

Patrolling the Resource Transfer Frontier: Economic Rights and the South African Constitutional Court's Contributions to International Justice

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Abstract: Coming out of the apartheid nightmare in 1994, South Africa became an immediate sovereign beacon for global justice with its path-breaking Constitution of 1996 that is the most rights-protective in the world. South Africa's Constitutional Court has garnered global acclaim for the quality of its legal reasoning and the strength of its rights-protective commitment. Decisions such as that prohibiting the death penalty under the Constitution, in a national context of growing crime rates, have inspired rights-protective legal and judicial approaches throughout the global community. This is similarly true for the Court's decisions - especially in the *Grootboom* and *Treatment Action Campaign* cases - more recently. This paper explores the Court's contributions to global justice notions through its legal reasoning in *Grootboom* and subsequent related cases. Particularly, the paper examines the Court's use of "reasonableness" as an essential element of its justiciability analysis, and asks how reasonableness here advances notions of justice regarding the particular importance to poor people in South Africa, and elsewhere, of effectively enforcing economic, social, and cultural rights as legal rights. The Court's use of reasonableness is compared with approaches on the same major issues in the reports of the United Nations Committee on Economic, Social, and Cultural Rights, which provides standards of global justice for these issues. The question here is how strongly in a justiciability analysis this Court should push its judicial authority towards having actual decisional influence on national resource priorities and allocations, including where resources are scarce. Issues and arguments are also explored as to whether the Court has done all it could do in its legal approach to these rights. Whether or not this Court 'has gone far enough' in protecting these rights, however, it has provided a model for the competence of courts anywhere to protect these rights as legal rights - notwithstanding a western legal history of strong expectations and market demands to limit them to 'aspirations.' Through principled legal analysis it has held that where great needs exist for poor people, not least those of color, judicially-enforced legal rights can provide access to critical resource transfers for their basic welfare.

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PROLOGUE AND INTRODUCTION

The judicial leadership of South Africa's able Constitutional Court under both that country's national Constitution and international law, in defining and enforcing economic, social and cultural rights for South Africans through holdings in important cases, has been prominent in the world community.² It has been both nationally and globally significant in the struggle to protect economic rights against what amounts to different shades of global economic apartheid. The Court's analytical strategies and jurisprudential approach in protecting these legal rights, in a nation of limited resources whose history and economy remain tortured by the results of comprehensive apartheid, are the focus of this article. Some assessment of the Court's work will be presented, as it has decided issues relative to protecting these rights, including justiciability, separation of powers, "minimum core" rights, "reasonableness," scope of remedial orders and judicial supervision, constitutional duties versus international legal duties, and judicial restraint versus the need to define a new role of judicial involvement in protecting and enforcing this particular category of human rights.

Assessments of the Court's work in South Africa can help us understand, among other things, the Court's contribution to global justice along this global frontier of potential resource transfers as a matter of legal rights, as these rights confront refusals from entrenched interests to modify processes of exclusive wealth and privilege. Since the global judicial potential and success on these issues contributes directly to an answer to Heilbroner's question below, judicial orders upholding and enforcing the economic rights of those petitioners before the Court generally represent a real or potential resource or wealth transfer across the fault-line to those particular poor people of color and all who are similarly situated on those issues.

Establishing and maintaining the legal existence and enforceability of international economic, social, and cultural rights is critical to realizing any system of justice in the world's organized nations and communities. Doing so is particularly critical for communities of color who are embedded in economic contexts and processes that are leveraged or dominated by Anglo-American, Western European and generally Northern Tier decision-makers and interests. Protecting and enforcing these rights under the rule of law is especially pertinent to the prominent late economist Robert Heilbroner's question of whether a global politics will evolve in the near future which realistically can promise a transfer of wealth and resources to people of poor and deprived communities of color, which will be of real meaning in bettering their lives.³

With the rise of rampant official free market ideology, of public equations drawn between money and public praiseworthiness, and the elevation of policy trends facilitating and demanding that Southern Tier nations welcome incoming multi-national foreign investment, there is much reason for pessimism about a positive answer to Heilbroner's question. All the more so because this question in the current global policy context inherently brings into play strategies by dominant power-holders that subordinate such poor communities, and create divide-and-conquer strategies aimed towards destroying the leverage needed to improve these communities by fragmenting their effective leadership, and undermining their political unity. In other words, the attempted claiming and enforcement of human rights, and particularly economic, social and cultural rights, tends to bring forward an array of the aggressive and

traditionally crude, as well as the subtle and carefully tailored strategies of race and class domination from above.

The priority to enforce these human rights has long established a global fault line between the haves and have-nots - a frontier patrolled by those interests able and willing to use all means, including violence, to prevent any meaningful transfer of wealth and resources. For example, this was the case - in systemic terms - for the assassination of Martin Luther King, Jr. in 1968 in Memphis, during his presence to support the economic rights of that city's public sanitation workers and during the last stages of his planning for the Poor Peoples' March on Washington later that same year.

That same frontier, fortunately, is also patrolled and mediated by a process of legal and jurisprudential invocations, prescriptions, enforcement, appraisals and determinations of the body of international economic, social and cultural rights under international law, intertwined as those rights may be with their constitutional and other legal analogues in any specified country.⁴ Under the principles of its 1996 Constitution, which I consider the most rights-protective in the world, South Africa, as a new nation of thirteen years, and its excellent Constitutional Court are barely holding their positions on this global fault line, as the nation struggles to rectify the embedded continuing problem of economic apartheid.⁵ It is a commonplace that this problem has long exhibited international and national strategies of racial and class deprivation, in the context of Northern Tier and allied internal pressures to define economic justice as maintaining a free market, foreign investment-friendly national economy.

The last part of this article will look at the Court's holdings in this regard in light of both differing and harmonious perspectives from the United Nations Committee on Economic, Social, and Cultural Rights (UN Committee on ESCR), which I take as indicative of international organizational perspectives about global justice standards.⁶ I do so to further understand this Court's decisions in particular cases, as they contribute to building perspectives of global justice around the enforcement of these legal rights, along the great length of, as well as across, the global fault line.

SOUTH AFRICA'S GLOBAL JUSTICE LEADERSHIP

Progress has indeed been made by the South African government and South Africans since 1994, in spite of large obstacles, towards meaningful transfer of resources across this fault line to meet the great needs of the many Black and Coloured South Africans. In this regard, South Africa has already given the world community much justice-leadership, even beyond the epochal anti-apartheid movement. It has given us the institution of the Truth and Reconciliation Commission, the philosophy of *ubuntu* to approach one's former enemies, and through the essential historic leadership of Nelson Mandela, it has recalibrated, for the guidance of peoples and states everywhere, the relationship between revenge and justice, through truth-telling, honesty, and reparations.⁷ But there is much yet to do, especially regarding economic justice.

To better understand the Constitutional Court's work, we should widen the frame of South Africa's post-1994 global justice-leadership. Archbishop Desmond Tutu has made the prophetic insight that South Africa is a laboratory for the world: if its peoples can work out ways to get along equitably, the world will directly profit by its example.⁸ This insight gains importance in

light of the historic symbiosis, not least in the matters of race long discussed by George Fredrickson and other scholars, between South Africa and the United States.⁹ This symbiotic linkage with the world's current sole hyperpower has had some positive recent consequences for the world community. They include the visibility of South Africa's advocacy of a more just U.S. policy towards Cuba, and greater visibility, especially through Mandela's observations, of the illegality of the U.S. invasion and occupation of Iraq in 2003.

