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The Efficacy of the Constitutional Court's Jurisprudence in Achieving Socio-Economic Transformation in Post-Apartheid South Africa

by

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DEDICATION

I dedicate this dissertation to my lovely family, especially my wife, Mampenyane Malatja, and my son, Meso Malatja, for their love, support and constant encouragement during difficult moments of my research.

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First, I would like to thank my Heavenly God for granting me the wisdom, strength and courage to complete my studies. Indeed, all things are possible through Him. May His everlasting grace and peace be upon us.

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SUMMARY

Transformative constitutionalism, popularised in the context of South Africa's transition from an apartheid State to constitutional democracy in 1994, arguably provides a valuable framework or constitutional ethos for redressing socio-economic disparities and imbalances brought about by the apartheid State. The greatest challenge facing contemporary South African society and its constitutional democracy is securing greater levels of equality and socio-economic justice amongst its populace, especially many previously disadvantaged South Africans.

It has been almost three decades since the demise of the apartheid system of racial injustices. Still, the majority of contemporary South African society remains subjected to abject poverty, deplorable social conditions and exclusion from the mainstream economy. Consequently, the debate amongst scholars on socio-economic rights has now shifted from the desirability of constitutionalising socio-economic rights to problems of enforcement or realisation of the rights.

The present study examines the extent to which the judicial adjudication and enforcement of socio-economic rights contained in the South African Bill of Rights have redressed the past socio-economic disparities and imbalances created by apartheid social engineering. The study engages in an analysis of the relevant international human rights law instruments, constitutional law jurisprudence, related legislation, as well as case law. The study shows that whilst progress has been made in achieving socio-economic transformation post-1994, there is a greater need to strengthen the legislative and judicial arms of government, specifically the courts' judicial review, towards improving the realisation of socio-economic rights contained in the Bill of Rights for the benefit of all South Africans. Poverty and inequality, exacerbated by unemployment, are the country's foremost challenges. Regrettable, the reality is that poverty and inequality grew since the advent of democracy in South Africa.

DECLARATION OF ORIGINALITY

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ACRONYMS AND ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AHRLR	African Human Rights Law Reports
CC	Constitutional Court
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CH	Chapter
CRC	(United Nations) Convention on the Rights of the Child
ECOSOC	Economic and Social Council
EHP	Emergency Housing Programme
FN	Footnote
GEAR	Growth Employment and Redistribution policy
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NHI	National Health Insurance
OP-ICCPR	Optional Protocol to the International Covenant on Civil and Political Rights
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
RDP	Reconstruction Development Programme
RSA	Republic of South Africa

SAHRC	South African Human Rights Commission
OHCHR	Office of the High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UPR	Universal Periodic Review
WHO	World Health Organisation

CHAPTER 1: INTRODUCTION

1.1 Introduction and Contextual Background

The Constitution of the Republic of South Africa, 1996 (hereafter 'Constitution'), which came into effect in 1996, is the supreme law of the Republic of South Africa.[1] The Constitution incorporates the most important values that underpin the country's democracy,[2] namely social justice,[3] equality, *ubuntu* (human dignity),[4] non-racialism, rule of law and supremacy of the Constitution.[5] It also defines the structure of the government.[6] At the heart of the Constitution is the Bill of Rights, found in chapter 2. The Bill of Rights sets out the rights and duties of all people in South Africa (SA),[7] including the vulnerable, the marginalised, the socially outcast, as well as victims of prejudice and stereotyping.[8]

Politically, the post-apartheid SA government inherited the most authoritarian and centralised system, characterised by racial discrimination and segregationist policies.[9]

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[1] Sections 1(c) & 2 of the Constitution.

[2] Sections 1 & 7(1) of the Constitution.

[3] 'Social justice' can be defined as a concept of fair and just relations between the individual and society, as measured by the distribution of wealth, opportunities for personal activity and privileges within a society. The concept regulates the way in which human rights are manifested in the daily lives of people at every level of society. See M Reisch 'Defining Social Justice in a Socially Unjust World' (2002) 83 (4) *Journal of Contemporary Human Services* 345-346. Social justice is an 'evolving concept', because as things evolve, they usually come to be more complex, more advanced, as well as better adapted to context and circumstance. Thus, social justice will mean different things at different times and in different spaces and places. AE Beckett & A Lawson 'International Journal of Disability and Social Justice: Introduction and Aspiration' (2021) 1 (1) *International Journal of Disability and Social Justice* 11.

[4] In *S v Makwanyane & Another* 1995 (3) SA 391 (CC) (hereafter '*Makwanyane*'), Mokgoro J defined *ubuntu* at para 308 as follows:

> In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality.

Langa J defined *ubuntu* as a cultural principle, which embodies the values of communitarian societies. *Makwanyane* para 224.

[5] Sections 1(c) & 2 of the Constitution.

[6] Chapters 3, 4 & 5 of the Constitution.

[7] Chapter 2 of the Constitution.

[8] M Trilsch 'What's the Use of Socio-Economic Rights in a Constitution? Taking a Look at the South African Experience' (2009) 42 (4) *Law and Politics in Africa, Asia and Latin America* 552.

[9] R Omond 'South Africa's Post-Apartheid Constitution' (1987) 9 (2) *Third World Quarterly* 622. See also FT Endoh 'Democratic Constitutionalism in Post-Apartheid South Africa: The Interim Constitution Revisited' (2015) 7 (1) *Africa Review* 68-69.

The system ensured that the nation's minority white population socially and economically dominated SA. Under the apartheid regime, if parliament passed a law, however unjust and oppressive, there was no way to challenge it on substantive grounds.[10] In general, the judiciary did not have the power to review and reverse unjust laws. Rather, the courts and all the other institutions had to implement and administer such laws.[11]

Following the end of apartheid, SA chose to translate its aspirations for social justice and welfare into justiciable constitutional guarantees.[12] The Preamble to the Constitution recognises the injustices of the past that left a legacy of vast inequality and social inequity.[13] The dawn of constitutional democracy changed the apartheid regime 'culture of authority', which was based on unreasoned command by a higher authority, to a 'culture of justification'.[14] Consequently, protecting the weak, the marginalised and the socially outcast became a matter of constitutional rights in SA.[15] In this regard, the SA Constitution entrenches a range of socio-economic rights to ensure the protection of societal interests and to advance the values of freedom, equality, dignity and social justice.[16] The rights are premised on the notion that all human beings have inherent human dignity, and their lives and well-being are valuable.[17] They include, but are not

[10] TH Madala 'Rule under Apartheid and the Fledgling Democracy in Post-Apartheid South Africa: The Role of the Judiciary' (2001) 26 (3) *Journal of International Law and Commercial Regulation* 747-748.
[11] Madala (n 10 above) 748.
[12] Trilsch (n 8 above) 553. 'Justiciability', in general terms, refers to the capacity of a particular right to be adjudicated upon by the judiciary. As a juridical concept, 'justiciability' is central in the adjudication and enforcement of constitutional socio-economic rights. A justiciable right means that the violation of a right due to non-observance of the State's obligations can be judicially enforced. SMA Naznin 'Justiciability of the Basic Necessity of Housing: Litigation of Forced Slum Evictions in Bangladesh' (2017) 18 (2) *Australian Journal of Asian Law* 1.
[13] LV Theron 'Leadership, Social Justice and Transformation – Inspire a Leader' (2018) 21 (April) *Potchefstroom Electronic Law Journal 2.*
[14] Mureinik defines a 'culture of justification' as 'a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command'. E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 (1) *South African Journal on Human Rights* 31-32.
[15] Trilsch (n 8 above) 553.
[16] C Heyns & D Brand 'Socio-Economic Rights in South Africa' in D Brand *Introduction to Socio-Economic Rights in the South African Constitution* (2005) 1.
[17] Heyns & Brand (n 16 above) 2-3.

limited to, the rights of access to land,[18] access to adequate housing,[19] access to health care services, sufficient food and water, and social security,[20] and access to education.[21]

'Constitutionalism', defined as 'the doctrine that governs the legitimacy of government actions',[22] is thus one of the most important features of post-apartheid SA.[23] In the South African context, constitutionalism has been directed towards achieving a radical, democratic, participatory and egalitarian project that seeks to redress socio-economic imbalances and disparities brought about by the apartheid system.[24] Referred to as 'transformative constitutionalism',[25] the project aims to transform the legal, political and socio-economic tenets of the country by using the Constitution as a vehicle for such transformation. The achievement of equality within this transformation project involves the eradication of systemic forms of oppression and material disadvantage based on race, gender, social status and other grounds of inequality. It also entails the development of opportunities, which allow people to realise their full human potential within positive social relationships.[26] Seen in this light, transformative constitutionalism has become as important as ethical leadership and good governance in securing greater levels of equality, and political and socio-economic justice.[27]

[18] Section 25 of the Constitution.
[19] Section 26 of the Constitution.
[20] Section 27 of the Constitution.
[21] Section 29 of the Constitution.
[22] H Barnett *Constitutional and Administrative Law* (2005) 5.
[23] Modern constitutionalism is a prescriptive doctrine in that it does not simply describe how governments exercise their authority in practice. Rather, it indicates how State power should be exercised. It is also normative, in that it sets out the values that should be upheld in the governing process. See Unpublished PhD thesis: JC Calitz *A Reformatory Approach to State Regulation of Insolvency Law in South Africa* University of Pretoria, 2009 166.
[24] E Kibet & C Fombad 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa' (2017) 17 (2) *African Human Rights Law Journal* 348-350.
[25] K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 (1) *South African Journal of Human Rights* 150. See also P Langa 'Transformative Constitutionalism' (2006) 17 (1) *Stellenbosch Law Review* 351.
[26] C Albertyn & R Adams 'Introduction: Special issue on 'The Covid-19 Pandemic, Inequalities and Human Rights in South Africa', part 1' (2021) 37 (2) *South African Journal on Human Rights* 147-150. See also C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 (2) *South African Journal for Human Rights* 248-249.
[27] M Bazezew 'Constitutionalism' (2009) 3 (2) *Mizan Law Review* 358.

For SA to secure greater levels of equality, as well as political and socio-economic justice amongst its citizens, it requires some form of State intervention that truly imbibes the goals of transformative constitutionalism and pursues it relentlessly.[28] Of paramount importance is that the intervention should be cognisant to the unique attributes and historical context of the country and its citizens.[29] The SA government and judiciary should play a positive and interventionist role to ensure redistribution of power and resources, substantive equality and eradication of all forms of unfair discrimination, as well as creating opportunities to enable realisation of full human potential in line with its commitments under the Constitution, as well as in terms of international human rights law.[30]

Under international human rights law, the guarantee of socio-economic rights makes provision for all people to have access to the basic commodities, services and opportunities necessary to make a living and thrive.[31] Thus, international law recognises that in a just society, all people should have access to the social and economic goods and services that they need to live a dignified life and to participate equally in society.[32] Therefore, under international law, socio-economic rights can be summed up as discrimination-free access to an adequate standard of living, dignified employment, a

[28] M Heywood 'Economic Policy and the Socio Economic Rights in the South African Constitution Why Don't They Talk to Each Other' (2021) 11 *Constitutional Court Review* 343-348. See also Endoh (n 9 above) 67.

[29] V Jaichand 'In Transition? The Struggle for Socio-Economic Justice in South Africa' (2017) 7 (1) *Notre Dame Journal of International & Comparative Law* 17-19.

[30] Sections 7, 33 & 165 of the Constitution. Heywood (n 28 above) 343-348. See also DF Meyer & H Van der Elst 'The Interventionist Role of the State in Socio-Economic and Political Development in Democratic South Africa' (2014) 5 (7) *Mediterranean Journal of Social Sciences* 74.

[31] D Landau 'The Reality of Social Rights Enforcement' (2012) 53 (1) *Harvard International Law Journal* 190-191. See art 25 of the Universal Declaration of Human Rights (UDHR), which recognises a right to a certain standard of living. The provision states:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

[32] Human Rights Measurement Initiative 'Measuring Economic & Social Human Rights' https://humanrightsmeasurement.org/methodology/measuring-economic-social-rights/ (Accessed 30-11-2022). Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also provides that 'all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

minimum basic income, health care services and extensive educational and cultural opportunities.[33]

Despite the socio-economic rights guarantees in various international human rights instruments, access is not always universally guaranteed from the outset. Significantly, the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), which is a key treaty guaranteeing socio-economic rights at the United Nations (UN) level, imposes a duty on States Parties to take steps 'to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights' recognised in the treaty.[34] The interpretation of the nature and extent of the duty of States Parties in respect of internationally guaranteed socio-economic rights is influenced in various ways, including through the general comments and recommendations of the UN Committee on Economic, Social and Cultural Rights (CESCR).[35] The CESCR's definition of the 'progressive realisation' concept introduces an element of flexibility in terms of the obligations of States Parties, including the enforcement of rights.[36] Thus, the concept recognises that the full realisation of socio-economic rights would not usually be achieved in a short time period.[37] However, in General Comment Number No. 13, published in 1999, the CESCR cautioned that the progressive realisation concept does not preclude States Parties from their obligation to ensure full realisation of the rights.[38]

[33] Article 25 of the UDHR & Preamble to the ICESCR. See also Human Rights Measurement Initiative (n 32 above).
[34] Article 2(1) of the ICESCR.
[35] The CESCR was established in 1985 by a decision of the Economic and Social Council (ECOSOC). FC Maastricht 'The Role of the UN Committee on Economic, Social and Cultural Rights in Strengthening Implementation and Supervision of the International Covenant on Economic, Social and Cultural Rights' (2002) 35 (2) *Law and Politics in Africa, Asia and Latin America* 183. Unlike the Human Rights Committee, the CESCR is not a body established by treaty, but it is a subsidiary body of ECOSOC. The CESCR oversees implementation of the ICESCR through its consideration of reports, individual complaints, inter-State complaints, and inquiry requests, as well as the preparation of general comments. S Khoza *Resource Book: Socio-Economic Rights in South Africa* (2007) 30.
[36] CESCR *General Comment No. 3: The Nature of States Parties Obligations* UN doc E/1991/23 (1990) para 9.
[37] L Chenwi 'Unpacking "Progressive Realisation", Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance' (2013) 46 (3) *De Jure* 744.
[38] CESCR *General Comment No. 13: The Right to Education* UN doc E/C12/1999/10 (1999) para 44.

A significant feature of CESCR comments on the interpretation of socio-economic rights relates to the 'minimum core' concept.[39] The interpretation by the CESCR is that States Parties have an obligation to ensure the satisfaction of, at the very least, minimum essential levels of socio-economic rights.[40] Therefore, 'minimum core' obligations are meant to apply, irrespective of the availability of resources of the States Party concerned or any other factors.[41] Since SA has ratified the ICESCR, it is bound to ensure compliance with its provisions. Further, in accordance with section 39(1)(b) of the SA Constitution, SA courts are bound to consider international law, such as the ICESCR, when interpreting socio-economic rights guaranteed in the Constitution.[42] Given the SA geographical context, SA courts are also obliged to consider international law at the African regional level.

At the African regional level, socio-economic rights find expression in the African Charter on Human and Peoples' Rights, 1981 (ACHPR or African Charter). The ACHPR is widely recognised as the first international human rights treaty to protect the three 'generations' of human rights.[43] States Parties to the African Charter undertake to respect,

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[39] Chenwi (n 37 above) 753. See, e.g., CESCR *General Comment No. 3* at para 1: '… while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect.' According to the CESCR, the minimum core concept obliges States Parties with immediate effect to satisfy human rights to an absolute minimum core level to the most vulnerable or disadvantaged in the society. CESCR *General Comment No. 3* para 1.

[40] CESCR *General Comment No. 3* para 10.

[41] Chenwi (n 37 above) 753.

[42] According to Tladi, SA courts should apply the international rules of interpretation and identification of international law when dealing with international law. He explains that States Parties that have signed and ratified the international treaty must adopt and implement their national developmental plan and strategic policy imperatives in light of international law instruments. Thus, States Parties must take all appropriate measures, including legislative measures, toward the realisation of socio-economic rights. D Tladi 'Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga' (2016) 16 (2) *African Human Rights Law Journal* 320. See also s 231, s232 & s233 of the Constitution.

[43] First generation human rights primarily emphasise individual liberties that enable free participation in political and civic life. They protect the individual's right of association and expression from potential abuse by the State. Second generation human rights compel government to meet or create conditions for the fulfilment of certain basic services and needs to enhance human development and dignity. Third generation human rights mainly emphasise collective developmental rights, including sustainable development and rights of future generations. See S Domaradzki, M Khvostova & D Pupovac 'Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse' (2019) 20 (4) *Human Rights Review* 424. See also M Ssenyonjo 'Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter' (2011) 29 (3) *Netherlands Quarterly Journal of Human Rights* 359.

protect, promote and fulfil all the rights in the Charter, including economic, social and cultural rights.[44] However, despite being fundamental for human survival and preservation of human dignity, socio-economic rights are modestly included in the African Charter due to the adoption of a 'minimalist' approach during the drafting of the instrument.[45] South Africa ratified the African Charter on 9 July 1996.[46] Thus, it is bound to ensure compliance with the ACHPR provisions.

In line with its international law obligations under the ICESCR and the ACHPR, SA has adopted sound legislative frameworks and policies, which are the basis for promotion and protection of social-economic rights. Important to note, is that the legislative frameworks and policies seek to improve socio-economic conditions of the vulnerable disadvantaged groups in the society as well as eliminate structural inequality. In light of the foregoing context, SA has expressly protected socio-economic rights in the Bill of Rights of its Constitution. The formulation of the SA State's constitutional duties in relation to ensuring the protection, promotion and realisation of socio-economic rights is, to some extent, similar to its international law obligations under the ICESCR and the ACHPR.[47] However, the adjudication of socio-economic rights claims in landmark Constitutional Court cases, such as *Soobramoney v Minister of Health, KwaZulu-Natal,*[48] *Government of the Republic of South Africa v Grootboom*,[49] *Minister of Health v Treatment Action*

[44] S Khoza 'Promoting Economic, Social and Cultural Rights in Africa: The African Commission Holds a Seminar in Pretoria' (2004) 4 (2) *African Human Rights Law Journal* 334-335. See also art 1 of the African Charter on Human and Peoples' Rights, 1981 (ACHPR): 'The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.'

[45] Ssenyonjo (n 43 above) 359 and Khoza (n 44 above) 335.

[46] Ssenyonjo (n 43 above) 359.

[47] M Rapatsa 'The Right to Equality under South Africa's Transformative Constitutionalism: A Myth or Reality?' 2015 11 (2) *Acta Universitatis Danubius Juridica* 20. See also African Commission on Human and Peoples' Rights 'Concluding Observations and Recommendations on the First Periodic Report of the Republic of South Africa' (2005) para 431.

[48] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (hereafter '*Soobramoney*').

[49] *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC) (hereafter '*Grootboom*'). The point of departure for any discussion pertaining to constitutional socio-economic rights claims in SA has mostly been the *Grootboom* case, which had far-reaching implications for future litigation related to socio-economic and other rights. See also Department of Human Settlements Annual Report Vote 26 (2010). http://www.dhs.gov.za/sites/default/files/annual_reports/Annual_report_2009-2010_B.pdf (30-11-2022).

Campaign,[50] *Mazibuko v City of Johannesburg,* [51] and *Occupiers of 51 Olivia Road v City of Johannesburg*,[52] has been the subject of much academic critique. The Constitutional Court in the aforesaid cases illuminated questions concerning both the justiciability of socio-economic rights, as incorporated in the Bill of Rights, together with the concepts of 'minimum core' obligations,[53] 'reasonableness',[54] and 'meaningful engagement'.[55] The judgment in the *Mazibuko* case, which concerned the constitutional right of access to sufficient water,[56] is reflective of the increasingly deferential and conservative approach adopted by the Constitutional Court in the context of socio-economic rights claims.

Part 1.2 below expands upon the research problem. It discusses the impact of the apartheid legacy on post-1994 SA and highlights the challenges relating to the

[50] *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (10) BCLR 1033 (CC) (hereafter '*TAC*').
[51] *Mazibuko & Others v City of Johannesburg & Others* 2010 (3) BCLR 239 (CC) (hereafter '*Mazibuko*').
[52] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others* 2008 (3) SA 208 (CC) (hereafter '*Occupiers of 51 Olivia Road*'). The landmark cases show the extent to which socio-economic transformation of vulnerable or disenfranchised groups lags behind in relation to housing, education, healthcare, water and related services.
[53] J Fitzpatrick & RC Slye 'Economic and Social Rights - South Africa: Role of International Standards in Interpreting and Implementing Constitutionally Guaranteed Rights' (2003) 97 (3) *American Journal of International Law* 669-671. 'Minimum core obligations' is a concept adopted by the CESCR with the aim of ensuring that the provision of core goods and services enjoys immediate priority.
[54] The international legal framework embraces the notion of availability of resources and progressive realisation of socio-economic rights in light of the reasonableness standard of review. The reasonableness standard essentially takes into account the institutional capacity and limitation of resources in giving effect to the right to effective remedies for socio-economic rights violations. Chenwi (n 35 above) 753. See also A Fisher 'Minimum Core Obligations of Socio-Economic Rights: Minimum Core and the Right to Education' (2017) https://openknowledge.worldbank.org/bitstream/handle/10986/29142/WP-FisherPUBLIC.pdf (Accessed 30-11-2022). For an in-depth discussion of the reasonableness standard, see chapter 2 (ch) below.
[55] A Pillay 'Towards Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement' (2012) 10 (3) *International Journal of Constitutional Law 732*. The concept of 'meaningful engagement' has been developed by the Courts in adjudicating housing rights cases, e.g. in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), but it was first properly defined by the Constitutional Court in the case of *Occupiers of 51 Olivia Road*. The concept refers to a process that requires mandatory engagement between government and citizens whose socio-economic rights are threatened by means of forced eviction. Thus, 'meaningful engagement' entails that parties whose socio-economic rights were violated should engage in discussions and negotiations to settle or resolve a dispute, while respecting the democratic mandate and institutional expertise of legislative and executive bodies in setting and implementing socio-economic policies. Pillay (n 53 above) 734-746. For a discussion of the origin or introduction of meaningful engagement as an alternate remedy by the courts, see ch 3 below.
[56] The applicants in the *Mazibuko* case were residents in one of the poorest areas in Johannesburg Township. The city of Johannesburg municipal authorities had decided to supply six kilolitres of water per month free to every account holder in the city. The applicants challenged the constitutionality of this decision on the ground that section 27(1)(b) of the Constitution provides that everyone has the right of access to sufficient water. For a brief discussion of the judgment and reasoning, see ch 4 below.

enforcement and realisation of socio-economic rights for the majority of previously disadvantaged South Africans.

1.2 Outline of the Research Problem

As alluded to in part 1.1 above, post-1994, SA is still battling the legacy of apartheid in the form of deep-rooted inequality and poverty among most black South Africans.[57] Almost three decades into the democratic dispensation, it remains to be seen whether democratic constitutionalism will successfully redress past racial and social injustices, while ensuring the economic development of the country.[58] The fact that an estimated 4.35 percent of white South Africans are poor, compared to 61.4 percent of black South Africans, points to the adverse impact that the apartheid era has had on the socio-economic circumstances of the majority of black South Africans.[59] The legacy of socio-economic injustice, inherited from the Natives Land Act 27 of 1913 and other segregationist laws and policies, continues to prevail in SA.[60] Certainly, while the policies of deeply institutionalised racism were overturned almost three decades ago, the impact of apartheid has contributed in various ways to the ever-widening socio-economic gap between black and white South Africans.[61]

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[57] Jaichand (n 29 above) 17-19. See also J Govender 'Social Justice in South Africa' (2016) 16 (2) *Civitas* 237-239.

[58] JM Luiz 'The Evolution and Fall of the South African Apartheid State: A Political Economy Perspective' (1998) 26 (2-3) *Journal of African Studies* 137.

[59] L Modise & N Mtshiselwa 'The Natives Land Act of 1913 Engineered The Poverty of Black South Africans: A Historic-Ecclesiastical Perspective' (2013) 39 (2) *Studia Historiae Ecclesiasticae* 5. See also P Lehohla 'Social Profile of Vulnerable Groups in South Africa 2002–2012' (2013) 70-72. https://www.statssa.gov.za/publications/Report-03-19-00/Report-03-19-002012.pdf. (Accessed 30-11-2022).

[60] Modise & Mtshiselwa (n 59 above) 5.

[61] Stats SA' 2019 Inequality Trends Report indicates that White South Africans earn three times more than black South Africans earn. The average annual earning among black South Africans was R6,009 in 2006 and R9,186 in 2015, while the figures for white South Africans were R77,308 in 2006 and R100,205 in 2015. R Maluleke 'Statistics South Africa Inequality Trends in South Africa: A Multidimensional Diagnostic of Inequality' (2019) http://www.statssa.gov.za/publications/Report-03-10-19/Report-03-10-192017pdf (Accessed 30-11-2022). To the candidate's knowledge, this was the last inequality trend report released by StatsSA. The Mail & Guardian reports that the richest one percent of South Africans own 67 percent of the country's wealth, with the top 10 percent owning 93 percent and the remaining 90 percent owning a mere 7 percent. J Rudin 'Analysis of Inequality in South Africa Remains Shallow' 1 December 2019 https://mg.co.za/article/2019-12-01-00-analysis-of-inequality-in-south-africa-remains-shallow/ (Accessed 30-11-2022).

Bills of Rights invariably manifest from periods of struggle. They signify a collective commitment to ensure that the conditions that led to the conflict from which the particular society is emerging are not allowed to happen again in the future.[62] In the same vein, the advent of SA constitutional democracy was meant to signal a fundamental break from the previous discriminatory and segregationist system. However, despite the express recognition of socio-economic rights in the SA Constitution and the Constitutional Court's extensive adjudication of socio-economic rights matters, the majority of previously disadvantaged South Africans continue to live in poverty. They lack access to adequate housing, education and health care services, amongst other basic needs.[63] Their plight shows that having a democratic constitutional dispensation alone does not redress historic socio-economic disparities and imbalances by ensuring poverty alleviation and substantive equality.[64]

As the country advances towards the end of the third decade of constitutional democracy, commentators are debating whether the Constitution is an obstacle to meaningful socio-economic transformation in South Africa,[65] particularly in the context of

[62] C Heyns & D Brand 'Introduction to Socio-Economic Rights in the South African Constitution' (1998) 2 (2) *Law, Democracy & Development* 153.
[63] Ssenyonjo (n 43 above) 358-359. See also E Brundige & S Kalantry 'Socio-Economic Rights: Adjudication under a Transformative Constitution' (2012) 34 (2) *Human Rights Quarterly* 581.
[64] I Shai 'The Right to Development, Transformative Constitutionalism and Radical Transformation in South Africa: Post-Colonial and De-Colonial Reflections' (2019) 19 (1) *African Human Rights Law Journal* 154-159. See also JM Modiri 'Introduction to Special Issue: Conquest, Constitutionalism and Democratic Contestations' (2018) 34 (3) *South African Journal on Human Rights* 303.
[65] JS Kotze *Delivering an Elusive Dream of Democracy* (2018) 50. See also MA Mubecua 'Land Expropriation without Compensation: The Challenges of Black South African Women in Land Ownership' (2019) 8 (3) *Journal of Gender Information and Development in Africa* 13-14.

land restitution,[66] redistribution and expropriation without compensation,[67] insufficient and defective public schools,[68] and inadequate health care services. Having regard to the

[66] Land reform in South Africa is an emotive and politically fraught subject because land was at the heart of the dispossession of Africans by the colonial-apartheid system. In pursuit of a socially just post-apartheid regime, the SA government introduced a land reform programme to rectify the past racial imbalance and segregation in the allocation of land. While over three million hectares were delivered through land redistribution and tenure programmes, analyses reflects that land reform in SA is slow, mainly due to financial, legislative and capacity challenges. The 'willing seller-willing buyer' principle has also proved to be less effective in speeding-up land reform. See R Makhado 'South Africa's Land Reform Debate: Progress and Challenges' (2012) 1 (1) *Social & Political Philosophy Journal* 1-2. It is nearly three decades since the ushering of a democratic dispensation in 1994 but South Africa has yet to crack land reform. Opinions vary on what has gone wrong with land reform and what should be done about it. W Sihlobo 'Land Reform in South Africa: What the Real Debate should be about' (16 May 2022) https://theconversation.com/land-reform-in-south-africa-what-the-real-debate-should-be-about-182277 (Accessed 30-11-2022).

[67] WJ du Plessis 'Valuation in the Constitutional Era' (2015) 18 (5) *Potchefstroom Electronic Law Journal* 1752-1754. There is legal uncertainty about what compensation is payable in select circumstances under the current constitutional provisions. See s 25 of the Constitution. As things stand, the judiciary is yet to be called upon to give a clear meaning to the concept of 'just and equitable compensation'. In 2021, the National Assembly debated the proposed amendment to the land reform bill on expropriation of land without compensation with the view to amend s 25 of the Constitution. Regrettably, the National Assembly failed to pass the constitutional amendment to allow land expropriation without compensation. The ruling party, viz. the ANC, failed to muster the required two-thirds majority, as both the DA and EFF voted against the bill. Some opposition parties are of the view that s 25 of the Constitution is not a stumbling block in the way of land reform. J Gerber 'National Assembly Fails to Pass Constitutional Amendment to Allow Land Expropriation without Compensation' (7 December 2021) https://www.news24.com/news24/southafrica/news/breaking-national-assembly-fails-to-pass-constitutional-amendment-to-allow-land-expropriation-without-compensation-20211207 (Accessed 30-11-2022).

[68] The Basic Education Ministry at large had been under immense pressure to meet scheduled plans, and was in constant discussion with the Treasury for funding to meet the demands of infrastructure, which culminated with the pressure of placing new learners in schools. Every year, the provincial education departments battle to find space for grades one and eight learners due to, among other reasons, learner migration, lack of space to build more schools and growth in certain areas. B Macupe 'More Than a Month since Schools Opened, Some Learners are still without Schools' (27 March 2021) https://mg.co.za/education/2021-03-27-more-than-a-month-since-schools-opened-some-learners-are-still-without-schools/ (Accessed 30-11-2022). Sadly, the leaner placement problems has not improved in 2022. Some parents in Gauteng and Western Cape province have raised their frustration on the leaner placement process by the government due to online system failures. As a result, they are predicting the same problem where thousands of learners will remain unplaced for 2023. K Schoeman 'Thousands of Learners Await Placement for 2023 School Year' (3 October 2022) https://mg.co.za/education/2022-10-03-thousands-of-learners-await-placement-for-2023-school-year/ (Accessed 30-11-2022). According to the Parliamentary Monitoring Group, since 2009, there has been an annual growth of learners in the system beginning at 900 000, until 2021, where numbers reached 1 096 605 learners. As a result, there is a big demand for new school buildings, teachers, books, feeding schemes and transportation. L Botha 'Unplaced Learners in Western Cape: WCED Briefing' (04 May 2021) https://pmg.org.za/committee-meeting/32775/ (Accessed 30-11-2022). Another thorny issue in the Basic Education Ministry is that of pit toilets. As at the end of 2021, there were more than 3 000 schools that had pit toilets across the country. In this regard, the South African Human Rights Commission (SAHRC) expressed the intention to initiate civil litigation in 2022 against five provincial education departments over a lack of sanitation in schools. N McCain 'SAHRC Starts Legal Action against Five Provincial Education Departments over Pit Toilets at Schools' (21 December 2021) https://www.news24.com/news24/southafrica/news/sahrc-starts-legal-action-against-five-provincial-education-departments-over-pit-toilets-at-schools-20211221 (Accessed 30-11-2022). To candidate's

Constitutional Court's jurisprudence on socio-economic rights, there is growing scepticism among academics about whether the constitutional guarantee of socio-economic rights has significantly improved the quality of lives of previously disadvantaged South Africans by alleviating poverty, inequality and socio-economic exclusion.[69] A key concern among academic commentators is whether the socio-economic rights in the SA Constitution have been properly formulated, interpreted and enforced to meet the goals of a transformed SA.[70] While SA's Constitution is unique in its robust protection of a wide array of socio-economic rights, the contention is that the judiciary cannot adequately enforce socio-economic rights because of the indeterminacy of their guarantees.[71] Moreover, the Constitutional Court, in evaluating government policy regarding socio-economic rights, has adopted a deferential standard of reasonableness review instead of developing a substantive account of the content of socio-economic rights.[72]

Shai argues that the problems of poverty, inequality and deepening disaffection of many previously disadvantaged South Africans cannot be deferred solely to the judiciary to resolve. He rejects the notion that the justiciability of socio-economic rights has the capacity to overcome SA's socio-economic impasse.[73] Madlingozi and Modiri have also respectively critiqued the capacity of the SA Constitution itself to bring about radical socio-economic transformation. Madlingozi describes the SA constitutional dispensation as

knowledge, the SAHRC has not officially initiated legal proceeding against the five provincial education departments.

[69] JC Mubangizi 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' (2006) 1 (2) *African Journal of Legal Studies* 3. See also Landau (n 30 above) 191 and T Masipa 'South Africa's Transition to Democracy and Democratic Consolidation: A Reflection on Socio-Economic Challenges' (2018) 18 (4) *Journal of Public Affairs* 1.

[70] Endoh (n 9 above) 73 and Shai (n 62 above) 159. Problems of inequality, poverty and socio-economic exclusion glaringly persist in post-1994 SA along racial lines. Modiri (n 64 above) 295.

[71] Brundige & Kalantry (n 63 above) 579. Davis argues that the judiciary, in its interpretation of socio-economic rights, would not be able to determine a sufficiently clear standard to decide whether a litigant who claims that they have not received adequate government support was sufficiently impoverished to qualify to invoke the right. DM Davis 'Adjudicating the Socioeconomic Rights in the South African Constitution: Towards "Deference Lite"?' (2006) 22 (1) *South African Journal on Human Rights* 304-305.

[72] Brundige & Kalantry (n 63 above) 581. Brundige & Kalantry further argue that, instead of interpreting what the Constitution guarantees with regard to a violation of a particular right and consequently evaluating the governmental policy in light of that interpretation, the Constitutional Court chose to adopt a standard of review that focuses on the reasonableness of the government's actions when interpreting socio-economic rights.

[73] Shai (n 64 above) 156-159.

neo-apartheid constitutionalism.[74] He argues that it is the reinvention of the colonial and apartheid state.[75] Modiri likewise describes the SA constitutional dispensation as anti-liberatory and complicit in the perpetuation of deepening disaffection and inequality in SA society.[76] The basis of Madlingozi and Modiri's argument is that the South African democratic Constitution represents a colonial order of legal knowledge that suppresses and marginalises indigenous African ways of knowing and doing law.[77] Madlingozi and Modiri further argues that, while the advent of a new constitutional order did transform the moral and political foundation of the country, there can be no guarantee that the Constitution will alleviate poverty and increasing inequality levels amongst many previously disadvantaged South Africans.[78]

The debate about the efficacy of constitutional socio-economic rights in redressing socio-economic imbalances and disparities in post-apartheid SA has also found expression amongst politicians and ordinary citizens facing abject poverty,[79]

[74] T Madlingozi 'Social Justice in a Time of Neo Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 1 (1) *Stellenbosch Law Review* 133-140.
[75] Madlingozi (n 74 above) 133-140.
[76] JM Modiri 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' (2018) 34 (3) *South African Journal on Human Rights* 303.
[77] M le Roux & D Davis 'Lawfare: Why Blaming the Constitution for SA's Problems is not the Answer' (16 April 2019) https://www.news24.com/news24/Books/lawfare-why-blaming-the-constitution-for-sas-problems-is-not-the-answer-20190416 (Accessed 30-11-2022). See also Madlingozi (n 74 above) 133-140 & Modiri (n 76 above) 303-306.
[78] Modiri (n 76 above) 303-306.
[79] According to the Poverty Trends Report published by Statistics South Africa (StatsSA) for 2006 to 2015, 30.4 million South Africans (55.5% of the population) are living in poverty. This is up from the 53.2% or 27.3 million people reported in 2011. Unfortunately, due to funding limitations, Statistics SA have not conducted a new expenditure survey since 2014/15, As a result, they have not compiled a recent official poverty trends report. See P Lehohla 'An Examination of Absolute Poverty Between 2006 and 2015' (2017) http://www.statssa.gov.za/?p=10334#:~:text=More%20than%20half%20of%20South,(pppm)%20in%2020 15%20prices (Accessed 30-11-2022). In 2015 StatsSA had R160 million stripped from its budget and government imposed a freeze on all posts. This significant budget cut has remained in place to date, and it reached crisis point by early 2020 according to a statement issued by Professor David Everatt, Chairperson of the South African Statistics Council. It is in this sense that StatsSA was unable to produce accurate official statistics in particular poverty trends report for 2020/2021. The organisation is being forced to consider cost-saving cuts in certain aspects of data production. D Everatt 'Statement from the South African Statistics Council on Stats SA Funding' (18 February 2020) http://www.statssa.gov.za/?p=12992 (Accessed 30-11-2022). To the candidate's knowledge, nothing has changed as 2022 Treasury medium term budget continued with expenditure cuts which is believed by advocacy groups further widen socio-economic inequalities.

unemployment,[80] homelessness and mainstream economic exclusion.[81] Notably, there is an overwhelming focus by non-governmental human rights organisations, lobby groups and academia on advocating for the respect, protection, promotion and fulfilment of economic, social and cultural rights as a key to ensuring greater overall enjoyment of human rights.[82] The public at large have also become increasingly vocal about their disillusionment with the current constitutional arrangement.[83] As a result, the country has been experiencing persistent civil protest for service delivery,[84] which has often led to litigation in the courts.[85] In addition, there has been nationwide student protests for free higher education,[86] as well as protests by those alleged to be in illegal occupation of vacant land.[87] The violent civil unrest characterised by looting, destruction of property and

[80] See Statistics South Africa 'Key Findings: P0211 - Quarterly Labour Force Survey (QLFS), 1st Quarter 2020' http://www.statssa.gov.za/?page_id=1856&PPN=P0211&SCH=7889 (Accessed 31-11-2022). The Quarterly Labour Force Survey (QLFS), as published by StatsSA, indicates that SA's unemployment rate increased by 1.0 of a percentage point to 30.1% in the first quarter of 2020 compared to the fourth quarter of 2019. The latest QLFS, 4th Quarter 2020 released by StatsSA painted a gloomy picture. The official unemployment rate increased by 1.7 percentage points to 32,5% in the 4th Quarter 2020 compared to 3rd Quarter 2020, the highest unemployment rate since the Quarterly Labour Force Survey was introduced in 2008. See also StatsSA 'Quarterly Labour Force Survey (QLFS), 4th Quarter 2020' http://www.statssa.gov.za/?page_id=1854&PPN=P0211&SCH=72942 (Accessed 30-11-2021). However, in the 1st Quarter of 2022 QLFS, unemployment rate decreased by 0,8 of a percentage point to 34,5% compared to 4th Quarter of 2021 QLFS. The unemployment rate further decreased by 0,6% to 33,9% in the 2nd Quarter of 2022. See StatsSA https://www.statssa.gov.za/?p=15685&gclid=CjwKCAiAyfybBhBKEiwAgtB7fkF01VrQUUDcWcSakhs-CWOfVCWrPe_G9zaqYLh3QG3rYEvRbvYF3hoCQ7EQAvD_BwE (Accessed 31-11-2022).

[81] Masipa (n 55 above) 2'. See also Endoh (n 9 above) 67-68.

[82] OHCHR 'Economic, Social and Cultural Rights' Fact Sheet No. 33 (2008) 1. http://www.ohchr.org. (Accessed 30-11-2021).

[83] P Andrews 'SA's Problem is Not its Constitution' (6 July 2017) https://www.iol.co.za/news/opinion/sas-problem-is-not-its-constitution-10156416 (Accessed 30-11-2022). See also Human Sciences Research Council 'Constitutional Democracy in South Africa: Fanciful Ideal or Tangible Reality?' http://www.hsrc.ac.za/en/review/hsrc-review-november-2013/constit-democ (Accessed 30-11-2022).

[84] Masipa (n 55 above) 2 and Endoh (n 9 above) 68.

[85] SH Chiumbu, V Reddy, N Bohler-Muller, NA Gumede & A Mtshengu 'Social Justice for the Poor: The Framing of Socio-Economic Rights in Selected South African Newspapers' (2018) 19 (7) *Journalism* 964.

[86] E Bitzer & E de Jager 'The Views of Commerce Students Regarding "Free" Higher Education in South Africa – Research' (2018) 32 (4) *South African Journal of Higher Education* 12-14. See also M Langa '#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities' (2016) https://www.csvr.org.za/pdf/An-analysis-of-the-FeesMustFall-Movement-at-South-Africanuniversities.pdf (Accessed 30-11-2022). Although education is an important socio-economic right, fee-free tertiary education is not considered a justiciable socio-economic right in the same vein as the rights to housing, health care and basic education.

