of the United Nations, the Charter of the Organisation of African Unity, Universal Declaration of Human Rights, and other human rights instruments adopted by the United Nations and its bodies, and African countries in the arena of human rights.

¹⁴⁰ See Article 60 of the African Charter, and Articles 55-56 of the United Nations Charter.

¹⁴¹ Article 15 of the African Charter.

¹⁴² Article 16 of the African Charter.

¹⁴³ Article 17 of the African Charter.

¹⁴⁴ Article 24 of the African Charter.

¹⁴⁵ Chirwa 2008 (note 132 above) at 331-332 and 332-334.

¹⁴⁶ *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Communication No. 155/96 ACHPR (27 May 2002) (hereafter 'SERAC'); *Centre for Minority Rights Development*

The African Charter does not expressly protect the right to adequate housing. However, its other sister human rights instruments expressly protect this right amongst other rights.¹⁴⁷ Article 20(2)(a) of the African Charter on the Rights of the Child requires Member States to “take appropriate steps to provide assistance to the parents and other persons responsible for the child in case of need with support regarding nutrition, health, education clothing and housing in accordance with their means and national conditions.”¹⁴⁸ However, this provision does not usurp the primary role of parents and other persons responsible for the child to care for the child because the duties on Member States are secondary in nature. They are only activated when the primary caregivers are unable to provide for the material needs of the child.¹⁴⁹

It has been argued that the most significant contribution of the African Charter on the Rights of the Child is that it is detailed compared to the African Charter in its identification of the nature and obligations arising out of economic, social and cultural rights.¹⁵⁰ This makes it easier for Member States and others to identify their duties with precision, and also makes it easier for those relying on its provisions to enforce the rights protected in it.¹⁵¹

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa also protects women’s right to adequate housing.¹⁵² Article 16 of the Protocol to the African Charter on the Rights of Women provides that:

(Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Communication No. 276/03 ACHPR (11-25 November 2009) (hereafter ‘*Endorois*’).

¹⁴⁷ African Charter on the Rights and Welfare of the Child (adopted in 1990, entered into force: 29 November 1999) OAU Doc.CAB/LEG/24.9/49 (1990); Protocol to the African on Human and Peoples’ Rights on the Rights of Women in Africa (adopted by the 2nd Ordinary Session of the Assembly by the Union, Maputo, 11 July 2003) (hereafter ‘Protocol to the African Charter on the Rights of Women’). South Africa signed the African Charter on the Rights of the Child on 10 October 1997, and ratified it on 7 January 2000. To date, only 45 out of 53 Member States have signed and ratified it, while 8 have signed but not ratified

¹⁴⁸ Article 20(2)(a) of the African Charter on the Rights of the Child.

¹⁴⁹ Article 20(1) of the African Charter on the Rights of the Child.

¹⁵⁰ Chirwa 2008 (note 132 above) at 334.

¹⁵¹ Chirwa 2008 (note 132 above) at 334.

¹⁵² See: Article 16 of the Protocol to the African Charter on the Rights of Women. Article 16 is an expansion of the rights accorded to women as a disadvantaged group in society, as found in Article 18(3) of the African Charter. Article 18(3) of the African Charter protects African women and children and other vulnerable groups from all kinds of discrimination by placing duties on the Member States to take measures aimed at achieving this.

Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, State Parties shall grant to women, whatever their marital status, access to adequate housing.¹⁵³

The implications of article 16 of the Protocol to the African Charter on the Right of Women are that Member States are required by this Protocol and the African Charter to take positive steps to ensure that women enjoy all economic, social and cultural rights.¹⁵⁴ In the context of the right to adequate housing, Member States must ensure women's full access to adequate housing regardless of their marital status. This proviso seems to also entrench and recognise African women's independence, and the need to treat them as equals in all aspects of life. The Protocol to the African Charter on the Rights of Women differs however, from the African Charter on the Rights of the Child because it does not have its own monitoring mechanism that complements those under the African Charter, compared to the African Charter on the Rights of the Child, which does.¹⁵⁵ The Protocol to the African Charter on the Rights of Women can be enforced in the African Commission and African Court.

Before I turn to examine the jurisprudence of the African Commission on housing rights, it is important to address the status of the recently developed Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (hereafter 'the Principles and Guidelines'), and the State Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (hereafter 'State Reporting Guidelines').¹⁵⁶ This is because the Principles and Guidelines and the State Reporting Guidelines cannot be separated from the discussion of the African Commission's

¹⁵³ Article 16 of the Protocol to the African Charter on the Rights of Women.

¹⁵⁴ Chirwa 2008 (note 132 above) at 332-333.

¹⁵⁵ See Articles 26-27 of this Protocol to the African Charter on the Rights of Women.

¹⁵⁶ The Principles and Guidelines conceived by the African Commission's Working Group on Economic, Social and Cultural Rights in Africa (hereafter 'the Working Group') were developed by the Working Group at its meetings. The Working Group has to date held various meetings, such as those held on 4 and 5 August 2005 at the University of Pretoria, South Africa; 6-7 October 2005, London; 7-22 May 2008 Ezulwini, Swaziland; 5-6 November 2008, Abuja, Nigeria. This has resulted in the submission of both the Principles and Guidelines, and the State Reporting Guidelines to the African Commission for consideration at its 48th Ordinary Session in private on 10-24 November 2010. The African Commission adopted the two documents on 25 October 2011 in its 50th Ordinary Session, 24 October to 5 November 2011. Despite the adoption, these Principles and Guidelines, and the State Reporting Guidelines will not be legally binding in the sense treaties are, but will be very influential guidelines in the protection and promotion of economic, social and cultural rights in the region.

social rights jurisprudence because they may prove significant in the future development and interpretation of economic, social and cultural rights by the African Commission and the African Court.¹⁵⁷

The Working Group was established by the African Commission at its Ordinary Session held on the 23 November-7 December 2004.¹⁵⁸ The Principles and Guidelines and the State Reporting Guidelines were drafted by the Working Group pursuant to this mandate. In addition, they are aimed at further elaborating on the content of the economic, social and cultural rights in the African Charter in so far as there are gaps in its content. To that end, they lay down general principles of interpretation, elaborate on the nature of Member States' duties arising out of the African Charter, and elaborate on the express and implied rights in the African Charter.¹⁵⁹ The State Reporting Guidelines aim to guide and encourage State Parties to comply with their obligations in terms of the African Charter.¹⁶⁰

The Principles and Guidelines elaborate on the right to housing even though it is not expressly protected by the African Charter.¹⁶¹ The Principles and Guidelines recall that the right to housing is not expressly guaranteed in the African Charter, but was impliedly protected by the combination of the right to property, the right to enjoy the best attainable standard of mental and physical health, and the rights accorded to the family as noted by the African Commission in its jurisprudence.¹⁶² In addition, the Working Group has noted that the right to adequate housing in human rights embraces the right of everyone to “gain and sustain a safe and secure home and community in which to live in peace and dignity.”¹⁶³

¹⁵⁷ See: Olowu D “A critique of the African Commission’s Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter” (2010) 11 *ESR Review* 7-9; Solomom S “An overview of the African Commission’s Principles and Guidelines on Economic, Social and Cultural Rights” (2010) 11 *ESR Review* 3-4; Kaguogo W “Perspectives on the African Commission’s State Reporting Guidelines” (2010) 11 *ESR Review* 5-7.

¹⁵⁸ Resolution 78. ACHPR/Res.73 (XXXVI) 04 (36th Ordinary Session, Dakar, Senegal, 23 November -7 December 2004).

¹⁵⁹ Principles and Guidelines at 8-78.

¹⁶⁰ Olowu 2010 (note 157 above); Solomon 2010 (note 157 above); Kaguogo 2010 (note 157 above).

¹⁶¹ See: Principles and Guidelines at paras 40-44.

¹⁶² Principles and Guidelines para 77; see communications cited above at n 146.

¹⁶³ Principles and Guidelines para 78.

Furthermore, the right to housing according to the Working Group imposes what it refers to as certain minimum core duties, such as the duty to refrain from conducting forced evictions, and ensuring that evictions are conducted lawfully, in accordance with national, international and humanitarian laws.¹⁶⁴ This also entails securing the security of tenure to those people who lack security of tenure to homes, and land.¹⁶⁵ Moreover, Member States are required to ensure at the very least, that people in their borders have access to basic shelter.¹⁶⁶ This conception of the right to adequate housing also included the basic amenities which are indispensable to decent living conditions such as “safe drinking water, energy for cooking, heating, cooling and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage, and emergency services.”¹⁶⁷

Finally, Member States are required to adopt comprehensive national policies, legislation and other detailed measures aimed at addressing the housing situation in their borders, and to carry out a comprehensive review of national policies and legislations in order to conform to international human rights provisions.¹⁶⁸ Member States are also required to protect the security of tenure of the vulnerable and disadvantaged groups in society, such as women and children against evictions, and to also ensure their equitable access to housing, land, and all that comes with housing, such as basic amenities.

The housing provisions in the Principles and Guidelines regard housing as standard everywhere and for everyone, whereas in the African context, housing must not only be habitable, and contain basic amenities for it to be adequate, but must also be culturally appropriate. This is owing to the fact that Africa has people from different tribes and who speak different languages and have different cultural practices, some of which cannot be separated from the kind of accommodation which is appropriate for the relevant practices. To African tribes and people, housing and land hold certain cultural importance which differs from tribe to tribe, which is why housing must be in accordance with their cultural customs and practices.

¹⁶⁴ Principles and Guidelines para 78(i). This also required that Member States apply civil and criminal sanctions to those who carried evictions in a manner detailed here.

¹⁶⁵ Principles and Guidelines para 79(ii).

¹⁶⁶ Principles and Guidelines para 79(iii).

¹⁶⁷ Principles and Guidelines para 78.

¹⁶⁸ Principles and Guidelines para 79(iv-xxxii).

The African Commission has decided some ground-breaking cases pertaining to economic, social and cultural rights.¹⁶⁹ The African Commission in *SERAC* found that the Nigerian government had violated many provisions of the African Charter, in particular articles 2 (rights of individuals to enjoy rights guaranteed in the African Charter free of discrimination of any kind), 4 (right to human dignity and life), 14 (right to property), 16 (right to health), 18(1) (right to family), 21 (right to freely dispose of their wealth and resources), and 24 (right to a general and satisfactory environment).¹⁷⁰ In addition, the Commission found that the right to housing or shelter, and food were not expressly recognised in the African Charter. However, housing is derived from a combined reading of articles 14, 16 and 18(1) of the African Charter, while the right to food is derived from a combined reading of articles 4, 16 and 22 (right to economic, social and cultural development).¹⁷¹

Furthermore, the African Commission found that the right to housing or shelter imposed minimum duties on the government of Nigeria not to destroy the housing of its citizens either through legal, policy, or other measures or to prevent them from rebuilding the destroyed homes.¹⁷² The government was also obliged by this right to protect citizens from interference with their right to housing or shelter by other individuals or non-state actors.¹⁷³ The African Commission also found that the right to housing or shelter in the African Charter entailed more than a roof over one's head. It encompassed the right of an individual to be left alone, to "live in peace whether under one's roof or not."¹⁷⁴ The African Commission also drew inspiration from the jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights in formulating its evictions principles.¹⁷⁵ It found that the right to housing or shelter also encompasses protection against forced

¹⁶⁹ *SERAC* (note 146 above); *Purohit and Moore v The Gambia*, Communication No. 241/01 ACHPR; *Endorois* (note 146 above); *Centre on Housing Rights and Evictions (COHRE) v The Republic of Sudan*, Communication No. 279/03 and 296/05 ACHPR. I will focus on those cases that relate to the right to housing for the purposes of this thesis.

¹⁷⁰ *SERAC* (note 146 above).

¹⁷¹ *SERAC* (note 146 above) paras 60 and 64.

¹⁷² *SERAC* (note 146 above) para 61.

¹⁷³ *SERAC* (note 146 above) para 61.

¹⁷⁴ *SERAC* (note 146 above) para 62. The African Commission's interpretation of the right to adequate housing bears certain similarities with that of the Committee on Economic, Social and Cultural Rights, that of the European Committee on Economic, Social and Cultural Rights, and that of the European Court on Human Rights.

¹⁷⁵ *SERAC* (note 146 above) paras 62-63.

evictions and the fact that evictions cause trauma, psychological, physical, emotional distress, and loss of economic means of survival.¹⁷⁶

The African Commission also adopted and endorsed the fourfold obligations that States have under socio-economic rights, namely, the obligations to respect, protect, promote and fulfill human rights.¹⁷⁷ It reasoned that the rights guaranteed in the African Charter are not an exhaustive list, this means that other rights are by implication, protected by the African Charter through the interpretation of other provisions in the African Charter such as that the right to life implies the right to food, and the property right implies the protection of the right to housing and other rights.¹⁷⁸ Lastly, the African Commission also confirmed the relevance and application of the minimum core under the African Charter when interpreting socio-economic rights.¹⁷⁹ However, It is noteworthy though that the minimum core conception in the context of the jurisprudence of the African Commission, has more to do with the negative aspects of economic, social and cultural rights, such as the right not to interfere with existing enjoyment of economic, social and cultural rights, this also entails the rights not to “destroy shelter or housing,” “contaminate food and water sources” amongst others. This is in contrast to the minimum core conception under the ICESCR as developed by the Committee in its General Comments because the minimum core conception under the ICESCR has more to do with the positive duties to ensure that everyone has access to essential levels of the relevant economic, social and cultural rights.

The implications of this are that States have negative and positive duties arising out of the African Charter to protect economic, social and cultural rights. Negative duties in this context would entail the non-interference by the State and others with existing economic, social and cultural rights such as the right to housing or shelter, and the right to food. The positive duties of the State in this regard would entail the taking of measures by the State concerned to protect the citizens and communities from interference with their rights by individuals, non-state actors and state actors. In addition, the

¹⁷⁶ *SERAC* (note 146 above) para 63.

¹⁷⁷ Kapindu 2009 (note 132 above) at 21.

¹⁷⁸ Kapindu 2009 (note 132 above) at 21; Liebenberg S “Adjudicating the positive duties imposed by economic, social and cultural rights” (2006) 15 *Interights Bulletin* 109-113 at 110.

¹⁷⁹ *SERAC* (note 146 above) paras 61 and 65; Kapindu 2009 (note 132 above) at 21.

fact that certain rights are not explicitly guaranteed in the African Charter does not mean that those rights are not protected.¹⁸⁰

Finally, the African Commission has further elaborated on its housing jurisprudence recently, in the *COHRE v Sudan* communication.¹⁸¹ The African Commission in *COHRE v Sudan* found that articles 1, 4, 5, 6, 7, 12(1) and (2), 14, 16, 18(1) and 22 of the African Charter have been violated by the government of Sudan.¹⁸² In the context of the right to adequate housing, the African Commission found that “cruel or inhuman or degrading punishment or treatment” had to be interpreted in a wide sense as far as possible to include protection against physical or emotional abuse.¹⁸³ In addition, the African Commission noted that exposing victims of human rights violations to personal suffering and indignity violated the right to human dignity, and that this personal suffering and indignity can take many forms depending on the facts of each case.¹⁸⁴ Based on this analysis, the African Commission concurred with the United Nations Committee Against Torture in the matter of *Hijrizi v Yugoslavia*¹⁸⁵ that the forced evictions and destruction of housing undertaken by non state actors amounts to cruel, inhuman and degrading treatment or punishment, when the State fails to protect the victims of such violations.¹⁸⁶ Forced evictions, destruction of homes and similar structures in the context of this case were found to have not only violated the right to adequate housing, but also articles 4 (the right to integrity of the person) and 5 (prohibition on cruel, inhuman, degrading treatment or punishment) of the African Charter.¹⁸⁷

The implications of the *COHRE v Sudan* communication in the context of housing are that the African Commission elaborated on the *SERAC* communication,¹⁸⁸ by upholding the *SERAC* communication and extending it to interpreting the right to adequate housing and evictions

¹⁸⁰ See Article 60-61 of the African Charter. The African Commission has shown in various cases including the *SERAC* case that it will draw inspiration from international human rights law where necessary in line with Article 60 and 61 of the African Charter. The principles enunciated in this case were affirmed in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*

¹⁸¹ *COHRE v Sudan* (note 169 above).

¹⁸² *COHRE v Sudan* (note 169 above) para 228.

¹⁸³ *COHRE v Sudan* (note 169 above) para 158.

¹⁸⁴ *COHRE v Sudan* (note 169 above) para 158.

¹⁸⁵ Communication No. 161/2000: UN Doc. CAT/C/29/D/161/2000 (2 December 2002).

¹⁸⁶ *COHRE v Sudan* (note 169 above) para 159.

¹⁸⁷ *COHRE v Sudan* (note 169 above) para 159-168 and 191-205.

¹⁸⁸ *COHRE v Sudan* (note 169 above) paras 116, 121 and 126; Thiele B “Applying the African Charter on Human and Peoples’ Rights to atrocities in Darfur” (2010) 7 *ESC Law Quarterly* 1-7 at 4-5.

principles as intertwined with the right to integrity of the person, and the prohibition on cruel, inhuman and degrading treatment or punishment. The *COHRE v Sudan* communication also provides guidelines on Member States' duties arising out of the African Charter and international law in similar contexts. Furthermore, it provides guidelines on specific remedies available to the victims of such human rights violations.¹⁸⁹ The African Commission has therefore gone some distance in giving substantive content to many rights protected in the African Charter, including the right to housing or shelter.¹⁹⁰ However, this development has been mainly in the context of duties to respect and protect housing rights, and not yet in terms of developing the obligations of State Parties to provide decent housing to those who lack access to housing or those in inadequate housing.

I shall now deal briefly with the significance of the African Court on Human and Peoples' Rights. The African Court was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court.¹⁹¹ The establishment of the African Court represents an opportunity to develop the jurisprudence of the African Commission, particularly in relation to the positive duties of State Parties in the context of the right to housing, as well as developing effective remedies for breaches of housing rights.¹⁹²

3 4 4 The European regional human rights system

3 4 4 1 Background

The other regional human rights system that protects and promotes socio-economic rights is the European regional human rights system. The European human rights system enshrines socio-

¹⁸⁹ *COHRE v Sudan* (note 169 above) paras 145-168. The African Commission drew inspiration and persuasive value on the United Nations' Pinheiro Principles, which act as a guide in addressing housing and property restitution issues where these rights have been violated. It further recommended detailed remedial action that the government of Sudan may take in addressing the violations it had identified.

¹⁹⁰ See discussion of Principles and Guidelines, and the State Reporting Guidelines above.

¹⁹¹ OAU Doc.OAU/LEG/ESP/AFCHPR/PROT (III).25 (Adopted on 9 June, entered into force on 25 January 2004)

¹⁹² See: Articles 3-6 of the Protocol; Chenwi L "An appraisal of international law mechanisms for litigating socio-economic rights, with a particular focus on the optional protocol to the international covenant on economic, social and cultural rights and the African Commission and Court" (2011) 3 *Stell LR* 683-705 at 699-703; Yeshanew SA *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theories, Laws, Practices and Prospects* (2011) 1-379 at 121-124.

economic rights and other human rights in a statute-based human rights system,¹⁹³ and treaty based human rights systems.¹⁹⁴ The European Convention on Human Rights focuses mostly on civil and political rights,¹⁹⁵ with a limited indirect protection of economic, social and cultural rights.¹⁹⁶ Article 8 and its interpretation by the European Court of Human Rights provide some measure of indirect protection to the right to adequate housing, through the right to respect private and family life and home.¹⁹⁷ The protection of housing in the old European Social Charter on the other hand is guaranteed in article 16 of this Charter, which deals with the “right of the family to social, legal and economic protection.”¹⁹⁸ The wording of article 16 of the old European Social Charter (1961), as in the case of article 8 of the European Convention on Human Rights, places more emphasis on the family, as opposed to individual, self-standing rights to housing. In contrast, the Revised European Social Charter (1996) guarantees housing under various provisions, namely articles 15(3), which makes housing provision for the disabled, and article 16, which is similar to article 16 in the old European Social Charter (1961).

¹⁹³ The Council of Europe established on 5 May 1949. On the European human rights system, see generally: Drzewicki K “European system for the promotion and protection of human rights” in Krause C and C Scheinin M (eds) *International Protection of Human Rights: A Textbook* (2009) at 365-388; Lawson R “The European Convention on Human Rights” in Krause C and Scheinin M (eds) *International Protection of Human Rights: A Textbook* (2009) at 389-424; De Schutter O “The European Social Charter” in Krause C and Scheinin M (eds) *International Protection of Human Rights: A Textbook* (2009) at 425-442; Khaliq U and Churchill R “The European Committee of Social Rights: Putting flesh on the bare bones of the European Social Charter” in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 428-452; Clemens L and Simmons A “European Court of Human Rights: Sympathetic unease” in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 409-427; Rosas A “The European Union and fundamental rights/human rights” in Krause C and Scheinin M (eds) *International Protection of Human Rights: A Textbook* (2009) at 443-474.

¹⁹⁴ Drzewicki 2009 (note 193 above) at 370-387. The main system for the promotion and protection of human rights under the European system of human rights is the treaty-based human rights system, which falls under the Council of Europe. The Council was established by ten signatures of Member States on 5 May 1949. Its main design is to cultivate the spirit of “fundamental values and principles common to all democratic” States in Europe and to bring European States together. The membership of the Council is limited to European States that observe democracy and the rule of law, uphold and protect human rights and continue to fulfil these conditions from the date of membership and during membership.

¹⁹⁵ See: articles 2-7, and 9-18. This was however modified by the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No.11, which added the right to education, and property as part of the European Convention on Human Rights, see: Articles 1 and 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No.11. For jurisprudence on article 2 (right to education), see: Clemens and Simmons 2008 (note 193 above) at 424-425.

¹⁹⁶ Article 8 of the European Convention on Human Rights.

¹⁹⁷ Article 8 of the European Convention on Human Rights. I deal with the jurisprudence of the European Court on Human Rights pertaining to the right to housing in the section that follows below.

¹⁹⁸ Article 16 of the old European Social Charter.

The Revised European Social Charter protects and promotes housing in various provisions, besides in the main provision. Article 23 of the Revised European Social Charter makes provision for housing for the elderly, while article 30 (“the right to protection against poverty and social exclusion”) of the Revised European Social Charter also guarantees the right to housing, while article 31 is the main housing provision in the Revised European Social Charter. Article 31 of Revised European Social Charter places duties on Member States to:

- (1) promote access to housing of an adequate standard;
- (2) prevent and reduce homelessness with a view to its gradual elimination;
- (3) make the price of housing accessible to those without adequate resources.

In the following sections I consider how the European Court on Human Rights and the Committee on Social Rights respectively have dealt with the right to housing under the European system of human rights.

3 4 4 2 European Committee on Social Rights

The European Committee on Social Rights has also decided a number of important complaints on issues pertaining to human rights, in particular on housing rights.¹⁹⁹ In *European Roma Rights Centre (ERRC) v Greece*, the Committee found Greece to have violated article 16 of the European Social Charter by failing to provide suitable permanent housing to the Roma people, failing to provide temporary stopping facilities, and forcefully evicting the Roma people.²⁰⁰ The Committee reasoned that the right to housing allows the exercise of many other rights, civil and political, as well as economic, social and cultural rights, and is critical to the institution of family.²⁰¹ The Committee reasoned further that the State Contracting Parties have a duty to supply housing to families, take the needs of families into account when devising housing policies, and ensure that the

¹⁹⁹ Complaint No. 15/2003, *European Roma Rights Centre v Greece*, Decision on the merits, para 24. For similar decisions, see: Complaint No. 51/2008 (decision on *European Roma Rights Centre (ERRC) v France*, Decision on the merits, 19 October 2009); Complaint No. 52/2008, *Centre for Housing Rights and Evictions (COHRE) v Croatia*, Decision on the merits.

²⁰⁰ *European Roma Rights Centre (ERRC) v Greece* (note 199 above) paras 40-43 and 46-47.

