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Craig Scott

Osgoode Hall Law School of York University

Philip Alston

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ADJUDICATING CONSTITUTIONAL PRIORITIES IN A TRANSNATIONAL CONTEXT: A COMMENT ON *SOOBARAMONEY'S* LEGACY AND *GROOTBOOM'S* PROMISE

CRAIG SCOTT* AND PHILIP ALSTON**

ABSTRACT

This article discusses the first two social rights cases to go to the Constitutional Court under the 1996 Constitution. *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) involved a claim of a breach of the right to health care brought by one person pursuant to s 27 of the Bill of Rights. *Grootboom v Oostenburg Municipality* 2000 (3) BCLR 277 (C) involves a claim of breaches of rights to housing or shelter brought by some 900 persons under ss 26 and 28. The article seeks to demonstrate why the Court's judgment in *Soobramoney* would be problematic if replicated in future cases, most immediately in the appeal decision in *Grootboom*. The authors argue that the result in *Soobramoney* may have been correct, but that its reasoning on several fronts should not be treated as a dispositive precedent in the face of better understandings that will evolve as the courts, and the Constitutional Court itself, gradually feel their way forward in the adjudication of social rights. Similarly, the judgment in *Grootboom* is found wanting for having been far too deferential to government justifications as to why the failure to meet even the core shelter needs of the applicant adults was not a violation of s 26. At the same time, the High Court in *Grootboom* was too ready to interpret children's rights to shelter under s 28 as absolute priorities without locating that interpretation in a discussion of the concept of core minimum entitlements, a concept which should have been equally applicable to the s 26 claims of the applicant adults as to the s 28 claims of the children. The doctrinal analysis of the two cases is situated within an interpretative account of the relationship between the South African Bill of Rights and both international human rights law and foreign constitutional law.

I INTRODUCTION: *SOOBARAMONEY'S* IMPORTANCE FOR THE *GROOTBOOM* CASE

As 1999 drew to a close, a full bench of the Cape High Court handed down judgment in a case with the potential to affect understandings of effective human rights protection well beyond the shores of South Africa

* Associate Professor of Law, Osgoode Hall Law School, Toronto.

** Professor of International Law, European University Institute, Florence. Former Chairperson of the UN Committee on Economic, Social and Cultural Rights, 1991–8.

and well into the new century.¹ In *Grootboom*, a group of applicants comprising 390 adults and 510 children (276 of them under the age of eight) sought constitutional relief for a situation of homelessness which saw them living in appalling conditions as squatters on a community sports field. The High Court declined to find a violation of the adults' right of 'access to adequate housing' under s 26 of the Constitution of South Africa, but did find a violation of the children's 'right to shelter' under s 28.² However, by virtue of the care provided to the children by their parents and guardians, many of the applicant adults were also brought within the scope of relief ordered by the High Court to remedy the breach of the children's right to shelter.³

At the time of writing (May 2000), the *Grootboom* case was due to be heard by the Constitutional Court on direct appeal by the respondents from the High Court ruling. It would seem that there is no cross-appeal by the applicants on the s 26 ruling. However, it will be assumed, for the purposes of this article, that the s 26 claim is so integrally connected to the s 28 appeal that the Constitutional Court may wish to address its interpretation, whether in exercise of its s 173 inherent powers or whether simply as formally obiter reasons.

Grootboom serves as a compelling reason to conduct an analysis of the precedent set by the Constitutional Court in the 1997 case of *Soobramoney*.⁴

1 *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C) (hereinafter *Grootboom*). Davis J wrote the judgment which was concurred in by Comrie J.

2 The constitutional sections *directly* at issue in the case were:

Section 26 Housing

(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.

Section 28 Children

(1) Every child has the right –

(a) . . .

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services. . . .

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years.

See Constitution of the Republic of South Africa Act 108 of 1996 (the 1996 Constitution).

3 The authors have not had the opportunity to consult the lower court evidentiary record in order to discern how many of the adults do not fall within the scope of the order to provide shelter.

4 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (hereinafter *Soobramoney*). Chaskalson P penned the majority judgment concurred in by nine of the ten judges. Madala J wrote separate reasons that largely concurred with the majority but seemed to add a suggested remedial course of public education about the causes of renal failure and how to prevent them. He also discussed the role of the private sector without reaching a finding, as 'the private sector is not before us and we cannot condemn it without hearing it'. Sachs J delivered a separate concurring judgment.

The judgment in *Soobramoney* forms a crucial part of the context for the future interpretive development of the Bill of Rights. Significantly, Davis J's reading of that case was dispositive for him on the role of the courts in relation to the concept of progressive realisation of human rights. For that reason, *Soobramoney* is discussed in considerable detail with the intention of showing why that case should be seen as only the first tentative step in fashioning a productive relationship between the South African judiciary and legislators as well as between the Constitution and its international analogues, and why the pending *Grootboom* appeal presents the first full opportunity for engagement with international human rights law respecting 'economic, social and cultural rights'. In particular, it is not only the lack of any discussion of international human rights law in *Soobramoney* that speaks against too readily reading *Soobramoney* as something resembling a first and final word on key aspects of interpreting positive rights in a situation of radically scarce resources, but it is also the urgency with which arguments were heard and digested by the Court. While not presuming to contend that aspects of the case were decided *per incuriam* as we are insufficiently informed as to what the Court heard and what it did not, an appreciation of the limitations of *Soobramoney* will put the case into perspective as a precedent for future Bill of Rights cases. Arguments to be presented to the Court in *Grootboom* – and, beyond *Grootboom*, in future cases – will undoubtedly include reference to doctrine and ideas to which the Court may well not (or not adequately) have been exposed before deciding the *Soobramoney* case.⁵

This article's main purpose is to put *Soobramoney* in context – most particularly, in an internationalised context. Once that analysis is carried out, we also provide a brief analysis of the merits and demerits of the High Court's reasoning and the result in *Grootboom*. While that discussion takes place in part VII of this article, it will prove helpful to set out the facts and provisional remedial result in part II. This will enable the reader to keep constantly in mind what is at stake in assessing the normative legacies of *Soobramoney*, and will allow readers to conduct their own analysis of whether a critical assessment of the reasoning (while not necessarily the result) in *Soobramoney* should affect the reasoning to be brought to bear in *Grootboom*. Also, having a sense of the facts in *Grootboom* at an early point in the article is important for understanding the examples given in parts IV and V of the relevance of international human rights law for interpreting the South African Bill of Rights.

5 This point relates more broadly to the need to take an open approach to doctrines of precedent in the constitutional context especially where courts are bravely navigating uncharted waters, as Davis J put it in *Grootboom*. See in this respect, C Scott 'The Judicial Role in Relation to Constitutionalised Social Rights' (1999) 1(4) *Economic & Social Rights Review* 4: 'The notion of binding precedent in the context of human rights interpretation should also be adapted to the need for courts to be open to new and different interpretations of some rights in the future as fresh information and research comes to light, and as new understandings evolve.'

II THE FACTS AND RESULT IN *GROOTBOOM*

The applicants were squatters who, at one point, had moved from squatter settlements in the Wallacedene area of the Western Cape to 'what they considered to be vacant land known as "New Rust"'.⁶ Amongst the reasons for their move were poor living conditions in Wallacedene, conditions which included overcrowding and threats to health resulting from asthma, flu and other conditions stemming at least in part from the fact that the area in which they were squatting was waterlogged.⁷ Some, although not all, applicants had applied to the local municipality (Oostenberg Municipality, the first of five respondents) for accommodation in subsidised, low-cost housing. The municipality could not or would not indicate when they might expect the accommodation to come through, and this uncertainty was an added factor in some of the applicants deciding to move to the New Rust land.

It turned out that the New Rust land was in fact privately owned and had also been 'earmarked for low cost housing'.⁸ The applicants, when faced with a judicial order requiring them to show cause why they should not be evicted, decided not to oppose eviction but instead 'to negotiate with [the municipality] in order to obtain alternative accommodation as well as to secure agreement to a deferred date for the move from New Rust'.⁹ In the result, the applicants were evicted from the New Rust land. In the process, it appears that the structures they had erected on the New Rust land were bulldozed with personal possessions inside. The shack materials were then burned, including, it would seem, by members of the local police. Whether or not the applicants had been given enough time to dismantle the structures and remove both the building material and their personal belongings was in dispute, and no express finding of fact appears to have been made on this point by the High Court.

There is considerable ambiguity in Davis J's account of the facts as to how and why the eviction occurred without alternative accommodation having first been arranged. This lack of clarity is of some import given that the flipside of the applicants' decision not to oppose eviction from New Rust was the decision to try to negotiate such alternative accommodation, or at least an alternative site. A provision of the final judicial order for eviction issued by the Kuilsrivier Magistrate's Court addressed an alternative site ('alternatiewe grond') but did so in terms which appear to have left it unclear when – and indeed even whether – 'mediation would entail the identification of the site to which applicants

6 *Grootboom* (note 1 above) 280B–C.

7 *Ibid* 281B–D.

8 *Ibid* 281E–F. It is not stated in the judgment what the nature of this project was, whether a private development scheme which had received government zoning approval, a public project involving expropriation and/or purchase of the land, or some kind of joint public/private venture.

9 *Ibid* 281H–I.

could be relocated.’¹⁰ Whatever the meaning of the order (not broached again, let alone clarified, in Davis J’s *Grootboom* reasons), no such alternative site was in fact designated before the eviction was carried out.

The applicants were again left to their own devices. But now, as their space in the Wallacedene camp had been taken by others upon their departure to New Rust, ‘[t]he applicants had become truly homeless’. They ended up camping on a (presumably public) sports field adjacent to the Wallacedene community centre.¹¹ Hampered by the loss of the building materials destroyed in the New Rust eviction, the applicants tried to build temporary structures out of plastic, ‘structures’ which proved ‘wholly inadequate’ within a week of being erected, at the first rainfall.¹² In particular, Davis J found that the plastic shelters ‘provided no protection against the elements particularly for the children who were so housed’.¹³

Very shortly thereafter, the 900 applicants lodged an urgent constitutional application to address their circumstances. Their lawyers very carefully cited five levels of respondents, starting with the first respondent (the local municipality) and then moving through the intermediate levels of metropolitan Cape Town’s council (second respondent) and the Province of the Western Cape (third respondent) before reaching the national level with the National Housing Board (fourth respondent) and the government of the Republic of South Africa (fifth respondent). The application included a plea for relief related to alleged breaches of various constitutional rights (including those concerning health care and social services) but eventually the case came to focus on a specific prayer for relief with respect to those constitutional rights that expressly concerned accommodation, ss 26 and 28(1).

Prior to the case arriving before Davis and Comrie JJ, their High Court colleague, Josman AJ, heard the initial application and issued a provisional order after having conducted an on-site inspection of the conditions of the sports field ‘community’. For the interim period before a full hearing, he ordered the five respondents

jointly and severally . . . to make available to the applicants, free of charge the Wallacedene Community Hall on a continuing basis in order to provide temporary accommodation to the various children of the applicants and in the case of children who require supervision, one parent/adult for each child.¹⁴

It can be seen that the motion court judge had responded provisionally by prioritising the s 28 claims of the children while avoiding basing his order on any free-standing s 26 rights of adults.

¹⁰ Ibid 281.

¹¹ Ibid 280D–E.

¹² Ibid 282E–F.

¹³ Ibid.

¹⁴ Ibid 280H–I. We have assumed that the community hall was and remains a publicly funded facility accessible to all members of the local public, and is not the property of a private association.

The parties agreed to postpone the full hearing that was to come before Josman AJ three weeks later. When the High Court did reconvene, the two-judge bench of David and Comrie JJ ended up with carriage of the hearing. In the result, the Court found in favour of some dimensions of the applicants' claim of constitutional violations and issued an order studded with important remedial implications for the future development of human rights protection through adjudication. In order that the reader may appreciate in advance the issues which this comment will ultimately seek to address, it is worth reproducing the remedial order in its entirety at this introductory stage:

I propose that an order shall be issued in the following terms:

- (1) The application insofar as it relates to housing or adequate housing, and insofar as it is based on s 26 of the Constitution, fails and it is dismissed;
- (2) It is declared, in terms of s 28 of the Constitution that:
 - (a) the applicant children are entitled to be provided with shelter by the appropriate organ or department of state;
 - (b) the applicant parents are entitled to be accommodated with their children in the foregoing shelter; and
 - (c) the appropriate organ or department of state is obliged to provide the applicant children, and their accompanying parents, with such shelter until such time as the parents are able to shelter their own children;
- (3) The several respondents are directed to present under oath a report or reports to this Court as to the implementation of paragraph (2) above within a period of three months from the date of this order;
- (4) The applicants shall have a period of one month, after presentation of the foregoing report, to deliver their commentary thereon under oath;
- (5) The respondents shall have a further period of two weeks to deliver their replies under oath to the applicants' commentary;
- (6) There will be no order as to the costs of these proceedings up to the date of this judgment;
- (7) The case is postponed to a date to be fixed by the Registrar for consideration and determination of the aforesaid report, commentary and replies;
- (8) The order of Josman AJ dated 4 June 1999 will remain in force until such time as the further proceedings contemplated by the preceding paragraph have been completed.¹⁵

It can be seen that the High Court acted in a way that is at once creative and pragmatic. The order is both deferential to government in terms of fashioning a remedial plan and demanding of government in the way in which it fashions a dialogue that will lead to a second-stage hearing on a final shelter scheme for the families that will replace the provisional measures of using a community hall for shelter.