[87] L Botes 'South Africa's Landscape of Social Protests' (2018) 10 (4*) African Journal of Public Affairs* 242-244. See also M Oosthuizen 'South Africa in "Cluster of Crises": Nowhere to go Except Social Unrest? Chilling Analysis' (23 November 2016) https://www.fin24.com/BizNews/south-africa-in-cluster-of-crises-nowhere-to-go-except-social-unrest-chilling-analysis-20161123 (Accessed 30-11-2022).

the disruption of economic activity,[88] which took place in Gauteng and KwaZulu-Natal in July 2021 reflects the intense frustration experienced by persons facing prolonged socio-economic inequalities.[89] There has also been widespread dissatisfaction with the prolonged lack of investment in critical health systems and social security, highlighted during the Covid-19 pandemic, which has exacerbated the socio-economic inequalities in SA.[90] According to a recent UN Development Programme study that assessed the socio-economic impact of Covid-19 in SA, the country's overall Gross Domestic Product (GDP) was expected to decline by at least 5.1 and up to 7.9 percent since the Covid-19 pandemic outbreak in 2020, and recover slowly through 2024.[91] The study cautioned that the expected decline in the overall GDP will lead to major setbacks in addressing poverty, unemployment and inequality.[92]

On the national research front, Statistics SA reported that SA's GDP fell by just over 16 percent between the first and second quarters of 2020 due to covid-19 pandemic.[93] The ailing SA economy grew by 1.1 percent in the first quarter of 2021 (January-March), translating into an annualised growth rate of 4,6 percent. This follows a revised 1,4 percent rise in real GDP in the fourth quarter of 2020.[94] The statistics show

[88] *Report of the Expert Panel into the July 2021 Civil Unrest* (29 November 2021) 12.
[89] R Hartley, H Sands & G Mills 'After the Looting: A Snap Survey Reveals What South Africans Think – and Fear' (2021) https://www.dailymaverick.co.za/article/2021-08-01-after-the-looting-a-snap-survey-reveals-what-south-africans-think-and-fear/ (Accessed 30-11-2022).
[90] S Liebenberg 'Covid-19 and the Critical Importance of Achieving Socio-Economic Rights' (2 April 2020). https://www.gi-escr.org/blog/covid-19-and-the-critical-importance-of-achieving-socio-economic-rights (Accessed 30-11-2022).
[91] United Nations Development Programme South Africa 'Socio-Economic Impact Assessment of Covid-19 in South Africa' (2020). https://reliefweb.int/report/south-africa/covid-19-south-africa-socio-economic-impact-assessment (Accessed 30-11-2022).
[92] UN Development Programme South Africa (n 91 above).
[93] Statistics South Africa 'Steep Slump in GDP as COVID-19 Takes its Toll on the Economy' (2020) http://www.statssa.gov.za/?p=13601 (Accessed 30-11-2022).
[94] Statistics South Africa 'GDP Rises in the First Quarter of 2021' (2021) http://www.statssa.gov.za/?p=14423 (Accessed 30-11-2022). Despite the growth in GDP, due to pressures of tighter Covid-19 lockdown restrictions and a spate of civil unrests in July 2021, as well as several other headwinds, the SA economy contracted in the third quarter of 2021 (July–September). After recording four consecutive quarters of positive growth, GDP slumped by 1,5 %, eroding some of the economic gains that SA has made since the severe impact of Covid-19 in the second quarter of 2020. StasSA 'Third Wave of Covid and Civil Disorder Pummel Economy as GDP Falls by 1,5%' (2021) http://www.statssa.gov.za/?p=15008 (Accessed 30-11-2022). After two consecutive quarters of positive growth, real GDP decreased by 0,7% in the second quarter of 2022. As a results of recent floods in KwaZulu-Natal and load shedding which contributed to the decline and weakening of an already fragile national economy that had just recovered to pre-pandemic levels, GDP was dragged back below the 4th

that the full impact of the Covid-19 pandemic will continue to be felt by the already-impoverished previously disadvantaged majority of South Africans, especially female-headed households, persons without social assistance, and heads of households who have been pushed from permanent to informal employment or who have been retrenched.[95] If not appropriately addressed, the sad reality is that the pandemic will have long-term destabilising effects on the realisation of socio-economic rights, compounding pre-existing socio-economic imbalances.[96] Given the country's myriad challenges arising from the widening inequality gap,[97] coupled with increasing levels of insecurity and deepening disaffection, the creation of a substantively equal SA society in which all persons are able to reach their full potential remains elusive.[98] Thus, a key issue for investigation concerns whether the Constitutional Court's adjudication of socio-economic claims to date lives up to the envisioned transformative constitutionalism project.[99]

1.3 Research Aims

The current study provide a detailed exposition of the Constitutional Court's jurisprudence on socio-economic rights, using the theoretical framework of transformative constitutionalism, together with the constitutional imperative to consider international law in the interpretation of the Bill of Rights.[100] In so doing, it seeks to evaluate the extent to which the current constitutional guarantee of socio-economic rights and judicial remedies have contributed towards redressing the problems of poverty, inequality and socio-economic vulnerabilities in the post-1994 dispensation. Ultimately, the study seeks to

quarter of 2019 pre-pandemic level. https://www.statssa.gov.za/?p=15728#:~:text=After%20two%20consecutive%20quarters%20of,2022%20(Q2%3A%202022). (Accessed 30-11-2022).

[95] United Nations Development Programme South Africa (n 67 above) 10-11.

[96] P Ozili 'COVID-19 in Africa: Socio-Economic Impact, Policy Response and Opportunities' (2020) 40 (1) *International Journal of Sociology and Social Policy* 1-4.

[97] South Africa is one of the most unequal societies in the world. Commentators argue that inequality is high in SA due to wage disparities and the gap between the employed and unemployed. See Masipa (n 55 above) 4-6.

[98] R Maluleke 'Statistics South Africa Inequality Trends in South Africa: A Multidimensional Diagnostic of Inequality' (2019) http://www.statssa.gov.za/publications/Report-03-10-19/Report-03-10-192017pdf (Accessed 30-11-2022).

[99] LA Williams 'The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study' (2010) 3 (1) *Constitutional Court Review* 145. There is a sentiment that affected communities got the short end of the stick in the *Mazibuko* case, where the court refused to compel government to provide more water to households.

[100] Section 39(1)(b), read with ss 231, 232 & 233, of the Constitution.

determine whether the achievement of 'a radical, democratic, participatory and egalitarian' society is feasible, in light of the Constitutional Court's extant jurisprudence on socio-economic rights.

1.4 Key Research Questions

Using the theoretical framework of transformative constitutionalism and taking into the account the duty to consider international law when interpreting the Bill of Rights, the study interrogates the following questions:

(i) Is the constitutional formulation of socio-economic rights capable of adequately addressing the problems of poverty and inequality in South Africa?

(ii) To what extent, if any, does the Constitutional Court's extant jurisprudence on the protection and enforcement of the socio-economic rights relating to housing, education and health care guide promote socio-economic transformation in a manner that adequately addresses poverty and inequality-related vulnerabilities in SA?

(iii) What other appropriate measures should be implemented to effectively redress the socio-economic imbalances and disparities brought about by the apartheid system, and alleviate poverty and inequality in current SA society?

1.5 Motivation and Hypothesis

South Africa's constitutional democracy is lauded across the world for its progressive integration of civil and political rights,[101] as well as the inclusion of socio-economic rights. However, its achievements tell a mixed story, as challenges of unemployment, poverty and inequality persist, with the result that SA remains one of the most unequal societies in the world as per the Gini Index or Coefficient estimates from the World Bank.[102] From a legal reform perspective, the current study is motivated by the

[101] T Ebrahim & T Masiangoako 'Reflecting on South Africa's Socioeconomic Progress' (25 March 2019) https://www.constitutionhill.org.za/blog/reflecting-on-south-africas-socioeconomic-progress (Accessed 30-11-2022).

[102] International Bank for Reconstruction and Development 'Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities' (2018) http://documents1.worldbank.org/curated/en/530481521735906534/pdf/124521-REV-OUO-South-Africa-Poverty-and-Inequality-Assessment-Report-2018-FINAL-WEB.pdf (Accessed 30-11-2022). The Gini index is the prominent and widely used measure of inequality. It takes into account the distribution of a nation's

purpose of contributing towards developing regulatory framework that will facilitate the effective realisation of an inclusive and resilient socio-economic project in SA.

Taking into account the constitutional imperative to transform SA society,[103] the current study hypothesises that SA has not adopted adequate measures to respect, promote, protect and fulfil socio-economic rights in the post-apartheid constitutional dispensation. Furthermore, the judiciary, specifically the Constitutional Court, has not intervened sufficiently in its adjudication of socio-economic claims to ensure poverty alleviation and substantive equality.[104]

1.6 Methodology

The current study is conducted using doctrinal methodology, which is the methodology mostly employed by scholars undertaking research in law. Doctrinal research is purely theoretical research, concerned with the analysis of legal doctrine, including how it was developed and applied.[105] Primary legal sources, such as national constitutions, court cases and statutes, are analysed in the current study using the doctrinal legal research method. Secondary sources, such as scholarly work in the area

income or wealth. However, it is criticised as a measure of income inequality due to some limitations, e.g. the Gini index does not capture social benefits and other interventions, such as social grants for vulnerable citizens, and subsidised housing, healthcare and education aimed at reducing income inequality. Human Sciences Research Council 'Income Inequality and Limitations of the Gini Index: The Case of South Africa' (2014) http://www.hsrc.ac.za/en/review/hsrc-review-november-2014/limitations-of-gini-index (Accessed 30-11-2022). Nevertheless, the recent report released by the World Bank for Southern Africa region on the third quarter of 2022, re-affirmed SA as the most unequal country in the world, according to its latest data (Gini Index or Coefficient estimates). According to this report, the legacy of apartheid underpinned by racial and spatial segregation continues to reinforce socio-economic inequalities. In addition COVID-19 pandemic, which generally affects poor people more severely and poor functioning of labor markets significantly hampered progress in reducing poverty and inequality. V Sulla, P Zikhali & PF Cuevas 'Inequality in Southern Africa: An Assessment of the Southern African Customs Union' (07 March 2022) https://documents1.worldbank.org/curated/en/099125303072236903/pdf/P1649270c02a1f06b0a3ae02e57eadd7a82.pdf (Accessed 30-11-2022).

[103] A responsive socio-economic regeneration governmental approach is one which is alert to the needs of its people and which effectively addresses these needs. Calitz (n 23 above) 167.

[104] Sections 7, 33 & 165 of the Constitution. See also DF Meyer & H Van der Elst 'The Interventionist Role of the State in Socio-Economic and Political Development in Democratic South Africa' (2014) 5 (7) *Mediterranean Journal of Social Sciences* 74.

[105] SI Ali, ZM Yusoff & Z Amin Ayub 'Legal Research of Doctrinal and Non-Doctrinal' (2017) 4 (1) *International Journal of Trend in Research and Development* 493.

of human rights and judicial remedies, reports of committees and legal history, are also analysed using the research method.

The current study also involves a comparative international law analysis, as well as a comparative foreign law analysis to a lesser extent. Regarding the comparative international law analysis, the study considers binding international human rights law instruments when construing SA constitutional rights, particularly the nature of the obligations imposed by the rights, and their enforcement by the courts. The consideration of international human rights law instruments serves as a useful tool for coherent and effective action towards the realisation of human rights within States Parties. In the area of socio-economic rights, the CESCR has recommended the enactment of framework legislation, and the adoption of national plans and strategies towards the full realisation of the rights in a wide variety of instances.[106] The strategies are a crucial element of compliance with the obligation to fulfil the rights enshrined in the Universal Declaration of Human Rights, 1948 (UDHR), the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) and other international instruments. Consideration of international human rights law instruments thus provides guidance in terms of setting clear targets and benchmarks against which to check the SA State's performance towards the full realisation of the socio-economic rights, including the determination and indication of particular recourse and remedies that rights holders have at their disposal.

As mentioned in part 1.1 above and reiterated in parts 1.3 and 1.4 above, the study examines the Constitutional Court's adjudication of socio-economic claims in relation to housing, education and access to health care service and its implications for the progressive realisation of socio-economic rights against the idea and the demands of transformative constitutionalism.

[106] F Viljoen & N Orago 'An Argument for South Africa's Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the Light of its Importance and Implications' (2014) 17 (16)) *Potchefstroom Electronic Law Journal* 2562-2564.

1.7 Limitations and Delimitations of the Study

One of the key limitations of the current study are several pipeline and new developments relating to realisation and enforcement of socio-economic rights, including scholarly work, legislation and policies giving expression to the rights, as well as court decisions. Many more institutional and legal developments are still underway in pursuit of social justice. A study of this nature thus requires that the research data used should be aligned with the recent developments. The information presented in the present thesis is up to date as at the date of submission for examination.

The primary focus of the study is on the impact of constitutional socio-economic rights, and the extent to which they have alleviated poverty and redressed socio-economic inequalities in the post-1994 democratic dispensation. At the heart of the study is the analysis of judicial review of socio-economic rights claims brought by the most vulnerable and marginalised groups in society, in particular the previously disadvantaged SA populace.

Notwithstanding the interdependence and interrelatedness of all human rights, and the array of socio-economic rights that are internationally and domestically protected, the current study focuses on the Constitutional Court's adjudication of claims relating to three specific socio-economic rights, namely the rights of access to adequate housing, access to education and access to health care services.

While the present study acknowledges the detrimental impact of the Covid-19 pandemic on the enjoyment of socio-economic rights, it does not delve into the issue in depth.

1.8 Overview of Subsequent Chapters

The current study is divided into six chapters, including the present introductory chapter and the conclusion. The present chapter provided an outline of the research problem, the research aims, key research questions, the rationale underpinning the study, as well as the research methodology used. It also introduced key concepts, such as

‘minimum core’ and ‘progressive realisation’, within international and domestic law discourse on socio-economic rights.

Chapter two deals with the status and formulation of socio-economic rights in international and regional law, as well as SA law. It considers the historic debate and basis for their inclusion in human rights law instruments including the SA Constituion. It also highlights key concepts in international and domestic socio-economic rights discourse that impact on the SA State’s duty to ensure the fulfilment of socio-economic rights.

Chapter three, four and five outlines the socio-economic rights that form the focus of the current study, namely the rights of access to adequate housing, access to health care services, and access to education. These three chapters discusses the socio-economic obligations of the SA State under international and domestic law, and the mechanisms for ensuring the fulfilment of such obligations. They assess the manner in which the Constitutional Court has dealt with institutional problems, such as capacity, legitimacy, integrity and security, as well as separation of powers, which have been encountered in the adjudication and enforcement of socio-economic rights claims. Lastly, these three chapters analyse of Constitutional Court’s interpretation and enforcement of the rights of access to adequate housing, access to health care services, and access to education. In addition, the chapters will also highlights setbacks in law that are hampering progressive realisation of socio-economic rights through examination of relevant case law, including landmark judgments.

Chapter Six concludes the study by providing a summary analysis of all chapters, and proposed recommendations on measures the State and judiciary need to observe to expedite the realisation of socio-economic rights for vulnerable people in SA.

CHAPTER 2: THE STATUS AND FORMULATION OF SOCIO-ECONOMIC RIGHTS IN INTERNATIONAL LAW AND SOUTH AFRICAN LAW

2.1 Introduction

Socio-economic rights are recognised as human rights in several international human rights treaties and instruments at the United Nations (UN) and African Union (AU) levels. The South African Constitution has drawn on key international human rights law treaties and instruments in the formulation of its socio-economic rights provisions. The present chapter discusses the status and formulation of socio-economic rights at the UN, AU and SA domestic levels. It considers the historic debate and basis for their inclusion, alongside civil and political rights, and highlights key concepts in socio-economic rights discourse that impact on the South African State's duty to respect, protect, promote and fulfil socio-economic rights. Part 2.2 begins the analysis with an overview of the origins of socio-economic rights recognition in the global north. It then looks at the status and formulation of socio-economic rights in key international law instruments at the UN level.

2.2 The Status and Formulation of Socio-Economic Rights at the UN Level

Historically, socio-economic rights were treated differently from civil and political rights. They were often regarded as mere aspirations or 'second class rights' that are not deserving of the status of human rights.[1] The earliest recognition of socio-economic rights can be traced to the French and the Russian revolutions in the 19th century,[2] which were both precipitated by socio-economic exclusions, poverty and inequalities.[3] During this period, the recognition of socio-economic deprivation as a human rights problem gained

[1] Unpublished PhD thesis: RK Hardowar *Improving Domestic Enforcement of Socio-Economic Rights through International Law: Ratification of the International Covenant on Economic, Social and Cultural Rights by South Africa* University of Western Cape, 2009 9.

[2] Unpublished PhD thesis: C Mbazira *Enforcing the Economic, Social and Cultural Rights in the South African Constitution as Justiciable Individual Rights: The Role of Judicial Remedies* University of the Western Cape, 2007 41. Following the French Revolution, the French Declaration of the Rights of Man and Citizens was adopted on 26 August 1789, with the aim of eradicating problems of social inequality. S Moradi 'A Critical Legal Study of the Declaration of the Rights of Man and of the Citizen' (2019) 10 (5) *Beijing Law Review* 1143-1145. The Russian Revolution of 1917 sought to address problems of distribution and access to land, which had been enjoyed previously by only a privileged few. D Lane 'V.I. Lenin's Theory of Socialist Revolution' (2021) 47 (3) *Critical Sociology* 463-466.

[3] Mbazira (n 2 above) 42.

traction globally.[4] In 1945, the UN was formed, with the mandate to address global problems of an economic, social and cultural nature, as well as promote and encourage respect for human rights.[5] Thus, the formation of the UN set the platform for the proclamation of human rights and the consequent adoption of the Universal Declaration of Human Rights (UDHR) in 1948.[6] Although the UDHR is not a treaty, it has attained the status as a cornerstone for international human rights law over the years due to its milestone role in establishing the international human rights system.[7] In addition, the UDHR is the first instrument to establish a detailed list of human rights, incorporating civil, political, social, economic and cultural rights.[8] The socio-economic rights proclaimed in the UDHR include, among others, the rights to social security,[9] employment opportunities,[10] adequate food, housing and health care,[11] and education.[12] The strong presence of socio-economic rights in the UDHR, alongside civil and political rights, indicates the drafter's acknowledgment that socio-economic rights are equal in status to civil and political rights.[13]

Given the non-binding nature of the UDHR, the UN General Assembly deemed it necessary to include the existing UDHR-proclaimed rights in a subsequent binding international human rights treaty. However, the adoption of the envisaged treaty encountered a number of objections. The objections were mostly raised by countries in the 'west' who argued that socio-economic rights should not be included in the same human rights treaty as civil and political rights.[14] The 'western' countries contended that,

[4] Lane (n 2 above) 466.
[5] Article 1(3) of the United Nations Charter, 1945.
[6] General Assembly resolution 217 A (III) of 10 December 1948.
[7] Mbazira (n 2 above) 43.
[8] Mbazira (n 2 above) 43. See also OHCHR *Fact Sheet No. 16*/ Rev 1 'The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies' (2012) 3-6.
[9] UDHR, art 22.
[10] UDHR, art 23.
[11] UDHR, art 25.
[12] UDHR, art 27.
[13] The UDHR makes no distinction between civil, political and socio-economic rights. Hardowar (n 1 above) 9.
[14] K Roth 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization' (2004) 26 (1) *Human Rights Quarterly* 64. During the Cold War, socio-economic rights tended to be debated in ideological terms. For instance, the 'western' countries, comprising the United States of America, United Kingdom, France and Germany, advocated for a civil and political rights treaty. Many in the West went so far as to deny the very legitimacy of socio-economic rights. See

unlike civil and political rights, socio-economic rights lack legal enforcement, as their realisation is dependent mainly on availability of resources.[15] In contrast, the 'eastern' countries associated socio-economic rights with socialistic ideals that advocated for the provision of basic commodities and services in respect of all people.[16] The 'eastern' countries consequently argued for the legal protection of socio-economic rights as a guarantee to people's socio-economic development, preservation of human dignity, as well as for the protection of the right to the continuous improvement of living conditions.[17] The differing perspectives between the 'western' and 'eastern' countries led to the adoption of two separate human rights treaties in 1966, namely the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).[18]

Notwithstanding the ideological differences influencing the debate and opposition to the guarantee of socio-economic rights in international human rights law instruments at the UN level, the ICESCR and ICCPR point to the indivisibility, interdependence and interrelatedness of socio-economic rights on the one hand, and civil and political rights on the other hand.[19] In 1993, the World Conference on Human Rights in Vienna also affirmed that all human rights are universal, interdependent and interrelated. It further asserted that the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.[20] Since then, States

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also T Stein 'Constitutional Socio-Economic Rights and International Law: "You are Not Alone"' (2013) 16 (1) *Potchefstroom Electronic Law Journal* 13.

[15] Mbazira (n 2 above) 36.

[16] Mbazira (n 2 above) 45. On the other hand, the socialist 'Eastern' bloc emphasised the importance of equality, and thus stressed socio-economic rights. 'Eastern' countries included the communist Soviet Union with 15 Republics, viz. Russia, Ukraine, Georgia, Belorussia, Uzbekistan, Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Tajikistan, Latvia, Lithuania and Estonia. See also T Stein (n 14 above) 13-14.

[17] Mbazira (n 2 above) 45-46.

[18] The ICESCR was adopted and opened for signature, ratification and accession by UN General Assembly resolution 2200A (XXI) of 16 December 1966 at New York. It came into force on 3 January 1976. On the other ICCPR was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. It came into force on 23 March 1976.

[19] See the Preambles to the ICESCR and ICCPR respectively.

[20] Vienna Declaration and Programme of Action World Conference on Human Rights in Vienna 25 June 1993. https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx (Accessed 30-11-2022). One of the central reaffirmations of the equal nature of the two sets of rights is found in General Assembly resolution 32/130 of 16 December 1977, para 1:

Parties have made significant progress in clarifying the legal content of internationally recognised socio-economic rights, as well as in developing mechanisms and methodologies to implement them and monitor their realisation.[21]

In its formulation, the ICESCR set out the general obligation framework of 'progressive' realisation with respect to the rights enumerated in the Covenant.[22] The concept of 'progressive realisation' essentially entails the obligation of States Parties to take appropriate measures towards the full realisation of socio-economic rights to the maximum of their available resources. The reference to 'resource availability' reflects a recognition that the realisation of the rights can be hampered by a lack of resources and can be achieved only over an extended period.[23] It also implies that a State Party's compliance with its obligation to take appropriate measures is assessed in the light of the resources available to it, including other factors, such as institutional competency and political will.[24] The CESCR has specified that while the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the State Party concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards

(a) All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights;
(b) The full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.

https://www.un.org/depts/dhl/resguide/r32_resolutions_table_eng.htm (Accessed 30-11-2022). The adoption of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights reaffirmed that all human rights are undisputedly indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, States are as responsible for violations of socio-economic rights as they are for violations of civil and political rights. Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) paras 4 & 5.

[21] OHCHR *Fact Sheet No. 33* 'Economic, Social and Cultural Rights' (2008) 7. http://www.ohchr.org. (Accessed 31-03-2022). See also A Mavedzenge 'Revisiting The Role of the Judiciary in Enforcing the State's Duty To Provide Access to the Minimum Core Content of Socio-Economic Rights in South Africa and Kenya' (2020) 7(2) *Journal of Comparative Law in Africa* 68-71.

[22] Art 2(1) of the ICESCR.

[23] OHCHR *Fact Sheet No. 33* (n 21 above) 13.

[24] OHCHR *Fact Sheet No. 33* (n 21 above) 13.

meeting the obligations recognised in the Covenant.[25] Progressive realisation is described by the CESCR in its General Comment No. 3 as follows:[26]

> The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights.

Apart from the ICESCR, progressive realisation of socio-economic rights finds recognition in various other international human rights instruments, such as the CESCR General Comments,[27] the UN Convention of the Rights of the Child, 1989 (CRC) and Convention on the Rights of Persons with Disabilities (CRPD).[28] Nonetheless, the CESCR and other authorities have identified that not every aspect of a particular right is subject to the 'progressive' qualifier.[29] In realising particular socio-economic rights, States Parties to the ICESCR have general and specific obligations.[30] Therefore, a particular socio-economic right can be interpreted to impose a series of obligations, some of which are of an immediate nature and others of which are subject to progressive realisation.[31]

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[25] CESCR *General Comment No. 3: The Nature of States Parties Obligations* UN doc E/1991/23 (1990) para 2.
[26] CESCR *General Comment No. 3* para 9.
[27] CESCR *General Comment No. 3* para 9. States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation. Art 4 of the CRC.
[28] With regard to economic, social and cultural rights, art 4(2) of the CRPD provides that 'each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Covention that are immediately applicable according to international law'.
[29] CESCR *General Comment No. 3* para 1.
[30] CESCR *General Comment No. 3* para 1 & 8.
[31] CESCR *General Comment No. 3* paras 4-5.

In its General Comments, the CESCR has indicated certain socio-economic rights are 'capable of immediate application by judicial and other organs in many national legal systems'.[32] They include the ICESCR provisions relating to health care,[33] and education.[34] In relation to the ICESCR right to health, the CESCR has stated that the treaty obligation on States Parties to take 'steps … to achieve the full realisation of this right also imposes obligations of immediate effect to take deliberate and targeted steps and use all appropriate means'.[35] The steps include legislative measures, such as the incorporation of the ICESCR into domestic statutes, as well as the provision of judicial remedies.[36] They also include other appropriate means, such as administrative, financial, educational or social measures.[37] For example, adopting and implementing a national strategy and plan of action in the field of health can be related to the immediate obligation to take steps.[38] According to the CESCR, these obligations continue to apply at all times, even in times of economic crisis.[39] Thus, States Parties remain under a continuing duty to move as expeditiously and effectively as possible towards the full realisation of the right to health.[40]

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[32] CESCR *General Comment No.3* para 5.

[33] Article 12(1) of the ICESCR. Article 12 stipulates:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
   (a) the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
   (b) the improvement of all aspects of environmental and industrial hygiene;
   (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
   (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

[34] Article 13(1) & (2)(a) of the ICESCR. The provisions stipulate:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
   (a) primary education shall be compulsory and available free to all;

[35] CESCR *General Comment No. 3* para 2.

[36] CESCR *General Comment No. 3* para 5.

[37] CESCR *General Comment No. 3* paras 5 & 7.

[38] Article 14 of the ICESCR.

[39] CESCR *General Comment No. 3* para 12.

[40] H Dawson & D McLaren 'A Framework for Monitoring and Evaluating the Progressive Realisation of Socio-Economic Rights in South Africa (2015) *Studies in Poverty and Inequality Institute* 5.

In relation to the ICESCR right to education, the CESCR has asserted that there is minimal flexibility in that States Parties have an obligation to adopt a plan of action within a reasonable number of years and the timeframe must be fixed in the plan.[41] The plan should specifically set out a series of targeted implementation dates for each stage of the progressive implementation of the plan, and the steps taken must be effective and not be of negligible impact.[42]

Apart from the principle of progressive realisation, the CESCR has also applied the concept of the 'minimum core' when interpreting the nature of States Parties obligations in relation to particular socio-economic rights.[43] The CESCR defines 'core obligations' that have to be realised by all States Parties as follows:[44]

> The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. Thus, for example, a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison de'tre*.

As per the CESCR, the concept of 'minimum core' seeks to establish a minimum or basic legal content for the indeterminate claims of socio-economic rights.[45] In other words, a minimum core approach to rights involves identifying such subsistence levels in respect of each socio-economic right and insisting that the provision of core commodities and

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[41] L Chenwi 'Unpacking "Progressive Realisation", Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance' (2013) 46 (3) *De Jure* 745.

[42] CESCR *General Comment No: 11 Plans of Action for Primary Education* (1999) para 10. See also Chenwi (n 37 above) 745.

[43] CESCR *General Comment No. 3* para 10.

[44] CESCR *General Comment No. 3* para 10. Minimum core obligations, highlighted by the CESCR in its general comments, require States Parties to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe drinking water. Minimum core obligations also require States Parties to ensure access to a social security scheme that provides a minimum essential level of benefits that cover at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. Further, minimum core obligations require States Parties to ensure free and compulsory primary education to all. CESCR *General Comment No. 11* para 6-7.

[45] KG Young 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale International Law Journal* 113.

services enjoys instant priority.[46] Thus, 'minimum core' represents a floor of immediately enforceable entitlements from which progressive realisation should proceed. Further, minimum core obligations are meant to apply irrespective of the availability of resources of the State Party concerned or any other factors.[47] However, the issue of availability of resources cannot be ignored. Resource constraints are taken into account in assessing whether a State Party is meeting its minimum core obligations. For a State Party to attribute failure to meet minimum core obligations to resources, it must show that every effort has been made to use all resources at its disposal to satisfy, as a matter of priority, the minimum obligations.[48] This includes fulfilling its ICESCR article 2(1) obligation to 'take steps … through international assistance and cooperation' to facilitate the full realisation of the relevant right.

Most human rights commentators are in support of 'minimum core' obligations for the realisation of socio-economic rights. However, some commentators disagree that socio-economic rights should have a minimum core content considering, amongst other factors, their inherent broad and sometimes ambiguous nature. Lehman, for example, argues that the 'minimum core' approach is not an appropriate tool for courts to apply when deciding on socio-economic rights claims.[49] In Lehman's view, the minimum core requires a ranking of interests in respect of urgency, which will be difficult to achieve.[50] In addition, Lehman contends that there are significant conceptual flaws with the 'minimum core' approach, resulting in the court's intellectual discomfort and subsequent unwillingness to adopt the approach.[51] The counter argument posed by other scholars against the concept, is that the content of the 'minimum core' itself is not absolute rather, it differs between States Parties, depending on their particular or available resources. The CESCR acknowledges the disparities in resource availability in different contexts for each

[46] Chenwi (n 41 above) 753.
[47] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) para 9.
[48] CESCR *General Comment No. 3* para 10.
[49] K Lehman 'In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core' (2006) 22 (1) *American University International Law Review* 180.
[50] Lehman (n 49 above) 181.
[51] Lehman (n 49 above) 182. The conceptual problems are particularly apparent in relation to the right to health care, e.g., how should courts distinguish between minimum, or essential, levels of health care versus non-essential forms of health care.

member States, and contends that in the event that a State uses 'resource constraint' as a justification for the adoption of a retrogressive measure, it will assess such a claim accordingly.[52]

A further feature of socio-economic rights claims is the reasonableness standard of review. The ICESCR does not contain any provision that refers to the reasonableness standard but article 8(4) of the Optional Protocol to the ICESCR endorses this standard of review.[53] The Optional Protocol is a mechanism through which socio-economic rights can be adjudicated before the CESCR. It further considers it appropriate to enable the CESCR to carry out the functions in the Optional Protocol as a means of furthering the achievement of the purpose of CESCR and the implementation of the provisions therein.[54] The wording of article 8(4) of the Optional Protocol to the ICESCR is derived from the SA Constitutional Court judgment of *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (hereafter '*Grootboom*').[55] The reasonableness review standard contemplated in article 8(4) of the Optional Protocol does acknowledge that the kinds of substantive socio-economic rights claims that address systemic inequality, poverty and destitution, present different kinds of challenges to adjudicative bodies.[56] While the CESCR is directed by article 8(4) of the Optional Protocol not to have reservations on adjudicating these critical claims, it is on the other hand directed not to lose sight of the fact that its role is to focus on compliance with the ICESCR and on the fundamental values it protects.[57] The Committee has stated that in assessing State's compliance with the obligations under the ICESCR, it will assess the reasonableness of steps taken, taking into account a number of factors including: the extent to which the

[52] F Viljoen & N Orago 'An Argument for South Africa's Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the Light of its Importance and Implications' (2014) 17 (16)) *Potchefstroom Electronic Law Journal* 2562-2563.
[53] L Chenwi 'Correcting the Historical Asymmetry between Rights: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2009) 9 (1) *African Human Rights Law Journal* 23-29. See also Optional Protocol to the ICESCR.
[54] Chenwi (n 53 above) 29.
[55] B Porter 'The Reasonableness of Article 8(4): Adjudicating Claims from the Margin' (2009) 27 (1) *Nordic Journal for Human Rights* 39 & 49. The SA Constitutional Court landmark judgment, where the Court first described its approach to reasonableness review in relation to the right of access to adequate housing in s 26 of the SA Constitution.
[56] Porter (n 55 above) 40.
[57] Porter (n 55 above) 41.

measures are deliberate, concrete and targeted; whether the state exercised its discretion in a non-discriminatory and non-arbitrary manner; whether decisions not to allocate resources accords with international human rights standards; whether the state, faced with several policy options, adopted a less restrictive option; the time frame in which the steps were taken; and whether the precarious situation of disadvantaged and marginalised individuals or groups was taken into account, in a non-discriminatory fashion but prioritised grave situations or situations of risk.[58] The 'reasonableness standard' in the Optional Protocol acknowledges the institutional roles and limitations in giving effect to the right to effective remedies for socio-economic rights violations.[59] The Committee's conception of the reasonableness standard also places emphasis on transparent and participative decision-making processes at the national level.[60]

Having established the equal standing of socio-economic rights with civil and political rights at the UN level, and looked at the formulation and interpretation of socio-economic rights in the ICESCR, part 2.3 below traces the introduction and development of socio-economic rights jurisprudence at the African regional level. The purpose of the analysis is to determine the extent of its recognition as a fundamental human right on the same footing as civil and political rights. The analysis also seeks to identity any similarities and differences between the formulation and interpretation of socio-economic rights at the UN and AU levels.

2.3 The Status and Formulation of Socio-Economic Rights at the AU Level

Following much debate, scepticism and pressure,[61] the ACHPR was adopted in 1981 by the Assembly of Heads of State of the Organisation of African Unity (OAU), which

[58] Chenwi (n 41 above) 756. See also CESCR 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant' UN doc E/C12/2007/1 para 8.
[59] CESCR *Optional Protocol* (n 58 above) para 8.
[60] CESCR *Optional Protocol* (n 58 above) para 8.
[61] AT Shehu 'The Enforcement of Social and Economic Rights in Africa: The Nigerian Experience' (2013) 2 (1) *Journal of Sustainable Development Law and Policy* 104-105. It took concerted pressure from the UN to get the African Heads of State to reach consensus, as many of them were suspicious and sceptical about the proposed human rights treaty for Africa, believing it to be an attack on the sovereignty of their respective States. See also Unpublished LLM Thesis: N Jo-Maduga *Protection of Socio-Economic Rights in Africa: A Comparative Study of the African Union and Selected Countries* University of Tilburg, 2017 16-19.

was the predecessor to the now African Union (AU). The ACHPR subsequently came into force in 1986.[62] Since the process leading to its adoption was arduous, the coming into force of the treaty was a watershed moment in Africa.[63] To a large degree, the ACHPR reflects the political reality of Africa as it existed in 1981, taking into account the ripple effect of the colonial era, which was characterised by a complete negation of respect for human rights.[64] The background to, and distinct purpose of, the ACHPR is clearly captured in its Preamble, which endorses the right to development, and the duty to achieve the total liberation of Africa from colonial legacies and the phenomenon of African civilisation.[65]

Fifty-four African States have now ratified the African Charter.[66] South Africa is a State Party to the Charter, having ratified it on 9 July 1996. As the main human rights treaty at the African regional level, the African Charter established the African Commission on Human and People's Rights (hereafter 'African Commission').[67] The primary goals of the Commission are to promote and protect human rights, and to interpret the African Charter for States Parties, the AU and organisations recognised by the AU.[68] In 1998, the Assembly of Heads of State and Government of the OAU adopted a Protocol to the African Charter on Human and Peoples' Rights.[69] The protocol established an African Court on Human and Peoples' Rights to supplement the existing protections afforded by the African Commission.[70] Unlike the position at the UN level,[71] the African

[62] P de Vos 'A New Beginning? The Enforcement of Social, Economic and Cultural Rights under the African Charter on Human and Peoples' Rights' (2004) 8 (1) *Law, Democracy & Development* 2. See also Unpublished LLM Thesis: T Kasongo *The Implementation of the Socio-Economic Rights Provisions of the African Charter on Human and Peoples' Rights at the National Level: A Case Study of Democratic Republic of Congo (DRC)* University of Cape Town, 2014 21.
[63] S Ibe 'Beyond Justiciability: Realising the Promise of Socio-Economic Rights in Nigeria' (2007) 7 (1) *African Human Rights Law Journal* 227.
[64] De Vos (n 62 above) 4.
[65] De Vos (n 62 above) 5. See also Preamble to the ACHPR, paras 3, 4 & 5.
[66] ACHPR 'State Reports and Concluding-Observations' https://www.achpr.org/statepartiestotheafricancharter (Accessed 31-11-2022).
[67] De Vos (n 62 above) 11.
[68] Article 45 of the ACHPR.
[69] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998 (hereafter 'Protocol to the ACHPR').
[70] Protocol to the ACHPR, para 9 of the introduction.
[71] As stated in part 2.2 above, under the UN system, economic, social and cultural rights are guaranteed separately in the ICESCR, while civil and political rights are guaranteed in the ICCPR.

Charter uniquely guarantees a wide range of rights, combining civil and political rights together with socio-economic rights in a single instrument.[72] It explicitly provides for socio-economic rights, such as the right to work,[73] the right to mental and physical health,[74] the right to education,[75] the right to free disposition of wealth,[76] and the right to development.[77] Other socio-economic rights, like the rights to shelter and food, are not explicitly guaranteed, but have been included through ACHPR adopted resolutions.[78] While the ACHPR does not expressly refer to the principle of progressive realisation, the principle is widely accepted in the interpretation of socio-economic rights and has been implied into the Charter in accordance with articles 60, 61 and 62 of the ACHPR.[79]

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[72] De Vos (n 62 above) 7-8. M Ssenyonjo 'Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter' (2011) 29 (3) *Netherlands Quarterly of Human Rights* 359. See also M Ssenyonjo 'The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa' (2017) 64 (1) *Netherlands International Law Review* 267-268.

[73] Article 15 of the ACHPR.

[74] Article 16 of the ACHPR.

[75] Article 17 (1) of the ACHPR.

[76] Article 21 (1), (3) & (4) of the ACHPR.

[77] Article 22 of the ACHPR. See also JC Mubangizi 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' (2006) 2 (1) *African Journal of Legal Studies* 1. From the AU perspective, the overall development of the continent is intrinsically linked with the protection of socio-economic rights. Shehu (n 61 above) 104.

[78] M Ssenyonjo 'The Protection of Economic, Social and Cultural Rights under the African Charter' in DM Chirwa & L Chenwi *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* 2016 92-93. See, e.g., Resolution on Human and Peoples' Rights as Central Pillar of Successful Response to COVID-19 and Recovery from its Socio-Political Impacts - ACHPR/Res. 449 (LXVI) 2020. Paragraph 6(d) of the Resolution states: 'Supporting minorities and indigenous communities by ensuring they have access to medical services, food, adequate shelter and clean water to manage the spread of the virus; and to ensure their inclusion in all social and economic services; as well as conduct advocacies relating to COVID-19 in indigenous languages'. *See further Social and Economic Rights Action Centre & Centre for Economic and Social Rights v Nigeria Communication* 155/96 (2001) AHRLR 60 par 52 and *Purohit & Moore v The Gambia Communication* 241/2001 (2003) AHRLR 96 para 84. In the latter case, the Commission read into the ACHPR article 16 right to the best attainable state of physical and mental health, the obligation of States Parties to 'take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind'. Thus, ACHPR art 16 has some elements of progressive realisation as well as reasonableness.

[79] ACHPR applicable principles in terms of article 60, 61 & 62 stipulate:

> 60. The ACHPR shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African;
> 61. The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine;

Generally, the AU strongly recognises the need for respecting, protecting, promoting and fulfilling the socio-economic rights of the people of Africa for the overall development of the continent. Socio-economic rights are thus given regional recognition and made justiciable under the ACHPR, including the communications of its African Commission and adopted resolutions.[80] The African Charter makes clear that the obligations that States Parties assume with respect to socio-economic rights are of immediate application,[81] and the rights are placed on the same footing as all other rights in the Charter.[82] More importantly, the African Charter recognises the interdependence of human rights by stating that socio-economic rights cannot be dissociated from civil and political rights, both in their conception and universality.[83] Like the ICESCR, the African Charter is silent on the 'reasonableness standard'. However, the African Commission has referred, in its jurisprudence, to the obligation of States Parties to 'take reasonable and other measures', and 'concrete and targeted steps' to ensure realisation of socio-economic rights. Even so, it does not elaborate on whether this should be understood within the context of the reasonableness standard.[84] In the case of *Endorois Welfare Council v Kenya Communication*,[85] the ACHPR Commission also observed that the State bears the burden of proving that measures adopted are reasonable, and that the measures should be based on equality and objective and reasonable grounds.[86]

62. Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present African Charter.

[80] Shehu (n 61 above) 103.

[81] *See Social and Economic Rights Action Centre & Centre for Economic and Social Rights v Nigeria Communication* (note 78) and *Purohit & Moore v The Gambia Communication* (note 78) para 84, as discussed in fn 78 above.

[82] Preamble to the ACHPR, para 8.

[83] Preamble to the African Charter. The Preamble is a form of agreement between signatories showing a commitment to uphold the principles contained in the Charter. Once the treaty has been signed and ratified, it becomes binding on the States Parties. Therefore, they have an obligation not only to obey, but also to enforce, the Charter.

[84] See *Social and Economic Rights Action Centre & Centre for Economic and Social Rights v Nigeria Communication* (note 78) and *Purohit & Moore v The Gambia Communication* (note 78) para 84, as discussed in fn 78 above.

[85] *Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* 276/2003 (2010) para 172.

[86] *Endorois Welfare Council v Kenya* (n 86 above) paras 227, 238, 234 & 296.

In light of the foregoing context, it is not surprising that the African Charter purports to represent a distinctly African conception of human rights, while at the same time drawing inspiration from the UDHR and other international human rights treaties.[87] States Parties to the African Charter, including SA, have accepted the view of the African Commission that socio-economic rights, like all other human rights, engender a duty on States Parties to respect, protect, promote and fulfil the rights in the African Charter.[88] In terms of this view, States Parties have a negative duty to respect the socio-economic rights contained in the African Charter.[89] States Parties also have a duty to refrain from unwarranted interference in the enjoyment of socio-economic rights.[90] Therefore, any action by a States Party that takes away existing access to enjoyment of socio-economic rights or makes it more cumbersome for an individual to experience socio-economic well-being, would potentially result in an infringement of the right.[91] Part 2.4 below examines the extent to which SA, as a States Party to both the ICESCR and the African Charter, complies with the obligations imposed upon it by the respective treaties. It specifically enquires into whether the status of socio-economic rights in the South African Constitution corresponds to that of the ICESCR and the ACHPR. It also examines the extent to which the formulation of socio-economic rights in the South African Constitution corresponds to that of the ICESCR and the ACHPR.

2.4 The Status and Formulation of Socio-Economic Rights in South Africa (SA)

Tladi described the SA Constitution as an international-law friendly constitution. It provides, for example, consideration of the international law when interpreting the Bill of Rights, and that when interpreting any legislation, any reasonable interpretation

[87] De Vos (n 62 above) 5.
[88] Art 30 & 45 of the ACHPR. The obligation to respect, protect, promote and fulfil fundamental rights and freedoms also finds expression in s 7(1) & (2) of the SA Constitution.
[89] ACHPR Resolution 449 (n 78 above) & Resolution on the Need to Develop Norms on States' Obligations to Regulate Private Actors Involved in the Provision of Social Services - ACHPR/Res. 434 (EXT.OS/ XXVI1) 2020.
[90] Resolution on the Appointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa ACHPR/Res. 453 (LXVI) 2020. Article 26 of the ACHPR. See also De Vos (n 62 above) 19.
[91] Resolution on States' Obligation to Regulate Private Actors Involved in the Provision of Health and Education Services ACHPR / Res. 420 (LXIV) 2019 para 1. States Parties have an obligation to 'ensure access to an effective remedy for violations of the right to health and education or other human rights violations by private actors involved in the provision of health and education services'

consistent with international law must be preferred over any other interpretation that is inconsistent with international law.[92] When a State ratifies an international human rights treaty, such as the ICESCR or the ACHPR, it accepts a solemn responsibility to apply each of the obligations embodied therein. It also undertakes to ensure the compatibility of its national laws with its international law duties.[93] Consequently, through the ratification of human rights treaties, States Parties become accountable to the international community and to other States who have ratified the same treaties, as well as to their own citizens and others resident in their territories.[94] Since SA has ratified both the ICESCR and the ACHPR,[95] it has a duty to ensure the compatibility of its domestic laws with the international law standards set out in the ICESCR and ACHPR.[96]

Concerning the recognition of socio-economic rights at a national or State level, the UN promotes constitutional incorporation as one of the strongest national statements regarding socio-economic rights.[97] It further promotes the direct justiciability of socio-economic rights as instrumental to the improvement of domestic socio-economic conditions.[98] This part of the chapter considers the status of socio-economic rights in SA during the apartheid era and in the post-1994 dispensation, and the influence of international law on the SA position. Part 2.4.1 examines the status of socio-economic

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[92] D Tladi 'Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga' (2016) 16 (2) *African Human Rights Law Journal* 311. See also ss 39(1)(b) & 232 of the Constitution.