However, the same symbiosis has had negative consequences in the vulnerability of a new South Africa, just getting organized in 1992-94, to American and European pressures to relinquish the ANC (African National Congress) Freedom Charter as the rightful economic map to address the monster distortions of the apartheid economy. Thus, its organizing leadership and processes of decision may have been prematurely prodded to adopt a free market, free-trade approach to national economic objectives, and a subsequently deep and vulnerable reliance on Western foreign investment to provide essential development capital for bringing the majority population of Black South Africa into the national economy on an equitably beneficial basis. More recently, though, the symbiosis has had further beneficial consequences for South African justice-leadership and the international community. Under strong national NGO leadership, it has served as a framework to define, at the opening of the 21st century, the principle that international trade law must provide, in conjunction with their human right to health, affordable essential medicines to people in South Africa and elsewhere who are HIV-infected, no matter the source of these medications. South Africa has further defined that such a right cannot be infringed by the claimed patent-protective legal prerogatives of American or other international pharmaceutical companies who originally developed such medicines.¹⁰ Thus, it is in this wider frame of the New South Africa's global justice-leadership that the leadership of its Constitutional Court in protecting economic, social and cultural rights under law must be understood.

THE COURT'S JUDICIAL LEADERSHIP

The South African Constitutional Court has taken a globally prominent leadership role in protecting economic rights in a series of major cases, beginning, for the purposes of this article, in 1997. Among these are the *Soobramoney* case in 1997, the *Grootboom* case in 2000, the *Treatment Action Campaign* case in 2002, and also the *Port Elizabeth Municipality* and *Jaftha* cases in 2004.¹¹

In each of these cases, as many South African and international commentators have already discussed, the Court recognized, developed and refined the justiciability of various economic, social and cultural rights. These decisions enabled the Court to protect these rights for South Africans as their legal rights under the South African Constitution, and also as rights under international law, notably codified by the *ESCR Covenant*.¹² In doing so, the Court aimed to ensure that these rights are protected as legal rights that are entitled, and not as discretionary executive, administrative, or legislative governmental policy contingencies.

The Court has decided these cases against a history, along with continuing practices, of much Western official and academic opposition to such justiciability, i.e. the notion that these rights are quite manageable by judicial courts, which should play an important role in interpreting and protecting them under law to individual petitioners. This history of opposition,

much of which stems from cold war perspectives on this entire body of rights as 'socialist' or 'communist,' has persisted notwithstanding the wide global scope of ratification of the above-noted *Covenant*.¹³ The United States signed this treaty in 1976, but has not yet ratified it, nor has it permitted itself as a nation to have the crucial national conversation about economic rights as legal rights as South Africa has done. The *ESCR Covenant* provides some ammunition for these rights' opponents by its textual definitions of *gradual* state duties, but still creates international legal obligations, to support and enforce them domestically.¹⁴ Nonetheless, in the intervening years, as the global demand for such legal protection has generally risen, there has been much United Nations and international narrative about economic rights protection and justiciability.

Led and supported by the Bill of Rights of South Africa's Constitution, its Constitutional Court has tackled the justiciability and related questions head-on in these cases to give these rights, as interpreted, a protected place in the law of post-apartheid South Africa.¹⁵ This is a country where the gaps between rich and poor people, which break largely along racial lines, are difficult and deep. Thus the Court has had to interpret the content of these rights in this context, which also features appreciable but limited national resources to reallocate the national wealth equitably among all South Africa's people. In doing so in its rulings, it has constantly confronted the potential of Court-ordered wealth transfers to classes of poor people, not previously agreed by executive or legislative decisions.¹⁶ If taken too far, this potential could render the Court - as with any independent national judiciary - more vulnerable to attack, by interests disposed to do so, for being anti-majoritarian and anti-democratic. The Court, clearly aware of these dangers, has faced them squarely in the cases discussed here, through several approaches of legal interpretation, emphasis, and remedies to be examined below.

THE COURT'S MAJOR CASES ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Since 1997, the Court has taken opportunities of litigation to focus on the justiciability and applicability of these rights. These major cases will now be discussed, roughly chronologically, although we will begin with *Grootboom* as the most globally prominent.

Gov of Republic of SA and Others v. Grootboom and Others

Irene Grootboom and others were living in deplorable conditions in an informal squatter settlement called Wallacedene. The conditions in this settlement were "lamentable" as one quarter of the households had no income; more than two thirds of the residents made less than R500 per month; children comprised approximately half of the settlement; and water, sewage and refuse removal were unavailable. Rather than stay in these conditions indefinitely, Irene Grootboom, who had previously applied for subsidized low-income housing from the municipality and had been on the waiting list for approximately seven years, left Wallacedene and established shelter on vacant land (now referred to as "New Rust") that was privately owned, and had "been earmarked for low-cost housing." Since the new squatters did not have the landowner's consent, the owner obtained an eviction notice, which the squatters ignored. Subsequently, the landowner obtained an order authorizing the sheriff to evict the parties and dismantle their structures.

The issue in this case is whether the measures taken by the State to implement the right of access to adequate housing, a right guaranteed under the South African Constitution, were reasonable. Under the Constitution, the Court has authority to review and rule on whether the Legislature is adequately providing the socio-economic rights guaranteed by the Constitution. Upon its review of the current Housing Program, the Court held that the measures taken by the State to provide access to housing were not reasonable, and that the State's available resources would not prevent them from establishing a reasonable Program.

The Court addresses the UN Committee on ESCR's concept of minimum core (if owed protection for these rights) and states that the UN Committee on ESCR's pertinent

general comment does not specify precisely what the minimum core is. The concept of minimum core obligation was developed by the UN Committee on ESCR to describe the minimum expected of a state in order to comply with its obligations under the *ESCR Covenant*. It is the floor beneath which the conduct of the State must not drop if there is to be compliance with the obligation. Each right has a 'minimum essential level' that must be satisfied by the State parties. . . Minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligation must be understood in international law.¹⁷

Since in a subsequent case, the Court explicitly rejects adoption of minimum core, it is noted that the Court here seems to be more open to the concept, as they state "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."¹⁸ In the end, the Constitutional Court holds that:

it is not possible to determine the minimum threshold for the progressive realization of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such right . . . In this case we do not have sufficient information to determine what would compromise 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.

The Court next turned to the important question of reasonableness. "In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the program."¹⁹ "A reasonable program therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available."²⁰ In order to be "reasonable" "each sphere of government must accept responsibility for the implementation of particular parts of the Program but the national sphere must assume responsibility for ensuring that laws, policies, programs and strategies are adequate to meet the State's obligations."²¹ "The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable."²² "A court considering reasonableness will not enquire whether other more desirable or favorable measures could have been adopted, or whether public funds could have been spent better. The question would be whether the measures that been adopted are reasonable." The policies and programs must be reasonable in their conception and their implementation.

In *Grootboom*, the Constitutional Court provides a Reasonableness Test:

In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic, and historical context and to consider the capacity of institutions responsible for implementing the Program. The program must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium, and long term needs. A Program that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the Program will require continuous review.²³

The Court makes clear that the government has a thorough, well-funded policy and program on the housing problem in South Africa. At the same time the Court finds that "there is no express provision to facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition. These people are in desperate need."²⁴ Additionally, the Court characterizes reasonable measures as those which take into account "the degree and extent of the denial of the right they endeavor to realize. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realization of the right."²⁵ With respect to the "reasonableness within available resources," the Court states that the Constitution "does not require the State to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of the resources."²⁶