III SOUTH AFRICA AND TRANSNATIONAL CONSTITUTIONALISM

South Africa is increasingly at the centre of the transnational exchange of ideas and experience about the rule of law and human rights and, as such, human rights scholars around the world can ill afford not to pay attention to developments there. For example, when South Africa became the first state expressly to prohibit discrimination on grounds of

15 Ibid 293H–294C.

sexual orientation in its constitutional text, normative ripple effects spread around the globe. From the present authors' perspective, there is a similar world-historical aspect to the *Grootboom* case. Davis J has shown considerable judicial leadership in engaging with evolving international human rights law dealing with the nature of positive obligations and with the right to housing, in particular aspects of the jurisprudence which has grown up around the International Covenant on Economic, Social and Cultural Rights (the ICESCR).¹⁶

The way in which the Constitutional Court deals with Davis J's approach and the arguments of parties before it in *Grootboom* is thus likely to have a significant influence, not just on other 'domestic' human rights orders, but also on international human rights discourse itself. Treaty bodies charged with monitoring compliance of states with the UN human rights treaties have long understood that their role is complementary to that which must be carried out by domestic institutions if international human rights law is to be effective.¹⁷ But – crucially – for the treaty bodies to play the constructive support role entailed by this conception, there must evolve a normative partnership with national courts, tribunals, legislatures, commissions, and so on. A willingness to work with the human rights treaty texts, jurisprudence and scholarly literature is key – and for that to be possible, international human rights lawyers must start to become part of the conversation that is now quite commonly referred to as 'global constitutionalism'.

Various national legal systems are increasingly drawing on international human rights law in giving content to domestic law, whether by way of statutory interpretation or constitutional adjudication. Judges who take a leadership role in this process are implicitly adopting a view of their role that is able to accommodate a kind of dual allegiance to both the international and the domestic legal orders, working (implicitly or explicitly) from a presumption that they have an interpretive duty to prefer reasonable interpretations of domestic law that are consistent with – or even promote – international law over interpretations that cut in the opposite direction. Such 'double functioning' will play an important role in forging a transnational legal order of fundamental human rights law where the 'international' and the 'domestic' will cease to exist as separate spheres in the way they currently do.¹⁸ Beyond a national/international axis of development of human rights law, it is probably true to say that a

16 Adopted on 16 December 1966, (1967) 6 ILM 360.

17 As the UN Committee on Economic, Social and Cultural Rights has stated: 'The existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies.' Committee on Economic, Social and Cultural Rights 'The Domestic Application of the [International] Covenant [on Economic, Social and Cultural Rights]' General Comment No 9, UN Doc E/C.12/1998/24, December 1998 para 4.

18 On the concept of domestic courts as 'double functioning' institutions and, as such, agents of both the international rule of law and the domestic rule of law, see Kenneth Randall *Federal Courts and the International Human Rights Paradigm* (1990) 206, 280.

growing number of national judges see themselves as juridical citizens of the world. There is ample evidence of a community of judges from around the world conversing with each other – in person during colloquies and inter-court visits, through their judgments and speeches, and through having developments drawn to their attention in the pleadings of counsel – and striving, at varying levels of explicitness, to help forge a pan-constitutional law of human rights through inter-constitutional dialogue. However, while this conversation deepens with each passing day, what remains largely missing is a discourse in which constitutional systems engage in dialogue with one another about each system's reception of international human rights norms.¹⁹

We thus return to the potential for *Grootboom* with respect to the special role of domestic courts in an evolving transnational order of human rights protection. As courts increasingly interpret international human rights obligations as part of interpreting their own constitutions and statutes, they help gradually to build up a transnational consensus that can be 'received' into the international legal order, both in terms of persuasive reasoning that international bodies see fit to embrace and, more formally, in terms of general principles of law with their own status as international law.²⁰ In this way, domestic legal processes can influence the progressively evolving interpretations of the international human rights treaty bodies.²¹ For transnational judicial dialogue about

19 A notable exception to the tendency of academic writing to concentrate on comparative constitutionalism absent any interest in international human rights law's constitutional reception is the recently published volume, TS Orlin, A Rosas & M Scheinin (eds) *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach* (2000). See especially the framework discussion of Orlin and Scheinin in 'Introduction' (1), and Rosas' 'Epilogue' (287). *Grootboom* itself constitutes a notable exception in its reference to the Indian Supreme Court's use of international 'soft' law principles – the Limburg Principles (see note 49 below) – in interpreting the Indian Constitution: *Grootboom* (note 1 above) para 23, citing *Ahenedabad Municipal Corporation v Newab Khan Gulab Khan* (1997) 11 SCC 121. Reference to other systems' use of the Convention on the Rights of the Child (see note 53 below) in parental deportation cases constitutes another evolving example. Both the Australian High Court and the Supreme Court of Canada cited the use made by the New Zealand Court of Appeal of the Convention on the Rights of the Child. See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 (Australian HC) and *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817. In the latter case, the majority said (para 70): 'The important role of international human rights law as an aid in interpreting domestic law has also been emphasised in other common law countries: see, for example, *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).' One long-standing area of cross-fertilisation of national jurisprudence interpreting international human rights law is case law under the Refugee Convention, although, even here, the use of comparative precedent is a limited practice.

20 The Statute of the International Court of Justice lists such general principles of law as one of the three classic primary sources of public international law, the others being custom and treaty: see art 38(1)(c). For a discussion of general principles of law (whether inductively received from national legal systems or whether autonomously generated by basic rule of law premises of the international legal order), see P Alston & B Simma 'The Sources of Human Rights Law: Custom, Jus Cogens, General Principles' (1992) 12 *Australian Year Book of Int L* 82–108.

21 The former Chief Justice of Canada, Antonio Lamer, has put his finger on the importance of national judicial developments for the development of law at the international level: 'The development of effective judicial responses to the violation of human rights under national law can only facilitate and nourish the growth of a human rights culture within a nation. As that

human rights to reach its full potential, domestic courts must go beyond sharing their 'domestic' legal wisdom and seek to communicate and learn from the way in which they and their foreign counterparts have interpreted and applied international human rights law in the course of interpreting their domestic law.²² Thus it is that the eventual judgment of the Constitutional Court in *Grootboom* will have much to say about the evolution not only of South Africa's Constitution but also of foreign constitutions and of the international human rights regime.

IV THE NORMATIVE STRUCTURE OF THE SOUTH AFRICAN BILL OF RIGHTS

In order to make subsequent discussion of *Soobramoney* more intelligible, the present section seeks to draw attention to the authors' understanding of the general normative structure that frames the interpretation of any given substantive right in the South African Constitution.

(a) Normative inclusiveness and intermingling

A first and quite distinctive structural feature of South Africa's Bill of Rights is the non-hierarchical approach it takes to received categories of human rights. Not only do key rights associated with 'civil and political rights' appear but so also do those commonly associated with 'economic, social and cultural rights'. In this respect, the Bill of Rights is a holistic document that echoes the 1948 Universal Declaration of Human Rights in the range of rights (and thus persons) included. There is no textual categorisation of any given right or group of rights as one 'sort' and another right or group of rights as another 'sort'. This inclusiveness is heightened by the way in which no abstract hierarchy is constitutionalised in terms of the institutional role of the courts in giving content to the rights. In terms of s 38, '[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.' Those listed range from persons acting purely in their own interest and those claiming to act in the public interest.

(b) Positive and negative obligations, state and private conduct, and the interpretive relevance of other legal systems

With respect to the nature of obligations of the state, s 7(2) of the 1996 Constitution presents a stark contrast to the United States and, more

culture becomes ingrained, it will, one has to hope, percolate up to the international realm.' Rt Hon Antonio Lamer 'Enforcing International Human Rights Law: The Treaty System in the 21st Century', address at York University, 22 June 1997. The Lamer speech can be found at www.yorku.ca/research/crs/chief.htm (visited 30 April 2000).

22 Recall the reason the Canadian court in *Baker* cited the New Zealand court in *Tavita* (note 19 above).

generally, liberal constitutional tradition of so-called negative liberties: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.' *All* the rights. This departure from received constitutionalism is further emphasised by s 8's direction that '[t]he Bill of Rights applies to all law . . . [and a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.' The 1996 Constitution is thus a decidedly non-traditional constitution to the extent that the US liberal tradition has had an implicit lock-hold of sorts on the idea of constitutional rights protection in much legal discourse, probably due to the central judicial role associated with the US model. But the US tradition has not been particularly receptive either to the notion that rights generate positive obligations on the state or to the notion that the constitution can be violated by the conduct of non-state actors in situations where the actor's conduct cannot be assimilated to some exercise of a state function. Although somewhat of a simplification, the US approach to its Bill of Rights is encapsulated in a rather unmovable fixation on *state action* as the magnet which attracts potential constitutional review.

Of course, ss 7 and 8 of the 1996 Constitution have a pervasive interpretive role to play in interpreting all the substantive rights in the Bill of Rights in terms of considering a range of potential obligations placed on a range of potential actors. But, beyond this, ss 7 and 8 signal the special importance of considering other legal systems which are, in relevant respects, compatible with the underlying theory of rights and obligations represented by these two sections. Thus criteria of relevance and jurisprudential compatibility can give shape to s 39 by which South African institutions '*must* consider international law' and '*may* consider foreign law' in interpreting the Bill of Rights. For instance, the wording of s 7(2) suggests the special relevance of documentation and literature on those aspects of international human rights law which have addressed and helped give content to positive human rights obligations on states and which both have made use of and have generated the four-fold obligations typology adopted by s 7(2).²³ Such relevance extends to the normative state of affairs under the Covenant with respect to the necessary and legitimate role of national courts, as when the UN

23 Philosopher Henry Shue's *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980) is commonly credited as having first conceptualised a multiple obligations structure applicable to all human rights. See 52 (duties to avoid, protect and aid). And see H Shue 'The Interdependence of Duties' in P Alston & K Tomasevski (eds) *The Right to Food* (1984) 83. International legal scholars and treaty body experts then began to work with the structure, initially in relation to rights in the ICESCR and increasingly in relation to all the core UN human rights treaties as it is recognised that no single right in any treaty is either 'negative' or 'positive' but generates a range of obligations, both negative and positive – obligations which are made concrete as interpretive practice and experience evolves. See, for example, GJH van Hoof 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views' in Alston & Tomasevski 97; S Holmes & CR Sunstein *The Cost of Rights: Why Liberty Depends on Taxes* (1999).

Committee on Economic, Social and Cultural Rights articulated the following principles in its 1998 General Comment 9 on domestic application of the ICESCR:

The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate. . . . Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. By the same token . . . whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.

In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. . . . While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.²⁴

While these principles may not contain new insights for the South African context – and indeed, after the *First Certification* judgment may be closer to ‘old hat’²⁵ – they can still provide a set of very important normative reference points when it comes to South African courts reflecting on their appropriate role in any given case. Constitutional rights adjudication involves choice as to the degree and nature of the involvement of a court – and, within that choice, an assessment of whether the court can be more constructive by being assertive or by being more circumspect – and is generally not profitably approached as some stark choice as to whether to get involved or not. Perhaps nowhere is this more clearly the case than in South Africa. The above-quoted principles from General Comment 9 thus furnish relevant interpretive baselines in terms of giving shape to a judicial ethos or orientation even for South African courts where the question of ‘whether’ has already been addressed by the Constitution, but where the questions of ‘to what extent’ and ‘in what ways’ are necessarily part of what judges faithful to the constitution have to assess and justify on a daily basis.