[93] M Ssenyonjo 'The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa' (2017) 64 (1) *Netherlands International Law Review* 261-262. See also T Stein 'Constitutional Socio-Economic Rights and International Law: "You are Not Alone"' (2013) 16 (1) *Potchefstroom Electronic Law Journal* 18. OHCHR *Fact Sheet No.* para 2.

[94] Ssenyonjo (n 90 above) 262. OHCHR *Fact Sheet No. 16* (n 8 above) para 2.

[95] See part 2.3 of this ch for the date of ratification by SA.

[96] Ssenyonjo (n 93 above) 263-264.

[97] D Ahmed & E Bulmer *Social and Economic Rights Primer* (2017) 22-23. See also C Jung, R Hirschl & E Rosevear 'Economic and Social Rights in National Constitutions' (2014) 62 (4) *The American Journal of Comparative Law* 1043-1044. See the Preamble to the UDHR and article 2 of the ICESCR, which respectively state:

> 'Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.'

[98] Jung *et al* (n 97 above) 1063-1067. Article 2 of the ICESCR stipulates:

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

rights in apartheid SA, while part 2.4.2 examines the status of socio-economic rights in post-1994 SA.

2.4.1 The Status of Socio-Economic Rights in Apartheid SA

Prior to the current constitutional dispensation, the SA State was one of the most oppressive regimes due to the inhumane apartheid system and its racial segregationist policies.[99] A particularly hideous feature of the apartheid state was the systematic violation of the norms of social justice.[100] The social engineering of apartheid secured a virtual monopoly of political and economic power for white persons at the expense of the majority of black South Africans.[101] Under the apartheid regime, various notorious laws and policies were enacted to deprive the majority of black South Africans of the most basic social securities needed for survival and development.[102] The core of apartheid policy and power revolved around land.[103] For instance, the Natives Land Act 27 of 1913, which was the cornerstone of apartheid, set aside about seven percent (extended to thirteen percent in 1936) of the land in SA for black ownership, and precluded black South Africans from ownership of the remaining ninety-three percent of the land.[104] The apartheid laws and policies represented the ultimate form of structural violence that stripped hundreds of thousands of black South Africans of their land and forcefully

[99] M Strauss 'A Historical Exposition of Spatial Injustice and Segregated Urban Settlement in South Africa' (2019) 25 (2) *Fundamina* 135-136 and C Landsberg & S Mackay 'South Africa 1994-2004' in South African Human Rights Commission *Reflections on Democracy and Human Rights: A Decade of the South African Constitution South Africa 1994-2004* (2006) 1.

[100] Strauss (n 99 above) 135-136. C Heyns & D Brand 'Socio-Economic Rights in South Africa' in D Brand *Introduction to Socio-Economic Rights in the South African Constitution* (2005) 154. For a brief discussion of 'social justice', see fn 3 of ch 1 (part 1.1) above.

[101] V Jaichand 'In Transition? The Struggle for Socio-Economic Justice in South Africa' (2017) 7 (1) *Notre Dame Journal of International & Comparative Law* 12-15.

[102] Strauss (n 99 above) 141 and Landsberg & Mackay (n 99 above) 53. The Mines and Works Act of 1911 (as amended in 1926), and its successor the Minimum Wages Act of 1925, promoted White employment by reserving certain jobs in mining and the railways for white workers. The Natives' Land Act 27 of 1913 laid the foundation for dispossession by demarcating the spaces within which black residents could legally settle. The latter Act defined less than one-tenth of SA as Black 'reserves' and prohibited any purchase or lease of land by Blacks. Strauss (n 99 above) 145-146.

[103] L Modise & N Mtshiselwa 'The Natives Land Act of 1913 Engineered the Poverty of Black South Africans: A Historic-Ecclesiastical Perspective' (2013) 39 (2) *Studia Historiae Ecclesiasticae* 1.

[104] Sections 1 and 2 of the Black Land Act 27 of 1913. In terms of s 10 of the Act, a 'scheduled native area' was any area in a province or homeland listed in the Schedule to the Act. The scheduled areas were the forerunners for the establishment of the Bantustans or independent homelands during apartheid. Strauss (n 99 above) 146-147. See also JM Luiz 'The Evolution and Fall of the South African Apartheid State: A Political Economy Perspective' (1998) 26 (2-3) *Journal of African Studies* 51.

relocated them to racially segregated developments in townships far outside the city, where home ownership was practically impossible.[105] Such townships became extremely overcrowded. They were distinctly cut off from infrastructure, as well as urban utilities and services, such as water and electricity, leaving people to fend for themselves.[106]

In addition to depriving black South Africans of ownership of their agricultural land, apartheid laws and policies also deprived them of their livestock by exclusively imposing hefty livestock levies in the form of tax on black farmers.[107] As a result, agriculture and farming in black communities gradually collapsed, compelling black South Africans to seek employment to ensure their livelihoods.[108] Pursuant to its segregationist and oppressive goals, the apartheid government introduced the labour migration system as a means of meeting the need for cheap labour in the mines and cities of 'whites',[109] while concurrently facilitating the relocation of black South Africans from their land.[110] In this

[105] The Natives (Urban Areas) Act 21 of 1923. The Natives Act was legislated on a broad front to regulate the presence of Africans in the urban areas. Municipalities were also instructed to establish separate African revenue accounts based on the income from fines, fees and rents exacted from 'natives' in the locations. The money was to be used for the upkeep and improvement of the locations. Modise & Mtshiselwa (n 103 above) 2-3.

[106] Modise & Mtshiselwa (n 103 above) 3. See also R Fogel 'Informal Housing, Poverty, and Legacies of Apartheid in South Africa' https://depts.washington.edu/urbanuw/news/informal (Accessed 30-11-2022).

[107] Modise & Mtshiselwa (n 103 above) 5. The Natives Taxation and Development Act, 1925 ('Natives Tax Act'). The Natives Tax Act introduced national poll, hut, dog & road taxes, which continued to be levied until 1969. The Act introduced numerous other African taxes, including the head tax or general rate, livestock rate and the dipping taxes. See also M Shandu *The Truth about Black Tax* 18 October 2018. https://medium.com/@MthiyaneShandu/the-truth-about-black-tax-84de3c10a1f4 (Accessed 30-11-2022).

[108] The Development Trust and Land Act 18 of 1936 extended the application of the Black Land Act 27 of 1913 by providing for the acquisition of additional scheduled areas or rural reserves designated for black inhabitants. The function of the Trust was to acquire and administer all released land. Thus, African people were not permitted to own land in their own right. Section 10(1) of the Development Trust and Land Act established control over spatial settlement patterns by limiting land allocated for black persons to 13,7 percent. Strauss (n 99 above) 147. See also LS Hinds 'Apartheid in South Africa and the Universal Declaration of Human Rights' (1985) 24 *Crime and Social Justice* 23.

[109] Natives Land Act 27 of 1913, together with Black Administration Act 38 of 1927. Section 5(1)(b) of the Black Administration Act was a powerful mechanism for managing and reconfiguring urban space through the forced removal of black inhabitants. In practice, the Black Administration Act enabled the comprehensive spatial control and relocation of the black population, together with the administration of land tenure and land use in the scheduled reserves.

[110] C Vosloo 'Extreme Apartheid: The South African System of Migrant Labour and its Hostels' (2020) 34 (1) *Image & Text* 2-3. The government of the day instituted coercive measures to encourage labour migration. One such measure was the introduction of hut and poll taxes, which forced African/black people to supplement their subsistence economic activities with money earned by selling their labour. Another measure that encouraged labour migration was the introduction of the Natives Land Act, which declared squatter farming illegal. The restrictions placed on the farming activities of African people ultimately led to the collapse of African agricultural production. R Smit 'The Impact of Labor Migration on African Families

way, the apartheid powers and their agents engineered poverty by forcing economically independent black South Africans to vacate the land of their birth and give up their previous livelihoods to become reservoirs of cheap, unskilled labour for the mines and factories.[111] The discriminatory and oppressive apartheid laws and policies disregarded and violated the UDHR solemn proclamation, which states:[112]

> All human beings are born free and equal in dignity and rights … Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Taking into account apartheid SA's human rights violations, there were numerous attempts from 1962 by international organisations to deploy anti-apartheid institutions as mobilising agents against SA. For example, the UN Special Committee against Apartheid was established in that year.[113] In the wake of this development, the UN began to institutionalise punitive measures against SA by imposing sanctions that curtailed SA's trade, economic, financial, business, diplomatic, sports and cultural ties with the outside world.[114] Still, the SA government persisted with the apartheid system and its doctrine of political, social and economic segregation of its citizenry based on crude racial criteria.[115]

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in South Africa: Yesterday and Today' (2001) 32 (4) *Journal of Comparative Family Studies* 534. Strauss (n 99 above) 150.

[111] Modise & Mtshiselwa (n 103 above) 5. See also Vosloo (n 110 above) 4-5 and Luiz (n 104 above) 51-52.

[112] Department of Public Information (UN) *The United Nations and Apartheid 1948-94* (1994) 1, United Nations *Blue Book Series* 8.

[113] Landsberg & Mackay (n 99 above) 3. Hinds (n 108 above) 6. A series of UN resolutions and declarations firmly rooted in the seminal Universal Declaration have laid an ample foundation for legal analysis of the continuous crimes against humanity committed by the apartheid regime and the creation of legal obligations upon other States to support people seeking to exercise their human rights and rights to self-determination. See the ICESCR, ICCPR and the Optional Protocol to the ICCPR GA Res. 2200 A(XX1). The historic UN Resolution 1514 of 1960 declared the Right of Colonial Peoples to Independence and Self-Determination. As a result, apartheid was declared a crime against humanity in 1966.

[114] Landsberg & Mackay (n 99 above) 3. Hinds (n 108 above) 6. On 6 November 1962, the General Assembly adopted its resolution 1761 (XVII), which, in its operative para 4, requested, among other things, that Member States take certain measures, separately or collectively, in conformity with the Charter. The measures included the boycott of all SA goods and refraining from exporting goods, including all arms and ammunitions to SA. RC Malhotra 'Apartheid and the United Nations' (1964) 354 *Africa in Motion* 141.

[115] S Khoza *Resource Book: Socio-Economic Rights in South Africa* (2007) 20. In 1960, the white government held a referendum to decide whether SA would become a Republic. On 31 May 1961, SA was declared a Republic and the government adopted the second Constitution, which also took away the rights of black people. In 1983, the government passed the third Constitution. The third Constitution created the tri-cameral parliament, which meant there was a separate parliament for the White, Coloured and Indian

Since socio-economic rights were not recognised as fundamental human rights in apartheid SA, the State was able to systematically degrade the living conditions of black South Africans, relegating them to poverty and indignity. The international community condemned SA's non-compliance with international human rights standards and eventually excluded it from membership.[116] It was only after SA became a democracy and adopted a human rights-based approach that the international human rights community welcomed its renewed membership. Part 2.4.2 below discusses the change in the SA approach to human rights recognition in the post-1994 dispensation.

2.4.2 The Status of Socio-Economic Rights in Post-1994 SA

Freedom and equality constitute the ideological blueprint of most States and their constitutions. In SA, the transition in 1994 was a watershed moment that saw the birth of a new democratic Constitution, underpinned by the values of human dignity and respect for human rights and fundamental freedoms.[117] The drafting of the Constitution was a significant outcome of the Convention for a Democratic South Africa (CODESA).[118] CODESA was a negotiating forum that was established in 1991 to facilitate a new constitutional dispensation for a post-apartheid SA.[119] The CODESA talks epitomised the commitment to end the liberation struggle and political violence. The talks ultimately led to SA transitioning into a constitutional democratic state.[120]

groups. The third Constitution excluded black people and automatically made them citizens of the homeland where they were born. Thus, Black people had no rights outside these homelands. South African History Online 'A History of the South African Constitution 1910-1996' 2019 https://www.sahistory.org.za/article/history-south-african-constitution-1910-1996 (Accessed 30-11-2022).

[116] Landsberg & Mackay (n 99 above) 2.

[117] FT Endoh 'Democratic Constitutionalism in Post-Apartheid South Africa: The Interim Constitution Revisited' (2015) 7 (1) *Africa Review* 71-72.

[118] M Mamdani 'Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa' (2015) 43 (1) *Politics & Society* 63.

[119] Mamdani (n 118 above) 66-69.

[120] Mamdani (n 118 above) 70.Unpublished LLM Thesis: KH Raligilia *The Impact of CODESA Talks on the Socio-Economic Rights of the Majority of South Africans* University of Pretoria, 2014 41-43. See also D Davis 'Socio-Economic Rights in South Africa: The Record after Ten Years' (2004) 5 (5) *New Zealand Journal of Public and International Law* 48.

The redressing effect of the CODESA talks is evident in the SA Bill of Rights, especially the emphasis on substantive equality, the role assigned to dignity, the limitations on freedom of expression and the uniquely important position that socio-economic rights occupy in the new constitutional text.[121] Even so, the inclusion of socio-economic rights in the constitutional text generated much controversy in the process leading to the adoption and certification of the final Constitution in 1996. At the heart of the debate was the issue of whether socio-economic rights should be conferred such significant constitutional protection, coupled with the erosive effect that it could have on the legitimacy of the Constitution,[122] and the budgetary implications it may hold for the State.[123] Further issues related to the institutional competence of the judiciary to enforce socio-economic rights, plus arguments about the need to maintain the separation of powers between the judiciary, the executive and the legislature.[124] Albie Sachs, who was part of the Constitutional Committee charged with the drafting of the new Constitution, argued that a new Constitution should provide for an orderly and fair redistribution by means of the establishment of a minimum floor of rights to a series of carefully defined social and economic needs.[125] In addition to advocating the significant role of socio-economic rights in the new dispensation, Sachs argued for the equal status of socio-economic rights with civil and political rights. In his view, the guarantee of a civil or political right, such as freedom of expression, means little to someone who lives in poverty and without shelter.[126] Sachs and others involved in the constitutional drafting process envisaged that the Constitution would have a far-reaching role in the transformation of post-apartheid society, particularly the lived reality of previously disadvantaged black South Africans.[127]

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[121] Heyns & Brand (n 100 above) 153.
[122] DM Davis 'Adjudicating the Socioeconomic Rights in the South African Constitution: Towards 'Deference Lite'?' (2006) 22 (2) *South African Journal on Human Rights* 304.
[123] Heyns & Brand (n 100 above) 154.
[124] Mbazira (n 2 above) 264-265.
[125] Davis (n 122 above) 302-303. Sachs further challenged conventional jurisprudential thinking about the role of law in social transformation, and cautioned against the use of the ordinary courts to enforce these rights. Instead, he contended that a series of commissions would be a better means by which to promote a new jurisprudence. A Sachs *Protecting Human Rights in a New South Africa* Town (1991) 21-22. See also P Langa 'Transformative Constitutionalism' (2006) 3 (1) *Stellenbosch Law Review* 353-354.
[126] Heyns & Brand (n 100 above) 154.
[127] S Liebenberg 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty' (2002) 6 (2) *Law, Democracy & Development* 159.

In 1996, following the concerted drafting and certification process, the SA Constitution became the supreme law of the country. In stark contrast to the previous dispensation, the post-1994 Constitution is founded on the values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the constitution and the rule of law, universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness'.[128] Among the key aims of the Constitution is to 'improve the quality of life of all citizens and free the potential of each person'.[129] The envisioned socio-economic wellbeing of previously disadvantaged Black South Africans is noticeable in the entrenchment of a wide range of justiciable socio-economic rights in the Bill of Rights. They comprise, among others, the right of access to housing,[130] the right of access to health care,[131] and a range of children's rights, which included a guarantee for each child of a right to basic nutrition and shelter,[132] education,[133] basic health care services and social services.[134]

The inclusion of socio-economic rights as justiciable rights signify an important role for the judiciary in relation to the enforcement of the rights.[135] Socio-economic rights were included purposefully by the drafters of the constitution as justiciable rights in the Bill of Rights primarily to better the lives of the previously disadvantaged, to protect and advance their fundamental socio-economic needs and interests.[136] These rights should therefore, be interpreted in a way that promotes this purpose. In interpreting and applying socio-economic rights, the courts have authority to define the nature of the State's obligations in relation to rights, the conditions under which the rights can be claimed, and the nature

[128] Section 1 of the SA Constitution. Rapatsa (n 47 above) 18.
[129] Preamble to the Constitution.
[130] Section 26 of the Constitution.
[131] Section 27 of the Constitution.
[132] Section 28 of the Constitution.
[133] Section 29 of the Constitution.
[134] Section 27 of the Constitution.
[135] Liebenberg (n 127 above) 160.
[136] K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 (1) *South African Journal on Human Rights* 147. See also Liebenberg (n 127 above) 161.

of the relief that those who approach the courts may expect.[137] The court's jurisprudence on socio-economic rights is not only significant for future litigation aimed at enforcing socio-economic rights, but also in guiding the adoption and implementation of legislation and policies by government to facilitate access to them.[138] It is also important to the monitoring and advocacy initiatives by civil society, the South African Human Rights Commission (SAHRC) and the Commission for Gender Equality. The strategic importance of socio-economic rights as tools in anti-poverty initiatives will diminish if the courts interpret them as imposing weak obligations on government and fail to protect them as vigorously as they do the other rights in the Bill of Rights.[139]

2.5 The Formulation of Socio-Economic Rights in the SA Constitution

While section 7(2) of the SA Constitution requires the State to take active steps to promote and fulfil socio-economic rights, it does not tell the State how it should go about fulfilling these positive constitutional obligations. Notwithstanding the State's positive duties to 'promote' and 'fulfil' guaranteed socio-economic rights, the rights are subjected to three qualifications, namely: 'reasonable legislative and other measures', 'progressive realisation', and 'within available resources'. Therefore, the positive duties to 'promote' and 'fulfil' progressively must be read together with the wording of a particular socio-economic right to give it proper context.[140] When interpreting the particular SA constitutional right, SA courts must have regard to how the right has been formulated and interpreted at the international law level. The ICESCR bears relevance in this regard.

As suggested by the CESCR in its General Comment No. 3, the principle of 'progressive realisation in the context of socio-economic rights discourse entails an element of flexibility in relation to obligations of States Parties and the enforcement of socio-economic rights. As a State Party to the ICESCR, the progressive realisation of socio-economic rights entails that the SA State must implement a reasonable and

[137] Liebenberg (n 127 above) 160.
[138] Liebenberg (n 127 above) 160.
[139] Liebenberg (n 127 above) 160.
[140] G Allsop 'Socio-Economic Rights' University. https://openbooks.uct.ac.za/uct/catalog/download/30/44/1489-1?inline=1 (Accessed 30-11-2022).

measurable plan, including the setting of achievable benchmarks and timeframes for the enjoyment of economic, social and cultural rights within the resources available to it.[141] South African courts should properly construe 'progressive realisation' as meaning that deliberate retrogressive measures are not permissible and have to be fully justified by reference to totality of rights.[142] With regard to vulnerable and disadvantaged groups, progressive realisation should be construed to mean that special measures need to be put in place, and that the SA State is required to do more than to abstain from taking measures that might have a negative impact on the enjoyment of the rights.[143] Thus, a lack of resources cannot justify State inaction or indefinite postponement of measures to implement the rights. Rather, the SA State must be required to demonstrate that it is making every effort to improve the enjoyment of socio-economic rights, even when resources are scarce. Further, irrespective of the resources available to it, the SA State must show that it seeks, as a matter of priority, to ensure that everyone has access to, at the very least, minimum levels of rights, and targets programs to protect the poor, the marginalised and the disadvantaged.[144] The SA discourse on the 'minimum core' concept, traditionally focuses on its potential role in the judicial enforcement of constitutional socio-economic rights.[145] For example, the Constitutional Court's conception on the minimum core obligation when assessing compliance with the State's socio-economic rights-based duties. Despite the SA judiciary's awareness of international jurisprudence, and that the text of the Constitution does not rule out a 'minimum core' obligation, however, the Constitutional Court has to date refused to recognise minimum core obligation of socio-economic rights for various reasons.[146]

The South African Constitutional Court employs the reasonableness approach in assessing the government's compliance with its socio-economic rights obligations in the Constitution. The reasonableness standard was first articulated in *Grootboom*, where the

[141] Chenwi (n 41 above) 745.
[142] Chenwi (n 41 above) 746.
[143] Chenwi (n 41 above) 746.
[144] OHCHR *Fact Sheet No. 33* (n 21 above) 14.
[145] O Fuo & A Du Plessis 'In the Face of Judicial Deference: Taking the "Minimum Core" of Socio-Economic Rights to the Local Government Sphere' (2015) 19 (1) *Law, Democracy & Development* 7.
[146] Fuo & Du Plessis (n 145 above) 7.

court held that in reviewing socio-economic rights positive duties, the key question to ask is whether the means chosen by the government are reasonably capable of facilitating the realisation of the socio-economic rights in question.[147] *Grootboom* and *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (10) BCLR 1033 (CC) (hereafter '*TAC*') developed a detailed criteria for assessing the reasonableness of the State's measures, which has been the subject of considerable debate.[148] It is argued that if one looks at the Court's interpretation of progressive realisation, it is clear that the reasonableness approach is influenced by some aspects of 'progressive realisation' and 'the availability of resources'.[149] In cases, such as *Grootboom*, *TAC* and *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) (hereafter '*Mazibuko*'), the Constitutional Court has held that the decision whether the measures the State has taken to implement socio-economic rights meet the standards envisaged by the Constitution depends on the reasonableness of those measures.[150]

2.6 Conclusion

The UDHR, ICESCR and African Charter serve as the basis for inclusion of socio-economic rights in the constitutions of many AU countries, though some member States have been reluctant to ratify the ICESCR and other related human rights treaties.[151] Within the SA context, the Constitution is supreme, and any other law that is inconsistent with the provisions of the Constitution shall be declared null and void to the extent of its inconsistency.[152] Therefore, unless it can be shown that the socio-economic rights provisions in the international and regional human rights law instruments are inconsistent

[147] *Grootboom* para 41.
[148] Chenwi (n 41 above) 757.
[149] Chenwi (n 41 above) 757.
[150] M Clark, J Dugard, F Veriava, J Duncan, K Moyo, S Plagerson, K Tissington, M Ulriksen & S Wilson *Socio-economic Rights: Progressive Realisation?* (2016) 55.
[151] The United States (US) has not ratified the first Optional Protocol of the ICCPR, as well as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). The US government often argues that implementing legislation that will give treaties' intended effects is unnecessary because all the rights in the treaty are already protected by US law. The US is one of only seven countries who have not ratified CEDAW. The other countries are Iran, Nauru, Palau, Somalia, Sudan and Tonga. The US and Somalia are the only countries that have not ratified the Convention on the Rights of the Child (CRC). M Wilken 'U.S. Aversion to International Human Rights Treaties' 22 June 2017 https://globaljusticecenter.net/blog/773-u-s-aversion-to-international-human-rights-treaties (Accessed 30-11-2022).
[152] Section 2 of the Constitution.

with provisions of the Constitution, the State has obligations under international law to obey and enforce the provisions.[153]

The ICESCR lays out the general obligation of progressive achievement or realisation with respect to the rights enumerated in the ICESCR.[154] In addition, CESCR and other authorities have identified that not every aspect of a particular right is subject to this progressive qualifier. Although, the concept of progressive realisation and maximum available resources imply different standards for different countries, the States Parties have general and specific obligations in realising socio-economic rights.[155] To clarify State parties' obligations under Article 2(1) of the ICESCR, the CESCR adopted General Comment No. 3 in 1990. The CESCR was concerned that socio-economic rights would not be observed as strictly as civil and political rights.[156] Many view the latter as having immediate effect, compared to the former. In order to clarify the meaning of socio-economic rights, the CESCR gave a greater/clear definition and interpretative guidance on the provisions of Article 2(1) of the ICESCR.[157] A significant development in the interpretation of Article 2 by the CESCR is the notion of a 'minimum core' obligation, meaning that while states cannot fulfil the rights immediately, they are required to fulfil the minimum essential level of each socio-economic right.

Some academic scholars argued that it would be erroneous to believe that the democratic government would be able to execute its policies efficiently without first grappling with the bureaucratic legacy of apartheid.[158] The degree of inequality and poverty today faced by many is such that the consequences are still very visible across

[153] Sections 231, 232 & 233 of the Constitution.
[154] Article 2(1) of the ICESCR provides:

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

[155] C Ngwena 'Health' in J Kollapen *Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996)* (2006) 126.
[156] Section 27 NPO 'The role of international law in South African health law and policy-making' (2010) https://section27.org.za/wp-content/uploads/2010/04/Chapter5.pdf (Accessed 30-11-2022).
[157] Section 27 NPO (n 156 above) 141.
[158] Jaichand (n 101 above) 15.

SA twenty-six years after the demise of apartheid.[159] Therefore, to make amends for past apartheid laws and injustices, the new SA had to adopt a radical transitional justice,[160] in terms of which the State plays a significant role in the socio-economic setup of the country.[161] The nature and scope of the inclusion of socio-economic rights as justiciable rights in the Constitution, makes the redress of inequality and poverty an ongoing matter of fundamental constitutional concern.[162] In the purported principles of transformative constitutionalism, as coined by Karl Klare,[163] the government must create an enabling environment for everyone to access basic services, including the entrenched normative value system and institutional framework that aspires to realise equality and socio-economic justice.[164] Moseneke and Langa argued that, if meaningfully applied, transformative constitutionalism is capable of ensuring that a comprehensive realisation of substantive equality and protection of human dignity of persons becomes a reality.[165] Lastly, the core business of transformative constitutionalism is to guide the nation to a better future. Jajbhay J also argued that the full transformative power of the rights in the Bill of Rights will only be realised when they are interpreted with reference to the specific socio-economic context prevalent in the country as a whole.[166]

Chapter three, four and five below will examine whether the constitutionalisation of socio-economic rights has had a significant impact on alleviating poverty and reducing inequality in SA. Nevertheless, it remains extremely difficult to capture in words and numbers as well as with sufficient precision and pathos, the exact nature and extent of the disparities in material living conditions, life opportunities, and social provisioning that

[159] Jaichand (n 101 above) 15.
[160] Transitional justice can be described as the approach adopted by countries, emerging from a period of conflict and repression, to address large-scale or systematic human rights violations so atrocious that the normal justice system will not be able to provide an adequate response. Jaichand (n 101 above) 13.
[161] Luiz (n 104 above) 142.
[162] Davis (n 122 above) 304-305. See also Landsberg & Mackay (n 99 above) 54-55.
[163] She posited it as a 'long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country's political, legal and social institutions, and power relations in a democratic, participatory and egalitarian direction'. Klare (n 136 above) 147.
[164] Rapatsa (n 128 above) 26-27.
[165] Langa (n 125 above) 353.
[166] *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 6 BCLR 728 (W) paras 51-52.

stubbornly persist between different race groups in South Africa.[167] Therefore, numerous studies including this study have sought to detail these disparities rooted in the country's history and how they continue to be a commonplace feature of post-1994 SA. These chapters will provide a comprehensive context to the aforementioned fundamental rights for human development, such as the rights of access to housing, education, and health care services. They will also explore obligations of the SA government under international and domestic law, and measures that will ensure that States Parties realise those rights, including the analysis of the CC's extant jurisprudence.

[167] S Sibanda 'When Do You Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism' (2020) 24 (1) *Law, Democracy & Development* 386-388.

CHAPTER 3: ANALYSIS OF CONSTITUTIONAL COURT'S INTERPRETATION AND ENFORCEMENT OF THE RIGHT TO HOUSING

3.1 Introduction

South Africa (SA) faces an acute housing shortage as well as backlog. Millions of South Africans in need of housing occupy rudimentary informal settlements that provide only minimum shelter, while thousands of others have no access to housing or shelter of any kind.[1] The cause of the acute housing shortage and backlog lies, at least partly, in the apartheid policy of influx control,[2] which sought to curb massive migration of the rural black populace to the large cities and urban areas.[3] Moreover, apartheid land and planning policies and legislation deprived black persons of formal access to land and housing in urban areas. This led to an increase in overcrowding in the black townships

[1] M Sobantu, N Maphosa & N Zulu 'Housing as a Basic Human Right: A Reflection on South Africa' (2019) 31 (1) *Southern African Journal of Social Work and Social Development* 1-2. See also P de Vos 'Housing' in J Kollapen *Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996)* (2006) 73.

[2] *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) (hereafter '*Grootboom*') para 6. When the new democratic government came into existence in 1994, it inherited a huge housing backlog. See also M Clark, J Dugard, F Veriava, J Duncan, K Moyo, S Plagerson, K Tissington, M Ulriksen & S Wilson 'Socio-economic Rights: Progressive Realisation?' (2016) *Foundation for Human Rights* 155-157.

[3] See the 1947 unpublished report by the National Party government (known as Sauer Report). On coming to power in 1948, the National Party began implementing an urbanisation policy based on the recommendations of the Sauer Report. The Report had called for measures that would slow down and eventually reverse the movement of Africans into the White-controlled urban areas. The long-term aim was to settle all Africans in territorially segregated areas on an ethnic basis. The areas were ultimately to be developed into economically and politically independent units. DC Hindson 'Orderly Urbanization and Influx Control: From Territorial Apartheid to Regional Spatial Ordering in South Africa.' (1985) 25 (99) *Cahiers D'études Africaines* 402-403. See also Sobantu *et al* (n 1 above) 2.

and a drastic surge of backyard dwellers,[4] ultimately resulting in spatial inequality,[5] as well as poverty.[6]

The continued racialised nature of access to land and housing in SA is one of the most damaging legacies of apartheid.[7] Since the dawn of democracy in SA, the poorest and most vulnerable members of the society have been struggling to access adequate housing. Others have been victims of arbitrary evictions without the provision of alternative accommodation.[8] Not surprisingly, the right to housing has been litigated more than any other socio-economic right in the post-1994 dispensation.[9] According to Pieterse and others,[10] the Constitutional Court's housing rights jurisprudence is more developed than any other socio-economic rights contained in the Constitution, with eviction cases having been a particular focus of the Constitutional Court (CC).

[4] Clark *et al* (n 2 above) 155. Backyard dwellings are informal housing structures (essentially 'shacks') most often built in the backyard of another property or house to rent out to earn an income. These are uniquely South African phenomenon, and most backyard households live in unsafe, overcrowded conditions and have inadequate access to basic services such as water and electricity. C Lemanski 'Augmented Informality: South Africa's Backyard Dwellings as a By-Product of Formal Housing Policies' (2009) 33(4) *Habitat International* 472-473.

[5] Spatial inequality is defined generally as inequality in socio-economic indicators of citizen's wellbeing in the country. It is also described as the unequal distribution of resources and services across different areas or locations, such as healthcare, welfare, public services, household income and infrastructures. Examples of socio-economic indicators are access to housing, healthcare, education and social security. In the SA context, the black majority of the population was disempowered educationally and left with inferior healthcare and other public services. A Todes & I Turok 'Spatial Inequalities and Policies in South Africa: Place-Based or People-Centred?' (2018) 123 (1) *Progress in Planning* 1-3. Hence, spatial inequality is one of the defining features of overall inequality in SA, and is historically entrenched. DP von Fintel 'Long-Run Spatial Inequality in South Africa: Early Settlement Patterns and Separate Development' (2018) 42 (2) *Journal Studies in Economics and Econometrics* 82-85.

[6] Clark *et al* (n 2 above) 155.

[7] Clark *et al* (n 2 above) 156.

[8] Von Fintel (n 5 above) 83-85. See also L Chenwi 'Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions' (2008) 8 (1) *Human Rights Law Review* 108. See further L Chenwi 'Implementation of Housing Rights in South Africa: Approaches and Strategies' (2015) 24 (4) *Journal of Law and Social Policy* 67-68.

[9] Even after almost three decades of constitutional democracy, millions of poor, black South Africans remain homeless and without access to adequate housing. Clark *et al* (n 2 above) 156.

[10] M Pieterse 'Socio-economic Rights Adjudication and Democratic Urban Governance: Reassessing the "Second Wave" Jurisprudence of the South African Constitutional Court' (2018) 51 (1) *Law and Politics in Africa, Asia and Latin America* 20-24. See also LA Williams 'The Right to Housing in South Africa: An Evolving Jurisprudence' (2014) 45 (3) *Columbia Human Rights Law Review* 816 and Chenwi 2015 (n 8 above) 68.

This chapter provides a conceptual analysis of the constitutional right to housing, using the theoretical framework of transformative constitutionalism. The chapter explores the nature and scope of the right to determine the extent to which the Constitutional Court's extant jurisprudence on the interpretation and enforcement of the right guides state-driven, socio-economic transformation in a manner that adequately addresses poverty and inequality-related vulnerabilities in SA.

In accord with the constitutional imperative to consider international law in the interpretation of constitutional human rights, the chapter commences in part 3.2 with a determination of SA's international law obligations in relation to the right to housing. Here, the formulation and interpretation of the nature and content of the right to housing under international human rights instruments at the United Nations (UN) and African Union (UN) levels is examined. Thereafter, part 3.3 considers the Constitutional Court's interpretation of the nature and scope of the constitutional right to housing through examination of specific case law. Next, part 3.4 investigates the extent to which the Constitutional Court has enforced the right to housing in its adjudication of claims relating to housing rights. Lastly, part 3.5 provides a determination of whether the Constitutional Court's extant jurisprudence on the right to housing accords with the transformative constitutionalism imperatives as outlined in chapter 1 above.[11]

3.2 SA's International Law Obligations in Relation to the Right to Housing

Socio-economic rights have become increasingly well-defined in the international human rights law instruments at the UN and AU levels, as well as in national Constitutions.[12] Their recognition and acceptance as fundamental human rights impose obligation on States, including SA, to ensure that everyone in the country enjoys the

[11] K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 (1) *South African Journal on Human Rights* 147-149. As argued by Klare, Langa, Kibet & Fombad, the core idea of transformative constitutionalism is that the SA society should change from its racist and unequal past to a society in which all South Africans can live with dignity, peaceful co-existence and development opportunities. P Langa 'Transformative Constitutionalism' (2006) 17 (1) *Stellenbosch Law Review* 351-352. See also E Kibet & C Fombad 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa' (2017) 17 (2) *African Human Rights Law Journal* 348-349.

[12] United Nations High Commissioner for Human Rights (OHCHR) *Economic, Social and Cultural Rights* Fact Sheet No.33 (2008) 7. http://www.ohchr.org. (Accessed 30-11-2022).

rights. States are also obliged to provide remedies if the rights are violated.[13] As a State Party to various international human rights instruments at the UN and AU levels, SA has both negative and positive obligations to ensure that it respects, protects, promotes and fulfils socio-economic rights, including the right to housing, in line with its commitments under international law.[14] This part of the chapter examines the formulation and interpretation of the right to housing at the UN and AU levels in parts 3.2.1 and 3.2.2 respectively. Then, in part 3.2.3, it determines the nature and extent of the SA State's international law obligations in relation to the right to housing in part 3.2.3.

3.2.1 Formulation and Interpretation of the Right to Housing at the UN Level

At the UN level, the right to adequate housing and protection from forced evictions is guaranteed in article 25 of the Universal Declaration of Human Rights (UDHR). The Declaration states that 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care ….' The Universal Declaration has served as a model for many national constitutions, laws, regulations, and policies that protect fundamental human rights.

The International Covenant on Economic, Social and Cultural Rights (ICESCR), which was adopted in 1966, also guarantees the right to housing. Article 11(1) of ICESCR guarantees the right to adequate housing and protection from forced evictions. It provides for 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'. Article 11(1) of the ICESCR bears a strong resemblance to article 25 of the UDHR. Further, the provisions in the respective instruments recognise the interdependence and interrelatedness of socio-economic needs, a right of everyone to an

[13] A Mavedzenge 'Revisiting The Role of the Judiciary in Enforcing the State's Duty to Provide Access to the Minimum Core Content of Socio-Economic Rights in South Africa and Kenya' (2020) 7 (2) *Journal of Comparative Law in Africa* 79-83. See also DM Davis 'Adjudicating Socioeconomic Rights in the South African Constitution: Towards "Deference Lite"?' (2006) 22 (2) *South African Journal on Human Rights* 301.
[14] AT Shehu 'The Enforcement of Social and Economic Rights in Africa: The Nigerian Experience' (2013) 2 (1) *Journal of Sustainable Development Law and Policy* 104-105. See also part 2.3 of ch 2 above on the international law obligation by member States.

adequate standard of living, and adequate housing.[15] However, unlike the ICESCR, which is a binding international human rights instrument, the UDHR is not a binding instrument.[16] In addition to expressly guaranteeing the right to housing, the ICESCR recognises the right to adequate housing in relation to vulnerable identity groups within the society, such as children, rural women, racialised groupings, people with disabilities and migrants.[17]

The UN established a Committee on Economic, Social and Cultural Rights (CESCR), which is the body that monitors implementation of the ICESCR as well as clarifies related obligations by its States Parties. At the heart of the CESCR is the mandate to develop and determine whether the Covenant's norms are being applied, as well as assess how the implementation and enforcement of the Covenant could be improved so that all people can fully enjoy guaranteed socio-economic rights. The CESCR published two General Comments on housing and forced evictions, namely General Comment No.4 and General Comment No.7.[18] General Comment No.4 was adopted by the CESCR in 1991. It sets out a number of factors related to the meaning of 'adequacy', including security of tenure, access to services, materials, facilities and infrastructure.[19] According to the CESCR, the ICESCR human right to adequate housing sets out the essential levels of the right or 'minimum core' content to be immediately achieved or justified in instances of insufficient resources by States Parties, together with the obligation to use the

[15] L Forman 'Human Rights Treaties are an Important Part of the "International Health Instrumentariam"' (2018) 7 (5) *International Journal of Health Policy Management* 467-468. & Clark *et al* (n 2 above) 158.
[16] Forman (n 15 above) 468
[17] De Vos (n 1 above) 73 & Clark *et al* (n 2 above) 158. Article 2 (2) of the ICESCR asserts that 'the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'
[18] The Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts that was established under United Nations Economic and Social Council (ECOSOC) Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the ECOSOC in Part IV of the Covenant. FC Maastricht 'The Role of the UN Committee on Economic, Social and Cultural Rights in Strengthening Implementation and Supervision of the International Covenant on Economic, Social and Cultural Rights' (2002) 35 (2) *Law and Politics in Africa, Asia and Latin America* 183. Unlike the Human Rights Committee, the CESCR is not a body established by treaty, but it is a subsidiary body of ECOSOC. The CESCR oversees implementation of the ICESCR by its States parties through its consideration of reports, individual complaints, inter-State complaints, and inquiry requests, as well as the preparation of general comments. S Khoza *Resource Book: Socio-Economic Rights in South Africa* (2007) 30. See also Forman (n 15 above) 468.
[19] CESCR *General Comment No.4: The Right to Adequate Housing* UN doc E/1991/23 (1991) para 6.

maximum available resources to achieve progressively the full realisation of the right.[20] The 'minimum core' content to be immediately achieved by States Parties includes obligations to ensure effective monitoring of the situation demanding access to adequate housing.[21] In light of General Comment No.4, States Parties to the ICESCR should put in place enabling strategies in the form of legislation, policies and budgets to ensure access to adequate housing and prohibit forced evictions.[22] Further, disadvantaged and vulnerable identity groups should be ensured some degree of priority consideration in the housing programs.

In response to the global prevalence of evictions, the CESCR adopted General Comment No.7 on forced evictions in 1997.[23] General Comment No.7 established a general prohibition on forced evictions. Amongst other things, the instrument specifies that States Parties must enact legislative measures and relevant policies to protect security of tenure. States Parties must also take all appropriate measures to ensure adequate alternative housing to the maximum of available resources.[24] General Comment No.7 additionally asserts that States Parties must put in place procedural and due process protection regarding any planned evictions, including adequate notice, consultation prior to eviction, identification of possible alternative housing, provision of information regarding the eviction, and the provision of legal remedies and legal aid, where possible.[25]

In 2005, the CESCR adopted General Comment No.16 on the equal right of men and women to the enjoyment of all socio-economic rights, which addresses the right to housing for vulnerable individuals. The Committee highlighted that States Parties are

[20] CESCR *General Comment No.3: The Nature of States Parties Obligations* UN doc E/1991/23 (1990) para 9.
[21] CESCR *General Comment No.4* paras 13 & 18.
[22] Clark *et al* (n 2 above) 159.
[23] CESCR *General Comment No.7: The Right to Adequate Housing: Forced Eviction* UN doc E/1998/22 (1997) para 3. The CESCR defines forced evictions as the 'permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.' CESCR *General Comment No.7* paras 10-21.
[24] Clark *et al* (n 2 above) 158.
[25] CESCR *General Comment No.7* paras 2, 10, 11 & 15.

bound to 'provide victims of domestic violence, who are primarily female, with access to safe housing'.[26] It further asserted that the right to adequate housing requires that 'women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so'.[27] Since SA has ratified the ICESCR, the CESCR General Comments provide a valid and useful tool for interpreting and applying the right to adequate housing as entrenched in the Constitution.

3.2.2 Formulation and Interpretation of the Right to Housing at the AU Level

At the regional level, SA has ratified the African Charter on Human and Peoples' Rights, 1981 (ACHPR or African Charter). The ACHPR established the African Commission on Human and Peoples' Rights (African Commission) to serve as a quasi-judicial regional body, tasked with promoting and protecting human rights, including socio-economic rights, in Africa.[28] Article 14 of the African Charter explicitly recognises the right to property. It states:

> The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Notably, the African Charter does not explicitly guarantee the right to housing or shelter. However, in *SERAC v Nigeria*,[29] the African Commission interpreted article 14, together with articles 16, 18(1) and 24 of the Charter, to provide for a right to adequate

[26] Equality of treatment is also the basis upon which all women are accorded, among other rights, the right to housing. CESCR *General Comment No.16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights* UN doc E/C.12/2005/4 (2005) para 27.

[27] CESCR *General Comment No.16* para 28. States Pparties are specifically required to eliminate discrimination against women in rural areas and to ensure to such women the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply. Article 14 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

[28] M Ssenyonjo 'Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter' (2011) 29 (3) *Netherlands Quarterly Journal of Human Rights* 358.