In offering a remedy to Mrs. Grootboom and the other individuals, the Court does not provide applicants with immediate access to housing. "Neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand.... However, section 26 does oblige the State to devise and implement a coherent, coordinated program designed to meet its section 26 obligations."²⁷ "It is necessary and appropriate to make a declaratory order. The order requires the State to act to meet the obligation imposed upon it by Section 26(2) of the Constitution. This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need."²⁸ The Constitutional Court acknowledges that Grootboom and others are living in deplorable situations, but states that there are thousands in South Africa in the same situation. Also, the Court states that Grootboom was involved in land invasion and although the province did not properly hear her case or treat her appropriately, the Court is not prepared to approve "any practice of land invasion for the purpose of coercing a state structure into providing housing on a preferential basis to those who participate in any exercise of this kind."²⁹ The Constitutional Court disagreed with the High Court's determination below that the State discharged its obligation to applicants under section 26. The High Court had held that, since section 26 does not require the State to provide applicants with minimum core entitlements, the State fulfilled section 26 by enacting reasonable legislative and other measures within its available resources, devising housing legislation in the national and provincial spheres, and targeting low-income earners regardless of race.³⁰ The High Court stated that a national provision for the desperate is not a necessary consideration in the

reasonableness of a policy, and that such provision would detract from integrated housing development as defined in the Act.³¹

Upon its review on appeal, however, the Constitutional Court found the state's policy unreasonable in that it failed to provide immediate or temporary relief for those in dire need, especially in light of the severe and indefinite nature of the housing shortage. The Constitutional Court criticized the Program as lacking an express provision to facilitate access to temporary relief for people in desperate need of access to land and shelter, and for people in crisis because of a natural disaster or because their homes are under threat of demolition. While the Constitutional Court stated that the Program is not necessarily haphazard, it questioned whether the measures are reasonable under the Constitution and deemed it not "sufficiently flexible to respond to those in desperate need in our society and to care appropriately for immediate and short-term requirements."³² The next case features facts which define a somewhat different relationship between immediate need and a justiciable right.

Soobramoney v. Minister of Health, KwaZulu-Natal

Appellant is a 41-year-old unemployed man, who is diabetic and suffers from ischaemic heart disease and cerebro-vascular disease which has caused him to suffer a stroke. His condition is irreversible and is in the final stages of chronic renal failure, but his life could be prolonged by regular renal dialysis (treatment two to three times per week). This patient has been receiving dialysis treatment from private hospitals and doctors, but can no longer afford the treatment. The hospital does automatically provide resources for patients who have acute renal failure. However, patients suffering from chronic renal failure must qualify for treatment under a special hospital Program. The primary requirement under the Program is that a patient be eligible for a kidney transplant. Due to this appellant's ischaemic heart disease and cerebro-vascular disease, he is not eligible for a kidney transplant and therefore does not qualify for the Program.

Appellant brings claim under section 27(3) of the Constitution which provides that "no one may be refused emergency medical treatment" and section 11 which requires, "everyone has a right to life." He does not argue that the guidelines issued by the Hospital (or the State) are unreasonable or not applied fairly or rationally as the Court states, "it has not been suggested that these guidelines are *unreasonable* or that they were not applied fairly when the . . . appellant did not qualify for dialysis."³³ Rather, appellant contends that patients such as himself, who suffer from terminal illness and require treatment to prolong their lives, are entitled to treatment provided by the state, including funding and resources.

Thus, the issue in the case is whether all patients who suffer from terminal illnesses and require treatment to prolong their lives are entitled, in terms of section 27(3), to be provided with such treatment by the State, and whether the State "is required to provide funding and resources necessary for the discharge of this obligation."³⁴ The Court rules against appellant's contention, finding that "it would make it substantially more difficult for the State to fulfill its primary obligations under 27(1) and (2) to provide health care services to 'everyone' within its available resources. It would also have the consequence of prioritizing the treatment of terminal

illness over other forms of medical care and would reduce the resources available."³⁵ While the State has a constitutional duty to comply with the socio-economic obligations imposed on it by the sections of the Constitution, the appellants were unable to show that the State's failure to provide renal dialysis facilities for all persons suffering from chronic renal failure constitutes a breach of those obligations.

The Court distinguishes this patient's case from a person in need of "immediate medical attention" or a person in an "emergency" and states that in order "to be kept alive by dialysis he would require such treatment 2 to 3 times a week. This is not an emergency which calls for immediate remedial treatment."³⁶ Then the Court rejects the appellant's contention that the Court should tell the legislature how to spend the budget. "These choices [about funding of health care] are difficult decisions to be taken at the political level in fixing the health budget and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."³⁷ The Court addresses the appellant's contention that nurses should be offered overtime hours and hospitals stay open later to handle the patients. Ultimately, the Court rejects the expenditure of additional resources and states,

If all persons in South Africa who suffer from chronic renal failure were to be provided with dialysis treatment. . .the cost of doing so would make substantial inroads into the health budget. And if this principle were to be applied to all patients claiming access to expensive medical treatment or expensive drugs, the health budget would have to be dramatically increased to the prejudice of other needs which the State has to meet.³⁸

The next case leads the Court to further refine the relationship between constitutional criteria of reasonableness and the creation of a workable remedy under the right.

Minister of Health & Others v. Treatment Action Campaign (TAC)

The applicants in *TAC* challenged the Government's Program for the prevention of mother-to-child transmission of the HIV virus. The Program only made Nevirapine (NVP), a drug used to prevent the transmission of HIV between mother and child, available to two pilot sites per province, one urban and one rural. A public sector doctor, who was not in one of the pilot sites, was unable to prescribe the drug to his patients. NVP was given free-of-charge to the South African government. However, the government would be required to spend money on infrastructure, training, counseling and other related services in conjunction with their comprehensive Program.

The issue at bar is whether the Government's Program, which offered NVP on a limited basis, sufficiently satisfied their obligations as stated by the South African Constitution.³⁹ In deciding this issue, the Court clarifies its position on Minimum Core from *Grootboom*. The Court states, "There is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the State are reasonable; the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them."⁴⁰ Minimum core was thus treated as possibly being relevant to

reasonableness under subsection (2) and not as a self-standing right conferred on everyone under subsection (1). The Court further adds, "It is impossible to give everyone access to even a "core" service immediately. All that is possible, and all that can be expected of the State, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis."⁴¹ "It should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make wide-ranging factual and political enquiries necessary for determining what the minimum core standards called for by the [amici pleadings] should be, nor for deciding how public revenues should most effectively be spent."⁴²

The Court must determine whether the legislature's actions were reasonable, stating that "the state is obliged to take reasonable measures progressively to eliminate or reduce large areas of severe deprivation that afflict our society." Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance. The Court uses the *Grootboom* model for determining reasonableness which requires that the program for realization of the economic right be: "balanced and flexible and make appropriate provision for attention to crises and to short, medium, and long term needs. A program that excludes a significant segment of society cannot be said to be reasonable." Thus, the Court held that the government's policy was unreasonable as it was inflexible in that it "denied mothers and their newborn children at public hospitals and clinics outside the research and training sites the opportunity of receiving a single dose of NVP at the time of the birth of the child."⁴³ The Court agrees with the government that there is significant cost in creating a comprehensive drug program that provides many useful services to women. However, such services are not being challenged here. Rather, it is the ability to have access to a single dose of NVP. Since, that dose of NVP is free to the State, the cost is not an issue and is within the available resources of the state.

The Court required the government to immediately remove the restriction that NVP would not be available at hospitals and clinics other than the research and training sites. Once this is done, the government should devise and implement a more flexible and comprehensive policy. However, they do not afford everyone the right to NVP. The Court also urged the government to make NVP available in more locations immediately stating, "the steps that [must] be taken to comply with the order. . . should be taken without delay."⁴⁴ The Court, though, reversed the lower court decision and did not require the State submit a revised policy that would be consistent with their decision, despite admitting that the court possessed supervisory authority and had the power to require such behavior.

The next case presents a collision between a different socio-economic right and long-held property law doctrine.

Jaftha v. Schoeman and Others; Van Rooyen v. Stoltz and Others

The appellants in these cases (two cases were consolidated into single matter) were two women. Both women, Jaftha and Van Rooyen, were single, impoverished mothers who had both acquired their homes from State housing subsidies. Should they lose their homes pursuant to a sale-in-execution, these women would be barred from receiving future state assistance.