As for comparative law, most relevant are those constitutional systems in which courts are playing an important role in interpreting and enforcing positive rights, whether this role has evolved by judicial initiative in approaching ‘classical’ rights in terms of an organic and

24 General Comment 9 (note 17 above) paras 9 and 10.

25 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) paras 77–78.

holistic approach (such as in India and, to an evolving extent, Canada) or whether a more explicit mandate is found. Such jurisprudence will of course only ever have a persuasive force – and will always need to be assessed in terms of the quality of the reasoning of the foreign court as related to the unique context of South African constitutional interpretation – but it warrants special attention qua comparative law as contrasted to a foreign legal system where there is neither a textual basis nor a judicial culture of human rights review of government failures to act.²⁶ Dissimilarity, not just in historical and social context but also in constitutional legal culture and philosophy, should not of course exclude reference to US law, but it does suggest a frank consideration of the extent to which US precedent is generated disanalogously.²⁷

(c) Purposes and context

The Constitutional Court of South Africa has already made clear that a 'purposive approach' is to be taken to the interpretation of the Bill of Rights.²⁸ Borrowing from the articulation by Dickson J (later Chief Justice of Canada) in the Canadian Supreme Court case of *Big M*, the Court appears to endorse the need to give content to rights in the Bill of Rights by reference both to the underlying interests a given guarantee seeks to protect and to the larger purposes of the Bill of Rights and Constitution as a whole.²⁹ Even more significantly, it seems that a

26 For instance, it is hard to see any strong relevance for South Africa of administrative law-based judicial review of, say, health care provision by UK courts, especially prior to the enactment of a bill of rights statute in the UK.

27 This is not to say that some areas of US law, approached *mutatis mutandis* and with appropriate caution, may not have much to say. For instance, the idea of constitutional torts by private actors does exist in the US. But, even here, US doctrine requires a court first to determine whether the private actor has acted in such a way as to qualify its action as 'state action', a requirement which would be wholly contrary to the spirit of s 8 of the South African Bill of Rights. US case law *may* possibly be instructive in suggesting at least the very minimum kinds of 'private' conduct that should be interpreted under s 8 to be of a nature to be capable of breaching the 1996 Constitution. In other words, it would be difficult to justify South African horizontality being less exacting than the US constitutional torts tests. Conversely, neither could it be justified to limit South African horizontality to the US tests given the vast philosophical gulf between the US Constitution and South Africa's Bill of Rights. Two cases which apply (not necessarily with success) one or more of four recognised tests for state action in respect of constitutional torts to international human rights tort claims are *Doe v Unocal*, 963 F Supp 880 (CD Cal 1997) and *Beanal v Freeport-McMoran Inc* 969 F Supp 362 (ED La 1997). German theoretical debates, which are more self-consciously focused on the 'horizontal' application of constitutional law, unmediated by a state action requirement, are also likely to provide a relevant source for what, in the end, will be South Africa's sui generis constitutional philosophy of applicability of rights. See O Gerstenberg 'Private Law, Constitutionalism and the Limits of the Judicial Role' in C Scott (ed) *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (forthcoming, 2000). But, again, the German debate will never be on all fours with the South African context in the absence of a similar constitutional directive to s 8.

28 See notably *S v Zuma* 1995 (2) SA 642 (CC) para 15; and *S v Makwanyane* 1995 (3) SA 391 (CC) para 9.

29 *Zuma* (note 28 above), endorsing *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321, 359–60.

philosophy of *effective* protection of rights is tied to the purposive approach, with what amounts to a series of interpretive presumptions having been recognised by the Court, again by way of approval of the formulations of Dickson J in *Big M*. Notable are the presumptions that interpretations should be: 'generous' rather than 'legalistic'; aimed not just at being consistent with the purpose of the right in question but at 'fulfilling' that purpose; and directed at 'securing . . . the full benefit' of the Bill of Rights' protection.³⁰

Fused to the purposive method is a contextual approach to understanding the purpose and thereby giving meaning to specific rights. Such contextualism is viewed by the Constitutional Court as requiring that a given provision be understood in light of the text as a whole (the Bill of Rights and, where appropriate, the entire Constitution). This requires consideration of the impact of other provisions on the meaning that should be accorded to a given provision.³¹ This would seem to open up the potential for a holistic approach of some sort, especially when the interpretive issue is whether certain interests are protected implicitly by the Constitution. By reading provisions together, greater coherence is achievable with respect to determining what is protected and what is not. Whereas an each-provision-in-isolation approach can easily result in rights (and thus people) falling through the constitutional cracks in an unprincipled way, a holistic approach to contextual interpretation is more likely to take seriously the interpretive presumptions associated above with the purposive approach. As shall be seen in *Grootboom*, discerning rights protections in the interstices of the textual formulations of various rights becomes both possible and desirable.³²

It should be noted that principle and values do not simply allow a fulsome approach to fulfilling the purposes of the Bill of Rights. Rather these principles and values can play a role in justifying some limitations on the enjoyment of rights, most notably where the justification for limiting one right is that a certain priority must be accorded, on the issue in question, to one person's right to 'x' over another person's right to 'y'. Here, values and principles (and normative theories that are reasonable accounts of those values and principles) assist in approaching the idea of progress in rights adjudication in terms of qualitative judgments rather than in terms of the fallacy that a quantitative expansion of all rights protections is what progress is always about.³³ One need only think of the interaction between privacy, dignity and equality interests and freedom of

30 Ibid.

31 *Makwanyane* (note 28 above) para 10.

32 For further discussion of what might be called gap-filling versus gap-falling, see the subsections entitled 'Systemically Implied Rights Protections' in C Scott 'Towards the Institutional Integration of the Core Human Rights Treaties' in I Merali & V Oosterveld (eds) *Reaching Beyond Words: Giving Meaning to Economic, Social and Cultural Rights* (forthcoming 2001).

33 For a discussion of constitutional rights in terms that argue why it is incoherent to speak of *maximising* rights in some metaphorically quantitative sense, as compared to *optimising* rights, see J Rawls *Political Liberalism* (1993) 331–40.

expression: quantitatively deep protection of freedom of expression can be qualitatively shallow. Similar kinds of principled normative trade-offs need to be considered quite often, especially in a constitutional context like that of South Africa. For example, nowhere is this clearer than in the way that property rights in s 25 are formulated in a way that is balanced against considerations of the constitutional imperative to remedy discrimination patterns and to create a fair land tenure system.

Thus, purposive constitutional adjudication requires an open recognition of the need to give dimensions of weight and of comparative importance to rights, both in general terms and in concrete contexts.³⁴ This need operates at both a normative level (whether the right to life has priority over, say, a claim of an implied constitutional right to defend one's property forcibly) and at the institutional level (whether a court should act on its own judgment or rather should decide that another institution is best placed – in one way or another, for some period of time or another – to assess the trade-off, in which case the proper institutional relations will be built into a standard of review). But, the key point is that prioritising and playing some role in prioritising is at the very core of constitutional rights interpretation and adjudication. It is not, somehow, something which has suddenly appeared only with the introduction of rights protections that were not expressly entrenched in many older Western constitutions.³⁵

(d) Identification of principles and values relevant to purposive interpretation

Of considerable importance to purposive interpretation is how contextual interpretation helps identify the overarching principles and underlying values of the Constitution. As already noted, in the South African Constitution recourse to principles and values for a meta-interpretive role is facilitated by the care with which the constitutional drafters have expressly stated in s 39 ('Interpretation of Bill of Rights') the animating values that *must* inform interpretation:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum –
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. . . .

The choice of the verb 'promote' is telling as it connotes an assertive role for the courts and not one of passively ensuring only that its interpretations are, for instance, simply 'consistent' with democratic values. Courts are thereby recognised as having a value-forging role in interpreting generally worded and open-textured textual provisions, a

34 This includes a kind of super-core of the 1996 Constitution, those rights specifically singled out in s 37 as non-derogable in emergency situations.

35 The words 'not expressly entrenched' are important, as some constitutional traditions are coming to see, more and more, that open-textured guarantees are necessarily connected to the protection of interests and values associated with so-called 'economic, social and cultural rights'. On this, see B Porter 'Beyond *Andrews*: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*' (1998) 9 *Constitutional Forum* 71.

role which is a far cry from theories of adjudication which advocate seeing courts as much as possible as mere neutral appliers of pre-given legal rules.

The nuanced, complex and onerous nature of this interpretive responsibility is of course made clear by the way in which s 39(1)(a) dovetails with two other sections, ss 7(1) and 26. Section 7(1) in essence elevates 'the democratic values of human dignity, equality and freedom' to the status of being the ultimate normative sources of the rights enshrined in the Bill of Rights. By s 36, the same values – those of an 'open and democratic society based on human dignity, equality and freedom' – expressly serve as the substantive basis on which limitations to rights may be justified. In this way, the constitutional meta-values of human dignity, equality and freedom are both the genesis of rights and the basis for the principled limitation of those rights.³⁶ This normative circle of reference is bolstered, in purposive terms, by the general statements that appear in the Constitution's preamble and in ss 1 and 2. Constitutional supremacy is linked to a South African vision of the rule of law in the service of a national enterprise of establishing a democratic and open society in which a central collective project is, as the preamble announces, to '[i]mprove the quality of life of all citizens and free the potential of each person'.

While we do not wish to make heavy weather of a point of which all those working with the 1996 Constitution are more than aware, it nonetheless deserves emphasis. It is crucial to place such a substantive interpretive telos at the very centre of the project of purposive and contextual interpretation of the Bill of Rights. In the heat of arguing and deciding a constitutional case, it is all too easy to slip into the lawyer-like role of paying close attention to the specific words in specific textual provisions and, in the process, to lose sight of the forest for the trees. A conscious and principled attention to equality, dignity and freedom can play all kinds of roles in uniting judicial confidence and judicial legitimacy. One such role may be to assist in identifying at least three substantive-rights provisions which, by virtue of their special connection to constitutional meta-values, must play a pervasive contextual role in interpreting all the other substantive rights. Those provisions are ss 9 ('Equality'), 10 ('Human dignity') and 12 ('Freedom and security of the person'). In this way, even when one or other of these three provisions is not the direct basis for a constitutional claim, courts should of their own motion ask whether those rights can help reach the best interpretive result by treating them as overarching principles. This approach is hardly radical – and indeed seems to have been present in the reasoning of some

³⁶ This holistic conception is shared by the understanding that has evolved of the 'dual function' of basic values of a free and democratic society in s 1 of Canada's Charter of Rights and Freedoms. In outlining what some of those values are, including 'respect for the inherent dignity of the human person . . . [and] . . . commitment to social justice and equality', former Chief Justice Dickson notes that the same values that generate rights are the values that justify their limitation: *R v Oakes* [1986] 1 SCR 103, 136.

judges³⁷ – but it is an approach which may need more forthright recognition in fashioning a case law attentive to the constitutional interests of the most disadvantaged in South African society.

(e) International law: reprise

It has already been noted that s 39 specifically requires international law to be ‘consider[ed]’ in interpreting the Bill of Rights. While the existence of a judicial duty is thus clear, s 39 does not go on expressly to indicate what courts may, should or must do once they understand international law to contain certain (existing or evolving) rules and principles. This would appear to be something that has largely been left to the courts to work out.³⁸ Section 233, in contrast, states a principle of statutory interpretation that is clearer on the substantive interpretive role of international law:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

This accords with the final two paragraphs of General Comment 9 in which the Committee on Economic, Social and Cultural Rights states its view that this interpretive presumption is not just a principle of domestic law coincidentally shared by many, if not most, domestic legal orders, but rather is required by international (human rights) law and by the law of the Covenant:

Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State’s conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.

It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State’s international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the State in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.³⁹

However, while this presumption’s applicability with full force to statutory interpretation cannot be doubted, the case for its applicability

37 See, for example, O’Regan J in *Makwanyane* (note 28 above) para 326, where the ‘right to life’ is framed in terms which go beyond traditional conceptions of the right not to lose one’s life at the hands of the state to embrace the right to live with dignity: ‘the right to live as a human being, to be part of a broader community, to share in the experience of humanity’. This conception is cited with approval by the majority in *Soobramoney* (note 4 above) para 31.

38 The Constitutional Court has so far hinted at a duty to do more than simply look at international law, but has still framed matters in a cautious (bordering on neutral) way. See *Makwanyane* (note 28 above) para 35 where Chaskalson P stated that international human rights law provides ‘a framework within which chap 3 can be evaluated and understood’ and juridical acts of relevant international human rights bodies (decisions, reports, and so on) ‘may provide guidance as to the correct interpretation of particular provisions’.