²⁰¹ *European Roma Rights Centre v Greece* (note 199 above) para 24.

housing is of an adequate standard, and includes essential services, such as heating and electricity.²⁰²

The Committee further developed its jurisprudence in *European Roma Rights Centre (ERRC) v France*. The Committee found France in violation of article 31(2) of the Revised European Social Charter because of the manner in which the Romani people were forcefully evicted from their homes. Of particular concern was the failure of the authorities to respect the procedural rights of the community prior to carrying out the eviction. Furthermore, the evictions were carried out under conditions that did not respect their human dignity, and no alternative accommodation was made available.²⁰³ Moreover, the Committee found violations of article E of the Charter read with article 31 of the Revised Social Charter, and articles 16 and 30. In this regard, the Committee held that the conditions under which the Romani people lived perpetuated social exclusion and amounted to a violation of their human dignity. This was because the housing policy of France made no provision for promoting access to adequate housing for people who lived or risked living in conditions of social exclusion.²⁰⁴

The combined implications of the above decisions are that housing refers to more than a dwelling. It must contain amenities such as heating, electricity, must be culturally suitable, and be of suitable size considering the make-up of the family. This manner of viewing the right to housing also applies to security from unlawful evictions.²⁰⁵ In addition, economic, social and cultural rights such as the right housing are a gateway to an enjoyment of civil and political rights - the two sets of rights are interrelated and indivisible.

Moreover, the Committee found that the principles of equality and non-discrimination were an important part of the right to housing as a result of the preamble to the European Social Charter. This formed the basis for the finding that Greece had violated article 16 of the Charter by providing insufficient housing and temporary stopping facilities, and by subjecting the people of the Roma to

²⁰² *European Roma Rights Centre v Greece* (note 199 above) paras 24 and 51.

²⁰³ *European Roma Rights Centre (ERRC) v France* (note 199 above) paras 67-71.

²⁰⁴ *European Roma Rights Centre (ERRC) v France* (note 199 above) paras 67-71 and 97-107.

²⁰⁵ *European Roma Rights Centre v Greece* (note 199 above) para 24 and 47-51. This means that alternative accommodation must also be of appropriate standards.

forced evictions.²⁰⁶ The implications of this are that the Committee is willing to engage systematically with the positive obligations imposed by both socio-economic rights and civil and political rights, and this has led to an interpretation of the right to housing in ways that embrace the substantive content of this right.

3 4 4 3 European Court of Human Rights

The European Court on Human Rights's housing jurisprudence revolves primarily around article 8 of the European Convention. Article 8 of the European Convention provides that:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

It is noteworthy though that textually, article 8 of the European Convention concerns mainly the duty to ensure respect of a person's private and family life, his home and correspondence. Article 8 is thus primarily orientated to the duty to respect the relevant rights as opposed to the manifestly positive duties imposed on Member States by article 31 of the Revised European Social Charter to fulfill the right to housing.

The Court has decided many precedent-setting cases on a variety of matters.²⁰⁷ In *Airey v Ireland*, it recognised that the rights protected and promoted by the European Convention will be interpreted in the context of the facts of each case, taking into account factors such as practicality, the availability of resources in the state concerned and the interrelatedness and indivisibility of rights.

²⁰⁶ *European Roma Rights Centre v Greece* (note 199 above) paras 47-51. This was confirmed in Complaint No. 51/2008, *European Roma Rights Centre v France*, Decision on the merits. A case dealing with substantially similar facts; see also: Complaint No. 58/2009, *COHRE v Italy*, Decision on the merits.

²⁰⁷ *Airey v Ireland* (1979) 2 EHRR 105. See also: *Buckley v United Kingdom* (1997) 23 EHRR 101; *Chapman v United Kingdom* (2001) 33 EHRR 18; *Moldovan and Other v Romania (no.2)* Application No. 41138/98 and 64320.01 EHRR (12 July 2005).

The European Court on Human Rights has also decided many cases involving housing, such as in *Buckley v United Kingdom* (hereafter ‘*Buckley*’).²⁰⁸ The majority Court held that the applicant, a Gypsy, was not punished at any time by the government of the United Kingdom or subjected to differential treatment for trying to follow her gypsy lifestyle and tradition since the national housing policies in place catered for Gypsies. Therefore she could not claim to have been discriminated against by the government of the United Kingdom for being a Gypsy.²⁰⁹

There were three dissenting judgments in this matter, the most noteworthy being that of Judge Lohmus, who adopted similar reasoning and conclusion to that of the Committee in the same matter. Judge Lohmus reasoned that living in caravans and travelling were important parts of the cultural heritage and traditional lifestyle of Gypsies, which had to be balanced against rights of the general community, and deserved protection as well, especially against all forms of discrimination.²¹⁰

In *Chapman v United Kingdom* (hereafter ‘*Chapman*’),²¹¹ the Court reasoned that Mrs Chapman’s occupation of her caravans was an important part of her ethnic identity as a Gypsy, which entailed regular travel from one place to the next. This was vital even though there were indications that it was no longer the case with all Gypsies, since some of them remained in one place for a long time due to the pressure of developments and changing policies or out of their own volition in order to achieve stability for their children.²¹² The measures adopted against her involved the refusal by the planning authorities of permission for her to remain on her own land, and subsequent measures aimed at her eviction. The measure thus had an impact going beyond her right to respect for her home, but also affected her right to live her life as a Gypsy, and to live her private and family life according to Gypsy traditions.²¹³

²⁰⁸ *Buckley* (note 207 above).

²⁰⁹ *Buckley* (note 207 above) para 85-89. The majority judgment in *Buckley* was confirmed in *Chapman* (note 207 above) paras 111-130.

²¹⁰ *Buckley* (note 207 above) (dissenting judgment of Judge Lohmus).

²¹¹ *Chapman* (note 207 above).

²¹² *Chapman* (note 207 above) para 73-74.

²¹³ *Chapman* (note 207 above) para 73.

The Court held that the decision of the planning authorities to deny her the right to remain on her own land, in her own caravans, and the measures adopted against her for so remaining on her own land amounted to an interference with her right to respect for her private life, family life and home guaranteed by article 8(1) of the European Convention. The question remained whether this was justified within the meaning of article 8(2) of the Convention.²¹⁴ In this regard, the Court held that this was justified, having regard to the interests of the community, the law, and the fact that she unlawfully placed her caravan on land not zoned for residential purposes.²¹⁵ The Court also rejected the argument that since, statistically speaking, there are more Gypsy families than the number of places available on authorised Gypsy sites, the decision not to allow the applicant Gypsy family to occupy land where they wished and to install their caravan there was not by itself, without more, a violation of article 8 of the European Convention. This was because to find otherwise would be similar to imposing on the United Kingdom and other Member States a duty, by virtue of article 8, to provide an adequate number of suitable sites where they could live as Gypsies. Despite the evolution of international law in this context, the Court was not convinced that article 8 could be interpreted so as to imply such a far-reaching positive duty of general social policy on Member States.²¹⁶

There were seven dissenting judges in this case.²¹⁷ The main dissenting judgment essentially held that it was not justifiable and necessary to interfere with Mrs Chapman's rights in a democratic society. This was because international law promoted and protected the rights of minorities, and that the majority court failed to reconsider the *Buckley* case in light of changes in international law.²¹⁸

The minority in *Chapman* was clearly willing to engage substantively and practically with the content of the right to adequate housing, and other implicated rights. This is evident in its approach to article 8 of the Convention, which the minority interpreted as giving rise to positive duties on Member States in certain mentioned situations. The minority judgment in *Chapman* is therefore a

²¹⁴ *Chapman* (note 207 above) para 78.

²¹⁵ *Chapman* (note 207 above) paras 73-74, 78-82, 90-98, 99-100, and 120-130. The Court also found that she should have appealed the adverse decision with the relevant authorities before going to courts.

²¹⁶ *Chapman* (note 207 above) paras 93-94.

²¹⁷ See the joint dissenting opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach, and Casadevall (hereafter 'joint dissenting judgment').

²¹⁸ *Chapman* (note 207 above) paras 2-7 and 9-11 (joint dissenting judgment).

better view compared to that of the majority court, which offers no protection to the security of tenure rights to people in situations like that of Mrs Chapman.

The cases of *Buckley* and *Chapman* represent a plethora of similar cases involving gypsy families that have been decided along similar lines as *Buckley* and *Chapman* by the Court.²¹⁹ The Court in these cases has been unwilling to adopt the line of reasoning adopted by Judge Lohmus in *Buckley*. Judge Lohmus engages substantively with the housing rights and discrimination provisions of the Convention. The Court has chosen instead to hide behind the thin reasoning on the measures adopted by the United Kingdom to protect the housing rights and way of life of the gypsy families, instead of seriously interrogating whether those adopted measures protect the housing rights of minorities.

The implications of the European Court of Human Rights's jurisprudence are that the Court is still unwilling to protect the housing rights of minorities, like Gypsies. This is in contrast to the minority court which recognises that international law protects the housing rights of minorities.

The other regional human rights system in which housing rights and duties imposed by this right have received a measure of sustained attention is the Inter-American system of human rights. Both the inter-American Commission on Human Rights and the Inter-American Court on Human Rights have interpreted the right to housing in different contexts.

3 4 5 The Inter-American human rights system

3 4 5 1 Background

The Inter-American Commission on Human Rights ('Inter-American Commission') and the Inter-American Court of Human Rights ('Inter-American Court') are the main mechanisms to enforce human rights, and to promote and protect human rights in the region. In addition, they complement

²¹⁹ See for instance *Coster v United Kingdom* [2001] 24876/94; *Beard v United Kingdom* [2001] 24882/94; *Jane Smith v United Kingdom* [2001] 25154/94; *Lee v United Kingdom* [2001] 25289/94; *Moldovan and Other v Romania* (no.2) Application No. 41138/98 and 64320.01 EHRR (12 July 2005).

one another in the ways in which they function. For instance, article 61(1) of the American Convention grants the Inter-American Commission the right to submit cases to the Inter-American Court.²²⁰

The Inter-American human rights system protects social rights under the American Declaration,²²¹ American Convention,²²² and the Protocol of San Salvador. Article 26 of the American Convention imposes duties on Member States to adopt legislative and other measures in order to ensure the full realisation of economic, social and cultural rights, internal and international co-operation.²²³

The right to housing is expressly provided for in article XI of the American Declaration, even though article XI makes provisions for the “right to the preservation of health and well-being.” Article XI provides that “Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing, and medical care, to the extent permitted by public and community resources. This means that the provision of housing is seen as means to the preservation of health, and is therefore a precondition to the preservation of peoples’ health and well-being.

Moreover, articles 3-25 of the American Convention guarantee civil and political rights, while Chapter III of the same Convention refers to the protection of economic, social and cultural rights. There is no express mention of the individual economic, social and cultural rights under the American Convention, beyond a section labelled Economic, Social and Cultural Rights. However,

²²⁰ See also: article 35 of the Rules of Procedure of the Inter-American Court, which relates to the filing of petitions by the Inter-American Commission with the Inter-American Court. The Rules of Procedure of the Court are available online at: <http://www.cidh.oas.org/Basicos/English/Basic.TOC.htm> (accessed on 6 July 2011).

²²¹ See Articles VIII-XIV. Housing is guaranteed in Articles IX and XI of the American Declaration. It is noteworthy that the American Declaration also guarantees many civil and political rights as well. In addition, the American Declaration is not a treaty, but is considered binding by Member States, and a useful source when interpreting the American Convention; Melish TJ “The Inter-American Court on Human Rights: Beyond progressivity” in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 372-408 (hereafter ‘Melish’) at 343-344, and 374-378; Melish TJ “The Inter-American Commission on Human Rights” in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 339-371 (hereafter ‘Melish’). It is also noteworthy that the important social rights jurisprudence of Inter-American Court and Commission has developed under the Inter-American Convention, owing to the fact that the individual petitions procedure under the Protocol of San Salvador is limited to two rights, trade union and education.

²²² See Melish (note 221 above) at 343-344.

²²³ Article 26 of the American Convention.

Melish argues that the right to housing is guaranteed under article 26 of the Convention along with other economic, social and cultural rights.²²⁴ Article 26 provides that:

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

The text of article 26 requires State Parties to take positive measures, both internally and through international assistance with a view to ensuring the progressive realisation of economic, social and cultural rights, including the right to housing. In contrast to article 1 of the Protocol of San Salvador, the description of the obligations of State Parties enunciated in article 26 of the Convention makes no mention of available resources and the degree of development of State Parties. In addition, they give rise to both positive and negative duties. The positive duties are evident from the fact that State Parties are required to take certain measures aimed at achieving these rights progressively. Negative duties arise from the norm that State Parties cannot take away existing social rights unless there is a justification for this grounded in human rights.²²⁵

3 4 5 2 Relevant Inter-American Commission on Human Rights jurisprudence

The Inter-American Commission's jurisprudence is full of promise, since it has issued some important communications on economic, social and cultural rights, including housing and related matters.²²⁶ The Inter-American Commission jurisprudence on housing is mainly concentrated in the

²²⁴ See Melish (note 221 above) at 343-344.

²²⁵ Article 1-2 of the Inter-American Convention and articles 1-2 of the Protocol of San Salvador.

²²⁶ Such as: *Maria Chiriboga and Guillermo Chiriboga v Ecuador*, case 12.054, Report No. 76/03, Inter. Am. Comm (2003) (decision on admissibility); *El Dorado Dos Carajas v Brazil* case 11.820, Report No. 4/03, Inter. Am. Comm (2003) (decision on admissibility); *Sebastião Carmago Filho v Brazil* case 12.310, Report No. 25/09, Inter. Am. Comm (2009); *Duarte v Nicaragua* case 11. 433, Report No. 37/05, Inter-Am.Comm (2005) (decision on admissibility); *Sebastião Carmago Filho v Brazil* case 12.310, Report No. 25/09, Inter. Am. Comm (2009) (decision on admissibility and merits) paras 42-43. For more cases on the right to housing, see: Melish (note 221 above) at 359. Although some of these petitions were found inadmissible, the mere fact that the Commission considered them means that the Commission is slowly appreciating the seriousness with which human rights, especially economic, social and cultural rights should be held, this although it noted that it has jurisdiction to hear these cases, because of non-compliance with admissibility requirements.

areas of negative duties arising out of this right, particularly in the context of forced evictions. There are, as yet, no clear cases pertaining to the positive duties arising out of this right.

In *Maria Chiriboga and Guillermo Chiriboga v Ecuador* (hereafter ‘*Chiriboga*’),²²⁷ the Inter-American Commission found that the expropriation of the petitioners’ properties without compensation by government in the public interest to build a public park violated the rights of the petitioners. The petitioners alleged that the expropriation without compensation deprived them their use and enjoyment of their land.²²⁸ This matter is significant for the Commission’s jurisprudence for future cases because land and housing usually go hand in glove, since there can be no housing without the availability of suitable land on which to build housing or to settle, as evident in the jurisprudence of the Inter-American Commission highlighted here.

In *Duarte v Nicaragua* (hereafter ‘*Duarte*’),²²⁹ the petitioner approached the Inter-American Commission to complain about the expropriation of his property through legislation, and its subsequent sale to third parties. This was a property he had been renting to third parties, and this rental income was his only source of income to cover his medical expenses.²³⁰ The petitioner further alleged that this expropriation deprived him of his property and prevented him from collecting rental from the occupiers.²³¹ However, this petition was declared inadmissible because the petitioner had not exhausted his domestic remedies as required by article 46(1)(a) of the American Convention, despite the fact that the Inter-American Commission found that it had jurisdiction consider it.²³²

In addition, the Inter-American Commission in *Corumbiara v Brazil* found that Brazil had violated articles 4, 5, 8 and 25 of the American Convention by forcefully and violently evicting 500 families of extremely poor, unemployed, and landless rural workers.²³³ The Commission found the excessive use of force in effecting the evictions unjustifiable and a violation of the right to humane

²²⁷ *Chiriboga* (note 226 above).

²²⁸ *Chiriboga* (note 226 above) paras 1-5.

²²⁹ Case No. 11.433, Report No. 37/05, Inter-Am.Comm (2005) (decision on admissibility).

²³⁰ *Duarte* (note 226 above) paras 17-20. The petition was based on Articles 21 (right to property) of the American Convention.

²³¹ *Duarte* (note 226 above) para 19-20.

²³² *Duarte* (note 226 above) paras 55-57.

²³³ Melish (note 221 above) at 356.

treatment.²³⁴ The families had settled illegally on a small portion of a ranch and set up a camp there in order to meet their most urgent survival needs and also to put pressure on the government to solve the problem of land in Northern Brazil.²³⁵ The owner of the ranch approached the court, and obtained a court order, which was granted the same day. The squatters were then forcefully and violently evicted at night with some of them losing their lives in the process.²³⁶

Melish however, laments the failure of the petitioners in the *Corumbiara v Brazil* case to broaden their claims, her criticism is based on Articles 11, 25 and 26 of the Convention, and that the Commission did not do so *mero motu* in order to deal with evictions holistically. Such holistic treatment would have incorporated issues of basic housing and duties of the state in this regard. This according to Melish would have addressed issues such as alternative accommodation, lack of consultation and a chance to make representations before the evictions were carried out, and the manner in which the evictions were carried out.²³⁷

The matter of *Sebastião Carmago* concerned families of rural workers who were violently and forcefully evicted from the land they had occupied. These evictions were conducted in the early hours of the morning, by heavily armed men hired by owners of the land which these families had occupied.²³⁸ In addition, the perpetrators of these forced evictions destroyed the shacks that the families used as homes, beat them up, injured some of the people being evicted and murdered a senior citizen, 65 year-old Mr Carmago.²³⁹ The Inter-American Commission found that the State of Brazil had violated articles 4, 8 and 25 of the American Convention by failing to comply with the duties imposed on it by article 1(1) of the American Convention, which requires Member States to ensure and protect the rights guaranteed in the American Convention.²⁴⁰

The decision in *Sebastião Carmago* is important because it demonstrates that the Inter-American Commission is willing to protect the negative duties emanating from the right to housing. It

²³⁴ Melish (note 221 above) at 356.

²³⁵ Melish (note 221 above) at 356.

²³⁶ Melish (note 221 above) at 356.

²³⁷ Melish (note 221 above) at 356.

²³⁸ *Sebastião Carmago* (note 226 above) paras 51-55.

²³⁹ *Sebastião Carmago* (note 226 above) paras 54-55.

²⁴⁰ *Sebastião Carmago* (note 226 above) paras 74-124.

highlights the obligations of State Parties to ensure that evictions are conducted in a manner that respects and promotes human rights, and does not leave people homeless.

I will now consider how the Inter-American Court on Human Rights fared in the protection of economic, social and cultural rights, especially the right to housing.

3 4 5 3 Inter-American Court on Human Rights

The jurisprudence of the Inter-American Court in the area of economic, social and cultural rights has lagged behind other regional courts on human rights. This is because of the Inter-American Court's failure to recognise and deal with different economic, social and cultural aspects in an independent manner. The Inter-American Court chose instead to deal with these rights under the concept of life.²⁴¹ The result has been that the Inter-American Court has developed the rights to health, education, food, recreation and adequate housing under articles 4 and 5 of the American Convention, which protect rights to life and personal integrity respectively instead of developing these rights under article 26 of the Convention.²⁴² For instance, the Court interpreted the right to health care, education and other human rights as guarantees for a dignified life, and the violation of these rights an interference with the right to life and personal integrity of the person.²⁴³

In the *Moiwana Village v Suriname* (hereafter '*Moiwana*'),²⁴⁴ the Inter-American Commission submitted an application to the Court on behalf of the Moiwana community, in which they alleged that the State of Suriname had violated articles 25 (right to judicial protection), 8 (right to a fair trial), and 1(1) (obligation to respect rights) of the American Convention. In addition, the Inter-American Court was asked to rule that the State of Suriname had to pay monetary and non-monetary reparations, and pay the legal costs incurred by the Moiwana community.²⁴⁵ The Inter-American Commission submitted this case to the Inter-American Court after it had failed to resolve

²⁴¹ Melish (note 221 above) at 388-392.

²⁴² Melish (note 221 above) at 388.

²⁴³ Melish (note 221 above) at 389-390.

²⁴⁴ *Moiwana Village v Suriname*-Series C No. 145 [2006] IACHR 1 (15 June 2005).

²⁴⁵ *Moiwana* (note 244 above) paras 1-2.

the matter through its procedures due to the failure of the State of Suriname to comply with its communications and recommendations.²⁴⁶

The facts giving rise to this case were that on 29 November 1986, members of the Moiwana indigenous community were attacked by the armed forces of Suriname, which killed over 40 men, women, and children, as well as burning down the village belonging to the Moiwana community. In addition, the survivors of these attacks fled into the nearby forest, and then into exile, with some becoming internally displaced. Furthermore, no adequate investigation of the events leading up to these attacks took place, nor was anyone held accountable, while the survivors remained internally displaced from their lands, exiled, and unable to return to their traditional ways of life.

The Inter-American Court held that it had the jurisdiction to hear and decide this case because the alleged violations of human rights of the Moiwana community and its members were of a continuing nature, and fell within the ambit of its powers conferred by the American Convention.²⁴⁷ In addition, the Court held that the State of Suriname had implicitly waived the right to raise the objection of failure of exhausting domestic remedies because it did not raise it within the time period allowed, in the first stages of the proceedings, and that this was clear from the record of the proceedings.²⁴⁸

The State of Suriname was also found to have violated the rights of the Moiwana community to humane treatment, in relation to obligations to respect this right. This was because the Moiwana people had suffered severe emotional, psychological, spiritual and economic hardship because they were forcefully separated from their lands, preventing them from honouring their deceased according to their traditional ways of life, and were unable to access justice.²⁴⁹ Furthermore, the State of Suriname was found to have violated the right to freedom of movement and residence, as guaranteed in article 22, read with article 1(1) of the American Convention, to the detriment of the Moiwana community.²⁵⁰ This was because of the continued internal displacement of the Moiwana

²⁴⁶ *Moiwana* (note 244 above) paras 5-11.

²⁴⁷ *Moiwana* (note 244 above) paras 43-44.

²⁴⁸ *Moiwana* (note 244 above) paras 48-51.

²⁴⁹ *Moiwana* (note 244 above) paras 90-103.

²⁵⁰ *Moiwana* (note 244 above) para 121.

people, who, since 1986 remained unable to return to their ancestral lands and places of residence.²⁵¹ The Court also found that the property rights (article 25) of the Moiwana people had been violated in relation to article 1(1) of the American Convention, because they were prevented by the foregoing events from the communal use and enjoyment of their traditional properties.²⁵²

The State of Suriname was also found to have violated the rights of the Moiwana community to judicial guarantees and protection (articles 8(1) and 25) of the American Convention in relation to article 1(1) of the same Convention, through its failure to institute adequate investigations and hold people liable for violations of the rights of the Moiwana community despite overwhelming available evidence.²⁵³

The State of Suriname was ordered to take measures to investigate the violations of human rights of the Moiwana community, identify, prosecute and hold accountable all those that were involved in these violations.²⁵⁴ It was also ordered to locate the remains of the deceased members of the Moiwana community, and deliver them to the surviving members,²⁵⁵ adopt legislative and other measures aimed at securing the property rights of the Moiwana community, in relation to the traditional territories from which they had been forcefully evicted.²⁵⁶ These measures include methods for the demarcation and titling of their lands and territories according to their traditional ways of life and customary laws.²⁵⁷

Finally, the State of Suriname was also ordered to secure the safety of those members of the Moiwana community who decide to return to their territories, and establish a community development fund that would enable the community to secure basic social services, such as health, housing, and educational for the members of the Moiwana community.²⁵⁸

²⁵¹ *Moiwana* (note 244 above) paras 113-120.

²⁵² *Moiwana* (note 244 above) paras 125-135.

²⁵³ *Moiwana* (note 244 above) paras 138-164.

²⁵⁴ *Moiwana* (note 244 above) paras 202-207.

²⁵⁵ *Moiwana* (note 244 above) paras 208.

²⁵⁶ *Moiwana* (note 244 above) paras 209-211.

²⁵⁷ *Moiwana* (note 244 above) paras 209-211.

²⁵⁸ *Moiwana* (note 244 above) paras 212, 213-215, and 232. The Court also retained jurisdiction of the case by requiring that yearly reports be filed with it by the State of Suriname on the progress made in complying with its orders.