Jaftha had two children and suffered from serious heart problems. Unable to continue payments on a loan for R250, she was forced to vacate her property following a sale-in-execution for R5000 which was permitted pursuant to section 66(1)(a) of the Magistrates' Courts Act 32 of 1944.⁴⁵

The other applicant, Van Rooyen, was an unemployed mother of three. Similarly, her home was sold-in-execution for R1000 and she was forced to vacate when she purchased vegetables on credit for approximately R190 and was unable to make her payments. It should be noted that in both cases the amount in debt was very small and the sale of the house to satisfy the small debt was considerably larger. Also, the proceedings were instituted and conducted almost entirely by the creditor or a private party. The State's function in the eviction was issuing and/or authorizing the judgment order on behalf of the debtor, as compared to *Grootboom* where the state failed to provide housing.

The issue at bar is whether the section 66(1)(a) of the Magistrates' Courts Act 32 is unconstitutionally overbroad by allowing a person's right to have access to adequate housing, a constitutional right protected under section 26(1) of the Constitution, be taken away even in circumstances where it is unjustifiable and thereby removing their security of tenure. The Constitutional Court holds that section 66(1)(a) is unconstitutional to the extent that sales-in-execution may be permitted even when not justifiable. That Court overrules the High Court and holds that the State *has* a negative obligation with respect to guaranteeing the rights in section 26.

The Constitutional Court first provides a brief review on the Constitution's protection of socio-economic rights, holding that "any claim based on socio-economic rights must necessarily engage the right to dignity. The lack of adequate food, housing, and health care is the unfortunate lot of too many people in this country and is a blight on their dignity. Each time an applicant approaches the courts claiming that his or her socio-economic rights have been infringed the right to dignity is invariably implicated."⁴⁶ The Court comments on the particular importance of housing, citing the UN Committee on ESCR's view that "security of tenure takes many forms, not just ownership, but that all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."⁴⁷ Then the Court provides a historical review of "security of tenure" and its influence on section 26. It significantly discusses the history of "forced removals and racist evictions in South Africa," including how "the focus on security of tenure in section 26 of the Constitution marks an intention to reject that part of our history where invasive legislation was used to remove people from their lands and homes forcefully and to intimidate and harass with senseless eviction rendering them homeless."⁴⁸ "The situation under apartheid demonstrates the extent to which access to adequate housing is linked to dignity and self-worth."⁴⁹ Section 26 speaks directly to the practice of forced removals and summary evictions and the section is aimed at "creating a new dispensation in which every person has adequate housing and in which the State may not interfere with such access unless it would be justifiable to do so."⁵⁰ Finally, the Court is very clear and concise when it states that "the underlying problem raised by the facts of this case is not greed, wickedness or carelessness, but poverty."⁵¹

In *TAC*, *Grootboom*, etc., the applicants were claiming a *positive obligation* on the State to provide access to the socio-economic rights guaranteed in the Constitution. Contrary to those cases, *Jaftha* presents a situation where the applicants are arguing the State has a "negative

obligation under 26 [which] is not to prevent or impair existing access to adequate housing."⁵² The applicants argue that the positive obligation only applies to the State whereas the negative obligation to the right applies to everyone, including State and private individuals.⁵³ The applicants further argue, rather successfully it seems, that where the positive obligations are subject to progressive realization, such is not the case with respect to negative obligations, as they currently have their homes and it is the State's duty to protect their right of access.⁵⁴ In its holding, the Court holds that Section 26 does create a negative obligation on the State. In order for a measure to deprive a person of an existing access to adequate housing, that measure must be justified under section 36 of the Constitution.⁵⁵ The Court holds that the "fact that trifling debts can lead to sales-in-execution is not relevant to the question of whether the right to adequate housing has been limited by section 66(1)(a) but is relevant to the justifiability of this particular measure."

The Court ultimately finds the measure in *Jafftha* to be unreasonable and unjustifiable in deprivation of access to housing. The Court states, "it is difficult to see how the collection of trifling debts in this case can be sufficiently compelling to allow existing access to housing to be totally eradicated, possibly permanently, especially when other methods exist to enable recovery of the debt."⁵⁶ The Court does not create a bright line rule that taking someone's home to cover a debt would never be justifiable, and they offer these factors to be considered, including the circumstances in which the debt was incurred, any attempts made by the debtor to pay off the debts, the financial situation of the parties, the amount of the debt, whether the debtor is employed or has a source of income to pay off the debt, and any other factors relevant to the particular facts of the case.

The Court's remedy is to institute a more comprehensive and flexible form of judicial oversight over the execution process. Previously, judicial oversight only occurred at the first stage of the debt recovery process, where the creditor seeks the judgment.⁵⁷ Hereafter, the Court adopts the appellant's suggestion and holds that if a creditor wants to satisfy a judgment by executing immovable property of the debtor, they must go in front of the Court in order to get a special execution order "only if the circumstances of the case make it appropriate."⁵⁸

Section 36 of the Constitution provides an analysis of circumstances in which such a special execution order may be appropriately granted:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors including the nature of the right, the importance of the purpose of the limitations, the nature and extent of the limitation, the relations between the limitation and its purpose; and less restrictive means to achieve the purpose.

The Court states that, of the factors that section 36 enjoins the courts to consider, the nature of the right and nature and extent of the limitation are of great importance when weighed against the importance of purpose of the limitation.⁵⁹

This final case continues to confront the legacy of apartheid as related to the constitutional right to access to housing.

Port Elizabeth Municipality v. Various Occupiers

The respondents in this case comprise sixty-eight people, including twenty-three children, who have been occupying twenty-nine shacks, for between two and eight years, on privately owned land, which is within the Municipality, the applicant. The Municipality sought eviction of the occupiers in response to a petition by the people in the neighborhood. The occupiers agreed to leave the land if the Municipality provided them with suitable alternative land. The Municipality suggested Walmer, which the occupiers rejected as it is crime ridden and "unsavoury," and also because they faced possible eviction there.

The Court gives a detailed background of racism and segregation in South Africa and how the housing laws were established and enforced to foster such views. The Prevention of Illegal Eviction (PIE) and Unlawful Occupation of Land Act 19 of 1998 replaced The Prevention of Illegal Squatting Act, 52 of 1951. PIE was adopted with the "manifest objective of overcoming the abuses and ensuring that eviction in the future took place in a manner consistent with the values of the new constitutional dispensation."⁶⁰ The Act decriminalized squatting and the eviction process was made subject to a number of requirements, some in compliance with the Bill of Rights. The new system instituted "humanized procedures that focuses on fairness to all. People once regarded as anonymous squatters now became entitled to dignified and individualized treatment with special consideration for the most vulnerable."⁶¹ The court's new role was to "hold the balance between illegal eviction and unlawful occupation" with the new law guiding "them as to how they should fulfill their new complex and constitutionally ordained function: when evictions were being sought, the courts were to ensure that justice and equality prevailed in relation to all concerned."⁶² The issue in this case is whether the Supreme Court of Appeal properly applied PIE, and thus whether their order overruling the eviction order should be upheld. The Court affirms the decision of the lower court and denies the appeal.