39 General Comment 9 (note 17 above) paras 14 and 15. The Committee’s approach is not simply that of one UN human rights committee. Rather, it parallels and is supported by the major

as a presumption of constitutional interpretation needs further argument given that the Constitution is, after all, the supreme and hard-to-amend law. The solution may be to recognise the formal principle, as for example has the Supreme Court of Canada, while conditioning the operation of the presumption (its rebuttability) on the same purposive and value-laden structure as generally governs the interpretation of the Constitution.⁴⁰

Here the structure of s 39 may assist in suggesting what interpretive weight should be accorded to international law beyond salutary reference. Section 39(1) is reproduced below in its entirety so that the point will then be clearer:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum –
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.

There are two interpretive ‘musts’ here: a court must consider international law and it must promote specified values. It would not seem to be a radical step to combine these musts, so as to suggest that a court must (or, at least, should) adopt an interpretation of the Bill of Rights which promotes international law, firstly, where the international law in question is substantively relevant (ie international human rights law) and, secondly, where that law reflects the constitutional values of ‘an open and democratic society based on human dignity, equality and freedom’. This is not as redundant as it may sound because giving effect to international law through a substantive test of constitutional values occurs in a context where international law helps clarify and give content

statement made in a recent high-level resolution by the UN General Assembly with respect to the relationship between the entire corpus of UN human rights law and domestic law. In the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedom, GA Res 53/144 (9 December 1998), art 2(1) reads:

Each State has a prime responsibility and duty to protect, *promote and implement* all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy those rights and freedoms in practice. (emphasis added)

Note the correspondence between use of the word ‘promote’ in art 2(1) and its use in s 39 of the 1996 Constitution. The link is then strengthened by art 3 of the Declaration:

Domestic law consistent with the Charter of the United Nations and other international obligations of the State in the field of human rights and fundamental freedoms is the juridical framework within which human rights and fundamental freedoms should be implemented and enjoyed and within which all [human rights protection and promotion] activities referred to in the present Declaration for the promotion, protection and effective realization of those rights and freedoms should be conducted. (emphasis added)

40 In Canada, ‘the Charter [of Rights and Freedoms] should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified’: *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038, 1056–57 (Dickson CJ).

to those very values. There is an internal link between paras (a) and (b): especially given that the values are stated not only in s 39(1)(a) but also in ss 1, 7 and 26, it follows that international law must be considered in order to properly understand 'human dignity, equality and freedom'. Thus, again, the same basic values that link the genesis of rights and their justifiable limitations also create an interpretive circle between international law and the Constitution. Such a substantive test for constitutional reception of (or – better put – interaction with) international law simultaneously manages to assert the supremacy of the Constitution and a persuasive normative force for international human rights law. Approached in this way, the Committee on Economic, Social and Cultural Rights' General Comment 4 on the right to adequate housing would seem to be worthy of special 'consider[ation]' by the Constitutional Court not only because of its articulation of principles directly relevant to the *Grootboom* situation but also because of how equality, dignity and security are values to which the Committee has turned in giving content to the notion of adequacy.⁴¹

(f) Remedial flexibility and creative potential

We are not assuming that, by simple virtue of their having the power to interpret and enforce all rights, the courts somehow are institutional owners of the Constitution. Far from it. Without a constitutional ethos pervading decision-taking and policy-making at all levels of government (and society), the kind of democratic culture that is the best assurance of effective human rights protection will be slow to take hold and, when it does, the roots may not run deep. Part of the challenge of interpreting rights is developing ways for courts to give content to rights that take account of the role of other institutions in the same overall normative enterprise. It is desirable to build a pragmatic notion of inter-institutional cooperative interaction into adjudication while at the same time not losing sight of the courts' duty to *promote* 'human dignity, equality and freedom' through rights adjudication. This is not the occasion to enumerate the various techniques and general patterns of interaction that may be conducive to such an institutional project.⁴² However, the willingness to experiment in this respect is crucial.

41 Committee on Economic, Social and Cultural Rights 'The Right to Adequate Housing (Art 11(1))', General Comment 4, UN Doc E/1992/23, Annex III (adopted in December 1991). See especially paras 6 and 7, given more detailed expression in the seven 'aspects' discussed in para 8. While Davis J referred to a subsequent general comment on housing, he did not cite or work with General Comment 4. The later General Comment is Committee on Economic, Social and Cultural Rights 'The Right to Adequate Housing (Art 11.1 of the Covenant: Forced Evictions)', General Comment 7, UN Doc E/1998/22, Annex IV (adopted in May 1997). As will be seen in the discussion below of *Grootboom*, it is problematic both that Davis J failed to turn to General Comment 4 in interpreting s 26(1) and (2) of the Bill of Rights and that he only cited General Comment 7 in passing at the remedial stage without having conducted any interpretive inquiry into whether s 26(3) on evictions had been engaged.

42 For a schematic typology, see Scott (note 5 above).

It is at the level of remedies where the greatest potential may lie for forging productive inter-institutional relations and, in the process, helping bring about relief that is both effective and legitimate in the eyes both of litigants and of society at large.⁴³ Indeed, through its provisions on remedies and court process, South Africa's Constitution may provide a better framework for a flexible – and thus potentially creative – judicial role than any other current constitution. In its use of a nuanced medley of remedial measures, *Grootboom* warrants serious study as a principled first step towards appropriate development of the extensive powers accorded by the Constitution to the courts.

Key aspects of the remedial framework available to the courts are digested below for the convenience of the reader. Section 38 ('Enforcement of rights') provides:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and *the court may grant appropriate relief, including a declaration of rights.* [emphasis added]

Section 165(5) ('Judicial authority') provides: '[a]n order or decision issued by a court *binds all persons to whom and organs of state to which it applies*' (emphasis added).

Section 172 ('Powers of courts in constitutional matters') provides:

- (1) When deciding a constitutional matter within its power, a court –
 - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) *may make any order that is just and equitable, including –*
 - (i) *an order limiting the retrospective effect of the declaration of invalidity; and*
 - (ii) *an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.*
- (2) (a) . . .
- (b) . . .
- (c) . . .
- (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or *vary an order of constitutional invalidity* by a court in terms of this subsection. [emphasis added]

Section 173 ('Inherent power') provides:

The Constitutional Court, Supreme Court of Appeal and High Courts have *the inherent power to protect and regulate their own process . . .* taking into account the interests of justice. [emphasis added]

In view of these provisions, a court can declare a violation, without necessarily mandating a particular response. A court can specify a result that must be achieved – or seriously aimed at – while leaving the means to the result completely open. A court may fashion a remedial process around dialogue amongst the parties with the goal of creating remedies that merge effectiveness with legitimacy. A court can experiment with

43 One emerging area of constitutional theory in both the US and Europe focuses on how constitutionalism and democratic deliberation and participation can fit together. See especially MC Dorf & CF Sabel 'A Constitution of Democratic Experimentalism' (1999) 98 *Columbia LR* 267.

interim remedies as a way to get a handle on what final remedies should be considered – for instance where the court is provisionally convinced that very focused and targeted measures are necessary to remedy a situation but also wishes government to bring back to the court its proposed remedial action within a certain period. A court can fashion forms of non-binding relief (such as constitutional recommendations) by specifying aspects of a judgment which are framed in terms of relief but which are not part of the operative order or decision intended to apply to a party or parties – for instance recommendations as to what the case suggests (to the judge) about principles or processes that Parliament may wish to consider including in a ‘Charter of Rights’ enacted in keeping with s 234 of the Constitution.⁴⁴ And so on. The potential is probably infinite – or limited only by the combined imagination and mutual good faith of the relevant institutional actors.

V INTERNATIONAL HUMAN RIGHTS TREATIES

Consistently with s 39, Davis J’s judgment in *Grootboom* is notable for its willingness to engage – albeit fleetingly and far from comprehensively – with international human rights law as a necessary element of interpreting the Bill of Rights.⁴⁵ The treaty jurisprudence on which Davis J concentrated was that generated by the Committee on Economic, Social and Cultural Rights under the ICESCR. More specifically, he referred to aspects of two General Comments.⁴⁶ The Committee’s General Comment 3 had as its purpose the elaboration of the framework of principles and considerations of art 2(1), the general obligations clause in the ICESCR.⁴⁷ As will be discussed in section VII, Davis J sought interpretive guidance from General Comment 3 with respect to the concept of ‘progressive realisation’ – the notion of the full realisation of economic, social and cultural rights taking place over time and not

44 Section 234 (‘Charters of Rights’) reads: ‘In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.’

45 Recall that s 39(1)(b) reads in part: ‘When interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law.’

46 These are juridical acts by UN human rights treaty bodies which are designed to set out, in relatively succinct form, the content of states’ obligations under the relevant treaty with respect to a given right, or aspect of a right, or with respect to the treaty as a whole; the principles are articulated only after enough experience evaluating state reports has been generated for principles to be synthesised, articulated and to an extent developed in one easy-to-access document.

47 Committee on Economic, Social and Cultural Rights ‘The Nature of States Parties’ Obligations (art 2, para 1 of the Covenant)’, General Comment No 3, UN Doc E/1991/23, Annex III (adopted in December 1990). Article 2(1) reads:

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.

immediately. General Comment 7, the second of the Committee's doctrinal syntheses relied on by Davis J, dealt specifically with the normative content of the right to adequate housing, with Davis J having regard to the principle of adequate alternative accommodation in the evictions context.⁴⁸ What bears emphasis at this point is the seamless way in which the Cape High Court integrated ICESCR obligations into its interpretive analysis.⁴⁹

(a) Normative interaction amongst treaties and a principle of greatest protection

When considering the ICESCR as a normative reference point in *Grootboom*, it is important to note that the ICESCR is not an isolated treaty. Rather it interacts with other treaties, notably the five other core UN treaties – influencing the content of other treaties at the same time as being influenced. Of central importance is the normative exchange that occurs between the ICESCR and the International Covenant on Civil and Political Rights (ICCPR).⁵⁰ It has long been generally accepted, for example, that the content of the 'right to life' in art 6 of the ICCPR overlaps with and draws upon the essential interests protected by various ICESCR rights such as those respecting health. The body overseeing the interpretation of the ICCPR, the Human Rights Committee, has very recently confirmed how extensively the ICCPR and the ICESCR overlap and mutually influence each other in their normative protections.⁵¹

48 General Comment 7 (note 41 above) art 11(1) reads:

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

49 Perhaps even more significant is the fact that the court considered international 'soft law'. Davis J considered the Limburg Principles generated by a conference of international human rights law experts and he also considered the UN Guidelines on the Prevention of Juvenile Delinquency: *Grootboom* (note 1 above) 285H–286E. See Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN ESCOR, Commission on Human Rights, 43rd Session, Annex, Agenda Items 8 and 18, 1, issued as UN Doc E/CN.4/1987/17 (1987); the Limburg Principles can also be found at www.law.uu.nl/english/sim/instr/limburg.asp (visited 30 April 2000). See also United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), adopted and proclaimed by General Assembly Resolution 45/112 of 14 December 1990. See *Human Rights: A Compilation of International Instruments*, UN Doc ST/HR/1/Rev.5, Vol 1 (1994) 346; and www.server.law.wits.ac.za/humanrts/instree/j2ungpjd.htm.

50 Adopted on 16 December 1966, (1967) 6 ILM 368.

51 Canada's failure to take adequate steps to address the situation of homelessness was found by the Human Rights Committee to compromise the ICCPR's right to life, in part through the organic connection that exists between adequate housing and health. Also, the Human Rights Committee found that the right to non-discrimination had been affected by cuts to social assistance rates that did not have a 'neutral' effect across all poor persons but necessarily operated to exacerbate disproportionately the poverty of disadvantaged social groups such as women and children. See the discussion and citations in C Scott 'Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?' (1999) 10 *Constitutional Forum* 97–111.

One especially important implication of the ICCPR–ICESCR relationship is that it helps highlight how those dimensions of protecting positive rights (whether an adequate legal aid scheme or an adequate housing regime) that involve ‘progressive realisation’ – a realisation that deepens and expands with the passage of time – coexist with obligations with more immediacy in terms of the time span in which they must be met. While it is a false notion to think the ICCPR generates only obligations capable of immediate fulfilment, it is true that the basic obligation not only to respect but also to *ensure* all the ICCPR rights, as set out in art 2(1) of the ICCPR, is phrased in such unqualified terms as to signal the need for a special effort to be made to organise state policy-making and resource allocation in a way that gives priority to measures necessary to ensure that ICCPR rights are not infringed. In turn, there is a conceptual concordance between this presumption of immediacy and the doctrinal principle laid out in ICESCR jurisprudence and noted by Davis J in *Grootboom*, namely that the obligation progressively to realise human rights includes the obligation to give a special priority to ensuring a core minimum entitlement without delay.⁵² To read the principle of progressive realisation as incompatible with immediate duties to ensure key protections would be, in effect, to conceptualise duties to ensure positive rights as never capable of being violated, as constantly receding into the future.

