1. Introduction

The South African Constitution is one of the few constitutions to incorporate justiciable socioeconomic rights. From the system of apartheid that prevailed in the country depriving millions of their basic rights and democratic participation, the country transitioned to a democracy in the 1990s. Its new constitution, adopted in 1996, recognised not only civil and political rights but also social and economic rights, the latter being crucial to address the inequalities prevalent in the country. The South African Constitutional Court, in exercising its mandate to approve the final constitution, approved the inclusion of socioeconomic rights therein, dismissing objections to their justiciability. The Court has faced socioeconomic rights cases from almost the time of the commencement of the constitution and has adopted what is known as, “reasonableness review”, to assess the government’s measures towards their enforcement, rejecting the CESCR’s minimum core notion, though the Constitutional text adopts language similar to the ICESCR in the context of these rights. This approach, developed and applied in various decisions enables the Court to assess the state’s actions for compliance with the Constitution, at the same time showing deference to the government. This also addresses separation of powers objections to justiciability of these rights. While its approach is criticised at times, for being deferential, it has demonstrated inter alia, that judicial enforcement of socioeconomic rights need not necessarily involve encroachment on functions of other branches or decisions on financial allocation by the judiciary. Although it has certain similarities with other approaches, it presents a separate model for socioeconomic rights enforcement that many have recommended as ideal. In seeking remedies or solutions, the dialogic approach has been adopted which is both democratic and in certain cases (such as meaningful engagement in the context of evictions), enables the participation of those affected in seeking solutions cooperatively rather than in the traditional adversarial manner. It is for these reasons
among others, that the present study makes a comparison of the Indian approach with that in South Africa towards effective realisation of socioeconomic rights.

As in the previous chapter on the Indian context, this chapter discusses the status and justiciability of social and economic rights in the Republic of South Africa. The second section looks into social and economic conditions in South Africa, and considers statistics and indicators on various parameters—health, education, income levels, poverty, and standard of living, besides human development. The third section highlights major social and economic challenges facing South Africa, which like in India, include poverty, as well as issues specific to South Africa such as the HIV/AIDS pandemic, which also in turn adversely impacts poverty and unemployment, despite economic growth. The Constitution of South Africa, as mentioned, is one of the few Constitutions in the world, wherein social and economic rights have been recognised as justiciable rights. However, some qualifications seen in the international human rights regime of progressive realisation and resource availability stand incorporated in some of its social and economic rights provisions. The fourth section considers the Constitution of South Africa and its protection of socioeconomic rights. It looks into the evolution of the Constitution, and the reasons why the protection of social and economic rights was of such importance in that country. Thereafter, the chapter gives an overview of the provisions on social and economic rights. The next section shifts the focus onto legislation; the South African Parliament has enacted for the protection of different social and economic rights, various pieces of legislation, which include the conditions of employment, employment equity, the Water Act, and the National Health Act among others, which define the responsibilities of various authorities, and set out remedies for non-compliance. The government has also put in place a social assistance programme and introduced various other

1 The Constitution has been termed "an instructive modern example of entrenched socio-economic rights". Tara Usher, "Adjudication of Socio-economic Rights: One Size Does Not Fit All", 1(1) UCL Human Rights Review 154, 159 (2008).
programmes towards realisation of socioeconomic rights. While these programmes have seen varied levels of success, some challenges remain.

The judiciary in South Africa, particularly the South African Constitutional Court, as mentioned, has been concerned with the issue of social and economic rights from the stage of the drafting of the Constitution, when it was entrusted the responsibility of certifying the constitution before its adoption. The seventh section in this chapter discusses the role of the judiciary in the protection of social and economic rights. After the adoption of the Constitution, a number of cases involving the enforcement of socioeconomic rights have come up before the courts in the context of which, as mentioned, the reasonableness review approach has been adopted. This approach while praised as a flexible, context-sensitive model for review of social and economic rights claims, has also been criticised on various grounds including not protecting the rights to the full potential. This section further considers the mechanisms adopted in the context of social and economic rights, primarily monitoring through the South African Human Rights Commission (SAHRC). The court has also encouraged participation by the affected parties in identifying remedies and ensuring rights. Finally, the status of implementation of the courts’ decisions is considered. The concluding section summarises the chapter’s main findings.

2. Social and Economic Position

South Africa is classed by the World Bank as an “upper-middle income” country and is the largest economy in Africa, with a per capita GNI of USD 12,870 in 2015 as against 7,520 in 2000. The Gross Domestic Product (GDP) in 2015 was USD 314.6 million. The country recorded a population growth

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rate of 1.1 percent for the period 2010–15, marginally higher at 1.6 for urban areas.\(^5\) The sex ratio in 2013 (males per 100 females) was 94.3,\(^6\) but increased to 1.03\(^7\) in 2015.

Life expectancy at birth in South Africa stands at 57.44 in 2015 compared to 55.83 in 2000, and 62.12 in 1990, while infant mortality was 33.6 in 2015 compared to 54 in 2000.\(^8\) For children under five years of age, the mortality ratio (U5MR per 1000 live births) was 40.5 in 2015,\(^9\) while the maternal mortality ratio was 138 (per 100,000 live births) in the same year.\(^10\) Life expectancy in the country has thus reduced since the 1990s though there has been some improvement between 2000 and 2015 and infant mortality has also reduced, although there was an increase in the period 1990–2000. According to another source, life expectancy at birth for the period 2010–15 for females was 59.1, and for males 54.9, while the infant mortality rate for the same period was 38 per 1000 live births.\(^11\) The “tumble” in life expectancy figures is seen largely to be a function of the HIV/AIDS epidemic in the country.\(^12\) As regards other health indicators, physicians per 1000 population in South Africa in the year 2013 stood at 0.8, while health expenditure in 2014 was 8.8 percent of GDP, though according to World Bank estimates, it was only 4.2 percent.\(^13\) Further, percentage population having access to improved water sources in urban and rural areas, respectively in 2015 stood at 99.6 and 81.4, and to improved sanitation facilities in the same year stood at 69.6 and 60.5 for urban and rural areas.\(^14\) A study by Statistics South Africa found improvement in access to various household services between the years 2001 and 2011 including piped water, sanitation facilities, etc. with the exception of the middle income category where a

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\(^{6}\) Ibid.


\(^{9}\) UNDP, *supra* note 7 at 228.

\(^{10}\) Id. at 215.


\(^{14}\) Department of Economic and Social Affairs, *ibid.*
reverse trend was noted, attributed to delivery of services not keeping pace with income growth in this category.\textsuperscript{15} Further, 5 percent of South Africa's population was undernourished in 2015.\textsuperscript{16} Self-reported hunger has been noted to have declined between 2002 and 2011 from about 30 percent to 13 percent, while as per the Global Hunger Index, South Africa’s score at 11.8 falls into the “moderate” category.\textsuperscript{17} Thus on health, various aspects have shown improvement despite the decline seen in the 1990–2000 period with promising statistics on nutrition and hunger, and improvements in access to basic services such as water and sanitation.

Education figures for the country appear promising in terms of school enrolment and literacy levels, but as discussed in the next section, issues such as skill mismatches with the job sector, and lack of adequately qualified staff may have prevented equal improvements in employment. School enrolment (primary) (% gross) in 2014 was 99.72 while school enrolment (secondary) (% gross) in 2011 and 2012 was 91.05 and 91.95, respectively.\textsuperscript{18} For 2014, another source places the secondary gross school enrolment ratio for females and males respectively, at 103.8 and 85.3.\textsuperscript{19} The literacy rate for the country in the period 2005–15 for persons aged 15 and over stood at 94.3 percent.\textsuperscript{20}

Unemployment rates in the country are high, in fact among the highest in the world. In 2014, unemployment (% of labour force) was at 24.9 percent, while labour force participation of women was 46.1 percent against 59.8 percent for adult men.\textsuperscript{21} For 2015, the Human Development Report

\begin{footnotesize}
\begin{enumerate}
\item See “Gross Enrolment Ratio: Primary”, http://data.worldbank.org/indicator/SE.PRM.ENRR?locations=ZA (last visited 23 May 2017); “Gross Enrolment Ratio: Secondary” http://data.worldbank.org/indicator/SE.SEC.ENRR?locations=ZA (last visited 23 May 2017). As per another source, for the year 2014, the primary gross school enrolment ratio stood at 97.3 and 102.2 for females and males, respectively. Department of Economic and Social Affairs, supra note 11 at 191.
\item UNDP, supra note 7 at 232.
\item Department of Economic and Social Affairs, supra note 11 at 191. Unemployment, underemployment, and non-remunerative employment are linked to the incidence of poverty, and in case of rural poverty, lack of access to employment is identified as the greatest cause. Leon Swartz, “Overview of Poverty Situation and Reduction in South Africa for the Past 10 Years”, 19(Supp) African Population Studies 47, 51, 58 (2004).
\end{enumerate}
\end{footnotesize}
placed unemployment (% of labour force) in South Africa at 25.1 percent, showing a marginal increase.\textsuperscript{22} According to the World Bank, unemployment for males (% of male labour force) between 2013 and 2016 was 23.8, and for females, 28.5 (% of female labour force).\textsuperscript{23}

Poverty as discussed in the previous chapter is closely related to human rights, and particularly, socioeconomic rights deprivations, being both a cause and consequence of this. Poverty thus is an important indicator of the position of socioeconomic rights. In South Africa, as in India, different estimates indicate varied levels of poverty, though internal estimates identify higher levels than some external ones, such as that by the World Bank. A study by Statistics South Africa, which examines absolute poverty between 2006 and 2011, found that in 2006, 57.2 percent of the country’s population was poor which figure declined to 45.5 percent in 2011.\textsuperscript{24} The poverty gap and severity of poverty were found to have decreased over this period, with reduction in female and male poverty but poverty among women remains higher than among men at 47.1 percent as against 43.1 percent.\textsuperscript{25} The population living in extreme poverty was also found by this report to have reduced from 26.6 percent in 2006 to 20.2 percent in 2011.\textsuperscript{26} A 2015 report of Statistics South Africa also found positive results on incidence of poverty in terms of decrease in "no income" and “low income” households, and increase in middle- and upper-income households between 2001 and 2011.\textsuperscript{27} World Bank estimates on the international poverty line, on the other

\textsuperscript{22} UNDP, \emph{supra} note 7 at 240.
\textsuperscript{24} Statistics South Africa, \emph{supra} note 17 at 12.
\textsuperscript{25} \textit{Id}. at 26. Male poverty declined from 54.6 percent to 43.8 percent and female poverty from 59.7 percent to 47.1 percent between the period 2006 to 2011. \textit{Ibid}. Not only that there were marked gender inequalities in development opportunities including access to development resources, an issue which the population policy sought to address. Swartz, \emph{supra} note 21 at 49. Earlier studies also found substantial increase in African and coloured households living below the poverty line in the period 1993-2001, though there was increase in the African middle class besides partial closure of income gaps between average whites and average africans demonstrating overall increase in inequality though decrease in gaps between races. \textit{Id}. at 50. 
\textsuperscript{26} Statistics South Africa, \textit{ibid}.
hand, placed 16.6 percent of the South African population below the USD 1.90 per day mark in 2011 and 34.7 percent at below USD 3.10 per day. Poverty measured in terms of the food poverty line (related to the expenditure required to meet daily dietary needs) stands closer to the World Bank estimates, with 32.7 percent households identified as living below the food poverty line as per 2011 census data.

Internal indices of poverty have also been developed in South Africa, one such being the South African Multidimensional Poverty Index (SAMPI). Calculated by Statistics South Africa, this index considers five components, namely, health (child mortality), education (school attendance and years of schooling), standard of living (lighting, heating, cooking, sanitation, water, dwelling, and assets), and economic activity (employment), adopting a nested weighting approach. This index found 8 percent or 1.2 million households to be multi-dimensionally poor in 2011 with intensity of 42.3 percent.

As discussed, human development too, indicates the status of enjoyment of socioeconomic rights considering the development of persons in terms of health, education, etc., rather than economic growth alone. South Africa is ranked 119 in terms of HDI by the UNDP’s Human Development Report for 2016, and is a “medium human development” country. Satisfaction on education quality, healthcare quality, and standard of living in the country was found in 74, 59, and 42 percent of persons respectively, while 50 percent persons felt they had an ideal job and 42 percent persons felt safe.

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29 Statistics South Africa, supra note 15 at 40.
30 Id. at 44–45.
31 Id. at 46.
32 UNDP, supra note 7 at 266, 271.
33 Id. at 252.
3. Major Social and Economic Challenges

The policy of apartheid pursued in South Africa since 1948, expanded earlier policies of segregation, impacting nearly every aspect of people’s lives including their rights, opportunities, relationships with others and the state, with its effect being felt on the social, economic, and political life of people.34 When the country transitioned to democracy, thus, it was these deprivations that were sought to be addressed. However, as has been noted, despite the transition, the “‘triple challenge’ of unemployment, poverty and inequality is a lingering problem that continues to persist”.35

The economic and social challenges facing South Africa are comparable to those facing India, including poverty, healthcare, and other socioeconomic rights. Poverty and inequality are among the most serious challenges facing South Africa, with an estimated 45 percent of the population (18 million people) (in 2001) living below the poverty line, ten million of whom were in “ultra-poor” households, with poverty in the country being noted to have strong racial, gender, age, and spatial (rural–provincial) dimensions.36 More recent figures from the World Bank place over 30 percent of the population below the USD 3.10 per day mark, while internal estimates still find over 45 percent of the population living in poverty.37 The situation of millions of South Africans is characterised by struggles for survival; exhaustion; humiliation; lost opportunities; and violence and stress

34 Eric Christiansen, “Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court”, 38 Columbia Human Rights Law Review 321 (2007), http://ssrn.com/abstract=999700 (last visited 10 November 2011). One CODESA negotiator and member of the Constitutional Assembly described the struggle as having been not only for the right to vote, or to move but “a struggle for freedom from hunger, poverty, landlessness, and homelessness”. Kader Asmal, 3 Debates of the Constitutional Assembly Rep of South Africa 447–50 (1996) quoted in, id. Christiansen notes further that while the standards of living of whites was nearly at par with people in Norway and Sweden, that of the black South Africans was below residents of Ghana or Kenya. id.


36 Sandra Liebenberg, “The Right to Social Assistance: The Implications of Grootboom for Policy Reform in South Africa”, 17 South African Journal on Human Rights 232, 234 (2001). As Liebenberg further points out, severe poverty also results in malnutrition, physical and mental health problems, and in extreme cases, death, again attesting to the fact that poverty is both a cause and consequence of socioeconomic rights deprivation. id. at 236.

37 See “World Development Indicators: Poverty Rates at International Poverty Lines”, supra note 28; Statistics South Africa, supra note 17 at 12.
associated with insecurity, besides hungry children.\textsuperscript{38} The depth of poverty and inequality in the country is attributed to its history of colonialism and apartheid, the high rate of unemployment also contributing to the incidence of poverty.\textsuperscript{39}

The unemployment rate in 2000 stood at 22.5 percent (25.1 percent in 2015), with employment growth far from keeping pace with the number of entrants in the market, making unemployment one of the country’s major challenges.\textsuperscript{40} In fact, the country is noted to have one of the highest rates of unemployment in the world, significantly higher than other middle-income countries, the country being seen as having “jobless economic growth”.\textsuperscript{41} An OECD report also emphasised this fact noting that while per capita incomes are growing, and there is improvement in health indicators, expansion of public services, drop in crime rates, and favourable demographic indicators, an extremely high proportion of the population is out of work, the case having been so for about three decades.\textsuperscript{42} Moreover, what is not shown by unemployment statistics alone, is significant aspects of the nature of employment in South Africa including the very low wages earned by the working poor; decline in formal sector employment; and growth of “atypical” forms of employment being characterised by low wages, minimal benefits, and low social security.\textsuperscript{43}

South Africa also has one of the highest income inequalities in the world, attributed to large-scale

\textsuperscript{38} Liebenberg, supra note 36 at 235–36. Davis highlighting the socioeconomic challenges facing the country, observes, millions of people continue to live without houses, jobs, education, in which living conditions there is little dignity; and the constitutional goals of dignity, equality, and freedom, can only be achieved, if there is a transformation in the socioeconomic conditions. Dennis M. Davis, "Socioeconomic Rights: Do they Deliver the Goods?" 6 I.CON 687, 706 (2008). Poverty has been noted not only to be about income but about loss of people’s creativity and potential to contribute to society, of choices and opportunities to lead a decent life, of freedom, dignity, and self-respect. Corrigan, supra note 12 at 12. See also Jaftha v. Shoeman, (2005) 2 SA 140 (CC), ¶30, where some implications of poverty in the context of housing and evictions were considered.

\textsuperscript{39} Liebenberg, id. at 236; Swartz, supra note 21 at 51, 58; Corrigan, ibid. (identifying unemployment as one of the “key” causes of poverty).

\textsuperscript{40} Liebenberg, id. at 234; UNDP, supra note 7 at 240; “South Africa: Challenges”, http://www.southafrica.info/business/economy/ econooverview.htm#.U8DMEPmSxQ4 (last visited 12 July 2014). An earlier study noted that unemployment rates were higher for Africans and coloured persons as compared to whites, and where employed these sections are more likely employed in the informal sector or self-employed compared to whites. Swartz, supra note 21 at 49.

\textsuperscript{41} Govindjee, supra note 35 at 60; "The New South African Economy Grows...But is it Enough", supra note 27.


\textsuperscript{43} Liebenberg, supra note 36 at 234–35.
This “persistence of high rates of long-term unemployment and discouraged labour force participation” has the effect of “erod[ing] human capital, [and] thereby raising the structural inactivity rate.”\(^{45}\)

One factor impacting employment rates concerns education. The 2013 OECD report identifies "skill mismatches", that is, skills required by the market not being produced by the education system, as one aspect of the high unemployment rates, besides the fact that in terms of finding jobs and earnings premiums, returns on high school certificates are low.\(^{46}\) There is a shortage of skilled workers reflected in the high premiums for university graduates and a "vast discrepancy" in skills in various groups of persons in the country, attributed to the impact of apartheid.\(^{47}\) Another issue in education is in the context of quality, there being shortage of both learning materials and teachers, support staff, and well–trained principals.\(^{48}\)

The HIV/AIDS pandemic in the country is a factor that has led to further deterioration of the poverty situation in South Africa, in the form of increased health costs, fall in productivity, illness and death of breadwinners, and increase in the number of AIDS orphans.\(^{49}\) Over 18 percent of the adult population suffers from HIV/AIDS as per 2016 UNAIDS figures, and the number of AIDS orphans stands at 1.7 million.\(^{50}\)

Another significant challenge facing the country is lack of access to basic social services such as healthcare, safe drinking water, and education.\(^{51}\) As noted, access to basic social services in the

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\(^{44}\) Id. at 235; Govindjee, supra note 35 at 61 (He writes, "[t]he inability to create large-scale employment has also apparently been a major contributory factor in the rise of inequality").

\(^{45}\) OCED, supra note 42 at 12.

\(^{46}\) Id. at 8.

\(^{47}\) Ibid.; Govindjee, supra note 35 at 61.

\(^{48}\) OCED, ibid; Corrigan, supra note 12 at 18. Moreover, in South Africa costs of books and uniforms have been noted to make education expensive. Corrigan, id. at 19.

\(^{49}\) Liebenberg, supra note 36 at 235. She points out that it is estimated that by 2011, at least half the population would live in households affected by at least one HIV infection. Ibid. Earlier studies had estimated over 900,000 AIDS orphans by 2005 and about 2 million by 2010. Swartz, supra note 21 at 61.