This case turns on "establishing an appropriate constitutional relationship between section 25 dealing with property rights, and section 26, concerned with housing rights."⁶³ The State has a duty to satisfy both the land (property) rights and the socio-economic rights (as stated in *Grootboom*). There are three ways the Constitution approaches the interrelationship between land hunger, homelessness and respect for property rights. The Court considers that "the rights of the dispossessed in relation to land are not generally delineated in unqualified terms as rights intended to be immediately self-enforcing," that the Constitution acknowledges that "eviction of people living in informal settlements may take place, even if it results in loss of a home," and notes an emphasis on the need to seek concrete and case-specific solutions to the problems that arise.⁶⁴ Therefore, the role of the Court is to "balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case."⁶⁵

An action for eviction may be brought by the State or the owner of the property, and different factors will be considered. This case is brought by the State and eviction requires that, the court may grant such an order:

(1) if it is just and equitable to do so, after considering all the relevant circumstances and if it is in the public interest to grant such order; (2) the public interest includes the interest of the health and safety of those occupying the land and the public in general; (3) In deciding whether it is *just and equitable* to grant an order of eviction, the court must have regard to: (a) the

circumstances under which the unlawful occupier occupied the land and erected the building or structure; (b) the period the unlawful occupier and his/her family have resided on the land; and (c) the availability to the unlawful occupier of suitable alternative accommodation or land.⁶⁶

The Constitutional Court makes it clear that the three factors listed are not the only circumstances that a court should look at in determining whether the eviction is just and equitable; the Court suggests that courts should also examine the "vulnerability of occupiers" (as stated in section 4, the elderly, children, disabled and households headed by women). Further, it is stated that what is just and equitable "could be affected by the reasonableness of offers made in connection with suitable alternative accommodation or land, the time scales proposed relative to the degree of disruption involved, and the willingness of the occupiers to respond to reasonable alternatives put before them."⁶⁷ Each decision should depend on the specific facts of the case.

The Court's analysis of the facts and the law are as follows: the Municipality clearly meets the first part of PIE as the occupiers built the shacks on privately owned land without consent of the owner; the land owners admit that the land is vacant and it is clear that they are not using the land for productive purposes; most of the occupiers have been there for a long period of time; and some of the children attend nearby schools and the parents work close to the land. The Court takes note of the alternative land suggested by the Municipality, but however notes that the Municipality has not discussed with the occupiers what their interests are, and further the Court states the obvious problems of safety and distance of the suggested locales. Also the Municipality fails to determine whether Walmer can be safe and permanent. The Court angrily rejects the Municipality's contention that instituting a four-peg housing program adequately accommodates the homeless families. The Court cites *Grootboom* and states that when a municipality tries to evict a party they must comply with the Constitution and fulfill their obligation to housing. Due to the factors listed above, specifically the time that the occupiers were on the land, the lack of use of the land and the absence of any significant attempts to find more suitable land, the Court affirms the lower court.

THE COURT'S USE OF A REASONABLENESS ANALYSIS IN THE FOREGOING CASES

In analyzing these cases regarding protecting the pertinent socioeconomic rights as primarily constitutional rights, but also international human rights, we see that Reasonableness as a doctrine allows the Court:

- to find that a government program addressing the content of the constitutional international human right is constitutionally sufficient, without providing immediate remedy, or the known needs of petitioners before the Court;⁶⁸
- to assess the relationship of a government program to a person's constitutional right under an independent, essential value of reasonableness, with Court controlling the latter's legal definition, and its elements of comparative reasoning if any;
- to thus independently examine the details of any challenged South African government program and its merits;
- to examine the government program and the person's right in full context, including the person's need in a socio-economic context, and in the national context of resources

available to the government, plus the scope of different national needs among which the government decides priorities for allocating its total national resources, and to give more legal weight to the latter;

- to *not* define minimum core right for any constitutional/human right as a separate source of legal entitlement to the person/petitioner. Instead, the Court can use the facts of desperation and comparatively severe deprivation elements of minimum core regarding the person and her group, in social context, as one or more analytical factors (whether the government program addresses these elements of deprivation sufficiently) in assessing the reasonableness of the government program addressing that constitutional right (e.g. to housing). Thus, the Court may find the program reasonable or unreasonable without ordering an individual remedy for petitioner's known needs;
- to have a doctrine which is both contextual and absolute (reasonableness) which can be applied by the Court to all legal elements of any constitutional right *as a defining judicial trope* to administer and oversee the South African government's duty (both constitutional, and international under the *ESCR Covenant*) of "progressive realization" of all pertinent rights, regarding any person or group who may claim to enjoy benefit from any among those rights;
- to support the government as a defendant where it says: "My program with its national focus on implementing the right is *connected* to the lack of needed resources for a petitioner/person with the same constitutional/human right, even causally connected, but whether my program is reasonable or unreasonable, I am not legally liable for harm to that person because my program failed to address or give individual help to her for her admittedly severe (deadly) problem defined by the same constitutional/human right;
- to determine under what facts and contexts the Government is obligated to give children's rights/needs immediate and targeted attention, e.g. *TAC*; and
- to portray a finding under the reasonableness doctrine as both a declaratory judgment - e.g. validating the government program - or either as a basis to order a specific petitioner's remedy, or not, but in any case as a basis from which to address the issue of petitioner's individual remedy.

Thus, reasonableness, as a central part of its application-of-the-right analysis, enables the Court to control the flow of resource-transfers to poor people of color, under the particular national and global right, across the fault line. The Court exercises this control in the cases brought to it, and also through its national *stare decisis* authority.

But reasonableness here also enables the government to interpret its constitutional/international duty (within latitudes) to "progressively realize" the economic right within its national jurisdiction. It does so through programs which fail to immediately, or even through the medium term of time, transfer new economic resources to clearly deprived poor persons. In thus asserting its reasonableness, the government is allowed to maintain the fault line between 'haves' and 'have-nots' at the *status quo*. It is allowed to do so by saying under law to deprived citizens, "my programs are linked to your continuing deprivation, that you are entitled to have meaningfully met, but I am not liable for your continuing deprivation, nor for frustrating your entitlement to relief under your economic rights."

Enmeshed in these strictures of reasonableness across the fault-line, the Court has a dilemma in protecting socio-economic rights. It can continue to declare deficiencies in, or declare the reasonableness of government rights-implementing programs, but without changing their resource-transfer potential. It will thus implicitly accept the *status quo* fault-line, and in doing so help, even unintentionally, to embed it into South African constitutional law, and into global international human rights judicial precedents on these issues. Alternatively, the Constitutional Court might more actively and frequently exercise its remedial authority through judicial orders that immediately transfer some resources to petitioners according to the urgency of their deprivation, and orders which also continue to monitor both "reasonable" and "unreasonable" government programs to ensure progressive, but real resource-transfers to the same categories of deprived people under the particular economic, social or cultural right. This path implies that the Court must move towards minimum core right notions for each economic right, and towards a bolder interpretation of its own authority of judicial review.

THE COURT'S HOLDINGS AND ANALYSIS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THESE CASES IN LIGHT OF STANDARDS OF GLOBAL JUSTICE

If we look at the comments and deliberations over the past decade of the UN Committee on ESCR, and further do so in light of pertinent issues raised by international legal commentators to the above cases handed down by the South African Constitutional Court, we see that, arguably, perspectives of global justice on the justiciability and application of economic, social and cultural rights reflect several issues.⁶⁹ One is the inclusion in the legal definition and application of minimum core rights to serve as the basis of immediate individual remedies for deprived persons petitioning the court when the state is found in violation of the right regarding them.⁷⁰ They are owed that remedy, in some tangible measure, irrespective of the availability of resources to meet it.