A second UN human rights treaty with special relevance for *Grootboom* is the UN Convention on the Rights of the Child (the CRC).⁵³ In the same way that the 1996 Constitution highlights the special vulnerability of children by particularising certain of their rights in s 28, the international community decided there was a need to create a special normative visibility – and, to an extent, priority – for children’s interests and needs. The CRC is also a normative analogue to the 1996 Constitution in as much as it entrenches the human rights of children from both categories of so-called ‘civil and political rights’ and ‘economic, social and cultural rights’ in a way that does not segregate them, nor, indeed, even indicate whether a given right falls into one category or the other – or into both, in the manner of the evolving knitting together of the ICCPR and the ICESCR.

However, a problem would arise were one to approach the relationship between art 2 and art 4 of the CRC in a legalistic as opposed to a purposive and holistic manner. Article 2 sets out the basic ICCPR-style duty to ‘respect and ensure’ *all* the rights in the treaty. Then, ‘economic, social and cultural rights’ are given additional mention in art 4:

52 This reasoning arguably lies behind the way in which the Committee on Economic, Social and Cultural Rights discussed the rapprochement between the ICCPR and the ICESCR with respect to forced evictions. The Committee interpreted art 11 of the ICESCR broadly in light of art 17 of the ICCPR in General Comment 7, in the process recognising a shared norm unifying rights with respect to housing and rights with respect to home. This concordance has special relevance to the interpretation of the evictions provision of the Bill of Rights, s 26(3). See General Comment 7 (note 41 above) especially at paras 9 and 14.

53 Convention on the Rights of the Child, adopted on 20 November 1989, (1989) 28 ILM 1448.

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 co-operation.

Some may seek to draw a negative inference from this: that this specific mention in art 4 conditions, indeed supplants, the general obligation to respect and ensure all CRC rights in art 2. This would be a profoundly erroneous interpretation. Not only would such an interpretation fail to grasp the idea of degrees of priority in ensuring human rights noted earlier. It also begs the question of what is and what is not a social, economic or cultural right as distinct from a civil or political right – a distinction that has always been on a very shaky footing and which is constantly called into question by the interpretive practice of the human rights treaty bodies. The extent to which the very distinction is one which has limited conceptual integrity is also the extent to which it would be contrary to the overall purpose of the CRC to view a subsystem of second-class rights as having been surreptitiously created within the CRC.⁵⁴

With the above in mind, art 4 is best viewed not in terms of implying lesser protection for some rights (ie, some rights in the CRC are not to be as ‘respect[ed] and ensure[d]’ as others), but simply as stating – out of an excess of caution, as it were – the minimum degree of protection owed. And even here, it should be noted that the drafters chose to emphasise the immediacy of the positive obligations by not including express reference to progressive realisation, a term that the Committee on Economic, Social and Cultural Rights has said has too often been unfortunately misinterpreted by states as an excuse for delay.⁵⁵ As such, art 4 in essence emphasises how onerous such bottom-line obligations are – ‘to the maximum extent of [a state’s] available resources’ – rather than how attenuated. Such a signal as to a floor of protection for rights that drafters perhaps feared might be swept under the carpet leaves unaddressed, and thus intact, all the attendant jurisprudential dimensions of positive obligations with resource implications. Nothing in art 4 speaks to how immediately and with what priority certain obligations must be met. Far less does art 4 prejudice the very notion of a continuum of priorities amongst ‘economic, social and cultural rights’ or associated notions such as that any given abstract right protects a range of concrete interests, some more pressing in terms of the duty to fulfil (closer to the core of that right) and some less pressing (closer to the periphery).⁵⁶

54 For a recent querying of the justifiability of talking about ‘economic, social and cultural rights’ – or almost any broad human rights category – as a distinct category, see C Scott ‘Reaching Beyond (Without Abandoning) the Category of “Economic, Social and Cultural Rights”’ (1999) 21 *Human Rights Q* 633.

55 General Comment 3 (note 47 above) paras 1 and 2.

56 For the notion of core and periphery in relation to how compelling are the interests protected by an abstract right, see the Supreme Court of Canada in *United States of America v Cotroni* [1989] 1 SCR 1469.

That the foregoing must be the case flows in part from a principle of greatest protection which we would argue should govern interpretive harmonisation amongst human rights treaties. Such a principle flows from the best reading of the combined normative signals of art 41(b) of the CRC ('Nothing in the present Convention shall affect any provisions which are more conducive to the realisation of the rights of the child and which may be contained in: . . . (b) International law in force for that State') and the general principle of treaty interpretation in art 31(3)(c) of the Vienna Convention of the Law of Treaties which calls for a treaty term to be read in light of other relevant international law applicable in the relations between the parties.⁵⁷ To invoke the text of art 4 of the CRC as placing less onerous obligations on states to protect children's 'economic, social and cultural rights' than is recognised to flow from obligations of progressive realisation under the ICESCR would be in effect actively to argue for normative dissonance between treaties *and* to argue that such dissonance should be eliminated by preferring the least generous interpretation – with the implied corollary message that the treaty with the more generous approach should revise downward its level of protection. However implicit this structure of argument, it necessarily follows from positing that any given state must be assumed to want coherence between its obligations, where it is party to more than one human rights treaty. In other words, a state must be willing this result if it is not to engage in what some philosophers have called a performative contradiction.⁵⁸ A state party to both the CRC and the ICESCR which seeks to invoke a parsimonious interpretation – that only attenuated dimensions of the duty of progressive realisation apply to children's economic, social and cultural rights (ie, no immediate core duties and no priority-based progression from there) – would be disingenuous if it claimed to be making this argument only with respect to the CRC while accepting that its obligations towards children with respect to the same abstract rights are greater under the ICESCR. For what would be the point? The only possible purpose would be to facilitate special pleading – to avoid a legal judgment of non-compliance with human rights obligations under this treaty today even when the state knows it is due to be found wanting for the same conduct under that treaty tomorrow. Faced with the consequences of such a 'logic' of argumentation, the only principled interpretation of the combined effect of art 41(b) of the CRC and art 31(3) of the Vienna Convention is that a principle of treaty harmonisation according to the more human-rights-protective interpretation must prevail.

The above point is underlined by the extensive overlap that exists between the positive obligations to protect and provide for children

57 Vienna Convention on the Law of Treaties, 1969 (1969) 8 ILM 679.

58 On performative contradiction as the argumentative use of 'the very thing [the arguer] wants to negate', see J Habermas *Moral Consciousness and Communicative Action* (1990) (trans C Lenhardt & S W Nicholsen) 95 and also 80–81, 88–89 and 129.

found in arts 10(1) and 10(3) of the ICESCR and arts 23 and 24 of the ICCPR. If the ICESCR mandates ‘the widest possible protection for the family . . . particularly . . . while it is responsible for the care . . . of dependent children’ and that ‘[s]pecial measures of protection and assistance should be taken on behalf of all children’, while the ICCPR stipulates not only that ‘the family . . . is entitled to protection by society and the State’ but also that ‘[e]very child shall have, without any discrimination . . . the right to such measures of protection as are required by his status as a minor’, then it is impossible to argue seriously for a principled distinction within the CRC that is rejected by the ICCPR and the ICESCR themselves. There are two reasons why these common protections assume importance in a case such as *Grootboom*. First of all, emphasis can be placed on the concept of families as bearers of rights as a function of the environment of care they provide for children. Secondly, it helps us understand why some provisions of the CRC signal positive obligations that are closer to the pressing-fulfilment sort than to the eventual-fulfilment sort. Article 27 of the CRC makes it clear that those responsible for a child’s upbringing, notably parents, have ‘primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development’, and that the state plays a complementary back-up role for children not fortunate enough to have parents able to meet this responsibility. The CRC thus helps simultaneously to limit the state’s financial obligations while setting out the principle by which such obligations are triggered: need triggered by parental (or guardians’) financial incapacity. And, then, it does so in a way that highlights three core interests in the following terms in art 27(3): ‘States Parties, in accordance with national conditions and within their means . . . shall in case of need provide material assistance and support programmes, *particularly with regard to nutrition, clothing and housing.*’⁵⁹ While leaving room for contextual determination of a range of core needs of children (‘material assistance and support programmes’), a normative prioritisation is set up for aspects of well-being that go to the very core of children’s ability to develop and of life itself. Such signalling must be taken seriously in interpreting the timing and scope of children’s rights protection.⁶⁰ It also bears noting that the strength of that signal is enhanced by the fact that there is near-universal ratification of the CRC: only two states are not parties.

59 Emphasis added.

60 Even here, caution is of course required. The apparent super-priority of these three interests must still be approached in a principled and holistic way. For example, even if health care is excluded from specific mention, it is integrally connected to these three goods, and indeed health consequences may be one of the best and easiest ways of assessing the adequacy of nutrition, clothing and housing. Furthermore, nothing precludes that which is not specifically mentioned from being read into the general duty with respect to ‘material assistance and support’ as another core right that is very close, perhaps so close as to be all but identical, in priority to the three interests selected for specific mention.

(b) Interpretive relations amongst international and national human rights systems

It was earlier noted that South African courts will have to work out the substantive relationship of international human rights law and the content of the Bill of Rights. We do not propose to discuss in any detail how actively South African courts must not only consider international human rights law but also seek to go beyond the existing positive-law consensus at the international level. We would like, however, to comment briefly on two aspects of the relations between national law and international human rights law that are clearly governed by treaty obligations.

First of all, recall the presumption of compliance with international law. We have noted how it is not quite as straightforward to apply this to a constitutional document as to statutory interpretation and have argued that a substantive test of concordance of values between treaties and constitution should condition what would otherwise be a substance-neutral interpretive principle such as found in s 233 of the 1996 Constitution. The close proximity in content and in shared values between the UN human rights treaties and the Bill of Rights does suggest the justifiability of a presumption of protection at least as great as that under the treaties, but such a presumption must be rebuttable where it can be shown that international human rights law seems to have taken a course that clashes with the values of the Bill of Rights.⁶¹ A second dimension to this principle can be seen if one recalls the Committee on Economic, Social and Cultural Rights's formulation in General Comment 9, parts of which are reproduced again below:

Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. . . . [W]hen a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter.⁶²

What is signalled here is a collective accountability on the part of relevant institutional actors within a state. If constitutional review can be used by one institution as the way to ensure that all institutions acting in concert do not breach international human rights law, and there is no statutory

61 For example, some would argue that it can be dangerous to look to some elements of international human rights law with respect to non-discrimination because of how formalistic the application of that principle has sometimes become. While this formalism is less of a problem when understood in the light of the substantive protections for vulnerable and disadvantaged groups that international human rights bodies have read into rights other than the right to non-discrimination, not all human rights treaty bodies have clearly embraced a philosophy of substantive equality with respect to the norm of non-discrimination itself. Although implicit in the practice of the UN human rights treaty bodies, not all of them have yet been as clear as the Committee on Economic, Social and Cultural Rights in saying that '[g]uarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights'. General Comment 9 (note 17 above) para 15.

62 Ibid paras 14 and 15.

source which can be interpreted both reasonably and broadly so as to accomplish this result, then such review would be both 'appropriate' and 'necessary' as an interpretive 'choice'. This is not to say that matters would not be different were the state to take the statutory initiative, including, for example, by partially covering the field with statutory Charters of Rights, per s 234 of the 1996 Constitution. In this case, courts will have more flexibility and be able to bring international law directly to bear on the interpretation of the Charters without filtering international human rights law through the Constitution as a necessary intermediate step. This flexibility could allow a judicial–legislative dialogue to develop which would help build up the institutional familiarity and comfort level with international human rights law, thereby providing a surer South African footing when cases unavoidably raise the issue of constitutionalisation of international human rights norms.⁶³

Secondly, it bears noting that a certain form of legal reasoning – which could be called formalistic or legalistic – may accord undue importance to formulations in international treaties that may appear to offer less protection than provisions in the Bill of Rights are capable of being interpreted as offering. For example, were a litigant to offer an interpretation of the Bill of Rights that gives a pervasive interpretive role to s 9 equality and a court to be convinced (probably incorrectly) that equality rights guarantees do not – or do not yet – go this far in any of the human rights treaties, that court may be tempted to invoke the narrower approach to equality rights as a reason not to interpret the Constitution as offering the degree of protection contended for.⁶⁴ Such use of international human rights law misconceives the relations between the systems in a way that is a direct analogue to the negative approach to inter-treaty relations discussed earlier with respect to interpretive harmonisation of the CRC and ICESCR.⁶⁵ Human rights treaties must be viewed, presumptively, as floors for national human rights protections, not ceilings.⁶⁶ States have been careful to include in each treaty a savings clause such as that found in Article 5 of the ICCPR:

63 Such unavoidability would arise, for example, when the only effective remedy would involve invalidation of a statute and when the remedies Parliament has provided for under a Charter of Rights (for example, judicial declaration followed by recommendation to modify legislation) are found by the courts to be too soft for the dictates of the situation.