[29] *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60. See also Communication 155/96, *The Social and Economic Rights Action Centre v Nigeria*, 15th Annual Activity Report of the African Commission on Human and Peoples' Rights.

housing right.[30] When examining the conduct of the Nigerian government in relation to ACHPR articles 14, 16 and 18(1), the Commission held as follows:[31]

> **60.** Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that *the combined effect of Articles 14, 16 and 18(1) reads into the [African] Charter a right to shelter or housing which the Nigerian Government has apparently violated*.
>
> **61.** *At a very minimum, the right to shelter obliges the Nigerian Government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes.* The state's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs. Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies. *The right to shelter even goes further than a roof over one's head. It extends to embody the individual's right to be let alone and to live in peace, whether under a roof or not.*

[30] Article 16 of the ACHPR states:

> 1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
> 2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 18(1) of the ACHPR states:

> The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.

Article 24 of the ACHPR states: 'All peoples shall have the right to a general satisfactory environment favorable to their development.'

[31] See *SERAC v Nigeria* paras 52-54, for the Commission's views on how ACHPR art 24 relates to the right to housing. See also the African Commission 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' with regard to the right to housing. Cite the relevant paragraph(s) from the document.

Thus, the African Commission implicitly recognised a right to housing or shelter guaranteed under the African Charter.[32] Since the Charter does not expressly guarantee the right to adequate housing and the African Commission has not comprehensively developed its jurisprudence relating to the right to adequate housing through a specific General Comment on the right, the AU jurisprudence on the right to housing is less developed than the UN jurisprudence on the right. Thus, part 3.2.3 below will focus on the UN international human rights law instruments to interpret the nature and extent of the SA State's international law obligations under the ICESCR in relation to the right to housing.

3.2.3 Nature and Extent of the SA State's International Law Obligations in Relation to the Right to Housing

International law has special significance in SA law, particularly within the framework of the Constitution.[33] The Constitution provides for mechanisms for the direct application,[34] and indirect application of international law.[35] The ICESCR is one of the important international human rights law instruments, which inspired the drafting of the Bill of Rights in the SA Constitution.[36] Since SA ratified the ICESCR, the treaty's provisions are binding on the SA State. Consequently, SA is obliged to implement the ICESCR provisions into its national law. The State's obligations are articulated most authoritatively in ICESCR articles 2(2) and 11(1). The provisions recognise the right of everyone, including vulnerable identity groups, to an adequate standard of living for themselves and their family that should consist of, *inter alia*, adequate housing. This means that, in accordance with ICESCR articles 2(2) and 11(1), the SA State must guarantee the right to adequate housing to everyone, including vulnerable identity groups.

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[32] De Vos (n 1 above) 73. See also Resolution on the Right to Adequate Housing and Protection from Forced Evictions - ACHPR/Res.231 (LII) 2012.
[33] R E Kapindu 'The Influence of International Human Rights Law on South African Labour and Housing Law' (2009) 10 (4) *Economic and Social Rights Review* 6.
[34] Sections 231 & 232 of the Constitution.
[35] Section 39(1)(b) of the Constitution.
[36] F Dube 'Neither Adopted nor Borrowed: A Critique of the Conception of the South African Bill of Rights' (2020) 23 (1) *Potchefstroom Electronic Law Journal* 2-7. See also M Ssenyonjo 'The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa' (2017) 64 (1) Netherlands International Law Review 259-265.

The CESCR has interpreted and clarified the various State or governmental obligations arising from recognition of the right to adequate housing through a number of initiatives. These included adopting General Comment No.4 on the right to adequate housing; holding a general discussion on housing rights; comprehensively revising the guidelines for States' reports under ICESCR articles 16 and 17 and lastly, including in its concluding observations on some States Parties' reports, remarks to the effect that the State in question was infringing the right to adequate housing owing to the practice of forced eviction.[37] Several States Parties whose national laws violated ICESCR article 11(1) through the practice of large-scale forced evictions were criticised by the CESCR.[38] As per CESCR General Comment No.4,[39] the SA State should define the term 'adequate' to include security of tenure, access to services, materials, facilities and infrastructure.[40] Further, the SA judiciary should interpret the constitutional right to adequate housing in a manner that identifies and ensures the essential levels of the right.[41] In other words, the SA judiciary should interpret the right as guaranteeing a 'minimum core' content to be immediately achieved or justified in instances of insufficient State resources.[42] The judiciary must also interpret the right to adequate housing as imposing an obligation on the State to use the maximum available resources to achieve progressively the full realisation of the right.[43] Further, in line with General Comment No.4, the SA State should

[37] United Nations High Commissioner for Human Rights (OHCHR) *The Human Right to Adequate Housing* Fact Sheet No.21 (2009) 6. https://www.un.org/ruleoflaw/blog/document/the-human-right-to-adequate-housing-fact-sheet-no-21/ (Accessed 30-11-2022).

[38] The CESCR pleaded with States Parties to cease any practices which could result in infringements of the right to adequate housing, in particular the practice of forced mass evictions and any form of racial or other discrimination. It further held that States Parties should repeal and amend any existing legislation, policies, programmes or projects which in any manner negatively affect the full realisation of the right to adequate housing. OHCHR Fact Sheet No.21 (n 37 above) 6-7.

[39] Paragraph 18 of General Comment No.4 provides: 'The Committee considers that instances of forced evictions are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.'

[40] CESCR *General Comment No. 4:* para 6.

[41] South African State adopted the ICESCR interpretation of 'adequate housing' in the Housing Code which is one of the key policy documents outlining South Africa's housing mandate or imperatives. In explaining what the word 'adequate' means in section 26(1), the Code states: the wording of the housing right provision corresponds with the International Covenant on Economic, Social and Cultural Rights (1966). In that context, 'adequate housing' is measured by certain core factors: legal security of tenure; the availability of services; materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy. South Africa's housing policy concurs with this concept of housing. National Housing Code 2000 (revised in 2009), parts 1 & 7.

[42] Art 11.1 of the ICESCR & CESCR *General Comment No.7* para 3

[43] CESCR *General Comment No.3* para 9. See also OHCHR Fact Sheet No.21 (n 37 above) 7.

adopt enabling strategies in the form of legislation, policies and budgets to ensure access to adequate housing.[44] Moreover, vulnerable identity groups should be given some degree of priority consideration in the housing programs developed by the State.

As per the CESCR General Comment No.7,[45] the SA State is obliged to prohibit forced evictions by putting in place procedural and due process protection regarding any planned evictions. Such measures should include providing adequate notice regarding any planned evictions, consulting with the relevant stakeholders prior to eviction, identifying possible alternative housing, providing information regarding the planned eviction, and the providing legal remedies and legal aid, where possible.[46] Part 3.3 below examines the extent to which the SA State has complied with its international law obligations relating to the right to housing.

3.3. Inclusion and Formulation of the Right to Housing in the SA Constitution

The Constitution of the Republic of South Africa, 1996 (hereafter 'Constitution') is renowned for entrenching a broad range of judicially enforceable socio-economic rights, including the right of everyone to have access to adequate housing and to be protected from arbitrary evictions. The Constitution aims to address the historic deprivation of black persons from having formal access to housing in urban areas through the explicit inclusion in section 26 of the right of access to housing. The entrenchment of the right to housing in the SA Constitution is premised on the principle that everyone has inherent human dignity, and their lives and wellbeing are valuable.[47] Section 26 stipulates:

26. Housing

[44] Clark *et al* (n 2 above) 159.

[45] The ICESCR prohibition against forced eviction illustrates how housing rights can be violated by State action as well as by omission, e.g. General Comment No. 7 unequivocally states that the practice of forced eviction is a *prima facie* violation of the right to adequate housing. It also explicitly provides a definition, using distinct and concrete elements, of what constitutes a 'forced eviction'. See fn 25 above for the CESCR definition of 'forced evictions' in *General Comment No*. 7. The elements constituting a forced eviction lend themselves to judicial enforcement, including both equitable and legal remedies. United Nations and the Rule of Law 'Housing Rights Legislation: Review of International and National Legal Instruments' Report No.1 (2002) 124. https://www.un.org/ruleoflaw/blog/document/housing-rights-legislation-review-of-international-and-national-legal-instruments/ (Accessed 30-11-2022).

[46] CESCR *General Comment No.7* paras 2, 10, 11 & 15.

[47] Section 7(1) of the Constitution & A Chaskalson 'Dignity as a Constitutional Value: A South African Perspective' (2011) 26 (5) *American University International Law Review* 1380-1382.

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

The drafters of the SA Constitution also recognised that the most vulnerable members of the society, such as children, should be granted every available means to protect and realise their individual and collective human rights. For this reason, section 28(1)(c) of the Constitution additionally guarantees to children the right to shelter.[48]

The section 26 constitutional right of access to housing engenders both a negative and a positive obligation on the State and other relevant role players. The positive obligations are contained in section 26(1) and (2). They largely relate to what a 'reasonable' State response to the 'progressive realisation' of the right of access to housing within available resources would entail.[49] The negative obligations, as envisaged in section 26(3) of the Constitution, oblige State and non-State role players to desist from preventing or impairing the right of access to adequate housing that persons have already realised for themselves.[50]

Notably, the formulation of the section 26 right does not entitle anyone to individual relief, as the State does not have a duty to immediately provide every South African with adequate housing. Rather, the State's duty is to devise and implement a comprehensive plan that will achieve the goal of providing access to adequate housing to everyone over time.[51] To give effect to section 26 of the Constitution and ensure compliance with its international law obligations, SA drafted numerous policy documents and enacted several

[48] Section 28(1)(c) of the Constitution states that every child has the right to basic nutrition, shelter, health care and social services.
[49] *Grootboom* para 41.
[50] *Grootboom* para 41.
[51] De Vos (n 1 above) 74.

housing-related statutes that provide for sustainable housing development processes.[52] Further, the meaning of the section 26 constitutional right to housing has been clarified in numerous court cases. Some of the most noteworthy cases include *Government of the Republic of South Africa v Grootboom*,[53] *Residents of Joe Slovo Community v Thubelisha Home*,[54] and *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg*.[55]

Despite the express constitutional entrenchment of the right to housing, there are several aspects of the formulation of the right, which remain a subject of contestation among legal scholars. For instance, legal scholars have questioned whether, in light of SA's international law obligations, the section 26 constitutional right of access to adequate housing has been appropriately formulated and interpreted.[56] They have also questioned whether the qualification of the right by the requirements of reasonable measures, the availability of resources and progressive realisation is appropriate.[57] Part 3.4. below examines how the Constitutional Court (CC) has interpreted the section 26 constitutional right to housing.

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[52] De Vos (n 1 above) 74. Housing Act 107 of 1997 as amended; Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE); Rental Housing Act 50 of 1999 & Social Housing Act 16 of 2008. See also Clark *et al* (n 2 above) 161.The Housing Act in its general principles obliges the State to give priority to the needs of the poor, to consult meaningfully with people affected by housing development and to ensure that housing development is based on integrated development planning. On the other hand, PIE enforces section 26(3) of the Constitution by prohibiting arbitrary evictions, and affords greater protection to desperately poor unlawful occupiers by implying that meaningful engagement should take place prior to the eviction of individuals lacking security of tenure. M Strauss and S Liebenberg 'Contested Spaces: Housing Rights and Evictions Law in Post-Apartheid South Africa' (2014) 13 (4) *Planning Theory* 432.

[53] *Grootboom* paras 40-41. Section 26 of the Constitution obliges the State not only to devise and implement a coherent, coordinated housing program, but to provide such program for those in most desperate need.

[54] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* 2010 (3) SA 454 (CC) (hereafter '*Residents of Joe Slovo*') at paras 5-7. The Constitutional Court ruled that the State was obliged to provide temporary shelter for people who had been evicted or faced imminent eviction and were unable to find shelter for preservation of their human dignity. The implementation of the eviction order granted in that case was made dependent on the parties reaching agreement on, among other things, the timing and manner of removal of the occupiers. *Residents of Joe Slovo* paras 8-11.

[55] The Constitutional Court also clarified the need for consultation and meaningful engagement with occupiers before conducting evictions. While prioritising the rights of vulnerable groups and those facing potential eviction, all parties in the engagement must act with reasonableness. *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others* 2008 (3) SA 208 (CC) (hereafter '*Occupiers of 51 Olivia Road*') at paras 17-21.

[56] Strauss & Liebenberg (n 52 above) 429-431 & Sobantu *et al* (n 1 above) 3.

[57] Mavedzenge (n 13 above) 74. See also D Bilchitz 'Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights' (2007) 8 (4) *Economic Social Rights Review* 27.

3.4 Constitutional Court's Interpretation of the Nature and Scope of the Right to Housing

Housing backlog, alarming growth and overcrowding of informal settlements, and the illegal occupation of private land and abandoned buildings are prevalent in SA.[58] The result is that many of the country's most vulnerable women, children, the elderly, and those living with disabilities are evicted and left homeless.[59] The judicial enforcement of section 26 of the Constitution signifies an important means of redressing both past and present imbalances and disparities in the context of housing rights. When interpreting constitutional rights, courts are required to consider international law.[60] The foregoing principle was affirmed in *S v Makwanyane & Another* 1995 (3) SA 391 (CC) (hereafter '*Makwanyane*'), where the CC stated that public international law includes non-binding as well as binding law, both of which provide a framework for interpretation.[61]

In the context of housing rights, *Grootboom* is heralded as the first landmark decision of the CC. The *Grootboom* judgment considered the nature and scope of the right to adequate housing in detail. It also affirmed a positive duty on the State to ensure that those living in deplorable conditions or confronted with homelessness gain access to adequate housing.[62] As per the facts of the case, a group of homeless adults and children, who had nowhere else to go to escape the mid-winter cold, gathered on a sports field. However, they could not erect shelters because their building materials had been burned and destroyed in a previous eviction that was reminiscent of apartheid era evictions.[63] The group brought an emergency legal action against the State demanding temporary

[58] The case of *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* 2022 (8) BCLR 985 (CC) (hereinafter Thubakgale) affirms for example, the systemic challenges that continue to compromise the enjoyment of the right of access to adequate housing for the marginalised and the poor within the society. Wilson S *The Right to Adequate Housing in Dugard et al Research Handbook on Economic and Social Rights as Human Rights* 2020 188-189.
[59] Strauss & Liebenberg (n 49 above) 431.
[60] Sobantu *et al* (n 1 above) 5-8 & Strauss & Liebenberg (n 52 above) 431. See also L Chenwi 'Advancing the Right to Adequate Housing of Desperately Poor People: *City of Johannesburg v. Rand Properties*.' (2006) 14 (1) *Human Rights Brief* 14.
[61] *S v Makwanyane & Another* 1995 (3) SA 391 (CC) (hereafter '*Makwanyane*') para 35. See also sections 39(1) & 233 of the Constitution.
[62] *Grootboom* paras 24-25 & 35-38.
[63] *Grootboom* para 46.

adequate shelter until they could obtain permanent housing.A key issue before the CC in *Grootboom* was the determination of the State's obligations in terms of the right of access to adequate housing.[64] The court deliberated, amongst other issues, whether the State housing programme was in compliance with the housing rights guaranteed to 'everyone' in section 26 of the Constitution and the rights of children in section 28(1)(c) of the Constitution.[65] CC extensively considered international law, particularly the relevant provisions of the ICESCR and the General Comments of the CESCR. In this regard, Yacoob J highlighted the differences between the texts of section 26(1) of the Constitution and article 11(1) of the ICESCR, which are integral in determining the extent to which the provisions of ICESCR may be a guide to the interpretation of section 26.[66]

Thus, while the CC considered the 'minimum core' jurisprudence of the CESCR under General Comment No.3 on the nature of States Parties' obligations,[67] it reached the following conclusion in paragraph 33 on the issue of whether the SA section 26 constitutional right should be interpreted to comprise a minimum core obligation:

> In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. It is not in any event necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core content of a right.

Nonetheless, having considered the international human rights law instruments, the Court interpreted section 26(1) of the Constitution to mean that, at the very least, the State as well as other entities and persons have a negative obligation to desist from preventing or impairing the right of access to adequate housing.[68] As a result, the court held that State's duty is to create the conditions for access to adequate housing for people

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[64] *Grootboom* para 1.
[65] *Grootboom* para 46.
[66] *Grootboom* para 28. First to note is that section 26 does not provide a right to housing itself, but only a right to have access to adequate housing, in contrast to art 11(1), which provides a right to adequate housing. Second, while the ICESCR obliges States Parties to take 'appropriate steps' to realise the right to an adequate standard of living, section 26 provides that the SA State must take 'reasonable legislative and other measures' to realise the right to have access to adequate housing. K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 139.
[67] *Grootboom* paras 26-33. See the further discussion in part 2.2 of ch 2 above on 'minimum' core obligations at the UN level.
[68] *Grootboom* para 34.

at all economic and social levels.[69] This means that the State should devise and implement a coherent and co-ordinated housing program to ensure access to adequate housing, taking into account the conditions and capabilities of people at all levels of society.[70]

On the facts, the CC held that the State's housing programme fell short of compliance with section 26(2), but surprisingly found no violation of section 28(1)(c) of the Constitution.[71] Further held that since existing housing policy and programs did not make specific provision for those in extreme distress, the State had failed to take constitutionally required, reasonable measures to progressively realise the right to housing.[72] However, the CC has refused to accept the CESCR 'minimum core' obligation approach but rather adopted the reasonableness review approach wherein the State must have a reasonable programme to progressively realise the right to housing within available resources.[73]

Though the *Grootboom* judgment is renowned and significant for, among other things, affirming that access to adequate housing is intrinsically linked to a number of other cross-cutting rights,[74] such as right to public participation, equality, human dignity, and access to information.[75] Strauss & Liebenberg criticised the court for taking an excessively deferential approach by adopting the reasonableness review standard for determining the compliance by the State with its socio-economic rights obligations.[76] This

[69] *Grootboom* paras 35-36.
[70] *Grootboom* para 36.
[71] *Grootboom* paras 40-41.
[72] *Grootboom* paras 43, 44, 64, 68 & 99.
[73] Consideration of the CESCR 'minimum core' jurisprudence as argued by amici curiae was rejected by the court on the basis that there was inadequate information before the Court for it to determine the minimum core of the right to adequate housing. *Grootboom* paras 31-33. The case of *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (10) BCLR 1033 (CC) (hereafter '*TAC*') paras 26-29, also outline the Constitutional Court's reasoning behind the apparent rejection of the 'minimum core' obligations.
[74]*Grootboom* paras 26-33. See also A Kucs, Z Sedlova & L Pierhurovica 'The Right to Housing: International, European and National Perspectives' (2008) https://www.corteidh.or.cr/tablas/r26740.pdf (Accessed 31-08-2022). Kapindu (n 32 above) 9-10.
[75] Kapindu (n 33 above) 10.
[76] Strauss & Liebenberg (n 52 above) 442-444. See also O Fuo & A Du Plessis 'In The Face of Judicial Deference: Taking The "Minimum Core" of Socio-Economic Rights to the Local Government Sphere' (2015) 16 *Law Democracy & Development* 1-2.

has also led to a restrictive interpretation of the section 26(1) and 26(2) of the Constitution.[77] Bilchitz is of the view that the Court in *Grootboom* specifically declined the opportunity to affirm that the normative content of section 26 of the Constitution included a 'minimum core' obligations as envisaged in the UN international human rights instrument, which would allow citizens to claim certain minimum essentials or set standards against which the action of the State could be tested.[78] Bilchitz further argued that the Court neither prescribed the exact details of what the State must do nor what individuals can claim from the State, which she deemed a significant departure from the approach of the CESRC.[79] When interpreting reasonableness, the Courts do not have to enquire whether their other more desirable or favourable measures could have been adopted, or whether public money could have been better spent.[80] In essence reasonableness simply requires the Courts to adopt a flexible approach, in terms of which a wide range of possible measures could be adopted by the State to comply with its constitutional mandate or obligations.[81] *Grootboom* also interpreted 'progressive realisation' of access to housing to mean that the State should, over time, proactively remove or dismantle any obstacles which may impede access to housing rights and consequently increasing the access to housing to a larger and broader range of people.[82] Nevertheless the Court did not expand any further on this notion, thus leaving the concept of progressive realisation largely undefined.[83] On the hindsight apart from the Court's refusal to embrace the concept of the 'minimum core' obligations as defined under CESCR General Comment No.3 on the nature of States Parties' obligations, *Grootboom* laid the foundation for the adoption of the Emergency Housing Programme (EHP), which

[77] Williams (n 10 above) 822-823.
[78] Bilchitz (n 57 above) 28. *Grootboom* paras 29-33. Art 11.1 of the ICESCR. CESCR *General Comment No.4* para 9. Mavedzenge (n 13 above) 74.
[79] Bilchitz (n 54 above) 28.
[80] Clark *et al* (n 2 above) 180. *Grootboom* para 41.
[81] *Grootboom* para 41.
[82] *Grootboom* para 45.
[83] Clark *et al* (n 2 above) 181. It is argued by some commentators that the court misinterpreted the nature of obligations of the State that arise from socio-economic rights. In respect of access to adequate housing, the State owes a duty to provide basic housing and related services immediately to those who are vulnerable and homeless. Therefore, the Courts in its adjudication should reconsider how the 'minimum core' obligation can be enforced judicially, without undermining the separation of powers doctrine. Mavedzenge (n 13 above) 75.

compels the State to prioritise those in desperate need and vulnerable.[84] The legal obligations stemming from the international human rights law instruments such as CESCR General Comments are compelling, but in practice the enforcement of the right to housing in SA finds expression largely within national legal frameworks as well as housing policies.[85]

Subsequent to the *Grootboom* case, the courts have, over time, in several eviction cases below, developed considerable jurisprudence on what would constitute a breach of the negative obligations in terms of section 26(3) of the Constitution. Breaches have come to range from out-right evictions and relocations to disruption of use and stability of tenure security.[86] Moreover, Section 26(3) encompasses both procedural and substantive protections for people facing evictions from their homes, such as the requirement that eviction orders may only be issued after consideration of all relevant circumstances. To give effect to this subsection, the South African legislature enacted Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). This piece of legislation set out a more rigorous legal framework to govern evictions by requiring that a Court could only authorise an eviction after it was satisfied that such eviction would be 'just and equitable' in the circumstances.[87] The first housing case that analysed an eviction in greater detail, and the interaction between the constitutional provisions governing housing is the *Modder East Squatters & Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa & Others v Modderklip Boerdery* (Pty) Ltd 2004 (3) All SA 169 (SCA) (hereafter '*Modderklip* SCA judgment'). *President of the Republic of South Africa and Another v Modderklip Boerdery* (Pty) Ltd 2005 (5) SA 3 (CC) (hereafter '*Modderklip*'). Referring to *Grootboom*, the Court stated that there was an unassailable obligation on the State to ensure that, at the very least, evictions are executed humanely.[88] As a result, the Court held that the failure on the part of the State

[84] Clark *et al* (n 2 above) 179.
[85] Clark *et al* (n 2 above) 160 & 180. See also Bilchitz (n 57 above) 28 & Mavedzenge (n 13 above) 73-74.
[86] Clark *et al* (n 2 above) 181-182.
[87] Clark *et* al (n 2 above) 181-182.
[88] *Modder East Squatters & Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa & Others v Modderklip Boerdery (Pty) Ltd* 2004 (3) All SA 169 (SCA) (hereafter '*Modderklip* SCA judgment') para 26.

to fulfil its constitutional obligation to take pro-active steps to realise the right to housing of the residents leads ineluctably to an inference that the State simultaneously breached its constitutionally entrenched section 25(1) obligations towards Modderklip.[89] Following *Modderklip* CC judgment, the CC's next real engagement with eviction law came in the case of *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA (CC) (hereafter '*PE Municipality*'). In this matter, the High Court ordered the eviction of a group of sixty-eight people, including twenty-nine children, from privately owned land in Port Elizabeth. In a wide ranging and emotive judgment, Justice Sachs reviewed the way in which the apartheid legal order particularly through the Prevention of Illegal Squatting Act 52 of 1951, deliberately sought to make eviction as easy as possible.[90] According to Clark *et al*, the power of *PE Municipality* judgment lay in its fusion and understanding of the conception of 'justice and equity' under PIE, the constitutional requirement of reasonableness set out in *Grootboom* and CESCR General Comment No.4 regarding preservation of human dignity.[91] In addition whether it is just and equitable to order an eviction under PIE will normally depend on whether an occupier can find alternative accommodation and, if not, whether the state has taken reasonable measures to make accommodation available to occupiers who are unable to provide it for themselves.[92] However, the implications of the judicial interpretation set out in the *PE Municipality* decision were clarified in later cases.[93]

[89] *Modderklip* SCA judgment para 28.
[90] Clark *et al* (n 2 above) 184.
[91] Clark *et al* (n 2 above) 185.
[92] Clark *et al* (n 2 above) 185.
[93] Mokgoro J held that 'thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order'. *PE Municipality* para 37. For example where relocation cannot be avoided, PIE can mitigate the spatial consequences of the relocation by ensuring that the local authority provides proximal alternative accommodation or land. *Occupiers of 51 Olivia Road, Berea Township & 197 Main Street, Johannesburg v City of Johannesburg & Others* 2008 (3) SA 208 (CC) (*Occupiers of 51 Olivia Road*). *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) (hereafter '*Residents of Joe Slovo*'). *Abahlali baseMjondolo Movement SA & Another v Premier of the Province of KwaZulu-Natal & Others* 2010 (2) BCLR 99 (CC) (hereafter '*Abahlali baseMjondolo*'). *Blue Moonlight Properties v Occupiers of Saratoga Avenue* 2010 ZAGPJHC 3 (4 February 2010) (hereafter '*Blue Moonlight*')

The case of *Occupiers of 51 Olivia Road, Berea Township & 197 Main Street Johannesburg v City of Johannesburg & others* 2008 (3) SA 208 (CC) (hereafter '*Occupiers of 51 Olivia Road'*) was also of particular importance to the development of eviction jurisprudence and the importance of upholding inherent human dignity. The applicants in this matter were several hundred occupiers of two buildings in the inner city of Johannesburg, which were earmarked for refurbishment by a property developer. The City issued a notice in terms of section 12(4)(b) of the National Building Standards and Building Regulations Act 103 of 1977, which enabled it to circumvent the supposedly onerous provision in PIE and applied to the High Court for an eviction order to give effect to the notice.[94] In its decision the CC, held that the aspects of the dispute relating to the constitutionality of the city's housing policy and eviction practices had become moot because of the agreement reached between the occupiers and the City. Important to note is that, the Court seized an opportunity to develop and expatiate the concept of 'meaningful engagement' as constituent of reasonable State action required by section 26(2) of the Constitution.[95] The Court held that where the State intends to displace people from their existing shelter, engagement is normally a prerequisite to the institution of eviction proceedings.[96]

Engagement must be individual and collective.[97] This imply that affected communities must be engaged as a group in relation to the impending/envisaged removal, as well as at an individual and household level, to ensure that all relevant including personal circumstances are taken into account in the process.[98] Engagement must be undertaken with dignity, transparency, and should focus on meeting the reasonable needs of an affected community, and providing alternative accommodation where it is needed.[99] Because no such engagement had been undertaken by the city in relation to the *Occupiers of 51 Olivia Road*, Justice Yacoob held that the eviction order issued by the SCA should be set aside. The Court once again considered a large-scale

[94] *Occupiers of 51 Olivia Road* para 1.
[95] *Occupiers of 51 Olivia Road* para 13-18. See also Clark *et al* (n 2 above) 185.
[96] *Occupiers of 51 Olivia Road* para 30.
[97] *Occupiers of 51 Olivia Road* para 13.
[98] Clark *et al* (n 2 above) 187.
[99] *Occupiers of 51 Olivia Road* paras 10, 14, 18 & 21.

eviction in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) (hereafter '*Residents of Joe Slovo'*). However, the Court in this case was widely criticised for employing a deferential approach and for the failure on the part of the Court to properly assess the reasonableness of the government's policy choices.[100] Although the Court upheld 'meaningful engagement' principle stating that the State and the occupiers had to engage meaningfully, displayed a particularly deferential attitude to the State as argued by Clark *et al*.[101] On various occasions the judges indicated that the Court was an institutionally inappropriate forum to determine how the State should realise its section 26 constitutional obligations. This is particularly evident in the judgment of Justice CJ Ngcobo who states that it is not for the courts to tell the government how to upgrade an area. This is a matter for the government to decide.[102]

Another significant case to note that came before the Constitutional Court and outlining how housing rights relates to human welfare and dignity as defined by the CESCR, was *Abahlali baseMjondolo Movement SA & Another v Premier of the Province of Kwazulu-Natal & Others* 2010 (2) BCLR 99 (CC) (hereafter '*Abahlali baseMjondolo*'). This case addresses a legal challenge to the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act 6 of 2007 (the Slums Act). Section 16 of the Slums Act empowered the MEC for Housing in KwaZulu-Natal to direct private owners of unlawfully occupied land to institute eviction proceedings within a certain period on notice in the provincial gazette.[103] If owners were unwilling to do so, the municipality would be compelled to bring eviction proceedings on its own accord. There were also fines attached to a failure to institute eviction proceedings. The CC found section 16 of the Slums Act to be inconsistent with the right of access to adequate housing on three grounds. First, the

[100] Pieterse (n 10 above) 25-26. K McLean 'Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on *Joe Slovo*' (2010) 3 (1) Constitutional Court Review 223 & 223-242. See also L Chenwi 'Legislative and Judicial Responses to Informal Settlements in South Africa: A Silver Bullet?' (2012) 23 (3) *Stellenbosch Law Review* 540, 540-563. K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) *SERI Resource Guide* 48–52 https://housingfinanceafrica.org/app/uploads/SERI_A-Resource-Guide-to-Housing-in-South-Africa_Feb11.pdf (Accessed 31-08-2022). S Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of "meaningful engagement"' (2012) 12 (1) *African Human Rights Law Journal* 17-18.
[101] Clark *et al* (n 2 above) 188-189.
[102] *Residents of Joe Slovo* para 253.
[103] *Abahlali baseMjondolo* paras 4-5.

provision precluded meaningful engagement which is an essential component of the housing process, and has been read into section 26 of the Constitution.[104] The Court determined that if engagement took place after a decision to evict or relocate had already been taken, such engagement would not be genuine.[105] This effectively means that the requirement to meaningfully engage is crucial in determining whether an eviction is just and equitable. Second, the Court found that the provision violated the principle that evictions or relocations should only be considered a measure of last resort. Effectively, this means that the possibility of *in situ* upgrading of the informal settlement must be considered before the State can resort to evictions or relocation, and the provision of alternative accommodation where necessary.[106] The final ground on which section 16 of the Slums Act was found to be constitutionally invalid was that it undermined security of tenure by allowing eviction proceedings to be instituted without the safeguards contained in PIE.[107]

In *Blue Moonlight Properties v Occupiers of Saratoga Avenue* 2010 ZAGPJHC 3 (4 February 2010) (hereafter '*Blue Moonlight*'), the Court had to address more closely the concrete duties of a municipality where an ordinary common law eviction would result in homelessness. In this matter, eighty-six people faced eviction. Taking the cue from *Grootboom* and *PE Municipality*, both the High Court and the Supreme Court of Appeal (SCA) judgments,[108] declared unconstitutional the city's differentiation between people it evicted from allegedly unsafe properties, and those evicted by private landowners. Both *Grootboom* and *PE Municipality* made it clear that the State had an obligation to respond to the needs of people facing housing emergencies.[109] *PE Municipality* made clear that the primary duty to do so lay with a municipality, even where occupiers were sought to be evicted from privately-owned land. The Court further found that a municipality is not

[104] *Abahlali baseMjondolo* paras 113-115.
[105] *Abahlali baseMjondolo* paras 69 & 120.
[106] The Constitutional Court ordered the State to find alternative accommodation in consultation with the occupiers. The Court further ordered that prior to the movement to alternative accommodation, the city must put in place interim measures to, amongst others, ensure the safety of the buildings, access to sanitation, potable water and toilets, all at the city's expense. *Abahlali baseMjondolo* paras 114 & 126.
[107] *Abahlali baseMjondolo* paras 102, 113, 114, 115 & 118.
[108] *City of Johannesburg v Blue Moonlight Properties* 2011 (4) SA 337 (SCA).
[109] Clark *et al* (n 2 above) 190.

entitled to cast its obligations on a National and Provincial spheres of government.[110] It has the obligation to plan and procure resources to meet emergency housing needs within its area of jurisdiction. It cannot rely on lack of resources to do so if it has not at least acknowledged its obligations and attempted to find resources to allocate to emergency housing projects.[111] This obligation becomes particularly apparent when one considers that municipalities are ideally suited to promptly react, engage and plan to fulfil the needs of local communities'.[112]

The realisation of right to housing for the poor including the vulnerable sectors of the society such as women and children, have suffered a major setback in the recent CC judgment in *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* 2022 (8) BCLR 985 (CC) (hereinafter '*Thubakgale*'). As per the facts of the case, the applicants were residents of the 'Winnie Mandela informal settlement' all desperately poor and in dire need of dignified housing.[113] They lived in appalling deplorable conditions in squalid hovels with up to ten people each, and without basic services such as access to electricity, water and sanitation since 1996.[114] Each of the applicants applied for a State housing subsidy and was granted, some as far back as 1998.[115] They were matched to a particular stand developed with that subsidy in the Tembisa area, and, in due course, they ought to have been given possession and ownership of that stand and the house constructed on it but that did not happen.[116] Instead, the Municipality unlawfully gave possession of the subsidised houses intended for the applicants, and to which they were still matched on the national housing database, to other residents.[117] Part of the relief sought by the applicants was awarding of constitutional damages. However, the CC's interpretation right of access to housing in this case inadequately addressed the deplorable living conditions and the urgent housing need of the applicants which prevailed

[110] *Blue Moonlight* paras 37 & 40.
[111] *Blue Moonlight* para 74.
[112] *Blue Moonlight* paras 47 & 57.
[113] *Thubakgale* paras 10-12.
[114] *Thubakgale* para 17.
[115] *Thubakgale* para 13.
[116] *Thubakgale* para 13.
[117] *Thubakgale* paras 15-16.

since 1996. This was due to the CC's failure to provide a clear scope and content to the right to access to adequate housing.[118]

The housing cases analysed above as brought before the CC relates to eviction law except for *Thubakgale* which is classical case of systematic challenges which perpetuate unending quest for the realisation of the right of access to adequate housing for the marginalised and the poor. In *Grootboom*, the court emphasised on the relationship between reasonable State action and the need to treat human beings with the appropriate respect and care for their dignity to which they have a right as members of humanity.[119] However, Tissington and Bilchitz in their argument affirmed the Court's judgment in *Modderklip* that in the circumstances, it seemed evident that the eviction could not be executed humanely (with dignity) without the State providing some form of alternative accommodation or land.[120] In most cases when poor and vulnerable occupiers are evicted and provision of alternative accommodation is not fulfilled, they would have had nowhere else to go which would simply result in them re-occupying the same land/shelter or occupying other vacant land/shelter, once again rendering them at risk of eviction as well as remaining in a poverty and vulnerable state.[121] Most notably, the Court in *Grootboom* has been extremely reluctant to consider the review of unqualified children's socio-economic rights in section 28(1)(c) as well as women, and has effectively ignored them in favour of qualified socio-economic rights. Nevertheless, the Court's approach to

[118] The CC held that the established interpretation of section 26(1) and (2) imposes no obligation directly enforceable against the State to provide citizens with houses on demand immediately or on a particular date, and such failure cannot cause an injury or damage to the individual in dire need of adequate housing. Further held that without an injury, there can be no claim for constitutional damages. *Thubakgale* para 84.
[119] The Court held that 'All levels of government must ensure that the housing program is reasonably and appropriately implemented in the light of all the provisions in the Constitution. All implementation mechanisms and all State action in relation to housing falls to be assessed against the requirements of s 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.' *Grootboom* para 82.
[120] *Modderklip* SCA judgment para 26.
[121] Mavedzenge (n 13 above) 85. See also D Bilchitz 'Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*' (2010) 127 (4) *The South African Law Journal* 597. Some legal scholars controversially argued that if there is a guaranteed right of access to housing in SA, how could Irene Grootboom have died homeless and poor, more than eight years after the court's decision? This is the judgment which laid the foundation for the adoption of the Emergency Housing Programme, which compels the State to prioritise those in desperate need and vulnerable. CI Tshoose 'A Closer Look at the Right to Have Access to Adequate Housing for Inhabitants of Informal Settlements Post Grootboom' (2015) 30 (1) *South African Public Law* 97-99 & 102. Clark *et al* (n 2 above) 179.

remedies has improved and become less deferent in their interpretation in subsequent eviction case law.[122] In all the jurisprudence enumerated above, the underpinning socio-economic human rights framework and argument is that the poor and other vulnerable members of the society are human beings who deserve to be treated with respect, equality and dignity in line with the constitutional Bill of Rights.[123]

3.5 Constitutional Enforcement of the Right to Housing

The protection of various members of the society against the adverse effects caused by homelessness or lack of access to adequate housing on their livelihoods and inherent human dignity is at the core of the right to housing.[124] Therefore, recognition and effective implementation of the right is vital to alleviate poverty and inequality, better livelihoods and in promoting and protecting the enjoyment of human rights.[125] SA is hailed for its progressive housing laws, jurisprudence, policies and programmes.[126] However, the realisation and effectiveness of the right to adequate housing would require Court's intervention and oversight through adequate procedural safeguards, as well as impartial legal and non-legal remedies.[127]

The South African Courts arguably have broad remedial powers, but have been hesitant to utilise them fully.[128] *Grootboom*, the landmark case on socio-economic right to housing, held that three subsections of section 26 of the constitution are interlinked with each other. Section 26(1) delineates the general scope of the right in terms of everyone's right of access to adequate housing, section 26(2) alludes to the positive obligations imposed upon the State and sec 26(3) contemplate aspects of the negative right, by prohibiting arbitrary evictions.[129] The justiciable nature of the right put an obligation on the State to 'respect and protect right to housing for everyone. The obligation to 'respect' the

[122] McLean (n 66 above) 147.
[123] Sobantu *et al* (n 1 above) 12. Section 10 of the Constitution.
[124] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 270.
[125] Chenwi (n 8 above) 68.
[126] Chenwi (n 8 above) 68.
[127] Pieterse (n 10 above) 20-21. See also G Budlender 'Justiciability of the Right to Housing - The South African Experience' Legal Resources Centre https://docs.escr-net.org/usr_doc/budlenderhousing.pdf (Accessed 30-11-2022).
[128] Chenwi (n 8 above) 69-70. See also section 172 of the Constitution.
[129] *Grootboom* paras 34 & 38.

housing right, requires the State to refrain from interfering directly or indirectly with the enjoyment of the right.[130] This is of particular significance where the individual already enjoys the right to some extent, and there is a threat to overlook or infringe the right.[131] On the similar prism, Liebenberg argues that a violation of the duty to 'respect' a right emerges when the State, through legislative or administrative conduct, deprives people of the access they enjoy to socio-economic rights.[132] The obligation to 'protect' a right to housing requires the state to take measures that prevent third parties from interfering with the right.[133] In SA, the State has given effect to this duty through the enactment of legislation which give protection to people whose tenure of their homes is insecure, and who are vulnerable to eviction.[134] The legislation set out procedures and criteria for eviction. The duty on the State to 'protect' the right to housing is critical to the process of judicial enforcements of these statutes. This is so because of the constitutional origin of the legislation, and that the legislation require court's judgments to be made on matters, such as whether eviction is 'just and equitable' under the circumstances.[135] The PIE Act thus, provides some legislative texture to guide the courts in determining the approach to eviction as required by the Constitution.[136] There are additional pieces of legislation, as well as policies and programmes, that form part of the legislative framework on housing rights.[137] The constitutional obligation on the State to 'protect' the right to housing is thus an important interpretive and enforcement tool.

Generally, courts have an important role of contributing and influencing social change or the transformation agenda of the country. Socio-economic rights litigation is often pursued by many as a strategy to bring about social change, especially in relation to issues such as structural inequalities, poverty and access to services by the poor.[138]

[130] Sections 9 & 10 of the Constitution. See also Tissington (n 100 above) 12-13.
[131] Chenwi (n 8 above) 68 & Budlender (n 127 above).
[132] Budlender (n 127 above) & Pieterse (n 10 above) 26-27.
[133] Budlender (n 127 above) & Chenwi (n 8 above) 71.
[134] Budlender (n 127 above) & Chenwi (n 8 above) 72.
[135] Pieterse (n 10 above) 31-32 & Chenwi (n 8 above) 72.
[136] Chenwi (n 8 above) 73.
[137] Pieterse (n 10 above) 3. These include, amongst others, the White Paper on Housing 1994, the National Housing Code (revised in 2009), the Housing Act 107 of 1997 and the Emergency Housing Programme 2004. See also Chenwi (n 8 above) 73-74.
[138] Chenwi (n 8 above) 75.

The contribution of Courts to social change may be direct, where they provide a platform for the concerns of vulnerable groups within the society to be raised as legal claims and thus provide legal redress in the form of judicial remedies in ways that have implications in developing law, policy and administrative action, as well as protecting existing pro-poor institutional arrangements and reinforcing pro-poor State policies.[139] From the foregoing analysis in part 3.3 above, it is undoubtbly clear that the courts have adopted a 'reasonableness review' standard for assessing the constitutionality of State socio-economic programs and policy related to housing rights. Further, the courts have opted to develop its socio-economic adjudication approach on a case-by-case basis. However, it is argued that the courts have adopted the reasonableness review approach as a means of providing leeway to the political branches of government to make the necessary and appropriate policy choices to meet their socio-economic rights obligations including housing rights obligations.[140] As a result, the role of courts is then narrowed to whether the government policy choices fall within the bounds of 'reasonableness'. Put differently, the approach requires the courts to consider whether the measures taken are reasonable, as opposed to questioning whether, other more desirable or favourable measures could have been adopted, or whether public money could have been well spent.[141]

The reasonableness review approach was first conceptualised in the *Grootboom* case where, the court found the State's housing programme not to be reasonable on the basis that it did not make reasonable provision for poor people in desperate need of housing, who had no access to land, and were living in crisis situations.[142] Apart from the housing rights the reasonableness approach by the court in *Grootboom,* has subsequently been applied in other socio-economic rights cases, and is deemed to be influenced by progressive realisation of the right and the availability of resources.[143]. In terms of the reasonableness approach as adopted and ordered by the South African courts in later cases, measures aimed at housing rights implementation should: be

[139] Pieterse (n 10 above) 32 & Chenwi (n 8 above) 75.
[140] Chenwi (n 8 above) 77.
[141] *Grootboom* para 41 & Pieterse (n 10 above) 32.
[142] *Grootboom* para 99.
[143] Section 26 of the Constitution. See also Chenwi (n 8 above) 78.

comprehensive, coherent, inclusive, flexible, transparent; be properly conceived; make short, medium and long-term provision for those in desperate need or in crisis situations and housing needs; not exclude a significant segment of society; not ignore those whose housing needs are the most urgent; clearly set out the responsibilities of the different spheres of government and ensure that financial and human resources are available for their implementation; take account of different economic levels in the society, including those who can afford to pay for housing and those who cannot; allow for meaningful or reasonable engagement with the public or affected people and communities; and be continuously reviewed.[144]

Notwithstanding the foregoing measures, Liebenberg argued that the courts could have developed a robust version of reasonableness review through extended discussion of housing's integral role on both a practical and theoretical level.[145] Regrettably South African courts have, thus far, been reluctant to endorse the 'minimum core' approach as defined by the CESCR in its General Comments. The CC has held that 'it is not possible to determine a minimum threshold for the progressive realisation of the right to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right'.[146] This is because groups are differently situated and have varying social needs. However, there may be cases where it may be possible and appropriate to have regard to the content of a 'minimum core' obligation to determine whether the measures taken by the State are reasonable.[147] Drawn from interpretations of the ICESCR, the 'minimum core' concept imposes an unqualified duty on the State to satisfy a defined minimum essential level of benefit for every person.