A second such issue, relative to the Court ordering a remedy as opposed to merely declaring that the government has violated the petitioner's economic rights, goes to the Court in its remedial orders maintaining continuing supervisory jurisdiction over the government's actions and over "progressive realization" of the petitioner's right-fulfillment, to ensure that the remedy as delivered continues to meet the essential requirements of the right. A third such issue goes, in light of the two foregoing issues, to the Court perhaps perceiving that a first phase of its work has been done, in establishing the justiciability of these rights, within the framework of constitutional separation of powers notions in South Africa and the Court's concern not to substantially modify national allocations of limited resources for meeting the spectrum of these rights and other national needs. The Court may now perceive that its obligations must enter a necessary second phase, that of deciding economic rights cases somewhat more boldly. It would do so by seeing them as not merely presenting petitioners' legal demand and need to protect their economic rights under constitutional and international law, but perhaps more so by the Court's moving, as one scholar put it, to "exercise the full transformative possibilities of the doctrine of judicial review."⁷¹ In doing so, it might address more directly and affirmatively the impact that its remedial orders protecting these rights would have on national executive and legislative decisions allocating and prioritizing the necessary national resources. It might do so by more heavily invoking certain established principles in this area of international human

rights law, such as the juridical equality of international economic, social and cultural rights and their application with international civil and political rights. The Court could thus certify that all of the judicial strategies that are available to enforce, the latter must also be applied to enforce the former economic rights. It might do so by rulings that clarify and interpret the principle of judicial review in its own national jurisdiction to include the Court's authority, in its ongoing constitutional relationship with other branches of the central and local government, to make remedial rights-protective orders, based on minimum core notions, as part of the Court's "saying what the law is," without unconstitutionally trespassing on the defined prerogatives of the national executive and legislative branches.

FURTHER REFLECTIONS IN THIS REGARD ON THE COURT'S HOLDINGS

The South African Constitutional Court in these cases has indeed looked, or at least glanced, towards a wider judicial role in protecting these rights, but generally without formally holding as such. It has, for example, invoked the principle that the Bill of Rights under the South African Constitution applies to *all law* and to all organs of state and government. It has also invoked the constitutional principle of 'accountability' which generally frames the positive duty on the state to protect the right.⁷² These invocations recall, *inter alia*, Grotius' natural law premise for international law that no sovereign or international actor can escape the normative and therefore legal assessment of its acts and their consequences, and that such assessments must be made.⁷³ On the other hand, in *Soobramoney*, the Court basically held that economic, social and cultural rights *per se* are limited, including the Court's competence to make remedial orders, by the lack of programmatic and state resources.⁷⁴

The Court has glanced towards minimum core notions of economic rights, and indicated that it sees this notion as related to its own assessment of the reasonableness of the government's program which addresses a rights-deprivation problem.⁷⁵ It has employed reasonableness as a standard to assess the South African state's providing access to the Constitution's socio-economic rights on a progressive basis.⁷⁶ But reasonableness here may limit the scope and numbers of deprived persons who have legal access to the economic right and its protections. The Court seems to be aware that it must push forward its decisions regarding each such right towards protectiveness, but whether it is doing so at the faster rather than slower affordable speed remains a question. More than one international commentator has expressed understanding that this Constitutional Court, in a young democratic state in defining the justiciability and applicability of this class of rights, was understandably erring on the side of caution, at least for the present time.⁷⁷

In *TAC*, the Court did define its remedial authority as including the competence to issue a mandatory and not merely a declaratory order as against other government organs, upon the Court's finding of the unreasonableness of a government economic rights program. Its holding here was related to its expressed concern for the deprivations facing children in the context of this case, and its finding that definite issues arose regarding children's rights and their protection. But the Court also held in this case that it was impossible to grant everyone needing it an immediate, in effect, core right remedy. The State's duty must be defined as to act to provide access to socio-economic rights under the Constitution.⁷⁸

In the *Grootboom* case, the Court did respond to the notion of minimum core right as an obligation of South Africa, and each State party to the International Covenant on Economic, Social and Cultural Rights, in connection with the Court's constitutional duty to take international human rights into account in deciding pertinent Bill of Rights cases.⁷⁹ As noted previously, the UN Committee on ESCR, along with several international commentators, has held in its Comments that minimum core is an essential notion in the legal definition of any of these rights and in their effective local application.⁸⁰

The South African Constitutional Court rejected the notion of minimum core, on the grounds, *inter alia*, that the Court does not have available to it "many years" of annual States' reports on meeting their obligations under the *ESCR Covenant*, and the information therein, which is available to the UN Committee on ESCR. It therefore has insufficient information to determine the legal definition of minimum core regarding the principles of the South African Constitution. Moreover, it is not necessary to determine minimum core in the first instance. And further, minimum core must depend on the Court identifying petitioners' needs and opportunities for the enjoyment of a particular economic right.⁸¹ In this connection the Court held, somewhat differently than it would in *TAC*, that children and the invocation of their rights cannot trump the Court's careful legal reasoning on the basic economic right before it - in *Grootboom*, the right of access to housing. There are no separate children's rights in this regard. The Court's findings on governmental reasonableness will both be affected by, and will help determine petitioner's right relative to available national resources.⁸²

Taking a cue from systems of legal equity, individualized remedies somewhat tailored to personal/group needs and potential harms in detailed context, have long been seen as an important priority of courts doing justice under the rule of law. If so, the tension facing the Court here is clear, when it refuses to order individual remedies to a rights-holder who is faced with a government program that, for whatever reason, cannot deliver rights-benefits to her, notwithstanding her clear, even desperate need and facial rights entitlement. Whether a finding of lack of programmatic or national resources, judicially administered through a doctrine of reasonableness satisfactorily resolves this tension is a separate issue. It is especially so, since the ICESCR Committee and some international scholars appear to argue that the requirements of global justice - the Court also being an international, as well as a national tribunal - would be better met if the entire judicial equation on the application of justiciable economic rights were pushed more towards judicial orders for individual remedies for rights-holders presenting severe rights-related deprivations.⁸³

The argument, in one form, is that the notion of minimum core right should be applied as a basis of the Court's defining an individual right in context and an appropriate order for a remedy. Doing so would be consistent with protecting all classes of human rights as individual rights, and also with the State duty for "progressive realization" of the right. It could be administered in context of limited national resources. If a human right cannot be applied to relieve the most distressed rights-holders in their own context, the right is directly violated.

Let us further consider the Constitutional Court's response to this global justice demand. Part of the global constitutive aims of the international human rights process, regarding national legal human rights decisions in any state, is to both recommend and contextually provide more rights-protective solutions than national laws might regularly feature. The same

aims also include sheltering under that process's international authority and legitimacy any national institution or leader who, in the name of rights-protection of vulnerable peoples, push their own national legal economic and political envelope (at the risk of local retaliation) to move under law in that direction.⁸⁴

Our assessing the Court's work here under a standard of global justice demanding more individual local rights protection can be taken as a suggestion, added to others, for the Court to push, *inter alia*, its definitions of judicial review and its concepts towards wider interpretation of its own constitutional authority to incorporate principles and interpretations of international human rights law in its protecting economic rights of local people. Likewise, our assessment of the Court's work comprises a solid prediction that if the Court rises even further in its jurisprudence towards individual rights protection within limited national resources, this will help build a national resource of rights-protected citizenry who believe their dire needs will be met under the rule of law. The Court will gain new international legitimacy, new local legitimacy and wider recognition of its judicial leadership. Under the feedback of global interdependence, this international judicial recognition will provide protection for the Court and South African judiciary within South Africa, not least among vulnerable people of color still confronting apartheid's legacy.

Indeed, there are concrete indications that there is mounting pressure regarding these questions being put on the Constitutional Court, through South African academic commentary and criticism of the Court and its use of the doctrine of reasonableness in its *Grootboom* line of cases. This pressure is demanding the Court to more directly affirm the application and enforcement of the Constitution's economic, social and cultural rights regarding petitioners in specific cases by first, moving further towards adopting a judicial interpretation of these rights that each includes a minimum core of entitlement for all qualified persons, who must include those petitioners whose contextual lives and circumstances the Court finds to be dire, desperate and long-standing regarding the right. And second, the demand is for the Court to frame remedies for violation of these rights that are individual-based in giving at least some immediate relief, especially to those rights- petitioners whose circumstances are the most deprived, and to issue appropriate judicial orders to enforce and monitor the carrying out of those remedies.