The Court has further shown signs of its willingness to be robust in the adjudication of economic, social and cultural rights in various cases dealing with indigenous communities.²⁵⁹ The Court in *Yakye Axa Indigenous Community v Paraguay* held that the rights of a displaced indigenous community, living in extreme conditions of homelessness, lack of food, health care services, sanitary and water were violated. In particular, the Court found violations of articles 8, 25, 1(1), 2 and 21 and 1(1) and 2 respectively.²⁶⁰ A significant aspect of the court order required the state to provide the Yakye Axa community with essential goods and services necessary for their survival until they had a territory of their own.²⁶¹ In addition, the state was ordered to take legislative and other measures necessary to guarantee the property rights of the Yakye Axa community within a reasonable time period.²⁶² Lastly, the Court retained jurisdiction over the matter in order to monitor compliance with its orders.²⁶³

The outcome of the *Moiwana* case, as well as the *Yakye Axa* case have been confirmed in another similar case, *Saramaka People v Suriname* (hereafter ‘*Saramaka*’).²⁶⁴ The only difference is that the facts giving rise to the *Saramaka* case were the ongoing effects associated with the construction of a hydroelectric dam in the 1960s which flooded the traditional territory of the Saramaka people. In addition, the *Saramaka* case is distinguishable from the *Moiwana* and *Yakye Axa* cases because the *Saramaka* case also involved a dispute over the recognition of the Saramaka people as an indigenous community.²⁶⁵

Finally, and significantly, the State of Suriname was ordered to allocate six hundred thousand United States dollars for the creation of a community development fund on behalf of the Saramaka community members in their territory, in order to finance the educational, housing, agricultural, and

²⁵⁹ *Mayagna (Sumo) Awas Tingni Community v Nicaragua*-Series C No. 79 [2001] IACHR (2001); *Moiwana* (note 244 above); *Yakye Axa Indigenous Community v Paraguay*-Series C No. 125 [2005] IACHR (17 June 2005). For similar cases, see also: *Saramaka People v Suriname*-Series C No. 172 [2007] IACHR 5 (28 November 2007).

²⁶⁰ *Yakye Axa* (note 259 above) paras 55-119 and 123-156. This case confirmed principles established in its earlier judgment in *Awas Tingni Community* (note 259 above); see also: Melish (note 221 above) at 390-392 and 392-395.

²⁶¹ *Yakye Axa* (note 259 above) para 221 of the original order.

²⁶² *Yakye Axa* (note 259 above) para 225 of the original order.

²⁶³ *Yakye Axa* (note 259 above) para 214 of the original order.

²⁶⁴ *Saramaka* (note 259 above).

²⁶⁵ *Saramaka* (note 259 above) paras 4-5.

healthcare projects, including the provisions of electricity and drinking water where necessary, for the Saramaka community members.²⁶⁶

The implications of these cases are that the Court is willing to protect and promote the social, civil and political rights of indigenous communities, including their rights to property, ancestral lands, and traditional ways of living from both state actors and non-state actors. In addition, the Court has shown a willingness to develop the substantive content of various rights such as property rights, land and housing which are linked to the traditions and customs of the indigenous communities concerned, including crafting innovative remedies such as moral damages²⁶⁷ and the establishment of a community development fund.

The Inter-American Court jurisprudence on housing does not define what would constitute adequate housing within the meaning of the American Convention, or the American Declaration. Its biggest weakness lies in conflating housing with other rights, a thread that it arguably draws from the failure of the American Declaration or the American Convention to enumerate clearly defined housing rights. However, the jurisprudence shows a lot of promise in view of cases such as the *Saramaka* case, where it was recognised that housing must also be culturally appropriate within the context of indigenous communities.

3.5 Emerging international law norms and instruments

There are many emerging norms and instruments in the area of human rights as a whole, aimed at strengthening protection of international human rights treaties, and also assisting in crafting other mechanisms for dealing with new violations of international human rights. These developments extend to the areas of economic, social and cultural rights, especially the right to housing. Many new norms²⁶⁸ and instruments have emerged with regard to the right to housing, and these consist of

²⁶⁶ *Saramaka* (note 259 above) paras 201-202.

²⁶⁷ *Moiwana* (note 244 above) paras 191-196.

²⁶⁸ See: *Moiwana* (note 244 above) para 191-196; *Saramaka* (note 259 above) paras 201-202; *COHRE v Sudan* (note 169 above) paras 145-168.

both binding and non-binding norms which emerged recently at different levels of international human rights.²⁶⁹

The emerging international law instruments can be broadly grouped into those that are binding, and those that are not binding (soft law).²⁷⁰ It is important to distinguish between non-binding international law instruments and binding instruments for the purposes of identifying whether a state is bound by certain international law rules or not. In order for international law rules to become binding on a State and between States, it must generally comply with the requirements of customary international law, or be found in treaties that the state concerned has signed and ratified.²⁷¹ However, the non-rectification of treaties by States, where for instance, the state concerned has only signed the treaty concerned or has failed to sign or ratify, does not by itself mean that that state must ignore the treaty concerned.

Certain rules emanating from soft law become universally accepted and practised by the international community in their dealings with one another. The fact that a certain state was not party to the process leading to the adoption of a particular soft law instrument will not by itself mean that it must ignore the particular international norm. This is because certain rules of

²⁶⁹ Istanbul Declaration on Human Settlements, UN Doc. (A/RES/64/236), adopted by the United Nations General Assembly Resolution 51/77 of 6 December 1996 and 53/242 of 28 July 1999, 18th Plenary Meeting, Conference on Human Settlements (Habitat II); Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter; State Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter; United Nations Millennium Declaration, UN Doc. (A/55/L.2), adopted by the General Assembly on 8 September 2000, 8th Plenary Meeting); United Nations Sub-Commission on the Promotion and Protection of Human Rights, *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, 28 June 2005, E/CN.4/Sub.2/2005/17, available online at <http://www.unhcr.org/refworld/docid/41640c874.html> [accessed 17 July 2011]; United Nations Special Rapporteur Reports, available online: <http://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx> (accessed on 24 August 2011) (hereafter 'Pinheiro Principles'); United Nations Political Declaration on Africa's Development, UN Doc (A/RES/63/L.1), adopted by the General Assembly on 22 September 2008, 4th Plenary Meeting; United Nations Declaration on the Rights of Indigenous Peoples, UN Doc (A/RES/61/295), adopted by Resolution 61/295 of 13 September 2007 of the United Nations General Assembly, 61st Session.

²⁷⁰ For a difference between binding instruments and soft law, see: Klabbbers J "The redundancy of soft law" (1996) 65 *Nordic J. Int'l L.* 167-182; Hillgenberg H "A fresh look at soft law" (1999) 10 *EJIL* 499-515; John Dugard *International Law: A South African Perspective* 2nd ed (2000) Vii-463 at 36-39. Soft law consists of standards generated by declarations and resolutions of international organisations, and those adopted at human rights conferences that are intended to act as guidelines for countries in their dealings with each other, but lack the status of binding law. Examples of soft law instruments are the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights under the African Charter; the State Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter, the Millennium Declaration; Pinheiro Principles; the Political Declaration on Africa's Development; Reports of the United Nations Special Rapporteur on Adequate Housing.

²⁷¹ John Dugard 2000 (note 270 above) at 47, and 51-59; Hillgenberg 1999 (note 270 above) at 504-514.

international law have become universally accepted and practised by the international community in their dealings with one another.

Soft law has the potential to assist courts in the development of the substantive content of economic, social and cultural rights, including the right to housing. For instance, the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights under the African Charter provides elaborate guidelines on what constitutes adequate housing, thereby filling in gaps that exist in the African Charter. Adequate housing is defined in the Principles and Guidelines as:

[T]he right of every person to gain and sustain a safe and secure home and community in which to live in peace and dignity. It includes access to natural and common resources, safe drinking water, energy for cooking, heating, cooling and lighting, sanitation, and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.²⁷²

The State Reporting Guidelines complement the Principles and Guidelines,²⁷³ in that they should be used in conjunction with the Principles and Guidelines. In addition, the State Reporting Guidelines are designed to provide guidelines to Member States in their submissions of state reports to the African Commission. These reports must deal with each of the rights enumerated in the State Reporting Guidelines,²⁷⁴ and must contain measures adopted by the state concerned to progressively realise the rights in question. These measures may take the form of laws, policies and strategies adopted, and must also deal with challenges that the Member State concerned faces in realising each individual right, and how it plans to meet these challenges.

²⁷² Principles and Guidelines para 78. For a comprehensive discussion of these Principles and Guidelines, including the obligations arising out of them, see discussion in 3.4.3.1 above.

²⁷³ See Preamble of the Principles and Guidelines. It provides that the Principles and Guidelines should be used as an additional guide to the State Reporting Guidelines to guide the Member States in their submission of their state reports to the African Commission. For criticism of the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights under the African Charter, see: Kaguogo 2010 (note 157 above) at 6-7. Kaguogo has criticised the lack of clarity in the State Reporting Guidelines regarding the benchmarks to be used when assessing the realisation of rights in the reports. In addition, he criticised the failure to emphasise the duty on Member States to identify violations of Social Rights in the region. Kaguogo emphasised that this duty of Member States could have gone a long way in protecting and promoting social rights if it was included in the State Reporting Guidelines. Kaguogo further argued that the State Reporting Guidelines do not clarify the relationship between the Guidelines and Principles pertaining to National Periodic under the African Charter, and the State Reporting Guidelines.

²⁷⁴ For a comprehensive discussion of the State Reporting Guidelines, see: Kaguogo 2010 (note 157 above).

The enumerated rights in the State Reporting Guidelines number ten individual rights, namely: rights to property, work, health, education, culture, housing, social security, water and sanitation, food, and protection of the family, in contrast to six individual rights expressly provided in the African Charter, namely: right to work, property, health, education, right to the protection of the family, and environment. Despite the shortcomings of the State Reporting Guidelines, they remain very instructive towards the realisation of the substantive content of adequate housing or shelter in the region. In particular, they act as a guide to Member States on the duties and standards imposed by the right to adequate housing or shelter and other socio-economic rights in the African Charter. The State Reporting Guidelines also have the potential to add clarity regarding the ways in which Member States can give content on the right to housing, and socio-economic rights protected in the African Charter.

The other soft law instrument that is instructive in the context of the right to adequate housing is the Millennium Declaration. The Millennium Declaration or Millennium Development Goals ('MDGs') are a set of guidelines and indicators used to measure global poverty reduction.²⁷⁵ The Millennium Declaration has evolved into a set of global goals called the Millennium Development Goals, consisting of eight goals and eighteen targets which set out a specific time frame by which a particular right must be fulfilled, and timeframes by which certain poverty reduction measures must have been put in place.²⁷⁶ Goal number 7 (target 11) of the MDGs aims at improving the lives of 100 million slum dwellers worldwide by year 2020. The key indicators for progress on this goal are the "proportion of urban population with improved access to improved sanitation, and proportion of households with access to secure tenure (owned or rented)."²⁷⁷

The MDGs have a significant role to play in the continued quest for the substantive content of the right to adequate housing. This is because States are now subject to a global assessment mechanism

²⁷⁵ For a discussion and criticism of the Millennium Development Goals, see: Sumner A and Melamed C "The MDGs and beyond: Pro-poor policy in a changing world" (2010) 41 *IDS Bulletin* 1-7; Langford M "A poverty of rights: Six ways to fix the MDGs" (2010) 41 *IDS Bulletin* 83-91; Moss T "What next for the Millennium Development Goals?" (2010) 1 *Global Policy* 218-220. The MDGs act as additional duties of States, by adding to the duties that States have at national level in their respective countries. In addition, the MDGs recognises the universality of human dignity, equality and equity at an international level, see in this regard: Millennium Declaration para 2.

²⁷⁶ Millennium Declaration para 19.

²⁷⁷ See Millennium Development Goals Indicators 31-32.

on the progress they are making in the realisation of this right, and other socio-economic rights in the MDGs. This assessment may go a long way in assessing successes and failures in the realisation of the right to adequate housing, and other socio-economic rights, and identifying any assistance that the particular State may need in order to fulfill the particular MDGs.

The Pinheiro Principles also elaborates on the right to adequate housing by providing guidelines to States when faced with violations of the property and housing rights of refugees and internally displaced persons, and dealing with issues of restitution in this context.²⁷⁸ The Pinheiro Principles originates from the United Nations processes dating back to year 1997, in which the Committee on the Elimination of Racial Discrimination suggested to the Sub-Commission on the Promotion and Protection of Human Rights, the need to assess the property, housing, and the restitution status of returning refugees and displaced persons. This then led to the adoption of Resolution 1998/26 on Housing and Property Restitution in the Context of the Return of Rights of Refugees and Internally Displaced Persons. This was later followed by the appointment of Sergio Pinheiro of Brazil as an expert to prepare working papers on this issue. Pinheiro was then appointed as a Special Rapporteur on Housing and Property Restitution for Refugees and Internally Displaced Persons in 2002 and was tasked with the drafting of what is now known as the Pinheiro Principles, which were adopted by the Sub-Commission on Promotion and Protection of Human Rights on 11 August 2005.²⁷⁹

The Pinheiro Principles contains various guidelines on the right to housing. Principle 5 of the Pinheiro Principles protects the housing rights of internally displaced persons by requiring States to put measures in place that are in line with international law and international humanitarian law, in order to prevent and protect people against being displaced from their homes, land or places of residence. Principle 6, on the other hand, guarantees the right of “everyone to be protected against arbitrary or unlawful interference with his or her privacy and his or her home.”²⁸⁰ Principle 8 is the main guideline on housing, since it provides for the general right to adequate housing,²⁸¹ but

²⁷⁸ Principle 5, 6 and 8 of the Pinheiro Principles; *COHRE v Sudan* (note 169 above) para 203-204.

²⁷⁹ See Handbook, *Housing and Property Restitution for Refugees and Displaced Persons: ‘Implementing the Pinheiro Principles’* (2007) 3-112 at 11.

²⁸⁰ Principle 6(1) of the Pinheiro Principles. Principle 6(2) of the Pinheiro Principles guides compliance with this Principle by placing obligations on States to ensure that everyone is provided with due process protection against arbitrary or unlawful interference with his or her privacy, and his or her home.

²⁸¹ Principle 8(1) of the Pinheiro Principles.

specifically in the context of requiring States to take positive measures directed at alleviating the conditions of refugees and displaced persons living in inadequate housing.²⁸²

Moreover, the other soft law instrument that makes provision for adequate housing is the Declaration on Indigenous Peoples Rights.²⁸³ Article 21 guarantees the right of indigenous people to the improvement of their socio-economic conditions, in the areas of education, employment, health, vocational training and retraining, sanitation, housing and social security.²⁸⁴ States have a duty in terms of article 21 to take steps to ensure that the conditions of indigenous people are secured, especially those of women, youth, elders, children and persons with disabilities.²⁸⁵ This is fortified by article 23 which gives indigenous people the right to active participation in the development of socio-economic programmes that affect them.²⁸⁶

Finally, the other important source of soft law pertaining to the right to adequate housing is the reports and work produced under the auspices of the United Nations Special Rapporteur on Adequate Housing. The Special Rapporteur on Adequate Housing is a vital institution because it has over the years developed useful standards and benchmarks on the right to adequate housing in international human rights. Special Rapporteurs under the United Nations system are independent experts in the relevant field of human rights, who are appointed by the United Nations Human Rights Council to deal with specific human rights. The post of Special Rapporteur on housing was created on 17 April 2000 in accordance with the resolution of the Commission on Human Rights.²⁸⁷

The mandate of the Special Rapporteur on housing includes reporting on the status of the realisation of the right to adequate housing around the world; promoting cooperation and assistance to governments in their quest to secure social rights; applying gender specific outlooks on his or her work; facilitating regular dialogue with governments and relevant United Nations human rights bodies in the area of adequate housing; identifying possible sources of financing for relevant

²⁸² Principle 8(2) of the Pinheiro Principles.

²⁸³ Declaration on Indigenous Peoples (2007).

²⁸⁴ Article 21(1) of the Declaration on Indigenous Peoples Rights.

²⁸⁵ Article 21(2) of the Declaration on Indigenous Peoples Rights

²⁸⁶ Article 23 of the Declaration on Indigenous Peoples Rights.

²⁸⁷ United Nations Commission on Human Rights Resolution 2009/9 (adopted on 17 April 2000, 52th Meeting). The Special Rapporteur on Adequate Housing is appointed for a period of three years.

advisory and technical cooperation; and facilitating the inclusion of issues relevant to the mandate of the relevant United Nations projects; compiling and submitting country specific annual reports to the Commission on Human Rights.²⁸⁸

The Special Rapporteur on Adequate Housing has interpreted the right to adequate housing under various themes in the report submitted to the United Nations General Council, in fulfillment of the mandate of this office.²⁸⁹ The Special Rapporteur Report on Adequate Housing dated 6 August 2009 focused on the impact of climate change on the realisation of the right to adequate housing. It further highlighted the effects of climate change on the right to adequate housing, and the international human rights obligations that arise in conditions of extreme weather, including measures that States can take to anticipate these challenges, and to deal with them once they occur.²⁹⁰ The Special Rapporteur concluded in its 6 August 2009 report by recommending that States need to take climate changes into account in all the stages of the realisation of the right to adequate housing in accordance with local and international standards. This would include factoring climate changes into legislative policy measures, and implementation stages of the realisation of the right to adequate housing, so as to better respond to the housing needs of the people in conditions of extreme weather.²⁹¹

Moreover, the Special Rapporteur on Adequate Housing has dealt with the importance of factoring the right to adequate housing standards in post-disaster and post-conflict situations, in its report

²⁸⁸ See article 7(d)(i)-(vii) of the Commission on Human Rights Resolution 2000/9. The mandate of the Special Rapporteur on Adequate Housing was recently extended by the Human Rights Council, a body which succeeded the Commission on Human Rights, see UN Doc (A/60/L.48), and adopted by the United Nations General Assembly on 3 April 2006, 72nd Plenary Meeting, 66th Session; United Nations Human Rights Council Resolution 5/1 (adopted 18 June 2007, 9th Meeting); United Nations Human Rights Council Resolution 6/27 (adopted on 14th December 2007, 33rd Meeting United Nations Commission on Human Rights Resolution 2009/9 (adopted on 17 April 2000, 52th Meeting). The Special Rapporteur on Adequate Housing is appointed for a period of three years.

²⁸⁸ See article 7(d)(i)-(vii) of the Commission on Human Rights Resolution 2000/9. The mandate of the Special Rapporteur on Adequate Housing was recently extended by the Human Rights Council, a body which succeeded the Commission on Human Rights, see UN Doc (A/60/L.48), adopted by the United Nations General Assembly on 3 April 2006, 72nd Plenary Meeting, 66th Session; United Nations Human Rights Council Resolution 5/1 (adopted 18 June 2007, 9th Meeting); United Nations Human Rights Council Resolution 6/27 (adopted on 14th December 2007, 33rd Meeting).

²⁸⁹ See for example: UN Doc. (A/64/255), adopted by the United Nations General Assembly on 6 August 2009, 64th Session; UN Doc (A/HRC/16/42), adopted by the United Nations General Assembly on 20 December 2010, 16th Session.

²⁹⁰ Special Rapporteur on Adequate Housing Report (6 August 2009) para 5-21.

²⁹¹ Special Rapporteur on Adequate Housing Report (6 August 2009) paras 65-77.

dated 20 December 2010.²⁹² The Special Rapporteur on Adequate Housing has also concluded and recommended that States need to take into account the devastating effects that disasters and conflicts can have on housing. Therefore, States need to note the importance of securing the security of tenure, consultations, public participation, and institutional coordination after disasters and conflicts for its people in accordance with the international standards and benchmarks on the right to adequate housing.²⁹³

The implications of the abovementioned soft law instruments on the right to adequate housing are that there is a growing body of these instruments in the international human rights jurisprudence, which when considered in the light of international law, provide useful guidelines and norms to States in dealing with their domestic and international law obligations, violations, policy, and technical or legal problems arising out of this right.

I will now analyse the relevance of foreign case law.

3 6 Relevant cases from foreign jurisdictions

3 6 1 Introduction

The debate on the use of foreign law to interpret the South African Constitution is fairly settled compared to the position, for example, under the United State’s Constitution where foreign law plays a very restricted role. This is because section 39(1)(c) of the Constitution provides that “when interpreting the Bill of Rights, a court, tribunal or forum may consider foreign law.” This however, does not mean that there are no controversies and resistance surrounding the use of foreign law to interpret the South African Constitution.²⁹⁴

The Constitution does not specify the extent to which foreign law may be considered. Roux argues that the jurisprudence of Justice Laurie Ackermann (retired Justice of the Constitutional Court) was

²⁹² Special Rapporteur on Adequate Housing Report (20 December 2010).

²⁹³ Special Rapporteur on Adequate Housing Report (20 December 2010) paras 14-57, and 58-67.

²⁹⁴ Roux T “The dignity of comparative constitutional law” (2008) *Acta Juridica* 185-203.

grounded in the careful analysis of foreign law, drawing out the useful principles for particular cases that he dealt with. This was based on the interpretation of sections 39(1)(c), read with 39(1)(a) and 36(1) of the South African Constitution.²⁹⁵ This was because Ackermann J was of the view that the use of foreign law in a democratic South Africa was not an optional choice, but a vital part of any constitutional interpretation.²⁹⁶ In addition, Ackermann, according to Roux, believed that the use of foreign law to interpret the South African Constitution was not only for educational reasons, but also essential for an interrogation of the values underlying an open and democratic society.²⁹⁷

Ackermann J believed that foreign law should be used at the interpretation phase of constitutional adjudication, and at the limitations inquiry.²⁹⁸ This ensured that the courts engaged systemically with the values underlying particular rights, values such as human dignity, equality and freedom, and gave content to rights through the interrogation of the scope, and nature of the rights implicated.²⁹⁹ Furthermore, Roux laments the Constitutional Court's scant use of foreign law, after Ackermann J left its bench.³⁰⁰

Whilst judges obviously need to be cautious in their use of comparative sources, taking into account the fact that they lack intimate information pertaining to the historical, social and legal context of the particular comparative jurisdiction that they have chosen to use in a particular case they may be dealing with at a particular time,³⁰¹ there is a great need to learn from other jurisdictions in order to illuminate and develop South African jurisprudence, especially in the context of socio-economic rights.³⁰²

A court, tribunal or forum should consider foreign law when interpreting a constitution or the domestic legal system, particularly where there are similarities in legal, political and social

²⁹⁵ Roux 2008 (note 294 above) at 190-203.

²⁹⁶ Roux 2008 (note 294 above) at 191.

²⁹⁷ Roux 2008 (note 294 above) at 192-193.

²⁹⁸ Roux 2008 (note 294 above) at 191.

²⁹⁹ Roux 2008 (note 294 above) at 188, and 192-203.

³⁰⁰ Roux 2008 (note 294 above) at 202-203.

³⁰¹ Liebenberg 2010 (ch 1, n 5) at 118.

³⁰² Roux 2008 (note 294 above) at 192-193.

contexts.³⁰³ In the following section, I highlight key constitutional law cases dealing with housing rights in the context of the Colombian and Indian Constitutions to illustrate the fact that there is a developing jurisprudence on housing rights which can serve as a valuable reference point for the South African courts in developing their jurisprudence under section 26. These jurisdictions have been selected, given the similar socio-economic and developmental challenges they face, and their common history of colonialism with South Africa.

3 6 2 Cases from Colombia and India

There are a number of interesting developments in socio-economic and human rights jurisprudence in the abovementioned jurisdictions that might serve as a useful reference point for South African courts, especially for the Constitutional Court in the interpretation of the right of access to adequate housing.³⁰⁴ The Colombian Constitution (1991) protects and promotes rights in three categories, fundamental rights, socio-economic rights, and collective and environmental rights.³⁰⁵ The first category of rights consists of civil and political rights, including some negative duties relating to economic, social and cultural rights.³⁰⁶ The second category is made up of economic, social and cultural rights,³⁰⁷ and the third made up of consumer and environmental rights.³⁰⁸ The right to adequate housing is guaranteed in article 51 of the Colombian Constitution. Article 51 of the Colombian Constitution places negative and positive duties on the state to protect and promote the right to adequate housing by devising and providing the appropriate housing programme and finance aimed at the progressive realisation of this right.

³⁰³ This could be determined by having regard to the facts of each case, and practicalities. This means that the Court does not need to have a strictly similar case as to facts before it in order to consider foreign law. It would suffice if the case before the court bears different facts, but raises similar issues of law and practice that are found in foreign law.

³⁰⁴ Courtis C “Argentina: Some promising signs” in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 163-181 at 176-177; Sepúlveda M “Colombia: The Constitutional Court’s role in addressing social justice” in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 144-162 at 151-152.

³⁰⁵ See chapters 1, 2 and 3 of the Colombian Constitution.