64 Here again, caution with this example is necessary, for a court could only be so tempted while simultaneously ignoring how substantive equality tends to appear in international human rights law by way of the interaction of non-discrimination with other substantive rights: see, for example, the discussion in Scott (note 54 above) 640–41. It would also ignore the evolving trend for human rights treaty bodies to use equality rights less obliquely and to see equality itself as organically connected to protection of the interests of disadvantaged members of society: recall the last sentence of General Comment 9 (note 17 above) para 15.

65 See V(a) above.

66 One of the authors has earlier noted (Scott, note 5 above), in the context of discussing 'supererogatory interaction' between international human rights institutions and the South African courts:

The standards set at an international level should not be seen as imposing a cap on how far domestic courts can (indeed, must) go. A good example is the judgment in *S v Makwanyane*

no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.⁶⁷

In a similar vein, the CRC's art 41, already mentioned in terms of inter-treaty relations, also speaks to international–domestic relations in the following terms:

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) The law of a State party. . . .

With the international normative context outlined, we turn now to the reasoning used by the Constitutional Court in adjudicating constitutional priorities in *Soobramoney*.

VI SOOBARAMONEY

(a) The case

Forty-one-year-old Thiagraj Soobramoney suffered from several diseases including diabetes and heart disease. In addition, he was struck down by chronic renal failure, a more serious form of kidney failure than acute renal failure. Whereas acute failure can be remedied – and even cured – by treatment on a renal dialysis machine, chronic failure is irreversible such that regular renal dialysis is needed just to keep a person alive. A kidney transplant becomes the only option for saving (as opposed to simply prolonging) the person's life, with renal dialysis playing a bridging role until a transplant operation occurs. Various factors are relevant in determining how good a candidate a person is for a transplant, including whether or not the person is free of other major disease.

The most proximate hospital for potential treatment of Mr Soobramoney was Addington Hospital in Durban, a state-funded facility. The doctor who had to assess whether Mr Soobramoney could receive dialysis, Dr Saraladevi Naicker, was a highly regarded specialist in renal medicine, being President of the South African Renal Society at the time of the case. Dr Naicker's affidavit testimony set out the state of affairs at Addington and the process by which the hospital determined that Mr Soobramoney did not qualify for treatment in the renal dialysis unit.

At its disposal the hospital had 20 dialysis machines, in varying states of repair. Nursing resources were built into the hospital budget for use of

. . . in which the Constitutional Court avoided the more limited interpretation of the right to life under international law in deciding the case. Absent specific commitment by a state to abolish the death penalty through ratification of the Second Optional Protocol of the International Covenant on Civil and Political Rights, international law does not currently appear to prohibit the death penalty absolutely. Yet, this international legal state of affairs did not prevent the Court from interpreting [South Africa's] domestic legal system to have evolved to the point where the right to life includes such a prohibition.

67 See also the virtually identical ICESCR art 5(2).

those machines, although not on a 24-hour basis (even were these nursing resources available for continual use of the machines, such use would have to be balanced against the need to keep the machines from breaking down from such use and to replace machines earlier than would be the case on a schedule of less frequent use). Given the relationship between currently available resources and a level of potential use that exceeded those resources, the hospital had a policy of allocation of renal dialysis geared quite sensibly towards using those machines where they could make the most difference. Thus, patients suffering from *acute* renal failure, a remediable condition, were given first priority, meaning automatic access to the renal dialysis programme. As for patients suffering from *chronic* renal failure, access was more constrained with the governing principle again being whether or not dialysis could help save the person's life. This translated into a requirement that a person be a candidate for a kidney transplant and this in turn was governed by a set of written guidelines on eligibility. Because Mr Soobramoney was not, in the words of the guidelines, '[f]ree of significant disease elsewhere', he was found not to be eligible for a transplant – and thus not to be eligible for dialysis the sole purpose of which would be to bridge the time period during which an organ donor is sought out.⁶⁸

Mr Soobramoney was not alone in this result. Dr Naicker's testimony revealed that only a minority – about 30 per cent – of those suffering from chronic renal failure meet the admission criteria for transplants.⁶⁹ Of the remaining 70 per cent, access to renal dialysis falls entirely to 'private' financial resources. As Chaskalson P would note in speaking for the Constitutional Court, '[t]he hard and unpalatable fact is that if [Mr Soobramoney] were a wealthy man he would be able to procure such treatment from private sources'.⁷⁰ Indeed, Mr Soobramoney had turned to the private hospital sector. It was only when he had exhausted his personal finances and could thus no longer afford to pay for treatment that he brought his constitutional application, seeking an order for Addington to provide him with access to dialysis treatment. The High Court dismissed the application. The applicant was then granted leave to appeal by the Constitutional Court, which set the matter down for an urgent hearing. The case was heard on 11 November 1997 and judgment rendered very soon thereafter, on 27 November. The Constitutional

68 Quoted in *Soobramoney* (note 4 above) para 4. It is not clear from a reading of the *Soobramoney* judgment what the specific principle is behind the transplant criteria. Is the main concern whether the operation is likely to be successful in the sense of the patient not rejecting (immediately or some time after) the organ by virtue of complications created by other disease or is it that transplants should be reserved for those who stand a decent chance of living some time thereafter (versus succumbing to the other diseases or the cumulative effect of hosting a new organ and combating other diseases)? The authors shall assume the latter consideration is at least a major rationale as this increases the extent to which the dialysis-access issue for chronic failure patients falls squarely within a tragic-choices dynamic in which a utilitarian calculus helps decide what policy to adopt.

69 *Ibid* para 26.

70 *Ibid* para 31.

Court upheld the lower court's decision and decided that the failure to provide treatment to Mr Soobramoney did not violate the Bill of Rights. Three days after the Court's judgment, Mr Soobramoney died.⁷¹

(b) The holding

It was accepted all round that the primary right at issue was s 27, which reads:

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

That being said, the Court accepted that 'aspects of the right to life' in s 7 were also directly at stake by virtue of the link between such goods as health care, housing, food and water, social security and employment opportunities and a broad understanding of the right to life as 'the right to live as a human being, to be part of a broader community, to share in the experience of humanity'.⁷²

In what follows, we adopt a primarily narrative approach to presenting the Court's reasoning. Embedded in the presentation will be implicit comments on the limits of, or problems with, some of the reasoning. Further assessment then appears in VI(c) below.

(i) Section 27(3): emergency medical treatment

It seems that Mr Soobramoney's lawyers argued the case primarily as a s 27(3) question, seeking to benefit from the specific and emphatic formulation of the right not to be 'refused emergency medical treatment'. The central issue in the case thus became one of definitional inclusion of renal dialysis within the notion of 'emergency' treatment. In accepting that a purposive approach to interpreting the Bill of Rights is generally required, the Court seemed to say that this approach creates, as a corollary, a presumption of a 'generous interpretation' (that is, as wide an interpretation as can be borne by the text). However, that presumption can, in effect, be rebutted and a narrower interpretation adopted.

71 Prega Govender 'Family Fulfils Man's Dying Wish by Helping Kidney Patients' *Sunday Times*, 25 April 1999. The same article reports that members of Mr Soobramoney's family had raised two-thirds of the funds necessary to purchase a dialysis machine which they have donated to a medical facility to mark the first anniversary of Mr Soobramoney's death. The other one-third of the funds was put up by the facility to which the donation was made. Mr Soobramoney's final wish before lapsing into a coma was that his family make the effort to ensure that other kidney-failure patients are helped by adding one more machine to South Africa's medical capacity.

72 *Soobramoney* (note 4 above) para 31, quoting O'Regan J in *Makwanyane* (note 28 above) para 326. But see the discussion in VI(b)(i)(aa) below where this approach to the right to life is undermined by the use of negative inferences as a way to interpret ss 7 and 27 in light of each other.

The Court found that Mr Soobramoney's case related not to an 'emergency' or 'sudden catastrophe' but to an 'ongoing state of affairs', and thus did not fall within the scope of s 27(3) protection. Furthermore, the Court seems to have read limitations into the wording of s 27(3) by stating that the state's duty is 'not [to] refuse ambulance or other emergency services *which are available*' and not to turn a person 'away from a hospital *which is able* to provide the necessary treatment'.⁷³ This available-and-able qualification follows on from the Court's stating, without analysis, that s 27(3) creates a negative right only: the right not to be turned away from treatment institutionally capable of being given at the moment when the emergency arises. As such, the right in s 27(3) is read in a way that creates no constitutional imperative for the state to make sure emergency medical facilities are brought on stream so that no one in an emergency situation can be turned away. Section 27(3) is turned into a right not to be arbitrarily excluded from that which already exists: 'What the section requires is that remedial treatment that is necessary and available be given immediately to avert . . . harm.'⁷⁴

In reaching this conclusion, the Court drew normative support from the following arguments.

(aa) No inferences from the right to life

First of all, Mr Soobramoney contended that s 27(3) must be interpreted quite broadly in order to be consistent with s 11 because his claim was for a form of life-saving treatment. Having earlier noted that interests organically connected to life (such as health) are encompassed by the right to life, the Court seemed to engage in a *volte-face* by simply declining to address the interpretive 'relevance [of s 11] to the positive obligations imposed on the State under various provisions of the bill of rights',⁷⁵ including s 27. But it is also possible to read the Court as having obliquely decided against s 11 having a meaningful interpretive impact on s 27. Noting that the Indian Supreme Court has interpreted the right to life to have far-ranging content including state duties with respect to medical treatment, the Constitutional Court seems to view it as significant that Indian courts have interpreted the right to life broadly because the Indian Constitution does not have as wide an express range of justiciable rights as the South African Constitution:⁷⁶

Unlike the Indian Constitution ours deals specifically with certain positive obligations imposed on the state, and where it does so, it is our duty to apply the obligations as

⁷³ *Ibid* para 20 (emphasis added).

⁷⁴ *Ibid*.

⁷⁵ *Ibid* para 15.

⁷⁶ Medical treatment, for example, is addressed as a non-justiciable 'directive principle' in the Indian Constitution. On the relevance of Indian jurisprudence to social rights in a South African constitution, see C Scott & P Macklem 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 *Univ of Pennsylvania LR* 1, 114–31.

formulated in the Constitution and *not to draw inferences that would be inconsistent therewith*.⁷⁷

While this formulation clearly leaves open the potential for the right to life to be the repository for some contextually determined positive obligations, at the same time it seems to engage in a form of 'negative textual inferentialism' that is out of place in human rights jurisprudence.⁷⁸ If the passage just quoted is taken at face value, it would seem that both the right to life and the right to health must be *read down* in light of each other rather than drawing normative energy from each other.

(bb) Invocation of Indian Supreme Court case as exemplar

Despite minimising the relevance of the right to life to the case, the Court goes on to draw support for its result by briefly discussing an Indian Supreme Court constitutional case, *Samity*, in which the state was found to have violated the right to life by failing to provide 'timely medical treatment' to a person in need of treatment.⁷⁹ The breach resulted from turning a train accident victim, Hakim Seikh, away from a number of public hospitals in Calcutta, forcing him in the end to be treated at a private hospital. Although all the hospitals appear to have turned him away on grounds of not having either the necessary facilities or the space at the time in question, the South African Constitutional Court read the Indian Supreme Court as having ruled on the basis that 'the claimant could in fact have been accommodated in more than one of the hospitals which turned him away and that the persons responsible for that decision had been guilty of misconduct'.⁸⁰ The *Samity* case is taken as being about a situation where emergency treatment 'was available but denied'.⁸¹ Accordingly, the Court invokes *Samity* as precisely the kind of state conduct which the Court would be willing to find to be a violation of s 27(3).⁸²

77 *Soobramoney* (note 4 above) para 14 (emphasis added). And see the first sentence of para 19: 'In our Constitution the right to medical treatment does not have to be inferred from the nature of the state established by the Constitution or from the right to life which it guarantees.'