Thus, Professor Richter, writing in 2006 on the constitutional/human right to access to social security of people living with HIV/AIDS, considers the constitutionality of the pertinent government act under the constitutional right, government policy, and socio-economic rights jurisprudence. Finding that the Court in *Grootboom* and other related cases needs to be more pro-active on these issues, she concludes that the Court has focused on these cases using administrative standards rather than taking a more substantive approach to the application of these rights. She critically discusses *Grootboom's* reasonableness standard regarding the availability of national resources and its addressing the needs of those persons in crisis, including *Grootboom's* rejection of the minimum core concept. And she suggests that the Court could better "supervise" legislative actions in this regard, within legitimate separation of powers parameters.⁸⁵

Additionally, Professor Pieterse, also writing in 2006 on socio-economic rights and constitutional entitlements to health care services, indeed notes and approves that the Court has

widened its use of the doctrine of reasonableness in these cases in the direction of upholding equality-based entitlements to share in the benefits of socio-economic laws and policies, and entitlements to meaningful access to socio-economic amenities. He notes that a minimum core approach may not be the only, or even the best way for the Court to protect such entitlements. But he argues that the Court should expand further its reasonableness approach by the recognition of more positive entitlements, in appropriate circumstances, and that this could be done within the ambit of reasonableness. The Court hinted as much in *TAC*, and such entitlements should be explicitly articulated and developed. He goes further to argue that minimum core is consistent, properly interpreted, with reasonableness, but it was not properly interpreted in *Grootboom*. Indeed *Grootboom* hewed too closely to administrative law-like standards, and the Court must look beyond this approach to reasonableness towards developing an entitlement-oriented approach to health-related rights.⁸⁶

Finally, there is some indication that the Court is hearing these criticisms and working out among its Justices, a yet incomplete process, how best to refine its approach towards the application and enforcement of these rights. For example, in its 2006 *New Clicks* case, the Court reviewed the authority and work of a Pricing Committee under ministerial authority, and its pricing system for medicines relative to the viability of pharmacies throughout South Africa as that affects the constitutional(/human) right of South African people to access to health care.⁸⁷ Although Chief Justice Chaskalson did seem to take an administrative law-review approach to the work of the Pricing Committee, and the Court did find and order several regulations in this program to be amended, other Justices, while concurring, revealed a degree of tension within the Court about its best approach regarding the possible infringement of the constitutional right embedded in these facts, compared to the role of the Legislature.

Notably, Justice Sachs defined the legislative obligation to integrate the rule-making functions of a governmental program with the administrative functions of implementing the rules. If the legislature does not integrate these functions, the Court under doctrines of judicial review must do so and strike the proper balance. It must do so because the Court must ensure that constitutional principles are integrated in both functions, under its wider duty to subject all public power to judicial assessment under the Constitution, and in recalling the legacy of apartheid's control through unjust and confining administrative regulations. Thus what is at issue in this case, and in similar cases, is not the reasonableness of the original legislation, but the reasonableness of the manner in which it is given effect. Reasonableness today derives in part from the Constitution, which governs the manner in which statutes must be applied. It must be used by the Court to assess this entire spectrum of decision making, and must be heavily dependent on the nature of the interests at stake in each particular instance than on the labels to be attached. And further, when reasonableness is considered, it becomes particularly important to ensure that vulnerable sections of the population are protected. The discretion of the rule-makers becomes attenuated to the degree that the fundamental rights of the people who are most disadvantaged are affected.⁸⁸

It may therefore be suggested that Justice Sachs would push the Court in the general direction on reasonableness suggested above by Professor Pieterse relative to enforcing economic, social and cultural rights for South Africans. Justice Sachs, however, seems to emphasize that the enforcement of these rights, through the correct notion of reasonableness, is

so central to the Constitution, and to the Court's duty to guard its rights, that the Court's decisions in this area must be thoroughly grounded in constitutional jurisprudence and doctrine that are adequate to dispense justice to the most vulnerable people.

Conclusion

The question of the justiciability of economic, social, and cultural rights provides an opportunity for wealth and resource transfers to poor and vulnerable people of color, which are sorely needed in South Africa and globally. Post-apartheid South Africa has shown great global justice leadership in its rights-protective Constitution, its institutions of truth and reconciliation, and in the work of its Constitutional Court to date in confirming the justiciability of economic, social, and cultural rights under its Constitution and also under the International *ESCR Covenant* under international law as a treaty which South Africa has signed, and in defining and protecting those rights as legal rights to entitled persons.

Since 1997, the Court has particularly done so in three major cases, and two others worthy of mention, involving deprivations to vulnerable people of color related to the entitlements which various among these rights arguably guarantee, particularly the right to housing and the right to health.⁸⁹ Faced under both international law and the South African Constitution with legal definitions of states' duties regarding these rights in terms of 'progressive realization' of those duties, the Court has embedded in its holdings in these cases a flexible and judicially protective doctrine of reasonableness under which to assess the state's duty to any given petitioners, in social and economic context, regarding its policies addressing petitioners' deprivations, and as to petitioners' right in a given case to an immediate remedy through Court order.⁹⁰ In some of these cases the Court has found the government's policy affecting petitioners to be unreasonable in some way, but also in most the Court has refused to order an immediate direct remedy and ruled that petitioner's rights do not include the right to such a remedy.⁹¹

In this connection, the Court has used reasonableness to, *inter alia*, hold that these economic, social, and cultural rights, being clearly justiciable, nevertheless do not provide a minimum core right with an immediate remedy to all petitioners in need, or even to those in the direst need, relative to the content of the particular right. It has also used reasonableness to govern and balance the Court's duty to "say what the law is" and enforce economic rights as legal rights under the Constitution and international law, without, in its view, overly infringing on the final responsibilities of the government's executive and legislative officials to set priorities and allocate limited national resources along a spectrum of national needs, many of which include great needs among the population.⁹²

If we take the quasi-judicial rulings of the UN Committee on *ESCR*, regarding *ESCR Covenant* duties of state parties, as an indicator of global justice standards on these same issues, we find, *inter alia*, rulings that go to the essentiality for each of these rights of courts and other decision-makers to uphold the notion of minimum core right, especially for those in direst need, in order to avoid hollowing out and fatally diluting the legal authority of these human rights.⁹³ This would seem to conflict with trends of analysis and holdings although not with some views among the opinions of the South African Constitutional Court on these same rights. We find also a global legal academic literature in response to the Constitutional Court's rulings on

economic rights, as well as on the general question of the justiciability and state duties under international law towards these rights. This literature has been both favorable and critical of the Court, the latter seeing its over-caution regarding its rights holdings, its over-deference to other branches of government, and its reluctance to order individual remedies.⁹⁴

In light of the above, if we ask whether the Court has already made a contribution to global justice in providing leadership of justiciability of economic rights and on pathways of judicial management of these issues in a difficult national situation, the answer is yes. But we can also suggest that the legal evolution through the Court of enforcing these rights must necessarily enter a next phase of its decision-making. This might be defined by a greater willingness across the protection of all these rights to find minimum core rights as individual entitlements for the petitioners in direst need, and to issue orders so granting an immediate remedy addressing their deprivation. It has also been suggested that this next phase might involve the Court re-conceptualizing its own role, here, into one of protecting these rights through exercising its full potential under the doctrine of judicial review vis-à-vis other branches of government. The implications of doing so for its current heavy, but flexible reliance on reasonableness to strike the necessary balances of authority regarding resource allocation of limited national wealth are unclear, and continue to be worked out. But needed resource-transfer across the global fault line through the enforcement of these rights to, *inter alia*, poor and vulnerable people of color, cannot be denied as a prominent hallmark of global justice which all courts and governments not least those of South Africa and the United States, must respond to in meaningful ways under the rule of law.