³⁰⁶ Articles 11-41 of the Colombian Constitution.

³⁰⁷ Articles 42-77 of the Colombian Constitution.

³⁰⁸ Articles 78-82 of the Colombian Constitution.

The Constitution also establishes a Constitutional Court, which is the final arbiter of the rights in the Colombian Constitution. The Court protects various rights, including the economic, social and cultural rights under the abstract constitutional review of legislation, as well as decisions delivered in the case of individual complaints.³⁰⁹ The Constitutional Court mainly protects socio-economic rights in the Constitution through the method of protection of fundamental rights called *tutela* action, which is a simplified procedure to refer cases to the Court. This procedure allows individuals and groups alike to approach a Court or tribunal for the immediate protection of their fundamental rights where their rights are threatened or violated.³¹⁰

The housing jurisprudence of the Colombian Constitutional Court for instance, serves as a useful example.³¹¹ This is because of the genuine willingness to develop the substantive content of socio-economic rights. The Colombian Constitutional Court has made great strides despite operating under a situation of political instability. The Court held in *Judgment T-025/2004* that various rights of internally displaced persons as guaranteed in the Colombian Constitution have been violated by various organs of State.³¹² *Judgment T-025/2004* was confirmed in *Judgment T-821/2007*, the Court in *T-025/2004* was confronted with 108 cases filed by internally displaced persons and their families. These cases related to a number of similar cases filed by 1150 families, consisting of women, minors, elderly and many indigenous persons. These applicants were victims of forced internal displacements in various parts of Colombia owing to events that took place over one and a half years before this case.³¹³ The Court reasoned that the issues for determination were whether the applicants had standing before it, and whether their rights to work, minimum subsistence income, dignified housing, healthcare, and access to education amongst other rights were violated by the

³⁰⁹ Sepúlveda (note 304 above) at 145.

³¹⁰ Sepúlveda (note 304 above) at 146-147.

³¹¹ *Judgment T-025/2004* (Colombian Constitutional Court); *Judgment T-821/2007* (Colombian Constitutional Court); Manrique D “Restitution for internally displaced persons: A step towards peace and recovery in Colombia” (March 2008) 5 *Housing and ESC Rights Law Quarterly* 1-12 at 1-4; Yamin AE and Parra Verra O “Judgment T-760/08 and the restructuring of Colombia’s health system” (June 2009) 6 *Housing and ESC Rights Law Quarterly* 1-8 at 1-4. It is noteworthy that most judgments of the Colombian Constitutional Court are available in Spanish, with a select few available in English, such as *T-025/2004*, available at: http://www.brookings.edu/~media/Files/Projects/IDP/Laws%20and%20Policies/Colombia/Colombia_T%20025_2004.pdf (accessed on 25 June 2011). *T-821/2007* is available from the article of Manrique 2008.

³¹² *Judgment T-025/2004* (note 311 above) at 2.2.

³¹³ *Judgment T-025/2004* (note 311 above) para 1-2.

failure of the State entities concerned to adequately address their plight as internally displaced persons.³¹⁴

The Court reasoned further that internally displaced persons were entitled to the minimum level of satisfaction of their constitutional rights by reason of their vulnerable position. The minimum level of satisfaction involved two legs: the duty to respect the bundle of fundamental constitutional rights of internally displaced persons, and the satisfaction by the State of certain positive duties originating from the constitutional rights and international law relating to internally displaced persons.³¹⁵ In this regard, the Court held that internally displaced persons had a right to basic subsistence. This entailed the obligation on the State to provide them with essential food and potable water, basic shelter and housing, appropriate clothing, necessary healthcare and sanitation. The compliance by the State with these duties would ensure that internally displaced persons enjoyed a dignified life.³¹⁶

The Court noted its previous jurisprudence in the context of the right to dignified housing for internally displaced persons, by holding that internally displaced persons had a right to be provided with basic housing and lodging conditions by the State, because of the conditions they had to endure as a direct result of their displacement. These include being forced to abandon their homes or places of residence and being forced into deplorable housing conditions at the place where they are placed.³¹⁷ Moreover, the State was found to have violated various rights of the internally displaced persons in this case, and was ordered to provide access to programmes for economic stabilisation of the living conditions of the internally displaced. These programmes were to include temporary jobs, productive projects, training, food security, and housing amongst other socio-economic rights.³¹⁸ Finally, the State was required to report to the court within a month from the date of judgment on its progress in complying with the order given in this judgment.³¹⁹

³¹⁴ *Judgment T-025/2004* (note 311 above) para 1-2.

³¹⁵ *Judgment T-025/2004* (note 311 above) para 9.

³¹⁶ *Judgment T-025/2004* (note 311 above) para 9.

³¹⁷ *Judgment T-025/2004* (note 311 above) para 5.2.

³¹⁸ *Judgment T-025/2004* (note 311 above) paras 10.2.1 and IV.

³¹⁹ *Judgment T-025/2004* (note 311 above) para 10.2.1.

There is much to learn from the Colombian Constitutional Court's express engagement with the social and economic conditions of displaced communities, and its responsiveness to their needs. In many respects, the living conditions of displaced persons in Colombia mirror those of people living in informal settlements in various parts of South Africa. Internally displaced persons have no access to water, sanitation, adequate housing, electricity, food, and other essential necessities, just as residents in informal settlements and those living in inadequate housing in South Africa. In many respects, the Colombian Constitutional Court shows an admirable sensitivity to the lived realities of socio-economic marginalised communities, and has developed an interpretation of housing-related rights which seeks to advance the values of human dignity and minimum participation rights in society for these communities. In addition, the Court has been willing to fashion participatory structural remedies which involve government, civil society organisations and affected communities in designing and monitoring the relevant programmes to give effect to the Court's normative prescriptions.³²⁰

The Indian constitutional jurisprudence is also a rich source of interpretative and remedial approaches to socio-economic rights, including the specific context of the right to housing. Key cases in this regard include *Olga Tellis v Bombay Municipal Corporation* (hereafter '*Olga Tellis*'); *Shantistar Builders v Narayan Khimalal Totame* (hereafter '*Shantistar Builders*'); *Chameli Singh and Others v State of UP and Another* (hereafter '*Chameli*'); and *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan and Others* (hereafter '*Nawab Khan*').³²¹

The Indian Constitution (1950) distinguishes between enforceable fundamental rights and non-justiciable Directive Principles of State Policy ('DPSPs'), including the powers and duties of the State.³²² Section 37 of the Indian Constitution provides that the provisions found in Part IV (DPSPs)

³²⁰ Sepúlveda (note 304 above) at 161-162.

³²¹ *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545; *Shantistar Builders v Narayan Khimalal Totame* (1990) 1 SCC 520; *Chameli Singh and Others v State of UP and Another* (1996) 2 SCC 549; *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan and Others* (1996) RD-SC 1300. These cases form part of a long list of cases since the *Olga Tellis* case, which deal with the plight of pavement dwellers or the homeless in India.

³²² See Part III of the Indian Constitution, which protects fundamental rights such as articles 14 (the right to equality), 20 (right against double jeopardy), 21 (right to life), 22 (fair trial rights). For Directive Principles of State Policy, see: Part IV of the Indian Constitution. See also: Muralidhar S "India: the expectations and challenges of judicial enforcement of social rights" in Langford M (ed) *Social Rights Jurisprudence: Emerging Norms in International and Comparative Law* (2008) 102-123 at 102.

are not enforceable by any court, but the principles found therein are nevertheless fundamental in the governance of the country, and must be taken into account by the State in making laws. In addition, section 39 of the Indian Constitution makes provision for certain principles of state policy that the State must follow, such as the right to an adequate means of livelihood.³²³ The DPSPs have however gradually acquired a measure of justiciability through the interpretation of certain fundamental rights by the Indian Supreme Court, such as the right to life, right to livelihood, right to live with dignity and equality of status as including within their ambit economic, social and cultural rights.

The Indian Supreme Court has developed the right to housing or shelter under the auspices of the right to life.³²⁴ It has held that the right to life encompasses the right to live with dignity, the right to clean and safe drinking water, and the right to a livelihood.³²⁵ A leading example of the latter development, particularly in the context of housing rights, is the Indian Supreme Court decision in *Shantistar Builders*. The applicants complained that the State had set aside land under the Urban Land (Ceiling and Regulations) 1976, so that houses could be built for the “weaker section of society.”³²⁶ However, the applicants alleged that this had not been done because the weaker sections of society (poor people) were not accommodated by the builders in the housing scheme. This failure to accommodate the weaker sections of society was challenged on the basis that it violated the exemptions granted by the State in respect of the land. The builders were alleged to be leaving the weaker sections out of the scheme even though they applied timeously for apartments.³²⁷ The Court in *Shantistar Builders* reasoned that basic needs were no longer limited to food, clothing and shelter, but that the right to life included within its contours the rights to food, clothing, decent environment and reasonable accommodation to live in, amongst others.³²⁸ In addition, the Court reasoned that suitable accommodation is important to a human being because it allows a human being to grow in every aspect, physically, mentally, and intellectually.³²⁹

³²³ Section 39(a) of the Indian Constitution.

³²⁴ Article 21 of the Indian Constitution.

³²⁵ Muralidhar 2008 (note 322 above) at 112-115.

³²⁶ This case was declared moot in the Bombay High Court because of changes in state policy.

³²⁷ *Shantistar Builders* (note 321 above) paras 7-8.

³²⁸ *Shantistar Builders* (note 321 above) para 9.

³²⁹ *Shantistar Builders* (note 321 above) para 9.

The Court accordingly ordered that the truthfulness of the applicants' claims, along with those of others who claimed to belong to the weaker section of society be examined in accordance with the guidelines it laid down.³³⁰ The Court also ordered the builders not to allocate any apartments until the claims of the 1420 applicants, the same applicants who brought this case to court had been verified.³³¹ This case and others have been confirmed and elaborated upon in the *Nawab Khan* case.³³² The significance of the *Shantistar Builders* case and similar cases is that they demonstrate the Court's willingness to engage with the substantive content of the economic, social and cultural rights, in particular, the right to adequate housing or shelter, which the Court views as connected to the other basic needs.

The Indian Supreme Court has attempted to overcome the formal non-justiciability of the Directive Principles through developing the principle of the interdependence of civil and political rights, and economic, social and cultural rights or principles. To this end, the Court has interpreted the right to life, right to livelihood, right to live with dignity and equality of status, as taking within their sweep economic, social and cultural rights, including the right to shelter.

The Court has interpreted the right to life so as to incorporate the essential values protected by housing rights or the right to shelter. It has done so through the interpretation of various provisions of the Indian Constitution such as the right to life as forming part of the right to shelter. However, this protection of shelter under the Indian Constitution has focused mainly on the negative duties imposed by the right to adequate housing or shelter.³³³ Despite this shortcoming, the Indian Supreme Court has given an expansive meaning to the right to shelter, and this may prove instructive for the South African Constitutional Court in interpreting the right of access to adequate housing entrenched in our Constitution.

³³⁰ *Shantistar Builders* (note 321 above) para 14.

³³¹ *Shantistar Builders* (note 321 above) para 14.

³³² *Nawab Khan* (note 321 above).

³³³ See for example: *Olga Tellis* (note 321 above) *Shantistar Builders* (note 321 above).

3 7 Conclusion

In the above sections, I have attempted to demonstrate how the substantive content of the right of access to adequate housing guaranteed in section 26(1) of the Constitution can be developed through applying the methodology set out in section 39(1) (a), (b), and (c) of the Constitution. To that end, I have highlighted key features of the history and context of housing in South Africa including how this history and context assist in understanding the current housing crisis, specifically the conditions of homelessness and inadequate housing in which the majority of the population live in. In addition, I have elaborated on how the constitutional values of human dignity, equality, freedom as well as *ubuntu* can illuminate the underlying purposes and values protected by the right of access to adequate housing.

Furthermore, I have elaborated on the meaning of housing in international human rights law, including the key elements of adequacy in the context of housing which have been identified in international and regional human rights instruments and jurisprudence. These benchmarks of adequacy have great potential to assist the Court in developing the qualitative dimensions of the the right of access to adequate housing guaranteed in the Constitution. Finally, I have highlighted selected housing jurisprudence from Colombia and India to illustrate how comparative constitutional courts have succeeded in being responsive to the lived realities of homeless communities or those living in inadequate housing. This sensitivity to context and the values and purposes underlying housing rights can serve as rich reference points to the South African courts as they agitate to develop the substantive content of the right of access to adequate housing. In the following chapter I shall consider how the South African Constitutional Court has sought to define the meaning and the scope of the right of access to adequate housing.

CHAPTER 4: THE CONTENT OF THE RIGHT OF ACCESS TO ADEQUATE HOUSING IN THE JURISPRUDENCE OF THE SOUTH AFRICAN CONSTITUTIONAL COURT

4 1 Introduction

In this chapter, how the South African Constitutional Court ('the Court') has dealt with the meaning and content of the right of access to adequate housing in cases involving the long-standing deprivations of access to adequate housing, such as those involving residents of informal settlements, and those in inadequate housing, will be examined.¹

In this section, I will build on the analysis and arguments developed in the previous section dealing with developing the right to housing as a human right. To that end, I will assess the extent to which the Court has developed the substantive content of the right of access to adequate housing by first analysing the cases of *Grootboom*, *Port Elizabeth Municipality v various Occupiers* (hereafter '*PE Municipality*'), *Jaftha v Schoeman and Another, Van Rooyen Stoltz and Other* (hereafter '*Jaftha*'), *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (hereafter '*Occupiers of 51 Olivia Road*'), *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (hereafter '*Residents of Joe Slovo Community*'), *Joseph v City of Johannesburg and Others* (hereafter '*Joseph*'),² and *Nokotyana v Ekurhuleni Metropolitan Municipality and Others* (hereafter '*Nokotyana*').³ Secondly, I will evaluate the extent to which the Court has given substantive content of the right of access to adequate housing by evaluating the selected housing jurisprudence. I will also highlight the

¹ See for example *The Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 14; 2001 (1) SA 46 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Jaftha v Schoeman and Another, Van Rooyen Stoltz and Other* [2004] ZACC 25; 2005 (2) SA 140 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16; 2010 (3) SA 454 (CC).

² [2009] ZACC 30; 2010 (3) BCLR 212 (CC).

³ [2009] ZACC 33; 2010 (4) BCLR 312 (CC). These housing rights cases are a representative sample of major cases on the right of access to adequate housing that dealt with the negative and positive duties arising out of this right.

inconsistent approach of the Court when it deals with the negative as opposed to the positive duties arising out of the right of access to adequate housing.⁴

Finally, I will briefly analyse the remedies provided in these cases with a view to considering what light they shed on the substantive content of housing rights. This chapter concludes with an evaluation of the extent to which the Court has developed the substantive content of the housing rights as found in section 26 of the Constitution.

4 2 Analysis of selected jurisprudence of the South African Constitutional Court on housing rights

4 2 1 *Grootboom*

The *Grootboom* matter concerned a group of poor and desperate people who lived in an informal settlement called Wallacedene, and who were forced to move onto privately owned land situated at Wallacedene, earmarked for low-cost housing because they had nowhere else to go. They were later evicted by the owner of the land, and had their belongings destroyed in the process. Mrs. Grootboom and others in the group then sought refuge at the Wallacedene sports grounds.⁵

⁴ See Shue H *Basic Rights: Subsistence, Affluence, and the U.S Foreign Policy* (1980) 1-248 at 35-55. Shue argued that economic, social and cultural rights, like civil and political rights, give rise to both positive and negative obligations. In addition, he argued that these obligations are imposed upon various actors. What Shue meant by positive obligations was that the State for instance, is required to take certain positive actions in order to realise or to promote and protect peoples' rights. Negative obligations meant that the State is required to refrain from taking certain actions that would deprive people of their rights, or interfere with their rights. This was adopted by the United Nations, South African courts and courts in other countries, and academics. For a comprehensive discussion of positive and negative duties imposed by socio-economic rights and the critique of this categorisation, see also Craven M "Assessment of the progress on adjudication of Economic, Social and Cultural Rights" In John Squires et al (eds) *The Road To A Remedy: Current Issues In Litigation of Economic, Social and Cultural Rights* (2005) 27-42. This fourfold typology has also been taken up in section 7(2) of the South African Constitution. See also reference to this typology of duties in the following Constitutional Court cases: *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996]; 1996 (4) SA 744 (CC) para 78; *Grootboom* (note 1 above) paras 20, 34 and 88; *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15; 2002 (5) SA 721(CC) paras 23-24, 32, 39 and 46; *Jaftha* (note 1 above); *Gundwana v Steko Development CC and Others* [2011] ZACC 14; 2011 (3) SA 608 (CC); *Governing Body of Juma Musjid Primary School and Others v Essay N.O. and Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) paras 31, 45 and 57-60.

⁵ *Grootboom* (note 1 above) paras 7-11.

On appeal to the Constitutional Court,⁶ the Court reasoned amongst other things that “socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only...”⁷ The Court reasoned further that it was duty bound by section 7(2) of the Constitution to make sure that these rights are protected and fulfilled.⁸ The question was accordingly not whether these rights were enforceable, but how to enforce them in any particular case.⁹

Furthermore, the Court reasoned that the issue of how to enforce such rights was a difficult issue that had to be determined by a court on the facts of each case.¹⁰ The Court reasoned further that the approach to the interpretation of section 26, like all other rights in the Bill of Rights, is to view section 26 in its context.¹¹ Viewing rights in their context required a consideration of their textual setting, the Bill of Rights as a whole, and their social and historical context. The social and historical context in South Africa, as elaborated in chapter 3, is one of deep social inequality. Subsection (1) of section 26 guarantees the general right of everyone to have access to adequate housing, while subsection (2) spells out the scope of positive duties imposed upon the State to take “reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.” Subsection (3) protects people against arbitrary evictions and provides that “[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.”¹²

The Court further reasoned that the rights guaranteed in the Constitution are interrelated and mutually sustaining.¹³ All socio-economic rights sought to advance certain values and purposes, such as human dignity, freedom and equality, the foundational values of the Constitution.¹⁴ These values and purposes are denied to those members of society who have no food, clothing or shelter.¹⁵

⁶ This matter was an appeal from a judgment and order of the Western Cape High Court, see: *Grootboom and Others v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C).

⁷ *Grootboom* (note 1 above) para 20.

⁸ *Grootboom* (note 1 above) para 20.

⁹ *Grootboom* (note 1 above) para 20.

¹⁰ *Grootboom* (note 1 above) para 20.

¹¹ *Grootboom* (note 1 above) paras 21-22 and 25.

¹² *Grootboom* (note 1 above) para 21.

¹³ *Grootboom* (note 1 above) para 23.

¹⁴ *Grootboom* (note 1 above) para 23.

¹⁵ *Grootboom* (note 1 above) para 23.

In Chapter 3 of this thesis I sought to develop and elaborate on the role of these fundamental values, along with the value of *Ubuntu*, in developing the substantive content of the right to housing.

Moreover, the realisation of socio-economic rights is vital to the enjoyment of all the rights guaranteed in the Bill of Rights, and to enabling all members of our society to reach their full potential.¹⁶ It follows that the right of access to adequate housing has to be seen in light of other socio-economic rights.¹⁷ This is fortified by the Court's reasoning that "the state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness, or intolerable housing."¹⁸

The Court also rejected the arguments raised by the *amici curiae* based on the minimum core obligation concept. In this regard, the Court held that it would be difficult to determine the minimum core of the right of access to adequate housing in any given case, taking into account the variation in needs, locality and other difficulties.¹⁹ However, the Court held that it would be willing to take the minimum core into account if sufficient information was placed before it.²⁰ It is noteworthy though that the Court did not provide examples of information that it would require to determine the minimum core, and what would constitute sufficient information.

The Court further reasoned that international law can serve as a guide to the interpretation of the rights guaranteed in the Constitution, but the weight attached to a particular principle or rule of international law will differ from case to case, depending on the facts.²¹ However, where a particular rule or principle of international law binds South Africa, it may be directly applicable.²² The Court went on to distinguish between the International Covenant on Economic, Social and Cultural Rights, and the Constitution, and concluded that there were some differences between the provisions of the Covenant and the Constitution pertaining to housing rights.²³ For example, the

¹⁶ *Grootboom* (note 1 above) para 23.

¹⁷ *Grootboom* (note 1 above) para 24.

¹⁸ *Grootboom* (note 1 above) para 24.

¹⁹ *Grootboom* (note 1 above) para 33.

²⁰ *Grootboom* (note 1 above) paras 30-33. The *amici curiae* had submitted arguments based on international law, in particular relying on General Comment No. 3 of the United Nations Committee on Economic, Social and Cultural Rights.

²¹ *Grootboom* (note 1 above) para 26.

²² *Grootboom* (note 1 above) para 26.

²³ *Grootboom* (note 1 above) para 28.

Covenant provided for “adequate housing,” while the Constitution provided for the “the right of access to adequate housing”; the Covenant imposed duties on State Parties to take “appropriate steps” which included legislation, while the Constitution obliged the South African state to take “reasonable legislative and other measures.”²⁴

Significantly, the Court held in *Grootboom* that the right of access to adequate housing “recognises that housing entails more than brick and mortar.”²⁵ It includes all that makes housing feasible and habitable such as land and a variety of basic services.²⁶ This right also suggests that it is not only the state that is responsible for its provision, but that the state had to enable other actors in society, through legislation and other measures, to play a role in the provision of housing.²⁷

The Court reasoned further that a distinction must be drawn between those people who can afford to pay for housing, and those who cannot.²⁸ This distinction determine the State’s obligations; the State is required to provide a springboard for those who can afford to pay for housing, by unlocking the housing market.²⁹ In contrast, special attention to the provision of housing must be afforded by the State to those who cannot afford to pay for housing.³⁰ This means that the State, in designing housing programmes, cannot treat the poor in the same way as people who have sufficient income to meet their housing needs.

The Court held that constitutional compliance by the State with its duties in terms of section 26 depended on whether the housing measures devised by the State were reasonable. Reasonableness in this context depends on factors such as the allocation of responsibilities to different spheres of government and ensuring that appropriate financial and human resources are made available.³¹ A reasonable government programme in the context of socio-economic rights must be coordinated, coherent and comprehensive;³² it must be directed towards the progressive realisation of the right

²⁴ *Grootboom* (note 1 above) para 28.

²⁵ *Grootboom* (note 1 above) para 35.

²⁶ *Grootboom* (note 1 above) para 35.

²⁷ *Grootboom* (note 1 above) para 35.

²⁸ *Grootboom* (note 1 above) para 36.

²⁹ *Grootboom* (note 1 above) para 36.

³⁰ *Grootboom* (note 1 above) para 36.

³¹ *Grootboom* (note 1 above) para 39.

³² *Grootboom* (note 1 above) para 40.

of access to adequate housing within available resources;³³ it must be reasonably conceived and implemented;³⁴ it must be balanced and flexible, making provision for short, medium and long term housing needs.³⁵ Finally, it must make provision for those whose housing needs that are most urgent, and those who find themselves in crisis situations.³⁶ The last criterion was derived particularly from the value of human dignity because the right of access to adequate housing is based on the fact that human beings are valued and must be protected by ensuring that they enjoy basic human necessities.³⁷

In applying these criteria, the Court found that the State's housing programme in the Cape Metropolitan area did not meet the reasonableness review criterion, and therefore fell short of the duties imposed on the State by section 26(2) of the Constitution. This was because it did not make housing provision for those people in desperate need, with no land, no roof over their heads, and who lived in intolerable conditions or crisis situations.³⁸ To that end, the Court found it appropriate to make a declaratory order to the effect that the State was required to comply with its obligations in terms of section 26(2) of the Constitution by devising an emergency housing programme.³⁹

The positive implications of the *Grootboom* decision of the Court are that the Court appeared genuinely willing to engage systematically with the substantive content of the right of access to adequate housing. This is evident in the Court holding that the right of access to adequate housing imposed both positive and negative duties on the State to shield against its impairment and to ensure its progressive realisation. It also acknowledges that adequate housing consist of far more than a simple structure providing shelter from the elements, but consist of the interrelated elements of land and associated services. It also acknowledges that decent housing is integrally connected to the value of human dignity. Finally, it acknowledges that human needs vary and that a "one-size-fits-

³³ *Grootboom* (note 1 above) para 41.

³⁴ *Grootboom* (note 1 above) para 42.

³⁵ *Grootboom* (note 1 above) para 43.

³⁶ *Grootboom* (note 1 above) para 44.