Most commentators such as Liebenberg, Chenwi and Mavedzenge have argued that the CC should also adopt 'minimum core' obligation approach in socio-economic

[144] Chenwi (n 8 above) 77-78. See also *Grootboom* paras 37, 42-44; *Modderklip* para 49; *PE Municipality* para 19; *Residents of 51 Olivia Road* paras 17-18 & *Residents of Joe Slovo* para 378.
[145] S Liebenberg 'Socio-Economic Rights. Adjudication under a Transformative Constitution' (2013) 24 (2) *European Journal of International Law* 743.
[146] *Grootboom* paras 27-29.
[147] *Grootboom* paras 27-29 & 32-33

rights cases where necessary.[148] Under the UN international human rights law instruments, 'minimum core' obligations are meant to apply irrespective of the availability of resources of the country concerned or any other factors.[149] Resource constraints are taken into account in assessing whether a State is meeting its 'minimum core' obligations.[150] The CESCR has specified that while the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant.[151] In terms of the extant CC jurisprudence, the Court's reasonableness standard obliges the State to take 'reasonable' measures to provide access to adequate housing, meaning that the core requirement for the fulfilment of the right to housing is thus that the State develops a reasonable housing policy or programme. In broader context, the State has a relatively broad discretion in relation to the policy and housing programmes it adopts, if the policy falls within the bounds of reasonableness as interpreted by the court.[152]

Despite the South African judiciary's awareness of international jurisprudence, and that the text of the Constitution does not rule out a 'minimum core' obligation, the CC has to date refused to recognise minimum core obligation of socio-economic rights for various reasons.[153] That as it may be, Bilchitz and Mavedzenge in their argument points out that the approach developed by the CESCR in General Comment No.3 is not an absolute standard, however, it permits for a situation where the fulfilment of 'minimum core' obligations may be genuinely or practically impossible.[154] It therefore put a burden on the State to show that it has marshalled all resources that are at its disposal in an effort to fulfil, as a matter of priority, its minimum core obligations.[155] The debate on whether the

[148] Liebenberg (n 145 above) 742, Chenwi (n 8 above) 78 & Mavedzenge (n 13 above) 78.
[149] Maastricht Guidelines (n 18 above) para 9. See also Mavedzenge (n 13 above) 75.
[150] CESCR *General Comment No 3* para 10. See also Mavedzenge (n 13 above) 76.
[151] CESCR *General Comment No.3* para 2.
[152] Clark *et al* (n 2 above) 180. This was also affirmed by the Court in *Mazibuko* para 9 as well as Bilchitz (n 121 above) 605.
[153] Fuo & Du Plessis (n 72 above) 7. See also Mavedzenge (n 13 above) 76-78.
[154] D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 (1) SAJHR 11-17 & Mavedzenge (n 13 above) 78.
[155] CESCR *General Comment No.3* para 10.

court should take a more robust approach of 'minimum core' obligation when enforcing the constitutional provisions of section 26 is an ongoing debate amongst legal scholars.

The South African CC has innovatively developed a remedy in housing rights jurisprudence known as meaningful or reasonable engagement. The declaration of meaningful engagement as a constitutional remedy has become significant to housing rights enforcement, and has been referred to mainly in housing rights cases. In its simplest form, meaningful engagement compels the State to consider negotiation or mediation in particular when the adoption of a new housing policy will require evicting residents.[156] This refers to mandatory consultation processes between the litigating parties in the course of enforcing housing rights. The approach of ordering meaningful engagement has been used in the process of adopting and implementing remedial measures to realise housing rights. Through the use of meaningful engagement, the Courts exercise their remedial powers in a way that allows for democratic processes of consultation and dialogue in housing rights enforcement.[157] This approach also provides an opportunity to individuals and communities to influence and shape policies and priority setting in relation to the provision of housing by the State.[158] In the context of democratic constitutionalism, the notion of meaningful engagement as a remedy of accountability provides a litmus test to determine whether the State has acted constitutionally and in the purported spirit of Ubuntu and human dignity.[159]

The constitutional basis for meaningful engagement is section 152 of the Constitution in terms of the obligation to provide democratic and accountable government for local communities, and services in a sustainable manner as well as encouraging the involvement of communities and community organisations in matters of local government.[160] The ordering of meaningful engagement as a remedy in socio-economic right to housing adjudication is important, as participation is a fundamental constitutional

[156] Tshoose (n 121 above) 108.
[157] Pieterse (n 10 above) 34.
[158] Chenwi (n 8 above) 78 & Clark *et al* (n 2 above) 185-187.
[159] Tshoose (n 121 above) 108.
[160] Section 152 (1)(a) & (b).

right in itself. Moreover, an important aspect and component of democracy, aimed to empower and upholding human dignity of the vulnerable and marginalised in society.[161] Examples of instructive cases in relation to understanding the approach of ordering meaningful engagement are *Residents of 51 Olivia Road* and *Joe Slovo Residents*. In *Residents of 51 Olivia Road*, the CC delivered the judgment against the backdrop of the engagement order. The court ordered 'meaningful engagement' after hearing arguments but before handing down its judgment. In its judgment the court held that it was essential for the State to engage meaningfully with the affected occupiers before evicting them from their homes if the eviction would render them homeless. Furthermore, enjoined the two parties to respect, protect, promote and fulfil the rights in the Bill of Rights by engaging with each other with a view of finding a mutually beneficial solution to the dispute.[162] The parties subsequently reached a comprehensive settlement and submitted it to the Court.[163] The court's judgment was issued subsequent to this agreement. On the other hand, 'meaningful engagement' in *Joe Slovo Residents* was ordered as one of the mitigating aspects to render the eviction 'just and equitable'.[164] The structured order requiring engagement, including the court's detailed specifications on the alternative accommodation to be provided upon eviction, had a positive impact.[165] Chenwi concurs with Liebenberg's view that *Joe Slovo Residents* confirms that the approach of ordering 'meaningful engagement' would be adequate where normative parameters have been substantively articulated and a reporting obligation placed on the parties in relation to the engagement process.[166]

[161] Chenwi (n 8 above) 79 & Pieterse (n 10 above) 34. Meaningful engagement, is guided by the following principles: the parties must act reasonably, in good faith, proactively, with honesty and equality of voice for all concerned, and understand and accommodate each other's concerns. *PE Municipality* paras 30 & 39.
[162] *Residents of 51 Olivia Road* para 5 & Section 7(2) of the Constitution. The Court indicated that it regarded meaningful engagement as a procedural prerequisite for "just and equitable" evictions in terms of prevailing housing legislation, compliance with which would be a central consideration in the judicial assessment of the reasonableness of any policy authorizing evictions. *Residents of 51 Olivia Road* paras 10-13, 15-20, 22.
[163] *Residents of 51 Olivia Road* paras 24-26.
[164] *Joe Slovo Residents* paras 7 (5) & 338.
[165] *Joe Slovo Residents* paras 7 (5) & 338. See also Liebenberg (n 96 above) 26.
[166] Chenwi (n 8 above) 80 & *Strathmore Law Clinic* (n 167 above) 140-143.

While the CC has been able to make considerable gains over the years in terms of socio-economic rights jurisprudence, its recent judgment in *Thubakgale* has been criticised for its failure to provide a clear scope and content to the right of access to adequate housing against the backdrop of self-created crisis and egregious conduct by the State at the expense of the poor and vulnerable.[167] The majority in *Thubakgale* also uncannily found that the remedy of constitutional damages sought by the residents was inappropriate in enforcing socio-economic rights, even though that the Constitution does not draw a distinction between the remedies available for socio-economic rights and other types of rights, such as civil and political.[168] *Thubakgale* confirmed that the implementation of the right to adequate housing has, for example, been plagued by poor planning, a lack of coordination, a failure to adequately monitor the implementation of government policies, and a lack of institutional competency.[169] Still, the poor and marginalised's call for adequate housing and dignity, remain ignored. As a result, many poor South Africans and low-income households have had to resort to living in appalling conditions in South Africa's growing informal settlements with little to nothing by way of access to water, sanitation and electricity.[170] Heywood reaffirms Wilson in that SA's deepening poverty and inequality is a stain on the constitutional dispensation, not the result of a design flaw in the Constitution, but due to systematic or institutional challenges and lack of political will.[171]

3.5 Conclusion

Access to adequate housing is a crucial requisite of upholding human dignity and stability for all citizens.[172] While many socio-economic rights claims have been

[167] SB Nxumalo & TR Jeewa 'Thubakgale: Obscuring the Right to Access to Adequate Housing' (22 December 2021) https://ohrh.law.ox.ac.uk/thubakgale-obscuring-the-right-to-access-to-adequate-housing/ (Accessed 30-11-2022).
[168] See s 172(1)(b) of the Constitution, which states that '[w]hen deciding a constitutional matter within its power, a court … may make any order that is just and equitable'.
[169] Wilson (n 58 above) 188-189. See also Socio-Economic Rights Institute of South Africa 'Informal Settlements and Human Rights in South Africa' (May 2018) https://www.ohchr.org/sites/default/files/Documents/Issues/Housing/InformalSettlements/SERI.pdf (Accessed 30-11-2022).
[170] Wilson (n 58 above) 195-197.
[171] M Heywood 'Economic Policy and the Socio-Economic Rights in the South African Constitution Why Don't They Talk to Each Other' (2021) 11 (1) *Constitutional Court Review* 343-348.
[172] Williams (n 10 above) 843.

adjudicated upon by the Courts, the greatest progress has been made with respect to the right of access to adequate housing, which has been almost exhaustively analysed. SA housing rights jurisprudence is more developed than any other socio-economic rights guaranteed in the SA Constitution and has been referenced or adopted by many foreign jurisdictions, such as Kenya.[173] However, the Court's extensive attention to housing rights is partly explained by the apartheid engineered forced removals and evictions, and other draconian laws that had restricted black urban residency and provision of adequate housing to vulnerable groups of the society post 1994.[174] Many previously disadvantaged South Africans are in dire need of houses, some currently live in sub-standard dwellings in the established townships. Consequently, they continue to live in poverty and socio-economic deprivation.[175] There is a growing consensus amongst commentators, ordinary citizens, politicians and advocacy groups on the necessity of an effective enforcement of the right to housing and the range of obligations for the South African State to ensure the essential elements of this right.[176] Therefore, some legal scholars argued amongst others, for a need to judicially enforce the State's obligations to immediately fulfil the 'minimum core' for the poor, as well as broader enjoyment of socio-economic rights by all segments of society through effective remedies for rights violations.[177] Many aspects of the right to

[173] Pieterse (n 10 above) 34. In *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* (2016) eKLR, the Kenyan Court extensively analysed South African Grootboom case and to what extent the jurisprudential principles may be a guide to the socio-economic right interpretation in this respect. See also Strathmore Law Clinic (n 167 above) 152-153.

[174] E Harsch 'Winding Path to Decent Housing for South Africa's Poor' (2014) https://www.un.org/africarenewal/web-features/winding-path-decent-housing-south-africa%E2%80%99s-poor (Accessed 30-11-2022). The post-1994 government adopted aggressive program of action to realise right to housing for many of the previously disadvantaged SA under the RDP and GEAR policy. The policies proposed extensive State spending on programmes to provide basic goods and services for many previously disadvantaged South Africans. See also J Chakwizira 'Low-Income Housing Backlogs and Deficits "Blues" in South Africa' (2019) 10 (2) *Journal of Settlements and Spatial Planning* 72.

[175] Harsch (n176 above) & Chenwi (n 8 above) 82.

[176] Bilchitz (n 121 above) 604-605 & Pieterse (n 10 above) 34. See also M Hartmann 'A Solution to SA's Housing Crisis is Right under our Noses' (2018) https://www.news24.com/fin24/Opinion/a-solution-to-sas-housing-crisis-is-right-under-our-noses-20181224-2 (Accessed 30-11-2022). Justiciable socio-economic rights mean little without domestic legal systems that afford access to effective remedies for rights violations. It is argued that the judiciary explore a paradigm to craft effective remedies while not encroaching upon the separation of powers doctrine. See also S van der Berg 'A Capabilities Approach to Remedies for Systemic Resource-Related Socio-Economic Rights Violations in South Africa' (2019) 19 (1) *African Human Rights Law Journal* 291.

[177] Mavedzenge (n 13 above) 85 & Pieterse (n 10 above) 34.

housing are already justiciable in terms of international and regional instruments as well as national constitutions and its human rights protection institutions.[178]

Budlender is of the view that the obligation to 'fulfil' the right to housing has traditionally been regarded as the most contentious of the components of socio-economic rights.[179] In terms of the international and regional human rights law instruments, the approach on the implementation of housing rights and remedial actions on the envisaged violation or interference of this right requires, the State parties to ensure the satisfaction at the very least, minimum essential levels of each of the socio-economic rights including housing.[180] Although the South African Court's approach in that attention and priority has to be given to those whose needs are the most urgent and in peril, partly embrace the interpretation of the CESCR General Comments,[181] CC, however, remains reluctant to adopt the 'minimum core obligation' approach of the CESCR. Chenwi and other argues that the in the implementation of housing rights in SA, a number of interests could compete with each other, especially in the context of evictions. The competing interests include housing rights versus property rights and rights of landowners, and the government's constitutional obligations versus the interests of affected communities.[182]

The case of *Grootboom* held that where there is a conflict between housing and property rights, courts have to ensure a balance between both rights and the State has a duty to seek to satisfy both rights.[183] *In Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* (2001) 7 BCLR 652 (CC), the CC held that the interests of both the flood victims and the environmental and property interests of the residents have to be taken into account in the decision-making process.[184] Consequently,

[178] Kucs *et a*l (n 74 above) 122.
[179] Budlender (n 127 above).
[180] Every State Party is required to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of the right. CESR *General Comment No.14* para 33 & CESCR *General Comment No.3* para 10.
[181] CESCR *General Comment No.4* paras 8. See also CESCR *General Comment No.3:* para 12 & CESCR *General Comment No.7* para 11.
[182] Chenwi (n 08 above) 80.
[183] *Grootboom* para 74.
[184] *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others* (2001) 7 BCLR 652 (CC) paras 103 & 105-106.

in the *PE Municipality* and *Modderklip* cases, the CC emphasised the need to consider the interest of both landowners and unlawful occupiers, thus confirming that rights have to be balanced.[185] The approach of South African Courts has been to balance competing interests relating to housing, property and landowners rights, and the government's constitutional obligations to affected communities, rather than prioritise or place the rights and interests of those that stand to be evicted in an international legal context under the CESCR at the UN level.[186] Other commentators welcomed the innovative development in the SA housing jurisprudence with reservation, arguing that the 'progressive realisation' as informed by the reasonableness review standards can best be achieved through structural interdicts. This is because an abandonment of judicial enforcement or orders risks constitutional protections being reduced to mere words on paper lacking any real efficacy.[187]

In SA, eviction cases have been a particular focus of the CC's developing socio-economic jurisprudence. Litigation has been amongst other key strategies in SA to compel the State to reconsider its housing law and policies. In addition, advocacy groups, social mobilisation and democratic participation through 'meaningful engagement' are also relevant key strategy. If litigation is to result in enjoyment, as well as improvement of socio-economic rights for the marginalised and consequently effect social change, the relevant authorities must comply with judicial decisions, and political action by the State must be taken to implement court orders.[188] In the South African context, though the CC has laid down a number of pro-poor principles and rules, compliance with these has been an issue of concern, with the consequence being that successful litigants are unable to

[185] *PE Municipality* para 19. See also *Modderklip* para 49. In *Olivia Road* and *Joe Slovo*, balancing of interests were in the form of meaningful engagement by the state or private entity when contemplating eviction.
[186] Chenwi (n 8 above) 80. *General Comment No.7* para 11.
[187] Strathmore Law Clinic (n 167 above) 152-153 & Van der Berg (n178 above) 291-294.
[188] Chenwi (n 8 above) 81. Social change or social transformation, as explained elsewhere, implies transforming the South African society from one based on economic deprivation to one based on equal distribution of resources. On the one hand, it means an undoing of the injustices of colonial and apartheid rule in the political, social, economic and cultural realms. On the other hand, it means the building of a new and better society, founded on democratic values, social justice and fundamental human rights. See L Chenwi, 'Socio-Economic Gains and Losses: The South African Constitutional Court and Social Change' (2011) 41 (3) *Social Change* 429-430.

benefit fully from the orders arising from their victories. Consequently, they continue to live in poverty and socio-economic deprivation.[189] For the poorest South Africans, their demands generally have been simple liveable houses, clean water, basic sanitation and electricity.[190] However, given the scale of the housing problem for many of the previously disadvantaged within the South African society, achieving decent adequate housing for all is a moving target. It thus remains a far possible pipeline dream twenty-six years into democracy. Whether the socio-economic rights legislative frameworks and policy reforms post-1994 has improved the livelihoods of many previously disadvantaged South Africans by alleviating poverty and inequality, remains a subject of discussion in subsequent 'chapter four' under right to health care services.

[189] Chenwi (n 8 above) 81. See also Chenwi (n 190 above) 430.

[190] In *Grootboom*, the Constitutional Court noted that the right to housing is a nexus right, encompassing so much more than just bricks and mortar. Thus, for a person to have access to adequate housing, there must be land, appropriate services, such as the provision of water and the removal of sewage, plus the financing of all these, including the building of the house itself. *Grootboom* paras 24 & 93.

CHAPTER 4: THE ANALYSIS OF THE CONSTITUTIONAL COURT'S INTERPRETATION AND ENFORCEMENT OF THE RIGHT TO HEALTH CARE SERVICES

4.1 Introduction

The fulfilment of the right to have access to health care services is a requirement for the proper enjoyment of fundamental rights and a healthy living of human existence in any society.[1] The stark reality is that the South African health care system continues to be dogged by structural inequalities having deep roots in the legacy of apartheid.[2] Access to health care pre-1994 was overwhelmingly skewed in terms of income, geographical location, race and other arbitrary grounds. Most notably, race was the main determinant of the quantity and quality of health care received by the people of South Africa (SA).[3] Gross racial segregation characterised the provision of health care, and the facilities were not equal in quantity and quality.[4] Therefore, the post-1994 democratic dispensation inherited a health care system that had been indelibly shaped by the overarching apartheid political superstructure. This has also had a devastating ripple effect on the highest attainable standard of health care as a fundamental right, especially on the poor and many previously disadvantaged South Africans.[5]

The Constitution of the Republic of South Africa, 1996 (hereafter 'Constitution') explicitly provides for the imperative to improve the quality of life for all citizens and to free

[1] E Durojaye 'An Analysis of the Contribution of the African Human Rights System to the Understanding of the Right to Health' (2021) 21 (1) *African Human Rights Law Journal* 752. C Ngwena 'Health' in J Kollapen Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996) (2006) *South African Human Rights Commission* 79. See also M Clark, J Dugard, F Veriava, J Duncan, K Moyo, S Plagerson, K Tissington, M Ulriksen & S Wilson 'Socio-economic Rights: Progressive Realisation?' (2016) *Foundation for Human Rights* 375.
[2] Clark *et al* (n 1 above) 375-377 & Ngwena (n 1 above) 79.
[3] Ngwena (n 1 above) 80 & Clark *et al* (n 1 above) 377.
[4] Clark et al (n 1 above) 377-378.
[5] WT Maphumulo & BR Bhengu 'Challenges of Quality Improvement in the Healthcare of South Africa Post-Apartheid: A Critical Review' (2019) 42 (1) *Curationis* 1-2 and C Ngwena 'Equity and the Development of the South African Health Care System: From the Public Health Act of 1919 to the Present Day' (2003) 9 (1) *Fundamina* 130.

the potential of each person.[6] Section 27 of the Constitution entrenches the right of everyone to have access to health care services, including reproductive health care. As a result, it places an overarching set of obligations on the State to respect, protect, promote and fulfil the right to health, as enshrined in the Bill of Rights.[7] The Constitution also creates various mechanisms for holding the State and private actors accountable for any violations of socio-economic rights. For example, the South African Human Rights Commission (SAHRC) has been tasked with the constitutional mandate of monitoring the realisation of socio-economic rights, which include the right of access to health care.[8] The section 27 constitutional right to health care obliges the State to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right.[9]

This chapter provides a conceptual analysis of the constitutional right to health care using the theoretical framework of transformative constitutionalism. The chapter explores the nature and scope of the right to determine the extent to which the Constitutional Court's extant jurisprudence on the interpretation and enforcement of the right guides state-driven, socio-economic transformation in a manner that adequately addresses poverty and inequality-related vulnerabilities in SA.

In accord with the constitutional imperative to consider international law in the interpretation of constitutional human rights, the chapter commences in part 4.2 with a determination of SA's international law obligations in relation to the right to health care. Here, the formulation and interpretation of the nature and content of the right to housing under international human rights instruments at the UN and AU levels is examined. Thereafter, part 4.3 considers the Constitutional Court's interpretation of the nature and

[6] It further seeks to 'heal the divisions of the past', 'establish a society based on democratic values, social justice and fundamental human rights', as well as 'improve the quality of life for all citizens and free the potential of each person.' Preamble to the Constitution of the Republic of South Africa of 1996 (hereafter 'Constitution').
[7] Section 7(2) of the Constitution.
[8] Section 184(3) of the Constitution provides that 'each year the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.' See also Clark *et al* (n 1 above) 375-378.
[9] Section 27(2) of the Constitution.

scope of the constitutional right to health care through examination of specific case law. Next, part 4.4 investigates the extent to which the Constitutional Court (CC) has enforced the right to housing in its adjudication of claims relating to housing rights. Lastly, part 4.5 provides a determination of whether the Constitutional Court's extant jurisprudence on the right to health care is consistent with the transformative constitutionalism imperatives as outlined in chapter 1 above.[10]

4.2 SA's International Law Obligations in Relation to the Right to Health Care

Health, as an essential, fundamental and indispensable state of wellbeing, is a means by which people can undertake social, economic, civil and political activities.[11] Therefore, the human right to health care is deemed one of the cornerstones for the enhancement and improvement of overall socio-economic welfare and human development.[12] The right to health care enjoys the status of a fundamental right in international and regional human rights law instruments.[13] This part of the chapter examines the formulation and interpretation of the right to health care at the UN and AU levels in parts 4.2.1 and 4.2.2 respectively. It then determines the nature and extent of the SA State's international law obligations in relation to the right to health care in part 4.2.3.

4.2.1 Formulation and Interpretation of the Right to Health Care at the UN Level

International human rights law instruments provide for the right to health including the recognition right of every person, to enjoy the highest attainable state of health without

[10] K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 (1) *South African Journal on Human Rights* 147-149. As argued by Klare, Langa, Kibet & Fombad, the core idea of transformative constitutionalism in that the SA society should change from its racist and unequal past to a society in which all can live with dignity, peaceful co-existence and development opportunities for all South Africans. P Langa 'Transformative Constitutionalism' (2006) 17 (1) *Stellenbosch Law Review* 351-352. See also E Kibet & C Fombad 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa' (2017) 17 (2) *African Human Rights Law Journal* 348-349.

[11] Z Nampewo, JH Mike & J Wolf 'Respecting, Protecting and Fulfilling the Human Right to Health' (2022) 21 (36) *International Journal for Equity in Health* 2.

[12] Nampewo *et al* (n 11 above) 2.

[13] United Nations High Commissioner for Human Rights (OHCHR) *Economic, Social and Cultural Rights* Fact Sheet No.33 (2008) 7. http://www.ohchr.org. (Accessed 30-11-2021).

distinction of race, religion, political belief, economic or social condition.[14] The movement or advocacy towards recognising health as a social issue and a fundamental human right, led to the founding of the World Health Organisation (WHO) and its Constitution in 1946.[15] The WHO Constitution (1946) envisages the highest attainable standard of health as a fundamental right of every human being, including recognition of health as essential to the attainment of peace and security of individuals.[16] WHO developed the understanding of health as 'a state of complete physical, mental and social wellbeing, and not merely the absence of disease or infirmity'.[17] It further, defined an integrated approach linking together all the factors related to human wellbeing, including physical and social surroundings conducive to good health.[18] In terms of WHO's constitutional imperatives, understanding health as a human right creates a legal obligation on States to ensure access to timeous, acceptable, and affordable health care of appropriate quality.[19] States are also obliged to support the right to health through the allocation of maximum available resources to progressively realise this goal.

Right to health care also enjoy the status of fundamental human right in international law, through the instruments such as the Universal Declaration of Human Rights,[20] (UDHR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).[21] Realisation of right to health and its related services by States is reviewed through various international human rights mechanisms, such as the Universal Periodic Review (UPR) and the United Nations Committee on Economic, Social and Cultural Rights (CESCR).[22] The most important international human right law instrument, which

[14] DM Chirwa 'The Right to Health in International Law: Its Implications for The Obligations of State and Non-State Actors in Ensuring Access to Essential Medicine' (2003) 19 (1) *South African Journal for Human Rights* 546. See also Clark *et al* (n 1 above) 382 & Preamble to the World Health Organisation Constitution 1946 (hereafter 'WHO Constitution').
[15] Clark *et al* (n 1 above) 382-383.
[16] Preamble to the WHO Constitution.
[17] Preamble to the WHO Constitution.
[18] Clark *et al* (n 1 above) 382-383. See also article 2(i) of WHO Constitution.
[19] WHO *Human Rights and Health* (29 December 2017) https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health. (Accessed 30-11-2022).
[20] Article 25 of the UDHR.
[21] Article 12 of the ICESCR.
[22] CESCR *General Comment No. 14: The Right to the Highest Attainable Standard of Health* UN doc E/C.12/2000/4 (2000) para 30. See also WHO *Human Rights and Health* (n 19 above).

explicitly entrench the right to health, is the ICESCR as well as CESCR General Comment No.14, enjoining signatory States to recognise the right of everyone to the enjoyment of the highest attainable standard of health.[23] Article 12 of the ICESCR explicitly sets out a right to health and defines steps that States should take to realise progressively to the maximum available resources the highest attainable standard of physical and mental health, including the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child.[24] In many cases, the right to health care has since been given express recognition in a range of other international human rights law instruments and National constitutions, and is considered the basis for socio-economic justice and equality.[25] Therefore, the ICESCR provides a valid and useful tool for interpreting and applying the right to health care as entrenched in the SA Constitution. Moreover, the right to health care is also recognised in relation to vulnerable identity groups within the society including children, rural women, racialised groupings, people with disabilities and migrants.[26]

There other wide array of international human right law instruments such as article 12 of CEDAW which recognises health as a fundamental right issue by placing an obligation on signatory State parties to take all appropriate measures to eliminate discrimination against women in the field of health care and recipient of the services.[27] This include appropriate services relating to pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation. The CEDAW extend the exceptional obligation on States parties to ensure elimination of discrimination against women in rural areas on a basis of equality

[23] Article 12 of the ICESCR. Article 12 of the ICESCR is an improved version of article 25 of the UHDR. The latter provides for the right in a very broad sense that includes food, clothing, housing, medical care and necessary social services. Unlike the UDHR, the ICESCR is more specific and recognises health as a separate right from the right to an adequate standard of living. M Da Silva 'The International Right To Health Care: A Legal and Moral Defense' (2018) 39 (343) *Michigan Journal of International Law* 345-346.
[24] Article 12(1) & (2) of the ICESCR.
[25] Chirwa (n 14 above) 544-546. Most importantly, this recognition paved a way for the development of treaties, which include, among other, the ICESCR; the African Charter on Human and Peoples' Rights (ACHPR or African Charter) and its protocol on the rights of women in Africa; the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); the UN Convention on the Rights of the Child (CRC); the African Charter on the Rights and Welfare of the Child. Ngwena (n 1 above) 80.
[26] Nampewo (n 11 above) 4-5.
[27] Nampewo (n 11 above) 5. Da Silva (n 23 above) 360-361.

of men and women. Moreover, they must be participants and beneficiaries in the rural development programs and, in particular, shall be a guarantee to such women the right to have access to adequate health care facilities, including information, counselling and services in family planning.[28] The CRC also entrenched a comprehensive provision on the right to health of children. Article 24 CRC compels States parties to strive to ensure that no child is deprived of right of access to health care services.

The emphasises by the CRC is that State parties should pursue full implementation of the right and to take measures to diminish infant and child mortality, and to ensure the provision of necessary medical assistance and health care to all children.[29] In addition, States parties should show commitment towards fight against diseases and malnutrition, 'within the framework of primary health care, through the application of readily available technology and the provision of appropriate pre-natal and post-natal health care for mothers, and to take all effective measures to abolish traditional practices detrimental to the health of children'.[30] The right to health care further finds universal recognition in the 1978 Declaration of Alma-Ata on Primary Health Care (Alma-Ata Declaration), which was adopted at the International Conference on Primary Health Care, Almaty, Kazakh Soviet Socialist Republic, Soviet Union on 6-12 September 1978. This Alma-Ata Declaration implicitly proclaims that the attainment of the highest possible level of health is a most important global social goal.[31] The Alma-Ata Declaration encourages the progressive development of comprehensive health care systems to ensure effective and equitable distribution of resources for maintaining health.[32] Although the Alma-Ata Declaration is not binding, it provides the bases for implementing primary health care systems, a commitment on the part of States to respect the right to health, and further establishes the framework for an integrated policy aimed at securing the enjoyment of the right to health.[33]

[28] Article 4(2)(b) of CEDAW. See also Da Silva (n 23 above) 360-361.
[29] Clark *et al* (n 1 above) 384 & Da Silva (n 23 above) 360-361.
[30] Article 24 of the Convention on the Rights of the Child UN Doc A/44/49 (1989). The CRC was adopted by the UN General Assembly on 20 November 1989. It came into force on 2 September 1990.
[31] Declaration (I) of Alma-Ata.
[32] Declaration (II) & (V) (VIII) of Alma-Ata.
[33] Declaration (VIII) of Alma-Ata.

As with all socio-economic rights, the right to health care under the ICESCR, is subject to progressive realisation and resource availability.[34] Given this context there are limitations insofar as realising the right to health care, however, the limitations does not give rise to an inference that access to health care is a right that is incapable of immediate claim.[35] Notwithstanding these limitations, State has an obligation to take positive steps to dispense health care facilities, goods and services on an equitable basis which are an important determinant of health.[36] According to Du Toit, the notion of the highest attainable standard of health care should take into account the individual's biological and socio-economic circumstances and the resources at the disposal of the State.[37] The qualification concept of 'progressive realisation' and to the maximum of the available resources are necessary flexibility measures given limited resources and the practical difficulties surrounding the full realisation of socio-economic rights.[38] However, the CESCR through its General Comments has stated that article 2(1) establishes clear obligations for States parties to move as expeditiously and effectively as possible towards the full realisation of these rights.[39]

States have an obligation to refrain from taking and implementing 'deliberately retrogressive measures' resulting in the denial of existing rights.[40] Otherwise, such

[34] Article 2(1) of the ICESCR provides: 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'. The CESCR has elaborated on the meaning of the various components of this article in CESCR *General Comment No. 3: The Nature of States Parties Obligations* UN doc E/1991/23 (1990) paras 1 & 3.

[35] Chirwa (n 14 above) 548. See also Section 27 NPO 'The Role of International Law in South African Health Law and Policy-Making' (2010) *Health & Democracy* 141.

[36] M du Toit, L London, A de Keukelaere, G Reagon, L Paremoer, Z Rizvi, L Lake & M Heap 'Joint Submission of Health Stakeholders in South Africa to the United Nations Committee on Economic, Social and Cultural Rights, 64th Session (11 October 2018) https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/ZAF/INT_CESCR_CSS_ZAF_32292_E.pdf (Accessed 30-11-2022).

[37] Du Toit *et al* (n 36 above) 11.

[38] Da Silva (n 23 above) 347-349.

[39] CESCR *General Comment No.3* para 9.

[40] Section 27 NPO (n 35 above) 141. CESCR posits four requirements, buttressed in article 12 of ICESCR, that must be met in the provision of health care services. Health care must be available, accessible, acceptable and of good quality. Public health and health care facilities, goods and services must be available to all in sufficient quantity, including the underlying determinants. Health care that is provided

measures would have to be justified fully by reference to all rights recognised in the ICESCR in the context of the full use of the maximum available resources. A significant development in the interpretation of Article 2 by the CESCR is the concept of 'minimum core' obligations to ensure that socio-economic rights are not interpreted as being entirely ideals to be attained.[41] This imply that while State parties cannot fulfil the rights immediately, they are required to fulfil the minimum essential level of each socio-economic right. General Comments No.3 and 14 are particularly important for the right to health care in that they provide a detailed expression and interpretation guidance of the content of the right to the highest attainable standard of health in article 12 of the ICESCR.[42]

4.2.2 Formulation and Interpretation of the Right to Health Care at the AU Level

At the regional level, the right to health is entrenched and guaranteed in article 16 of the African Charter on Human and Peoples' Rights (ACHPR or African Charter). It further finds expression in article 14 of the African Charter on the Rights and Welfare of the Child (African Children's Charter) and article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women Protocol).[43] Therefore, States must undertake to adopt measures necessary to protect such individuals' health by ensuring that they receive medical attention when they are sick.[44] The African Commission on Human and Peoples' Rights (African Commission) through its resolutions and quasi-judicial bodies have also clarified and buttressed the right to enjoy the best attainable state of physical and mental health for all individuals within the States' respective jurisdictions as contemplated in the WHO constitution.[45]

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must be ethically and culturally appropriate. It must be dignified and respectful of the culture of individuals, minorities, peoples and communities. In terms of quality, health care must be scientifically and medically appropriate and of good quality. CESCR *General Comment No. 14* para 12.

[41] Da Silva (n 23 above) 347. Chirwa (n 14 above) 548 The CESCR relied heavily on the Declaration of Alma Alta when it set out the minimum core obligations imposed on States Parties to ensure that health care must be available, accessible, acceptable and of good quality. Ngwena (n 5 above) 126-127 & Section 27 NPO (n 37 above) 143

[42] Section 27 NPO (n 38 above) 143. See also Chirwa (n 14 above) 548 & Da Silva (n 23 above) 347.

[43] Durojaye (n 1 above) 758.

[44] Article 16 of the ACHPR.

[45] The African Commission is a monitoring organ under the African Charter and thus enjoined to interpret the African Charter and ensure that States adhere to their obligations under the Charter. Durojaye (n 1 above) 758.

The African Charter on the Rights and Welfare of the Child also provides for the right of every child to enjoy the best attainable state of physical, mental and spiritual health.[46] Regarding the right to health in the context of Women, the African commission adopted African Women Protocol, which became the first international treaty to provide for binding obligations on the right to health (i.e. HIV/AIDS treatment and reproduction choice).[47] In the case of *Purohit and Moore v The Gambia* (Purohit), the African Commission has held that States have an obligation to ensure provision of health care facilities and related commodities. Further held that the enjoyment of the right to health is crucial to the realisation of other fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind.[48] The African Charter has also played an important role in imposing a human rights responsibility on the Nigerian government to respect the right to health and provide medical care to its citizens including prisoners.[49]

In international law, it is generally recognised that the positive component of socio-economic right to health requires two forms of action from the State.[50] The first is that the State must create a legal framework that grants individuals the legal status, rights and privileges that will enable them to pursue their right, and the second requires the state to implement measures and programmes designed to assist individuals in realising their rights.[51] As discussed above, the UN human rights law instruments have served as the

[46] Article 14 of the African Charter on the Rights and Welfare of the Child UN Doc A/44/49 (1989).
[47] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2000) CAB/LEG/66.6. Article 14(1) of the African Women Protocol provides that States Parties shall ensure that the right to health of women, including sexual and reproductive health, is respected and promoted.
[48] *Purohit and Moore v The Gambia, Communication* 241/2001 (2003) AHRLR 96 para 80. The African Commission stated: 'Enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.'
[49] *Media Rights Agenda v Nigeria* 224/98 (2000) ACHPR 24. The Commission noted the allegation of the Constitutional Rights Project that 'Mr Nosa Igiebor was denied access to doctors and that he received no medical help even though his health was deteriorating through his detention.' The Commission found that the Nigerian government was in violation of article 16 of the African Charter. Therefore, it ordered 'the Government of Nigeria [to] take the necessary steps to bring its law into conformity with the Charter.' See para 90. See also Nampewo *et al* (n 11 above) 7.
[50] Chirwa (n 16 above) 541.
[51] Chirwa (n 16 above) 541.

pace setter for the conceptualisation of the right to health care. Article 12 of ICESCR contains an authoritative provision on the right to health care which has been replicated in almost all other regional human rights law instruments, including the African Charter.[52] Therefore, the ACHPR expressly guarantee the right to health care, and the African Commission's jurisprudence on the right to health care is fairly developed but not explicit and authoritative compared to the ICESCR and CESCR's General Comments on the right to health care. Thus, part 4.2.3 below will focus on the UN international human rights law instruments to interpret the nature and extent of the SA State's international law obligations under the ICESCR in relation to the right to health care.

4.2.3 Nature and Extent of the SA State's International Law Obligations in Relation to the Right to Health Care

The international human rights law instruments has been integral to the development of socio-economic right to health care in many countries including SA. Given that the South African Constitution compels the Courts to consider the international law in applying the Bill of Rights,[53] it will remain an important aspect in law and policy making in the area of socio-economic rights domestically.[54] A right to health care is among the socio-economic rights guaranteed and provided for in three sections of the Constitution of SA. This right is found in a number of provisions, but most explicitly and elaborately in Section 27 of the Constitution. It provides for access to health care services, including reproductive health, basic health care for children, and emergency services and medical services for detained persons and prisoners.[55] Universal access is provided for in section 27(1) (a) which states that everyone has the right to have access to health care services, including reproductive health care. Section 27 (1) (b) provides for the state to take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of the right. Section 27(3) states that no one can be denied emergency medical treatment. Section 28(1) (c) provides for the right to basic health care services for children, whereas section 35(2) (e) protects the right to adequate medical

[52] Durojaye (n 1 above) 760.
[53] Sections 231; s 232 & s 233 of the Constitution.
[54] Clark *et al* (n 1 above) 387-390.
[55] Sections 27(1)(a), (b) & (c); s 28(1)(c) and s 35(2)(e) of the Constitution.

treatment at state expense for detained persons. Other health-related constitutional provisions include section 24(a) of the Constitution, which protects the right to an environment that is not harmful to one's health or well-being. Section 12(2) protects the right to bodily and psychological integrity, including the right to make decisions on reproduction; to security in and control over one's body; and the right not to be subjected to medical or scientific experiments without one's informed consent.

The right to have access to health care and effective fulfilment of the right in SA, is subjected to international human right law instruments and principles set by Courts decisions on legal challenges relating to socio-economic rights. The Constitution also put in place various mechanisms for holding the State and private actors accountable for violations of socio-economic rights.[56] Ngwena regard section 27 of the Constitution as an integral provision for the transformation of the social, political, and economic fabric of SA society post 1994.[57] Thus argues that section 27 sought to redress the past through a fundamental break with a health care system that had historically been saturated with indelible imbalances and disparities.[58] Section 27(2), demands that the SA State should take reasonable legislative as well as other measures to ensure a progressive realisation of the right to access health care services. The notion of 'reasonable legislative measures and availability of resources' is derived from Article 2 (1) of ICESR and CESCR General Comment No.3 which provides an extensive interpretation of the notion. The CESCR in its enforcement of the ICESCR states that despite the existence of conditions of progressive realisation and availability of resources, States are obliged to take steps to realise the rights within a reasonable short time.[59] In doing so, the State is required to strive towards the fulfilment and improvement in the enjoyment of this right to the maximum extent possible even in the face of resource constraint.[60]

[56] Section 184(3) of the Constitution.
[57] C Ngwena 'The Recognition of Access to Health Care as a Human Right in South Africa: Is it Enough?' (2000) 5 (1) *Health and Human Rights* 27-28.
[58] Ngwena (n 57 above) 28.
[59] CESCR *General Comment No.3* para 2.
[60] L Chenwi 'Unpacking "Progressive Realisation", its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance' (2013) 46 (3) *De Jure* 744-746.