\(^{51}\) Liebenberg, supra note 36 at 235; Sandra Liebenberg, "South Africa’s Evolving Jurisprudence on Socio-economic Rights: An Effective Tool in Challenging Poverty?", 6 Law, Democracy & Development 159, 159 (2002). See also
country has improved in the 2001–11 period, but for instance, among no-income households, only 37.7 percent have access to piped water, 52.9 percent to flush toilets, and 60.5 percent to refuse disposal by local authority at least once a week.\textsuperscript{52} In other words, a large percentage of low-income households still lacks access to these facilities. Although the situation is better for other income groups, access to different services still needs to be provided to between 8–70 percent households in different categories.\textsuperscript{53} Moreover, while over 90 percent of persons have access to improved water supply, there is still reliance on unsafe water sources, besides the country reaching the limits of sustainable water sources.\textsuperscript{54}

Income inequality remains an important issue to be addressed, and while South Africa since the end of Apartheid, is noted to have made considerable progress towards establishing a more equitable society, there is no progress towards income equality.\textsuperscript{55} Its Gini coefficient is among the highest in the world at 0.70, and in fact, appears to be much starker than the global level of 0.62.\textsuperscript{56} Factors responsible for income inequality include the history of discrimination in the country, and labour market income, which contributed to as much as 85 percent income inequality in 2008.\textsuperscript{57} Inequality is also high among households with labour market earnings, as “real earnings” have not increased in the bottom deciles in the post-apartheid period, and have fallen relative to earnings in the top deciles.\textsuperscript{58}

A further socioeconomic challenge is homelessness or lack of access to adequate shelter. As Davis observes, the issue in Grootboom involved one of the most pressing social problems in South

\textsuperscript{52} Statistics South Africa, supra note 15 at 28.
\textsuperscript{53} Ibid.
\textsuperscript{54} Corrigan, supra note 12 at 27.
\textsuperscript{55} OCED, supra note 42 at 23–24.
\textsuperscript{56} Id. at 24. “The Gini coefficient is a measure of statistical dispersion intended to represent the income distribution of a nation’s residents”, and was proposed as a measure of income or wealth inequality. See, “Gini Coefficient”, Wikipedia, available at http://en.wikipedia.org/wiki/Gini_coefficient (last visited 1 June 2015).
\textsuperscript{57} OCED, id. at 25.
\textsuperscript{58} Ibid.
Africa—the illegal occupation of land by homeless people. Moreover, hundreds of thousands of persons live in informal squatter settlements having a “home”, but one that is very unsatisfactory.

In the South African Constitution of 1996, a number of economic and social rights form part of the Bill of Rights (Chapter II) as justiciable rights enforceable by the constitutional courts of the country. While these rights have been incorporated as justiciable rights, the language of some of these provisions limits the obligations of the state, requiring reasonable measures towards progressive realisation of the rights in question besides such measures being taken within available resources. In other words, there is no unqualified obligation to meet existing needs, and larger needs of society may be given priority over individual needs. These limitations are, however, not applicable to all the economic and social rights in the Constitution, although as will be discussed, the interpretation of some of these rights too, has been somewhat restricted. Civil and political rights in the Constitution are worded in more absolute terms, without such restrictions, as in international human rights law.

The Evolution of the South African Constitution
The African National Congress (ANC)’s Freedom Charter, a product of discussions of ordinary people adopted as far back as 1955, which represented guiding principles of the anti-apartheid movement, is seen as the inspiration for most fundamental rights in the 1996 South African

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59 Davis, supra note 38 at 692–93. Swartz, supra note 21 at 60. Again in City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties, [2011] ZACC 33, ¶ 2, the Court found that in 2001, 1.8 million households were living in informal housing while in Johannesburg alone, over 400,000 households were without adequate housing.
60 Swartz, ibid.
Constitution. It called for an end to racial discrimination besides referring to various socioeconomic rights but did not propose a judicial enforcement mechanism. It was only in the late 1980s that the ANC began to accept the idea of a judicially enforceable bill of rights.

One of the first significant contributions dealing with broader considerations of constitutional rights was made by Albie Sachs in a series of papers in the late 1980s, wherein he argued an orderly and fair redistribution of wealth noting that else the poor and powerless, though enfranchised, would continue to be oppressed.

In 1990, the ANC released a “Bill of Rights for a Democratic South Africa: Working Draft for Consultation”, containing judicially enforceable socioeconomic rights, “strikingly similar to the final draft of the 1996 Constitution”, though it still placed the “special responsibility” for ensuring respect for these rights on the Parliament. The early 1990s saw a vigorous debate as to the wisdom of entrenching social rights in the Constitution, which was opposed by both neoliberals (who saw the market as the effective agent for distribution of social capital) and social democrats (who objected to the extent and scope of the power of courts to enforce these rights, as concerns its impact on democracy).

The process of drafting of the Constitution “presented quite a challenge in relation to the country’s pre-existing trauma” due to which both transparency and legitimacy of the resulting document were of “paramount importance.” The formal process commenced in the early 1990s. In 1991, representatives from various political parties gathered at the Convention for a Democratic

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63 Kende, id. at 625. The Freedom Charter, inter alia, spoke of free, compulsory, universal, and equal education for all children, right to decent housing, freedom to bring up one’s family in comfort and security, freedom from hunger, medical care and hospitalisation, and special care for mothers and young children. Christiansen, id.
64 Kende, id. at 626. As Davis notes, in the late 1980s, when a large number of persons were detained without trial, there was also a surprising degree of debate on an entrenched Constitution including a justiciable bill of rights. Davis, supra note 38 at 687.
65 Davis, id. at 687–88.
66 Kende, supra note 62 at 626.
67 Davis, supra note 38 at 688–89.
South Africa (CODESA) for constitutional negotiations, where an initial core conflict revolved around the process of drafting the Constitution. As a solution, a preliminary or interim constitution was proposed to be drafted by CODESA, to be followed by democratic elections, and the setting up of the new Parliament charged with drafting the new Constitution.

On commencement of negotiations for a democratic Constitution, the central importance of the inclusion of social and economic rights was evident, particularly in light of “the appalling history of racism, poverty, and concomitant skewed distribution of wealth along racial lines”, concerns reflected in the ANC’s 1992 draft bill. A document entitled “Ready to Govern”, setting out the ANC’s guidelines for drafting the Constitution, demonstrated a “more mature application” of the values of the Freedom Charter, its more developed and sophisticated policies growing out of years of debate and intense discussions, and indicated the clear intention to include socioeconomic rights provisions. However, although the ANC’s February 1993 revised draft of the Bill of Rights contained judicially enforceable socioeconomic rights, it still took a cautious view of the judicial role.

The National Party opposed the inclusion of these rights, raising the traditional arguments against their justiciability as well as realpolitik arguments on the South African economy (though it is argued that what they “truly feared” was a change in the economic status quo), its policies advancing the doctrine of only negative liberties and no affirmative claims, not even as directive principles (other than primary education).

At the CODESA, “thirty four principles” were agreed upon as the foundation for the Constitution, which included “almost nothing” on economic and social rights, and the interim

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69 Christiansen, supra note 34. There were nineteen groups represented which included the ANC, National Party, Inkatha Freedom Party, South African Communist Party, and Democratic Party, among others.
70 Id.
71 Davis, supra note 38 at 688.
72 Christiansen, supra note 34.
73 Kende, supra note 62 at 626.
74 Christiansen, supra note 34.
constitution of 1994 included only a few socioeconomic rights.\textsuperscript{75} This is the consequence both of the stronger negotiating position of the National Party at this stage, as well as the postponement of the final settlement of several issues to complete the document and the delayed elections.\textsuperscript{76} In 1995, the ANC acknowledged in a document that the Interim Constitution leaned heavily in favour of liberty rather than equality and a balance needed to be achieved focussing on the dignity of individuals, though it was still ambivalent about an active judicial role.\textsuperscript{77}

On the interim Constitution coming into effect on 26 April 1994, the first multiracial elections were held, and the Constitutional Assembly comprised of 400 elected members of the National Assembly and ninety members of the senate, as decided, began its task of drafting the Constitution.\textsuperscript{78} In the drafting of the Constitution, the inclusion of socioeconomic rights as justiciable rights was a key issue of debate, with vigorous campaigning by civil society (including NGOs, church groups, and trade unions) for their inclusion.\textsuperscript{79} The drafting of the final text, in fact, involved an extensive public participation programme which saw the emergence of views supporting and opposing (including by some legal scholars) the inclusion of socioeconomic rights.\textsuperscript{80} In the Constitutional Assembly, negotiating positions changed with the ANC becoming the dominant political force, whose representatives along with those of the Pan African Congress supported inclusion of socioeconomic rights.\textsuperscript{81}

\textsuperscript{75} Kende, supra note 62 at 627; Christiansen, id. Some such rights were basic education, “security, basic nutrition, basic health, and social services” for children, basic nutrition and medical care for prisoners, and the right to freely engage in economic activity and pursue a livelihood. \textit{Ibid}. While limited in number, for Liebenberg, the rights included were “a small but significant core of socio-economic rights”. Sandra Liebenberg, “South Africa: Adjudicating Social Rights under a Transformative Constitution”, in Malcolm Langford (ed.), \textit{Social Rights Jurisprudence: Emerging Trends in International and Comparative Law} 76 (Cambridge University Press, New York, 2008).

\textsuperscript{76} Christiansen, id. It may also be mentioned here that the process of drafting the interim constitution and the thirty-four principles took a period of nearly two years since negotiations commenced. \textit{Id}.

\textsuperscript{77} Kende, supra note 62 at 627.

\textsuperscript{78} Christiansen, supra note 34.

\textsuperscript{79} Liebenberg, supra note 51 at 161; Liebenberg, supra note 75 at 75. These groups argued that the inclusion of these rights as justiciable would both assist poorer sections in the protection and advancement of their interests as well as assist the new government in its reconstruction and development programme. Liebenberg, supra note 51 at 162.

\textsuperscript{80} Trilsch, supra note 68 at 554.

\textsuperscript{81} Christiansen, supra note 34.
The South African Constitution is described as a transformative document, embracing a long-term vision for the transformation of the country's political and economic institutions and power structures. The rights entrenched therein, support the contention that the text should be treated as a social democratic narrative in which it seeks to "heal the divisions of the past and lay the foundation for a democratic and open society." It is based on the values of human dignity, equality, freedom, social justice, and ubuntu, which connotes a worldview characterised by humaneness and the inherent humanity of the individual. The South African Constitution embraces strands of libertarian and egalitarian liberalism, modernism, and three kinds of traditionalism, that is, African communitarianism, religious conventionalism, and Afrikaner nationalism. These developments have influenced constitutional interpretation elsewhere.

**Economic and Social Rights and the South African Constitution**

Sections 26 to 29 of the South African Constitution set out the major economic and social rights guaranteed therein, while section 30 deals with language and culture. Section 26 recognises the

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82 These rights are seen as "a critical part of [the Constitution's] transformative ambition", their inclusion demonstrating the important role envisaged for the judiciary in their enforcement. Katharine G. Young, "A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review", 8 I.CON 385, 389(2010); Liebenberg, supra note 51 at 160. As Young writes, the role of the Constitutional Court is to catalyse change "in keeping with the Constitution's broad aspirations, entrenched rights, and overall commitment to transformation". Young, id. at 412.

83 Davis, supra note 38 at 690. The Constitution represented an alternative to the neoliberal framework within which the then dominant trajectory of globalisation was located. It attempted to move the jurisprudence beyond a Hobbesian conception of rights to one that involved significant claims on state and community resources. Id. at 690–91. Wiles attributes such commitment to socioeconomic rights to the "imminent need" for regime change, experienced in the country with the collapse of apartheid. Ellen Wiles, "Aspirational Principles or Enforceable Rights? The Future for Socio-economic Rights in National Law", 22 American University International Law Review 35, 64 (2006).

84 Govindjee, supra note 35 at 58.


87 Young observes that these rights "establish a legal basis from which to observe the distributive implications of private law" and that "the Constitution radiates outwards to include private relations that may impact on economic and social rights". Katharine Young, "Freedom, Want, and Economic and Social Rights: Framework and Law", 24 Maryland Journal of International Law 182, 204 (2009). As Liebenberg too points out, the Constitution's provisions such as section 8(2) whereby provisions of the Bill of Rights bind a "natural and juristic person" if and to the extent applicable, and section 39(2) which enjoins courts, tribunals, etc. to "promote the spirit, purport and objects of the Bill of Rights" when interpreting legislation and when developing the common or customary law, among others
right to have access to adequate housing; section 27 covers the right to healthcare services, food, water, and social security, and appropriate social assistance for those unable to support themselves and their dependents; section 28 deals with various rights of children including basic nutrition, shelter, basic healthcare services, and social services [Section 28(1)(c)]; and section 29 guarantees the right to education. Section 23 contains provisions on fair labour practices and the rights of trade unions, including the right to engage in collective bargaining. These provisions may be compared with the ICESCR, which also contains provisions on the right to adequate standard of living including adequate food, clothing, and housing [Article 11]; right to social security including social insurance [Article 9]; and the right to the highest attainable standard of physical and mental health [Article 12]. In the provision on health, while the ICESCR mentions the “highest attainable standard of physical and mental health”, the South African Constitution only refers to “health care services” and emergency medical treatment. Moreover, right to clothing specifically mentioned in the ICESCR, has not been included in the South African Constitution. On the contrary, “water” finds express mention in the South African Constitution but not in the ICESCR. Section 23 addressing, inter alia, the rights of trade unions, is comparable with article 8 of the ICESCR.

Liebenberg classifies the socioeconomic rights in the South African Constitution into three categories, one, the unqualified rights, which include the rights of children, and the rights of both children and adults to basic education; two, rights of access to housing, healthcare, water, food, social security, etc. which are subject to restrictions of progressive realisation and resources; and three, rights to protection against eviction without the requisite procedural protections and

“create the possibility” for socioeconomic rights to apply in relations between private parties. Liebenberg, supra note 75 at 78–79.

Dixon points out that section 26 and 27 can be linked to section 10 of the Constitution that recognises inherent human dignity and to have dignity respected and protected (understood as right to a material baseline necessary for life as a human being) as well as to equality provisions, besides the right to life. Rosalind Dixon, Creating Dialogue about Socioeconomic Rights: Strong-form versus Weak-form Judicial Review Revisited, 5 I.CON. 391, 400 (2007).
emergency medical treatment, both phrased as negative rights and which do not specifically impose a duty on anyone.\textsuperscript{89}

Apart from the substantive content of the rights, the provisions on socioeconomic rights in the South African Constitution can be compared to those in the ICESCR because of similar qualifications of “progressive realisation” and “available resources”. For Liebenberg, “progressive realisation” is both a sword and a shield not only imposing an obligation on the state to take “deliberate, concrete, and targeted” steps towards achieving the constitutional goal but also acting as a “brake” on steps that reduce access to socioeconomic rights, and at the same time, allowing latitude for the state in achieving the goals.\textsuperscript{90} The phrase has been interpreted, by the South African Constitutional Court, to mean that the state must assess various hurdles (legal, administrative, and financial and operational) towards lowering these over time.\textsuperscript{91} The state thus has an obligation to roll out a realistic and comprehensive plan, as to when and by what means effect will be given to the rights progressively.\textsuperscript{92} Another point of comparison is the duty imposed by the Constitution on the state in respect of the bill of rights, to “respect, protect, promote, and fulfil” under section 7(2), a typology also adopted by the CESCR\textsuperscript{93} though not part of ICESCR text.

However, despite similarities, the Constitutional provisions on socioeconomic rights also differ in some respects from ICESCR provisions. Some points of distinction are: One, while the Constitution requires the state to take reasonable legislative and other measures for the

\textsuperscript{89} Liebenberg, \textit{supra} note 51 at 163. These categories proposed by Liebenberg are viewed as a "useful starting point" to understand the differences between the various social and economic rights included in the Constitution. Mitra Ebadolahi, "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa", 83 \textit{New York University Law Review} 1565, 1572 (2008).
\textsuperscript{90} Liebenberg, \textit{supra} note 36 at 252.
\textsuperscript{91} \textit{Republic of South Africa v. Irene Grootboom}, (2001) 1 SA 46 (CC), ¶ 45.
\textsuperscript{93} Liebenberg, \textit{supra} note 51 at 163. For Liebenberg, the employment of this typology with regard to the Bill of Rights "establishes" that the rights therein (both civil and political, and economic, social and cultural) impose both negative and positive duties on the state countering traditional arguments as to their compartmentalisation. Liebenberg, \textit{supra} note 75 at 77–78. The South African standards with regard to the respect–protect–promote–fulfil typology are not, however, the same as under the CESCR: "respect" for instance, prohibiting not only direct or indirect interference with enjoyment of socioeconomic rights, but also preventing or impairing access to these rights. Ebadolahi, \textit{supra} note 89 at 1575.
enforcement of these rights, the ICESCR requires the taking of all appropriate measures including in particular, legislative measures.\textsuperscript{94} However, as discussed in Chapter III, the influence as far as the expression “reasonable” is concerned has extended the other way with the optional protocol to the ICESCR adopting this standard.\textsuperscript{95} Two, while the Constitution uses the expression “available resources” as a limitation, the ICESCR uses “maximum” available resources, which as mentioned incorporates both ideal and practical concerns.\textsuperscript{96} Also, while the Constitution contains the limitation of progressive realisation only with regard to some rights, it applies to all rights under the ICESCR.\textsuperscript{97} Another difference lies in the socioeconomic rights in the ICESCR being phrased in terms of individuals having rights “to” housing, healthcare, food, water, and social security, while the South African Constitution speaks of rights of “access to”, which have been interpreted by the Constitutional Court to be wider than merely rights “to”.\textsuperscript{98}

The ICESCR was expected to influence interpretation, based on its impact on the phraseology of the Constitution, and the duty imposed on courts thereunder to interpret rights in light of international law (although the ICESCR at that stage had not been ratified by South Africa),\textsuperscript{99} but as will be discussed further, while international law has been taken into account, it is not so in all its aspects, the minimum core notion not having been accepted by the Constitutional Court.

\textsuperscript{96} Coomans, supra note 94 at 170–71; Liebenberg, supra note 51 at 163.
\textsuperscript{97} Coomans, id. at 171; Liebenberg, ibid.
\textsuperscript{98} This feature (“access to”) also distinguishes it from other constitutions (such as the Hungarian Constitution) as does the South African Constitution’s incorporation of only limited socioeconomic rights. Paul Nolette, “Lessons Learned from the South African Constitutional Court: Towards a Third Way of Judicial Enforcement of Socioeconomic Rights”, 12 Michigan State Journal of International Law 91, 107 (2003).
\textsuperscript{99} Coomans, supra note 94 at 171. The ICESCR was ratified by South Africa only in 2015 although it had signed it in 1994.
The socioeconomic rights framework in the Constitution is formulated in abstract terms not clarifying their content or standards for reasonableness, but the qualifications and language employed would both limit the courts powers and permit the legislature more latitude to work without the courts’ interference.\footnote{Nolette, supra note 98 at 105–06; Trilsch, supra note 68 at 557.}

5. Legislation for the Protection of Socioeconomic Rights
As in India, various pieces of legislation have been enacted in South Africa, giving effect to the economic and social rights enumerated in the Constitution. As in Chapter IV, legislation on work and workers’ rights, standard of living, social security and social assistance, and health, will be discussed. The overview in this case also, is not exhaustive but seeks to cover the types of legislation enacted and remedies provided thereunder.

**Right to Work and Workers’ Rights**
The Basic Conditions of Employment Act was enacted in 1997 “to give effect to the right to fair labour practices referred to in section 23(1) of the Constitution”.\footnote{Preamble, Basic Conditions of Employment Act, 1997 (No. 75 of 1997).} Section 23 of the South African Constitution recognises a number of workers’ rights and rights related to trade unions and employers’ organisations.\footnote{See respectively, sections 23(1) (fair labour practices), 23(2) (trade unions), and 23(3) (participation in activities of employers’ organisations), Constitution of the Republic of South Africa, 1995.} These rights are reflective of the rights of workers set out under the ICESCR, particularly article 8, though the South African Constitution does not specifically enumerate rights related to working conditions. In contrast, the Indian Constitution speaks of just and humane conditions of work, maternity benefits, etc. but does not specifically mention rights concerning trade unions though this is recognised and set out under legislation.