³⁷ *Grootboom* (note 1 above) para 44.

³⁸ *Grootboom* (note 1 above) paras 95-96.

³⁹ *Grootboom* (note 1 above) para 96 and 98. The Court also found that the primary duty to provide housing to children lay with their parents, and only alternatively with the State, where parents cannot provide for their children, see in this regard paras 77-78. The order of the High Court was accordingly replaced with the Court's order.

all” approach in housing design and financing will not acknowledge the diversity of housing needs in our society.

The Court also did not completely reject arguments based on the minimum core concept, but reasoned that it would be willing to have regard to the minimum core content duties to determine if the State complied with the reasonableness review model. However, this depends on the availability of enough information in this regard. The challenge then remains in prodding the Court in future cases for some guidelines on the nature and scope of this information. Doing so, would contribute immensely to the quest for the substantive content of the right of access to adequate housing.

The negative aspects of the Court’s judgment in *Grootboom* are that the Court reasoned that section 26(1) of the Constitution laid down the scope of the right of access to adequate housing, without elaborating in a systematic manner on its nature and scope and substantive content. This lack of attention to the substantive content of section 26(1) contributes to the conflation of the nature and scope of the right as guaranteed in section 26(1), and the duties imposed on the State through section 26(2) of the Constitution to realise this right.⁴⁰ This conflation detracts from the quest to develop the substantive content of the right of access to adequate housing, because it makes it difficult for the State to know exactly what the goals are which it is supposed to progressively realise, and the reasonable measures contemplated by section 26(2).⁴¹ It also makes it difficult for the courts, Chapter 9 institutions,⁴² and civil society organisations to determine if the State has complied with its obligations to adopt reasonable measures in the absence of normative benchmarks defining the right in section 26(1).⁴³ The potential litigants are also left none the wiser about the nature of section 26(1), and may not know what this section protects and does not protect. Moreover, the failure of the Court to articulate clearly the objective of the right of access to adequate housing, leaves the Court with too much discretion in determining the reasonableness of the State’s acts or omissions in the context of housing rights. This means that, in the absence of clearly defined purposes that this right aims to fulfill, this right can be anything that the court wants

⁴⁰ See: McLean K “Housing” in Woolman S, Roux T, Bishop M (eds) *Constitutional Law of South Africa* 2nd ed (Original Service, June 2008) Chapter 55 at 55.3.

⁴¹ McLean 2008 (note 40 above) at 55.3.

⁴² For Chapter 9 institutions, see: sections 181-194 of the Constitution. Chapter 9 institutions include the South African Human Rights Commission, the Public Protector, the Commission for Gender Equality, amongst other democracy supporting institutions.

⁴³ McLean 2008 (note 40 above) at 55.3.

it to be. This can easily result in a dilution of the normative purposes and values underlying the right of access to adequate housing.⁴⁴

The other criticism leveled at the *Grootboom* judgment is its failure to embrace the minimum core concept.⁴⁵ It is argued that the Court missed an opportunity to determine the basic threshold protected by socio-economic rights and necessary for human survival.⁴⁶ Although this criticism can also be seen to be directed at the failure of the Court to develop the substantive content of housing as a human right, it is also important to note that developing the substantive content of the right to adequate housing does not need to depend on the endorsement of a minimum core obligation concept.

In the remedial sphere, the main criticism of the *Grootboom* decision is that it did not clearly direct the State to take positive steps to comply with the duties set out in the order.⁴⁷ This means that further proceedings would have had to be instituted for the purposes of seeking a mandatory order, setting out in clear terms, the order the positive steps that the State would have been required to comply with.⁴⁸ This was compounded by the failure of the Court in *Grootboom* to allocate with precision, roles to the different spheres of government, despite an express and clear allocation of such roles in the Housing Act 107 of 1997.⁴⁹ This failure to allocate roles to the three spheres of government has been blamed for the confusion and discord between different spheres of government following the *Grootboom* decision.⁵⁰ The handing down of a declaratory order, instead of a structural interdict or supervisory order so as to enable the Court to monitor progress and compliance with its order, has also attracted criticism.⁵¹ A participatory structural interdict similar to that issued by the Colombian Constitutional Court in the *Judgment T-025/2004*⁵² would enable

⁴⁴ I draw from McLean 2008 (note 40 above) to develop this argument.

⁴⁵ Most notably: Bilchitz D “Giving socio-economic rights teeth: The minimum core and its importance” (2002) 119 *SALJ* 484-489; Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 1-300; Pieterse M “In support of the minimum core, eating socio-economic rights talk in alleviating social hardships revisited” (2007) 29 *HRQ* 796-822; Liebenberg 2010 (ch 1, n 5) at 173-186.

⁴⁶ Bilchitz 2002 (note 45 above); Bilchitz 2007 (note 45 above).

⁴⁷ *Grootboom* (note 1 above) para 96; Pillay K “Implementation of Grootboom: Implications for the enforcement of socio-economic rights” (2002) 6 *Law, Democracy and Development* 255-277 at 264.

⁴⁸ Pillay (note 47 above) at 264.

⁴⁹ Pillay (note 47 above) at 265-266.

⁵⁰ Pillay (note 47 above) at 267.

⁵¹ Pillay (note 47 above) at 271-277.

⁵² See discussion in chapter 3, 3 6 2.

the State and civil society to enter into a supervised process of determining what precise measures would be necessary to ensure short-term relief for those with no access to housing and land and living in intolerable conditions. In this way, content could be given to the right to adequate housing through a negotiated process by all stakeholders, but with ultimate oversight by the courts for ensuring that the constitutional obligations imposed by section 26, are complied with.

In conclusion, the Court in *Grootboom*, to its credit, edged closer to telling us what it means to have access to adequate housing when it reasoned that this right recognised that housing encompassed more than “brick and mortar.”⁵³ This description of what it means to have access to adequate housing is significant, but does not draw on the much more substantive standards elaborated under international law for determining the adequacy of adequate housing. Adequate housing in international law means an adequate standard of housing of a suitable size (taking into account family size); provision of essential services such as heating and electricity; and structures which are culturally suitable.⁵⁴ It is vital that the meaning of access to adequate housing is elaborated upon by the Court taking existing international law standards onto account, as well as the fact that most South African families are large, and that there are different cultural groups, and that many people live in dire poverty with no access to essential services such as heating and electricity.

4 2 2 Port Elizabeth Municipality

The *PE Municipality*⁵⁵ matter dealt with eviction proceedings initiated at the instance of the Municipality. The Municipality in *PE Municipality* initiated eviction proceedings in the South Eastern Cape Local Division of the High Court (‘the High Court’) to evict a large group of people, consisting of 68 people, including 23 children who had erected twenty-nine shacks on privately owned land within the Municipality’s jurisdiction, and without the Municipality’s permission.⁵⁶ This application for eviction by the Municipality followed a petition signed by 1 600 people, which included people living in the area where the shacks were erected, and private property owners in the

⁵³ *Grootboom* (note 1 above) para 35.

⁵⁴ See discussion in 3 4 4 2 of the preceding section.

⁵⁵ *PE Municipality* (note 1 above).

⁵⁶ *PE Municipality* (note 1 above) para 1.

area.⁵⁷ On appeal, this case turned on the appropriate constitutional relationship and balance that had to be struck between sections 26 and 25 of the Constitution.⁵⁸

The Municipality argued in Court that it was aware of its constitutional duties emanating from section 26 of the Constitution. This was why it had devised a comprehensive housing programme.⁵⁹ The Municipality argued that the provision of alternative land in this case would amount to “queue-jumping” by people who occupied private land, and when asked to move, demanded alternative accommodation.⁶⁰ If this were allowed, it would disrupt the housing programme, forcing the Municipality to give preferential treatment to those that occupy private land unlawfully.⁶¹

The Court reasoned that section 26(3) embodies a special constitutional space for a person’s home. This was because it recognised that “a home is more than just a shelter from the elements... [i]t is a zone of personal intimacy and family security.”⁶² The Constitution envisaged that land, access to adequate housing, and protection from arbitrary evictions could not be separated.⁶³ This was because the stronger the section 25 right (land), the stronger the possibility of a secure home.⁶⁴ Section 25 of the Constitution therefore recognised in various ways the need to protect residents of informal settlements through strengthening their weak security of tenure.⁶⁵ This meant that sections 25 and 26 created a broad overlap between the land rights and socio-economic rights, emphasising the duty on the State to seek to satisfy both.⁶⁶

The Court reasoned further that the rights guaranteed in section 26(3) are defensive, rather than assertive.⁶⁷ However, the private land owner cannot without more assert that a particular piece of land is his or hers, “and then send in bulldozers and sledgehammers.”⁶⁸ The Court went on to hold that section 26(3) also envisages that the eviction of residents living in informal settlements will

⁵⁷ *PE Municipality* (note 1 above) para 1.

⁵⁸ *PE Municipality* (note 1 above) para 7 and 19.

⁵⁹ *PE Municipality* (note 1 above) para 3.

⁶⁰ *PE Municipality* (note 1 above) para 3.

⁶¹ *PE Municipality* (note 1 above) para 3.

⁶² *PE Municipality* (note 1 above) para 17.

⁶³ *PE Municipality* (note 1 above) para 19.

⁶⁴ *PE Municipality* (note 1 above) para 19.

⁶⁵ *PE Municipality* (note 1 above) para 19.

⁶⁶ *PE Municipality* (note 1 above) para 19-22.

⁶⁷ *PE Municipality* (note 1 above) para 20.

⁶⁸ *PE Municipality* (note 1 above) para 20.

take place, even where this results in homelessness.⁶⁹ Furthermore, section 26(3) of the Constitution emphasised the need to search for case-specific solutions to the challenges that arise from the application of this section.⁷⁰ According to the Court, section 26(3) of the Constitution introduces new duties for courts in relation to property not previously part of the common law, by ushering in a right not to be arbitrarily deprived of a home. This new regime now requires courts to engage in a balancing exercise between the rights of possession, and use, occupation and ownership, by taking into account all the interests and circumstances involved between the traditional private property rights, and the new right to a home, in order to achieve some measure of fairness between these competing rights.⁷¹ Section 26(3) and its enabling legislation was necessitated by South Africa's social and historical context of forced evictions and land dispossessions along racial lines.⁷²

The Court found that the eviction of the residents of the informal settlement in this case was not just and equitable given the long period which the occupiers had remained on the land, the fact that there was no evidence that the private owners or the Municipality needed to use the land for some productive purpose, the absence of any significant attempt by the Municipality to take into account the problems of the informal residents in this case, and the fact that the occupiers consisted of a relatively small group of people who appeared genuinely homeless and in need.⁷³

The *PE Municipality* matter transformed the traditional notion of private property the origins of which goes back to Roman-Dutch-law, by seeking a balance between the concept of private property, and the right of access to adequate housing. This development had the result of removing the old notion of strong rights or absolute private property rights. The Court also clarified the principles applicable to alternative accommodation or land, it reasoned that alternative accommodation or land had to be taken into account when people are facing an eviction, but this requirement was not an inflexible one.⁷⁴ However, courts should be reluctant to grant an eviction order against relatively stable occupiers in circumstances where no alternative accommodation or

⁶⁹ *PE Municipality* (note 1 above) para 21.

⁷⁰ *PE Municipality* (note 1 above) para 22.

⁷¹ *PE Municipality* (note 1 above) para 23.

⁷² *PE Municipality* (note 1 above) paras 8-10.

⁷³ *PE Municipality* (note 1 above) paras 59-61.

⁷⁴ *PE Municipality* (note 1 above) para 28.

land is made available, even if this is temporary, pending permanent solutions in the formal housing programme.⁷⁵

The Court also pointed out that the availability of suitable alternative accommodation would depend on a number of factors, and would vary from municipality to municipality, and would also depend on the number of people facing eviction; the problems associated with finding something suitable for the unlawful occupiers without prejudicing the claims of lawful occupiers, and those in line for formal housing; and serious consideration of the occupier's request for alternative accommodation.⁷⁶ The Court also pointed out that the other way of resolving contradictions between the section 25 and 26 interests is engagement between the parties involved with the aim of finding mutually acceptable solutions.⁷⁷ Face-to-face mediation through a third party would have been appropriate in this context, but none of the parties supported it unconditionally, and in any event, many of the associated advantages of mediation were lost by the time the appeal was heard.⁷⁸

PE Municipality makes an important contribution in its attempt to flesh out the content and implications of the right of access to adequate housing in the specific context of the eviction of unlawful occupiers. The Court recognised, for example, that section 26(3) of the Constitution places a high premium on a person's home. A home is more than just shelter from the elements. It is a place of personal intimacy and family safety. A home in this context may also be the only safe place of privacy and accord in what is an unreceptive world, especially in the case of the poor and marginalised.⁷⁹

The Court in *PE Municipality* showed a serious willingness to engage systematically with the values and purposes underpinning the right of access to adequate housing, albeit in the context of section 26(3) of the Constitution. It reasoned that it was not only the dignity of the poor that is negated when the homeless are sent from pillar to post in a desperate search for where they and their families can live, but that our society is also demeaned when the State escalates

⁷⁵ *PE Municipality* (note 1 above) para 28.

⁷⁶ *PE Municipality* (note 1 above) paras 29 and 58.

⁷⁷ *PE Municipality* (note 1 above) para 39-43.

⁷⁸ *PE Municipality* (note 1 above) paras 39-43 and 47, and 59-61.

⁷⁹ *PE Municipality* (note 1 above) para 17.

marginalisation, instead of alleviating it.⁸⁰ The Court went further and reasoned that in a society founded on human dignity, equality and freedom, it could not be said that the greatest good for the many could be achieved at the cost of the suffering of the few, especially where this could be avoided by the application of “judicial and administrative statecraft.”⁸¹

The Court in *PE Municipality* also showed its concern with the actual circumstances and needs of the particular occupiers, when it reasoned that the existence of a housing programme was not the only determinant for the granting of an eviction order, but was important in establishing the context under which it would be just and equitable to grant an eviction order.⁸² Moreover, the Court in *PE Municipality* emphasised the interrelationship between different sections in the Bill of Rights, when it reasoned that sections 25 and 26 create a wide overlap between land rights, and socio-economic rights, and place the spotlight on the State to seek to satisfy both.⁸³ The Court recognised that property rights and socio-economic rights, including housing rights could not be separated from the land reform struggles.⁸⁴

Finally, the Court in *PE Municipality* displayed its seriousness in dealing with the substantive content of the right of access to adequate housing in the context of section 26(3) of the Constitution. It reasoned in this regard that section 26(3) embodied a need to seek tangible, case-specific solutions to the difficult challenges that arise. This was supported by the fact that section 26(3) was not prescriptive, but crafted in a way that left space for a court to manage the process.⁸⁵ This is relevant to an analysis of section 26(1) of the Constitution, and the quest for the substantive content of this right because section 26 is also crafted in generous, non prescriptive terms, and therefore allows enough space for the court to guide the process relating to developing its content.

4 2 3 *Jaftha v Schoeman, Van Rooyen v Stoltz*

⁸⁰ *PE Municipality* (note 1 above) paras 18 and 29

⁸¹ *PE Municipality* (note 1 above) para 29.

⁸² *PE Municipality* (note 1 above) para 29; *Grootboom* (note 1 above) para 44.

⁸³ *PE Municipality* (note 1 above) para 19.

⁸⁴ *PE Municipality* (note 1 above) paras 19-20.

⁸⁵ *PE Municipality* (note 1 above) para 22.

The *Jaftha* case concerned the constitutionality of a law that allowed the sale of poor peoples' homes in execution, in order to satisfy trifling debts, and whether this law violated the right of access to adequate housing in section 26(1) of the Constitution. The law in question was sections 66(1)(a) and 67 of the Magistrates' Court Act 32 of 1944 (hereafter 'the Act').⁸⁶

The Court in this case dealt with two similar cases, that of Mrs. Jaftha, and that of Ms. Van Rooyen. Both Mrs. Jaftha and Ms. Van Rooyen lost their State subsidised homes in sales in execution, due to trifling debts. The net result of these sales in execution would have been evictions, homelessness, and both Mrs. Jaftha and Ms. Van Rooyen would have been disqualified from ever benefiting from State housing subsidies.⁸⁷ This case came before the Court as an appeal from the decision of the Western Cape High Court.⁸⁸ The facts remained the same, but for the first time the Constitutional Court, the applicants relied on sections 25(1), and 10 of the Constitution.⁸⁹

The Court in *Jaftha* noted that it had yet to consider the concept of adequate housing in detail, but that this concept had been considered in detail in international law, and the Constitution required the Court to consider international law when interpreting provisions of the Bill of Rights.⁹⁰ The Court went on to endorse the approach to the right to adequate housing developed in international law as relevant to a section 26 analysis and evaluation because the courts are required by section 39(1)(b) of the Constitution to take international law into account when interpreting the Bill of Rights.⁹¹

The Court emphasised that the concept of adequacy was essential in relation to housing, "adequacy is 'determined in part by social, economic, cultural, climatic, ecological and other factors.'"⁹² The other important feature in relation to housing as noted by the Committee is the security of tenure, which takes many forms other than ownership.⁹³ The Court also noted that the

⁸⁶ *Jaftha* (note 1 above) para 1.

⁸⁷ *Jaftha* (note 1 above) paras 3-9. It is noteworthy that the other issues in this case were settled between the parties, and only constitutional issues remained for decision in the High Court.

⁸⁸ *Jaftha v Schoeman and Others, Van Rooyen and Others* 2003 (10) BCLR 1149 (C).

⁸⁹ *Jaftha* (note 1 above) para 20.

⁹⁰ *Jaftha* (note 1 above) para 23.

⁹¹ *Jaftha* (note 1 above) paras 23.

⁹² *Jaftha* (note 1 above) para 23-24.

⁹³ *Jaftha* (note 1 above) para 24.

Committee found that security of tenure also has to encompass a guarantee of legal protections to all persons against ‘forced eviction, harassment and other threats.’⁹⁴

The Court affirmed further that every claim based on socio-economic rights also implicates the right to dignity.⁹⁵ Therefore, the appellants’ reliance on section 10 as a self-standing right does not add anything new to their claim, making it unnecessary to consider this argument.⁹⁶ The Court similarly found that it was unnecessary to consider arguments based on section 25(1) of the Constitution even though this section could add new dimensions to a section 26 analysis.⁹⁷ The reason for not considering section 25(1) arguments was based on the conclusion reached by the Court on section 26.⁹⁸

The Court held that section 26(1) of the Constitution embraced a negative duty not to deprive persons of access to adequate housing, and any measure that allowed a person to be deprived of their existing access to adequate housing, constituted a limitation of section 26(1). However, this limitation may be justified in terms of section 36 of the Constitution.⁹⁹ In applying section 36, the Court held that a balancing exercise needed to be conducted in all sales in execution. This involved weighing the interests of creditors who were owed sums of money by the debtors, and the interests of debtors who stood to lose their homes.¹⁰⁰

In applying the limitations inquiry to the facts *in casu*, the Court held that section 66(1) of the Magistrates’ Court Act was a severe limitation of an important right because it put the appellants in a position where they might never be able to benefit from State housing subsidies again, and might never be able to restore their human dignity, and all because of a trifling debt.¹⁰¹ Moreover, the Court held that once a creditor’s claim cannot be satisfied against attachment of movables, that creditor must request the court which has jurisdiction to consider an application to execute against

⁹⁴ *Jaftha* (note 1 above) para 24.

⁹⁵ *Jaftha* (note 1 above) para 21.

⁹⁶ *Jaftha* (note 1 above) para 21.

⁹⁷ *Jaftha* (note 1 above) para 22.

⁹⁸ *Jaftha* (note 1 above) para 22.

⁹⁹ *Jaftha* (note 1 above) paras 31-34.

¹⁰⁰ *Jaftha* (note 1 above) para 53. This weighing up had to be done in each and every case, taking into account the differing facts and circumstances of each case.

¹⁰¹ *Jaftha* (note 1 above) paras 40-44 and 53; *Jaftha* (note 1 above) paras 55-64.

immovables.¹⁰² The Court would then have to consider all the relevant factors in the case together with section 26 of the Constitution.¹⁰³ These factors included the size of the debt; compliance with the procedure prescribed by the rules; circumstances giving rise to the debt; and the availability of ways of recovering the debt, other than execution against immovable property of the debtor.¹⁰⁴ Section 66(1) of the Magistrates' Court Act was therefore declared unconstitutional and invalid to the extent of invalidity.

By way of a remedy, a reading in remedy in respect of section 66(1) was ordered to permit judicial oversight over all proposed executions against immovable property.¹⁰⁵ The Court reasoned that courts must have judicial oversight over all executions against immovable property. This required that a creditor first execute against movables to discharge the debt, and only once insufficient movables to satisfy the debt are found, must the creditor apply to the court to execute against immovable property.¹⁰⁶

The *Jaftha* matter signals the Court's willingness to develop the substantive content of the right of access to adequate housing, in the context of the negative duties imposed by this right. This is evident in the Court's application of international law, its sensitivity to the social and historical context of housing in South Africa, and its express engagement with the values and purposes protected by the right of access to adequate housing. Of particular importance in this context was the right to human dignity.¹⁰⁷

Furthermore, the Court made an important contribution to the substantive content of the right of access to adequate housing by requiring that there be judicial oversight in all contemplated sales in execution of people's homes. This judicial oversight requires courts to consider all the relevant circumstances of the case in all proposed sales in execution of the debtor's home. This contributes to the development of the substantive content of the right of access to adequate housing because it means that courts will be slow to allow the taking away of existing access to adequate housing

¹⁰² *Jaftha* (note 1 above) paras 55-64.

¹⁰³ *Jaftha* (note 1 above) paras 55-64.

¹⁰⁴ *Jaftha* (note 1 above) paras 57-59.

¹⁰⁵ *Jaftha* (note 1 above) paras 61-64.

¹⁰⁶ *Jaftha* (note 1 above) para 64.

¹⁰⁷ *Jaftha* (note 1 above) para 21.

without consideration of the matrix of factors which the Court held were relevant to executions against immovable property.

The *Jaftha* matter marked the Court's first case in which the Court elaborated to some extent on the nature of negative duties imposed by section 26, and the model of judicial review applicable to cases involving violations of negative duties.¹⁰⁸ It illustrates the Court's willingness to robustly protect poor people who already enjoy access to adequate housing, and are deprived of such access through legislative or other measures.¹⁰⁹

4 2 4 *Occupiers of 51 Olivia Road*

This matter involved more than 400 occupiers of two buildings in the inner city of Johannesburg, who challenged the correctness of the decision of the Supreme Court of Appeal ('SCA') in the Constitutional Court.¹¹⁰ The SCA decision confirmed their eviction by the City of Johannesburg based on the finding that the buildings they occupied were unsafe and unhealthy.¹¹¹ The conduct of the City of Johannesburg in evicting the occupiers from the said buildings was pursuant to the provisions of the National Building Regulations and Building Standards Act 103 of 1977 ('the Act'), and the Health Act of 1977.¹¹²

The Court held that it was clear that the City had not made any attempt to meaningfully engage with the occupiers, before and after their eviction proceedings, even though the City must have been aware of the possibility that the eviction proceedings would leave the occupiers homeless.¹¹³ Section 26(2) of the Constitution in this context required the Municipality to give a reasonable response to potentially homeless people with whom it engages.¹¹⁴ This response could entail

¹⁰⁸ Liebenberg 2010 (ch 1 n 5) at 215.

¹⁰⁹ Liebenberg 2010 (ch 1, n 5) at 216-218.

¹¹⁰ *Occupiers of 51 Olivia Road* (note 1 above) para 1. This matter first came before the South Gauteng High Court, Johannesburg, then proceeded to the Supreme Court of appeal before coming to the Constitutional Court on appeal. See in this regard: *City of Johannesburg v Rand Properties (Pty) Ltd and Others* [2006] 2 All SA 240 (W); *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) SA 417 (SCA).

¹¹¹ *Occupiers of 51 Olivia Road* (note 1 above) para 1. The evictions were pursuant to the Johannesburg Inner City Regeneration Strategy (2003).

¹¹² *Occupiers of 51 Olivia Road* (note 1 above) para 1.

¹¹³ *Occupiers of 51 Olivia Road* (note 1 above) para 13.