78 See Scott (note 54 above) 638–70 for a critique of this approach to harmonising the content of different provisions within a human rights document through interpretation that creates a 'ceiling effect' on invoking one generally expressed right to offer greater protection of certain interests than is offered by a provision that specifically mentions those same interests.

79 *Paschim Banga Khet Mazdoor Samity and others v State of West Bengal and another* (1996) AIR SC 2426. *Paschim Banga Khet Mazdoor Samity* is an organisation of agricultural labourers. Amongst the 'others' in the style of cause was Hakim Seikh, a member of the organisation and the one whose accident triggered the case. Intervenors unnamed in the judgment were also part of the 'others' and appear to have been represented by one of India's most well-known and senior social action litigators, Mr Rajeev Dhavan.

80 *Soobramoney* (note 4 above) para 18, referencing *Samity* (note 79 above) 2429.

81 *Ibid*.

82 'This is precisely the sort of case which would fall within s 27(3). It is one in which emergency treatment was clearly necessary. The occurrence was sudden, the patient had no opportunity of making arrangements in advance for the treatment that was required, and there was urgency in securing the treatment in order to stabilise his condition. The treatment was available but denied.' *Ibid* para 18. Parenthetically, one might wonder whether identifying 'opportunity of

(cc) Historical racialised context as interpretively important

The Court leans heavily on a highly semantic reading of the word 'refused' in s 27(3) in order to interpret the subsection as operating only as a negative right, that is, as prohibiting state action but not mandating conduct. This leads the Court, in effect, to read s 27(3) as if it said: 'No one may be refused *available* emergency medical treatment *from existing facilities*.' The Court seems to derive 'the purpose of the right' from this textual interpretation rather than discussing competing views of the purpose in order then to read the text in light of the purpose. Since the text has already told the Court that the right is negative, the Court reasons that the kind of refusal of access to existing medical treatment facilities must be formal and not substantive: 'bureaucratic or other formalities'. But the Court then goes on to bolster its argument with reference to the historical context, so as seemingly to show why the right is not as thin as their reasoning suggested. Buried in a footnote is the following context of which the Court takes judicial notice:

We have only recently emerged from a system of government in which the provision of health services depended on race. On occasions seriously injured persons were refused access to ambulance services or admission to the nearest or best equipped hospital on racial grounds.⁸³

Discriminatory barriers to access thus are suggested as a core example of the kind of arbitrary barriers which would be prohibited by s 27(3).

(dd) Consequentialist concerns and polycentricity

The Court also provides a reason, based on trade-offs amongst rights of different persons to health care, for not interpreting s 27(3) too generously. Mr Soobramoney's argument that dialysis should be included within an interpretation of emergency treatment and that there is a positive duty to make dialysis available is viewed as having the negative consequence of prioritising treatment of life-threatening ('terminal') illness over other forms of medical needs and associated treatment, and of diverting resources away from the effort of the state to fulfil the rights of 'everyone' (ie, everyone else) to health care. The Court invokes these concerns as a reason for concluding that s 27(3) would have to be 'much clearer' in embracing treatment of life-threatening but ongoing medical conditions.

(ii) Sections 27(1) and (2): the right of access to health care

Having concluded that s 27(3) did not apply, the Court then went on to analyse whether either or both of ss 27(1) and (2) had been breached.

making arrangements in advance for the treatment that was required' as an aspect of something being an emergency does not rather beg some important questions where financial incapacity to make such advance arrangements means that some people will have no more 'opportunity' to make arrangements where there is notice of need than where there is no warning.

83 *Soobramoney* (note 4 above) para 20, fn 10.

At least in relation to positive obligations, the Court implicitly reads s 27(1) as serving, in effect, a definitional function only. Once a constitutional claim is found to be protected in the terms of s 27(1)'s list of protected interests (for example, 'access to . . . health care services'), the obligations of the state are understood to be set out in s 27(2)'s duty to take measures 'within its available resources'.

The Court does not engage in any doctrinal exegesis of s 27(2) by considering, for instance, scholarly writing on the subject, documentation related to the drafting of the Constitution (such as Constitutional Assembly Theme Committee reports), or the significance of the overarching obligations provision, s 7(2).⁸⁴ Implicitly, the Court seems to have assumed that the claim being raised by Mr Soobramoney was of a breach of the obligation to fulfil his right to health care and seems to see no further need to discuss any specific literature on what the duty to fulfil could mean in the health care context. In particular, there is no allusion to the considerable jurisprudence and doctrinal work on the duty to fulfil rights in the framework of the principle of progressive achievement or realisation of human rights. As such, there is no acknowledgement of the concept of core entitlements demanding priority attention that has developed under the guidance of UN human rights treaty bodies. One can assume that Mr Soobramoney's lawyers did not raise arguments based on international human rights law given s 39's requirement that courts have an obligation to consider international law in interpreting the Bill of Rights.

The Court takes as a given, conceded by Mr Soobramoney, that existing funds were not sufficient to meet his claim and those of persons similarly placed to him with respect to chronic renal failure. Mr Soobramoney's claim was that additional funds had therefore to be found from within the state apparatus. In responding to this claim, the Court by and large concentrates its analysis on principled use of existing funds within the four corners of the budgetary envelope already allocated to the decision-maker (in this case, the Addington Hospital), but there is also some reasoning which considers whether existing funds are constitutionally inadequate.

The Court first discussed whether the principles applied by Addington Hospital were justifiable in prioritising others over Mr Soobramoney in access to dialysis. Again, the Court is holding constant the existing hospital budget at this stage of analysis. Although it cannot be said that the Court gave much future guidance as to the criteria on which such an allocation policy can be constitutionally reviewed, it at the very least set out a general basis for review: 'It has not been suggested that these *guidelines are unreasonable* or that they were not *applied fairly and rationally*.'⁸⁵ Thus, the Court reasoned in a way that makes it clear that

84 Section 7(2) reads: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

85 *Soobramoney* (note 4 above) para 25 (emphasis added).

some standard of reasonableness applies to the rules that are devised for making allocation decisions while the application of those rules is also subject to separate scrutiny in terms of the ideals of fairness and rationality. Without expressly saying so, the Court subjects Addington's policy and its application of that policy to constitutional review in the following compact and rich sentence:

By using the available dialysis machines in accordance with the guidelines more patients are benefited than would be the case if they are used to keep alive persons with chronic renal failure, and the outcome of the treatment is also likely to be more beneficial because it is directed to curing patients, and not simply to maintaining them in a chronically ill condition.⁸⁶

The Court is undoubtedly being cautious here, but it may not be too much to suppose that these abstract review criteria – especially the notion of rationality – were formulated with some eye to the principles that govern limitations analysis including the requirement in s 36(1)(d) to consider 'the relation between the limitation [ie, the decision not to provide needed medical care] and its purpose [ie, allocating scarce resources in the most overall beneficial way]'.⁸⁷

The Court then moves on to discuss the question of whether additional funds should have been made available for this health care need. Here the discussion becomes ambiguous as two analytically separate questions are addressed with some fluidity in the exposition:

- (1) Is there a constitutional obligation on the part of the state to provide dialysis to all those with chronic renal failure by way of increasing the overall health budget?
- (2) Is there a constitutional obligation on the part of the state authority with jurisdiction over health care (here, the province of KwaZulu-Natal) to re-prioritise within the overall health budget of the authority?

In discussing the two issues, the Court gives substantive reasons against finding a constitutional obligation of either sort on the facts of the case, without locating those reasons in a doctrinal framework for under-

⁸⁶ Ibid.

⁸⁷ While we cannot develop the point here, it would seem that there would be much to be gained by using the justificatory criteria in s 36, *mutatis mutandis*, to provide part of the structure for reasonableness and rationality analysis within the interpretation of rights where the issue is whether sufficient constitutional priority has been accorded to a right or rights. The carefully articulated criteria in s 36 can be viewed as first principles of legal rationality in the field of human rights and need not operate exclusively in the realm of limitations analysis once an infringement has been found. We realise that this approach in effect treats the failure to satisfy a constitutionally protected interest as a *prima facie* infringement of a constitutional right within the analysis of rights such as those in s 27 and in effect introduces the justificatory rationality of s 36 into rights clauses themselves when the very issue is whether the government has acted reasonably and rationally in relation to setting and delivering on priorities in policy-making and legislation where budgetary expenditures are key. We think such an approach desirable – for otherwise the rationality and reasonableness analysis spoken of by the Court becomes amorphous and unexacting in the justifications required of government as to why these constitutional needs have not yet been satisfied.

standing positive constitutional obligations in relation to pressing individual need. There is, however, a clear normativity underlying the reasoning: the Court seems to opt for a certain conception of fairness in allocation. But it arguably does so in a way that ends up coming close to denying that any given person or group can legitimately assert a priority constitutional claim on resources.

The Court first notes that the impact of a claim for increased resources must be assessed by reference to the magnitude of funds required were all 'similarly placed' persons to be accorded the same access to treatment. Equality amongst those in need thus creates a multiplier effect on the budgetary amount that would be needed. Then the court moves outside fairness amongst persons with the same needs (renal dialysis) to note that a claim to life-prolonging treatment cannot be limited on a principled basis to only one kind of medical condition and one kind of expensive medical technology. This impacts even further on the overall funds required. And then, finally, the Court steps outside the field in question and draws attention to the classic problem of polycentricity: it is not just health care but housing and education and water and employment opportunities that the state must – fairly – address in a context of scarce resources. And so:

[F]or if treatment has to be provided to the appellant it would also have to be provided to *all other persons similarly placed*. . . . 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*.⁸⁸

Having thus set up a hugely radical consequence of this one judgment, the Court then formulates a crucial passage which has been read by many to signal a deference bordering on abdication of a review role in assessing the constitutional adequacy of existing state resources for respect, protection, promotion or fulfilment of any given constitutional right:

These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.⁸⁹

Yet, it would seem too quick a judgement to say that the Court in this passage must have intended *Soobramoney* to send a strong hands-off signal. While the words 'slow to interfere' do suggest the intention to signal some *degree* of judicial deference, it is crucial to note that this restraint is not absolute but relative – that is, relative to the role and capacities of other institutional actors. In this passage, deference is to kick in only when a court is persuaded not only that the challenged decisions are 'rational' – again suggestive of s 39-style factors – but also only when that rationality coincides with good faith. Here it is important to note that judging is not diplomacy in which the good faith of other

88 *Soobramoney* (note 4 above) para 28 (emphasis added).

89 *Ibid* para 29.

actors must be taken as an unquestioned given for fear of causing sovereign affront. Rather, the Court's invocation of 'good faith' must be taken seriously as having meaning with a normative bite. Tentatively, we would suggest that the good faith inquiry must take place at the level of assessing not simply whether there is the extreme of bad faith motive. In post-apartheid South Africa, we assume that it will likely be relatively rare that a court will have evidence of a more or less conscious government policy to undermine constitutional values. More significantly, there should be an inquiry into whether the legislative and executive purposes are consistent with good faith in the sense of being compatible with a full and sincere commitment to realising the constitutional rights in question.⁹⁰ Without some scrutiny of purpose according to a standard of keeping faith with the Constitution, rationality analysis would have no critical edge.⁹¹

The passage just quoted suggests that the Court's willingness to apply more deferential standards of review is related to an assessment of the comparative merits of a court being the institution to make a certain judgment as opposed to another institution. Both questions of legitimacy (who is more justified politically – that is, in terms of legitimate constitutional authority – in making a certain determination?) and capability or capacity (who is functionally most effective in playing a certain role in a way that is simultaneously rational and responsive to the relevant values?) enter into the picture.⁹² It is important to note, again, that judicial involvement is not an on-off switch: just because a court cannot legitimately or competently deal with all – or even many – aspects of a case does not mean it should deal with none.⁹³ This relational

90 The Court's formulation is suggestive of the relationship between justification and good faith in E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31. Something resembling Mureinik's approach may accordingly be what the Court wished to keep open for future development. See also Frank Michelman's comment on *Soobramoney* in the course of a discussion of Mureinik's work: F Michelman 'The Constitution, Social Rights and Reason: A Tribute to Etienne Mureinik' (1998) 14 *SAJHR* 499.

91 Arguably, this should be both an implication of, and an extrapolation from, the analysis of the Constitutional Court in the *Pharmaceutical Manufacturers* case in which constitutional rationality of executive decisions is discussed in terms of the purpose for which a power is given. For legislative rationality, the relevant source of power is the Constitution itself and thus irrationality cannot be judged simply by reference to the stated purpose of the executive act or statute. *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 95 (Chaskalson P).