To give effect of the content of section 27 and compliance with the international human rights law instruments, a white paper for the Transformation of the Health System setting out key health policy issues was released in 1997.[61] The main aim of the paper was to unify the national health system to address the effects of apartheid on health and reorganise the health service to give priority to primary health care.[62] Most importantly, special attention was given to health services reaching vulnerable groups of the society most in need of these services such as the poor, the elderly, women and children in rural areas.[63] Consequently, the National Health Act 61 of 2003 was promulgated with the aim of addressing inequities in the provision of health care services, and to provide a framework for a structured and uniform health system that took into account the obligations imposed on the State by section 27 of the Constitution as well as the ICESCR.[64] In its preamble, the National Health Act acknowledges the socio-economic injustices and inequities of health care of the past, the need to establish a society based on social justice and fundamental human rights, and the need to improve the quality of life for all in the country, bearing its resemblance from the Alma-Ata Declaration, the ICESCR and General Comment No.14.[65] Amongst other primary aims of the National Health Act was to make available, effective health care services including to protect, promote and fulfil the fundamental rights of citizens progressively by establishing a national health system that will provide people with the highest standard of health care services that available resources can afford.[66]

SA currently has a two-tier health care system consisting of the private health sector and the public or government public health sector that is tax funded. Both health sectors have two components namely the provision of healthcare services by healthcare

[61] Department of Health *White Paper for the Transformation of the Health System in South Africa* Notice 66 of 1997 https://www.gov.za/sites/default/files/gcis_document/201409/17910gen6670.pdf (Accessed 30-11-2022).
[62] Department of Health White Paper (n 61 above).
[63] Department of Health White Paper (n 61 above). Clark *et al* (n 1 above) 390.
[64] The National Health Act is the main legislation regulating the provision of health care services in SA. Clark *et al* (n 1 above) 391.
[65] Preamble to the National Health Act 61 of 2003. See also Ngwena (n 57 above) 29-30.
[66] Clark *et al* (n 1 above) 391.

practitioners and the funding of such health services.[67] The public health sector caters to all, particularly those without medical schemes, whereas access to the private health services depends on an individual's ability to pay.[68] The problem with the current two-tier system is that the private sector is unaffordable to the majority of the population while the standard and quality of care in the public sector is deteriorating.[69] Given the foregoing context, since 2011 SA's State contemplated the implementation of a National Health Insurance (NHI) scheme as a financing mechanism to achieve universal health coverage as a means for achieving highest attainable standard of health for all citizens regardless of their socio-economic status.[70] The NHI bill primarily seeks to address the inequities in the health system and the current lack of access to quality health care services. This will be achieved by introducing the NHI Fund, which will purchase/procure health care services from both the public and private health sectors on behalf of the population.[71] The Bill is a piece of legislation aimed at achieving the progressive realisation of the socio-economic right to access health care services.[72]

Notwithstanding significant legislation and policy reform to effect constitutional imperatives on health rights under section 27, Ngwena argues that section 27 is susceptible to the same criticisms of vagueness and imprecision that have been directed at Article 2.1 of the ICESCR, to which it bears a strong resemblance. It is argued that its formulation in terms of State obligation to make provision for access to health care is that of compromise and flexibility.[73] On the other hand he argues in favour of section 27 in the sense that section 27 is realistic and pragmatic in its formulation because the concept of

[67] PT Moyo, J Botha & A Govindjee 'The Constitutionality of the National Health Insurance Bill: The Treatment of Asylum Seekers' (2022) 25(1) *Potchefstroom Electronic Law Journal* 5.
[68] Moyo et al (n 67 above) 5.
[69] Du Toit *et al* (n 36 above) 11.
[70] Moyo et al (n 67 above) 4-5 & 9 and The NHI has been developed as a policy by the National Department of Health over the past 7 years starting with a Green Paper in 2011, a White Paper in 2015 and a Policy White Paper in 2017 linked to an Implementation Plan issued in a Government Gazette in July 2017. The policy process finally culminated in the release of the NHI Bill in June 2018. Du Toit *et al* (n 36 above) 11-12.
[71] Clause 2 of the Draft National Health Insurance Bill 2019. Notice of Intention to Introduce and Explanatory Summary Published for Comment (hereafter 'Bill'), explanatory summary published in GN 1014 in GG 42598 of 26 July 2019.
[72] Moyo et al (n 67 above) 4-5 & 9. For comprehensive discussion on the concept of Progressive realisation see part 2.2 of Ch 2.
[73] Ngwena (n 57 above) 30.

health care is inherently relative and acutely sensitive to the quantity of resources that a State can realistically galvanise (tax and other external aid).[74] Nevertheless, the obligations imposed by section 27 of the Constitution are neither open-ended nor without time constraints. Under section 27, the State should, at the very least, attempt to fulfil minimal or basic needs as proclaimed, in the Alma-Ata Declaration, ICESCR and General comment no.3.[75] Therefore, according to Ngwena, the quasi-legal interpretation by the CESCR of obligations imposed by article 2 (1) of the ICESCR, suggests that it is open to Courts to develop principles to ensure that the State diligently adheres to the purported spirit and intent/object of the Constitution in relation to health care rights.[76]

4.3 Inclusion and Formulation of the Right to Healthcare in the SA Constitution

The right to health care is fundamental to the physical and mental well-being of all people, necessary for the exercise of other fundamental human rights including the pursuit of an adequate standard of living.[77] To redress disparities and imbalances in the health care system brought about by the apartheid, health care reforms since the dawn of constitutional democracy have been primarily anchored in equity principle.[78] The right to health care is provided for in three sections of the Constitution. Section 27 states:

> **Health care, food, water and social security**
>
> 27. (1) Everyone has the right to have access to -
>
> (a) health care services, including reproductive health care;
>
> (b) sufficient food and water; and
>
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

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[74] Ngwena (n 57 above) 31.
[75] Ngwena (n 57 above) 31.
[76] Nampewo *et al* (n 11 above) 6-8 & Ngwena (n 57 above) 31.
[77] Art 12 of the ICESCR & CESCR *General Comment No.14* para 1.
[78] Ngwena (n 5 above) 125-130. Ngwena defines the concept of 'equity' as a notion of justice. However, equity as a concept cannot be ascribed a single meaning. In the egalitarian context of health, it means much more than merely desisting from unfair discrimination or allowing for choice in health care. According to Povlsen, Borup & Fosse, 'equity' means 'social justice or fairness'. Consequently, it is an ethical concept and closely related to the fundamental human right to the highest attainable standard of health. Therefore, the pursuit for equity thereby underpins the call for social justice included in the concept of Health for All'. L Povlsen, Borup & E Fosse 'The Concept of "equity" in Health-Promotion Articles by Nordic Authors - A Matter of Some Confusion and Misconception' (2011) 39 (6) *Scandinavian Journal of Public Health* 50.

(3) No one may be refused emergency medical treatment.

In terms of section 7(2) of the Constitution, the State is obliged to respect, protect, promote and fulfil all the rights in the Bill of Rights. In the context of the right to health care at UN level, these fourfold obligations are defined and clarified in General Comment No.14.[79] However, the framers of the 1996 Constitution may have intended to incorporate all of SA's international legal obligations under the ICESCR in the Constitution, the formulation and language of section 27 of the Constitution fall short of the ICESCR in few areas. The ICESCR guarantees the right to health, including preventative measures such as the control of epidemics, and the right to the highest attainable standard of physical and mental health.[80] By contrast, the provisions of section 27 of SA's Constitution only guarantees access to health care and mentions only the right of children to mental health.[81] Nonetheless, Ngwena, argues that the formulation and content of Section 27(2) to be specific grants the Courts a jurisdiction to adjudicate over matters of policy, including budgetary appropriations in relation to access to health care services for all.[82] This is notwithstanding the doctrine of separation of powers. In recent years, there has been increasing public sector attention on improving quality of health care and on the setting of standards of health care.

Although government policy and legislation have been primarily responsible for charting the course of reform in respect to accessing health care services, Courts have

[79] The obligation to respect the right compels the State to refrain from denying or limiting access to health care services to anyone without discrimination. While the obligation to protect includes, *inter alia*, adopting legislation and other measures to ensure equal access to health care facilities provided by third parties; and ensuring that privatisation does not constitute a threat to the availability, acceptability and quality of services provided. In terms of the obligation to promote, the State is required to disseminate appropriate information, foster research and support people to make informed choices. Last, the obligation to fulfil requires that the State facilitates and implements legislative and other measures in recognition of the right to health and adopts a national health policy with detailed plans on how to realise the right. CESCR *General Comment No.14:* paras 33, 35, 36 & 37.

[80] SA Karim & P Kruger 'Which Rights? Whose Rights? Public Health and Human Rights through the Lens of South Africa's COVID-19 Jurisprudence' (2021) 11(1) *Constitutional Court Review* 536-537.

[81] This legal technicality is discussed comprehensively in part 3.4 & 3.5 of Ch 3 under the interpretation and enforcement of the socio-economic right to housing.

[82] Ngwena (n 57 above) 28. Sections 8(3) and 34 of the Constitution.

also contributed to the reform process, as part of their adjudicatory functions.[83] Since 1994, there has been several landmark cases where the Court clarified the constitutional requirements of the right to health care. These cases have served to add to the normative content of the right to health care, and further shed the light on the concepts of 'available resources' and 'reasonable measures' in terms of section 27 (1) & (2) of the Constitution.[84] In three cases namely *B and Others v Minister of Correctional Services* 1997 (6) BCLR 789 (C), *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (Hereafter *'Soobramoney'*), and *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (10) BCLR 1033 (CC) (Hereafter '*TAC*'), the CC handed down important judgments on the constitutional requirements and normative content of the right to health under the democratic dispensation.[85] Through these cases, the CC has developed a jurisprudence and standard of review for assessing compliance with constitutional obligations in the area of socio-economic rights including the right of access to health care services by State. This standard allows for an assessment of the reasonableness of the measures taken by the government to realise socio-economic rights within its available resources.[86] Despite constitutional democratic reforms in legislation and policies to redress all the apartheid ills of the health care system, the burden on the health care system continues to increase/widen post 1994 on account of rising levels of poverty and unemployment.[87] As a result, limited progress has been made towards achieving the highest attainable standard of health care services as a fundamental right, notwithstanding, the impact of the Covid-19 pandemic on the socio-economic rights of different vulnerable groups within the South African society. The Covid-19 pandemic brought to the fore the inequalities besetting SA in relation to right of access

[83] R Phillips 'South Africa's Right to Health Care: International and Constitutional Duties in Relation to HIV/AIDS Epidemic' (2004) 11 (2) *Human Rights Brief* 9-10. See Nampewo *et al* (n 11 above) 7-8. See also Ngwena (n 1 above) 82.
[84] Durojaye (n 1 above) 775 & Phillips (n 76 above) 10.
[85] Ngwena (n 1 above) 82.
[86] F Coomans 'Reviewing Implementation of Social and Economic Rights: An Assessment of the "Reasonableness" Test as Developed by the South African Constitutional Court' (2005) 65 (1) *Heidelberg Journal of International Law* 168.
[87] K de Villiers 'Bridging the Health Inequality Gap: An Examination of South Africa's Social Innovation in Health Landscape' (2021) 10 (19) *Infect Dis Poverty* 2. Ngwena (n 5 above) 133.

to health care for the majority of South Africans who lives in abject poverty. [88] Part 4.4. below examines how the CC has interpreted the section 27 constitutional right to health care.

4.4 Constitutional Court's Interpretation of the Nature and Scope of the Right to Health

The CC has dealt with and handed down several judgments in relation socio-economic rights claims. Since the epoch of constitutional democracy post 1994, there has been several Court cases that have set a precedent and served to develop the normative content of the socio-economic rights including health care rights.[89] Up to mid-2004, the Courts have dealt with three cases in which Section 26 and 27 of the Constitution was the key provisions requiring interpretation. *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) (Hereafter '*Soobramoney*') was the first major socio-economic rights case wherein the CC adjudicated over the right to health care.[90] The applicant was a 41-year-old diabetic man suffering from heart disease and irreversible chronic renal failure. His life could have been prolonged by means of regular renal dialysis. He therefore, sought a renal dialysis treatment from a public hospital, but, he was refused this urgent treatment because his renal failure was at an advance stage and chronically irreversible. Furthermore, the hospital did not have enough resources to provide dialysis treatment to all patients in particular those with irreversible chronic renal failure.[91] *Soobramoney* contested hospital's decision and their policy on renal dialysis treatment in Court, relying on section 27(3) of the Constitution, which provides that no one may be refused emergency medical treatment. The Court in this case had to consider the health care resource rationing policy of a state hospital. The Court was then petitioned to decide primarily upon whether the health rights in section 27 of the Constitution entitled chronically ill patients in their advance stages of renal failure to an order enjoining a public

[88] A Mavedzenge 'Revisiting the Role of the Judiciary in Enforcing the State's Duty to Provide Access to the Minimum Core Content of Socio-Economic Rights in South Africa and Kenya' (2020) 7(2) *Journal of Comparative Law in Africa* 61-62.
[89] Clark *et al* (n 1 above) 405.
[90] L Chenwi 'Socio-economic Gains and Losses: The South African Constitutional Court and Social Change' (2011) 41 (3) *Social Change* 431. See also Coomans (n 86 above) 173.
[91] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (hereafter '*Soobramoney*') paras 1-5.

hospital to admit them to the renal dialysis treatment programme.[92] The CC held that the constitutional right not to be refused emergency medical treatment as contemplated in section 27(3) of the Constitution did not extend to renal dialysis for patients with chronic irreversible renal failure. It interpreted emergency treatment as a sort of treatment that an individual receives in trauma and emergency wards following a serious accident. As a result Mr Soobramoney's situation did not require such level of care and thus do not constitute emergency or health crisis.[93] Further, the court held that there was no suggestion that the guidelines drawn up by the hospital authorities for determining which patients qualified for dialysis treatment were unreasonable, or that they had not been applied 'fairly and rationally' in the applicant's case.[94] As a result, no relief was granted ordering the provision of dialysis treatment to Mr Soobramoney, who sadly died of kidney failure shortly after the judgement.

Although the Court allowed the Minister of Health discretion in the allocation of resources, it required a standardised priority system and reaffirmed the principle of progressive realisation in section 27 (2) of the Constitution. The second case on the right to health care was *TAC*, which concerned a challenge to the State's policy to respond to the HIV/AIDS pandemic, in particular with its program concerning mother-to-child-transmission of HIV at birth. Government used Nevirapine as a drug for purposes of preventing mother-to-child transmission of HIV during pregnancy.[95] However, the drug was made available as part of a pilot project at only a limited number of research and training sites in the provinces, and consequently to only a limited number of mothers. The applicants contended that these restrictions were unreasonable when seen from the perspective of the South African Bill of Rights, in particular Sections 7(2), 27 and 28(1).

[92] *Soobramoney* paras 5-7.
[93] *Soobramoney* paras 13-22. The Court held that because Mr Soobramoney was ineligible for kidney transplant due to heart disease and other limiting factors, the State was therefore, justified in providing dialysis treatment to individuals with fewer complications. See also Chenwi (n 90 above) 431& Clark *et al* (n 1 above) 405.
[94] *Soobramoney* para 25.
[95] *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC) (hereafter '*TAC*') paras1-22.

The second issue was whether the State, under Sections 27 and 28, had an obligation to plan and implement an effective comprehensive and progressive program for the prevention of mother-to-child-transmission of HIV throughout the country. Summarily, the State policy was challenged as inconsistent with the right to have access to health care services in section 27(1) and section 28 (1) (c) & (2) of the Constitution.[96] of paramount importance about the *TAC* case is intervention of the judiciary to compel the State to provide anti-retroviral treatment. Moreover, recognising and prioritising constitutional health rights to save life, as well as the State's competing duties to realise other socio-economic rights.[97] The Court found that the State's programme to be unreasonable in that it was inflexible and failed to take into account the needs of HIV-positive mothers and children who did not have access to the pilot sites.[98].However, the Court rejected the CESCR's defined standard of 'minimum core' obligations.[99] The Court held that it was practically impossible to give everyone access even to a "core" service immediately. All that is possible, and can be expected of the State, is that it act reasonably to provide access to the socio-economic rights health care, food, water and social security on a progressive basis as contemplated in section 27 of the Constitution.[100] Nevertheless, important to note contrary *Soobramoney* is that the jurisprudence developed in TAC became a corner stone for health rights approach by States relating to the epidemics and pandemics such as HIV and Covid-19 as well as entrenching a right to life.

The obligations of the State to effectively realise the right to health care is interpreted in light of the concept of 'progressive realisation' and dependent upon the availability of resources. Given the justiciable nature of section 26 and 27 of the Constitution, the Court in *Government of the Republic of South Africa v Grootboom* 2000

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[96] *TAC* para 5. See also Coomans (n 86 above) 174.

[97] Karim & Kruger (n 80 above) 545. Given SA's past social ills and disparities, the State has an urgent constitutional mandate in relation to right of access to housing, land, health care, education, water, electricity and social security. The State is therefore, obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of them. *TAC* para 99-100.

[98] *TAC* para 135. Chenwi (n 90 above) 432.

[99] The CESCR developed the concept of 'minimum core' obligations to ensure that essential levels of ICESCR rights, such as access to food and primary health care, were prioritised by the States and implemented immediately. CESCR *General Comment No.3* para 10.

[100] *TAC* para 35.

11 BLCR 1169 (CC) (hereafter '*Grootboom*') has interpreted 'progressive realisation' to mean the removal of a range of legal, administrative, operational and financial obstacles which might impede access to the enjoyment of socio-economic rights, and the expansion over time of such access, to many and urgently to vulnerable sectors of the society.[101] Some commentators argues that the phrase 'progressive realisation' envisage that the right to health care could not be realised immediately, however, the goal of the Constitution is that the basic needs of all in the society should be effectively met.[102] It is notable that the Courts have acknowledged, the enforcement of all rights have resource implications but the obligation to realise the right to health care progressively does not preclude the State from fulfilling their minimum core obligations.[103] Nevertheless, according to Liebenberg, 'available resources' and 'reasonable measures' as well as 'progressive realisation', must be understood to entail the State's obligation to improve the nature and quality of the services to which people have access including their state of well-being.[104] This implies that the standard of socio-economic goods and services provided by the State should be reasonable and acceptable as well as meeting minimal essential levels.[105]

The *Soobramoney, TAC* and *Grootboom* case are over twenty years since the CC pronounced its judgment, however, the set jurisprudence has been the subject of considerable debate among the South African socio-economic rights legal and academic scholars as well as foreign jurisdictions. These cases have shed light on the concepts of 'available resources' and 'reasonable measures' as well as 'progressive realisation' in the context of article 2 (1) of the ICESCR and article 16, 61 & 62 of the African Charter,[106] as

[101] *Government of the Republic of South Africa v Grootboom* 2000 11 BLCR 1169 (CC) (hereafter '*Grootboom*') para 45.
[102] Clark *et al* (n 1 above) 58.
[103] Clark *et a*l (n 1 above) 59.
[104] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 188-189.
[105] Liebenberg (n 104 above) 189. According to the Maastricht Guidelines, the minimum core rights apply irrespective of the availability of resources of the country concerned or any other factors and difficulties. See also. Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) para II (9).
[106] While the African Charter does not expressly refer to the principle of progressive realisation this concept is widely accepted in the interpretation of socio-economic rights, and has been implied into the African Charter in accordance with articles 61 and 62. Therefore States Parties have a duty and obligation to move as expeditiously and effectively as possible towards the full realisation of socio-economic rights. Chenwi (n

well as section 26 and 27 of the Constitution.[107] Though the CC in *Soobramoney* found that the hospital's resource rationing standards were well within the bounds of reason and fairly applied to the applicant, the judgment was criticised for the thinness of its analysis.[108] Moreover, the ambiguity on Court's interpretation on what constitute reasonable measures, and under what conditions limited resources constitute a valid basis for health authorities to ration access to certain forms of medical treatments.[109] In addition, Liebenberg further argued that the Court in *Soobramoney* has failed to develop the normative content of the right of access to health care, including its nexus and interdependency with other rights such as the right to life.[110] The criticisms of the *Soobramoney* judgment in the context of developing a substantive interpretation of health care rights is the lack of engagement with the purposes and values protected by this right in section 27(1)(a) of the Constitution, and that the Court could have done more to address the extreme inequality in access to health care as argued by other commentators.[111] Apart from, the rationality as the standard by which the CC in *Soobramoney* had established to scrutinise socio-economic rights claims, the reasonableness principle that emerges from the *Soobramoney* decision, is that the State is also obliged to ensure that reasonable policies are put in place to facilitate access to health services by all.[112] As a result of the application of a reasonable policy, which must be applied universally to all, the State must advance substantively or materially its obligation to provide access to health care services.[113] Despite the Court's refusal in *TAC* to recognise the CESCR concept of 'minimum core' obligations, it was argued that though

60 above) 747 & African Commission on Human and Peoples' Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (2011) par 14.

[107] The Constitutional Court was petitioned to assess whether State policies had complied with their constitutional obligation to take reasonable legislative and other measures, within their available resources, to achieve the progressive realisation of specific socio-economic rights. Coomans (n 86 above) 173.

[108] Liebenberg (n 104 above) 146.

[109] Clark *et al* (n 1 above) 407.

[110] Liebenberg (n 104 above) 146. Section 11 of the Constitution. The court stated that the international human rights law instruments declare the inherent and universal right to life, demand that right be protected by law and prohibit the arbitrary deprivation of that right. *S v Makwanyane & Another* 1995 (3) SA 391 (CC) para 324.

[111] Liebenberg (n 104 above) 146. See also Chenwi (n 90 above) 432.

[112] Clark *et al* (n 1 above) 407.

[113] *Soobramoney* para 29.

the ‘minimum core’ obligations might not be easy to define, but encompass at least the minimum decencies of life consistent with human dignity.[114]

4.4 Constitutional Enforcement of the Right to Health

The constitutional commitment to the protection of socio-economic rights is made clearer in the Bill of rights, and thus, the obligations engendered by these rights have been interpreted and enforced as justiciable. Bill of rights entrenched in the Constitution guarantees a variety of fundamental human rights as one of the mechanisms for realising the transformative imperatives of the Constitution.[115] These include socio-economic rights to health care aimed at securing basic quality of life and advancing the health needs for all members of the society, and to afford entitlements to the material conditions required for human welfare.[116] It is in this regard that the CC has developed numerous approach to give relief to those whose socio-economic rights to health care has been violated.

Although the South African judiciary has been hailed globally for confirming the justiciability of socio-economic rights, it has also been criticised for granting remedies that are incapable of translating these rights into individual entitlements.[117] Socio-economic rights litigants expect that their victories to be followed by immediate amelioration of their socio-economic conditions.[118] However, this may sometimes not be the case, as Court victories may either be followed by very minimal improvements or no improvements at all. For example, *Soobramoney* and *Grootboom* who have since died, arguably due to failure by the Court to put forth remedies that will effectively enforce the constitutional fundamental human right in a way that results in social change as well as to satisfy as a matter of priority the minimum essentials levels of benefits for the vulnerable and marginalised as defined by the UN CESCR. The CC has also been admonished for its

[114] *TAC* para 28. See also section 10 of the Constitution.
[115] D Brand ‘Introduction to Socio-Economic Rights in the South African Constitution’ In D Brand & C Heyns *Socio-Economic Rights in South Africa* (2005) 12-20.
[116] O Fuo & A Du Plessis ‘In the Face of Judicial Deference: Taking The “Minimum Core” of Socio-Economic Rights to the Local Government Sphere’ (2015) 16 *Law Democracy & Development* 1-2.
[117] L Chenwi ‘Implementation of Housing Rights in South Africa: Approaches and Strategies’ (2015) 24 (4) *Journal of Law and Social Policy* 68.
[118] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 4.

failure to exercise supervisory jurisdiction in order to ensure that the government carries out the judicial orders handed down against it.[119]

Section 27 of the Constitution bears a strong resemblance of Article 2.1 of the ICESCR and General comment No.3. Therefore, Courts should develop and appropriate tests, similar to those developed under UN human rights jurisprudence, for determining whether there has been a failure by the State to marshal and deploy available resources to progressively realise a right to health care and, if so, whether the failure can be justified.[120] The CC in *Grootboom* affirmed that international human rights law, including non-binding international instruments, are an important guide to interpreting the rights in the Bill of Rights.[121] The constitutional enforcement and full realisation of right of access to health care requires State to develop policies, which will progressively facilitate the examination of legal, administrative, operational and financial hurdles and, where possible lowered over time.[122] Ngwena and Pieterse argue that it is incumbent upon the South African courts when enforcing the right to health care to go beyond the traditional approach when reviewing the constitutionality of administrative action by the State in respect of the obligations in section 27 of the Constitution.[123]

In the case of *Soobramoney* the CC was petitioned to interpret the enforcement of a socio-economic right of access to health care in relation to the resources rationing standards by the State authorities. The Court in this case was criticised for overlooking the ICESCR principles, which establishes clear obligations for States to take steps towards full realisation of socio-economic rights, such as the right to health.[124] Pieterse

[119] M Pieterse 'Socio-economic Rights Adjudication and Democratic Urban Governance: Reassessing the "Second Wave" Jurisprudence of the South African Constitutional Court' (2018) 51 (1) *Law and Politics in Africa, Asia and Latin America* 20-21. See also Liebenberg (n 104 above) 270.
[120] P De Vos 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 (1) *South African Journal on Human Rights* 67-71. See also G Van Bueren 'Alleviating Poverty through the Constitutional Court' (1999) 15 (1) *South African Journal on Human Rights* 58 and Ngwena (n 57 above) 31-32.
[121] *Grootboom* para 26.
[122] Liebenberg (n 104 above) 129. *Grootboom* para 45.
[123] Ngwena (n 57 above) 31-32. Pieterse (n 119 above) 14.
[124] CESCR *General Comment No. 3* para 9. *Grootboom* para 26. The Court referred to its position developed *in Makwanyane* para 35. Section 39(1)(b) of the Constitution requires a court, tribunal or forum to consider international law when interpreting the Bill of Rights. According to s 39(1)(b) of the constitution,

affirmed Liebenberg who argued that in the case of pressing resource constraints in the provision of basic services, such as emergency health care, it is important that the needs of the most vulnerable and disadvantaged groups should receive particular attention. For example, prioritising *Soobramoney* in order to save or prolong his life.[125] This decision of the CC in *Soobramoney* seemed to have taken an excessively deferential approach as argued by other legal scholars. However, the subsequent decision of the CC in *TAC* and *Grootboom* has alleviated these concerns.

In *TAC*, the court appeared to have shifted to a more rigorous 'reasonableness' standard of review, requiring attention to the needs of the most vulnerable and disadvantaged if the State is to fulfil its constitutional obligations.[126] The court in *Grootboom* interpreted and applied the law by specifically endorsing the views of the CESCR by stating that 'any deliberately retrogressive measures …. would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the ICESCR and in the context of the reasonable measures and full use of the maximum available resources.'[127] The CESCR in its interpretation of the notion of 'available resources' and 'reasonable measures' as well as 'progressive realisation' indicates that States must show that every effort has been made to use all resources that are at its disposal in an effort to satisfy as a matter of priority the minimum essentials levels of benefits.[128]

courts must consider international law when interpreting the Bill of Rights. The obligation of the courts in this regard does not depend on whether SA has signed or ratified any pertinent international human rights law instruments. Ngwena (n 57 above) 32.

[125] Liebenberg (n 104 above) 188.

[126] DM Davis 'Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference Lite'?' (2006) 22 (1) *South African Journal on Human Rights* 301. Liebenberg and Mavedzenge affirm Davis's view that deference is a prominent feature of the approach of South African courts to the adjudication of socio-economic rights cases. In addition, it arguably serves as significant obstacle to the robust enforcement of these rights. Liebenberg (n 104 above) 66-69.

[127] *Grootboom* para 45, citing *CESCR General Comment No. 3* para 9.

[128] Chenwi (n 60 above) 744. Minimum core obligations, as highlighted by the CESCR in its general comments, require States to ensure: access to basic shelter, housing and sanitation, and an adequate supply of safe drinking water. It also requires States to ensure access to a social security scheme that provides a minimum essential level of benefits that cover at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education; ensure free and compulsory primary education to all. *CESCR General Comment No.3:* para 9-10. Maastricht Guidelines para (II) 9.

One of the concerns by Liebenberg and Bilchitz relating to the *Soobramoney* judgment was what constituted 'reasonable measures' within the available limited resources and failure by the Court to take in account the interdependency as well as interrelatedness of human rights in the Bill of Rights. However, the CC in the subsequent *TAC* redeemed itself by enforcing the right to health care in a way that results in social change on the ground and ultimately entrenching and preserving the right to life. The Court embraced the notion that socio-economic rights are interdependent and interrelated, and thus, should be treated holistically to protect human welfare.[129] Hence, the Court granted both declaratory and mandatory orders and ultimately, declaring the government's policy to be unreasonable.[130] It is arguably in this sense that the reasonableness test adopted in *Grootboom* was confirmed in *TAC*. The Court has expressly pointed out that the availability of resources will be a factor in the assessment of the reasonableness of the State's conduct.[131] In the *TAC* case, the Court held that the States' restriction which affected the availability and accessibility of essential medicines for women and children violates the constitutional human rights provisions and also constituted an unjustifiable barrier to progressive realisation of the right to health care services. The Court further held that the State is under a duty to reasonably provide access to socio-economic rights on a progressive basis.[132]

Important to note in the *TAC* case is that the court asserted its right to order effective relief, and to maintain supervisory jurisdiction, as well as ordering immediate implementation of the remedy. In addition, it served to mobilise affected individuals and groups across the country. Although the delineation of the reasonable standard by the court was not explicitly defined, it held that the State is required to undertake all reasonable measures to alleviate the deplorable condition and large areas of severe

[129] S Liebenberg 'The Interpretation Socio-Economic Rights' Constitutional Law of South Africa https://africanlii.org/book/chapter-33-interpretation-socio-economic-rights (Accessed 30-11-2022). The court applied a balancing test to determine whether measures taken by the government with respect to the prevention of mother-to-child transmission of HIV was reasonable.
[130] *TAC* para 135.
[131] Clark *et al* (n 1 above) 41-42. The court held that 'There is a balance between goals and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.' *Grootboom* para 46.
[132] *TAC* paras 13 & 40.

deprivation that afflict our society. The court in conclusion affirmed that the State's negative duty to refrain from impairing the relevant socio-economic rights, recognised in *Grootboom*, applied equally to section 27(1) of the Constitution.[133] Nampewo *et al* argue that recognition the right to health in the Constitution should generate positive health outcomes and promote adequate standard of living and human dignity as a Constitutional Value.[134] As a result, the constitutional duty by the State to respect, protect and fulfil health rights should considers each person including the vulnerable groups within the society. Therefore, the Courts have a duty to ensure that health rights are legally enforceable in view of social transformation of the poor and most vulnerable members of the society.[135] It is clear from the extant CC jurisprudence discussed above that while there is a constitutional duty to respect, protect, and fulfil the right to health, these duties will remain rhetoric or meaningless in practice without a clear scope and normative content to the health rights during judicial review by the CC.

4.5 Conclusion

An important source of inspiration when drafting the constitutional provisions on socio-economic rights, including the health care right, was the ICESCR. This is evident from a comparison of sections 26 and 27 of the Constitution, with the ICESCR, in particular article 2(1).[136] The right of access to health care is incorporated in the Constitution as a fundamental positive right, and thus can be enforced in a court of law, rather than leaving it as a hortatory health development objective of the State.[137] Since the adoption of the Constitution, there has been a limited number of cases in which the right of access to health care services has been invoked. As a result, there is a relative scarcity of judicial authority in this regard. The Court in *Grootboom*, *TAC* and *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) (hereafter '*Mazibuko*') held that the decision whether the measures the State has taken to implement socio-economic rights meet the standards envisaged by the Constitution depends on the reasonableness of those

[133] *TAC* para 46.
[134] Nampewo *et al* (n 11 above) 11.
[135] Nampewo *et al* (n 11 above) 11.
[136] Coomans (n 86 above) 170-171.
[137] Nampewo *et a*l (n 11 above) 10.

measures. These cases developed detailed but non-exhaustive criteria for assessing the reasonableness of the State's measures.[138]

According to Clark *et al*, *Grootboom* is arguably the most far reaching of the Court's socio-economic rights jurisprudence of reasonableness review. Moreover, the *TAC* case illustrates how the *Grootboom* jurisprudence of reasonableness review can be used strategically to support a broader campaign to advance access to socio-economic rights.[139] Notably, the Court relied on ICECSR to interpret and enforce the State's obligation to adopt 'reasonable measures' to implement the right to health care services and other related socio-economic rights. On the contrary, Ngang holds a different view to the reasonableness review standard in view of the *Mazibuko* case. She argues that had the Court undertaken an empirical scrutiny of the deplorable socio-economic circumstances of the litigants as well as combined its finding with a measure of accountability, the Court could have arrived at a more robust and probably more transformative conclusion or judgment notwithstanding the doctrine of the separation of powers.[140]

Despite the post-apartheid legislative and policy reform that sought to have due regard to the principles laid down in the Constitution,[141] with regard to quality, effectiveness and efficiency of health care services, SA has not adequately addressed

[138] *Grootboom* para 41. *TAC* paras 10-11. According to the CC, the right of access to sufficient water, neither require that the State provide everyone, upon demand with sufficient water nor does the obligation confer on any person a right to claim sufficient water from the State immediately. The constitutional right requires instead that the State take reasonable legislative and other measures, progressively and within the State's available resources, to realise the achievement of the right of access to sufficient water. See *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) (hereafter '*Mazibuko*') paras 50, 57, 106-111 & 157-158. Despite the CC's conservative ruling on payment for water services in *Mazibuko*, questions related to access to water will continue to arise and disconnections to be challenged. While a direct challenge to the *Mazibuko* ruling is unlikely in the short term, however, the CC could have used its broad discretionary powers to device equitable remedy in favour of dispossessed applicants. ED Couzens 'Avoiding Mazibuko: Water Security and Constitutional Rights in Southern African Case Law' (2015) 18 (4) *Potchefstroom Electronic Law Journal* 1163-1164.

[139] Liebenberg (n 129 above).

[140] *Mazibuko* para 10. CC Ngang 'Judicial Enforcement of Socioeconomic Rights in South Africa and the Separation of Powers Objection: The Obligation to Take 'Other Measures' (2014) 14 (1*) African Human Rights Law Journal* 670.

[141] Sections 27 and 195 of the Constitution.

health disparities in the country.[142] It is argued that at the very least, the South African Court's jurisprudence has been clearly successful on a symbolic level. The health-care system remains ill prepared to address the changing trend of burden of disease, poor management and lack of political will, inadequate human-resource capacity and a poor surveillance system.[143] De Vos, Bilchitz, Ngang and other commentators maintain that little has actually been accomplished in terms of improving the livelihood for victims of socio-economic deprivation, including right to health care in the democratic SA State. Considering that the enforcement of socio-economic rights is context-specific, they questioned the rationale for avoiding a jurisprudence of 'minimum core' rights or obligation, which demonstrates greater potential to produce transformative outcomes than the preferred 'reasonableness review' standard, which has shown little transformative effect.[144] Just as the realisation of socio-economic rights through political strategies amounts to material entitlement, the result of positive adjudication should equally amount to entitlement to the same material things promised by the rights in question.[145] Therefore, the judiciary is required to be more effective and transformative in the advancement of socio-economic rights, and consequently exercise its broad remedial powers to promote social justice and welfare.[146] The alleviation of poverty, and provision of basic services, such as clean water and sanitation and general economic growth in terms of resources, hold the key to the enhancement of provision of health care for all.[147] Whether the constitutional formulation of socio-economic rights as well as the extant Court jurisprudence are capable of addressing problems of poverty and inequality in SA, remains a subject of discussion in the succeeding chapter, which focuses on the right to education.

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[142] Clark *et al* (n 1 above) 399.
[143] K Kahn 'Population Health in South Africa: Dynamics over the Past Two Decades (2011) 32 (1) *Journal of Public Health Policy* 31.
[144] De Vos (n 120 above) 69. See also D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 (1) *South African Journal on Human Rights* 2. See too Ngang (n 140 above) 656-660 and Klare (n 10 above) 165.
[145] Ngang (n 140 above) 656.
[146] Pieterse (n 119 above) 32-34, Nampewo *et al* (n 11 above) 11 & Ngang (n 140 above) 659-660.
[147] Ngwena (n 1 above) 82.

CHAPTER 5: ANALYSIS OF CONSTITUTIONAL COURT'S INTERPRETATION AND ENFORCEMENT OF THE RIGHT TO EDUCATION

5.1 Introduction

The right to education is a core human right that is often described as an 'empowerment' right because it is perceived as a precondition for the exercise and enjoyment of other rights.[1] The underlying rationale for this view is that through education, individuals are able to develop cognitively to exercise their enjoyment of other human rights.[2] From a much broader perspective, the right to education enables individuals to develop their personalities, exercise their own human rights, and respect the rights of others.[3]

In the South African context, the education system is categorised into 'Basic Education' and 'Higher Education and Training'.[4] This chapter will examine the country's education system in general, though it shall predominantly focus on 'Basic Education', due to the plethora of case law and academic research on this dimension. In like manner to chapters 3 and 4 above, this chapter provides a conceptual analysis of the constitutional right to education, using the theoretical framework of transformative constitutionalism. The chapter explores the nature and scope of the right to determine the extent to which the Constitutional Court's (CC) extant jurisprudence on the interpretation and enforcement of the right guides state-driven, socio-economic transformation in a manner that adequately addresses poverty and inequality-related vulnerabilities in SA.

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[1] M Clark, J Dugard, F Veriava, J Duncan, K Moyo, S Plagerson, K Tissington, M Ulriksen & S Wilson 'Socio-economic Rights: Progressive Realisation?' (2016) *Foundation for Human Rights* 81.

[2] Clark *et al* (n 1 above) 82.

[3] L Nevondwe & KO Odeku 'Constitutional Right to Education in South Africa: A Myth or a Reality?' (2013) 4 (13) *Mediterranean Journal of Social Sciences* 847-848. See also F Veriava 'Education' in J Kollapen *Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996)* (2006) 101.

[4] Two national departments govern the education system in SA, namely the Department of Basic Education (DBE), which is responsible for primary and secondary education, and the Department of Higher Education and Training (DHET), which is responsible for tertiary education and vocational training. Nevondwe & Odeku (n 3 above) 849.

In accord with the constitutional imperative to consider international law in the interpretation of constitutional human rights, the chapter commences in part 5.2 with a determination of SA's international law obligations in relation to the right to education. Here, the formulation and interpretation of the right to education under international human rights instruments at the United Nations (UN) and African Union (AU) levels is examined. Thereafter, part 5.3 considers the inclusion and formulation of the right to education in the SA Constitution. Next, part 5.4 investigates the CC's interpretation and enforcement of the constitutional right to education through examination of specific case law. Lastly, part 5.5 determines whether the CC's extant jurisprudence on the right to education accords with the transformative constitutionalism imperatives, as outlined in chapter 1 above.[5]

5.2 SA's International Law Obligations in Relation to the Right to Education

The socio-economic right to education is recognised as a fundamental human right, and enjoys extensive protection at the level of international law.[6] The main human rights instruments that give expression to the right to education at the UN level include the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the UN Convention on the Rights of the Child (CRC). The human rights instruments that give expression to the right to education at the AU level include the African Charter on Human and Peoples' Rights (ACHPR or African Charter) and the African Charter on the Rights and Welfare of the Child (ACRWC).

[5] K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 (1) *South African Journal on Human Rights* 147-149. As argued by Klare, Langa, Kibet & Fombad, the core idea of transformative constitutionalism is that the SA society should change from its racist and unequal past to a society in which all South Africans can live with dignity, peaceful co-existence and development opportunities. P Langa 'Transformative Constitutionalism' (2006) 17 (1) *Stellenbosch Law Review* 351-352. See also E Kibet & C Fombad 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa' (2017) 17 (2) *African Human Rights Law Journal* 348-349.

[6] L Arendse 'The Obligation to Provide Free Basic Education in South Africa: An International Law Perspective' (2011) 14 (6) *Potchefstroom Electronic Law Journal* 98. United Nations High Commissioner for Human Rights (OHCHR) *Economic, Social and Cultural Rights* Fact Sheet No.33 (2008) 5-7. http://www.ohchr.org. (Accessed 30-11-2022).

As a matter of concern, access to education, specifically quality education, has become the defining characteristic of international policies.[7] Since SA is a State Party to various international human rights instruments at the UN and AU levels that guarantee the right to education, it is required to comply with its international law commitments. In addition, SA is obliged, through its Constitution, to consider international law in the interpretation of the right to education.[8] This part of the chapter examines the formulation and interpretation of the right to education at the UN and AU levels in parts 5.2.1 and 5.2.2 respectively. It then determines the nature and extent of the SA State's international law obligations in relation to the right to education in part 5.2.3.

5.2.1 Formulation and Interpretation of the Right to Education at the UN Level

The right to education at the UN level is recognised as both a fundamental human right and a developmental priority. The UDHR, though not binding, was the first international human rights instrument to incorporate and express the right to education. Article 26 of the UDHR provides that 'everyone has the right to education' and that 'education shall be free, at least in the elementary and fundamental stages.' It further states that 'elementary education shall be compulsory.'[9]

The subsequently adopted ICESCR, which is a binding international law instrument, comprehensively guarantees the right to education. Article 13(1) of the ICESCR stipulates:

> The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.

In addition, ICESCR article 14(1) obliges States Parties to put in place progressive measures for the realisation of compulsory free basic education.[10]

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[7] A Kanjee, M Nkomo & Y Sayed 'The Search for Quality Education in Post-Apartheid South Africa' *Human Sciences Research Council* (2013) 6-7.
[8] Section 39(1)(b) of the Constitution.
[9] Article 26(1) of the UDHR.
[10] Article 14 of the ICESCR asserts:

> Each State Party to the present Covenant which, at the time of becoming a party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the

Apart from the UDHR and the ICESCR, the right to education finds expression in other international human rights instruments in respect of the protection of specific vulnerable groups. The CRC,[11] for example, contains extensive provisions with regard to the progressive realisation of the child's right to education. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is a further international human rights instrument that protects vulnerable groups.[12] CEDAW requires that States Parties eliminate barriers to education for women through various measures, such as revisions to curricula, removing gender stereotypes, and adopting measures to

progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

[11] See, e.g., articles 23(3) & (4) and 28 of the CRC. The CRC became the first legally binding international convention to affirm human rights for all children. South Africa signed the Convention in 1993 and ratified it on the 16th June 1995. It was the first international treaty that the incoming South African democratic government ratified. *Clark et al* (n 1 above) 86.