The Basic Conditions of Employment Act sets out provisions on what is referred to as “just and favourable conditions of work” in the ICESCR. The major provisions of this Act include regulation of working time, leave, particulars of employment and remuneration, termination of
employment, and prohibition of employment of child labour.\textsuperscript{103} The Act prescribes limits of 45 hours a week and nine hours a day, where the employee works for five or less days a week, and eight hours a day if more than five days a week, as well as for overtime at a maximum of 10 hours a week and requiring an agreement to that effect.\textsuperscript{104} Further, the Act requires employers to provide employees meal intervals, as well as daily and weekly rest periods and also provides for annual leave, sick leave, maternity leave, and family responsibility leave, (the last category covering circumstances such as the birth or illness of a child, or deaths in the family).\textsuperscript{105} Schedule One to the Act contemplates progressive reduction of the maximum number of working hours to 40 hours a week and eight hours a day, through collective bargaining or sectoral determinations, having regard to the impact of reduced working hours on not only employment opportunities, creation, and economic efficiency, but also the health, safety, and welfare of employees.\textsuperscript{106}

The Act also provides for alteration, replacement, exclusion, or variations in basic conditions of employment so long as these are consistent with the Act and do not reduce the protections and benefits conferred. This may be through collective agreements concluded in a bargaining council; or by the Minister,\textsuperscript{107} and such determinations are binding, until amended, superseded, cancelled, or suspended.\textsuperscript{108}

Employers are required to maintain proper records as to employees, and to supply to employees, in writing, the various particulars of employment, besides displaying a statement of the rights of employees in the prescribed form and languages spoken at the workplace.\textsuperscript{109} The Act also

\textsuperscript{103} Chapter Two (regulation of work time), Three (leave), Four (Particulars of Employment and Remuneration), Five (Termination of employment), and Six (Prohibition of employment of children and forced labour), supra note 101.
\textsuperscript{104} Sections 9 and 10, id. The Mines Act, 1952 in India on the other hand contemplates a limitation of 10 hours per day including overtime under section 35.
\textsuperscript{105} Sections 14 (Meal intervals), and 15 (Daily and weekly rest period), 20 (Annual leave), 21 (Pay for annual leave), 22 (sick leave), 25 (maternity leave), 27 (family responsibility leave), Basic Conditions of Employment Act, id.
\textsuperscript{106} Clause 1, Schedule One, Basic Conditions of Employment Act, 1997.
\textsuperscript{107} Sections 49 (Variation by Agreement), 50 (Variation by Minister), 51 (Sectoral Determination), 52 (Investigation), id.
\textsuperscript{108} Section 56 (1), id.
\textsuperscript{109} Sections 29 (Written Particulars of Employment), 30 (Informing Employees of their Rights), 31 (Keeping of Records), id.
contains detailed provisions on the payment of remuneration covering manner, type, and time of payment, information related to remuneration, deductions, and contributions.\textsuperscript{110}

Provisions are also made to extend protection on termination of employment. Employment under a contract, may be terminated only on notice being given as prescribed or by payment in lieu of notice, with certain payments and a certificate of service to be provided on termination.\textsuperscript{111}

Employment of children under fifteen years of age or under the minimum school leaving age, is prohibited, with the Minister being empowered to make regulations, inter alia, to prohibit or impose conditions on the employment of persons over fifteen years of age or no longer subject to compulsory schooling.\textsuperscript{112} The Act also prohibits forced labour.\textsuperscript{113} Assisting an employer in employing a child in contravention of the Act or contravention of the prohibition on forced labour for one's own benefit or the benefit of another have been declared to be offences, punishable with imprisonment for a maximum term of three years.\textsuperscript{114}

The Act provides for the establishment of the Employment Conditions Commission to advise the Minister, inter alia, on sectoral determinations, matters concerning basic conditions of employment, and other matters under the Act.\textsuperscript{115} Compliance orders may be issued by labour inspectors (entrusted with various functions under the Act), where they have reasonable grounds to believe that an employer has not complied with a provision of the Act, objections to which may be made through representations filed with the Director-General, who may then confirm, modify, or cancel the order or any part thereof.\textsuperscript{116} Non-compliance with orders of the Director-General can lead the Director-General to apply for the same to be made an order of the labour court in terms of

\textsuperscript{110} Sections 32 (Payment of remuneration), 33 (Information about remuneration), 34 (Deductions and other acts concerning remuneration), 34A (Payment of contributions to benefit funds), and 35 (Calculation of remuneration and wages), \textit{id.}

\textsuperscript{111} Sections 37 (Notice of Termination of Employment), 38 (Payment Instead of Notice), 40 (Payments on termination), and 41 (Severance pay), 42 (Certificate of service), \textit{id.}

\textsuperscript{112} Sections 43 (Prohibition of employment of children), 44 (Employment of children of fifteen years or older), and 45 (medical examinations), \textit{id.}

\textsuperscript{113} Section 48, Basic Conditions of Employment Act, 1997. This provision may be compared with article 23 of the Indian Constitution which also prohibits forced labour.

\textsuperscript{114} Sections 46 (Prohibitions), and 48(3) (contravention of sections 48 (1) or (2)), and 93(2) (Penalties), \textit{id.}

\textsuperscript{115} Section 59, \textit{id.}

\textsuperscript{116} Section 69 (1) (Compliance order), and Section 71(1) and (3) (Objections to compliance order), \textit{id.}
section 73. The Labour Court has jurisdiction over all matters under the Act except certain specified offences, as well as over appeals against orders of the Director-General. Employees have the right to make complaints on failure or refusal by employers to comply with the Act, besides to refuse to agree to any term or condition of employment contrary to the Act or sectoral determination, and inspect records maintained in accordance with the Act among others. Offences committed under the Act are punishable by a magistrate's court by penalties including imprisonment and fine.

Another piece of legislation in this regard, is the Employment Equity Act, 1998, which seeks to ensure “the promotion of equal opportunity and fair treatment in employment, and to implement affirmative action to redress the disadvantages in employment faced by designated groups”. Section 5 requires employers to take steps to promote equal opportunity in the place of work by eliminating unfair discrimination in any employment policy or practice while section 6 prohibits unfair discrimination in employment policies or practices on numerous grounds (for instance, race, gender, marital status, etc.) and recognises harassment as a form of unfair discrimination. Designated employers are required to “implement affirmative action measures” for designated groups, so as to achieve employment equity. Such measures seek to ensure that “suitably qualified persons from all designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer”, and include measures to remove employment barriers such as unfair discrimination, measures designed to further diversity in the workplace, and reasonable accommodation for people from designated groups to enjoy equal opportunities and equitable representation in the workplace.

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117 Section 77 (1) (Jurisdiction of labour court) and Section 72(1) (Appeals from order of director general), id.
118 Section 78 (a), (d), and (e), id.
119 Section 93, id.
120 Section 2, Employment Equity Act, 1998.
121 Section 13(1), id. Designated employer includes a municipality, any organ of the state, person employing fifty or more persons, and a person employing less than fifty persons if certain conditions as to turnover are met. [Section 1].
122 Section 15(1), 15(2) (a), (b), and (c), id.
Designated employers are required to prepare employment equity plans to achieve “reasonable progress towards employment equity” in their respective workforce. Further duties imposed on designated employers relate to communicating provisions of the Act to employees as prescribed; making available copies of the employment equity plan to employees for consultation; maintenance of records; and making an annual report as prescribed to the Employment Conditions Commission.

The Act establishes the Commission for Employment Equity, to advise the Minister on codes of good practice, regulations, and policy besides other functions. Employees or trade union representatives may bring alleged contraventions of the Act to the notice of specified persons including a labour inspector, the Director General, and the Commission. Failure by employers to comply with the Act may result in the issuance by the labour inspector of a compliance order, non-compliance with which may result in the Director-General applying to the labour court for a compliance order.

Section 43 empowers the Director-General to conduct a review to determine whether or not an employer is complying with the Act, which may result in approval of an employer’s employment equity plan or recommendations by the Director-General, specifying inter alia, the steps to be taken as to the plan or its implementation. Failure to comply with any request or recommendation of the Director-General may lead to an order being sought from the labour court or the imposition of a fine. Contravention of the Act may lead to imposition of fines depending on the status of previous contraventions by the said employer and time period within

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123 Section 20(1), id. Such plans are to be prepared for periods between one and five years. Section 20(2)(e), id.
124 See sections 25(2), 25 (3) (Duty to inform), 26 (Duty to keep records), and 21(Report), id. The annual report includes a statement as to the remuneration and benefits received in each occupational level and where disproportionate income differentials or unfair discrimination are reflected therein, the designated employer is required to take steps to progressively reduce such differentials, subject to the Minister’s guidance. Section 27 (1), (2), id
125 Sections 27 (Establishment of Commission on Employment Equity), 28 (Composition of Commission of Employment Equity), and 29 (Functions of Commission for Employment Equity), id.
126 Section 34 (Monitoring by employees and trade union representatives), id.
127 Section 37 (1) and (6), id.
128 Section 44, id.
129 Section 45 (1), id.
which they occur; also compensation or damages may be directed to be paid by the employer to the employee by the labour court in case of unfair discrimination.\textsuperscript{130}

Other legislation in this regard include the Labour Relations Act, 1995 and Mine Health and Safety Act, 1996. The former contains numerous provisions regarding inter alia, forms of association [Chapter II], collective bargaining [Chapter III], strikes and lock-outs [Chapter IV], trade unions [Chapter VI], unfair dismissal [Chapter VIII], etc., and provides for dispute resolution inter alia, through conciliation, mediation, and arbitration, besides the Labour Court [Chapter VII]. The Mine Health and Safety Act contains various provisions towards promoting health and safety in mines including maintenance of healthy and safe mine environment [Section 5], adequate supply of health and safety equipment [Section 6], records of hazardous work and medical surveillance [Sections 14 and 15] among others, besides establishing an inspectorate of mine health and safety [Chapter 5] and prescribing imprisonment and fines for offences [section 92].

These enactments thus lay down a comprehensive framework enabling the effective exercise of the right to work. Duties are essentially imposed on the employer to ensure the rights of workers which can be said to give effect to the state's duty to protect, though authorities under the Act also have various functions including enforcing compliance, and provision of adequate remedies.

\textbf{Social Assistance}

The Social Assistance Act, 2004 seeks to render social assistance to people and set out the mechanism for the same. It envisages the provision of seven grants, respectively, for child support, care dependency, foster children, disability, older persons, war veterans, as well as a grant in aid.\textsuperscript{131} Eligibility for various grants is prescribed [Sections 5–12], and include residence and citizenship,

\textsuperscript{130} Schedule One, and Section 50, \textit{id}. Fines may range from ranging from R 1,500,000 to R 2,700,000.

\textsuperscript{131} Section 4, Social Assistance Act, 2004. The grant on care dependency is available for persons who are primary care givers, parents, or foster parents of a child who requires and receives permanent care or support services due to his or her physical or mental disability. Section 7(a), \textit{id}.
besides other specified conditions, and may additionally include other criteria prescribed by the Minister such as on income, age limits, forms and procedures, etc. The provision of social relief of distress to persons who qualify for such relief, is also contemplated.\textsuperscript{132} Applicants may prefer appeals in respect of any matter regulated by the Act within 90 days of gaining knowledge of the decision, such appeal being considered by the Minister or independent tribunal appointed by the Minister.\textsuperscript{133} Hindering the Director-General or employee of the agency or department in the performance of functions under the Act; refusal to comply with lawfully set requests or requirements of the agency or inspectorate; deliberate furnishing of false or misleading information, among others, are also offences, with penalties extending to imprisonment for up to fifteen years, fines, or both.\textsuperscript{134} The Act establishes an independent Inspectorate of Social Assistance to conduct investigations towards maintaining the integrity of the social assistance system, conducting audits, investigating frauds, and establishing a complaints mechanism, among other functions.\textsuperscript{135}

The Compensation for Occupational Injuries and Diseases Act, 1993, amended in 1997, provides compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of employment or death due to such injuries or diseases.\textsuperscript{136} The Act recognises various rights with regard to compensation for occupational injuries sustained by employees [Chapter IV] and occupational diseases [Chapter VII], besides medical aid [Chapter IX] and sets out the procedure for claims for compensation [Chapter V], its determination and calculation [Chapter VI].

The Unemployment Insurance Act, 2001 establishes a contributory Unemployment Insurance Fund for the benefit of those who are unemployed, applicable to all employers and employees except certain specified cases, and formed inter alia, of contributions by employers and

\textsuperscript{132} Section 13, \textit{id.}
\textsuperscript{133} Section 18, \textit{id.}
\textsuperscript{134} Sections 29 and 30, \textit{id.}
\textsuperscript{135} See sections 24, 25, 27, \textit{id.}
\textsuperscript{136} Preamble, the Compensation for Occupational Injuries and Diseases Act, 1993.
employees. It provides for various benefits such as unemployment benefit, illness benefit, maternity benefit, dependant's benefit, etc. providing for the manner of application, etc. [Chapter III], to be determined by the claims officer. In case applications in respect of any of these benefits are found not complying with the Act, the claims officer is required to inform the applicant of the same in writing with reasons for why it is defective (for instance, section 17(5) with respect to unemployment benefits, and 24(5) with respect to maternity benefits). A labour inspector may issue a compliance order where the employer has not complied with specified provisions of the Act [Section 39], to which objections may be filed by the employer, or the dispute may be referred to the Director General [Section 40].

Another piece of legislation related to social assistance is the Special Pensions Act, 1996 which seeks to provide for the payment of “special pensions” to persons who “made sacrifices or served the public interest in the cause of establishing a democratic constitutional order.” Surviving spouses or surviving dependants of a person so entitled are entitled under the Act to a survival lump sum benefit. Applications for benefits under the Act are considered by the Board, and an appeal against the determinations of the Board lies to a Review Board. Offences under the Act relate to obstruction or prevention of the performance of any activity contemplated by the Act, failure to comply with obligations imposed in terms of the Act, and the intentional submission of false and misleading information punishable by fine or in certain cases with the same punishment as imposable in cases of fraud. The Act does not provide any separate remedy for the non-receipt of the amount payable under the Act, although the provision related to failure to comply with obligations in terms of the Act would, perhaps, cover such cases.

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137 Sections 2 (Purpose of this Act), 3 (Application of this Act), 4 (Establishment of Unemployment Insurance Fund), the Unemployment Insurance Act, 2001.
138 Preamble, the Special Pensions Act, 1996.
139 Sections 2 (Right to a survivor’s benefit) and 3 (Payment to a survivor on death of a pensioner), id.
140 Sections 7 (Determination by Board) and 8 (Right of appeal against Board’s decision), id. The Board is established under section 15 of the Act and the Review Board under section 28.
141 Section 30, id.
These pieces of legislation both impose obligations on employers towards protection of employees' rights in certain circumstances as well as impose positive obligations on the state such as in case of social assistance or special pensions, besides also providing a mechanism for dispute redressal, and thus can be seen as giving effect to the obligations to protect and fulfil.

**Standard of Living**

Various pieces of legislation reflect the provisions on basic necessities in the South African Constitution. One instance is the Housing Act, 1997, which seeks to give effect to section 26 of the Constitution, and specifically takes note of housing as fulfilling a basic human need, viewing housing as a product and process, necessary to the socioeconomic well-being of the nation.\(^{142}\) It aims at providing for “the facilitation of a sustainable housing development process”, in this regard laying down general principles, and defining the functions of governments at various levels (national, provincial, and local).\(^{143}\) The general principles to be followed in matters of housing development include: prioritising the needs of the poor; meaningful consultation with individuals and communities affected by housing development; ensuring that housing development provides, inter alia, as wide a choice of housing and tenure options as reasonably possible, is economically, fiscally, socially, and financially affordable and sustainable, and is administered in a transparent, accountable, and equitable manner; encouraging and supporting individuals and communities in their efforts to fulfil their housing needs; taking due cognisance of the impact of housing development on the environment, and not inhibiting housing development in rural or urban areas.\(^{144}\) These include some of the elements considered by courts in evaluating reasonableness and procedural protections such as the needs of vulnerable sections and meaningful consultation. These principles are to be applied by all three (national, provincial, and local) spheres of

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\(^{142}\) See, Preamble, Housing Act, 1997.  
\(^{143}\) *Ibid.*  
\(^{144}\) Sections 2 (1) (a); (b); (c) (i), (ii), (iv); (d); (f); (g); *id.*
government, with the Minister being empowered to prescribe additional principles or principles already stated in greater detail, if consistent with the Act.\textsuperscript{145}

Functions of the national, local, and provincial governments in respect of housing include: determination of national or provincial policy, as the case may be, in respect of housing development,\textsuperscript{146} setting out broad national housing delivery goals and facilitating the setting of provincial and local (where appropriate) housing delivery goals,\textsuperscript{147} and promoting the adoption of provincial legislation for effective housing delivery,\textsuperscript{148} besides monitoring and facilitating supporting efforts of other levels of government in this regard, and various other functions.\textsuperscript{149}

Further, local governments are enjoined upon to take all reasonable steps to ensure access to adequate housing on a progressive basis; provision of basic services (water, sanitation, electricity, storm-water drainage, and transportation) in an economically efficient manner; besides setting out housing delivery goals, and other specified functions.\textsuperscript{150} Municipalities may participate in the national housing programme, inter, alia, by promoting housing development projects by developers.\textsuperscript{151} At the national level, the Minister is required to publish the National Housing Code, containing, the national housing policy and administrative and procedural guidelines on the effective implementation and application of the policy.\textsuperscript{152} Annual reports on activities under the Act are to be submitted to Parliament.\textsuperscript{153}

The provisions of this Act are concerned with the responsibilities of the government towards the provision of adequate housing and the principles on which this is to be provided. Besides affirming the constitutional right under section 26, this Act does not as such provide for the issue of housing from the perspective of rights. In addition, the general principles require in the

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\begin{enumerate}
\item Section 2(1) and 2(2), \textit{id}.\textsuperscript{145}
\item Sections 3(2)(a), and 7(2)(a), \textit{id}.\textsuperscript{146}
\item Section 3(2)(b), \textit{id}.\textsuperscript{147}
\item Section 7(2)(b), \textit{id}.\textsuperscript{148}
\item See, sections 3 (2) (c), (d), (e), (f); 7 (c), (d), (e), (f), \textit{id}.\textsuperscript{149}
\item Sections 9 (1) (a) (i), (ii), (iii), 9 (1) (b), \textit{id}.\textsuperscript{150}
\item Sections 9 (2) (a) (i), (iii), (iv), \textit{id}.\textsuperscript{151}
\item Section 4, \textit{id}.\textsuperscript{152}
\item Section 19 (2), \textit{id}.\textsuperscript{153}
\end{enumerate}
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administration of matters relating to housing development, respecting, protecting, promoting, and fulfilling the rights contained in the bill of rights by all levels of the government, reflecting section 7 of the Constitution.

In the context of municipalities accredited to administer housing schemes, review of performance is contemplated, and failure to perform adequately as against the accreditation criteria, may lead to intervention and necessary steps to ensure adequate performance.\textsuperscript{154} In addition, the Minister is empowered to monitor the performance of the national government, and with the Member of Executive Council, of the provincial and state governments, against housing delivery and budget goals.\textsuperscript{155} No other remedial or penalty provision is laid down by the Act.

Besides the National Housing Act, other statutes concerned with housing include the Rental Housing Act. This Act provides a mechanism for speedy resolution of disputes between landlord and tenant, besides balancing the rights of both and protecting them against unfair exploitation.\textsuperscript{156} The Act, comparable with rent control legislation in India, permits the termination of leases by landlords on specified grounds, so long as the same does not constitute an unfair practice.\textsuperscript{157} Besides this, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 decriminalises squatting (in contrast with the apartheid law, the Prevention of Illegal Squatting Act\textsuperscript{158}), and provides certain requirements as to the eviction process, so as to ensure treatment of the persons concerned with dignity, requiring the court to consider whether it will be just and equitable to grant eviction, whether this is sought by a private party or the state, with section 6 setting out some but not all, of the factors to be considered in this regard.\textsuperscript{159}

Another legislation relating to a basic need is the National Water Act, 1998. This seeks to ensure the protection, use, conservation, management, and control of the nation’s water resources.
towards “meeting the basic human needs of present and future generations”; “promoting equitable access to water”, “redressing the results of past racial and gender discrimination”; “promoting the efficient, sustainable and beneficial use of water in public interest”; and “promoting social and economic development”, among other objectives. While this legislation does not specifically speak of a "right" to water, it recognises the entitlement of people to use water for “purposes such as reasonable domestic use, domestic gardening, animal watering, firefighting and recreational use”; to continue existing lawful use of water, and to use water in accordance with a licence or general authorisation under the provisions of the Act.

The National Water Act lays down comprehensive provisions on various aspects of water use, conservation, protection, and water resource management, including on water management strategies [Chapter 2], classification and protection of water resources including prevention of pollution and emergency measures [Chapter 3], dam safety [Chapter 12], establishing catchment management agencies [Chapter 7], water user associations [Chapter 8], advisory committees [Chapter 9], and government waterworks [Chapter 11]. The financial aspect of water use charges and their recovery and financial assistance for the purposes of the Act, is also provided for in some detail [Chapter 5].

In respect of disputes, a national water tribunal is established in terms of section 146, empowered to exercise an appellate function against various specified orders and directives, while appeals against the tribunal’s decisions, questions of law (including in determinations of liability for compensation) lie to the High Court. A further dispute resolution mechanism provided for is mediation, which can be resorted to at the direction of the Minister in case of “any dispute between any persons relating to any matter contemplated in this Act”, either at the request of the person involved or at the minister’s initiative.