¹¹⁴ *Occupiers of 51 Olivia Road* (note 1 above) para 18.

making permanent housing available in some cases or to providing no housing at all in some cases.¹¹⁵

The Court held further that meaningful engagement emanates from section 26(2) of the Constitution, and imposes duties on the City to engage with those that are likely to be homeless as a result of the eviction.¹¹⁶ This was because reasonableness embraced every step taken to secure the provision of adequate housing.¹¹⁷ The Court reasoned further that where a Municipality institutes eviction proceedings against people who could become homeless, it has a constitutional duty to meaningfully engage, and this fact forms part of the factors that should be taken into account in the section 26(3) enquiry.¹¹⁸ The Court also held that, in this case, the SCA erred in granting an order of eviction when no meaningful engagement took place before the eviction of the occupiers.¹¹⁹

The Court elaborated in some detail on the purposes and nature of meaningful engagement. It held that meaningful engagement played an essential role in the resolution of disputes, and contributed towards an increased understanding and care where both parties were willing to take part in the process. It held that meaningful engagement entailed a two-way process in which the City and the occupiers about to become homeless, would communicate with each other in order to achieve certain aims.¹²⁰ There was no closed-list of aims that meaningful engagement could seek to achieve, but these could include the circumstances and consequences of the proposed evictions.¹²¹ A Municipality needed to be aware that people who were facing an eviction were vulnerable, and may not understand the essential nature of engagement, and may refuse to take part in the meaningful engagement process. If those facing eviction refused to take part in this process, the Municipality could not simply walk away, but had a duty to make reasonable efforts to reach out to those facing eviction.¹²²

¹¹⁵ *Occupiers of 51 Olivia Road* (note 1 above) para 18.

¹¹⁶ *Occupiers of 51 Olivia Road* (note 1 above) para 17.

¹¹⁷ *Occupiers of 51 Olivia Road* (note 1 above) para 17.

¹¹⁸ *Occupiers of 51 Olivia Road* (note 1 above) para 18.

¹¹⁹ *Occupiers of 51 Olivia Road* (note 1 above) para 23.

¹²⁰ *Occupiers of 51 Olivia Road* (note 1 above) para 14.

¹²¹ *Occupiers of 51 Olivia Road* (note 1 above) para 14.

¹²² *Occupiers of 51 Olivia Road* (note 1 above) para 15.

The Court in this case issued an order for the parties to engage meaningfully with each other on various aspects of the dispute before the Court's final judgment. The parties were required to report-back to Court on the outcomes of this engagement process.¹²³ It was in this context that the Court endorsed an agreement reached between the parties, in terms of which the City and the occupiers reached an agreement on issues of alternative accommodation, making it unnecessary for the Court to consider it.¹²⁴ The Court also found it unnecessary to deal with the issue of permanent housing because the settlement agreement between the parties provided that the solution in relation to permanent housing would be developed in consultation with the occupiers.¹²⁵ In addition, the Court reasoned that there was no reason to believe that the consultation process would not be conducted in good faith since the City was now willing to engage meaningfully with the occupiers. Consequently, the dire situation of the occupiers was alleviated by the City's response in the engagement process.¹²⁶ What is more, the Court was not willing to be the court of first and final instance on the question of whether the City had conducted itself reasonably in the engagement process, and was not willing to be the only determinant on the reasonableness of the permanent housing plan.¹²⁷

The Court's endorsement of the agreement between the parties implied that the Court was satisfied that the City intended to comply with its constitutional duties in relation to the right of access to adequate housing, that the City would make the bad buildings safe and habitable, provide alternative accommodation, and provide basic services in the interim, while negotiating permanent housing in consultation with the occupiers.¹²⁸

The Court therefore held that the SCA erred in concluding that there was nothing constitutionally problematic in the failure of the City to take into account the availability of suitable alternative accommodation or land for the occupiers in taking a decision in terms of section 12(4)(b)¹²⁹ of the

¹²³ *Occupiers of 51 Olivia Road* (note 1 above) paras 5-6.

¹²⁴ *Occupiers of 51 Olivia Road* (note 1 above) paras 27-35. This is the first housing case in which the Court endorsed an agreement between the parties before dealing with the merits.

¹²⁵ *Occupiers of 51 Olivia Road* (note 1 above) paras 32-34.

¹²⁶ *Occupiers of 51 Olivia Road* (note 1 above) para 34.

¹²⁷ *Occupiers of 51 Olivia Road* (note 1 above) para 34.

¹²⁸ *Occupiers of 51 Olivia Road* (note 1 above) paras 24-26, and 27-30.

¹²⁹ Section 12(4)(b) of the Act authorises a municipality to issue a notice to someone or people to vacate a building that is unsafe and unhealthy. If they refuse to vacate, a criminal sanction in terms of section 12(6) of the Act kicks in with a fine of R100 for every day of unlawful occupation of the unsafe and unhealthy building.

Act.¹³⁰ The City must therefore take into account the possibility of the homelessness of any occupier as a result of a section 12(4)(b) eviction process.

Moreover, the Court found that it was neither just nor equitable to set aside section 12(6) of the Act. However, it was appropriate to encourage people to vacate unsafe and unhealthy buildings in line with a court order for their eviction.¹³¹ The Court went on to hold that a criminal sanction, such as that envisaged in section 12(6) of the Act did not have this effect, but provided an additional encouragement for occupiers to leave unsafe and unhealthy buildings, reducing the necessity for the state to pursue forceful evictions.¹³²

Finally, the Court held that judicial oversight needed to be infused into a reading and application of section 12(6) of the Act through a reading-in remedy, so as to require that the subsection apply to occupiers, who after the service on them of an eviction order, continued to remain in occupation of the unsafe and unhealthy property.¹³³

This case represents what is possible when the Court engages with the substantive content of the right of access to adequate housing, in the context of section 26(3), and by extension what can be achieved in the context of section 26(1) of the Constitution. The Court in this case endorsed a post-engagement agreement that made provision for the interim improvements to the bad buildings, the provision of alternative accommodation, and provision of basic services to the occupiers pending engagement on permanent housing. This endorsement took place prior to the determination of the main case, and this means that the Court was serious about the plight of those in desperate need of housing.

The endorsement of a post-engagement agreement by the Court in *Occupiers of 51 Olivia Road* prior to the finalisation of the matter represents a further development of meaningful engagement beyond *PE Municipality*,¹³⁴ which in turn shows the potential of meaningful engagement to agitate for the development of the substantive content of the right of access to

¹³⁰ *Occupiers of 51 Olivia Road* (note 1 above) para 46.

¹³¹ *Occupiers of 51 Olivia Road* (note 1 above) para 50.

¹³² *Occupiers of 51 Olivia Road* (note 1 above) paras 50-51 and 54.

¹³³ *Occupiers of 51 Olivia Road* (note 1 above) para 51.

¹³⁴ *PE Municipality* (note 1 above).

adequate housing.¹³⁵ However, there are differences of opinion on the contribution of meaningful engagement to the development of the right of access to adequate housing.

Lillian Chenwi argues that meaningful engagement enhances democracy through the promotion of participatory and deliberative democracy, and is a progressive remedy capable of promoting social transformation.¹³⁶ She further argues that the Court in *Occupiers of 51 Olivia Road* grounded the duty to engage meaningfully within the City's constitutional duties to provide services to communities in a systematic manner, promote social and economic development, and encourage community involvement in local government matters, to fulfill the goals set in the Preamble to the Constitution, to respect, protect, promote and fulfill the rights guaranteed in the Constitution, and the State's duty in terms of section 26(2) of the Constitution, and the need to treat human beings as human beings.¹³⁷

Kirsty McLean notes the potential positive contribution that meaningful engagement can play, but criticises the Court's use of meaningful engagement to avoid dealing with issues, and argues that meaningful engagement amounts to nothing but the *audi alteram partem* rule.¹³⁸ She argues further that the Court failed to engage with the substantive issues raised, and that this is illustrated by its decision in *Occupiers of 51 Olivia Road*, where it failed to deal with the substance of the challenge on the housing policy brought by the parties, and encouraged the parties to resolve their dispute through a settlement.¹³⁹

McLean further argues that despite the Court's identification of outstanding issues between the parties, such as the failure of the City to conceive and formulate a housing plan for similarly situated people; the City's policy in dealing with dilapidated buildings; the constitutionality of section 12(4)(b) of the Act; the review of the City's eviction notices to the occupiers; the applicability of the PIE Act; and the reach and applicability of section 26 (1), (2) and (3) of the

¹³⁵ Different opinions on this are taken up in the evaluation section below.

¹³⁶ Chenwi L "A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road v and Others v City of Johannesburg and Others*" (2009) 2 *Constitutional Court Review* 371-394 at 379-382 and 382-389.

¹³⁷ Chenwi 2009 (note 136 above) at 379.

¹³⁸ McLean K "Meaningful engagement: One step forward or two back? Some thoughts on *Joe Slovo*" (2010) 3 *Constitutional Court Review* 223-242 at 232-238 and 238-241.

¹³⁹ McLean 2010 (note 138 above) at 238.

Constitution.¹⁴⁰ The Court ended up deciding a narrow question of the constitutionality of the criminal sanction imposed by section 12 of the Act, in the event of non-compliance with the notices issued in terms of the Act. The rest of the issues were left to the parties to negotiate about, despite the fact that the occupiers complained that the parties had not been able to reach agreement previously on these issues.¹⁴¹ This approach by the Court according to McLean, is different from “judicial avoidance,” but appears to be unwillingness to decide the issues at all.¹⁴²

The Court confirmed its earlier housing jurisprudence in *Grootboom*, and *PE Municipality*, on the need to apply the purposes and values protected by the right of access to adequate housing.¹⁴³ In particular, it held that any enquiry into section 26 must take into account the foundational values of the Constitution, human dignity, equality and freedom. This means that human beings, especially those in desperate need of suitable housing need to be treated with the appropriate care and respect.¹⁴⁴

Lastly, Chenwi criticises the decision in *Occupiers of 51 Olivia Road* for the failure of the Court to address the question of the location of the alternative accommodation.¹⁴⁵ She argues that addressing this question was important for the provision of guidelines for future cases.¹⁴⁶ This criticism may be unfair on the Court, taking into account that the issue of the location of alternative accommodation was largely resolved through a post-engagement agreement.¹⁴⁷ This agreement also obliged the City to provide the occupiers with alternative accommodation in certain identified buildings, pending the provision of permanent housing.¹⁴⁸ However, Chenwi is correct to assert that the location of alternative accommodation is a critical factor that must be taken into account in determining the justice and equity of eviction orders.¹⁴⁹ The Court could have made this clearer in its judgment, so

¹⁴⁰ McLean 2010 (note 138 above) at 238.

¹⁴¹ McLean 2010 (note 138 above) at 238-239.

¹⁴² McLean 2010 (note 138 above) at 239.

¹⁴³ *Occupiers of 51 Olivia Road* (note 1 above) paras 10-12.

¹⁴⁴ Chenwi L “Advancing the right to adequate housing of desperately poor people: *City of Johannesburg v Rand Properties (Pty) Ltd and Others*” (2006) 14 *Human Rights Brief* 13-17.

¹⁴⁵ Chenwi 2009 (note 136 above) at 387-388.

¹⁴⁶ Chenwi 2009 (note 136 above) at 388.

¹⁴⁷ *Occupiers of 51 Olivia Road* (note 1 above) paras 24-26 and 32.

¹⁴⁸ *Occupiers of 51 Olivia Road* (note 1 above) para 26.

¹⁴⁹ This is in line with the content of adequate housing in international law, see: discussion in 3.4.2 of the preceding section.

that location as a critical element of the suitability of alternative accommodation does not simply depend on negotiations between the parties.

4 2 5 Residents of Joe Slovo Community

Another key Constitutional Court case dealing with the right of access to adequate housing from the perspective of section 26(3) of the Constitution, is the *Residents of Joe Slovo Community* case.¹⁵⁰ This case concerned a proposed eviction of residents of an informal settlement in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 ('PIE Act') for the purposes of relocating the said community (approximately 20 000 people) in order to upgrade their informal settlement, so that low-cost houses could be built.¹⁵¹

On appeal,¹⁵² five judgments regarding this case were prepared by different members of the Court.¹⁵³ The main issues for decision were whether the applicants were unlawful occupiers within the meaning of the PIE Act at the time of their eviction.¹⁵⁴ Secondly, the Court had to determine whether the respondents acted reasonably within the meaning of section 26 of the Constitution in seeking the eviction of the applicants.¹⁵⁵

In all the judgments, it was accepted that by the time the eviction case was initiated, the applicants were unlawful occupiers within the meaning of the PIE Act, although reasons given in this regard differ among the five judgments.¹⁵⁶ This difference lies in whether the applicants had the consent of the Municipality to occupy the land in question within the meaning of the PIE Act.¹⁵⁷ Yacoob J held

¹⁵⁰ *Residents of Joe Slovo Community* (note 1 above); Chenwi 2009 (note 136 above) at 379-382 and 382-389; Ray B "Residents of Joe Slovo v Thubelisha Homes and Others: The two faces of engagement" (2010) 10 *Human Rights Law Review* 360-371; Liebenberg 2010 (ch 1, n 5) at 303-311, and 311-316; McLean 2010 (note 138 above) at 232-238 and 238-241. For recent thoughts on the strengths and limits of meaningful engagement, see: Liebenberg S "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'" (2012) 12 *AHRLJ* 1-29 at 13-28.

¹⁵¹ Liebenberg 2010 (ch 1, n 5) at 303.

¹⁵² This case was an appeal from the judgment and order of the Western Cape High Court, see: *Residents of Joe Slovo Community* (note 1 above) para 14; *Thubelisha Homes and Others v Various Occupiers and Others* [2008] JOL 21559 (C).

¹⁵³ *Residents of Joe Slovo Community* (note 1 above) para 1.

¹⁵⁴ *Residents of Joe Slovo Community* (note 1 above) para 3.

¹⁵⁵ *Residents of Joe Slovo Community* (note 1 above) para 3.

¹⁵⁶ *Residents of Joe Slovo Community* (note 1 above) para 4.

¹⁵⁷ *Residents of Joe Slovo Community* (note 1 above) para 4.

in this regard that the occupiers did not have the consent of the Municipality at all, while Moseneke DCJ, Ngcobo J, O'Regan J and Sachs J held that the occupiers had the consent of the Municipality, but this consent was later withdrawn.¹⁵⁸ There was also agreement that the eviction order crafted by the majority court in this case was just and equitable within the meaning of the PIE Act.¹⁵⁹ However, the order of the Court and that of the High Court differed significantly.¹⁶⁰

The Court held that the relocation of the occupiers would be in the public interest, taking into account the purpose of the relocation, and the fact that more than 1000 people from the informal settlement had already moved, transport arrangements would be made, and that the City would assist the residents to settle at Delft.¹⁶¹ The Court therefore found that taking into account various circumstances of this case, and the promise of 70% of the houses to be built, the eviction and relocation of the occupiers would be just and equitable.¹⁶² The Court found that the eviction would be reasonable because it was aimed at facilitating low-cost housing that would benefit the occupiers, and this constituted a measure to ensure the achievement of the progressive realisation of the right of access to adequate housing within the meaning of section 26(2).¹⁶³

The Court issued a supervisory order in terms of which the applicants were required to vacate Joe Slovo Informal Settlement according to a set time-table set out in its order, and subject to any revisions to the set time-table.¹⁶⁴ The vacation was made conditional upon relocation to Delft or other agreed suitable temporary accommodation for each family as set out in the judgment.¹⁶⁵ The temporary accommodation had to meet certain detailed criteria set out in the judgment. It had to be

¹⁵⁸ *Residents of Joe Slovo Community* (note 1 above) para 4. The view that the occupiers had the consent of the municipality, which consent was later withdrawn is based on the surrounding circumstances of this case in particular; the fact that the occupiers had been on the land in question for 15 years, during which time the State had not given any indication that their occupation of the land was unlawful. In addition, the State had provided the occupiers with basic sanitation and other services such as water and electricity, had constructed basic infrastructure, and had issued red cards to easily identify each family. These factors and the manner in which the State dealt with the occupiers indicated that the occupiers had consent to remain on the land, but this was later withdrawn. See in this regard: concurring judgments of Moseneke DCJ, paras 149-175; Ngcobo CJ, paras 176-262; O'Regan J, paras 263-326, and Sachs J, paras 327-409.

¹⁵⁹ *Residents of Joe Slovo Community* (note 1 above) para 5.

¹⁶⁰ *Residents of Joe Slovo Community* (note 1 above) para 5.

¹⁶¹ *Residents of Joe Slovo Community* (note 1 above) paras 105-113.

¹⁶² *Residents of Joe Slovo Community* (note 1 above) paras 114-118.

¹⁶³ *Residents of Joe Slovo Community* (note 1 above) paras 115-116 and 117.

¹⁶⁴ *Residents of Joe Slovo Community* (note 1 above) para 7.

¹⁶⁵ *Residents of Joe Slovo Community* (note 1 above) para 7.

newly constructed and of superior quality, and contain basic infrastructural services, electricity, water and other basic sanitation facilities.¹⁶⁶

The applicants and respondents were also ordered to engage meaningfully with each other through their representatives in order to reach an agreement on the date of relocation, a relocation timetable different from that contained in the annexure to the order, and any other matter they may need to agree upon.¹⁶⁷ The process of meaningful engagement was expected to be completed by 30 June 2009, and if it resulted in an agreement, the agreement had to be filed with the Court by 7 July 2009 for its consideration.¹⁶⁸ The State was also found to have acted in accordance with its housing duties, and to have engaged reasonably with the occupiers, although it would have been ideal to engage with each family, but the engagement must be seen in light of reality and practicality. Therefore engagement with the occupiers through their representatives was reasonable.¹⁶⁹

This matter was back in Court nearly two years after the original eviction order, coupled with a supervisory order that was granted by the Court on 10 June 2009.¹⁷⁰ The issues before the Court this time concerned the question of whether the eviction order previously granted by the Court, coupled with a supervisory order with regard to the execution of that eviction order should be discharged in light of changed circumstances of this matter.¹⁷¹ The Court found that it had the powers to discharge its orders concerning the eviction of people from their homes where this was required by exceptional circumstances and considerations of justice and equity.¹⁷² It further reasoned that these requirements had been met in this case because the order had been in suspension for more than a year, and the circumstances of the case had changed since the original eviction order was made.¹⁷³

The implications of *Residents of Joe Slovo Community* matter for the right of access to adequate housing are firstly that people should not be left homeless after an eviction, even in cases where the

¹⁶⁶ *Residents of Joe Slovo Community* (note 1 above) para 7.

¹⁶⁷ *Residents of Joe Slovo Community* (note 1 above) para 7.

¹⁶⁸ *Residents of Joe Slovo Community* (note 1 above) para 7.

¹⁶⁹ *Residents of Joe Slovo Community* (note 1 above) para 117.

¹⁷⁰ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2011] ZACC 8; 2011 (7) BCLR 651 (CC); BCLR 446 (CC) (*Residents of Joe Slovo Community No 2*).

¹⁷¹ *Residents of Joe Slovo Community No2* (note 170 above) paras 1-2.

¹⁷² *Residents of Joe Slovo Community No2* (note 170 above) para 28.

¹⁷³ *Residents of Joe Slovo Community No2* (note 170 above) paras 29-37. The whole eviction order was discharged save for the order of costs.

said eviction is for the building of low-cost housing for their benefit. Secondly, the Court developed detailed standards applicable to the quality of alternative accommodation that should be afforded to people who have been evicted. These detailed standards adopted by the Court seem to draw from similar standards developed by the United Nations Committee on Economic, Social and Cultural Rights in its General Comments.¹⁷⁴ The Court was very concerned about the dignity of the occupiers during the whole eviction process.¹⁷⁵ This is why it ordered the eviction of the occupiers conditional upon the provision of alternative accommodation in the form of temporary residential units situated at Delft or another suitable place, subject to further conditions as set out in the order.¹⁷⁶ The Court here appeared alive to the dignity interests of the occupiers, by emphasising that housing, even if temporary, must be of appropriate standards and quality. It must also be accompanied by appropriate infrastructural development, such as tarred roads, and cannot be separated from the provision of basic sanitation services.

The Court also confirmed the nature and importance of meaningful engagement in eviction disputes as established in earlier housing cases.¹⁷⁷ However, there is some debate with regard to the approach of the Court to meaningful engagement in this case, and with regard to whether meaningful engagement as a remedy can assist the Court to develop the substantive content of the right of access to adequate housing.¹⁷⁸ Chenwi argues that the Court in *Residents of Joe Slovo Community* has not taken forward the gains made in *Occupiers of 51 Olivia Road* in the context of meaningful engagement.¹⁷⁹ This is because the Court in *Residents of Joe Slovo Community* condoned the inadequacies in the consultation process that was afforded to the occupiers, on the basis that these inadequacies were outweighed by the purpose of the eviction, and the implementation of the

¹⁷⁴ See full discussion in 3.4.2 of the preceding section; *Residents of Joe Slovo Community* (note 1 above) para 7.

¹⁷⁵ *Residents of Joe Slovo Community* (note 1 above) para 119.

¹⁷⁶ *Residents of Joe Slovo Community* (note 1 above) para 7. The Court held that “a temporary residential unit must be made available to each household moved, and that each temporary residential unit must be newly constructed, and of equivalent or superior quality; it must be at least 24m² in extent; be serviced with tarred roads; be individually numbered for purposes of identification; have walls constructed with a substance called Nutec; have a galvanised iron roof; be supplied with electricity through a prepaid electricity meter; be situated within reasonable proximity of a communal ablution facility; make reasonable provision (which may be communal) for toilet facilities with water-borne sewerage; and make reasonable provision (which may be communal) for fresh water.”

¹⁷⁷ *Residents of Joe Slovo Community* (note 1 above) para 115-118.

¹⁷⁸ See Chenwi 2009 (note 136 above) at 377-382; McLean 2010 (note 138 above) at 232; Liebenberg 2010 (ch 1, fn 5) at 309-311.

¹⁷⁹ Chenwi 2009 (note 136 above) at 382-383.

housing project on land occupied by the informal settlement residents.¹⁸⁰ The failure of the Court to seriously consider meaningful engagement in this case meant that the voices of the residents were not taken into account in decisions that were aimed at determining where they would live. However, to its credit, the Court gave a robust order in relation to the engagement process, by crafting a detailed order listing the minimum requirements to be met in the engagement process.¹⁸¹

McLean offers a different view on meaningful engagement, she argues that meaningful engagement was utilised by the Court to avoid dealing with the substantive content of the rights implicated.¹⁸² Furthermore, she argues that meaningful engagement does not add anything new to the duties imposed by the *audi alteram partem* rule. According to McLean, meaningful engagement may in fact, be narrower than the *audi*, in *Residents of Joe Slovo* for instance, the Court notes the inadequate consultation, but does not set it aside, instead, it orders that there be meaningful engagement with the occupiers on a narrow set of issues shortly before their eviction.¹⁸³

This case has made an important contribution in relation to developing the qualitative dimensions of the alternative accommodation which must be provided in the case of evictions. These qualitative elements can usefully inform the development of the substantive content of the right in section 26(1), particularly in the context of the positive duty of the State to fulfil the right of access to adequate housing in the context of people who are homeless or living in vastly inferior housing conditions in informal settlements and rural areas.

4 2 6 *Joseph*

The *Joseph* matter concerned tenants of a block of flats, Ennerdale Mansions, which were owned by Mr Nel. The City of Johannesburg, through City Power, cut off the electricity supply to this block of flats without prior notice to the tenants because of arrears incurred by the owner on his

¹⁸⁰ It is noteworthy though that the Court's approach to meaningful engagement in *Residents of Joe Slovo Community* has recently been contradicted by its recent judgment, see: *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* (CCT 23/12) [2012] ZACC 26 (9 October 2012) as yet unreported paras 43-50. The Court in this case was not willing to condone inadequacies in the consultation process as fulfilling the requirement of meaningful engagement.

¹⁸¹ Chenwi 2009 (note 136 above) at 383.

¹⁸² McLean 2010 (note 138 above) at 239-240; Liebenberg 2012 (note 150 above) 21-26.