Notes:

1. I was fortunate to have the fine research assistance of Josh Bernstein (J.D. 2006), Christa Frank (J.D. 2007), and Catherine Nguyen (J.D. expected 2009), and to otherwise be assisted by paralegals, Michael Foley and Jennifer Hairston, and by John Necci, Director of the Law Library.
2. See e.g. *Jaftha v Schoeman*, 2005 (1) BCLR 78 (CC); *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC) [hereinafter *TAC*]; *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).
3. Heilbroner, pp. 11, 96-117.
4. The South African Constitution of 1996, key to the discussion of this article, is an excellent example of the intertwining of these two bodies of economic, social, and cultural rights, both substantively and regarding the competence of the Court to consider the rights in both jurisdictions.
5. S. Afr. Const. (1996); *Grootboom*, *TAC*, and *Jaftha*, *supra*, as discussed on their facts herein. See also Richardson pp. 1091, 1131n.
6. The Committee is responsible for, *inter alia*, administering country reports under the *International Covenant on Economic, Social and Cultural Rights (International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 215th Sess., Supp. No. 16, at 49, U.N. Doc. AJ63 16(1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.)* [hereinafter *ESCR Covenant*,]. South Africa has signed and ratified the *ESCR*

Covenant as of Oct. 2004. In this regard, see page 22 of *Grootboom, supra*, for analysis of international law. See also, as discussed herein, the relevant comments of the UN Committee on ESCR.

7. For the TRC, see Section 47a of the *Promotion of National Unity and Reconciliation Act, 1995* (Act No. 34). See also Tutu, 2000: 261-87 and 31-32.
8. Tutu, 2005.
9. Fredrickson.
10. Harris, p. 681.
11. *Soobramoney v Minister of Health, KwaZulu-Natal 1997* (12) BCLR 1696 (CC); *Grootboom and TAC*, note 1; *Port Elizabeth Municipality v Various Occupiers 2004* (12) BCLR 1268 (CC); *Jaftha*, note 1.
12. For rights under the Constitution, see *Jaftha, Port Elizabeth, TAC, Grootboom*, and *Soobramoney*. For rights under international law, see *ESCR Covenant*.
13. Haysom, 2005: 167; or Haysom, pp 451, 455-6.
14. See e.g. *ESCR Covenant*, Art. 11; Yamin, p. 192. Notwithstanding comparison of state duties in ESCR and political/civil rights, the duty is stated more directly in the category of international political and civil rights. As opposed to ESCR, where the duty of the state is defined as a duty to only have a process to realize the rights. See also Alston and Quinn, p. 156, stating that the right to ESCR is not any less of a duty of the state, and is an enforceable duty.
15. See e.g. *TAC and Grootboom, supra*.
16. See e.g. *TAC and Grootboom, supra*.
17. *Grootboom* at 26.
18. *Grootboom* at 27.
19. *Grootboom* at 33.
20. *Grootboom* at 31.
21. *Grootboom* at 32.
22. *Grootboom* at 32.
23. *Grootboom* at 34.
24. *Grootboom* at 47.
25. *Grootboom* at 47.
26. *Grootboom* at 47.
27. *Grootboom* at 66.
28. *Grootboom* at 66.
29. *Grootboom* at 65.
30. *Grootboom* at 12, 36.
31. *Grootboom* at 52.
32. *Grootboom* at 48.
33. *Soobramoney* at 14.
34. *Soobramoney* at 7.
35. *Soobramoney* at 11. (There was no discussion here of a "minimum core" right).
36. *Soobramoney* at 12.
37. *Soobramoney* at 16.

38. *Soobramoney* at 16.
39. See S. Afr. Const. (1996), Section 27(1) The right to access to health care; 27(2) The State must take reasonable legislative and other measures, within its available resources, to achieve progressive realization of each of these rights.
40. *TAC*, at 24.
41. *TAC*, at 24.
42. *TAC* at 25.
43. *TAC* at 45.
44. *TAC* at 72.
45. "A court, after consideration of all relevant circumstances, may order execution. against the immovable property of the party."
46. *Jaftha* at 16.
47. *Jaftha* at 18.
48. *Jaftha* at 19.
49. *Jaftha* at 19.
50. *Jaftha* at 20.
51. *Jaftha* at 21.
52. *Jaftha* at 22.
53. The Court does not reject this contention, and seems open to it, but chooses not to address its merits as it is not necessary to the outcome of this case.
54. Thus, the adequacy of State resources is not an issue here.
55. *Jaftha* at 24.
56. *Jaftha* at 27,
57. The Court further clarified: If the debtor failed to appear, which is likely considering the majority of the parties likely involved, the creditor would be able to obtain a default judgment without any other judicial intervention.
58. *Jaftha* at 33.
59. *Jaftha* at 25 (discussing reasonable and justifiable measures).
60. *Port Elizabeth Municipality* at 8.
61. *Port Elizabeth Municipality* at 9.
62. *Port Elizabeth Municipality* at 9.
63. *Port Elizabeth Municipality* at 14.
64. *Port Elizabeth Municipality* at 16.
65. *Port Elizabeth Municipality* at 17.
66. *Port Elizabeth Municipality* at 20.
67. *Port Elizabeth Municipality* at 24.
68. Or, as in *Soobramoney*, *supra*, sometimes no remedy at all.
69. See *ESCR Covenant*, General Comment 3, The nature of States parties obligations (Art. 2, par. 1) (Fifth Session, 1990); General Comment 7, The right to adequate housing (Art. 11, par. 1) (Sixteenth Session, 1997). Pieterse, 2006: 473; Richter, p. 197, as subsequently discussed herein.
70. See *ESCR Covenant on Economic, Social and Cultural Rights*, General Comment 3, par. 10, The nature of States parties obligations (Art. 2, par. 1) (Fifth Session, 1990).

71. Pieterse, 2004: 383.
72. See e.g. TAC and Grootboom, *supra*.
73. See Lauterpacht, pp. 18-53.
74. See Soobramoney, *supra*.
75. See e.g. TAC and Grootboom.
76. See e.g. TAC and Grootboom.
77. Lenta, p. 544.
78. See TAC, *supra*.
79. See Grootboom, *supra*.
80. See e.g. ESCR Covenant, General Comment 3, par. 10-12, The nature of States parties obligations (Art. 2, par. 1) (Fifth Session, 1990); see Pieterse, p. 473; Richter, p. 197.
81. See e.g. TAC and Grootboom, *supra*.
82. See e.g. TAC and Grootboom, *supra*.
83. See ESCR Covenant, General Comment 3, The nature of States parties obligations (Art. 2, par. 1) (Fifth Session, 1990); General Comment 7, The right to adequate housing (Art. 11, par. 1) (Sixteenth Session, 1997); Pieterse, 2006: 473; Richter, p. 197.
84. Henkin, p.167.
85. Richter, pp. 197, 221.
86. Pieterse, 2006: 473, 475-7.
87. *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others*, 2006 (1) BCLR 1 (CC).
88. *New Clicks* at 135.
89. See TAC, Grootboom, and Soobramoney for the major cases; the two others are *Jaftha* and *Port Elizabeth Municipality*.
90. S. Afr. Const. (1996); ESCR Covenant; TAC, Grootboom, and Soobramoney, *supra*.
91. See TAC, Grootboom, and Soobramoney, *supra*.
92. See TAC, Grootboom, and Soobramoney, *supra*.
93. ESCR Covenant, (Art. 2) (Fifth Session, 1990).
94. See e.g. Pieterse, 2006: 473; Richter, p. 197.

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