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161 Section 4, and Schedule 1, id. Schedule 1 of the National Water Act sets out the permissible uses of water.
162 Sections 148 (Appeals to Water Tribunal) and 149 (Appeals from decisions of Water Tribunal), id.
163 Section 150 (1), id.
Further, the Act provides for the monitoring of national water resources through the establishment of monitoring systems by the minister.\textsuperscript{164}

Utilising water otherwise than as permitted under the Act, as well as failure to provide documents or information or to comply with orders or conditions specified by the Act, are among various offences punishable with imprisonment and/or fine with liability to more stringent punishment for subsequent offences.\textsuperscript{165} In such proceedings, the Court is also empowered by section 152 on certain conditions being met to enquire into harm, loss, or damage caused as a result of acts or omissions constituting an offence under the Act and to inter alia, award damages and order remedial measures.\textsuperscript{166} Further, on application of the minister or concerned water management institution, the court may issue any interdict or other order against a person contravening the provisions of the Act including, inter alia, remedying the effects of the contravention.\textsuperscript{167}

\textit{Health}

The National Health Act of 2003 is another piece of legislation seeking to enforce a socioeconomic right recognising in its preamble, inter alia, “the socio-economic injustices, imbalances and inequities of health services of the past”, and enacted in light of various constitutional provisions, including section 27(2), which recognises the responsibility of the state to take “reasonable legislative and other measures within available resources” to achieve the progressive realisation of the right to access to healthcare services and section 27(3), concerned with emergency medical aid. The Act seeks among various objects to establish a national health system encompassing both public and private health service providers to provide the “best possible health services that available resources can afford”, as well as lays down the rights and duties of health service providers.

\textsuperscript{164} Sections 137(1) (Establishment of national monitoring systems), \textit{id.}

\textsuperscript{165} Section 151 (1) and (2), \textit{id.}

\textsuperscript{166} Section 153, \textit{id.}

\textsuperscript{167} Section 155, \textit{id.}
providers, establishments, and workers as well as users.\textsuperscript{168} The Act further seeks to respect, protect, and fulfil the constitutional rights of access: to healthcare services, to an environment not harmful to health or well-being, of children to basic nutrition and healthcare services, and of vulnerable groups.\textsuperscript{169} thus incorporating constitutional and CESCR standards.

Section 3 sets out the “responsibility for health” under which the Minister, “within the limits of available resources” is to “endeavour to protect, promote, improve and maintain the health of the population”; determine the necessary policies and measures; “ensure the provision of essential health services” including at least primary health services; and to “equitably prioritise the health services that the state can provide”, besides promoting the inclusion of health services in the country’s socioeconomic development plan.\textsuperscript{170} This section further imposes a duty on the national and provincial departments as well as the municipality to establish health care services as may be required by the Act and on public sector health establishments and service providers to equitably provide health services within available resources.\textsuperscript{171}

Further, Chapter 2 of the Act details the specific rights and duties of users and providers of healthcare services. This includes the duty of a healthcare provider, worker, or establishment to not refuse emergency treatment [Section 5]; providing users full knowledge of health status, available diagnostics, and treatment options with their benefits, risks, costs and consequences, and the user’s right to refuse such treatment with its implications and consequences [Section 6]; informed consent of users [Section 7] and requirements where a user is admitted to a health establishment without consent [Section 9]; right to participate in decisions affecting one’s health [Section 8]; and confidentiality among others [Section 14].

Users of health services can file complaints as to the manner of their treatment in a health establishment and have them investigated in accordance with the procedure to be established by

\textsuperscript{168} See sections 2 (a) and (b), National Health Act, 2003.
\textsuperscript{169} See section 2 (c), id.
\textsuperscript{170} Section 3 (1), id.
\textsuperscript{171} Section 3 (2), id.
specified authorities, which must be visibly displayed at all health establishments. In the case of private establishments, complaints lie to the head of the establishment. These provisions may be seen as providing a remedy for situations of inadequate fulfilment of the right. The Act does not, however, specify the consequences of a finding of improper or inadequate treatment of the user by the health establishment.

Members of the public and other persons may file complaints in respect of statutory health professional councils, in regard to which, the Forum of Statutory Professional Health Councils is required by section 50(4) to act as ombudsperson. Section 78 of the Act requires the Director-General to establish an “Office of Standards Compliance” in the National Department including a person to act as ombudsperson with respect to complaints in terms of the Act. Complaints, allegations, or suspicions as to the observation of prescribed health standards are to be investigated by a health officer or person designated as per section 80(3), and findings reported to the Director General.

Users also have to perform certain duties including adherence to the rules of the establishment, provision of accurate information to and co-operating with health service providers, and treating health care service providers with dignity and respect, among others. Similarly, the rights of healthcare providers are also recognised, which include the right not to be unfairly discriminated against on ground of health status, minimisation of disease transmission and injury to healthcare providers, and right of refusal to treat physically or verbally abusive persons.

Other provisions of the Act establish and define the functions of health departments and systems at the national, provincial, and district levels and also deal with health establishments, human resource planning and academic health complexes, health research and information, and

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172 Section 18, 18(3)(c), id. Section 18(3)(a) also requires this procedure to be communicated to users regularly.
173 Section 18 (3) (b), id.
174 Section 78 (2) (m), id.
175 Section 19, id.
176 Section 20, id.
health officers and compliance procedures. \(^{177}\) Chapter 8 of the Act is devoted to the “Control of Use of Blood, Blood Products, Tissues, and Gametes in Humans”. \(^{178}\) The Act thus seeks to comprehensively provide for various aspects of healthcare setting out rights and duties not only of the state but also users and service providers including private service providers, and positive obligations on part of the state such as for provision at the least of primary health services.

* * *

While various socioeconomic rights are dealt with by the statutes, some aspects such as food, right to work, etc. are not dealt with by separate legislation. Some legislation such as on housing, focus on duties alone. Labour legislation contains many positive provisions including the recognition that fewer working hours leads to better productivity and stronger economic growth and enabling better conditions of employment to be determined through collective bargaining. These enactments thus give effect to positive obligations of the state (that is, its obligation to fulfil) as well as to protect by imposing duties and penalties on third parties (such as employers, or private health service providers).

6. Government Schemes and Programmes
As in India, various programmes introduced by the government in South Africa, seek to alleviate poverty and address other aspects of socioeconomic rights such as water and healthcare. One such programme, which includes employment creation, is the Expanded Public Works Programme, seeking to provide for short and medium-term labour absorption and income transfers to poor households by creating opportunities in four sectors, infrastructure, non-state, environment, and social and culture. \(^{179}\) It is noted to have created over 4 million work opportunities since 2012–13

\(^{177}\) Chapters 3–7, 9–10, id.
\(^{178}\) Sections 53 (Establishment of National Blood Transfusion Service), 57 (Prohibition of reproductive cloning of human beings), 61 (Allocation and use of human organs), and 62 (Donation of human bodies and tissues of deceased persons, id.
and is targeted to create a further 4, 205, 730 opportunities by 2018–19. In the infrastructure sector, efforts involve use of labour-intensive construction methods, providing training and skills to the locally unemployed, etc.; in the non-state sector, wage subsidies are used to support non-profit organisations in community development initiatives; the environment and culture sector includes programmes such as waste management, parks and beautification, sustainable land-based livelihoods etc.; while the social sector includes home community based care (basic health service needs provided by formal or informal care-givers to people in their homes or accessible by the community closer to their homes), community crime prevention, etc. Among earlier programmes, the Community-based Public Works Programme sought to alleviate poverty in rural areas by enabling communities to be self-sustaining through creating jobs, starting community projects, and training. The Working for Water Programme launched in 1995 to check alien plants, worked in partnership with local communities, leading to job creation and ran 300 projects in nine provinces and is noted to have provided jobs and training to 20,000 people since its inception. While the Community-based Public Works and Work for Water programmes have been noted to have been managed well, and accomplished much in terms of enabling participants to pay-off debts, eat nutritious foods, repair dwellings, and access medical attention, among others, thereby improving standards of living, these two programmes provided only temporary relief creating only about 80,000 jobs in 2000–01. Plans for the Expanded Public Works Programme were based on these experiences. In case of the Expanded Public Works Programme, it has been noted that only a fraction of the money reaches intended beneficiaries (in some cases as little as 10 percent of programme costs), standards for training are vague, there is consistent

180 Ibid.
underdelivery on programme goals, besides the programme having “unacceptably high operating costs and inexplicably opaque overheads” being poorly conceived and executed from its commencement, though some programmes, such as Working for Water, have produced excellent results.\textsuperscript{185}

The LandCare programme, a community based approach to sustainable management and use of agricultural resources, was conceptualised in 1997 and implemented in nine provinces with various projects including land rehabilitation.\textsuperscript{186} It is noted to have created over 10,000 jobs in a three-year period, and rehabilitated 2.6 million hectares of land in five years since 2009, being among the well-managed programmes.\textsuperscript{187}

The government’s single largest redistributive programme is the social assistance programme. The programme as it stood under the Social Assistance Act, 1992, provided for four grants (for the aged, the disabled, the foster child grant, and child support) and reached over three million persons.\textsuperscript{188} The social security system in the country traces back to 1910, but from its inception, social assistance had been pervaded by racial discrimination reflected in exclusion of racial groups, discrimination in beneficiaries, and eligibility criteria, besides administrative delays, corruption, and inefficiency.\textsuperscript{189} The system taken over by the new government was thus


\textsuperscript{187} Id.; “LandCare: A Boon to SA Farming”, http://www.sanews.gov.za/south-africa/landcare-boon-sa-farming (last visited 10 October 2017); Swartz, supra note 21 at 75–76.

\textsuperscript{188} Liebenberg, supra note 36 at 236–37.

\textsuperscript{189} Id. at 242; Claudia Haarmann, Social Assistance in South Africa: Its Potential Impact on Poverty, Ph.D. thesis, University of the Western Cape (2000). For instance, the distribution of the disability grant was unequal, with lack of access by poor and rural African people, particularly from certain areas. Liebenberg, \textit{ibid}; Davis, \textit{supra} note 38 at 697.
characterised by fragmentation, inefficiency, and inequity.\textsuperscript{190} A process for reforming the programme commenced in the 1980s, a committee for restructuring social assistance was appointed in 1996, and a white paper for social welfare contained a commitment to provide a comprehensive social security system, broadening the focus to a “developmental social welfare perspective”.\textsuperscript{191} The shortcomings began to be addressed with the introduction of a child support grant in 1999, extensive use of technical support and international best practices, adoption of a management information system, and addressing corruption resulting in the removal of over 2500 employees.\textsuperscript{192} The 2004 Social Assistance Act provided seven different social grants, three of which are to children or caregivers of children, as well as social relief of distress. A 2016 report reviewing ten years of the programme found over 16 million benefited from social assistance grants at R11 billion a month, playing a role with other welfare programmes in reducing extreme poverty.\textsuperscript{193} Mention must also be made of the Social Security Agency, which it established, and which is accountable to people for quality, reliability, and transparency of payments.\textsuperscript{194} Set up along with biometric id verification and electronic payments, besides enhancement of fiscal resources devoted to social assistance, it has led to reduction of delays and a saving of R 2 billion per year in ghost beneficiaries and turnover.\textsuperscript{195} However, there still continue to be challenges faced by the programme which include the lack of integration between cash transfers and social services, and onerous application process besides allegations of fraud (as payments have not been taken over by the Social Security Agency), besides persistence of extreme inequality despite reduction in poverty

\textsuperscript{191} \textit{Id.} at 119, 123; Liebenberg, \textit{supra} note 36 at 237, 242.
\textsuperscript{192} Bruni, \textit{Id.} at 120–28.
\textsuperscript{193} “Celebrating Ten Years of the Social Assistance Programme”, http://www.thepresidency.gov.za/content/celebrating-ten-years-social-assistance-programme (last visited 28 June 2017); Bruni, "Reforming the Social Assistance System", in Asad Alam, Renosi Mokate, and Kathrin A. Plangeman (eds), \textit{Id.} at 131.
\textsuperscript{194} Bruni, \textit{ibid}.
to some extent. Nonetheless, the reformed Social Assistance Programme has played a role towards poverty reduction, covering many vulnerable groups and a large number of beneficiaries, though as noted it is alleged to increase dependency.

A food-based scheme for children in the country is the National School Nutrition Programme or school feeding scheme that aims as does India’s mid-day meal scheme, to alleviate short-term hunger besides providing incentives to attend school, with the provision of food for children up to grade 7. Some of the problems confronting the programme include the choice by providers of “cold” meal plans, corruption and theft, non-availability of potable water, food not reaching the beneficiaries, among others.

The government’s National Health Insurance Scheme aims to provide access, through pooling funds, to quality affordable health services and universal health coverage for all South Africans irrespective of socioeconomic status, implemented over a fourteen-year period commencing in 2012. While the introduction of an affordable health scheme is seen as positive in view of unreasonably high medical costs, the capability of the government to implement the programme has been questioned based on its past track record with other schemes.

Thus a variety of schemes and programmes with various aims have been initiated, impacting on socioeconomic rights such as employment, social protection, food, education, and

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196 Bruni, "Implementing Successful Reforms", id.
healthcare. The programmes have had mixed results with some more successful in achieving their aims and targets, and others plagued with problems like administrative inefficiencies, corruption, and lack of political will. The Health Insurance Scheme, among them seeks to achieve universal health coverage, irrespective of socioeconomic status, thereby aiming to achieve full realisation of the right, while the other schemes appear to focus on the needs of vulnerable sections alone.

7. Role of the Judiciary: The “Reasonableness Review” Approach

The South African Constitution contains many justiciable economic and social rights but with limitations of availability of resources and progressive realisation, akin to those in the ICESCR. In other words, most socioeconomic rights, while justiciable, are not so recognised in absolute form. In interpreting these rights (all rights in the Bill of Rights) courts are required by the Constitution (section 39) to consider both the values underlying “an open and democratic society based on human dignity, equality and freedom” and international law, and may also consider foreign law. Further guidance is provided by section 233, which requires courts to prefer interpretations consistent with international law over those which are not, when interpreting legislation. Such a position is seen as favoured by the Constitution, international law being a clear inspiration for it, for instance, in its adoption of the respect–protect–promote–fulfil typology and terminology similar to the ICESCR. In practice, courts frequently refer to international instruments when interpreting the Bill of Rights including socioeconomic rights, though they may not have adopted the international law position to the letter. Interpretation of fundamental rights must be purposive giving effect to the “context, principles, policies, and intention underlying the rights”, with courts

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200 Section 39, Constitution of the Republic of South Africa. Further, in Grootboom, it clarified that while the relevant international law can be a guide to interpretation, the weight attached to any particular principle or rule will vary. It may be directly applicable however, where it binds South Africa. Republic of South Africa v. Irene Grootboom, supra note 91, ¶26. The court’s approach regarding the minimum core concept demonstrates that it considered itself not bound to follow. However, since 2015 South Africa has ratified the ICESCR. The approach of the Court as impacted by this change remains to be seen, though minimum core is not a concept forming part of the text of the ICESCR.

201 Trilsch, supra note 68 at 568; see also Liebenberg, supra note 51.

202 Olivier, supra note 61.
being empowered to pass any order that is just and equitable and grant appropriate relief [Sections 172(b), 167(7), and 38].

Moreover, as mentioned, in the interpretation of the Bill of Rights, section 39 requires courts, tribunals, and forums to promote the values underlying an “open and democratic society based on human dignity, equality, and freedom” [Section 39(1)(a)]. Similarly, in considering the validity of a limitation, whether the same is reasonable and justifiable in such a society based on the said values, must be considered by the court. In Grootboom, for instance, denial of basic needs, was viewed in the light of these values, the Court noting that those who have no food, clothing, or shelter are denied these foundational values of society (human dignity, freedom, and equality). Human dignity is in fact, seen as the “basis and universal aim for the existence of social rights.” The relevance of this value in ECSR jurisprudence and in that of the Indian courts, may be recalled here. Another value considered by the Court to be of some importance is the shared solidarity concept of Ubuntu, the court being of the opinion that other values can be elevated to the status of values listed in the Constitution. It has been argued that this translates into an obligation on the state to mobilise resources to overcome poverty and inequalities, and respect for Ubuntu can guarantee the success of such measures.

203 Id.
204 Id.
205 Republic of South Africa v. Irene Grootboom, supra note 91, ¶23. Another instance is Rail Commuters Action Group v. Transnet Limited t-a Metrorail, (2005) 2 SA 359 (CC), where on the contention that the commuter rail service provided by the state was unsafe, the relevant legislation was interpreted in the light of the constitutional rights of dignity, life, freedom and security of person to hold the rail corporation constitutionally obliged to take affirmative steps to ensure the safety of their commuters. As Davis points out, this was the first judgment expressly raising distributional questions wherein the Court referred not to socioeconomic rights but concepts of dignity, life, freedom, and security of person to impose a positive obligation on the railway corporation. Davis, supra note 38 at 704–05. He further notes that Metrorail represented a holding that positive obligations may be imposed by a holistic reading of a series of constitutional rights. Id. at 708.
206 Olivier, supra note 61.
207 Id. Khanijow writes that “Ubuntu has been described as a philosophy of life which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, and where the fundamental belief is that ‘motho ke motho ba batho ba bangwe/umuntu ngumuntu ngabantu’, which literally translated means, ‘a person can only be a person through others’”. Shruti Khanijow, “Ubuntu and the Concept of Restorative Justice: African Concept in Indian Corridors”, 3 MLJ (Jour) 25, 25 (2013).
208 Olivier, id.
Issues involving economic and social rights, including healthcare and housing have arisen before the South African Constitutional Court almost since the coming into force of the Constitution. In fact, even prior to this, as mentioned, the issue of whether such rights could be included as justiciable rights was looked into in the Certification Proceedings. The Court has applied the “reasonableness” test in determining whether the government can be said to have acted in accordance with the Constitutional mandate, with various factors considered in this regard being set out in its decisions. The limitations built into the text, and framing of the rights as “of access”, define and restrict the courts' powers, delineating the outer limits of their role in socioeconomic rights enforcement, not permitting provision of unlimited rights, without regard to the circumstances of claimants. The court merely looks into available data to determine reasonableness not interfering with other branches' function to determine the specifics of programmes, functioning within the bounds of the separation of powers.

Interpretations by the court of the content of rights are incremental and related to context, there being no standalone content, as the court integrates the analysis of the right's progressive realisation within available resources in the same step as the definition, which helps keep the right "open to new claims and articulations". As the scope and content of the rights are left undefined, it is argued, that the court can "side-step the adjudication of an unqualified socioeconomic right, even at the most minimum level".

The approach of the South African judiciary has been commended, among other reasons, for the deference shown to the legislature on socioeconomic rights. Among the benefits of this approach are its being a flexible, context-sensitive model for review of socioeconomic rights claims.