¹⁸³ McLean 2010 (note 138 above) at 240.

electricity.¹⁸⁴ On appeal¹⁸⁵ to the Constitutional Court, the applicants relied on similar relief as that relied upon in the High Court. Their arguments were that section 3 of the PAJA applied to the facts of this case because their rights were adversely affected by the termination of the electricity supply.¹⁸⁶ In addition, they argued that sections 26(1) and 10 of the Constitution applied.¹⁸⁷ The Constitutional Court reasoned that City Power supplied electricity to the flats in question in fulfillment of the constitutional and statutory duties of local government, to provide basic municipal services to all people residing within its jurisdiction, and these services included electricity.¹⁸⁸ The applicants received this municipal service based on their corresponding public law right to receive basic municipal services.¹⁸⁹ Therefore, the conduct of the City, through City Power to deprive the applicants of this service meant that City Power was obliged to afford them procedural fairness before taking the decision to disconnect their electricity supply.¹⁹⁰ Procedural fairness in the context of this case was held to mean that the applicants should be afforded a pre-termination notice of 14 days in the form of a physical notice affixed in a prominent place in the building.¹⁹¹ In addition, this notice had to contain all the relevant information like the time and date of the disconnection, reasons for the disconnection, and the place where the disconnection could be challenged. Furthermore, in order to be adequate, such a notice should afford the applicants enough time to respond to it.¹⁹²

The Court accordingly held that the Electricity By-laws were inconsistent with the PAJA and section 33 of the Constitution, to the extent that the Electricity By-laws made provision for the disconnection of peoples' electricity supply without prior notice.¹⁹³ By way of a remedy, the Court

¹⁸⁴ *Joseph* (note 2 above) para 8.

¹⁸⁵ This matter was an appeal from the decision of the High Court, see: *Darries and Others v City of Johannesburg and Others* 2009 (5) SA 284 (SGJ).

¹⁸⁶ *Joseph* (note 2 above) para 12.

¹⁸⁷ *Joseph* (note 2 above) para 12.

¹⁸⁸ *Joseph* (note 2 above) paras 35-40 and 47. The constitutional and statutory framework that the Court relied on included Sections 152, 153 and 195(1) of the Constitution; Sections 4, 50-51, and 73 of the Local Government: Municipal Systems Act 32 of 2000; section 9(1)(a)(iii) of the National Housing Act 107 of 1997; *White Paper on Transforming Public Service Delivery* (1997) GG18340 GN 1449, 1 October 1997, which deals with *Batho Pele* (People First).

¹⁸⁹ *Joseph* (note 2 above) para 47.

¹⁹⁰ *Joseph* (note 2 above) para 47.

¹⁹¹ *Joseph* (note 2 above) paras 60-61.

¹⁹² *Joseph* (note 2 above) paras 60-61.

¹⁹³ *Joseph* (note 2 above) paras 70 and 77.

ordered that the words ‘without notice’ be severed from By-law 14(1) of the Electricity By-laws.¹⁹⁴ Therefore, the termination of electricity supply at Ennerdale Mansions was declared unlawful, and the City and City Power were ordered to immediately reconnect it.¹⁹⁵

The Court found it unnecessary to determine the arguments based on sections 26(1) and 10 of the Constitution, in the light of conclusions reached in the case. The applicants had argued that section 26(1) of the Constitution was relevant to this case as electricity was an element of the right of access to adequate housing, and the termination of the electricity supply constituted a retrogressive step that violated the negative duty to respect the right of access to adequate housing. It thereby adversely affected their constitutional right to housing for the purposes of PAJA.¹⁹⁶

The Court in this case missed an opportunity to develop the substantive content of the right of access to adequate housing by resorting to the duties of local government and the PAJA to dispose of the case, instead of applying international law or its *Grootboom* jurisprudence along with the duties of local government. It is well established in international law that adequate housing includes the provision of electricity or adequate lighting.¹⁹⁷

The positive aspect of *Joseph* is the Court’s affirmation of the relationship between citizens and government.¹⁹⁸ The Court’s reasoning in *Joseph* in relation to *ubuntu* shows the Court’s recognition that the relationship between the citizens and the government is grounded in communal relationships as opposed to strict legalistic relationships.¹⁹⁹ This recognition represents a positive development in which the citizens are treated with decency, good faith and friendliness.²⁰⁰

¹⁹⁴ *Joseph* (note 2 above) para 78.

¹⁹⁵ *Joseph* (note 2 above) para 78.

¹⁹⁶ *Joseph* (note 2 above) para 32. The applicants placed reliance on the *Jaftha* case to fortify their arguments in this regard.

¹⁹⁷ See discussion in 3 4 2 and 3 4 4 2 of the preceding section; See also: *Grootboom* (note 1 above) para 35, and Bilchitz D “Citizenship and community: Exploring the right to receive basic municipal services in *Joseph*” (2010) 3 *Constitutional Court Review* 45-78 (hereafter Bilchitz “Citizenship and Community”) at 51. Bilchitz argues that it was reasonable to expect the Court to engage with this argument especially since such an argument does not arise often, and because the Court is responsible for providing clarity on the Bill of Rights.

¹⁹⁸ Bilchitz “Citizenship and Community” (note 197 above) at 62-67.

¹⁹⁹ Bilchitz “Citizenship and Community” (note 197 above) at 62-68; see also: discussion on *ubuntu* in 3 3 2 of the preceding section.

²⁰⁰ Bilchitz “Citizenship and Community” (note 197 above) at 62-68.

4 2 7 *Nokotyana*

The *Nokotyana* case²⁰¹ concerned residents of the Harry Gwala informal settlement who challenged the failure of the Municipality to provide them with basic services in line with the Municipality's constitutional duties, pending the decision to upgrade the settlement. The Municipality disagreed with this view, holding that the National Housing Code provided that the Municipality did not have to provide basic services that required a huge capital expenditure until a decision to upgrade had been taken, and that the duty to provide emergency services did not arise in this case.²⁰²

The applicants' case in the Constitutional Court turned on the issue of sanitation and lighting. The residents wanted the Municipality to provide them with one ventilated pit latrine (VIP toilets) per family, and high-mast lighting in order to increase safety and access by emergency vehicles.²⁰³ These arguments were fortified by reliance on section 26 of the Constitution.²⁰⁴ The case turned on these issues in the Constitutional Court because the other issues had been disposed of in favour of the applicants in the High Court. The Constitutional Court essentially confirmed the decision of the High Court except in certain respects.²⁰⁵ The Court held that the applicants' submissions based on Chapter 12 of the National Housing Code had to fail because an emergency situation had not been declared by the MEC nor did the applicants apply for such a declaration.²⁰⁶

The Court held further that the arguments based on Chapter 13 of the National Housing Code had to fail because the Municipality had complied with its duties in terms of paragraph 13.7.1 of Chapter 13 of the National Housing Code, in that it had submitted an application to the MEC for assistance under Chapter 13, and was still awaiting a response.²⁰⁷ The Court reasoned that Chapter 13 made provision for phased development, consisting of four phases. The provision of basic services kicked

²⁰¹ *Nokotyana* (note 3 above).

²⁰² *Nokotyana* (note 3 above) paras 7-8; see also: Chapters 12 and 13 of the National Housing Code. Chapter 12 of the National Housing Code regulates the provision of housing assistance to people in emergency situations, whereas Chapter 13 regulates the upgrading of informal settlements.

²⁰³ *Nokotyana* (note 3 above) paras 2 and 14.

²⁰⁴ *Nokotyana* (note 3 above) para 2.

²⁰⁵ *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* (08/17815) [2009] ZAGPJ HC (SGJ)

²⁰⁶ *Nokotyana* (note 3 above) para 38-41.

²⁰⁷ *Nokotyana* (note 3 above) para 43-44.

into operation in the second phase, after a decision to upgrade had been taken by the MEC in the first phase.²⁰⁸

The Court further reasoned that the challenge and opposition to the City's newly adopted policy on the provision of temporary sanitation services, adopted on 16 April 2009, and the challenge based on Regulation 2 of Regulations Relating to Compulsory National Standards to Conserve Water (Promulgated in terms of the Water Services Act 108 of 1997) had to fail because it was brought to bear for the first time on appeal to the Court, requiring it to be a court of first and final instance.²⁰⁹ The City's policy could also not be scrutinised in the absence of a challenge to Chapter 13 of the National Housing Code. The Court held in this regard that the applicants could not rely directly on section 26 of the Constitution to sustain their claims because there was legislation giving effect to section 26 of the Constitution.²¹⁰ Therefore the applicants needed to rely on the legislation giving effect to the right, section 26 of the Constitution, or challenge the said legislation as inconsistent with the Constitution.²¹¹

Finally, the Court found it necessary to make provision for a speedy decision in its order. In particular, since the delay by the Gauteng provincial government in reaching a decision on the application by the municipality on the upgrading of the informal settlement was, in this case the prime cause of the desperate situation in which the residents found themselves.²¹² The Court then dismissed the appeal and issued an order that it deemed just and equitable to order the MEC to reach a decision on whether to upgrade the settlement or not, within a period of 14 months.²¹³

The approach of the Court in *Nokotyana* shows an irreconcilable inconsistency in its adjudication of the right of access to adequate housing. The Court in *Joseph* was comfortable to reason that electricity formed part of the States' duties of local government to provide basic services including

²⁰⁸ *Nokotyana* (note 3 above) paras 43-44.

²⁰⁹ *Nokotyana* (note 3 above) paras 19-20 and 45.

²¹⁰ *Nokotyana* (note 3 above) para 48.

²¹¹ *Nokotyana* (note 3 above) para 48. The Court held that the applicants did not challenge the constitutionality of either Chapter 12 or 13 of the National Housing Code, thereby failing to comply with the doctrine of subsidiarity. For a critical look at the doctrine of subsidiarity, see: Bilchitz D "Is the Constitutional Court wasting away the rights of the poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*" (2010) 127 *SALJ* 591-605 at 594-595.

²¹² *Nokotyana* (note 3 above) para 57.

²¹³ *Nokotyana* (note 3 above) paras 57 and 62. The *Nokotyana* decision has been heavily criticised by David Bilchitz, see in this regard: Bilchitz 2010 (note 211 above).

electricity, in a consistent manner, yet the same Court in *Nokotyana*, a case involving basic sanitation and lighting, is suddenly uncomfortable to extend the same reasoning it applied in *Joseph*.²¹⁴

Moreover, the Court's approach in *Nokotyana* confirmed the Court's overly deferential approach similar to that adopted in *Mazibuko and Others v City of Johannesburg and Others*.²¹⁵ Kapindu argues that the approach adopted by the Court in *Nokotyana* is overly deferential and amounts to the Court abdicating its constitutional role as the final arbiter of the rights guaranteed in the Constitution, by elevating legal technicalities above substantive justice issues.²¹⁶ This is evident in the Court's focus on how the issues were pleaded, and the fact that the applicants raised some of the relevant issues for the first time in the Constitutional Court and the failure to raise some issues before the Court.²¹⁷ This is particularly illustrated by the overly rigid and technical manner in which the Court applied the doctrine of subsidiarity. Bilchitz has criticised the Court in this regard for its failure to deal comprehensively with arguments related to section 26, by choosing instead to invoke the doctrine of subsidiarity.²¹⁸ Bilchitz argues that the application of this doctrine in the context of socio-economic rights as opposed to administrative law is unfounded because of the open-ended language of section 26(2) and 27(2) of the Constitution.²¹⁹ These two subsections suggest that the rights they protect cannot be realised through one major piece of legislation, as is the case with administrative justice. What is more, the Court erred in the way it understood the doctrine, by placing more focus on the manner in which the claim was formulated in the papers, and whether the applicants directly challenged the reasonableness of the legislation in question.²²⁰

In conclusion, the Court in *Nokotyana* displayed an unwillingness to deal with the content of the fundamental rights implicated.²²¹ The Court chose to rely on formalistic forms of adjudication

²¹⁴ Bilchitz "Citizenship and community" (note 197 above) at 51-55.

²¹⁵ [2009] ZACC 28; 2010 (3) BCLR 239 (CC); Kapindu RE "The desperate left in desperation: A court in retreat – *Nokotyana v Ekurhuleni Metropolitan Municipality* revisited" (2010) 3 *Constitutional Court Review* 201-222 at 206-212 and 212-221.

²¹⁶ Kapindu 2010 (note 215 above) at 206-212.

²¹⁷ Kapindu 2010 (note 215 above) at 212-221.

²¹⁸ Bilchitz 2010 (note 211 above) at 594-595.

²¹⁹ Bilchitz 2010 (note 211 above) at 594.

²²⁰ Bilchitz 2010 (note 211 above) at 595.

²²¹ Bilchitz 2010 (note 211 above); Bilchitz "Citizenship and community" (note 197 above); Kapindu 2010 (note 215 above).

which are not in line with the transformative vision of the Constitution, which requires the Court to undertake substantive legal reasoning.²²² The Court in *Nokotyana* had a constitutional duty to clarify whether basic sanitation and high-mast lighting form part of the right of access to adequate housing. This would have gone a long way in developing the substantive content of the right of access to adequate housing, and aligning our housing jurisprudence with international law.

I will now evaluate the abovementioned housing jurisprudence of the Court. To this end, I will determine the extent to which the Court has given to substantive content of the right of access to adequate housing.

4 3 Evaluation: To what extent has the Constitutional Court given substantive content to the right of access to adequate housing?

The above major housing jurisprudence of the Constitutional Court reveals far more willingness on the part of the Court to develop the substantive content of the right of access to adequate housing, in the context of the negative duties imposed by this right, and less willingness to develop this right in the context of the positive duties imposed by it. This is evident in its development of various procedural and substantive mechanisms in its eviction jurisprudence to protect and promote the negative duties imposed by this right, from the *Jaftha* case onwards. To this end, the Court has found in a long list of cases that it would be slow to grant an eviction order, or sanction evictions as just and equitable against people who are relatively settled on the land; where no or inadequate meaningful engagement or mediation took place prior to eviction; where people would be left homeless; and where there was no judicial oversight in a process that leads to loss of homes. The Court has also issued orders for the provision of alternative accommodation and basic services to occupiers of inadequate housing, pending meaningful engagement on permanent housing plans. In addition, the Court has found that the eviction and relocation of residents of informal settlements to make way for the implementation of a housing project, needs to be conducted in a dignified manner that respects the human rights of the occupiers.

²²² Quinot G “Substantive reasoning in administrative-law adjudication” (2010) 3 *Constitutional Court Review* 111-140 at 111-114.

Moreover, the Court has recognised that the relationship between government and citizens is rooted in communal, as opposed to strict legalistic form, and that occupiers need to be given notice and an opportunity to make representations before their access to basic services such as electricity is cut-off. Therefore, the Court's evictions jurisprudence, such as that developed in *PE Municipality* has contributed a rich, substantive jurisprudence on housing rights. In contrast to this robust protection and promotion of the negative duties arising out of the right of access to adequate housing, the Court has been far less willing to develop the substantive content of this right, in the context of the positive duties imposed by this right. The Court has instead developed the reasonableness review model to assess whether the State has complied with its duties in terms of section 26(1) and (2) of the Constitution. To this end, the Court has developed various criteria to assess whether the housing programme complied with the reasonableness review model. However, the reasonableness review model as developed in *Grootboom* and subsequent cases, does not take into account the nature and scope of this right, nor does it provide any guidance on the substantive content of the right of access to adequate housing, beyond statements that housing entails "more than brick and mortar."²²³ The Court has therefore adopted a strong model of judicial review that it applies whenever it deals with the negative duties protected by the right of access to adequate housing, and a relatively weak model of judicial review whenever the positive duties of this right are implicated.

4 4 Conclusion

In this section, there has been a discussion of the selected jurisprudence of the Court, with a view to analysing and evaluating whether the Court has given substantive content to the right of access to adequate housing. There has been an attempt to show how the Court has tended to give greater substantive content to socio-economic rights in the context of the negative duties imposed by these rights, while its jurisprudence in respect of the positive duties remain thin and insubstantial. In the next section alternative approaches which could contribute to the development of a more substantive approach to housing in the South African constitutional Court's jurisprudence, will be suggested.

²²³ *Grootboom* (note 1 above) para 35.

CHAPTER 5: TOWARDS A MORE SUBSTANTIVE APPROACH TO HOUSING RIGHTS IN THE SOUTH AFRICAN CONSTITUTIONAL COURT'S JURISPRUDENCE

5 1 Introduction

In this section, alternative approaches that might contribute to the development of the substantive content of the right of access to adequate housing will be suggested. I will do so by suggesting ways of overcoming the impediments to the adjudication of this right, and socio-economic rights in general. To this end, I will highlight the importance of assessing the reasonableness review model in the context of the purposes and values protected by the right of access to adequate housing. In addition, I will examine the implications of this approach for the development of the jurisprudence as a whole, and how the Constitutional Court ('the Court') may build and improve on its current housing jurisprudence.

The doctrine of separation of powers, judicial deference and the manner in which the courts, especially the Court ought to give meaning to the right of access to adequate housing and other socio-economic rights, have become the subject of much debate over the years in South Africa.¹ The Court's role as the ultimate guardian and guarantor of the rights in the Bill of Rights has been cast into the spotlight.² In particular, the Court's approach to the doctrine of separation of powers, and judicial deference in socio-economic rights cases and how it should deal with these rights in ways that promote and protect their substantive content, has enjoyed attention.³

¹ Hoexter 2000 (ch 1, n 9) Pieterse 2004 (ch 2, n 136) at 385-399; McLean 2009 (ch 1, n 9) at 61-87 and 105-111; Mbazira 2009 (ch 2, n 114) at 27-50, 192, and 233-236.

² Liebenberg 2006 (ch 1, n 5); Dugard Jackie (ch 2, n 47) at 966-969; Dugard Jackie (ch 2, n 47) at 215-238.

³ Pieterse 2004 (ch 2, n 136) at 385-389; Langa PN "'A delicate balance': The place of the judiciary in a constitutional democracy" (2006) 22 *SAJHR* 2-9; McLean 2009 (chapter 1, fn 9) at 23-87 and 105-115; Liebenberg 2010 (ch 1, n 5) at 66-78; Ngcobo S "South Africa's Constitution: Towards an appropriate doctrine of separation of powers" (2011) 1 *Stell LR* 37-49. For cases on the separation of powers doctrine and the role of courts in different contexts, including socio-economic rights, see: *Executive Council Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8; 1995 (4) SA 877 (CC) para 62; *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC) para 183; *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 [1996] ZACC 26; 1996 (4) SA 744 (CC) paras 76-78, 106-113 and 123; *Bernstein and Others v Bester No and Others* [1996] ZACC 2; 1996 (2) SA 751 (CC) para 105; *Certification of the Constitution of the Western Cape* [1997] ZACC 8; 1997 (12) BCLR 1653 (CC) para 8; *De Lange NO v Smuts NO* [1998] ZACC 6; 1998 (3) SA 785 (CC); *South African Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) SA 883 (CC) paras 18-22, and 24-26; *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC); *Certification of the Mpumalanga Petitions Bill, 2000* [2001] ZACC 10; 2002 (1) SA 447 (CC); *United Democratic Movement v President of the Republic of*

Before suggesting alternative approaches aimed at overcoming the use of the doctrine of separation of powers and judicial deference as impediments, it is important to contextualise the current state of the relationship between the three branches of government in South Africa. This is because the relationship between these three branches, including how they view their constitutional duties, has a direct bearing on the appropriate model of separation of powers doctrine, and judicial review in the context of the right of access to adequate housing, and other socio-economic rights.

The relationship between the executive and the judiciary, specifically the Constitutional Court has become controversial recently. The President of the Republic of South Africa recently remarked that courts should allow the executive to conduct its administration and policy-making business freely, and that the courts' powers cannot be superior to the popular mandate vested in the Executive and Parliament.⁴ These and other similar statements from the executive and other political organisations prompted the former Chief Justice, Sandile Ngcobo, to stress the importance of the rule of law, and the independence of the judiciary in a democracy,⁵ in particular, the importance of an independent judiciary that also enjoys the confidence of society and is able to dispense justice.⁶ This is even more essential in the arena of socio-economic rights and what should be the appropriate approach to the interpretation of the right of access to adequate housing so as to develop the substantive content of the rights in section 26?

5.2 Addressing the impediments to the adjudication of socio-economic rights

Besides the need for the Court to focus more on the normative nature and scope of socio-economic rights (the right of access to adequate housing) in order to progressively develop their substantive

South Africa and Others (NO 2) [2002] ZACC 21; 2003 (1) SA 495 (CC); *Doctors For Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 SA (CC) para 99; *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19; 2009 (1) SA 287 (CC) ('*Glenister1*') para 32; *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC) ('*Glenister2*'); *Justice Alliance of South Africa v President of the Republic of South Africa and Others, Freedom Under Law v President of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* [2011] ZACC 23; 2011 (5) SA 388 (CC); *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* (CCT 38/12) [2012] ZACC 18; 2012 (6) SA 223 (CC).

⁴ Speech delivered by President of the Republic of South Africa at the Access to Justice Conference, Zuma G (2011), available online at: http://www.justice.gov.za/access-to-justice-conference-2011/20110708_ajc_zuma-speech.pdf (accessed on 15 October 2011). These views were previously repeated by other members of the Executive.

⁵ Ngcobo S "Sustaining public confidence in the judiciary: An essential condition for realising the judicial role" (2011) 128 *SALJ* 5-17.

⁶ Ngcobo 2011 (note 5 above) at 11-17.

content, as explored in chapters 2, 3 and 4, the Court's role could also be enhanced by the need to maintain the appropriate doctrine of separation of powers, and judicial deference.⁷

The reliance on the doctrine of separation of powers, and by extension judicial deference to oppose the enforcement of socio-economic rights, is mainly based on two arguments.⁸ The first argument maintains that socio-economic rights adjudication allows an unelected judiciary to decide matters that require democratic deliberation. Secondly, the judiciary is institutionally incapable of dealing with certain issues arising out of the enforcement of socio-economic rights, such as budgetary, policy, and polycentric issues.⁹ Despite the Court's emphatic statements in its jurisprudence on socio-economic rights that it will interpret and enforce socio-economic rights, including the right of access to adequate housing, even if the matter involves an enquiry into budgetary, policy, and polycentric issues, the Court has not been immune to the clutches of the doctrine of separation of powers, and judicial deference.¹⁰

The Court has been careful to interpret and enforce socio-economic rights in ways that will not result in the Court exercising the functions that are constitutionally allocated to the legislature and the executive arm of government. To this end, the Court has been careful to note that it will not dictate policy, and the allocation of budgets to the responsible functionaries, but this does not mean abdication of its duties, because it will intervene in appropriate cases, and the intervention is mandated by the Constitution. The institutional constraints have impacted on the Court's approach to socio-economic rights, including the right of access to adequate housing in the context of the substantive content of this right, including remedies meted out for violation of these rights.¹¹ This is partly because the Court has been very conservative in the arena of remedies such as far-reaching structural interdicts.¹²

According to Mbazira, the Court's approach to the doctrine of separation of powers explains why this doctrine cannot simply be brushed aside on the basis that the Court is mandated by the

⁷ In this regard, I draw on Mbazira 2009 (ch 2, n 114) at 233.

⁸ Mbazira 2009 (ch 2, n 114) at 234; Hoexter 2000 (ch 1, n 9); Hoexter 2008 (ch 2, n 150); Jackie Dugard 2007 (ch 2, n 47); Jackie Dugard 2008 (ch 2, n 47); McLean 2009 (ch 1, n 9).

⁹ Mbazira 2009 (ch 2, n 114) at 233-234.

¹⁰ Mbazira 2009 (ch 2, n 114) at 234.

¹¹ Mbazira 2009 (ch 2, n 114) at 234; McLean 2009 (ch 1, n 9) at 114-115.

¹² Mbazira 2009 (ch 2, n 114) at 234.

principles of checks and balances, and the rule of law to enforce socio-economic rights.¹³ This is because the courts, unlike the executive and legislative arms of government, face many challenges, such as the lack of technical know-how to deal with budgetary issues and issues of policy that may arise when they are engaged in their judicial functions.¹⁴

The institutional challenges such as lack of skills and expertise to deal with budgetary- and policy issues, also lead to the courts facing questions that they find difficult to answer.¹⁵ Some of these questions relate to the allocation of the budget, and setting priorities.¹⁶ The courts' institutional challenges are the reason why the courts need to defer these issues to the executive and legislative branches in appropriate cases. This deference however, should not mean the courts' abdication of their judicial functions of interpreting and enforcing the rights in the Bill of Rights. This means that the courts need to maintain a fine line and balance between the demands of their judicial functions, and leaving enough space for the executive and legislative arms of government to perform their functions.¹⁷ Seeing the courts' role in this context means that the courts should be able to intervene when the other arms of government violate human rights and fail to adhere to their constitutional duties.¹⁸ This intervention should however, be guided by the seriousness of the violation of human rights or failure to adhere to constitutional duties, especially in the context of socio-economic rights.