> 23 (3) Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education….
>
> 23 (4) States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas.
>
> 28 (1) States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
>
> a. Make primary education compulsory and available free to all;
> b. Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
> c. Make higher education accessible to all on the basis of capacity by every appropriate means;
> d. Make educational and vocational information and guidance available and accessible to all children;
> e. Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

[12] Article 10(a, b & c) asserts:

> States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:
>
> a. The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;
> b. Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
> c. The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods.

reduce female student drop-out rates.[13] In addition to the CRC and CEDAW, there are also certain specialised international law instruments that deal specifically with access to basic education, such as the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Convention against Discrimination in Education,[14] and the World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs.[15]

Since the adoption of the UDHR in 1948, all subsequent international law instruments have applied the fundamental tenets of 'compulsory' and 'free' education at least with respect to education 'in the elementary and fundamental stages',[16] or 'primary education'.[17] To this end, the Committee on Economic, Social and Cultural Rights (CESCR) has issued General Comments,[18] in which the right to education, as enumerated in ICESCR, is clearly interpreted and given content.[19] For instance, the CESCR issued General Comment No.11 on plans of action for primary education,[20] which deals with the provisions in ICESCR article 14. The CESCR also issued General Comment No.13,[21] relating to the ICESCR article 13 right to education. General Comment No.13 provides one of the most useful foundations from which to begin to interpret, and

[13] Article 10(c) & (f) of CEDAW. South Africa signed the Convention in January 1993 and ratified the Convention on 15 December 1995, without entering any reservations.
[14] UNESCO was established for the purpose of contributing to the building of a culture of peace, the eradication of poverty, sustainable development and intercultural dialogue through education, the sciences, culture, communication and information. One of the key set objectives for UNESCO is to attain quality education for all and lifelong learning. JC Lerch & E Buckner 'From Education for Peace to Education in Conflict: Changes in UNESCO Discourse, 1945–2015' (2018) 16 (1*) Globalisation, Societies and Education* 28-29.
[15] Veriava (n 3 above) 101. Due to widespread concern over inadequacies in education systems around the world and the growing recognition of the vital importance of basic education for social progress, the World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs was adopted in 1990. The participants to the convention emphasised that education is an indispensable fundamental right for all people, women and men, of all ages globally and it contributes to socio-economic progress, tolerance, and international cooperation. See Preamble to the World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs.
[16] See article 26 of the UDHR.
[17] See article 14 of the ICESCR.
[18] CESCR *General Comment No.11: Plans of Action for Primary Education* UN Doc E/C 12/1999/4 (1999); CESCR *General Comment No.3: The Nature of States Parties Obligations* UN doc E/1991/23 (1990) & CESCR *General Comment No.13: The Right to Education (Art. 13)* UN Doc E/C.12/1999/10 (1999).
[19] Clark *et al* (n 1 above) 85.
[20] CESCR *General Comment No.11* para 1.
[21] CESCR *General Comment No.13* para 2-3.

to give substantive content to the right to education.[22] It recognises that while the exact standard secured by the right to education may vary according to conditions within a particular State, the education system of every State must exhibit the following fundamental tenets that are widely known as the four 'A' (4A) scheme:[23] Availability,[24] Accessibility,[25] Acceptability,[26] and Adaptability.[27]

It is very important for States Parties to understand the obligation posed by the ICESCR, as well as understand the implications of the realisation of the right to education on poverty alleviation and human dignity, as clarified by the CESCR in its General Comments No.11 and 13.[28] According to these instruments, the right to education is guaranteed, without any form of discrimination, to 'everyone', including non-citizens within a State Party.[29] The inclusion of the right to education in international human rights instruments at the UN level acknowledges its importance and interdependence with other rights.[30] Significantly, the UN human right instruments elevate the status and urgency of the right to education. While they guarantee the right to primary education as a compulsory, free and immediately realisable right,[31] other dimensions of the right to education, such as secondary and tertiary or higher education, are made subject to

[22] Clark *et al* (n 1 above) 86. See also CESCR *General Comment No.13* para 1.
[23] CESCR *General Comment No.13* para 6.
[24] With regard to availability, *General Comment No. 13* asserts that functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State Party. CESCR *General Comment No.13* para 6 (a).
[25] With regard to accessibility, *General Comment No. 13* asserts that educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State Party. CESCR *General Comment No.13* para 6 (b).
[26] With regard to acceptability, *General Comment No. 13* asserts that the form and substance of education, including curricula and teaching methods, have to be acceptable (i.e. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents. CESCR *General Comment No.13*: para 6(c).
[27] With regard to adaptability, *General Comment No. 13* asserts that education has to be flexible, so it can adapt to the needs of changing societies and communities, and respond to the needs of students within their diverse social and cultural settings. CESCR *General Comment No.13*: para 6(d).
[28] Samtani (n 15 above) 17-19.
[29] 'Education is both a human right in itself and an indispensable means of realizing other human rights.' Thus, 'the States parties to the present Covenant recognize the right of everyone to education.' CESCR *General Comment No.13* para 1 & Article 13 (1) of the ICESCR.
[30] See, e.g., article 13(1) of the ICESCR.
[31] The phrase 'basic education' and 'primary education' are sometimes used as synonyms in international human rights discourse. Therefore, the two phrases 'basic education' and 'primary education' are used interchangeably in this chapter. Arendse (n 6 above) 98-99.

progressive realisation within available resources.[32] For instance, under the core human rights instruments on right to education, namely the UDHR and the ICESCR, States Parties are required to make primary education 'compulsory and free', whereas secondary and tertiary or higher education are only required to be generally available and accessible.[33]

UN-generated human rights instruments, such as UDHR, ICESCR and CESCR General Comments, inspired and informed the content of many national constitutions, including the right to education provisions in the South African Constitution.[34] Given the various treaties in which the right to education is guaranteed, it cannot be over-emphasised that States Parties to the treaties, including SA, should guarantee access to education in their national laws. Moreover, States Parties should ensure that quality education, and educational materials are accessible and available to all people and groups on an equal basis without discrimination.[35] Thus, States Parties must respect, protect, promote and fulfil the various dimensions of the right to education and their corresponding obligations under the relevant treaties. In doing so, they should give particular attention to the equality and non-discrimination enquiry.[36]

5.2.2 Formulation and Interpretation of the Right to Education at the AU Level

At the regional level, the AU has a significant role to play in ensuring that the right to education is prioritised, and access to quality education on the continent is realisable by member States. There are various human rights instruments at the AU level that have

[32] It is important to note that in the SA context and legal discourse, 'basic education' refers to both primary and secondary education, while further education refers to higher or tertiary education and vocational training. Therefore, further education in this chapter is defined as such. Nevondwe & Odeku (n 3 above) 849-851.
[33] Article 26 of the UDHR and article 13(2)(a) & (b) of the ICESCR.
[34] AT Shehu 'The Enforcement of Social and Economic Rights in Africa: The Nigerian Experience' (2013) 2 (1) *Journal of Sustainable Development Law and Policy* 104-105.
[35] K Paterson 'Constitutional Adjudication on the Right to Basic Education: Are we asking the State to do the Impossible?' (2018) 34 (1) *South African Journal on Human Rights* 112-113. In the context of the SA Constitution, the right to basic education encompasses both education at primary and secondary level. See also L Mokate *Charter of Children's Basic Education Rights* (2012) 7-8 and Clark *et al* (n 1 above) 87.
[36] S Samtani 'The Domestic Effect of South Africa's Treaty Obligations: The Right to Education and the Copyright Amendment Bill' (2020) 10 (61) *Program on Information Justice and Intellectual Property* 11-12. South African Human Rights Commission *3rd Economic and Social Rights Report* 1999/2000 82. https://www.sahrc.org.za/index.php/sahrc-publications/section-184-3-reports. (Accessed 30-11-2021).

been adopted to ensure that the right to education is accessible to everyone, without discrimination.[37] The ACHPR or African Charter is the core human rights instrument that recognises the right to education. One of its key objectives is to prohibit discrimination of any kind and promote the enjoyment of rights and freedoms, including the provision of quality education for all.[38] In terms of article 17 of the ACHPR, everyone shall have the right of to education that includes educational material. Moreover, all AU member States 'shall recognize the rights, duties and freedoms' enshrined in the African Charter and 'shall undertake to adopt legislative or other measures' to give effect to the right to education.[39]

With regard to the education rights of children specifically, the African Charter on the Rights and Welfare of the Child (ACRWC or Children's Charter) safeguards children against unprecedented interference with their education, or any compromises on their development.[40] Article 11 of the ACRWC essentially promotes and guarantees children's rights of access to quality education. It obliges States Parties to ensure equal access to education for various sectors of the society, including access to actual physical training and preparing learners for employment.[41] The ACRWC also enjoins States Parties to take the necessary measures with the intent and purpose of realising the right to education.[42] It further obliges States Parties to implement special processes in relation to the talented, deprived, rich and destitute children to ensure equal access to education for all sectors of the society.[43]

[37] IM Sefoka & KO Odeku 'Critical Analysis of the Role of the African Union in Ensuring the Right to Access to Education in Africa' (2021) 10 (2) *Journal of African Union Studies* 77.
[38] Sefoka & Odeku (n 37 above) 81.
[39] Article 1 of the ACHPR or African Charter.
[40] Article 10, 11 & 15 of the ACRWC.
[41] Sefoka & Odeku (n 37 above) 82. Article 11(2) of the ACRWC precisely provides that the education of the child shall be directed to:

> the promotion and development of the child's personality, skills, talents and mental and physical abilities to the fullest potential; to foster respect and understanding for human rights and fundamental freedoms set out in regional and international instruments; to promote the child's understanding of primary healthcare and to preserve and strengthen positive African morals, traditional values and cultures.

[42] Article 11(3) of the ACRWC.
[43] Article 11(3) of the ACRWC. See also Sefoka & Odeku (n 37 above) 82.

In light of its strategic values to empower, emancipate, and strengthen education, especially teaching and learning as well as research and development, the AU has set forth various progressive and transformative educational interventions, which member States have ratified to foster the realisation of access to quality education for human development, capacity development, and skills acquisition.[44] The ACHPR and ACRWC expressly guarantee the right to education, and the African Commission's jurisprudence on the right to education is explicit and authoritative in similar manner to the ICESCR and CESCR's General Comments on the right to education, part 5.2.3 below will consider both the UN and AU human rights instruments in the interpretation of the SA constitutional right to education.

5.2.3 Nature and Extent of the SA State's International Law Obligations in Relation to the Right to Education

In SA, law-making and its enforcement through the Courts is conditioned and constrained by the Constitution, which is the supreme law of the country.[45] Section 39(1)(b) of the Constitution explicitly grants the SA courts a broad discretion to recognise and consider international law as well as its pivotal role in the interpretation of the right to basic education.[46] Further, the Constitution obliges the courts to opt for a reasonable interpretation of national legislation that is in harmony with international law over one that is not.[47] Liebenberg and other legal scholars argue that the court's engagement with, and adherence to, international human rights law treaties in the adjudication of constitutional rights may yield effective developments and insights, especially by providing clarity with regard to the scope and content of the right to basic education, which in turn could aid transformative adjudication.[48] The consideration of international law principles also aligns

[44] Sefoka & Odeku (n 37 above) 80.
[45] Section 2 of the Constitution.
[46] See *S v Makwanyane* 1995 3 SA 391 (CC) para 35, where it was held that the Courts may consider or rely on binding as well as non-binding international law when interpreting the Bill of Rights in terms of section 39(1)(b). This means that the Courts may consider treaties that SA has ratified and those that it is excluded from ratifying, or to which it is not a State Party.
[47] Section 233 of the Constitution.
[48] See C Chürr 'Realisation of a Child's Right to a Basic Education in the South African School System: Some Lessons from Germany' (2015) 18 (7) *Potchefstroom Electronic Law Journal* 2408. See also C Simbo 'A Hexagon Right: The Six Dimensions of the South African Right to Basic Education' (2018) 39 (1) *Obiter* 127.

with the commitment of the SA State, as set out in the Preamble to the Constitution. As per the Preamble, the SA State is committed to building a united and democratic SA that is able to take its rightful place in the international community. As Liebenberg states, the commitment entails complying with the standards set by international law as well as contributing to the development of international law.[49]

SA is a State Party to several international human rights treaties that guarantee the right to education, including the ICESCR, the CRC, the ACHPR,[50] and the ACRWC.[51] Therefore, as a State Party to the aforementioned international human rights instruments, the SA State is bound to comply with the treaty provisions by giving effect to the right to education equally to everyone, and without discrimination based on race, gender, socio-economic status and disability amongst others.[52] In addition, SA is obliged to put in place reasonable measures to ensure that basic education is compulsory and freely available immediately, regardless of the availability of resources.[53] This requires a co-operative governance approach of all arms and spheres of government to ensure that the right is achieved through pragmatic measures, such as the provision of properly and sufficiently equipped schools, appropriate learning materials, transport and financial assistance where necessary, properly trained teachers, and the delivery of teaching and assessment in an environment conducive to the endeavour.

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[49] S Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution* (2010) 101. This view was asserted by the Constitutional Court in the case of *Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC) (hereafter '*Kaunda*'), in which O'Regan J held as follows at para 222:

> Our Constitution recognises and asserts that after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law.

[50] SA is a member State of the AU, and it has ratified the ACHPR. Therefore, the SA State is obliged to ensure that everyone has access to education through teaching and learning, to know their rights and assert them as well as to respect other people's rights. More significantly, the SA State is obliged to ensure that basic education in the country is compulsory and free of charge without discrimination of any form. Samtani (n 36 above) 14.

[51] SA signed the ACRWC in 1997 and ratified it in 2000. Given that the ACRWC makes provision for a comprehensive right to education for children, the SA State has an obligation to take positive steps to ensure access to education for children, including those with special needs and disabilities. T N Khoza 'The Sen-Nussbaum Diagram of Article 11(3) of the African Charter on the Rights and Welfare of the Child: Facilitating the Relationship Between Access to Education and Development' (2021) 21 (1) African Human Rights Law Journal 10 and Samtani (n 36 above) 14-15.

[52] Section 29 of the Constitution. See Articles 2(2), 3, 13(2)(c) of the ICESCR & CESCR *General Comment No.11 & 13*. See also Articles 2,3,19 of the African Charter & Article 3, 11(3)(d), 12 of the Children's Charter.

[53] Article 13 (2) (a) of the ICESCR. The CESCR has stated that compulsory primary education means that 'neither parents, guardians nor the state are entitled to treat as optional the decision of whether the child should have access to primary education.' CESCR *General Comment No.11* para 6.

With regard to higher education, since international law requires that higher education has to be made progressively available and accessible, the SA State has a duty to move swiftly towards ensuring that further education is accessible to everyone within available resources. Significantly, the SA State may be held accountable for lack of compliance with treaty obligations relating to the provision of basic education and higher education in an international forum having jurisdiction in the matter.[54] There several cases on education rights, which will be comprehensively, articulated in part 5.4 and 5.5 below where the SA Courts carefully delineated and affirmed international law principles particularly on right to basic education, human dignity and other circumstances that might interfere with fulfilment of the right.

5.3 Inclusion and Formulation of the Right to Education in the SA Constitution

The South African education system has a complex history, characterised by a racial segregation. The current education system in SA was inherited from the apartheid system, which was responsible for the propagation of socio-economic structural injustice in the provision of education to citizens.[55] This historical context is imperative as it offers circumstantial information pertaining to the inclusion and formulation, as well as the evolution, of the right to education in the SA post-1994.[56] Historically, the provision of education was affected by apartheid policy and legislation. The basic education system was fragmented by racial discrimination, together with the inequalities and inequities of the apartheid order.[57] There was a disproportionate distribution of resources, with former white schools receiving more resources than schools of other racial groups.[58] In addition, there was gross inequality in the financing of education, differentiated curricula, as well as poor quality of teaching and learning.[59] Under the apartheid education regime, higher education was mostly restricted to the relatively well-off families, with the majority of poor

[54] Samtani (n 36 above) 17.
[55] Paterson (n 35 above) 112.
[56] BB Chitsamatanga & NS Rembe 'Children's Rights to Education in South Africa Twenty Years after Democracy: A Reflection on Achievements, Problems and Areas for Future Action' (2020) 17 (5) *Journal of Social Science and Humanities* 101.
[57] Nevondwe & Odeku (n 3 above) 847-848.
[58] Nevondwe & Odeku (n 3 above) 847-848.
[59] Veriava (n 3 above) 101.

South Africans not having the means to access higher education. This kind of education system did not serve and liberate the South African populace. Thus, many black South Africans remained disempowered.[60]

The SA Constitution, which drew inspiration from various international human rights law instruments,[61] seeks to bring forth social change in SA for the better of everyone.[62] This transformative aim extends to the education system that was riddled with infrastructural and resource inequalities. The Constitution guarantees that everyone in SA has the right to a basic education, which requires active measures to improve education and livelihood of South Africans.[63] In this regard, section 29 of the Constitution stipulates:

> **Education**
>
> (1) Everyone has the right-
>
> (a) to a basic education, including adult basic education; and
>
> (b) to further education, which the state, through reasonable measures, must make available and accessible.
>
> (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-
>
> (a) equity;
>
> (b) practicability; and
>
> (c) the need to redress the results of past racially discriminatory laws and practices.

[60] South African Human Rights Commission *3rd Economic and Social Rights Report 1999/2000* 79. https://www.sahrc.org.za/index.php/sahrc-publications/section-184-3-reports. (Accessed 30-11-2022).

[61] Notably, SA adopted and implemented the contents of the ACHPR in the formulation of its education policies and legislative frameworks, such as the South African Schools Act 1996 (SASA), which creates equal opportunity for all learners with regard to access to quality education by eliminating all educational inequalities and promoting broad inclusivity. Sefoka & Odeku (n 37 above) 81-82.

[62] S Sibanda 'When do you Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism' (2020) 24 (1) *Law, Democracy & Development* 385. In *Minister of Home Affairs & Others v Watchenuka & Another* (2004) 1 All SA 21 (SCA) at para 25, the SCA confirmed that the word 'everyone' in section 29(1) of the Constitution refers all people within SA's borders, including non-citizens. The court further displayed the nexus between the right to education and the right to human dignity in the Constitution.

[63] Klare (n 5 above) 150 and Langa (n 5 above) 351-352. See also Sibanda (n 62 above) 386-399.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that-

(a) do not discriminate on the basis of race;

(b) are registered with the state; and

(c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

Section 29 of the Constitution is a hybrid provision that embodies a cluster of education rights, and is divided into sub-sections. Each right confers specific entitlements on holders. The different subsections vary in nature and degree, and designate concomitant obligations on the State.[64] Section 29(1) characterises the socio-economic nature of the right, while sections 29(2) and (3) take the form of civil and political rights that contain freedom of choice guarantees, such as language choice in schools and the freedom to establish and maintain independent educational institutions.[65] The socio-economic entitlements under section 29 of the Constitution are also distinguishable from each other, in that section 29(1)(a) is an unqualified right which entitles everyone to a basic education immediately, compared to section 29(1)(b), which embodies the internal qualification.[66] Given the foregoing context, this chapter will primarily focus on the socio-economic guarantees under section 29(1)(a) and (b).

Section 29(1) of the Constitution entrenches the right to a basic education and the right to a further education. The right to a basic education in terms of section 29(1)(a) is not qualified by 'progressive realisation' and imposes both positive and negative obligations on the State to provide education for children as a priority.[67] Concerning the positive obligation, the State is required to take effective steps to guarantee that every child has access to educational facilities and that every child benefits from the right to education. On the other hand, the negative obligation imposes a duty on the State and its

[64] Veriava (n 3 above) 101 and Arendse (n 6 above) 97.
[65] Hence, the freedom of individuals to choose between State-organised and private education. Veriava (n 3 above) 101 and Arendse (n 6 above) 97.
[66] This implies that basic education is not a human right whose limitation or deprivations can be justified by resource constraints. Veriava (n 3 above) 101 and Churr (n 48 above) 2408-2409.
[67] Simbo (n 48 above) 128-129.

agencies not to impede children's access to education.[68] The right to further education in terms of section 29(1)(b) of the Constitution also imposes both positive and negative obligations on the State to develop various forms of further education. However, the right to access to further education should be achieved progressively and on merit. Moreover, necessary financial assistance should be provided where there is a need.[69]

With regard to whether section 29 of the Constitution is aligned with SA's international law obligations, it is important to note that article 14 of the ICESCR compels States Parties to implement 'free and compulsory' education. The Convention provides that States Parties, which have not yet secured free and compulsory primary education, have an obligation to formulate and adopt a detailed plan of action for the progressive implementation thereof, within two years after ratification. Moreover, the ICESCR calls for the removal of fees, especially for the poorest and most vulnerable in the community. In addition, CRC article 28 (1) and article 11 (1) and (3)(a) of the ACRWC stipulates that States Parties shall make primary education available, compulsory and free for everyone. Therefore, when contrasting section 29 of the SA Constitution to the ICESCR, ACRWC and CRC education rights provisions, it is evident that the SA formulation of the right to basic education falls short of the UN and AU standard, which expressly mandates 'free' and 'compulsory' primary education.[70] Since the SA Constitution does not expressly guarantee free and compulsory basic education, both State and Private schools are allowed to charge school fees. However, section 29 of the Constitution as expressed through legislative directives,[71] does make provision for the educational rights of

[68] Simbo (n 48 above) 128-129 and Churr (n 48 above) 2416. See also Liebenberg (n 49 above) 242-244.
[69] Simbo (n 48 above) 130-131 and Samtani (n 36 above) 42.
[70] Churr (n 48 above) 2408-2409. SA public & private basic education are fee-paying schooling systems, although the law stipulates that no child should be denied basic education because they cannot afford fees as prescribed by the school governing body. Universally accepted rights are the following: the right to education, equal access to educational facilities, freedom of choice, the right to education in the language of one's choice, the right to establish private educational institutions, as well as availability, accessibility, acceptability and adaptability of education. However, it aims to make basic education universally accessible as required by international standards. Accessibility, as part of the model for compliance, is therefore identifiable. Unlike the ICESCR and the CRC, section 29 of the SA Constitution does not also specify the content and quality of the education that the state must provide. Samtani (n 36 above) 42-43.
[71] By notice in the Government Gazette the Minister must annually determine the national quintiles for public schools, or part of such quintiles, which must be used by the Provincial Member of the Executive Council for Education to identify schools that may not charge school fees. Section 39(7) of the South African Schools Act 84 of 1996 (hereafter 'SASA'). In addition, according to section 40(1) of SASA, a parent is liable to pay

impoverished children and does not 'prohibit a sliding scale of fees' in relation to parents' children who are enrolled at State schools.[72] In *Centre for Applied Legal Studies and Others v Hunt Road Secondary School and Others* (10091/2006) [2007] ZAKZHC 6 (15 June 2007), the school was interdicted from proceeding with any further action for the recovery of outstanding school fees unless and until it had complied with its obligations in terms of Section 41 of the Schools Act.[73] Whether the continued existence of fee paying State schools violates the right to basic education is still unclear since the South African CC has yet to develop the scope and content of the right to a basic education in a clear manner.[74] Parts 5.4 and 5.5 below analyse the right to education as a continuum of two tiers of schooling, namely 'Basic Education' and 'Higher or Tertiary Education'. Part 5.4. examines how the CC has interpreted the section 29 constitutional right to basic education. Since the right to basic education is centred around children's right, parts 5.4 and 5.5 will investigate the interpretation and enforcement of the right, as it applies to children.

5.4 Constitutional Court's Interpretation of the Nature and Scope of the Right to Education

The SA State is required to 'protect, respect, promote and fulfil' the right to education. To ensure that the right is realised and enforced, the scope and normative content of the right must be properly defined.[75] As a justiciable right, violations of the right

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the school fees determined in terms of section 39 unless or to the extent that he or she has been exempted from payment of the school fees in terms of this Act.

[72] Churr (n 48 above) 2408-2411 and Simbo (n 48 above) 128-129. A clear reading of section 29 provides that no one may be denied the right to education due to a lack of financial resources. Arendse (n 6 above) 98. For example, the regulations relating to the exemption of payment of school Fees in public schools as gazetted, afford the poor and vulnerable parents of learners at public fee-paying schools the opportunity to apply for a full or partial exemption from the payment of school fees. Government Notice R.1052 in Government Gazette 29311 of 18 October 2006 (as amended).

[73] S Dass & A Rinquest Basic Education Rights Handbook – Education Rights in South Africa – Chapter 7: School Fees (2017). http://section27.org.za/wp-content/uploads/2017/02/Chapter-7.pdf (Accessed 30-11-2022). Before a parent is handed over to attorney for a debt collection in relating to a fee account that is in arrears, the school must ensure that: they have ascertained whether or not a parent qualifies for a school-fee exemption; the parent has completed and signed a form confirming that they were advised about the amount of school fees payable, that they are liable for the full payment of the fees, and that they are aware of their right to apply for a fee exemption. *Centre for Applied Legal Studies & Others v Hunt Road Secondary School & Others* (10091/2006) [2007] ZAKZHC 6 (15 June 2007) para 5.

[74] Veriava (n 3 above) 101, Arendse (n 6 above) 98 and Churr (n 48 above) 2409.

[75] L Arendse 'Slowly but Surely: The Substantive Approach to the Right to Basic Education of the South African Courts Post-*Juma Musjid*' (2020) 20 *African Human Rights Law Journal* 285-286.

to education can be challenged in court. In this regard, the courts have a key transformative role in the interpretation and enforcement of the right to education in line with the international norms and standards. However, the legislature also has a role in defining the scope and content of right to education and basic education.[76]

The realisation of the right to a 'basic education' has dominated education rights litigation, with very minimal focus thus far on adult basic education, as well as tertiary and vocational training. This is likely due to the impact basic education has on all children, plus the international human rights law instruments, such as the CRC and the ACRWC, together with the Constitution's special protection of children's rights and their best interests.[77] Moreover, the vast disparities in education provision and the fatal consequences of inadequate basic school infrastructure are key grounds for focusing on access to basic education for children.[78] Liebenberg, Churr and Simbo observe that whilst the right to basic education is explicitly and authoritatively guaranteed under international human rights law instruments, there is no legislative instrument or document which details a clear scope and content of section 29(1)(a) of the Constitution.[79] As a consequence of the lack of a legally determinable enforceable scope and content of section 29(1)(a), the nature and extent of the State's obligations in respect of the right is unclear.[80]

In *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (hereafter *'Grootboom'*) the CC emphasised that the courts must interpret socio-economic rights in context, both within the Bill of Rights as well as in their social and historical

[76] Simbo (n 48 above) 128-129. The State has a duty to oversee and implement its constitutional obligations with regard to education rights. However, it is the judiciary, which has the role of ultimate constitutional arbiter. See also A Skelton 'The Role of the Courts in Ensuring the Right to a Basic Education in a Democratic South Africa: A Critical Evaluation of Recent Education Case Law' (2013) 46 (1) *De Jure* and Arendse (n 75 above) 286-287.
[77] Section 28(2) of the Constitution provides that: 'A child's best interests are of paramount importance in every matter concerning the child.' See also J Brickhill & Y Van Leeve 'From the Classroom to the Courtroom: Litigating Education Rights in South Africa' in S Fredman, M Campbell & H Taylor *Human Rights and Equality in Education* (2018) 145.
[78] Brickhill & Van Leeve (n 77 above) 145.
[79] Liebenberg (n 49 above) 242-244 and Arendse (n 6 above) 98. See also Churr (n 48 above) 2409 and Simbo (n 48 above) 128-129.
[80] Arendse (n 75 above) 286-287 and Simbo (n 48 above) 129-130.

context.[81] A number of important cases on education rights were brought before the courts during the years 2010 to 2013. During that period, four major right to education cases that were heard by the CC produced arguably watershed outcomes.[82] The cases unearthed interesting developments about what the right to education entails, together with the progress and the impediments to fulfilling the right to a basic education, considering its social and historical context.[83] Of paramount importance is for State parties to understand the obligation posed by the international human rights instruments such as the ICESCR, as well as understanding the content and application of the right to education on poverty alleviation and human dignity as clarified by the CESCR in its General Comment No.11 & 13.[84] According to these instruments, the right to education is guaranteed to everyone without any form of discrimination, referring to both citizens of the country and non-citizens.[85] It is in this sense that the Court in its interpretation of section 29 (1) of the Constitution in the case of *Minister of Home Affairs & others v Watchenuka & another* (2004) 1 All SA 21 (SCA) confirmed the wide application of 'everyone' in its judgment. It referred to everyone as all people within SA's borders. Meaning that the right to education is not restricted to citizens only. The Court further displayed the nexus between the right to education with the right to human dignity in the Constitution.[86] They part of the thesis will discuss landmark education rights cases in a chronological order as contemplated hereunder.

[81] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (hereafter '*Grootboom*') para 22.
[82] *Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another* 2010 (2) SA 415 (CC) (hereafter '*Hoërskool Ermelo*'); *Juma Musjid Primary School & Others v Essay N.O. & Others* 2011 (8) BCLR 761 (CC) (hereafter '*Juma Musjid*'); *Head of Department, Department of Education, Free State Province v Welkom High School & Another* 2013 (9) BCLR 989 (CC) (hereafter '*Welkom*'); *MEC for Education in Gauteng Province & Others v Governing Body of Rivonia Primary School & Others* 2013 (12) BCLR 1365 (CC) (hereafter '*Rivonia*') and *Kwa Zulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal & Others* 2013 (6) BCLR 615 (CC) (hereafter '*KZN Liaison Committee*').
[83] Skelton (n 76 above) 2. See also S Fredman 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (2016) 9 (1) *Constitutional Court Review* 165.
[84] Samtani (n 36 above) 17-19.
[85] 'Education is both a human right in itself and an indispensable means of realizing other human rights.' Thus, 'the States parties to the present Covenant recognize the right of everyone to education.' CESCR *General Comment No.13* para 1 & Article 13 (1) of the ICESCR.
[86] *Minister of Home Affairs and others v Watchenuka & another* (2004) 1 All SA 21 (SCA) para 25.

Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another 2010 (2) SA 415 (CC) (hereafter '*Hoërskool Ermelo*') was the first landmark case to examine the intersection between the setting of a language instruction policy and its implications for the realisation of the right to education. The public high school in question had established Afrikaans as the only language or medium of instruction.[87] The policy restricted Black African learners' access to education at the school because they were not well equipped to learn in Afrikaans.[88] The school governing body (SGB) in this case refused to amend its language policy to make provision for English as another medium of instruction to accommodate and include Black African learners from the neighbouring township, who were formally receiving education in English.[89] As a result the provincial education department, acting through the Head of Department (HOD), argued that the SGB's policy violated the English-speaking learners' right to receive education in the official language of their choice as contemplated in section 29(2) of the Constitution.[90] Therefore, the CC had to determine whether the provincial government had the power to revoke the SGB's language policy, which endorsed Afrikaans as the only medium of instruction at the school.[91]

The CC held that the provincial government had power under section 22(1) and (3) of the Schools Act to retract or limit the power of the SGB to determine a school's language policy,[92] provided reasonable grounds exist and the procedural fairness requirements of section 22(3) are adhered to.[93] Moreover, the court held that the provincial department's power to withdraw a function of the SGB extends a to the language policy of a school.[94] Notably, the substantive issues of the rights to education and equality, including the constitutionality of the school policy were not brought directly

[87] Brickhill & Van Leeve (n 77 above) 153.
[88] Brickhill & Van Leeve (n 77 above) 153.
[89] *Hoërskool Ermelo* paras 17-18.
[90] *Hoërskool Ermelo* paras 21-23 & 25-26.
[91] For a detailed account of the development of the dispute, see *Hoërskool Ermelo* paras 12-20.
[92] *Hoërskool Ermelo* paras 63-75.
[93] The factors informing the assessment of reasonableness are outlined by the court in *Hoërskool Ermelo* paras 74-78.
[94] For further details on what the court had instructed the school to do with regard to their language policy and socio-economic obligation to redress the ills of the apartheid education system, see *Hoërskool Ermelo* paras 100-103.

before the court. However, the CC viewed the issues as integrally related.[95] The CC held that although the dispute was framed as a question of authority to set school policies, it was underpinned by issues of race, which is a prohibited ground of discrimination under the Constitution. Moreover, the effect of the SGB's Afrikaans only language policy was to exclude Black African learners from accessing education.[96] The CC also emphasised consultation, transparency and coherence within the arms of the State (i.e. Provincial Governments, SGBs and Principals) by emphasising the importance of engagement and cooperation between the parties as a constitutionally required approach to resolving socio-economic disputes.[97]

When interpreting the section 29(1) constitutional right to education in *Hoërskool Ermelo*, the CC did not directly or explicitly consider the international human rights law standards. However, the court impliedly concluded that the holistic construction of section 29 of the Constitution, in light of its social and historical context, requires that schools language policies be formulated in a manner that takes into account various factors. These include amongst others, the complex relationship between education in the language of one's choice, access to basic education by all children, the duty not to discriminate unfairly against any learners in admission to schools, and the imperatives of historical ills redress and transformation in the education system as a whole.[98]

One of the seminal judgments in education rights jurisprudence to confirm the unqualified nature of right to basic education, was *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. & Others* 2011 (8) BCLR 761 (CC) (hereafter *'Juma Musjid').* As per the facts, the Juma Musjid primary school was established as a government-aided, independent Islamic school. In 1997, the Trustees of the Juma Musjid Trust allowed the KwaZulu-Natal Education Department to enlist the school as a public

[95] Brickhill & Van Leeve (n 77 above) 153.
[96] Section 9(3) and (5) of the Constitution. See also *Hoërskool Ermelo* paras 76-78.
[97] S Liebenberg 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (2016) 19 (1) *Potchefstroom Electronic Law Journal* 3. While the court reasoned that governing bodies are intended to function as 'beacons of grassroots democracy', it cautioned against schools being governed 'as a static and insular entity'. See also *Hoërskool Ermelo* paras 79-80.
[98] Liebenberg (n 97 above) 14. See also *Hoërskool Ermelo* para 76-78.

school on its property. The arrangement was made subject to the conclusion of an agreement between the Trust and the MEC for Education of KwaZulu-Natal under section 14 of the South African Schools Act.[99] The impasse arose when the MEC failed to conclude an agreement as required by certain provisions of the Schools Act setting out the tenancy terms and conditions. Thus, the trustees of *Juma Musjid* approached the court for an order that would be just and equitable, including an order for eviction.[100]

At the centre of the legal dispute was a conflict between the right to education of the learners attending the primary school and the property rights of the landowner, which was the Trust. Amongst other questions before the Court was whether the Trust, as an owner of private property on which the primary school was situated, owed a constitutional obligation to the learners at the school vis-à-vis their right to a basic education under section 29 (1)(a) of the Constitution.[101] Thus, the CC was required to rule on the negative obligations of section 29(1)(a) of the Constitution on non-state actors to respect the right to education.[102] The CC recognised that the right to basic education is an immediately realisable right that is not subject to 'progressive realisation' or 'available resources' - an interpretation that is consistent with the international law position, as set out in the ICESCR and CRC.[103] Further, the CC observed that in terms of section 28 of the Constitution and the CRC,[104] the best interests of the child are of paramount importance. Therefore, the property rights of the Trust may be limited to ensure that the best interests of the child is upheld.[105] This is notwithstanding Court's conclusion that it was just and equitable to grant an eviction order.[106] Notably, the CC has generally been hesitant to give normative content to constitutional socio-economic rights, including the right to

[99] *Juma Musjid* para 1.
[100] *Juma Musjid* paras 1-3.
[101] The Right to Education Project '*Juma Musjid Primary School v Essay* (Constitutional Court of South Africa; 2011)' (July 2015) https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/South%20Africa%2C%20Constitutional%20Court%20Juma%20Musjid%20Primary%20School%20v%20Essay%2C%202011%20v5.pdf (Accessed 30-11-2022). See also *Juma Musjid* para 60.
[102] The Right to Education Project (n 101 above). See *Juma Musjid* paras 57-60.
[103] *Juma Musjid* paras 37 & 40-41.
[104] See article 3 (1) of the CRC, which provides that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'
[105] *Juma Musjid* paras 66 & 72.
[106] *Juma Musjid* para 79.

education.[107] However, its decision in *Juma Musjid* has been hailed for its confirmation of the nature of the right to basic education as an unqualified socio-economic right.

The constitutional right to basic education was once again tested in the following CC judgments in 2013: *Department of Education, Free State Province v Welkom High School & Another* 2013 (9) BCLR 989 (CC) (hereafter 'Welkom High School') and *MEC for Education in Gauteng Province & Other v Governing Body of Rivonia Primary School & Others* 2013 (12) BCLR 1365 (CC) (hereafter '*Rivonia Primary School*'). As with the *Hoërskool Ermelo* case, the legal dispute in *Welkom High School* was framed as a power struggle between the provincial education department and the SGB with regard to who had the ultimate authority over the formulation and implementation of school policies.[108] In this case, two pregnant learners were excluded from school for a protracted period due to the SGB's pregnancy policy. The provincial education department, through its HOD, intervened on behalf of the affected learners on the basis that a policy excluding pregnant learners was discriminatory and unconstitutional. However, the SGB sought and obtained interdictory relief in the High Court against the HOD, restraining interference in decisions taken by the school in terms of their learner pregnancy policy.[109] The CC held in favour of the schools, citing that the Schools Act did not empower the HOD of the provincial department of education to by-pass the SGBs and issue direct instructions to the principals of the schools contrary to the procedure as contemplated in the Schools Act, which determines the circumstances and manner in which a provincial department of education could directly intervene and take over the performance or policy-formulation function of a school.[110] Though the CC held in favour of the School on procedure and manner in which the State as represented by HOD could directly intervene on school policy formulation, the CC was hailed for protecting education rights of pregnant leaners in line with the international human rights standards as contemplated in the CRC and

[107] Arendse (n 75 above) 286.
[108] Liebenberg (n 97 above) 21 and Fredman (n 83 above) 165.
[109] Liebenberg (n 97 above) 21.
[110] For the court's detailed reasoning, see *Welkom High School* paras 72-82.

ACRWC. For the CC to order the school to allow pregnant learners not to be excluded from accessing basic education, impliedly realised article 11(6) of the ACRWC.[111]

In *Rivonia Primary School* case, the SGB of *Rivonia Primary School* had determined the capacity of Grade 1 enrolment at the school to be 120 learners. A grade 1 learner was refused admission and was accordingly placed on the waiting list because the school was full.[112] However, the provincial education department HOD, having looked at the intake of the school and its capacity, intervened on the basis that the school did indeed have capacity. The HOD then proceeded to overturn the refusal of the learner's application and issued an instruction to the school principal to admit the learner with immediate effect.[113] The school contested the provincial department education's unwarranted intervention and again, the Court held in favour of the school stating that the HOD when exercising his power in excess of the limit in its admission policy had not acted reasonably and in a procedurally fair manner.[114] However, the education rights of the leaner to basic education as envisaged in various international and regional human rights treaties such as amongst others CRC & ACRWC was protected, promoted and fulfilled. It is evident from the examination of jurisprudence in the above cases that the CC was consistently conscious of international human rights law standards relating to children's right of access to basic education without any form of discrimination. The foregone context does not take away some of the shortfalls by the CC, which will be discussed below.

Notably, in all four cases, the substantive issue of the constitutionality of the offending school policies were not directly before the Court, as a consequence, the Court was unwilling to take anything more than a tentative view of the substantive underlying rights to education and equality as argued by Fredman.[115] Instead, it followed its

[111] The ACRWC assert that 'States Parties to the present Charter shall have all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability.' Article 11(6) of the ACRWC.
[112] Liebenberg (n 97 above) 29 and Fredman (n 83 above) 165.
[113] *Rivonia Primary School* paras 9-15.
[114] *Rivonia Primary School* paras 48-68 & 81.
[115] Fredman (n 83 above) 197.

established pattern of facilitating appropriate procedures for substantive decision-making by what it regarded as more accountable and democratic bodies.[116] Nevertheless, what was surprising and commendable of the Court's decision in the four cases, was viewing and examining the power struggle dispute or issues as integrally related to the substantive issue of the constitutionality of measures for determining the admissions criteria, language policies and codes of conduct in public schools. Moreover, the decision to rely on section 172(1)(b) of the Constitution to analyse the relevant policies and their impact on the constitutional rights of access to basic education for the affected learners.[117] The Court held that the legal basis for addressing the underlying constitutional concerns was the broad, equitable remedial discretion vested in the Court by section 172(1)(b) of the Constitution. Therefore, the discretion to grant relief 'on the basis of claims that were not raised (directly, fully or at all) by the parties' was not unlimited and had to be 'exercised with caution and in a judicial manner, to ensure that justice is served.'[118] The Court in *Welkom High School* relying on the reasoning similar to that in the *Hoërskool Ermelo* case, held that even though the constitutionality of the relevant pregnancy policies was not before the Court, it would be remiss of it not to deal with the serious concerns regarding the constitutionality of the relevant policies.[119] Though the CC has consistently been cautious to give scope and content on the nature of right to education as argued by Liebenberg, it has however, by implication recognised and adhered to international human rights law standards when interpreting and analysing the right to basic education for all.[120]

The *Hoërskool Ermelo*, *Welkom High School* and *Rivonia Primary School* CC judgments highlight how the approach by SGB's powers to refuse admission based on the school's language or capacity policy determinations, affects the ability of leaners to

[116] Fredman (n 83 above) 197.
[117] Liebenberg (n 97 above) 22.
[118] *Welkom High School* paras 107-109.
[119] The position or argument as presented by governing bodies through SGB or principal was that the constitutionality of these policies was not properly before the CC. Liebenberg (n 97 above) 22-23.
[120] The *Juma Musjid* judgment provided some 'broad principles in guiding the content of the right to basic education, the High Courts and the Supreme Court of Appeal have been more specific in providing exact content to the right. Arendse (n 75 above) 291. Following *Juma Musjid* & others, the courts have been developing the normative content on the nature of right to education and basic education. Paterson (n 35 above) 116-119.

gain access to basic education.[121] Moseneke DCJ held that 'in an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular.'[122] However, the stark reality is that former model C or white schools tend to act as gatekeepers at the doors of learning, purporting to represent through SGBs both the internal and broader community within which a school is located.[123] As these cases illustrate, through admissions criteria, language policies and codes of conduct, SGBs wield substantial power in determining who has access to basic education within a given community. Nevertheless, Liebenberg argues that the current public schooling for many of the poor, black learners in SA is of appalling quality, whilst admissions in many well-resourced former Model C schools remain racially skewed.[124] Therefore, the legacy of apartheid education is far from being effectively redressed.

5.5 Constitutional Enforcement of the Right to Education

Education and the right to a basic education are not only of cardinal/paramount importance on a national level, but also on an international level. The empirical evidence and proven benefits of the importance of education in alleviating poverty and promoting human development including the development of nations requires a clarion call for a more serious commitment and political will on the part of the South African State.[125] Education furnishes people with dignity, self-respect and self-assurance, and is an important basic human right on which the realisation and fulfilment of other rights depend.[126] The regrettable reality in SA as confirmed by many legal and academic scholars including the Minister of Education through the Court is that the South African basic education system which comprise of primary and secondary schooling,[127] is

[121] Brickhill & Van Leeve (n 77 above) 152-155 and Fredman (n 83 above) 172.
[122] *Hoërskool Ermelo* para 47.
[123] Brickhill & Van Leeve (n 77 above) 152-155.
[124] Liebenberg (n 97 above) 35.
[125] L Maddock & W Maroun 'Exploring the Present State of South African Education: Challenges and Recommendations' (2018) 32 (2) *South African Journal of Higher Education* 194-200 & 207-209. See also Simbo (n 48 above) 127-129 and Churr (n 48 above) 2443-2444.
[126] Churr (n 48 above) 2406 and Paterson (n 35 above) 115.
[127] In ordinary parlance, 'basic education in South Africa refers to education in a person's primary and secondary schooling years, from grade R, the year in which a student starts formal schooling, until grade 12, the year in which the South African school leaving matriculation examinations are taken,12 or, more

suffering a great ordeal.[128] It is crippled by a myriad of unfavourable challenges and circumstances not limited to inequalities in the school environment, the lack of quality education, budgetary constraints for the provision of education materials, inadequate infrastructure and the inability of the school system to cater for learning differences as envisaged in section 29 of the Constitution.[129] In light of the foregoing myriad of challenges, SA risk the right of access to basic education being meaningless if schools continue to fail to meet minimum standards of adequacy in accordance with international standards.[130]

In a democratic country like SA underpinned by transformative constitutionalism ethos, all government arms and domains including the Judiciary have the must work coherently and in harmony to respect, protect, promote and fulfil the right to education.[131] The judiciary have a responsibility upon establishing an infringement or violation of constitutional rights especially where so few have the means to enforce their rights through the Courts to develop effective remedies.[132] In *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) (hereafter '*Fose*'), the CC encouraged the lower Courts to be creative and innovative when developing judicial remedies to ensure the effective vindication of constitutional rights.[133] In the context of education and the right to a basic education, Sefoka argues that the judiciary when presented with opportunity to adjudicate education rights should continuously contribute in ensuring that the provision of access to basic education is fulfilled or realised. This can be achieved by pronouncing judgements that promote quality sustainable education linked with good social services in schools across SA and as envisaged by the international and regional human rights

conservatively, the compulsory school going ages between 7 and 14.' Brickhill & Van Leeve (n 77 above) 145-146.