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209 Nolette, supra note 98 at 104, 107.
210 Id. at 113.
211 Katharine G. Young, "Proportionality, Reasonableness, and Economic and Social Rights", Research Paper 430, Boston College Law School Legal Studies Research Paper Series 20–22 (7 June 2016), http://ssrn.com/abstract=2892706 (last visited 2 March 2017). However, it allows the court to "obscure its own engagement with the underlying values behind particular rights and the impact of the deprivation on the claimant group". Young, id. at 21–22.
212 Govindjee, supra note 35 at 72.
and respecting competencies and roles of other branches, the courts playing a meaningful role in enforcing these rights, and deepening democracy and socioeconomic transformation.\footnote{Sunstein, supra note 2; Sandra Liebenberg, “Protecting Economic, Social and Cultural Rights under the Bill of Rights: The South African Experience”, 16(3) Human Rights Defender 2 (2007). See also Liebenberg, supra note 75 at 75 (noting that the courts’ “principled and pragmatic model for the judicial review of socio-economic rights” supports the Constitution’s transformative goals).}

"Reasonableness review", moreover, provides guidance to governmental authorities, forcing them to justify their policies as they are drafted, implemented, and reviewed but enables the legislature to set out its own obligation and exempts the judiciary from the burden of entering into complex and detailed policies and budgetary claims.\footnote{Coomans, supra note 94 at 194; Alana Klein, “Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights”, 39 Columbia Human Rights Law Review 351, 376 (2008).}

This approach is also seen as a more sensible long-term solution as it fits in with a minimalistic judicial concept and is perfectly harmonised with the separation of powers and polycentrism, the adoption of a “strong” approach being inappropriate as the government is neither unresponsive not unwilling to perform its functions in respect of basic needs.\footnote{Ilias Trispiotis, “Socio-economic Rights: Legally Enforceable or Just Aspirational?”, 8 Opticon1826 8(2010); Murray Wesson, “The Emergence and Enforcement of Socio-economic Rights” in Liora Lazarus, Christopher McCrudden, and Nigel Bowles (eds), Reasoning Rights: Comparative Judicial Engagement 294 (Hart Publishing, Oxford and Portland, 2014). Kende too believes that the approach adopted by the South African Constitutional Court avoids an escalation of separation of powers and other tensions, and that its approach is both more pragmatic and transformative than that suggested by critics. Kende, supra note 62 at 617–18. The deference is seen both in its criteria for determining the constitutionality of executive action (the immediate right of the individual applicant has not been declared), and in the relief ordered (lack of a supervisory element). Karin Lehmann, “In Defense of the Constitutional Court: Litigating Socio-economic Rights and the Myth of the Minimum Core”, 22(1) American University International Law Review 163, 177 (2006). O’Cinneide also sees a strong approach as uncalled for where democratic accountability mechanisms and bureaucratic decision-making are responsive. Colm O’Cinneide, “The Problematic of Social Rights: Uniformity and Diversity in the Development of Social Rights Review”, in Liora Lazarus, Christopher McCrudden, and Nigel Bowles (eds), Reasoning Rights: Comparative Judicial Engagement 313 (Hart Publishing, Oxford and Portland, 2014).}

It is felt that this approach “may serve to help South Africa rise out of its Apartheid past” and “provide a workable model for the rest of the world” by providing an answer to both the practical question of how socioeconomic rights should be enforced by courts, as well as the theoretical one of whether courts should enforce them.\footnote{Nolette, supra note 98 at 105.}
While the court not setting any baseline standard other than that provided by legislation is in consonance with its weak form review, not identifying a minimum core has been identified, as a weakness.\textsuperscript{217} The approach of the judiciary has also been criticised on account, of failing to include a supervisory element (which may mean that insufficient action may go unaddressed, if parties are unable or unwilling to approach the court again), as well as for failing to engage sufficiently with the content and scope of the rights.\textsuperscript{218} On the other hand, the inclusion of such an element, especially where the content of the right continues to develop, may imply that the jurisdiction may never end.\textsuperscript{219}

Davis finds that the South African judiciary understood that, “the constitutional enterprise on which the country had embarked entailed a jurisprudential commitment to social justice of a kind that had been absent in a predemocratic legal system”.\textsuperscript{220}

\textit{In Re Certification Case: Approval of Inclusion of Social and Economic Rights as Justiciable Rights in the Constitution}

The process of adopting the South African Constitution, as discussed, was a complex one involving a significant struggle. Commencing in 1991 with the CODESA, a significant step in the process was certification of the draft by the Constitutional Court as being in consonance with the Thirty-four Principles negotiated and agreed upon at the CODESA. As concerns economic and social rights, various drafts show the ANC’s reluctance to accept the idea of a judicially enforceable Bill of Rights, with even the 1993 draft Bill of Rights containing judicially enforceable socioeconomic rights with a commentary requiring courts to “restrain interference” with socioeconomic rights, and not “to order positive rights”, still falling within the traditional negative rights framework.\textsuperscript{221} Even the

\begin{footnotes}
\textsuperscript{217} Coomans, \textit{supra} note 94 at 194; Young, \textit{supra} note 211 at 21.
\textsuperscript{218} Liebenberg, \textit{supra} note 213; Klein, \textit{supra} note 214 at 379–80.
\textsuperscript{219} Klein, \textit{id.} at 390–91. Supervision through reports is seen to be preferable only where there is consensus between the legislature and judiciary on end-goals, with relatively short timelines. \textit{Ibid}.
\textsuperscript{220} Davis, \textit{supra} note 38 at 691. He felt that courts must interpret and apply the Bill of Rights in the context of the country’s history, the conditions prevailing in our society, and Constitution’s the transformative goals. \textit{Id.} at 706.
\textsuperscript{221} Kende, \textit{supra} note 62 at 626.
\end{footnotes}
Thirty-four Principles agreed upon as the foundation of the Constitution included almost nothing on socioeconomic rights, while the 1994 interim constitution included only some socioeconomic rights.\textsuperscript{222} It was in a document in 1995 that the ANC acknowledged that the Interim Constitution leaned heavily in favour of liberty and needed a balance, with a focus on dignity of individuals.\textsuperscript{223} The Draft Constitution, however, contained various economic and social rights including healthcare, housing, food, water, and social security, besides education and children’s rights.

In 1996, the proceedings for certifying the Draft Constitution came before the Constitutional Court, which had commenced functioning in 1995. Those opposed to the inclusion of social rights in the Constitution argued that these rights were not in consonance with some of the Thirty-four Principles as they were not “universally accepted fundamental rights”, and not justiciable, besides violating the separation of powers.\textsuperscript{224} In this regard, the Court held that “universally accepted fundamental rights” could be supplemented by other rights not universally accepted.\textsuperscript{225} It also was of the opinion that social rights are to some extent justiciable. Noting that even civil and political rights would give rise to similar budgetary implications without compromising their justiciability, it observed that economic and social rights giving rise to such implications was not a bar to their justiciability.\textsuperscript{226} It also did not agree that the task conferred on the courts with regard to economic and social rights was so different from that ordinarily conferred on them as to result in a breach of the separation of powers, recognising that at a minimum these rights could be negatively protected.

\textsuperscript{222} Id. at 627.
\textsuperscript{223} Ibid.
\textsuperscript{224} Christiansen, supra note 34. Specifically, Principle II provided that: “Everyone shall enjoy universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after giving due consideration to inter alia, the fundamental rights contained in Chapter 3 of this [Interim] Constitution”. Principle VI: “There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness, and openness.” Christiansen, id.
\textsuperscript{225} In Re Certification of the Constitution of the Republic of South Africa, (1996) 4 SA 744 (CC), ¶76. In Christiansen’s words, it viewed universal human rights as the floor and not the ceiling for rights. Christiansen, id.
\textsuperscript{226} In Re Certification, id., ¶78.
from improper invasion. This decision, thus, “attested to the legitimate presence of socioeconomic rights in the final text of the constitution”.


The South African judiciary applies, as mentioned, what is known as the “reasonableness review” approach, to adjudicating socioeconomic rights claims. The test applied essentially is “whether the measures the state has taken towards the progressive realization of the relevant rights are reasonable”. This test “engages a means–end inquiry” but is more than “mere ‘rationality review’” as well as more than “a traditional administrative law model of review”; it seeks justification to enhance the accountability of decision-makers and transparency of decisions, as in the case of proportionality. This approach has enabled the court to create a flexible tool to adjudicate such claims with some elements of the test coming close to threshold requirements. This approach has been the subject of both praise and criticism from commentators, critics focusing on failure of the court to give content to the rights, and rejection of the minimum core among other issues, and supporters praising its attempt to balance protection of rights with democratic decision-making. These views have been discussed briefly above, and will be discussed in more detail, subsequently in this section.

The limitations applicable to positive and negative obligations under the Constitution, differ with the general limitation clause applying to the latter rather than the reasonableness test, though some fundamental principles underlying the reasonableness test correspond with notions

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227 In Re Certification, id., ¶¶77–78.
228 Trilsch, supra note 68 at 555.
229 Young, supra note 211 at 6–7. Young illustrates this referring to Grootboom, and argues that the housing programme would have met the standards of coherence and comprehensiveness in Wednesbury but did not meet those of reasonableness. The standard in Wednesbury looked into whether a decision was so unreasonable that no decision maker could have made it. The principle heightened in intensity with time, to require a more substantial justification, the graver the impact on the affected individual. This was replaced with proportionality analysis. Young, id. at 7.
230 Trilsch, supra note 68 at 565.
underlying the general limitations, such as the requirement of justification for policy choices or taking into account historical and social context; the reasonableness test essentially being a variation of the general limitations clause.\textsuperscript{232} The reasonableness test implies constitutional reasonableness underlying which are the constitutional values of human dignity, good governance, and social justice, making it a legitimate standard for review.\textsuperscript{233}

In 1997, the South African Constitutional Court decided its first case involving economic and social rights. In \textit{Soobramoney v. Minister of Health, KwaZulu-Natal},\textsuperscript{234} the forty-one-year-old appellant, suffering from numerous health problems including ischaemic heart disease, cerebral-vascular disease besides hypertension and diabetes, had a stroke and his kidneys also failed. His life could be prolonged by regular renal dialysis which he sought from Addington State hospital. His request was refused as the hospital could offer treatment to only a limited number of patients, and only those patients with chronic renal failure were admitted, who were eligible for a kidney transplant; moreover they had to be free from significant vascular cardiac disease to be so eligible.\textsuperscript{235} He challenged this refusal relying on the right to life and to emergency medical treatment guaranteed by the Constitution. The Court noted that unqualified obligations to meet the needs of all could not at present, be met due to limited resources and significant demands on them. Section 27(3) on emergency medical treatment was found not applicable, the claimant’s case not being one of an emergency calling for immediate remedial treatment.\textsuperscript{236} It was thus the rights under sections 27(1) and (2), to, inter alia, healthcare services and the requirement of the state taking all reasonable legislative and other measures within available resources for the progressive

\textsuperscript{232} Trilsch, \textit{supra} note 68 at 565–66. All Bill of Rights provisions, though, by virtue of section 7(3) are subject to the general limitations clause. Ebadolahi, \textit{supra} note 89 at 1574.

\textsuperscript{233} Trilsch, \textit{id.} at 566.

\textsuperscript{234} (1998) 1 SA 765 (CC).

\textsuperscript{235} \textit{id.}, ¶¶1–4.

\textsuperscript{236} Woods views this narrow construction of the right to emergency medical treatment in section 27(3) as a negative right not imposing affirmative obligations on the state, and definition of emergency as an urgent sudden occurrence for which advance preparation was not possible, as necessary to conserve resources needed to effectuate the state’s overall healthcare obligations. Jeanne M. Woods, “Justiciable Social Rights as a Critique of the Liberal Paradigm” 38 \textit{Texas International Law Journal} 763, 780–81 (2003).
realisation of these rights, that were applicable.\textsuperscript{237} The guidelines of the hospital were not alleged to be unreasonable or applied unfairly or irrationally.\textsuperscript{238} The well-tailored programme would collapse if persons in the claimant’s situation were admitted, and those qualifying as per the guidelines were denied treatment. The state’s failure to provide dialysis to all patients of chronic renal failure was not found to be in breach of its obligations.\textsuperscript{239} This decision, despite not providing a remedy to the claimant, affirmed the duty of the state towards socioeconomic rights in clear terms; identified a standard of qualified deference to the legislature; reviewed the actual evidence of the financial status of the hospital and province not accepting mere assertions of financial limitation; and stressed the connection between available resources and limitations on rights, noting that the state bears the burden of proving that its actions were reasonable in light of available resources and that the state’s obligation is dynamic, besides also affirming the commitment to address poverty through the values of human dignity, equality, and freedom.\textsuperscript{240} The deferential approach adopted holds the government accountable for their choices and can help re-conceive both the role of the court and its relationship to the other organs of government and civil society in a more affable environment than the traditional view of rights.\textsuperscript{241} Such an approach is also perhaps more conducive to and supported by newer forms of remedies, such as engagement with the government and affected parties, that are being adopted by the court.

While some feel that Soobramoney was an “easy” first case for the Constitutional Court in some ways (such as verifiable evidence on cost and impact in medical matters; availability of relatively precise financial data, making possible a somewhat more precise balance of probabilities, etc.),\textsuperscript{242} for others, this was the worst possible beginning.\textsuperscript{243} While the result in Soobramoney is not

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\textsuperscript{237} Soobramoney v. Minister of Health, KwaZulu-Natal, supra note 238, ¶22.
\textsuperscript{238} Id., ¶25.
\textsuperscript{239} Id., ¶36.
\textsuperscript{240} Christiansen, supra note 34; Liebenberg, supra note 51 at 164–65.
\textsuperscript{241} Klein, supra note 214 at 355. For Wiles, it is clear that the judiciary has not treated enforceability as a panacea for finding socioeconomic rights violations, this decision demonstrating that judges are responsible in respecting the boundaries of their role; they have in fact been accused of being overcautious. Wiles, supra note 83 at 61.
\textsuperscript{242} Christiansen, supra note 34.
\end{flushright}
as such faulted, many have criticised the reasoning and language therein, as its deference seemed opposed both to the Constitutional commitment to enforceable socioeconomic rights as well as the Court’s own observations in its Certification judgment. The Court viewing some rights as the ideal to be strived for, seemed, for Trilsch, to accept the dichotomy between civil and political rights and socioeconomic rights as classically preconceived.

The decision illustrates restraints imposed on courts by the words "within available resources", suggesting that the state’s claims that it cannot pursue a socioeconomic right due to financial constraints, must be given due consideration, and ensuring that the socioeconomic rights in the Constitution are not interpreted as “rights on demand” without budgetary considerations. However, its adoption of a utilitarian perspective advancing the health of the population as a whole, rather than providing relief to individual patients to the extent of availability of funds, is argued to be extremely problematic in the rights context.

The next important decision of the Court, where the reasonableness review approach was set out was Republic of South Africa v. Irene Grootboom. In this case, Mrs Grootboom and others had been evicted from their informal homes on private land and were living in a sports field in extremely poor conditions. They had applied for low-cost housing and many were on the waiting list for nearly seven years. They thus sought adequate temporary basic shelter pending their

243 Richard J. Goldstone, “A South African Perspective on Social and Economic Rights” 13(2) Human Rights Brief 4, 5 (2006). Liebenberg too sees this decision as “an unfortunate first test case” as it involved a claim seeking expensive tertiary level treatment that would not cure the person concerned. Liebenberg, supra note 51 at 166.
244 For instance, Lehmann, supra note 215 at 169. On the other hand, Woods does fault the outcome in this decision observing that in acknowledging that a person’s wealth determined whether he would live or die, yet failing to interpret constitutional rights to health and life to avoid this outcome, the Court missed an important opportunity to give meaning to the new social contract suggesting a retreat from the challenge of justiciable social rights. Both majority and minority opinions beg the question whether the collective right to health actually conflicted with the individual’s right to health and life, that is whether the state should be allowed to treat dialysis as an extraordinary resource that must be rationed for the poor in the country where citizens enjoy one of the highest standards of living in the world. Woods, supra note 236 at 783.
245 Trilsch, supra note 68 at 558–59.
246 Soobramoney v. Minister of Health, KwaZulu-Natal, supra note 234, ¶42; Trilsch, id. at 559.
247 Nolette, supra note 98 at 109. One important concern in this regard is however, that such a provision might allow the legislature to determine the extent of its own obligations by adopting a smaller budget and the Courts at this stage may be reluctant to interfere with legislative moves to lower tariffs that may result in a lower budget within which to work, and which may also be in line with the basic separation of powers doctrine. Id. at109–10.
248 Woods, supra note 236 at 782.
249 Supra note 91.
obtaining permanent accommodation and basic nutrition, shelter, and healthcare for their children based on the right of access to housing in section 26, and rights of children in section 28. The issue involved was one of the most pressing of social problems in South Africa—the illegal occupation of land by homeless people.\textsuperscript{250} The Court held that that real question was whether the state’s measures to realise the right under section 26 were “reasonable”. The right of access to housing as against right to housing in the ICESCR were different in the court’s view, the former encompassing conditions like land, services, and dwelling, and suggesting that other agents than the state, including the individuals themselves must be enabled by legislative and other means to provide housing.\textsuperscript{251} It held that when considering reasonableness, it would not consider whether other more desirable or favourable measures could have been taken or public money better spent but would only look into whether measures taken were reasonable. The Court recognised that a range of possible measures could be adopted by the state to meet its obligations, many of which may be reasonable, and the requirement would be met, if it were shown that the measures met the standard of reasonableness.\textsuperscript{252}

Among the criteria it set out for determining reasonableness were: (a) allocating tasks and responsibilities among different branches of government and providing necessary financial and human resources to carry out the same; (b) complementing legislation by programmes that are reasonable in conception and implementation;\textsuperscript{253} (c) taking into account the social, economic, and

\textsuperscript{250} Davis, supra note 38 at 692–93.
\textsuperscript{251} Republic of South Africa v. Irene Grootboom, supra note 91, ¶35. Nolette finds that the approach adopted in Grootboom acknowledged that for poor citizens, access to the underlying “good” itself did not amount to true access as their socioeconomic position foreclosed actual access to such goods in the market, while for those who could afford housing, the appropriate response would have been “unlocking the system” to provide access, thus acknowledging that individuals and civil society share some obligation with the state in ensuring that the socioeconomic rights of citizens are met. Nolette, supra note 98 at 107–08.
\textsuperscript{252} Republic of South Africa v. Irene Grootboom, id., ¶41. See also Khosa v. Minister of Social Development, (2004) 6 SA 505 (CC), ¶48.
\textsuperscript{253} The Court emphasised that mere legislation is not enough and must be supported by appropriate, well-directed policies implemented by the executive, if the intended result is to be achieved. Republic of South Africa v. Irene Grootboom, id., ¶42.
historical context and background of the situation sought to be addressed;\(^\text{254}\) (d) devising flexible programme to cater for needs over the short-, medium-, and long-term; and (e) ensuring inclusion of the needs of a significant section of society (poorest and most desperate).\(^\text{255}\) Moreover, the programme must be comprehensive, coherent, and effective; capable of facilitating access to the right; in view of available resources; and lower administrative, financial, and operational barriers over time.\(^\text{256}\) Underlying reasonableness review are the values of dignity and equality.\(^\text{257}\) The state’s housing programme was found not to meet the requirement of section 26(2) as it failed to provide for relief for those in desperate need, non-provision of emergency housing being an omission in its long-term plan, the court also recognising that meeting immediate needs requires planning, budgeting, and monitoring for their fulfilment.\(^\text{258}\) While it was recognised that a reasonable part of the budget should be devoted to the needs of the vulnerable, the precise allocation was left to the government.\(^\text{259}\)

The Court declined however, to define a minimum core of the right. It found that minimum core obligation is determined generally by having regard to the most vulnerable group entitled to protection of the right in question, but did not feel that it had sufficient information to develop the minimum core, as such determination would require defining the needs and opportunities for enjoying such a right (which would vary with factors such as income, unemployment, etc.).\(^\text{260}\)

Also, it did not take the view that the state had absolute responsibility in case of children; rather it had such responsibility only where parental care was lacking, the first responsibility for care being on the parents.\(^\text{261}\) It observed that if people with children, unable to provide housing

\(^{254}\) As Nolette points out, it noted also that enforcement was a difficult proposition and must happen on a case by case basis, for which end it was necessary to examine the rights embodied in terms of both their textual setting, and their social and historical context. Nolette, supra note 98 at 101.

\(^{255}\) Coomans, supra note 94 at 175–76.


\(^{257}\) Young, supra note 211 at 10.

\(^{258}\) Republic of South Africa v. Irene Grootboom, supra note 91, ¶¶68, 69; Woods, supra note 236 at 784.

\(^{259}\) Republic of South Africa v. Irene Grootboom, id., ¶66. Olivier, supra note 61.

\(^{260}\) Republic of South Africa v. Irene Grootboom, id., ¶¶31, 32.