The courts' intervention of necessity operates at two levels, at the interpretive level, and at the remedial level.¹⁹ The intervention at the interpretive level should be determined by the severity of the violation of human rights or failure to comply with constitutional duties,²⁰ whereas, the intervention at the remedial level should be determined by the level of non-compliance with courts' orders or the likelihood thereof. This means that the intervention would also determine the nature and scope of the remedy meted out. Where there is naked non-compliance with the courts' orders by the legislative and executive arms of government, then the courts would be justified in issuing

¹³ Mbazira 2009 (ch 2, n 114) at 234.

¹⁴ Mbazira 2009 (ch 2, n 114) at 234; Pieterse 2004 (ch 2, n 136) at 405-406.

¹⁵ Mbazira 2009 (ch 2, n 114) at 234.

¹⁶ Mbazira 2009 (ch 2, n 114) at 234.

¹⁷ Mbazira 2009 (ch 2, n 114) at 234-235; Pieterse 2004 (ch 2, n 136) at 409.

¹⁸ Mbazira 2009 (ch 2, n 114) at 235.

¹⁹ Mbazira 2009 (ch 2, n 114) at 235.

²⁰ Mbazira 2009 (ch 2, n 114) at 235.

highly intrusive remedies such as mandatory or structural interdicts to remedy the violation or non-compliance with constitutional duties.²¹ The nature of the right involved should also play a role in this matrix, the more critical the right, the more the court should be willing to issue highly intrusive orders.

It is noteworthy though, according to Mbazira, that the application of highly intrusive remedies should be used as a measure of last resort.²² These remedies should be preceded by efforts to obtain the co-operation of the other arms of government.²³ However, these remedies should be used by courts as a measure of first resort where there is clear evidence that the courts are unlikely to obtain the co-operation of the implicated arm of government or where the seriousness of the case demands urgent intervention to restore human rights or correct the non-compliance with constitutional duties.²⁴

Furthermore, the doctrine of separation of powers must be deployed by the courts in the context of the prevailing economic and social challenges in order for this doctrine to be applied in light of the transformative vision of the Constitution, just as the classical conceptions of this doctrine were meant to be responsive to the challenges of an earlier era.²⁵ Deploying and applying the doctrine of separation of powers to take stock of the prevailing societal challenges will of necessity require the courts to take into account the values and purposes protected and promoted by socio-economic rights, including the right of access to adequate housing, and the manner in which these rights have been dealt with in international and foreign law.

Deploying and applying the doctrine of separation of powers, and by extension judicial deference in the manner suggested above, demonstrates that the doctrine of separation of powers, and judicial deference are not impediments in themselves, but become impediments to the progressive realisation of the substantive content of the right of access to adequate housing and other socio-economic rights when they are deployed in a manner that overemphasises the challenges that they present.

²¹ Mbazira 2009 (ch 2, n 114) at 235.

²² Mbazira 2009 (ch 2, n 114) at 235.

²³ Mbazira 2009 (ch 2, n 114) at 235.

²⁴ Mbazira 2009 (ch 2, n 114) at 235.

²⁵ Pieterse 2004 (ch 2, n 114) at 405.

In the following section, I consider how the Court can develop the substantive content of the right of access to adequate housing. In this regard, I draw on the value-based, transformative constitutionalism standards, and contextual and international law standards analysed in chapters 2 and 3.

5 2 1 Developing the substantive content of the right of access to adequate housing

There are many ways which the Court could explore in order to develop the substantive meaning of the right of access to adequate housing. Firstly, the Court could start by exploring the meaning of access to adequate housing, whenever it is faced with cases implicating section 26(3) of the Constitution. The Court has already developed the substantive content of housing rights, particularly in the context of evictions or negative deprivations of housing rights, section 26(3), such as in the *Jaftha v Schoeman and Another, Van Rooyen Stoltz and Others*.²⁶ The challenge is to develop this substantive content in the context of applications by homeless people or people living in inadequate housing to enforce the positive duties imposed by section 26(1) read with section 26(2).²⁷ The Court could develop the substantive content of section 26(1) read with section 26(2) in the same way it has done in cases dealing with evictions, by developing various procedural protections, clarifying the nature and scope of the positive duties.

Secondly, as Sandra Liebenberg argues, by reconceiving the model of reasonableness review in the context of socio-economic rights, the Court could also develop the substantive content of the right of access to adequate housing.²⁸ Repositioning the reasonableness review model could also include grounding it in a more substantive account of the values and purposes underpinning section 26(1) of the Constitution, instead of exclusively focusing on the reasonableness of government conduct in the context of section 26(2) of the Constitution.²⁹ Tied to this, the Court could link the reasonableness review model to a more broad expansion of the substantive content of individual rights and duties, so as to situate the compliance-measuring benchmarks to the nature and scope of

²⁶ *Jaftha* (ch 4, n 1) para 23.

²⁷ See suggestions in chapter 3, 3 4 to 3 6 and chapter 4, 4 3.

²⁸ Liebenberg 2010 (ch 1, n 5) at 131-146, and 146-203; Liebenberg S and Quinot S “Narrowing the band: Reasonableness in administrative justice and socio-economic right jurisprudence in South Africa” (2011) 3 *Stell LR* 639-663; See also: chapter 2, 2 2 3 for a full discussion of this point.

²⁹ This exercise would require a serious consideration of the substantive content of given to this right in international law, and comparative law.

this right. This would give impetus to the prioritisation of the right of access to adequate housing, and other socio-economic rights, and in so-doing align them with the transformative promise and vision of the Constitution.³⁰

Thirdly, the Court could also develop the substantive content of the right of access to adequate housing by enhancing the constitutional dialogue between itself, the legislature and the executive arm of government.³¹ This could be achieved by the development of clear non binding guidelines with regard to the model of separation of powers doctrine and judicial deference that it will apply in the context of the right of access to adequate housing, and by extension other socio-economic rights.

Fourth, in order for the Court to further contribute to the development of the substantive content of the right of access to adequate housing, it is suggested that the Court should adopt the practice of joining the Minister of Finance or Member of the Executive (MEC) as a joinder of necessity in all cases involving the right of access to adequate housing where parties have not done so.³² This would enable the Court to properly engage with the claims of limited resources in the context of the right of access to adequate housing, because the Court would be in a position to interrogate limited resources defences by asking for explanations on current and future budgets. These explanations would not involve the Court in prescribing or dictating budgetary policies to the other arms of government, but would require justifications regarding what the government is doing to meet its constitutional duties in the context of the right of access to adequate housing.

³⁰ I draw this line of reasoning from Pieterse, see: Pieterse 2004 (ch 2, n 136) at 407.

³¹ Ngcobo 2011 (note 5 above); Liebenberg 2010 (ch 1, n 5) at 71.

³² For principles of joinder, see: Loots C, Herbstein J and van Winsen LDV *The Civil Practice of the High Courts and Supreme Court of Appeal* 5th ed (Juta and Co Ltd, 2009) 1-1953 at 208. See also *Jacobus Marthinus Oelofsen N.O v Emily Bhacile Gwebu and Others* [2010]; 2010 (5) SA 241 (GNP) paras 16-20. The court per held that the matter could not be heard without the joinder of the local municipality as a necessary party to the proceedings. This requirement, the court reasoned, arose out of section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereafter 'the PIE Act) read with section 7(1) and (2) of the same Act. Section 7(1) gives the municipality discretion to facilitate mediation and settle an eviction dispute between parties, whereas section 4(7) applies where the unlawful occupier has been resident on the land for more than six months at the time the eviction application is initiated. It also empowers the court to evict if it is 'just and equitable' after considering all relevant circumstances; For Supreme Court of Appeal decisions on joinder of state organs, see: *Occupiers of ERF 101, 102, 104 and 112, Short Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* [2009] ZASCA 80; 2010 (4) BCLR 354 (SCA) paras 12-14 ; *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Mark Lewis Steele*[2010] ZASCA 28; 2010 (9) BCLR 911 (SCA) para 14.

The Court could also conduct inspections *in loco* or on-site visits to informal settlements and inadequate housing sites.³³ These steps could facilitate the Court in developing the substantive content of housing rights owing to a better understanding of the factual and social context of the oral evidence and the record in the context of review applications. The benefits of an inspection *in loco* are illustrated by the order made in the *Grootboom* case in the High Court by Josman AJ. After he conducted an inspection *in loco*, Josman AJ was in a position to make an interim order for the provision of alternative accommodation for Mrs Grootboom and others, pending the final determination of that case. Therefore, the Court could either appoint two judges to conduct the inspections or appoint independent people who are not part of the litigation to conduct the inspections, and collect data on its behalf.

Finally, the Court should also play a proactive role in coming up with creative remedies to remedy non-compliance with the positive duties imposed by the right of access to adequate housing, and these remedies could include more utilisation and development of mandatory or structural interdicts in appropriate cases. Devising creative remedies in this context would be in line with the court's mandate in terms of sections 38 and 172(1)(a) and (b) of the Constitution. Applying its wide remedial powers also presents an opportunity for the Court to nurture and enhance its relationship and dialogue with the other arms of government.³⁴ This approach to remedies may go a long way towards achieving the appropriate balance between the need for appropriate remedies, the dictates of the doctrine of separation of powers and judicial deference, and the need to maintain the appropriate checks and balances between the three arms of government.³⁵

5 2 2 The importance of assessing reasonableness in the context of the purposes and values promoted by the right of access to adequate housing

It is essential that the reasonableness review standard adopted by the Court to adjudicate the positive duties arising out of the right of access to adequate housing is assessed in the light of the

³³ *Grootboom and Others v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C). It is noteworthy though that inspections *in loco* and the joinder of the Minister of Finance or appropriate MEC, Finance might assist the Court to partially resolve some of its institutional competencies to consider budgetary and policy issues, but does not resolve the theoretical challenges posed by judicial deference in the context of socio-economic rights, including the right of access to adequate housing.

³⁴ Pieterse 2004 (ch 2, n 136) at 411-412; McLean 2009 (ch 1, n 9) at 199-203.

³⁵ Pieterse 2004 (ch 2, n 136) at 411-412.

purposes and values protected by this right. The reasons for this are numerous and varied, as doing so has the potential to assist in dealing with the legacy of past policies, laws, and practices. Secondly, it has the potential to contribute to the freeing of the potential of each person.³⁶ Assessing the reasonableness review standard in the context of the values and purposes protected by the right of access to adequate housing has the potential to assist the Court to use the doctrine of separation of powers and judicial deference as tools to maintain and protect the checks and balances between the three arms of government. Assessing the reasonableness review standard in the context of the purposes and values protected by the right of access to adequate housing has the potential to promote the transformative goals of the Constitution, and to deal with the realities of the right of access to adequate housing,³⁷ and might gradually contribute to the improvement of the quality of life of all citizens.³⁸

5.3 Implications for the development of the jurisprudence

The suggested model of separation of powers doctrine, and judicial deference for the development of the right of access to adequate housing has a number of implications for the adjudication of socio-economic rights. The Court might be able to utilise the separation of powers doctrine, and judicial deference as a means of promoting and protecting checks and balances between the three arms of government, as opposed to using them as tools to avoid its judicial duty to give meaning to the right of access to adequate housing.

The suggested model of separation of powers and judicial deference might also encourage the Court to uphold the transformative vision of the Constitution, by developing the positive duties arising out of the right of access to adequate housing, in line with the preamble, sections 7(1), and (2), and 39(1)(a) of the Constitution. This is because the suggested model of the doctrine of separation of powers, and judicial deference might encourage the Court to interrogate what is expected of it in the promotion of quality of life for all, and freeing the potential of each person, and what its role

³⁶ For a detailed discussion of this point, see: chapter 3, 3.3; Fox L “The meaning of home: A chimera concept or a legal challenge?” (2002) 29 *Journal of Law and Society* 580-610; Fox L *Conceptualising Home-Theories, Laws and Policies* (2007).

³⁷ Bilchitz D “Giving Socio-Economic Rights teeth: The minimum core and its importance” (2002) 119 *SALJ* 484-489 at 486-489; Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007); Liebenberg 2010 (ch 1, n 5) at 131-223.

³⁸ See chapter 2, for a full discussion of transformative constitutionalism, and its potential.

should be in the promotion of the values of human dignity, equality, freedom and *ubuntu* in relation to the right of access to adequate housing and other socio-economic rights.

Assessing the reasonableness review standard in the light of the purposes and values protected by the right of access to adequate housing may lead to a re-evaluation of the reasonableness review standard, because the Court might be required to answer some tough, but necessary questions, in particular, whether the people who live in informal settlements and inadequate housing across South Africa enjoy human dignity, equality, freedom, and *ubuntu*.

The Court might further be required to take a fresh look at the remedies ordered in housing rights cases. This will involve the Court asking whether it is not time to retain jurisdiction through supervisory orders in all cases involving the right of access to adequate housing, as a general rule.³⁹ This will allow the Court to sufficiently take into account the nature of the right, urgency of the situation, and the need to protect the residents of informal settlements, and those in inadequate housing. This would also dovetail well with the dialogic nature of the relationship between the three arms of government, affected communities and non-government organisations by encouraging them to jointly seek solutions for those people who reside in informal settlements and inadequate housing.

Finally, the Court might be encouraged to come up with innovative ways of adjudicating the right of access to adequate housing, by looking at the meaning of adequate housing under international law and foreign law, and then gradually adapting those meanings to fit local contexts on a case by case basis.

5 4 Conclusion

In this section, the focus is on making suggestions on the appropriate models of the separation of powers doctrine, and judicial deference to be applied by the Court in the context of the right of access to adequate housing, and how the Court could develop the substantive content of this right. It

³⁹ It is noteworthy though that the Court might not have the necessary human capacity in the form of judges to perform this function. Therefore, the Court could perform this function with the cooperation of the High Courts.

was suggested above that the separation of powers doctrine and judicial deference are not impediments *per se*, but become impediments to the development of the substantive content of the right of access to adequate housing and other socio-economic rights when the Court deploys them in ways that do not advance the transformative vision of the Constitution. In order to overcome this deployment of the doctrine of separation of powers and judicial deference, it was suggested that the Court should maintain the appropriate checks and balances by leaving enough room for the other arms of government to perform their constitutional functions, but intervene where necessary at the interpretive and remedial stages of adjudication to restore human rights, and ensure that these arms of government protect, promote and fulfill their constitutional duties, especially in the context of the right of access to adequate housing, and other socio-economic rights.

Tied to the appropriate models of the separation of powers and judicial doctrine is the development of the substantive content of the right of access to adequate housing. In this context, it was suggested that the Court could gradually develop the substantive content of the right of access to adequate housing by fleshing out its nature and scope whenever it deals with eviction cases. It was further suggested that the Court could reposition the reasonableness review model by locating it in the substantive account of the values and purposes protected and promoted by the right of access to adequate housing, and other socio-economic rights, instead of overly focusing on the reasonableness of government conduct. The Court could also link the reasonableness review model to the development of the substantive content of individual rights and duties so as to ground the compliance-measuring benchmarks established by the reasonableness review model to the nature and scope of the right of access to adequate housing.

It was further suggested that the Court could gradually develop the substantive content of the right of access to adequate housing by developing the practice of joining the Minister of Finance or relevant MEC (finance) where necessary, as a joinder of necessity in all cases involving scarce resource defences. Connected to the joinder of the Minister of Finance or relevant MEC are on-site visits. The Court could develop the practice of conducting on-site visits to informal settlements and inadequate housing sites. Conducting on-site visits might assist the Court to develop a better understanding of the factual and social context of the oral evidence and the record in housing matters before it.

In the context of remedies, it was suggested that the Court needs to utilise its wide discretionary powers in terms of sections 38 and 172(1)(a) and (b) of the Constitution to craft creative remedies. Creative remedies could include more utilisation of the mandatory or structural interdicts and other remedies in appropriate cases to remedy non-compliance with the positive duties imposed by the right of access to adequate housing.

The next section comprises a summary of the findings and a conclusion.

CHAPTER 6: SUMMARY AND CONCLUSION

6.1 Summary

This thesis set out to determine the extent to which the South African Constitutional Court (‘the Court’) has given substantive content to the right of access to adequate housing,¹ including the positive duties imposed by this right.² To this end, the work of various authors, case law (South African, international human rights law and foreign law), and international human rights instruments and emerging norms were examined. In addition, there was an attempt to establish the role of courts in the enforcement of the socio-economic rights entrenched in the Constitution, with the specific reference to the right of access to adequate housing of people in informal settlements and inadequate housing.

In chapter 1, a background to the whole study was provided, and the current state of housing in South Africa in general, and the causes and challenges of this deplorable state of housing, were discussed. The various measures that have been adopted so far in trying to deal with the housing backlog and the deplorable state of housing and the challenges involved, were mentioned, in the context of people in informal settlements and those in inadequate housing.

In chapter 2, the concept of transformative constitutionalism was examined by exploring its history, significance and its particular role in the context of the right of access to adequate housing. In addition, the origins and strong and weak points of the reasonableness review model used by the Court to adjudicate the positive aspects of socio-economic rights, in particular the right of access to adequate housing, were traced.

Furthermore, in chapter 2 of this study, the theoretical foundations of the doctrine of separation of powers and judicial deference were laid down with a view to demonstrate how the doctrine of separation of powers and judicial deference serve important purposes in the adjudication of socio-economic rights and other rights, when deployed appropriately. It was noted that the doctrine of

¹ Section 26(1) of the Constitution as read with subsection (2) of this section.

² The focus is on the way in which the Court has adjudicated this right.

separation of powers and judicial deference serve important purposes of maintaining the necessary checks and balances between the three arms of government, but can also act as impediments to the development and realisation of the substantive content of the right of access to adequate housing, and other socio-economic rights when they are deployed by the Court in ways that undermine the transformative vision of the Constitution.

In chapter 3 there is an investigation of the potential of developing the substantive content of the right of access to adequate housing, using the methodology found in section 39(1)(a), (b) and (c) of the Constitution. To this end, this chapter begins by highlighting the essential characteristics of the history and social context of housing in South Africa, and how this history and social context illuminates the present housing crisis, in particular, the specific conditions of homelessness and inadequate housing in which the majority of people live. I have also elaborated on how the constitutional values of human dignity, equality, freedom, as well as *ubuntu* can illuminate the underlying purposes and values of the right of access to adequate housing.

Furthermore, there is an elaboration of the meaning of housing in international human rights law, including the key components of the concept of adequacy in the housing, developed in international and regional human rights instruments and jurisprudence. In international law housing has been interpreted to mean more than a dwelling. A house must contain basic amenities such as heating, electricity, must be culturally suitable, be of suitable size and take into account the size and make-up of the family, in order to satisfy the requirement of adequacy. I then concluded by arguing that the substantive content of the right to adequate housing as developed in international law has a great potential to assist the South African Constitutional Court to progressively develop the substantive content of the right of access to adequate housing in the context of the positive duties imposed by this right.

In chapter 3, I also highlight selected housing jurisprudence from Colombia, and India to demonstrate how comparative courts have succeeded in being responsive and sensitive to the lived realities of the homeless communities and those in inadequate housing. The Colombian Constitutional Court has been far more willing to order the Colombian State to provide the vulnerable members of the community with essential food, potable water, basic shelter and housing,

appropriate clothing, health care and basic sanitation. The Colombian Constitutional Court has also been more willing to utilise participatory structural interdicts where the relevant government departments are not complying with their constitutional duties.³ Similarly, the Indian Supreme Court has been willing to develop the substantive content of the right to adequate housing, using an expansive interpretation of the right to life. The Indian Supreme Court developed the nature and content of the right to shelter or housing in cases such as *Shantistar Builders* and subsequent cases by interpreting the right to life to include within its contours, the right to food, clothing, decent environment, reasonable accommodation to live in, amongst others. The Court also underscores the importance of adequate shelter or housing by reasoning that suitable accommodation was essential to human beings because it enables them to grow in all aspects of life such as physically, mentally and intellectually.⁴ I then conclude by noting that the sensitivity of the Colombian and Indian courts to context and the purposes and values protected and promoted by the right to housing or shelter can serve as useful and rich reference points to the South African Constitutional Court as it agitates to develop the substantive content of the right of access to adequate housing.

In chapter 4 of the study, arguments advanced in the preceding chapters are developed and analysed by examining the selected housing jurisprudence from the South African Constitutional Court, with a view to determining the extent to which these cases contribute to the search for the substantive content of the right of access to adequate housing. The findings of this case law analysis are that the Court has given significant substantive content to the right of access to adequate housing in the context of its evictions or threatened evictions jurisprudence, section 26(3) of the Constitution. The Court has given significant substantive content to section 26(3) of the Constitution through the development of the requirements of justice and equity in evictions or threatened evictions, as well as the development of creative remedies, such as those involving mediation, meaningful engagement, and alternative accommodation as significant factors in the evaluation of the justice and equity requirement in evictions. This protection and promotion of the substantive content of section 26(3) has been enhanced by the protection of limited positive duties that arise after the court has given orders of mediation, meaningful engagement, and alternative accommodation because the remedies require the State to take positive steps or action in order to comply with the court orders.

³ See ch 3, 3 6.

⁴ See ch 3, 3 6.

In this chapter, there is also an attempt to show that the Court has failed to consistently give an expansive meaning to the right of access to adequate housing, in line with the values and purposes protected by this right in the South African context, international human rights law, and foreign law. The Court has been far more willing to engage with the substantive content of section 26(3) of the Constitution, by developing the procedural protections, and substantive content of this right.

Moreover, there has been an attempt to show how the negative/positive categorisation of socio-economic rights has given rise to dualistic standards of judicial review in socio-economic rights claims, including the right of access to adequate housing. A relatively weak standard of judicial review is applied by the Court when the positive duties arising out of these rights are implicated, and a strong standard of judicial review is applied when the negative duties of these rights are implicated. As a consequence, a less stringent standard of scrutiny is applied when people who lack access to adequate housing are involved, as opposed to situations where people who are deprived of their existing access to housing through evictions or threatened sales in execution against their homes are involved.

Chapter 5 of this study builds on the theoretical foundation laid down in chapter 2, and expands on the arguments advanced in the other chapters on the substantive content of the right of access to adequate housing. In this chapter, there is an attempt to provide alternative approaches that could help the Court to develop the substantive content of the right of access to adequate housing. To this end, I tentatively suggest ways of overcoming the impediments to adjudicating this right by suggesting that the Court maintain the appropriate checks and balances through allowing the other arms of government enough space to perform their constitutional duties, while at the same time being able to intervene at the interpretive and remedial stages of adjudication in appropriate cases, where there is a violation of human rights or a failure to comply with the duties imposed by the right of access to adequate housing or other socio-economic rights.

I also suggest that the Court adopt the practice of joining the Minister of Finance or relevant MEC (Finance) as joinders of necessity where parties have not done so, in order to better understand the resource arguments. In addition, I suggest that the Court should conduct on-site visits at informal settlements and inadequate housing sites, so as to better understand the factual and social context of

the oral evidence and the record, in housing cases before it. Moreover, I suggest that the Court should develop the nature and scope of the positive duties arising out of the right of access to adequate housing whenever it deals with eviction cases. Finally, I highlight the importance of repositioning the reasonableness review model by developing the reasonableness review model in the context of individual rights and duties, and values and purposes promoted and protected by the right of access to adequate housing, so as to develop the substantive content of this right.

6.2 Conclusion

The South African Constitutional Court's housing jurisprudence has come a long way in developing the substantive content of the right of access to adequate in the context of section 26(3) of the Constitution, negative duties of this rights. In particular, the Court has developed various procedural and substantive safeguards in the context of the negative duties imposed by this right, through its eviction and threatened eviction jurisprudence. However, the Court has not developed the substantive content of the right of access to adequate housing, section 26(1) and (2) of the Constitution, positive duties imposed by this right. The Court has failed to develop the nature and scope of the positive duties imposed by this right, through its focus on the compliance with the reasonableness review model.

This thesis also attempts to demonstrate that the Court could develop the substantive content of the right of access to adequate housing in the context of the positive duties imposed by this right, provided that the Court focuses on the transformative vision of the Constitution, and also concentrates on the values and purposes protected and promoted by this right in the South African context, international law and comparative law. Finally, I suggest that the Court could develop the substantive content of this right in the context of its positive duties by cultivating the potential of its early jurisprudence in order to gradually flesh out the nature and scope of this right.

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