[128] Churr (n 48 above) 2406 and Simbo (n 48 above) 129. The problems with the provision of basic education resources in South Africa are 'extremely serious and the consequences of these problems are such that many learners are already being denied their full rights to quality basic education'. *Centre of Child Law v Minister of Basic Education* (2012) 4 All SA 35 (ECG) para 14.

[129] Churr (n 48 above) 2406 and Simbo (n 48 above) 129.

[130] Paterson (n 35 above) 112.

[131] IM Sefoka 'Judicial Administration and Enforcement of the Right to Quality Education in South Africa: A Discussion of Selected Case Laws' (2022) 12 (2) *Journal of Educational and Social Research* 199.

[132] Liebenberg (n 97 above) 2. See also *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) (hereafter '*Fose*') para 69.

[133] *Fose* para 69.

law standards.[134] Notwithstanding a plethora of education law jurisprudence post 1994, of great concern to legal and academic scholars is that the CC has taken a deferential approach when developing the normative content to socio-economic rights including right to basic education under the Constitution.[135] Therefore, the absence of a legally clarified determined scope and content of right to education in particular basic education is an inevitable challenge.[136] Simbo argues that the role of providing the normative content and scope of the right to basic education remains with the legislature and the legislature cannot delegate the duty to the judiciary which makes the determination of the scope and content of section 29(1)(a) a matter of important engagement and determination. Moreover, courts are not the institution directly responsible for making policy or advocating for social change.[137] However, Liebenberg and Arendse do not agree with Simbo's view, their argument is that the South African Courts have broad, equitable remedial discretion vested in the Court in terms of section 172(1)(b) of the Constitution. What is required of the Court is to exercise the remedial discretion with caution and in a judicial manner, to ensure that justice is served while observing separation of powers principles.[138] In addition, they have a significant role to play in inducing and supporting the kind of fundamental transformative changes envisaged by the Constitution.[139]

The CC might have rejected the minimum core obligations approach when adjudicating the enforcement of the right to housing and healthcare.[140] But the obligations created by the right to basic education are similar to the minimum core standard as articulated in the international human rights law norms and standards, argued by Paterson.[141] The minimum core obligations demand greater care and urgency which is buttressed and reflected in the unqualified nature of basic education rights. Therefore, the

[134] Sefoka (n 131 above) 199-200.
[135] Arendse (n 75 above) 286 and Sefoka (n 131 above) 200.
[136] Although it is more than twenty-five years since the demise of apartheid, the sad reality is that there is no legislative document in South Africa that defines the phrase 'basic education' and the judiciary has also not defined the term. Sefoka (n 131 above) 200.
[137] Simbo (n 48 above) 129.
[138] Liebenberg (n 97 above) 15 and Arendse (n 75 above) 288-290.
[139] S Liebenberg 'Social Rights and Transformation in South Africa: Three Frames' (2015) 31 (1) *South African Journal on Human Rights* 447.
[140] For a detailed discussion, refer to Chs 3 & 4 above.
[141] Paterson (n 35 above) 119.

right to basic education as enumerated in the cases below is certainly the socio-economic right that has been confirmed to bear the Constitutional power of immediate enforceability without progressive realisation qualifier.[142] *Hoërskool Ermelo*, *Juma Musjid*, *Welkom High School* and *Rivonia Primary School* are the four significant educational rights judgments of the CC. The legal dispute in *Juma Musjid* case had its origin in conflict between the right to education of the leaners attending Juma Musjid primary school and the property rights of the landowner in the form of 'Trust', as well as the question on whether non-state actors have an obligation to promote and fulfil the right to education to leaners of Juma Musjid primary school.[143] Amongst other cardinal pronouncement, was the Court ruling on the negative obligations of section 29(1)(a) of the Constitution. *Juma Musjid* was seminal for its judicial remedy which confirmed the unqualified nature of section 29 (1) and that right to basic education is an immediately realisable right which can only be limited in terms of the law of general application.[144] As a result, the lower Courts have relied and adopted *Juma Musjid* judgment on the immediate realisation of the right to basic education as a basis to provide substantive content to section 29(1)(a) of the Constitution.[145] The Court in this case was not tasked with ruling on the positive obligation of the right to basic education, which according to Skelton and Arendse the Court might have circumscribe the right more tightly and thus a higher 'price tag' for the State should the positive dimension of the right was considered by the Court.[146] The enforcement of a positive obligation, unlike 'the enforcement of a negative obligation, is perceived as interfering in the executive or legislature's decisions on budgetary allocations' as argued by Brand on the basis of doctrine of separation of powers.[147] This deferential approach

[142] Paterson (n 35 above) 112 and Sefoka (n 131 above) 202. In stressing the prominence of the nature and meaning of this right, the Court also referred to section 28(2) of the Constitution in which children are afforded socio-economic rights without limitation or core constraint, which requires qualification. *Juma Musjid* para 37.

[143] *Juma Musjid* para 1-3.

[144] Section 36 of the Constitution. See also *Juma Musjid* paras 57-60.

[145] Arendse (n 75 above) 290-291 and Simbo (n 48 above) 132. To reaffirm the *Juma Musjid* stance on the unqualified nature of the right, the court in the *Madzodzo v Minister of Basic Education* 2014 SA 339 (ECM) (hereafter '*Madzodzo*') also stated that the right to basic education is an unqualified right, which is not subject to any limitations other than by law of general application. *Madzodzo* para 15.

[146] A Skelton 'How Far will the Courts go in Ensuring the Right to a Basic Education?' (2012) 27 (1) *Southern African Public Law* 396-397. See also Arendse (n 75 above) 289.

[147] Arendse (n 75 above) 290. Due to separation of powers doctrine, Brand outlines that the courts operate under the perception that 'enforcing negative duties require of them less interference in the sphere of power of the political branches than the enforcement of positive duties would'. D Brand 'Introduction to Socio-

by the Court also manifested in the case of *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal & Others* 2013 (4) SA 262 (CC) (hereafter '*KZN Liaison Committee'*) where the CC held in favour of the KZN provincial department of education's decision to cut the subsidy for independent schools. Further, held that budgetary decision-making and the effect of budget cuts remains with the provincial department and must be respected by the Courts.[148] However, unlike *Hoërskool Ermelo*, *Welkom High School* and *Rivonia Primary School* the Court in *KZN Liaison Committee* was prepared to find or formulate a remedy which addressed both the substantive and procedural issues, in addition to the Court's decision to resolve the dispute through co-operation or meaningful engagement which finds its origin in the values of human dignity.[149] Nonetheless, Liebenberg and Skelton's analysis assert the view that the CC is more cautious in its interpretive and enforcement approach of the positive obligations derived from socio-economic rights.[150] Therefore, Arendse is of the view that basic education right in *Juma Musjid* might have been enforced differently by the Court, had it been presented with set of facts which would have tasked it to rule on the positive obligations of the right to basic education.[151]

Apart from *Juma Musjid* and *KZN Liaison Committee* case, at the centre of the legal dispute in *Hoërskool Ermelo*, *Welkom High School* and *Rivonia Primary School*,[152] was the contestation over the power to take over performance or formulate policy for schools including restraining excess of power that has been the subject of litigation all the way to the CC.[153] These cases had their origin in concerns brought by SGBs to interventions by provincial education HOD in the language, pregnancy and admission

economic Rights in the South African Constitution' in D Brand & C Heyns *Socio-economic rights in South Africa* (2005) 11.

[148] *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal & Others* 2013 (4) SA 262 (CC) (hereafter '*KZN Liaison Committee'*) para 63.

[149] Fredman (n 83 above) 193.

[150] Skelton (n 76 above) 1-5 and Skelton (n 146 above) 369. See also Liebenberg (n 139 above) 454.

[151] Arendse (n 75 above) 290.

[152] Fredman (n 83 above) 197. Power dynamics between school governing bodies and spheres and arms of the State through National and Provincial officials responsible for realising right to education. Most importantly, ensuring that children are able to access school without any form of discrimination. Brickhill & Van Leeve (n 77 above) 150-152 and Liebenberg (n 97 above) 21.

[153] Fredman (n 83 above) 197 and Liebenberg (n 97 above) 3.

policies adopted by the respective governing bodies. Most notably in these cases, is that 'meaningful engagement' as a constitutional remedy in the context of the education rights was employed as a means to promote and fulfil the interest of the child including human dignity when resolving dispute between arms and domains of the government.[154] The CC emphasised the importance of engagement and cooperation between the SGBs and provincial HODs as a constitutionally and peremptory approach required to resolving the legal disputes. Hence, the Meaningful engagement featured prominently as a remedy ordered by the Court to resolve the dispute in an education rights context. Moreover, this remedy was significantly developed in these major cases cited above and featured as an element of the provisional orders or structural interdicts made by the CC particularly in the case of *Hoërskool Ermelo & Juma Musjid*.[155] Many Legal and academic scholars view meaningful engagement in these contexts to hold promise as an innovative remedial response to constitutional violation of the educational rights in section 29 of the Constitution including other related rights in the Bill of Rights.[156] According to Liebenberg three principles informing Court's enforcement of the education right are deduced from examining the role that meaningful engagement as a pioneered remedial action has played in the educational rights judgments referred to above. These principles are; substantive judicial reasoning, transparent and fair participation, and respect for the separation of powers doctrine.[157] According to Fredman while these cases demonstrated the Court's role in adjudicating education rights dispute and developing jurisprudence in these circumstances and context, they have not dealt with some of the most intractable problems about fair distribution of resources to achieve an equal right to quality education for all.[158] Nevertheless, the Court in *Section 27 v Minister of Education* 2013 2 SA 40 (GNP) and *Madzodzo* case, was flexible when formulating the remedies and thus stressed on the importance of having proper infrastructural amenities and adequate

[154] Liebenberg (n 97 above) 3. Meaningful engagement was pioneered in the earlier socio-economic rights cases relating to eviction disputes implicating the housing rights in section 26 of the Constitution. For example, see Occupiers of 51 *Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) & *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 1 SA 323 (CC).
[155] Liebenberg (n 97 above) 3.
[156] Liebenberg (n 97 above) 3-4.
[157] Liebenberg (n 97above) 6.
[158] Fredman (n 83 above) 197.

socio-economic resources to achieve an equal right to quality education for all.[159] Furthermore, the CC sought to reach the underlying substantive issues by entrenching a duty of all stakeholders in the education space including the non-State actors or private institutions to cooperate and engage meaningfully with one another.[160] The pioneering of the meaningful engagement by the CC in these cases will set the platform for a structured, participatory remedial process for amending policies to give effect to the rights of learners to education on a non-discriminatory basis.[161] As Liebenberg and others have noted, participatory remedies are well suited to redressing deeply entrenched patterns of institutional resistance to fundamental change.[162] Although some are of the view that the role of meaningful engagement has been inconsistent and requires continues development in the cases reviewed, the CC has affirmed its transformative role in resolving and effectively addressing systemic educational rights legal disputes.[163] Above all, to keep abreast with the continual shifts in the notion of social justice and the evolving circumstances of society, Arendse concur with Liebenberg in that the normative content of socio-economic rights cannot be fixed or be a 'cast on stone' but should be developed continuously.[164]

5.6 Conclusion

The right to education is generally recognised at both international and national levels as a justiciable fundamental human right upon which the full exercise and realisation of other rights is dependent.[165] Today, education is viewed globally as a human rights issue and continues to be given undivided attention. Basic education, in particular,

[159] Sefoka (n 131 above) 202-203. The Court in ordering the immediate delivery of text books to schools cutting across Limpopo Province held that "education is critical in both freeing and unlocking the potential of each person and it also found that textbooks are an essential component of quality teaching and learning". See also *Section 27 v Minister of Education* 2013 2 SA 40 (GNP) (hereafter '*section 27*') para 22 & 32-36. In *Madzodzo* the Court confirmed that 'school furniture is an integral component of the right to basic education as enshrined in section 29(1)(a) of the Constitution, and that the State is obliged to take all reasonable measures to realise the right with immediate effect' and that the provincial department violated the learners' constitutional right as provided for in section 29 of the Constitution. *Madzodzo* paras 17.
[160] Sefoka (n 131 above) 204, Arendse (n 75 above) 291-292 & Liebenberg (n 97 above) 36.
[161] Sefoka (n 131 above) 204 and Liebenberg (n 97 above) 36.
[162] Arendse (n 75 above) 311-312 and Liebenberg (n 49 above) 29.
[163] Arendse (n 75 above) 312 and Liebenberg (n 97 above) 38.
[164] Arendse (n 75 above) 312.
[165] Chitsamatanga & Rembe (n 56 above) 100.

is considered important in promoting global progress and advancement, as well as according people with dignity, self-respect and self-worth.[166] SA is a State Party to several international and regional human rights law instruments, such as the ICESCR, the CRC, the ACPHR and the ACRWC, that guarantee the right to education, including basic education, for everyone without any form of discrimination.[167]

The post-1994 SA education system is myriad, with historical social and structural injustice inherited from the apartheid era. The adoption of the 'Transformed Constitution' in 1996 brought about radical reformation in the laws of the country. However, the inequalities and fragmentation created by the apartheid education system remained.[168] Although significant strides have been made by the democratic government, infrastructural challenges, together with chronic resource and capacity constraints persist. These conditions have created fertile ground for the growth of advocacy and civic groups such as a national movement of students, parents and teachers campaigning for equal education and increasing litigation to improve access to quality education.[169]

The right to education in the South African context is analysed as a continuum of three bands of schooling namely Primary Education, Secondary Education and Tertiary or Higher Education and Training. A vast and diverse jurisprudence on education rights in general, and in particular, the right to basic education is evolving in South African Courts.[170] As a result, right of access to basic education has been on top of the SA's national agenda and most litigated socio-economic right since the advent of democracy post 1994.[171] Paterson describes the right to a basic education is one of the basic and yet the most powerful right in the Constitution. It is immediately realisable due to its unqualified nature to afford everyone equal entitlement to all necessities for adequate schooling.[172] Although the corollary obligation falls primarily on the State to respect,

[166] Chitsamatanga & Rembe (n 56 above) 100 and Churr (n 48 above) 2405-2406.
[167] See part 5.2 above on SA's international law obligations.
[168] Klare (n 5 above) 151-153 and Langa (n 5 above) 351-352.
[169] Brickhill & Van Leeve (n 77 above) 150-151.
[170] Clark *et al* (n 1 above) 97.
[171] Clark *et al* (n 1 above) 97.
[172] Paterson (n 35 above) 112 and Chitsamatanga & Rembe (n 56 above) 102.

protect, promote and fulfil' the right basic education of each learner, it is worth noting that the realisation and delivery of quality education necessitates a good co-operative governance approach between arms and domain of the State including the non-State actors while the judiciary must ensure that the right in question is interpreted and enforced appropriately.[173]

The SA State and non-State actors' failure to provide any of the necessary components of a basic education, equally, to all rights bearers is a violation to the international and regional human rights standards including SA's constitutional obligations as confirmed in the *Juma Musjid* case.[174] Although the *Juma Musjid* case did not realise any direct benefits for the children whose rights were being fought for, it did set a precedent about the need for children's best interests to be considered in applications for eviction, and further sent a strong message about the unqualified nature of the right to a basic education as well as State and non- State parties' obligations.[175] The Courts have also outlined State and non-State actor's responsibilities on access to basic education or, where the access is concerned, at least not to hamper children's rights to basic education.[176]

Important to note also in relation to the key cases discussed above in the development of education right jurisprudence, is the manner in which the Courts pivoted on crucial issues of equality, access to quality education, lack of education material and the protections afforded to vulnerable leaners and recently lack of basic infrastructure such as water, electricity and sanitation. These cases also presented opportunities for the Courts to explore or consider its broad remedial powers to innovatively develop effective remedies, and their impact on the right to a basic education and equality.[177] The *Rivonia Primary School* surprisingly extracted the 'meaningful engagement' concept from the CC's housing evictions jurisprudence into its education rights jurisprudence.[178] This

[173] Sefoka (n 131 above) 199.
[174] *Juma Musjid* paras 57-60.
[175] Skelton (n 76 above) 22. See also section 28 (2) of the Constitution.
[176] Skelton (n 76 above) 22.
[177] Brickhill & Van Leeve (n 77 above) 156.
[178] Clark *et al* (n 1 above) 103.

concept was employed by the Court in *Rivonia Primary School*, in the context of admission policies, when articulating the relationship of 'co-operative governance', in the three tier structure of school governance as established in the previous *Hoërskool Ermelo*, *Juma Musjid* and *Welkom High School* governance cases.[179] Furthermore, the Courts have also demonstrated a willingness to fashion or formulate new remedies, such as the "catch up" plan in the textbooks case and the time framed order of the post provisioning case.[180] Liebenberg confirms that this approach by the Court in the school governance cases paved the way for the development of meaningful engagement as a fully-fledged participatory remedy in future education rights disputes. She further argues that such remedies constitute powerful conduit or avenue for developing systemic policy reforms capable of advancing access to quality education for all SA's children.[181]

The fight for access to education and basic education in SA is a continuous lively, emotive and thorny struggle. Civil society groups have demonstrated their willingness to play an active role in shaping the model.[182] To fulfil the mandate of Transformative Constitutionalism, it requires all the spheres and arms of the State should provide clear scope and normative content of quality basic education, which should be measurable and relatively not cumbersome to monitor.[183] In addition, for the provision of education to be adequate to facilitate the radical transformation of the society. The Courts in their task to interpret and enforce the right to basic education has a pivotal role in shaping the contours of governance in the education space, as well as supervising access to relevant education services.[184] This include remedies which will address both the substantive and procedural issues to close the gap between the normative constitutional right to a basic education and the lived experiences of poor learners, who continue to progress through inadequate, under-resourced schools.[185] Nevertheless, the continuing existence of schools in SA that do not have adequate schooling facilities and basic services, and the problems related to

[179] Clark *et al* (n 1 above) 103.
[180] Clark *et al* (n 1 above) 103. See also *Section 27* para 36.
[181] Liebenberg (n 97 above) 36.
[182] Skelton (n 76 above) 23.
[183] Sefoka (n 131 above) 113.
[184] Skelton (n 76 above) 23 and Liebenberg (n 97 above) 36.
[185] Fredman (n 83 above) 193 and Sefoka (n 131 above) 113.

poor performances of leaners, indicate that the vision of a deracialised, dignified, equitable and transformed education system in SA, as envisioned in the Constitution, is not being realised in practice in the manner and the extent to which it was hoped.[186] Again, this points to a disjuncture between policy implementation and reality on the ground. Therefore, it remains a major concern on whether the legislative and policy reforms adequately address the realities of education system in SA. Regrettably, the current situation in SA is that the fortunate few who can afford private schooling and access to well-equipped former model C public schools receive an excellent education, but for the majority of South Africans, a basic and further education remains a hope rather than a reality.

Although SA is almost three decades into constitutional democracy, the pace of transformation has been slow due to the deeply unequal and dysfunctional education system left by the apartheid era. Despite the constitutional imperatives and policy reforms relating to education rights, the majority of the South Africans, in particular the less privileged and the vulnerable, are still facing tremendous difficulties to access education as a fundamental human right.[187] Therefore, whether the constitutional right to education is being effectively realised remains a continuous heated debate amongst commentators and various civic or advocacy groups.

[186] Chitsamatanga & Rembe (n 56 above) 105-108. See also Paterson (n 35 above) 121 and Sefoka (n 131 above) 204.
[187] Nevondwe & Odeku (n 3 above) 847.

CHAPTER 6: CONCLUSION

6.1 Introduction

Generally, socio-economic imbalances and disparities affect access to adequate livelihood, human dignity and social justice. The importance of respecting, protecting, promoting and fulfilling socio-economic rights cannot be overstated.[1] Post 1994, SA has to contend with structural inequalities and deplorable socio-economic conditions relating to insufficient access to housing, healthcare and education, as well as basic services, such as electricity, water and sanitation.[2] The provision of basic services to all and the levelling of the economic domains that were so drastically skewed by the apartheid system is central to the transformative constitutionalism project.[3]

As stated in parts 1.1 and 1.2 of chapter 1 above, the fundamental purpose of the present thesis is to determine whether the constitutionalising of socio-economic rights has been effective in redressing apartheid-era socio-economic inequalities and injustices. Using the theoretical framework of transformative constitutionalism, the thesis evaluated the extent to which the current constitutional guarantee of socio-economic rights and judicial remedies have contributed towards redressing the problems of poverty, inequality and socio-economic vulnerabilities in the post-1994 dispensation. The thesis sought to achieve this objective by exploring whether the constitutional formulation of socio-economic rights has been effective in adequately addressing the problems of poverty and inequality in SA. The thesis further sought to determine the extent to which the Constitutional Court's (CC) extant jurisprudence on the protection and enforcement of the socio-economic rights relating to housing, health care and education promotes socio-economic transformation in a manner that adequately addresses poverty and inequality-

[1] M Heywood 'Economic Policy and the Socio-Economic Rights in the South African Constitution: Why Don't They Talk to Each Other' (2021) 11 *Constitutional Court Review* 341-343.
[2] Heywood (n 1 above) 343-346.
[3] M Rapatsa 'The Right to Equality under South Africa's Transformative Constitutionalism: A Myth or Reality?' 2015 11 (2) *Acta Universitatis Danubius Juridica* 26-29. M Rapatsa 'Transformative Constitutionalism in South Africa: 20 Years of Democracy' (2014) 5 (27) *Mediterranean Journal of Social Sciences* 887-889. See also P Langa 'Transformative Constitutionalism' (2006) 3 (1) *Stellenbosch Law Review* 352 and *City of Johannesburg v Rand Properties* (Pty) Ltd 2006 6 BCLR 728 (W) paras 51-52.

related vulnerabilities in SA. As a third and final research objective, the thesis sought to determine if any other appropriate measures should be implemented to effectively redress the socio-economic imbalances and disparities brought about by the apartheid system, as well as alleviate poverty and inequality in current SA society.

At the outset, the thesis hypothesised that SA has not adopted adequate measures to respect, promote, protect and fulfil socio-economic rights in the post-1994 constitutional dispensation. Furthermore, the judiciary, specifically the CC, has not intervened sufficiently in its adjudication of socio-economic claims to ensure poverty alleviation and substantive equality. The thesis tested the hypothesis by engaging various primary legal sources, such as various international human rights law instruments, the Constitution of SA, statutes and the extant CC jurisprudence, as well as secondary sources, such as scholarly work in the area of human rights and judicial remedies, reports of committees and legal history.

This concluding chapter of the thesis provides a summary analysis of the key findings of all substantive chapters. The chapter also sets out the implications of the findings and recommendations to ensure improved efficacy in the realisation and enforcement of socio-economic rights. Part 6.2 below provides an overview of key findings, while part 6.3 explains the significance of the findings. Part 6.4 offers recommendations for such reform. Finally, part 6.5 provides concluding remarks.

6.2 Overview of Thesis Findings

As alluded to in part 6.1 above, *chapter one* of the present study introduced the topic and the theoretical framework underpinning the thesis, namely transformative constitutionalism. The chapter provided a brief social and historical context on socio-economic rights, their inclusion in the 1996 Constitution and their justiciability. It also outlined the research problem, set out the research questions and hypothesis, as well as disclosed the structure of the thesis and the research methodology used.

In chapter two, the thesis explored whether the constitutional formulation of socio-economic rights has been effective in adequately addressing the problems of poverty and inequality in SA. The chapter undertook a comparative analysis on the status and formulation of socio-economic rights in international human rights law instruments at the United Nations (UN) and African Union (AU) levels, as well as in South African law. The chapter determined that the international human rights norms and standards have imposed 'minimum core' obligations on State Parties, including SA. This implies that the basic rights and commodities should be ensured at all times for everyone, especially vulnerable groups within the various sectors of SA society. In the context of the right of access to an adequate standard of living, core obligations include ensuring access to the minimum essential nutrition, basic education, adequate basic shelter, housing, safe drinking water and sanitation and social protection that provides a minimum essential level of benefits for everyone. Notably, international human rights norms and standards do not require any prescribed method or approach of ensuring that everyone has a decent and adequate standard of living. Therefore, States Parties may take into account their historical and social context, and progressively provide essentials, such as adequate housing, basic education, health services and other essentials to the maximum available resources or at an affordable cost.[4] All States Parties, including those with limited resources and even in crisis, such as those brought about by the economic fallout relating to the Covid-19 pandemic, are still required to make every effort to ensure an adequate standard of living for all. Most importantly, States Parties are required to prioritise the precarious situation of the disadvantaged and marginalised groups within the society to protect against dignity-based harms.[5]

Chapters three, four and five comprehensively analysed institutional concerns and challenges relating to separation of powers during judicial review of specific socio-economic rights. The chapters respectively provided a conceptual analysis of the right to

[4] Article 2 of the ICESCR makes provision for States Parties to use the maximum available resources to achieve progressively the full realization of all the rights in the Covenant.
[5] Article 11(1) of the ICESCR. In terms of this provision, States Parties are obliged to ensure for everyone the 'continuous improvement of living conditions'. See also A Mavedzenge 'Revisiting the Role of the Judiciary in Enforcing the State's Duty to Provide Access to the Minimum Core Content of Socio-Economic Rights in South Africa and Kenya' (2020) 7 (2) *Journal of Comparative Law in Africa* 78-83.

housing, healthcare and education under the SA Constitution. In addition, the chapters analysed the impact of the CC's socio-economic rights jurisprudence in achieving the goals of the transformative constitutionalism project. At the centre of the conceptual analysis of the specific socio-economic rights was the CC's interpretation and enforcement of the rights, taking into account their formulation and interpretation at the UN and AU levels. The chapters further examined whether the CC's extant jurisprudence accords with the transformative constitutionalism imperatives in view of SA's social and historical context. Lastly, the three chapters explored the extent to which the CC advanced the transformative constitutionalism project that seeks to redress socio-economic imbalances and disparities brought about by the apartheid system.

The key findings in chapters three, four and five were that the ratification of the ICESCR, ACHPR and other relevant international human rights instruments by SA provides a valid and useful tool for interpreting the rights to housing, health care and education, specifically basic education, as entrenched in the Constitution. Further, in line with the CESCR General Comments, the SA State should adopt enabling strategies in the form of legislation, policies and budgets to ensure access to adequate housing, highest attainable standard of healthcare and free basic education without discrimination based on race, gender, socio-economic status or arbitrary grounds. Moreover, vulnerable identity groups should be given some degree of priority consideration in the housing, healthcare and education programs developed by the State. It bears noting that in relation to each of the socio-economic rights discussed in chapters three to five, the CC has held that the State's duty is to devise reasonable legislative framework and implement a comprehensive plan that will achieve the goal of providing access to adequate housing, health care services and basic education to everyone at all economic and social levels.[6]

Chapters three to five of the present thesis demonstrated that the CC generally avoided having to elaborate on the normative 'minimum core' content of constitutional socio-economic rights by immediately turning to an examination of the rights-based

[6] *Government of the Republic of South Africa v Grootboom* 2000 11 BLCR 1169 (CC) (hereafter '*Grootboom*') paras 35-36 & 40-41.

obligations imposed on government and scrutinising the reasonableness of the government's measures based on the need for institutional comity and reverence for the doctrine of the separation of powers.[7] Liebenberg and Mavedzenge aver that the CC's failure to embrace the 'minimum core' obligations, which requires the basic minimum level of subsistence for the enjoyment of a dignified human existence, is an absolute disregard of international human rights norms and standards.[8]

Chapter three underscored that, as per the jurisprudence of the CC, the formulation of the section 26 constitutional right of access to adequate housing does not entitle anyone to individual relief, as the State does not have a duty to immediately provide every South African with adequate housing.[9] A key chapter four finding relating to the CC's jurisprudence was that there are limitations to the section 27 constitutional right to health care. However, the limitations do not give rise to an inference that access to health care is a right that is incapable of immediate relief or claim.[10] In like manner, chapter five revealed that in terms of access to education and basic education rights, as contemplated in section 29 of the Constitution, the right is certainly the unqualified socio-economic right confirmed to bear the constitutional power of immediate enforceability without the progressive realisation qualifier.[11] Chapter 5 found that the obligations created by the constitutional right to basic education have similar characteristics to the minimum core standard as articulated in the international human rights law norms and standards.[12]

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[7] S Liebenberg 'Social Rights and Transformation in South Africa: Three Frames' (2015) 31 (1) *South African Journal on Human Rights* 453-454. D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 (1) *South African Journal on Human Rights* 11.

[8] Mavedzenge (n 5 above) 70-72. and Liebenberg (n 7 above) 454-455. See also D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2002) 119 (1) *South African Law Journal* 500-501and Bilchitz (n 7 above) 26.

[9] *Thubakgale & Others v Ekurhuleni Metropolitan Municipality & Others* 2022 (8) BCLR 985 (CC) (hereinafter '*Thubakgale*') para 84.

[10] Z Nampewo, JH Mike & J Wolf 'Respecting, Protecting and Fulfilling the Human Right to Health' (2022) 21 (36) *International Journal for Equity in Health* 3-5. See also DM Chirwa 'The Right to Health in International Law: Its Implications for The Obligations of State and Non-State Actors in Ensuring Access to Essential Medicine' (2003) 19 (1) *South African Journal for Human Rights* 546-548.

[11] IM Sefoka & KO Odeku 'Critical Analysis of the Role of the African Union in Ensuring the Right to Access to Education in Africa' (2021) 10 (2) *Journal of African Union Studies* 202 and K Paterson 'Constitutional Adjudication on the Right to Basic Education: Are We Asking the State to Do the Impossible?' (2018) 34 (1) *South African Journal on Human Rights* 112.

[12] Paterson (n 12 above) 119

The advent of the new Constitution was a watershed moment and milestone for SA in particular for many of the previously disadvantaged citizens. However, as chapters three to five demonstrated, SA is still grappling with the apartheid legacies in the provision of basic services, such as housing, healthcare, education, electricity, water and sanitation. As a result, the efficacy of constitutional socio-economic rights in adequately addressing the problems of poverty and inequality in the contemporary SA, remains debatable, as demonstrated in chapters three, four and five of the thesis.

The analysis in chapters three to five also showed that despite the establishment and design of the Constitutional Court to oversee the project of radical transformative constitutionalism,[13] the Constitutional Court has not deployed its discretionary powers to give clear and adequate content to socio-economic rights,[14] or to require the other branches of government to justify their socio-economic policies or programs that are not in line with the constitutional mandate.[15] As a result the Constitutional Court has failed in many instances to provide appropriate relief for socio-economic rights violations, and to further the goals of transformative constitutionalism. Given the exploration of the extant CC jurisprudence and the reality at the grass roots level, the CC has not clearly established itself as the agent for transformative constitutionalism and has yet to develop the coherent substantive vision of law required by the transformative constitutionalism ethos to fight poverty and the widening inequality gap.[16] Moreover, the CC appears to have been, at least focused on legal coherence over radical legal interpretation and innovative judicial remedies taking in to account SA's historical and social context.[17]

[13] J Dugard 'Testing the Transformative Premise of the South African Constitutional Court: A Comparison of High Courts, Supreme Court of Appeal and Constitutional Court Socio-Economic Rights Decisions, 1994–2015' (2016) 26 (8) *The International Journal of Human Rights* 1132.
[14] Liebenberg (n 7 above) 447-448.
[15] LA Williams 'The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study' (2010) 3 (1) *Constitutional Court Review* 141 & Liebenberg (n 7 above) 448.
[16] Dugard (n 13 above) 1155.
[17] Dugard (n 13 above) 1155.

6.3 Significance of the Thesis Findings

The deferential approach of the Constitutional Court in many matters relating to socio-economic rights disputes are effectively undermining the goals of transformative constitutionalism, especially since the problems of inequality, poverty and deepening disaffection persist.[18] The unfortunate reality of the contemporary South African society is that poverty levels and inequality grew since the advent of the constitutional democracy post-1994.

If socio-economic transformation continues snail pace,[19] widespread protests over the lack or otherwise inadequate provision of basic commodities at the grassroots level will continue and even worsen.[20] Therefore, any transitional justice mechanism in the South African context that merely addresses civil and political rights violations without addressing socio-economic violations actually prepares the country for another round of cataclysmic upheaval as witnessed in the July unrest in 2021, where businesses were looted and inter-racial conflict took place.

Against this background, the current South African socio-economic quagmire requires more than ever that the judiciary interrogate the formulation of socio-economic rights and determine how best to interpret and enforce them to address complex and systemic socio-economic problems. Failing this, confidence in the judiciary will also decline, thereby resulting in instability and uncertainty in the law. The controversial opinion vented in a recent column penned by senior Cabinet Minister Lindiwe Sisulu relating to African judges, the constitution and independence of the SA judiciary is illustrative. As advanced by scholars and former CC Justices, such as Langa and Moseneke,[21] the controversial opinion is a matter of concern and threat to the 'transformative constitutionalism' project. While some commentators have deemed

[18] M Clark, J Dugard, F Veriava, J Duncan, K Moyo, S Plagerson, K Tissington, M UlriKsen & S Wilson 'Socio-Economic Rights: Progressive Realisation?' (2016) 67.
[19] O Fuo & A Du Plessis 'In the Face of Judicial Deference: Taking the "Minimum Core" of Socio-Economic Rights to the Local Government Sphere' (2015) 16 *Law Democracy & Development* 2.
[20] Fuo & Du Plessis (n 19 above) 3.
[21] D Erasmus 'Judge Zondo Hauls Lindiwe Sisulu over the Coals for "unwarranted attack" on African Judiciary' (12 January 2022) https://www.dailymaverick.co.za/article/2022-01-12-judge-zondo-hauls-lindiwe-sisulu-over-the-coals-for-unwarranted-attack-on-african-judiciary/ (Accessed 30-11-2022).

Minister Sisulu's opinion as probably the worst insult that has been levelled against the judiciary in a democratic SA, the present thesis agrees with other scholars that this might be an opportunity for SA to review its constitutional democracy and the government systems.[22]

Finally, the findings of the present thesis are significant in that they demonstrate that in the absence of a robust approach in the CC's adjudication of socio-economic rights claims, the lived experience of the majority of people in South Africa will remain far from equal and dignified. For example, Irene Grootboom one of the litigants in the *Grootboom* case sadly died homeless and poor, more than eight years after the CC's decision.[23] Currently, 17 million people in South Africa are still living in abject or extreme poverty and excluded from mainstream economic activity, without access to the basic necessities, such as adequate housing and sanitation for living a dignified life.[24]

6.4 Recommendations for Reform

The present thesis demonstrated the lack of a deliberate policy of mainstreaming socio-economic rights due, inter alia, to the lack of commitment and political will from the political representatives of government when exercising their legislative and institutional authority. As Clark correctly observes, SA needs to dig deep in its policy reforms effort and national programmes to achieve socio-economic transformation.[25] To achieve this, it is imperative for the courts to adopt transformative adjudication, by advancing pro-poor

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[22] Erasmus (n 21 above). The Minister said:

> What has this beautiful constitution done for the victims [of colonialism] except as a palliative (Panadol)? The most dangerous African today is the mentally colonised African. And when you put them in leadership positions or as interpreters of the law, they are worse than your oppressor. They have no African- or pan-African-inspired ideological grounding. Some are confused by foreign belief systems. When it comes to crucial economic issues and property matters, the same African cosies up with their elitist colleagues to sing from the same hymn book, spouting the Roman-Dutch law of property. Today, in the high echelons of our judicial system are these mentally colonised Africans, who have settled with the worldview and mindset of those who have dispossessed their ancestors.

M Msimang 'Lindiwe Sisulu's extraordinary attack on South Africa's Constitution' (09 January 2022) https://www.dailymaverick.co.za/article/2022-01-09-lindiwe-sisulus-extraordinary-attack-on-south-africas-constitution/ (Accessed 30-11-2022).

[23] See parts 3.4 & 3.5 of ch 3 above for full discussion.

[24] Statistics South Africa 'Five Facts about Poverty in South Africa' http://www.statssa.gov.za/?p=12075 (Accessed 31-10-2022). See also the 'World Poverty Clock' https://worldpoverty.io/map (Accessed 30-11-2022).

[25] Clark *et al* (n18 above) 67.

socio-economic change and equality, as well as entrenching and enforcing a culture of justification of power.[26]

In addressing the shortfalls of the extant CC jurisprudence, Paterson and Liebenberg argue that the true difficulty to the realisation of socio-economic rights is not that the scope and content of the particular right needs still to be determined through judicial interpretation.[27] The main challenge is that the State's failure to provide the basic commodities and services is excused if the State does not have the resources available to do so.[28]

On the positive side, the CC has carved out an important role for itself in the enforcement of socio-economic rights.[29] In the *TAC* case, the CC's jurisprudence confirmed that the Courts are not limited to declaratory or one-time remedies when adjudicating socio-economic rights claims. The decisions in *TAC* and *Juma Musjid* are a welcome affirmation of the wide powers of the judiciary to grant effective remedies, but were not without controversy.[30]

The quagmire of achieving socio-economic transformation in post-1994 SA has been compounded by the Covid-19 pandemic, that is likely to have long-lasting consequences on socio-economic rights stemming from the direct and indirect effects of ill-health and existing structural inequalities in the country. The Covid-19 pandemic reinforced the relevance of the right to an adequate standard of living through access to basic housing, health care and education as provided in the international instruments and

[26] Dugard (n 23 above) 1133-1134.
[27] Paterson (n 12 above) 118-120. K Lehmann 'In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core' (2006) 22 (1) *American University International Law Review* 194. See also S Liebenberg 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?' (2002) (6) (2) *Law Democracy & Development* 189 and Liebenberg (n 7 above) 447. See also S Liebenberg 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (2016) 19 (1) *Potchefstroom Electronic Law Journal* 3-15.
[28] Paterson (n 12 above) 118-120 and Lehmann (n 51 above) 194. See also Heywood (n 1 above) 375-376.
[29] Liebenberg (n 27 above) 189 S Liebenberg *Socio-Economic Rights: Adjudicating Under a Transformative Constitution* (2010) 132-135.
[30] *Minister of Health v Treatment Action Campaign* 2002 (5) SA 703 (CC) (hereafter *'TAC'*) para 129.

constitution. The pandemic has starkly exposed economic inequalities in SA, with the poor and vulnerable groups bearing the brunt of the crisis as a result of economic fallout from Covid-19. SA witnessed deepening hunger, loss of livelihoods and income, decreased access to education, and illness and death.[31] To mitigate the socio-economic fallout from the Covid-19 pandemic, several types of government responses ought to be put in place, including scientific based recommendations for immediate to short-term, medium-term, and longer-term measures to help mitigate human rights risks posed by the pandemic and containment measures.[32] The present thesis concurs with Mavedzenge, Albertyn and Adams, who argue that to remain afloat during and post the Covid19 pandemic, SA will need adequate and targeted fiscal support that addresses the multiple axes of inequality and poverty.[33]

In terms of other appropriate measures that should be implemented to effectively redress the socio-economic imbalances and disparities brought about by the apartheid system and alleviate poverty and inequality in current SA society, the thesis concurs with Ngang that radical social transformation must practically be achieved within the existing constitutional order and an appropriately developed legislative framework.[34] The thesis also concurs with Klare, Moseneke and Langa, who affirm that the redress and healing process from apartheid ills must be grounded in the law within the framework of transformative constitutionalism to address the complex socio-economic dynamics, such as abject poverty and inequality gaps in SA.[35]

6.5 Conclusion

This thesis has sought to test the of constitutional rights in achieving socio-economic transformation in post-apartheid SA. It has done so by examining the CC's

[31] C Albertyn & R Adams 'Introduction: Special issue on 'The Covid-19 Pandemic, Inequalities and Human Rights in South Africa', part 1' (2021) 37 (2) *South African Journal on Human Rights* 147.
[32] S Liebenberg 'Covid-19 and the Critical Importance of Achieving Socio-Economic Rights' (2 April 2020). https://www.gi-escr.org/blog/covid-19-and-the-critical-importance-of-achieving-socio-economic-rights (Accessed 30-11-2022).
[33] JA Mavedzenge *COVID-19 Pandemic and Socio-Economic Rights in Selected East and Southern African Countries* (2020) 1-6.
[34] CC Ngang 'Radical Transformation and a Reading of the Right to Development in the South African Constitutional Order' (2019) 35 (1) *South African Journal on Human Rights* 47.
[35] Ngang (n 34 above) 47-48.

extant jurisprudence on the rights of access to adequate housing, health care and (basic) education, as well as the extent to which the judiciary has acted as the agent for advancing transformative constitutionalism.[36]

The present thesis should not be read as suggesting that there has been neither progress on social transformation in material living conditions and life opportunities, nor any policies or laws targeted at redressing socio-economic imbalances and disparities in the post-apartheid South Africa. Indeed, there has been a proliferation of legislated affirmative action, education, employment equity, health care and housing programs targeted at advancing the equality and adequate standard of living as well as alleviating poverty and inequality gaps, especially along the axes of race, gender and sexual orientation.[37] However, what has become apparent is that these socio-economic initiatives failed to deliver the outcomes or results equivalent in structural and material change that matches the much celebrated transformative constitutionalism project. Regrettably, these initiatives have largely left intact the racial, economic, cultural, and epistemic hierarchies associated with colonial-apartheid.[38]

To be viable and sustainable, the redressing process through the judiciary and government policies and national programs of action must address, [39] among other things, the social patterns within the society and structurally embedded economic violations

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[36] It has done so by employing doctrinal methodology to undertake an in-depth analysis of legal doctrine, including how it was developed and applied as articulated in part 1.6 of ch 1 above, as well as chs 3, 4 & 5.

[37] S Sibanda 'When do you Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism' (2020) 24 (1) *Law, Democracy & Development* 389.

[38] T Madlingozi 'Social Justice in a Time of Neo Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 1 (1) *Stellenbosch Law Review* 123 and JM Modiri 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' (2018) 34 (3) *South African Journal on Human Rights* 303.

[39] Specifically, item 16(6) of Schedule 6 to the Constitution states:

> (a) As soon as is practical after the new Constitution took effect, all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution.'
> (b) The Cabinet member responsible for the administration of justice, acting after consultation with the Judicial Service Commission, must manage the rationalisation envisaged in paragraph (a).

Therefore, the socio-economic transformation is a constitutional imperative, which is entrusted upon Government as a branch of the State that is assigned the responsibility of developing and implementing national policy and of initiating legislation, among others.

brought about by the apartheid era. Given the extent of these developmental or institutional challenges that impede aspirations for improved well-being, it is not practically impossible to transform the lives of many disadvantaged South Africans who fall within the poverty bracket and live under deplorable conditions. All it requires is a clear, robust legal and policy framework, together with a dynamic judiciary, as well as an appropriate model to guide state-driven, socio-economic transformation in a manner that adequately addresses poverty and inequality-related vulnerabilities in SA.

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Minister of Health & Others v Treatment Action Campaign & Others 2002 (10) BCLR 1033 (CC).

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