\(^{261}\) Olivier, supra note 61.
could seek that right under section 28, the result would be anomalous; the overlap between the rights under sections 26 and 27 and those under section 28 is not consistent with section 28 (1)(c) creating separate and independent rights for parents and children.\textsuperscript{262} At the first instance, as per international obligations binding on the country, the state was to see that legal obligations compel parents to fulfil their responsibilities towards their children, and children have a right to alternative appropriate care only where this is lacking (for instance, children removed from their families).\textsuperscript{263} Their obligation towards children in the care of their families would be to ensure that appropriate mechanisms are available to ensure that children are accorded the protection contemplated by section 28.\textsuperscript{264}

It issued a declaratory order requiring the state to meet the obligation imposed on it by section 26(2) with a duty on the South African Human Rights Commission (SAHRC) (in accordance with section 184) to monitor and report on the changes.\textsuperscript{265}

\textit{Grootboom} is seen as having “made up” for the shortcomings of \textit{Soobramoney} by treating the right as a constitutional right to be enforced by the court, and not merely an aspiration to be strived for; identifying both negative obligation to “desist from preventing or impairing the right of access to adequate housing”, as well as the positive obligation to “devise, fund, implement, and supervise” measures related to the right of access to housing.\textsuperscript{266} The negative obligation was formulated broadly, extending to private individuals or entities, and by identifying this obligation, the Court affirmed that arguments on resources or progressive realisation, cannot be a justification for depriving access to housing rights.\textsuperscript{267}

\begin{footnotesize}
\begin{enumerate}
\item[262] Republic of South Africa v. Irene Grootboom, \textit{id.}, ¶¶70–71,74.
\item[263] \textit{id.}, ¶75, 77.
\item[264] \textit{id.}, ¶78.
\item[265] \textit{id.}, ¶¶96–97.
\item[266] Trilsch, \textit{supra} note 68 at 562; Christiansen, \textit{supra} note 34.
\item[267] Liebenberg, \textit{supra} note 51 at 170, 177. See Republic of South Africa v. Irene Grootboom, \textit{supra} note 91, ¶34.
\end{enumerate}
\end{footnotesize}
The Constitutional Court demonstrated in this case, that violations of economic and social rights can be remedied by courts without unduly intruding on legislative discretion. Also, it showed that justiciable socioeconomic rights in the Constitution did not mean that every individual is entitled to assistance on demand; an approach allowing the legislature adequate time to design socioeconomic programmes, seen as better than “rights on demand”, as the latter fails to take into account inherent difficulties, particularly the requirement of substantial time for adequate compliance, crucial for enacting real, meaningful, and workable socioeconomic policies. It thereby, set out a new framework for socioeconomic rights enforcement, different from the two available frameworks of non-recognition and recognition in absolute terms. By highlighting the priority status of the right to housing and the plight of those deprived of the right, judicial review served as a catalyst of social change.

The decision also had implications for social security reform. In Liebenberg’s assessment, two such implications are: first, that any policy development must include ensuring effective implementation of social assistance programmes as an integral component; and second, that the state is obliged to expand access to social assistance rights for those unable to support themselves and their dependents, in the process, not ignoring immediate needs; also the reasonableness criteria would guide the design, implementation, and evaluation of the government’s social programmes.

The Court’s refusal to endorse the minimum core notion, viewing it instead as playing a role in the assessment of reasonableness of measures taken by the state, is however, criticised for not being convincingly justified by the Court, which could have defined the principles underlying the

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268 Woods, supra note 236 at 783. Woods finds that the decision in Grootboom evidences the possibility of judicial restraint; the court merely redistributed resources within the programme and did not disturb legislative determination of what resources were available. Id. at 786.
269 Kende, supra note 62 at 620; Nolette, supra note 98 at 111.
270 Nolette, id. at 100.
271 Woods, supra note 236 at 786.
272 Liebenberg, supra note 36 at 256; Liebenberg, supra note 51 at 180.
minimum core rather than the precise basket of goods. Liebenberg points out that while the court had rejected minimum core as presenting "difficult questions", reasonableness review of measures is also neither easily defined or applied. Moreover, although the reasonableness test requires a component to cater to the needs of the most desperate sections, it confers no individual right to claim anything tangible from the state nor does it require the needs of the disadvantaged sections to be addressed, as a matter of priority, before those of the more advantaged groups; besides placing a heavier burden on the litigant to show that the state has failed to act reasonably.

Liebenberg further faults the decision for failing to clarify how available resources would be assessed, despite recognising their importance, and for failing to clarify that the reasonableness test would apply to determine availability of resources, allocation between the branches, and allocation to particular programmes.

Grootboom is seen as an instance of a "weak" court enforcing a "weak" remedy in the form of a declaratory order, though as discussed in chapter II, the use of "weak" here does not indicate that the approach is an inappropriate one. As Young notes, weak adjudicatory postures "can (perversely) produce more rights-protecting results than strong form, muscular or managerial

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273 Liebenberg, supra note 51 at 169–70, 174. Its rejection of the minimum core concept is also argued to be a departure from international law though it did consider the same as required by the constitution. Trilsch, supra note 68 at 568.

274 Trilsch, id. at 569. However, as she goes on to point out, there are differences between the CESCR and the Court in that the CESCR is not subject to any separation of powers requirements and only makes recommendations to concerned states rather than specific directions on steps to be taken. Rejection of the minimum core allowed the court to avoid some of the difficult decisions that may have been otherwise involved. Id. at 570.

275 Liebenberg, supra note 51 at 176. Lehmann on the other hand, supports the Court’s rejection of the minimum core, viewing it as an inappropriate tool of judicial decision-making, and arguing that its reasonableness approach is jurisprudentially more sound. She is of the view that the Court’s rejection of the concept stems from an intellectual discomfort it is unable to articulate. This is concerned with whether the minimum core is an absolute or relative with regard to the respective state’s resources, as if the latter is true, the reasonableness test performs the same function. Lehmann, supra note 215 at 165, 182–84.

276 Liebenberg, id. at 176–77. This contrasts with the "minimum core" where the litigant only need show lack of basic needs and means of access to basic needs to claim relief. Ibid.

277 Liebenberg, supra note 36 at 255. Lehmann too raises the issue of resources in the context of this decision, noting that the judgment both indicates that there may be a second instance (first being the government) review of adequacy of resources but that this may not be the court, plausibly referring to some other levels of government. Lehmann, supra note 215 at 174.

278 Wesson, supra note 215 at 288.
adjudication”. Some see its approach as too weak, and its deferential stance as not conducive to socioeconomic rights enforcement. On the other hand, the Court has been found “willing to embrace stronger remedies” in cases involving the negative obligations associated with socioeconomic rights.

In *Minister of Health v. Treatment Action Campaign*, an advocacy group TAC along with a group of NGOs challenged as unreasonable the government’s programme regarding the drug Nevirapine, which significantly reduced the risk of mother to child transmission of HIV. The Government had developed a pilot programme for the distribution of the drug at limited sites with state doctors outside these sites, being prohibited from administering the drug. The Court found that the government’s policy failed to address the needs of mothers and babies not having access to the pilot sites; the costs of nevirapine were not at issue, its administration was simple, and the provision of a single dose was a simple, cheap and potentially life-saving process. The government’s policy was inflexible and denied mothers and new-born children outside the sites, the opportunity of receiving a single dose of a potentially life-saving drug. The policy thus fell short of compliance with the Constitution due to limiting the provision of the drug to specific sites, and failure to provide for training outside those sites, for counselling in nevirapine. The Court directed, inter alia, removal of restrictions preventing availability of nevirapine outside the research sites; making provision for training of counsellors at public hospitals, other than research sites, and extending testing and counselling facilities throughout the public health sector. However, it clarified that the policy not complying with constitutional requirements, did not imply

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279 Young, *supra* note 211 at 30.
281 Wesson, *supra* at 215 at 290.
282 *(2002)* 5 SA 721 (CC).
283 *Id.*, ¶¶ 67, 71, 73.
284 *Id.*, ¶80.
285 *Id.*, ¶135.
286 *Id.*, ¶135(3).
that everyone could immediately claim access to the treatment.\textsuperscript{287} In the context of children, it recognised that while the primary obligation to provide healthcare lay on parents, who could pay for the same, the state’s obligation arose where parental care was lacking, which was in the case of children born to indigent mothers with no access to private healthcare.\textsuperscript{288} Further, it found that it was “impossible to give everyone access even to a “core” service immediately” and reiterated that minimum core was relevant to reasonableness and not a self-standing right.\textsuperscript{289} The negative obligation recognised in Grootboom was held to apply equally to section 27 and the right of access to healthcare therein.\textsuperscript{290} It also acknowledged that courts may be ill-suited to adjudicate issues with multiple socioeconomic consequences.\textsuperscript{291} In the context of the reasonableness test, the Court also recognised the need for transparency and the contents of a programme being publicised.\textsuperscript{292}

The approach in TAC, though once again employing a declaratory order, was stronger and more prescriptive, compared to Grootboom, and has even been criticised for “overreach”, though some assert that it must be read narrowly in view of involving a unique and sympathetic set of facts, minimal costs, and the decision being of the extension of an existing programme.\textsuperscript{293} TAC thus “suggests that increased policy direction by the Courts will occur only where the legislature has indeed acted, but has acted in such a manner as to treat similarly situated citizens differently from region to region”.\textsuperscript{294} In other words, the decision was based on the value of equality, besides also being in line with “conditional social rights” that is, availability of rights being conditional on government action taken. Moreover, this decision is seen as having defined the right to health in more specific terms than housing in Grootboom, and undertaking a more searching inquiry,

\begin{itemize}
\item \textsuperscript{287} Id., ¶125.
\item \textsuperscript{288} Id., ¶¶77, 79.
\item \textsuperscript{289} Id., ¶¶34, 35.
\item \textsuperscript{290} Id., ¶46. As Liebenberg observes, this is enforceable without reference to progressive realisation or resources. Liebenberg, supra note 51 at 183.
\item \textsuperscript{291} Minister of Health v. Treatment Action Campaign, id., ¶38. It thus took up as Liebenberg notes, the issue of polycentricty. Liebenberg, id. at 182.
\item \textsuperscript{292} Minister of Health v. Treatment Action Campaign, id., ¶123. The inclusion of the transparency element is seen as welcome by Liebenberg. Liebenberg, id. at 184.
\item \textsuperscript{293} Wesson, supra note 215 at 288; Nolette, supra note 98 at 114.
\item \textsuperscript{294} Nolette, id. at 115.
\end{itemize}
attributable inter alia, to availability of information, minimal cost implications, and more concrete questions raised by litigants, also addressing concerns raised by a “strong rights” approach.\textsuperscript{295} The limited financial impact both on account of the drug being provided for free as well as availability of testing and counselling facilities, is seen as an important factor.\textsuperscript{296}

For Liebenberg, the decision in \textit{TAC} illustrates the application of the \textit{Grootboom} jurisprudence to support a broader campaign to advance access to socioeconomic rights.\textsuperscript{297} Its approach in this and the previous decisions of having to consider the larger needs of society rather than the specific needs of individuals, demonstrates, however, the difference in treatment of socioeconomic rights in contrast to civil and political rights where such holistic needs of society will be considered in the context of restrictions on individual rights.\textsuperscript{298} However, for Woods, the case illustrates that a court order enforcing a constitutional legislative command ultimately will benefit specific individuals.\textsuperscript{299}

It is however, criticised for lacking a principled basis on which the programme was found deficient, with the Court ordering immediate removal of restrictions rather than the formulation and implementation of a comprehensive programme.\textsuperscript{300}

The decisions in \textit{Soobramoney}, \textit{Grootboom}, and \textit{TAC} have been termed a “‘landmark trilogy’ which displays a distinctive narrative” drawing “a timeline from the infancy to the early adulthood of socioeconomic rights jurisprudence, the latter phase being characterised by a discernible methodological maturity in the adjudication of these rights.”\textsuperscript{301} The test of reasonableness has remained largely unchanged in subsequent ones but for some methodological issues such as of

\begin{itemize}
\item \textsuperscript{295} \textit{Klein}, \textit{supra} note 214 at 381–82.
\item \textsuperscript{296} \textit{Liebenberg}, \textit{supra} note 51 at 185.
\item \textsuperscript{297} \textit{Id.} at 186.
\item \textsuperscript{298} \textit{Id.} at 187.
\item \textsuperscript{299} \textit{Woods}, \textit{supra} note 236 at 790. However, she observes, that while the AIDS epidemic has all characteristics of a public health crisis and falls more easily within the scope of liberal state responsibility, kidney disease however is seen as a private misfortune. \textit{Ibid}.
\item \textsuperscript{300} \textit{Lehmann}, \textit{supra} note 215 at 175.
\item \textsuperscript{301} \textit{Trilsch}, \textit{supra} note 62 at 557.
\end{itemize}
equality in socioeconomic rights cases and limitations on negative obligations. The decisions in Grootboom and TAC are seen as human rights “victories”, which have improved the situation for many, the Court’s cautious approach not appearing to have hindered social transformation. Liebenberg, on the other hand, sees these early decisions as unnecessarily limiting the potential of these rights in creating a better quality of life for all. The application of the reasonableness test, while successful, has also resulted in the Court not determining the content of the rights, something it omitted to do in TAC, and looked into in only a limited manner in Grootboom, though it can well be argued that TAC did not as such require the Court to consider the meaning and content of the right to health, since it clearly involved a flagrant violation.

**Other Socioeconomic Rights Decisions**

**Social Assistance**

Subsequent cases have, however, demonstrated the possibility of a jurisprudence that is not restricted to a narrow reading of specific socioeconomic rights provisions. For instance, in *Khosa v. Minister of Social Development*, some Mozambican citizens, who were permanent residents in South Africa and integrated into the community, were denied social assistance on account of not being South African citizens. The Court clarified that the socioeconomic rights in the Constitution were closely related to the founding values of human dignity, equality, and freedom, noting that the rights to life and dignity were implicated in the applicants’ claims. Section 27 refers to the right of “everyone”, not citizens alone; and while the state may choose to justify not paying benefits to everyone so entitled, the criteria for the limitation must be consistent with the bill of

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302 *Id.* at 564.
303 Kende, *supra* note 62 at 624.
304 Liebenberg, *supra* note 51 at 190.
306 Davis, *supra* note 38 at 703.
307 *Supra* note 252, ¶¶1–4.
308 *Id.*, ¶¶ 40, 41.
rights. The differentiation between citizens and non-citizens, to pass constitutional muster should not have been arbitrary or irrational, and while it may be a requirement for social benefits in other countries, the Constitution specifically mentioned “everyone”. The case at hand was one of “intentional, statutorily sanctioned, unequal treatment” of those contributing to the welfare system through payment of taxes, the denial thus being unfair, and not a reasonable legislative measure contemplated by section 27(2), having impacted on their dignity and equality. Rather a suspended declaration of invalidity, the Court chose to read in the “curing words” “or permanent resident/s” in the appropriate legislation.

Khosa is seen as a “bold” decision, representing a new direction in judicial scrutiny of the government’s social policy and imposition of financial obligations, based on a reading of the equality guarantee, and a “significant break” from the administrative model adopted thus far in socioeconomic rights cases, demonstrating that the role of the courts in taking seriously the adverse effects of policy on the poor, depends less on boldly conceived constitutional clauses and rather on broader jurisprudential considerations that can destabilise existing legal concepts.

Standard of Living
Housing: Housing (with a particular focus on eviction) is an area in which the Constitutional Court’s jurisprudence is more developed than other socioeconomic rights, a development that may be explained by the trauma of evictions and forced removals during apartheid, the harmful effects of which linger in the new South Africa. The slow pace in bringing about reforms in this area has

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309 Id., ¶¶ 42, 44–45.
310 Id., ¶¶ 53–54.
311 Id., ¶¶ 74, 77, 82, 85.
312 Id., ¶¶ 88–89. Khosa for Young is an instance of "peremptory review" which is closer to the conventional static model of review wherein it read curing words into the legislation to include both citizens and permanent residents. This is so in four ways, one in reviewing legislation that had not yet come into effect; two, linking reasonableness inquiry to the values in the Constitution; three, refusing to ratify a settlement between parties; and four; its interventionist remedy. Young, supra note 82 at 408–09.
313 Davis, supra note 82 at 708.
subjected the government to much criticism.\textsuperscript{315} \textit{Jaftha v. Shoeman},\textsuperscript{316} involved appellants, who were rendered homeless when their homes were sold in execution to recover housing debts. The Court observed that any measure permitting a person to be deprived of existing access to housing (negative), limited the rights protected in section 26(1), and must be justified on the basis of the general limitations clause in section 36.\textsuperscript{317} The impugned provision severely limited the right to housing, putting indigent persons in a position where they may be not be restored to conditions of dignity, with there being insufficient judicial oversight in the process; the appropriate remedy was thus seen to be reading-in words to remedy this lacuna, providing for appropriate oversight.\textsuperscript{318}

In \textit{Minister of Public Works v. Kyalami Ridge Environmental Association},\textsuperscript{319} the Constitutional Court held that even though the legislative framework was inappropriate to provide relief to flood victims, it did not preclude the government’s common law power to make available its land to flood victims, in pursuance of its constitutional duty to provide them access to housing.

\textit{Occupiers of 51 Olivia Road}\textsuperscript{320} presented a case, wherein the principles of accountability and participation could be employed by the homeless against the power of property.\textsuperscript{321} In this case, eviction was ordered because the buildings occupied by the claimants were found unsafe and unhealthy. The impugned provision of the National Building Regulations and Building Standards Act, which imposed criminal sanctions in absence of an order to vacate, was held inconsistent with the Constitution as it would render nugatory section 26(3), the protection under which would amount to little, if people could be compelled to leave their homes on pain of criminal sanction.\textsuperscript{322} The Court observed that the city ought to have engaged with those sought to be evicted on issues of the consequences of their eviction, what the city could do to alleviate dire consequences;

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\begin{footnotesize}
\textsuperscript{315} Williams, \textit{id.} at 820.
\textsuperscript{316} \textit{Supra} note 38.
\textsuperscript{317} \textit{Id.}, ¶ 34.
\textsuperscript{318} \textit{Id.}, ¶¶ 39, 55, 64.
\textsuperscript{319} (2001) 7 BCLR 652 (CC), ¶ 49.
\textsuperscript{320} \textit{Occupiers of 51 Olivia Road v. City of Johannesburg}, (2008) 3 SA 208 (CC).
\textsuperscript{321} Davis, \textit{supra} note 38 at 706.
\textsuperscript{322} \textit{Occupiers of 51 Olivia Road v. City of Johannesburg}, \textit{supra} note 320, ¶ 49.
\end{footnotesize}
\end{flushright}
whether the buildings could be made safe; whether the city had obligations towards the residents; and how and when these could be fulfilled.\textsuperscript{323} Meaningful engagement was termed a “two-way process”, noting that while people may be vulnerable, may not understand the importance of the process, and may not be willing to participate, the municipality could not walk away but must make reasonable efforts to engage.\textsuperscript{324} If the municipality carried out eviction, a complete and accurate record of the engagement proceedings including the reasonable efforts of the municipality, were held to be essential.\textsuperscript{325}

The possibility of participation, which was given content in this decision reduces possibilities of capricious arbitrary decisions.\textsuperscript{326} Young, who describes this remedy as “experimentalist”, observes that the “deliberative stance recalls the literature on new governance that emphasizes the disentrenchment of public institutional power by litigation”.\textsuperscript{327} Remedies such as these are in line with suggestions made as to a cooperative effort between all organs of the state (with innovative measures such as an initial advisory opinion by the Court) for a way forward, such measures being important for both empowerment and improved public administration, and illustrating the significant part courts can play in securing relief, while respecting the democratic mandate and institutional expertise of other branches.\textsuperscript{328} The order of the court was concerned with a procedural value, and the relief offered by the engagement was procedural though the solution went to the substance of the problem, highlighting the difficulty of separating substance from procedure.\textsuperscript{329}

\begin{footnotes}
\footnotetext{323}{Id., ¶¶11, 14. It thus set out a detailed order with the subject matter and objectives of meaningful engagement, even specifying the date by which affidavits were to be filed reporting on its progress. Pillay, supra note 231 at 741.}
\footnotetext{324}{Occupiers of 51 Olivia Road v. City of Johannesburg, id., ¶¶14, 15.}
\footnotetext{325}{Id., ¶21.}
\footnotetext{326}{Davis, supra note 28 at 709.}
\footnotetext{328}{Govindjee, supra note 35 at 75; Williams, supra note 92 at 827; Pillay, supra note 231 at 732, 753.}
\footnotetext{329}{Pillay, id. at 746–47.}
\end{footnotes}
Even prior to this decision, in *Port Elizabeth Municipality v. Various Occupiers*, the Court observed that encouraging and requiring parties to engage with each other proactively and honestly is a “potentially dignified and effective mode of achieving sustainable reconciliations”, suggesting mediation or engagement replace “arms-length combat”, wherever possible.

Once again, the question of meaningful engagement arose in *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes*, where about 20,000 residents of the Joe Slovo settlement were required to be relocated at the instance of the company charged with developing housing at the settlement. There was some consultation, but applicants complained that they were not fully consulted, besides also alleging that there were broken promises, including a promise that 70 percent accommodation would be made available to Joe Slovo residents who qualified. Rents of between R150 and R300 were raised to between R600 and R1050. The Court stressed that meaningful engagement between authorities and those who would be rendered homeless was vital to the reasonableness of the government activity, and while engagement had taken place, there were a major failure of communication on part of the authorities; it ordered the parties to meaningfully engage with each other to reach agreement on the date and time-table for relocation, and other relevant matters, specifying a date by which the agreement had to be reached, as well as engagement on relocation specifying various matters from time and manner, to transportation (for relocation and access to amenities), and the temporary units. However, it emerged during the engagement process that in situ upgrading of the settlement would prove a feasible solution; this appears to have been adopted, in Williams’ view, being the less expensive solution. The decision in *Joe Slovo* turned on its own particular set of facts but indicated that

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331 (2010) 3 SA 454 (CC), ¶11. In this case 5 concurring judgments were delivered.  
332 *id.*, ¶¶109–110.
333 *id.*, ¶371.
334 *id.*, ¶¶378–79, 7(5), 7(6), 7(11).
335 Williams, *supra* note 92 at 833.
non-conduct of meaningful engagement would cause a court to order the government action to be halted.\textsuperscript{336}

Another decision concerned with the right to housing and engagement was the 2014 case of Malan\textit{ v. City of Cape Town}.\textsuperscript{337} An eviction order was passed against the applicant on allegations of breach of lease including for non-payment of arrears and illegal activities on the property. The Court found that the city had made no attempt to have any negotiations or mediation with the applicant, before deciding to cancel her lease and ask her to vacate the premises. She had resided in the property for over three decades lawfully, and had not been personally involved in any illegal activities and may not have knowledge of them due to her age and health. The city, on taking its decision, also did not make any offers to accommodate her elsewhere. The Court noted that "[t]he duty of engagement which a municipality is obliged to observe entails that the municipality should raise its concerns with persons whose eviction it may seek, discuss possible solutions with them and try to find ways of accommodating their concerns, if it can do so within its available resources".\textsuperscript{338} It was thus under an obligation to take procedural steps before it could cancel the lease. The eviction was thus set aside as not just and equitable. In Daniels\textit{ v. Scribante},\textsuperscript{339} the applicant was being compelled to vacate her home by the landlord, serving a notice on her when she herself commenced some improvements to ensure basic amenities, as he was not maintaining the premises. The Court once again stressed the importance of meaningful engagement to balance the conflicting rights and interests of owners and occupiers and among other orders directed the parties to engage meaningfully on the implementation of improvements.

\textsuperscript{336} Pillay,\textit{ supra} note 231 at 735. The Court has faced some criticism in this judgment for its reluctance in examining the proposed housing project too closely as there were even in the submissions before the court indications of inadequacies such as insufficient alternative accommodation, large discrepancies between rent promised and rent that would eventually be charged, and also sufficiency of the number of new units to accommodate all residents of the settlement.\textit{ Id.} at 748-49. The approach in\textit{ Joe Slovo} is seen as having features of managerialism though highly permissive on government policy. Young,\textit{ supra} note 82 at 406.

\textsuperscript{337} (2014) 6 SA 315 (CC).

\textsuperscript{338} \textit{Id.}, ¶150.

\textsuperscript{339} (2017) ZACC 13, ¶¶62, 71(5).
Williams sums up the factors she considers necessary for meaningful engagement, which include the court setting out the framework for the same in detail, with specific goals to be attained; providing the claimants with substantial expert legal assistance; and the process including engagement between the claimants/occupiers and their lawyers as in grassroots movements, lawyers bring their own values into the engagement, which may otherwise negatively influence their advice.\textsuperscript{340} The requirements for proper engagement were also set out in a subsequent decision, wherein it was said to mean taking into account the wishes of the persons to be evicted, whether the residences could be upgraded in situ; and whether alternative accommodation would be provided, in addition to manner and timeframe for eviction.\textsuperscript{341}

This meaningful engagement requirement, Pillay pints out, emerges from both section 26(2) and the right to procedurally fair administrative action under section 33.\textsuperscript{342} While not a strong remedy and not detracting from the final orders of the Court, it manifests “a deliberative model of judicial review”, which has in both 51 Olivia Road and Joe Slovo, resulted in important changes in government action and policy through community participation.\textsuperscript{343} For engagement to be truly meaningful and ensure the community’s right to real participation, it must be a precondition (unlike in Joe Slovo), and must not be undermined by the scale of the project.\textsuperscript{344}

More recently, in Molusi v. Voges,\textsuperscript{345} the applicants were served notices terminating their rights of residence on ground of non-payment of rent despite demand. The Land Claims Court had accepted that a periodic lease may be terminated on reasonable notice by either party under

\textsuperscript{340} Williams, supra note 92 at 834.  
\textsuperscript{341} Abahlali Basemjondolo Movement SA v. Premier of KwaZulu-Natal, (2010) 2 BCLR 99 (CC). After this decision, as has been noted, the failure to consider upgrading of an informal settlement renders the decision of eviction or relocation liable to review. Moyo, supra note 256 at 37.  
\textsuperscript{342} Pillay, supra note 231 at 746.  
\textsuperscript{343} Id. at 749–50. Strong community participation played an important role in Joe Slovo, indicating the importance of their role in driving the process from the early stages. Id. at 754. Further, it has been seen from various cases that this process of meaningful engagement has been absorbed by government officials as part of what they need to do towards implementation of socioeconomic policies. Id. at 751.  
\textsuperscript{344} Id. at 751–52. Narmada Bachao Andolan saw a similar situation where she feels the Court did not consider that the question of effective rehabilitation was inseparable from the construction going ahead and the delay in bringing the case was since the NBA had engaged with the government towards a comprehensive assessment of the project. Id. at 753.  
\textsuperscript{345} (2016) 3 SA 370 (CC), ¶¶5, 7, 13, 37, 47.
common law. The Extension of Security of Tenure Act which sought to limit homelessness by respecting, protecting, promoting and fulfilling the right to housing, and required that justice and equity should prevail in relation to all concerned when making an order of eviction, was required to be complied with. Reliance on common law did not exonerate the respondents from compliance with the Act. Eviction without compliance with the Act would render the appellants homeless and frustrate the aims of the Act. The application for eviction was thus, dismissed.

Another relevant judgment on housing rights, under the Rental Housing Act, is *Maphango v. Aengus Lifestyle Properties*, wherein the landlord cancelled the tenants’ leases and offered them tenancies on the same terms but at much higher rents. The Act required termination of lease and rental determinations to be just and equitable, and that the termination not constitute unfair practice, superimposing the unfair practice regime on contractual arrangements. The appellants were granted leave to appeal the eviction but final determination of the same was to be held over pending determination of whether the action constituted unfair practice.

In *President of the Republic of South Africa v. Modderklip Boerdery*, the state’s obligation to progressively realise the right of access to housing was reiterated, and it was recognised that the state not only has the obligation to provide mechanisms for resolution of disputes between citizens, but also to ensure that large-scale disruptions in the social fabric do not take place due to execution of court orders. In a decision building on the jurisprudence in *Modderklip Boerdery*, *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties*, an issue considered was entitlement to temporary, accommodation in lawful evictions. In this case, 81 adults and 5 children, including persons with disabilities and pensioners, occupied a property for

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346 [2012] ZACC 2, ¶2, 50, 51, 68. The dissenting decision that would have permitted the landlord to terminate the lease reflects the neoliberal direction taken by recent decisions, which as Williams notes would derail the transformative jurisprudence being developed. Williams, supra note 92 at 837. In this context, the general fear expressed by O’Connell of jurisprudence across the globe taking a more neoliberal stance in recent years, including that of South Africa may be recalled.

347 Case CCT 20/04, ¶¶39, 43. Modderklip was also held entitled to compensation from a specified date for the land occupied by the informal settlement. Id., ¶68(3)(b).

348 Supra note 59. Williams, supra note 92 at 840.
over six months, the location crucial to their income. Blue Moonlight, who purchased the property for redevelopment, sought eviction which was granted by the High Court. The Court observed that when land is purchased for commercial purposes, it may be reasonably expected that the owner aware of the presence of occupiers over time, must consider the possibility of having to endure the occupation for some time, though not indefinitely. The City’s housing policy differentiating between those relocated by them, and those sought to be evicted by private owners was found not reasonable, and unconstitutional. The Court recognised that in a question of homelessness it matters little who the evictees or evictors are. Therefore, while Blue Moonlight was entitled to eviction, the city was held obliged to provide temporary accommodation.

Water: The right of access to water guaranteed under article 27 of the Constitution came up before the Constitutional Court for the first time in Mazibuko v. City of Johannesburg. This was a decision from which there was great expectation from the Court towards further development of its socioeconomic rights jurisprudence and reconsideration of the minimum core question. The Court took note of the gross inequality in the matter of access to water, which was in its view “evident in South Africa”, with 8 million people in 2006 having inadequate access, and of which 3.3 million had no access at all to a basic water supply. The issues involved in the decision were as to the city’s policy of supplying free basic water, and installation of pre-paid water meters for use of water in excess of the free basic allowance of 6 kilolitres per person per month. The Court noted, that when a policy relating to socioeconomic rights is challenged, the government must explain why the policy is reasonable; must show what it has done to formulate the policy, its investigation and research, the alternatives considered, and the reason for selecting the option adopted, while

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349 City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties, id., ¶¶6, 8, 12.
350 Id., ¶¶40, 93–97. It is argued, however, that subsidising the developer which was directed by the court could give an incentive for unscrupulous practices and while the state may have to pay the costs (rather than the tenants), for the long-term a more coherent plan may be required so that tax payers may not be unnecessarily burdened with the social dislocation costs for economic development. Williams, supra note 92 at 842–43.
352 Trilsch, supra note 38 at 564, 570.
emphasising that the Constitution does not require the government “to be held to an impossible standard of perfection”. The policy must also be shown, as being reconsidered, consistent with the object of progressive realisation of the right, as a policy set in stone and never revisited is unlikely to result in the progressive realisation of the concerned right.\textsuperscript{353} Litigation on social and economic rights could “exact a detailed accounting from the government, and in doing so impact beneficially on the policy-making process”.\textsuperscript{354} The city’s policy involved relaying pipelines to improve supply, introducing a free allowance, and pre-paid meters, and communities were extensively consulted on what the project would entail and its implementation. The city had provided for additional free water allowance for those with the lowest incomes, and also, relief on charges levied for other services. The Court found the policies to be reasonable and not in breach of the city’s obligations.

The decision, where a deferential standard of reasonableness was applied, and the sufficiency of the basic minimum water not considered, has been criticised for interpreting progressive realisation to merely mean periodic review of policies, and being flexible and adapting to change rather than improving quality; its approach being formalistic and not taking account of the community’s circumstances; besides also for failing to consider whether less restrictive options could have been adopted.\textsuperscript{355} This decision is seen as demonstrating that the court ordinarily does not see it as institutionally appropriate for it to determine the content of a socioeconomic right, or the specific steps to be taken by the government towards progressively realising the right.\textsuperscript{356} For Young, the principle of proportionality would have assisted in this inquiry as by not setting out the content of the right (though it could have done so), the burden of proof unlike in the case of

\textsuperscript{353} Mazibuko v. City of Johannesburg, supra note 351, ¶¶161–62.
\textsuperscript{354} Id., ¶163.
\textsuperscript{355} Young, supra note 211 at 22, 29; Moyo, supra note 356 at 35–36. Young argues that the Court could have considered whether the city’s objective could be achieved through less restrictive alternatives such as whether a more generous quota would have proved more effective than monitoring indigent persons, demonstrating the destructuring of the proportionality step with reasonableness review. Young, id. at 29.
\textsuperscript{356} Govindjee, supra note 35 at 70–71.
proportionality, remains on the claimant; moreover, proportionality analysis would allow it to engage with more rights respecting alternatives.\textsuperscript{357}

A related issue, of adequate sanitation facilities, came up before the court in \textit{Nokotyana v. Ekurhuleni Metropolitan Municipality},\textsuperscript{358} wherein petitioners sought change in type and number of toilets, besides high mast lighting for enhanced safety as they were provided 1 toilet for every 10 households in informal settlements. The applicants sought that the right to adequate housing be given minimum content but the court did not consider this issue. The Court found that it would not be just and equitable to make an order benefiting those who approached the Court, while there are also others in a similar situation, who did not. There was, however, a delay on part of the municipality in deciding whether to upgrade the settlements (only after which residents could claim upgrades), which was found unjustified and unacceptable. The Court ordered that the decision be taken within 14 months. This case was once again concerned with directing implementation of a pre-existing policy but failed to give a finding of unreasonableness on account of the short-term and immediate needs of residents not being addressed.\textsuperscript{359}

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Thus, the Court has been able to demonstrate in its cases that socioeconomic rights must be taken seriously, its approach giving meaning to constitutional promises while not encroaching on the prerogatives of other branches, but in “harder cases”, where the legislature itself is yet to act, it is not inclined to foist specific directions regarding policy on the government.\textsuperscript{360} Its jurisprudence has demonstrated absence of institutional obstacles to realisation of collective rights, where there is sufficient political will that the full protection of social rights cannot be achieved without a re-
evaluation and reconstruction of the liberal rights discourse.\textsuperscript{361} The employment of concepts from administrative law such as rationality review or reasonableness review, in Davis' view, “could promote a culture of formal justification in the implementation of public policy”.\textsuperscript{362}

On the other hand, some feel that the careful wording of the constitution to show appropriate deference to the legislature, makes it very difficult for courts and judges determine at what point the legislature or executive can be seen as acting unconstitutionally, while its cautionary approach in practice is attributed in part, to its knowledge of the Indian experience with land reform.\textsuperscript{363} However, by questioning unjust resource distributions and affirming the right to social and economic benefits, the Court has facilitated the transformation of an apartheid society into a democratic society, even at times, overriding ownership for protecting citizens' socioeconomic rights.\textsuperscript{364}

In \textit{Soobramoney}, \textit{Grootboom}, and \textit{TAC}, the Court developed a "minimalist framework" to apply these rights, and has done so by "allowing the state to base a complete defense on grounds of limited availability of resources, save in respect of the development of programs that deal with the poorest in the community".\textsuperscript{365}

The South African approach, despite its many benefits, also has certain shortcomings. For instance, the Court not defining the content of the rights, sidestepping the enforcement of unqualified socioeconomic rights, as well as lack of clarity on the level of provision required, being attributed to the courts' "weak" approach.\textsuperscript{366} While the failure of the Court to define the content of the rights has been criticised, it is acknowledged that, this adds an element of flexibility. Davis finds that the Court's analysis in each case needs to involve the "extra step" of first attempting to understand the content of the right before engaging in assessment of reasonableness, noting that

\begin{footnotesize}
\begin{enumerate}
\item[361] Woods, supra note 236 at 791.
\item[362] Davis, supra note 38 at 702.
\item[363] Goldstone, supra note 243; Govindjee, supra note 35 at 73.
\item[364] Goldstone, \textit{id.} at 7. Instances of such "overriding" include \textit{Modderklip Boerdery} and \textit{Blue Moonlight}.
\item[365] Davis, supra note 38 at 701–02.
\item[366] \textit{id.} at 702; Wesson, supra note 215 at 290. The failure to define the content of the rights limits the potential of the judicial enforcement of socioeconomic rights. Ebadolahi, supra note 89 at 1585.
\end{enumerate}
\end{footnotesize}
the qualification of the court’s assessment by the element of resources, in a sense, impedes the
definition of the content.\textsuperscript{367}

The Court’s reluctance to define the minimum core of the rights, has also, as discussed, been
criticised by some. On the other hand, defining the minimum core would require provision of a
minimum level of goods to all citizens, irrespective of need (requiring rights on demand), besides
requiring the court to take on more of a policy-making role, resulting in unintended chaos; the
existing approach thus being more flexible and feasible and playing a role in ensuring that other
branches actually and appropriately meet the role constitutionally required of them.\textsuperscript{368} However,
as mentioned earlier, and as Young observes, by “rejecting the minimum core as a stand-alone
right”, the Court “held open the possibility that the minimum core understood as a relevant
standard, could guide its assessment of reasonableness”.\textsuperscript{369} The standard thus has a role to play,
and the approach of the Court seems in line with the constitutional intent though as Liebenberg
has noted, it could well have laid down principles on minimum core rather than a specific basket of
goods.

In Liebenberg’s view, reasonableness review can contribute to the creation of a
participatory dialogic space for adjudicating social rights, which can be achieved in three areas of
the courts’ interpretation of socioeconomic rights: greater protection within the reasonableness
review framework for basic needs claims; emphasising judicial role in relieving burdens on poor
communities; and contributions to deconstruction of private law concepts, that is, a hierarchical
set of legal concepts that supports the distribution of resources inherited from apartheid.\textsuperscript{370}

\textsuperscript{367} Davis, \textit{id.} at 697, 700.
\textsuperscript{368} Nolette, \textit{supra} note 98 at116–17; Kende, \textit{supra} note 62 at 622–23. For Nolette, the Court’s approach “works”
since it has shown that it is able to enforce what are seen as “positive” rights “while constraining itself to a
contextual examination of process”. Nolette, \textit{id.} at 115. Jheelan too finds the “reasonableness review” approach a
better one compared to a minimum core as concerns socioeconomic rights, their enforcement being inevitably
limited by resource constraints. Navesh Jheelan, "The Enforceability of Socio-economic Rights", \textit{2 European Human
\textsuperscript{369} Young, \textit{supra} note 211 at 11–12.
\textsuperscript{370} Davis, \textit{supra} note 38 at 706–07.
The approach, however, shows that the primary means of securing distributional decisions remains political organisation, a notion supported by some, but although it may reduce the potential promises of the text as judges adopt models in line with earlier traditions of legal practice, it holds democratic promise by enabling the “powerless” to compel transparency and accountability, a gain that cannot be discounted.371

**Mechanisms Adopted by the Courts for Monitoring, etc.**

Another ground on which the Constitutional Court’s approach is faulted is the lack of an adequate supervisory element.372 For instance, in *Grootboom*, the Court refrained from structuring its order so as to allow the successful party to approach the Court again to determine whether the plan had been implemented giving effect to the order, with the case being the same in *TAC*.373 In *Grootboom*, the duty to monitor implementation of obligations under section 26 was imposed on the SAHRC, which would report on the matter if necessary, but as has been noted, it did not approach the Court though orders were not immediately implemented.374 In *TAC*, the Court in fact, rejected a request from the complainants for judicial supervision of the government’s HIV programmes, despite the lower courts’ orders containing a supervisory element, though it did recognise that issuing of mandamus and supervisory jurisdiction may be employed, where necessary.375 Supervision has however been introduced as far as engagement is concerned.376 The need for a supervisory element in some form, is stressed by commentators due, not to refusal by the government to comply but administrative inefficiency, and inertia, besides the debilitating

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371 *Id.* at 711; See Kende, *supra* note 62 at 624–25.
373 Davis, *supra* note 38 at 607.
376 For instance, in *Olivia Road*, the court specified that a complete and accurate record of engagement be filed in any eviction proceedings before the municipality. *Occupiers of 51 Olivia Road v. City of Johannesburg*, *supra* note 320, ¶21.
consequences of demarcation of disputes at different levels of government, but the Court is reluctant to do so due to its deference to other branches.  

"Soft-protection" has, however, been introduced by the South African Constitution through the SAHRC and non-governmental organisations including by means of reports filed with the SAHRC, which has a constitutional obligation to monitor the realisation of rights enshrined in the Constitution.  

Section 184(3) is seen as introducing at the domestic level, the essential spirit of the international reporting procedure by placing an obligation on the state to justify itself to a domestic body, thereby inter alia, identifying shortcomings and highlighting successes, which make the monitoring process significant.  

Evaluation of annual reports from organs of the state (which the SAHRC is to require them to submit) to determine to the extent to which they have taken measures towards realisation of socioeconomic rights is one of its most significant functions.  

Ntlama views the role of the SAHRC as key for monitoring implementation and recommends in this regard that the SAHRC issue guidelines on what is expected of the various organs of the state; should have access to the government’s reports filed before international bodies, and must carefully consider the relationship of this report to that required to be filed before the National Assembly.  

According to Ntlama, there is significant room for participation in the monitoring process by NGOs in providing information on the real needs of people and problems they face, but

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377 Davis, supra note 38 at 701; Kende, supra note 62 at 624–25. Davis observes that the deference to the legislative and executive may have in part been fuelled by the awareness of the South African constitutional lawyers of the experience of the Indian Supreme Court and its well-publicised clashes with the Nehru government over property rights. Davis, id. at 698.

378 Nomthandazo Ntlama, "Monitoring the Implementation of Socio-economic Rights in South Africa: Some Lessons from the International Community", 8(2) Law, Democracy and Development 207 (2004). The SAHRC additionally has powers to (a) investigate and report on the observance of human rights and to take steps to ensure appropriate redress where there is violation of human rights; (b) institute litigation or make recommendations to relevant organs of the state where there is a violation of human rights; (c) an obligation to identify organs of the state that are responsible for delivery of socioeconomic rights which involves an analysis of the constitutional division of power. Id. at 208.

379 Id. at 209. Ntlama clarifies that the purpose of the information received by the SAHRC under section 184 (3) of the Constitution cannot be merely to gather information on socioeconomic rights but must be analysed and evaluated in terms of the duty of the SAHRC under section 184 (1) to monitor and assess the observance of human rights. Id. at 208.

380 Olivier, supra note 61.

381 Ntlama, supra note 378 at 212.
the “sad reality” is the non-involvement of most human rights NGOs in the field of economic and social rights; he thus recommends institutionalising NGO participation.\textsuperscript{382} Obstacles to NGO participation (key for successful monitoring) include lack of awareness and willingness, besides physical and financial constraints experienced by organisations working in the area of economic and social rights.\textsuperscript{383} Lobbying and advocacy by civil society can contribute toward making parliamentary processes more effective by increasing political pressure and helping toward removal of barriers faced by people in accessing socioeconomic rights, besides providing a voice to various vulnerable sections and informing the State, the Constitutional Court, and SAHRC of grassroots experiences.\textsuperscript{384}

As far as the availability of information and analysis to the Court is concerned, a role for Commissions, has been proposed, as is the case in India. Commissions with the role of producing impact assessment studies in relation to policy measures, would enable judges to take wider and more long-term policy considerations into account when coming to balanced decisions on such matters.\textsuperscript{385}

Although monitoring has been entrusted to the SAHRC under the Constitution, and in cases such as Grootboom, and while it has an important role to play in this regard, inadequate NGO participation, among others are barriers to effective exercise of this function, and such monitoring in itself may not be sufficient for ensuring implementation of decisions, thus calling for a stronger supervisory element. The SAHRC which has focused among others, on combating racism, and promoting socioeconomic rights, is seen as not having achieved its potential towards furthering socioeconomic rights.\textsuperscript{386} A role for the SAHRC proposed in the context of structural interdicts (a supervised remedy seen as apt for socioeconomic rights enforcement), and in line with its constitutional and statutory mandate, consists of assisting in the implementation of these by

\begin{itemize}
\item\textsuperscript{382} Id. at 215–16.
\item\textsuperscript{383} Ibid.
\item\textsuperscript{384} Id. at 217.
\item\textsuperscript{385} Wiles, supra note 83 at 43.
\item\textsuperscript{386} Ebadolah, supra note 89 at 1602.
\end{itemize}
helping relevant actors with the formulation of a remedial plan; ensuring provision of sufficient and accurate information to the Court, and following-up on plan implementation (also alleviating the Courts burden).  

Furthermore, as seen in the case of TAC, availability of information enabled the Court to take a stronger approach, though it was a contempt order that lead to implementation. The Court's reluctance to define a minimum core, as noted, is also in part due to lack of information. The role of Commissions as proposed, could thus be significant in this regard enabling the court to take more balanced decisions and perhaps, even determine the content of the rights.

**Status of Implementation of Decisions**

As discussed in Chapter IV, judgments, however progressive would mean little to people without implementation. Having mechanisms in place for enforcement of decisions is seen as the “real test” for commitment to human rights norms, with monitoring of progress to give a detailed overview of the entire situation so as to enable the evaluation of government performance in implementing socioeconomic rights.

In practice, the implementation of decisions on socioeconomic rights in South Africa appears to be mixed, as is the case in India. Research revealed that even two years after the judgment in Grootboom, there had not been full implementation. While the Government did develop a housing scheme in response to the decision in Grootboom, including the development of a programme for housing in emergency situations, and upgrading of informal settlements, neither Mrs Grootboom nor other members of the group she represented got housing as a result of the

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387 Id. at 1602–03.  
388 Ntlama, supra note 378.  
389 Davis, supra note 38 at 701. In this regard, and of the similar situation of the claimant in Soobramoney, Young notes the reaction of anger and disappointment that these decisions aroused in the public. Young, supra note 82 at 395. See also, Ebadolahi, supra note 89 at 1589–90 noting that even years after successful litigation, South Africans continue to suffer rights deprivations, meaningful access to the rights remaining a distant dream.
programme, and in fact, Mrs Grootboom died without ever receiving permanent housing. The SAHRC, though asked by the Court to monitor the situation and report back, did not approach the Court (the requirement to report was not mandatory). There have thus been implementation problems, key among them, the nature of the order handed down and the monitoring mechanisms in place. The High Court’s order was implemented to a limited extent and only some facilities made available to the community, but parts of the order requiring continuous involvement, were not fulfilled; while the Constitutional Court’s order to devise and implement within its available resources, a comprehensive and coordinated programme to progressively realise the right, was more general in nature, only declaratory, and did not compel the State to ensure compliance or contain time frames for the State to act. This “halting quality of South African developments” is seen as attributable to the “conservative nature of legal culture in South Africa, which acts as a significant restraint on progress toward an interrogation of background rules and beyond a paradigm that sees rights purely in negative terms.”

However, it is not that non-implementation is seen in all cases. In the TAC decision, the government, is seen by some, as having quickly implemented the Constitutional Court’s orders. Others paint a different picture of the impact of this decision noting that the government was reluctant in distributing the medicine to all deserving patients, and it was a contempt order that finally brought about its implementation in some provinces. Grootboom too, as noted, had a long-term impact.

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390 Williams, supra note 92 at 823; Tushnet, supra note 86 at 185. Tushnet notes that, the counterexample to Grootboom is the New Delhi Bus case and the order for conversion of buses to natural gas based on the right to health.
391 Goldstone, supra note 243 at 6.
392 Wiles, supra note 83 at 62.
393 Ibid.
394 Davis, supra note 38 at 708. He notes that to an extent, Chief Justice Langa acknowledged the importance of moving beyond deference to a background rule of law in Modderklip wherein he took note of the persistence of poverty and homelessness which serves as a “painful reminder” of the chasm to be bridged in order to achieve the constitutional ideal of a society based on social justice and improved quality of life for citizens. Id. at 708.
395 Goldstone, supra note 243 at 5.
396 Trilsch, supra note 68 at 574–75; Young, supra note 82 at 397-.
Involvement of civil society has, as in the Indian case, yielded more positive results as was seen in Joe Slovo, where without community lobby, eviction may have resulted, rather than meaningful engagement bringing about more positive results of in situ upgrades. TAC too illustrates the role of civil society in bringing about better results such as reconsideration of policy, besides the decisions themselves being more effective. In cases involving engagement, on the other hand, specification of time lines, and stronger orders specifying objectives of engagement have been seen, such as in Joe Slovo, and Yolanda Daniels. Again, in Nokotyana, a time period was specified for a decision to be reached on upgrading of the settlement, upon which improvement of amenities was dependent.

Wiles notes that it is natural for initial teething problems to have arisen, and a process of responsive adaptation of the system to occur. While this may be the case, it is clear from the experience of cases such as Grootboom or TAC that implementation even if it takes place may not be immediate, and as commentators have noted, administrative inefficiencies and inertia may be a reason behind this. This illustrates once again the need for stronger monitoring of implementation, which may as in the Indian case, yield more positive results.

8. Conclusion
Thus, like India, South Africa too has a mixed position as far as concerns socioeconomic indicators. While some statistics show improvements and a satisfactory position such as life expectancy, population having access to sanitation or other household services (such as piped water), secondary school enrolments and labour force participation of women, other areas, particularly unemployment and poverty, need attention. With life expectancy too, while there has been improvement, the same, as seen in statistics, has not been consistent, decreasing between 1990

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397 Pillay, supra note 231 at 754.
399 Wiles, supra note 83 at 63.
and 2000, and while once again on the rise by 2015, still remaining below 1990 levels, a consequence of the HIV pandemic in the country. Satisfaction among people with healthcare, education, and jobs remains low, below 50 percent in some instances. This is despite the country rating higher on the UNDP’s human development indices and having a relatively high GNI.

Poverty continues to be a major challenge for the country with some estimates listing 45 percent of the population living in poverty, and as identified by internal estimates, about 1.2 million households falling within the category of multidimensionally poor. While international/World Bank estimates of poverty in the country are much lower, still over 16 percent of the population is below the USD 1.90 mark and over 30 percent below USD 3.10, and poverty remains a problem that needs to be addressed from a rights perspective. It has also been pointed to as having implications for other problems. Homelessness persists and hundreds of thousands continue to live in informal settlements lacking basic amenities.

A challenge more specific to South Africa, impacting on both poverty and health, is the HIV pandemic which has resulted in enhanced health costs, fall in productivity, increase in orphans, violence, and stress. With the disease having affected over 18 percent of the population, and giving rise to rights-deprivations and impacts, the problem is one to be urgently addressed.

Unemployment rates in the country continue to be high at about 25 percent even though economic growth is high, the country in fact having one of the highest unemployment rates in the world, and seen as having "jobless economic growth". Even the nature of employment in terms of wage rates and social security, has been commented on. Inequalities in income and in the labour market also need to be addressed. From the rights perspective, work can be seen as related to the enjoyment of other socioeconomic rights (some cyclical) including food, health, shelter, and education.

A related issue in the context of education in the country is the finding that it does not provide the requisite skills for demands in the job market, there also being a vast discrepancy in
skills. This is despite reasonable (though still below full realisation) rates of primary and secondary school enrolments, as well as literacy rates. Availability of qualified staff and learning materials, has also been pointed to. These issues impact on unemployment and labour force participation.

Despite improvements in access to basic social services in the previous decade, a large percentage of households still lack access to adequate services, for reasons including corruption. Challenges have been noted in the middle-income category, where the rise in numbers of people has not been met by equal pace in provision of services. However, across categories, between 8 and 70 percent of households still lack adequate services. An adequately implemented social rights framework along with efforts by all branches of the State in this regard can play a role in improving the situation.

The South African Constitution, is among the few constitutions in the world to incorporate justiciable social and economic rights and contains the whole gamut of basic rights including that to food, water, social security, healthcare, and housing. Other than the rights of children, and other specific rights such as protection against eviction, emergency healthcare, etc., and the right to basic education, most rights require, as under international law, the State to take reasonable steps towards progressively realising these rights within available resources. The progressive realisation requirement would mean the obligation to take deliberate, concrete, and targeted steps, and to identify and address impediments (legal, financial, administrative, etc.) and lower them over time. The Constitution’s language including that of the specific rights, as well as the respect-protect-promote-fulfil typology is inspired by the ICESCR and CESC’s interpretation of the rights therein, the Court also being required to consider international law in its interpretations of the Bill of Rights. But it also differs from the ICESCR in several respects, including on inclusion of rights not mentioned, such as water or non-inclusion of certain rights mentioned, such as clothing, and certain basic rights in the South African Constitution, such as housing, healthcare, food, water, and social security being framed as rights of “access to”. Moreover, the Court has not accepted all
aspects emerging in the interpretation of the ICESCR, particularly the minimum core notion. The Constitution is transformative seeking to address the discrimination, inequalities, and lack of basic rights faced by millions during the apartheid regime.

As in India, various pieces of legislation have been enacted in areas of the right to work and workers’ rights, social security and social assistance, standard of living, and health to give effect to the socioeconomic rights set out in the Constitution. Some of these pieces of legislation such as the Basic Conditions of Employment Act and Housing Act set out in detail the functions or responsibilities of employers and of various levels of government as the case may be, towards giving effect to the rights covered therein. The Basic Conditions of Employment Act, Employment Equity Act, and Social Assistance Act, also for instance, define and prescribe punishment for offences and set out the mechanism for adjudication. Others such as the Housing Act define the responsibilities of different levels of government in respect of realisation of the right but do not specifically speak of the rights of beneficiaries. The Housing Act also does not provide specific remedies to beneficiaries in respect of the same.

In terms of government-initiated programmes, one of the most important in South Africa is the Social Assistance Programme, which was in place even during apartheid but has subsequently been revised to address the inequalities and other deficiencies therein. Major reforms in the programme since the 2000’s saw corruption and administrative inefficiencies being addressed, leading to savings of R 2 billion annually, and extension of benefits to 16 million beneficiaries under the programme, which provides seven different grants, from only around 3 million under the previous programme. The programme has also been noted to have impacted positively on the poverty situation in the country. Despite these significant improvements, challenges remain in the form of onerous application procedures and allegations of fraud. Other programmes such as school feeding, health insurance, and the Expanded Public Works Programme address other socioeconomic rights aspects. These programmes too have had positive results, but suffer from
certain drawbacks in the form of inefficiencies in implementation and corruption. The National Health Insurance scheme seeks to achieve full realisation of the right, rather than only focusing on vulnerable sections and while only recently introduced, doubts have been expressed about the government’s capacity to implement it.

The South African Constitutional Court has engaged with socioeconomic rights from the stage of certification of the Constitution prior to its adoption when it considered, among other questions, objections to the justiciability of these rights. Finding that the rights as universally recognised could be supplemented by other human rights, the Court rejected the arguments on non-justiciability of these rights, noting that at the least, they could be negatively protected, and that similar financial consequences would arise even in cases of civil and political rights. It saw no reason why these rights could not be judicially enforced.

Comparable with the ECSR’s approach, the values underlying the Constitution, of human dignity, equality, and freedom, which are specifically mentioned along with the unwritten solidarity value of ubuntu, are required to be considered by the Court in its interpretations of the rights. The former, while not specifically mentioned in the European Social Charter, have been identified as underlying that instrument. The two sets of values are almost identical, being values that underlie protection of human rights generally; however, solidarity is more relevant in the context of socioeconomic rights.

As mentioned, the Court, though required to consider international law in its interpretations has rejected the minimum core and instead has adopted reasonableness review to assess the measures taken by the government, which involves the consideration of various criteria including whether legislation is complemented by programmes; whether the programme is flexible catering to short-, medium- and long-term needs; whether it is reasonable in conception and implementation; and whether it is comprehensive, coherent, and effective, among others. The test seeks justification, transparency, and accountability from the government rather than requiring
certain minimum amounts to be provided, which may not be feasible in view of resource constraints. Writing in 2002, Liebenberg argued that socioeconomic rights should be interpreted so as to assist the poor in the protection and advancement of their fundamental socioeconomic needs and interests, which was the primary purpose of their inclusion in the Constitution. While one component of reasonableness review requires the needs of the most desperate to be addressed by the programme adopted by the government, by not providing individual relief, at times, these sections may be deprived of any immediate redress as was the case in Grootboom, where the petitioner in fact died without housing, although the decision had favourable longer-term impacts. Moreover, while the needs of vulnerable sections must be addressed, they are not required to be prioritised, again withholding immediate relief from those that require it urgently.

The reasonableness test is seen to be more than administrative law reasonableness (which merely requires consideration of coherence and comprehensiveness and taking into account relevant factors and excluding irrelevant ones), and involves the consideration of various factors, as mentioned.

As far as concerns negative obligations in the Constitution (such as protections against evictions), the general limitations clause in the constitution applies rather than the reasonableness standard, which includes justification for policy choices and taking into account the context as clarified in Jaftha.

In its application of reasonableness review in the context of housing, the Court has also adopted the dialogic remedy of “meaningful engagement”, whereby the authorities are required to engage with those likely to be evicted, towards identifying a solution and accommodating their concerns, including where possible in situ improvements in buildings so as to avoid evictions entirely, which has been seen in certain instances such as Olivia Road and Joe Slovo. Engagement is recommended in cases involving individuals (as opposed to large-scale evictions) too, such as

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400 Liebenberg, supra note 51 at 160.
Daniels. Such approaches are participatory and democratic, where the Court merely monitors the engagement process towards ensuring that the same has been meaningfully conducted. Moreover, they may also ensure more immediate relief to those whose rights are not effectively being realised or who are sought to be deprived of the same.

However, in other areas, decisions in line with neoliberal principles have been noted such as Mazibuko where the Court did not consider the basic free allowance of water being allowed to residents, which was alleged to be insufficient, and upholding the city’s policy involving pre-paid water meters as reasonable, not also considering whether less restrictive alternatives could have been adopted. Again on sanitation, the Court merely specified a time for considering upgrading of the settlement without looking into the specific issues of inadequate sanitation facilities alleged by the claimants, although its decision was in line with fairness and justice taking into account that others not before the Court were also in the same predicament.

The Constitutional Court’s approach is generally characterised as weak and deferential with weak remedies lacking mandatory orders and a sufficient supervisory element. The deferential approach adopted by the Court in many (though not all, for instance TAC, where various mandatory orders were issued) of its decisions involves the Court often identifying the shortcomings in the measures taken by the government amounting to non-compliance with constitutional requirements, leaving the situation to be remedied by the government. It thus does not specify policy changes required or financial allocations, thereby respecting the separation of powers and competences of the other branches.\footnote{Under the model adopted, it is clear that all the branches must act in a coordinated manner so as to effective realise the rights for all. As noted in Grootboom, realisation of the socioeconomic rights in the Constitution is the responsibility not of any one actor alone but a coordinated effort of various actors (including all three levels of government, national, provincial, and local). Republic of South Africa v. Irene Grootboom, supra note 91, ¶40; See also Olivier, supra note 61.} In fact, as in TAC, stronger orders were issued where financial implications of the decision were minimal, and adequate information was available. But by questioning non-compliance, and demanding justification and accountability, it has played a role towards transforming society, through an approach that is flexible and sensitive to the context.
and involves minimal judicial intervention, apt in particular for conditions, where other branches are responsive to their constitutional functions. Some however, question whether such a stance protects socioeconomic rights achieving the full potential of the constitutional provisions.

The approach is, moreover, also criticised for failing to define the content of rights and relatedly identify a minimum core, though it has accepted the latter as a relevant standard in assessing reasonableness. The reasonableness approach, however, can take into consideration resource constraints, which could not be pleaded if a minimum core approach is adopted, while lack of resources would prevent effective realisation of the right in practice, leading to non-implementation, were a minimum core standard adopted.

The South African approach considers collective rights requiring the State's measures to be reasonable in progressively achieving the right, and does not provide for individual remedies. This too has been criticised by some, in fact, pointing out that the burden on the Court in individual assessments, would be less onerous.\textsuperscript{402} The approach in application is thus comparable with that of the ECSR, which gives effect only to collective rights or addresses general situations of non-compliance. Even though individuals are permitted in the South African case, there is no relief on demand.

Lack of appropriate supervision has also led to criticism of the South African approach where the Court has in cases such as Grootboom and TAC, refused to monitor compliance. In the former, monitoring was handed to the SAHRC, which is mandated by the Constitution to monitor observance of human rights and perform a function of reviewing reports akin to that in international law. It is seen that lack of NGO participation, etc. hinders effective monitoring. Moreover, it may be the case that the parties lack resources to re-approach the court for remedies in cases of non-compliance. A supervisory element is still considered essential, due to

\textsuperscript{402} Liebenberg argues in favour of recognising individual entitlements both from the point of view of the court not having to review a wide range of measures to assess reasonableness, and burden being placed on the state to show why it was unable to provide the right, which will further ensure a more serious response and effort on part of the state. Liebenberg, supra note 51 at 188.
administrative inefficiencies and other problems that prevent effective implementation of decisions, despite responsiveness of other branches. In TAC as noted, it was contempt proceedings, that finally enabled implementation, in some instances. In fact, structural interdicts, whereby the violation is required to be rectified under court supervision, are viewed by commentators to hold particular promise for enhanced socioeconomic rights enforceability.\footnote{Ebadolahi, supra note 89 at 1591. This would also result in a “dynamic dialogue” between the judiciary and other branches. \textit{id} at 1592.}

Implementation of decisions, as in India, has a mixed record with many decisions not being implemented for long (for instance, \textit{Grootboom}), and some only after a contempt petition (for instance, TAC). Involvement of civil society as in TAC and \textit{Joe Slovo} is seen to yield positive results including in implementation.

Irrespective of its shortcomings, the model adopted by the South African Constitutional Court, has demonstrated that social and economic rights can be effectively adjudicated upon by the judiciary keeping within the limits of the separation of powers and enhancing democratic participation, but acting with restraint, identifying shortcomings and instances of non-compliance, and enabling other branches to carry out their functions, thereby facilitating the realisation of socioeconomic rights.