92 That legitimacy and capability are mutually reinforcing is clear: see Scott & Macklem (note 76 above) 24–25. The capacity of the court to act pragmatically and usefully to 'promote' constitutional values per s 39 itself speaks to the legitimacy of the court involving itself to the limits of its usefulness – and, conversely, to the illegitimacy of the court *not* involving itself where its involvement could make a difference.

93 'Courts create their own competence. The courage to be creative depends on a conviction that the values at stake are legitimate concerns for the judiciary. When the desirability of recognizing such values nonetheless conflicts with perceived institutional inadequacies, the judiciary need not absolve itself of the issue. Instead, it is free to provide an interpretation and a remedy as best it can do in the circumstances, and hope to provoke a cooperative and constructive dialogue with other organs of government and the citizenry at large.' Scott & Macklem (note 76 above) 68–69.

dimension of the role a court can play at any given time on any given normative question makes it very important to be aware of the differences in context between different cases. For example, it cannot help but be relevant that *Soobramoney* was litigated scarcely a year after the 1996 Constitution entered into effect, a very short period for government – especially multi-jurisdictional government – to have worked through the relationship between constitutionalised priorities and its policy-making in the fields to which those priorities relate. The Court signalled that it was aware that the nature of the duty progressively to realise human rights is such that a failure to take certain steps or achieve certain results may not violate the Constitution in a given year whereas the same omissions 3, 5, 10 or 20 years onward may indeed constitute a breach of the state's obligations: 'Given this lack of resources and the significant demands on them . . . an unqualified obligation to meet these needs would not *presently* be capable of being fulfilled.'⁹⁴

A further significant feature of *Soobramoney* is that the case in effect involved a kind of institutional actor with a tradition of principled engagement in exactly the kind of priority-setting which the Constitution now mandates. That actor is of course the medical profession, personified in this case by a doctor who was actually the president of the national society of specialists in the field of renal medicine. The presence of such an actor gives a reason for considerable presumptive deference, which is positively earned when that actor is able to show clear principles (for example, the Court's invocation of maximisation of benefits to those most likely to benefit) and consistent application of those principles. While there are limits to which many expert communities can act as the kind of front-line constitutional decision-makers, which is effectively what occurred at Addington Hospital, the basic principle of courts taking seriously *proven* expertise of other institutions in giving meaning to constitutional rights cannot be doubted.⁹⁵

A final observation will fill out the picture. It should already be apparent that the Court was willing to accept utilitarian ethics as a key component in arbitrating amongst competing rights in a situation of scarce resources. In the Court's evaluation, both the numbers of persons benefited and the quality of the benefit to those persons spoke against a policy of giving preference to Mr Soobramoney over others with a claim on *existing* renal dialysis resources. As a central element in decision-making that involves the reality of 'tragic choices' (some will get the machine, some will not), only a philosophical dogmatist could exclude the relevance of these kinds of choice criteria, although one must still legitimately insist on a more self-conscious justification of why some

94 *Soobramoney* (note 4 above) para 11 (emphasis added).

95 The separate opinions of Madala J and Sachs J in *Soobramoney* (note 4 above) serve to highlight the special role of the medical practitioner in keeping faith with the 1996 Constitution in the case: see para 45 (Madala J) and paras 58–9 (Sachs J).

lives must be valued over others.⁹⁶ There is, however, a need to be wary of the application of such utilitarian reasoning where fixed resources are not assumed, the issue being rather whether to find additional resources for the highest priority constitutional claims. Even where utilitarian reasoning is legitimately employed in fixed resource situations, the reasoning cannot avoid addressing how the special normative weight of core entitlements should be factored into the assessment of trade-offs amongst persons' rights.

By way, then, of leading into the next section of this article, it is worth noting two other passages of the Court – beyond those already cited⁹⁷ – which will force future judges, scholars and advocates to grapple with the role of utilitarian calculus in the state's justification of the failure to meet prima facie constitutional needs. The Court first draws support from a passage in an English judicial review case, *Cambridge Health Authority, ex parte B*, in which Sir Thomas Bingham MR says:

Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make.⁹⁸

It is important to note that this statement emerges from a judicial review context in which constitutional rights to health care play no role, and thus in which the normative baselines for judicial review are very different from those in South Africa. Keeping that in mind, it would seem valid to read this passage as dealing solely with the situation in which utilitarian reasons have maximum force: namely, where the question is one of allocation of health care within a fixed budgetary envelope for a given medical service. Even then, we would do well to recall that the *Soobramoney* Court had already stated that such intra-envelope decision-making is still subject to constitutional review based on reasonableness, fairness and rationality. To read Bingham MR's final sentence – 'That is not a judgment which the court can make' – as relevant in any strong sense to South African constitutional law on priorities in provision of health care would be to treat s 27 of the 1996 Constitution as if it were not there.

Chaskalson P concludes his judgment with the following:

The state has to manage its limited resources in order to address all [constitutional] claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.⁹⁹

This reference to 'the larger needs of society' is a rather more far-reaching kind of utilitarian claim than the earlier observations about maximising

⁹⁶ In many respects, this seems to have been the function of Sachs J's separate reasons, especially the passage at para 57 where he talks about the relevance of dying being a 'part of life' for the 'tragic medical choices' that have to be made.

⁹⁷ Note 85 above.

⁹⁸ [1995] 2 All ER 129 (CA) 137d–f, quoted in *Soobramoney* (note 4 above) para 30.

⁹⁹ *Soobramoney* (note 4 above) 31.

benefits for those claiming access to the same state services. As such, it should perhaps be read with some caution. It would seem desirable to understand the Court as relating those 'larger needs of society' primarily to the fulfilment of a range of constitutional obligations associated with the entire bundle of constitutional human rights claims mentioned by Chaskalson P in the previous sentence, rather than to some ill-defined notion of the 'general good'. The qualifier – 'There will be times . . .' – also suggests that the Court realises that favouring larger needs over the specific needs of individuals should operate more in the exception, at least with respect to core constitutional interests.

(c) Implications

This article's primary purpose in discussing the *Soooramoney* case is not to make any strong claims about whether the result was right or wrong. Rather, the purpose is to suggest the implications of some of the reasoning and gaps in reasoning, and thereby some avenues of inquiry that may prove fruitful in *Grootboom*.

(i) Section 27(3) as a virtually redundant negative right

As noted, the Court adopts a close reading of the verb 'refused' in s 27(3) to mean that the provision generated only negative duties on the state. In turn, this led almost inexorably to interpreting the subsection as being about state exclusion from *existing* and *available* resources. On top of the narrow reading given to the word 'emergency', this severely limits the import of s 27(3) because it seems to deny that there is any duty on the state to ensure that emergency medical services are sufficient to meet need. Had s 27(3) been interpreted in light of the right to life in s 10 and the general duty to fulfil rights in s 7 so as to generate a positive claim on resources, its function would have been to mandate a heightened constitutional priority for developing this kind of health care service. As it is, and as we will seek to show below, a negative-rights interpretation leaves s 27(3) to do no normative work that other provisions of the Bill of Rights do not already – and more clearly – do.

Here, the Court was too quick to draw support from the Indian Supreme Court *Samity* case which, it will be recalled, the Court presented as being about arbitrary exclusion from facilities that were available to treat the train-accident victim, Mr Seikh. This permits the Court to say that a South African court would have reached exactly the same finding as the Indian court. However, this is not the only dimension of *Samity*. While it is true that the Indian Supreme Court judges in *Samity* do seem to find that at least one hospital could have done more to find a way to treat the victim, it is also true that much of the judgment focused precisely on the inadequacy of the emergency care network in the entire city as well as the inadequacy of resources even in the hospital(s) held at fault for not finding corridor space or devising other triage-like ways of

treating the victim. What is more, there were far-reaching positive duties placed on the government by the Court's remedial orders. The first remedy was to order the state to compensate Mr Seikh to the tune of 25,000 rupiah (17,000 rupiah for what he had to pay the private hospital and the remaining 8,000 rupiah '[h]aving regard to the facts and circumstances').¹⁰⁰ The remainder of the judgment, however – well over half its written length – was devoted to a consideration of 'the remedial measures to rule out the recurrence of such incidents in future and to ensure immediate medical attention and treatment to persons in real need'.¹⁰¹ The first step of the *Samity* Court was to consider the detailed recommendations of an official Enquiry Committee headed by a retired judge which had been set up by the state of West Bengal following the *Samity* incident in order to investigate the system's failure. The recommendations seem to have been predominantly for measures that would make the system more efficient and less arbitrary, but there were also specific recommendations that the overall system's resources be increased, including recommendations to set up '[s]ome casualty hospitals or Traumatology Units . . . on [a] regional basis' and to upgrade existing hospitals 'so that a patient in a serious condition may get treatment locally'.¹⁰² The Court seems to have contented itself with noting that the government had accepted the Committee's recommendations without adding an independent order of its own, and sets out the detailed guidelines for handling emergency cases issued by the government in response to the Committee report.¹⁰³ Yet, these guidelines do not, at least as quoted by the Court, clearly address the resource inadequacy issue and it may be that the Court's report of the government having accepted the recommendations was intended to refer only to the efficiency-enhancing ones and not to the resource-increasing ones. Be that as it may, the Court then proceeded to consider representations from counsel for Mr Seikh as well as Rajeev Dhavan, counsel for the intervenors, as to what measures were needed 'in order to have proper and adequate emergency health services and to create an infra-structure for that purpose'.¹⁰⁴ Specific and quite detailed recommendations were made as to the kind of system upgrading that would be needed, with counsel Dhavan advancing three obligations that must be capable of being met as the standard of care in emergency cases: 'screening the patient; . . . stabilizing the patient's condition; and . . . transfer or discharge of the patient for better treatment'.¹⁰⁵ The two-judge Indian Supreme Court panel accepted these representations and issued a seven-point order addressing everything from upgrading of facilities to setting up a centralised communications

100 *Samity* (note 79 above) 2429, para 9.

101 *Ibid* 2429, para 10.

102 *Ibid* 2430, para 10.

103 *Ibid* 2430, paras 11 and 12.

104 *Ibid* 2413, para 14.

105 *Ibid*.

system amongst hospitals to ensure the adequacy of ambulance equipment and personnel.¹⁰⁶ The Court set out general parameters, clearly leaving it for the state to tailor the means necessary to meet those parameters. The Court acknowledged the cost implications in the following terms:

It is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the state to provide adequate medical services to the people. Whatever is necessary for this has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused[,] this Court has held that the state cannot avoid its constitutional obligation in that regard on account of financial constraints. . . . The said observations would apply with equal, if not greater, force in the matter of discharge of [the] constitutional obligation of the state to provide medical aid to preserve life. . . . It is necessary that a time-bound plan for providing these services should be chalked out keeping in view the recommendations of the Committee as well as the requirements for ensuring availability of proper medical services in this regard as indicated by us and steps should be taken to implement the same.¹⁰⁷

It can be seen how closely the Supreme Court adhered to the idea of constitutional priorities as generating duties to take steps with alacrity, even if fulfilment will still necessarily take time. A ‘time-bound plan’ for providing services necessary to give substance to the right to life is situated within a normative dynamic that combines pragmatism, principle and a faith in the human capacity for creative response, as captured by the imperative: whatever is (constitutionally) necessary has to be done.

A broader look at *Samity* might have alerted the Constitutional Court to how its negative-right interpretation of s 27(3) not only strays some distance from the need to make rights effective but, in the end, also creates – or comes very close to creating – a redundant right. First of all, arguably the same negative right is present in a minimal interpretation of s 27(1)’s right of ‘access to health care services’. Emergency medical services are also health care services. Whatever else the right of access means, it must surely mean at least the right not to be arbitrarily excluded from services which already exist and to which a person is already formally entitled. If existing services are nonetheless inadequate or fluctuate in their capacity to accommodate all who need them, then automatic access must be replaced by exactly the kind of non-arbitrary (reasonable, rational and fair) allocation policy that was in place at Addington Hospital. In other words, everything done in the Court’s s 27(3) analysis can already be read as a minimal component of the general right in s 27(1). Secondly, there is the specific example used by the Court of the history of racial discrimination in access to otherwise available emergency services, although the Court relies on judicial notice and cites no documentation to show this was foremost in the minds of the drafters. Might one not ask what this adds to the most basic component

106 Ibid 2431, para 15.

107 Ibid 2432, para 16.

of equality and non-discrimination rights in s 9? The answer would seem to be that it adds nothing.

Thirdly, there is the more general suggestion of arbitrariness of exclusion beyond something as pernicious as intentional discrimination. Bracketing the issue of whether any negative-rights interpretation of s.27(3) can be squared with s 27(1) already having that (minimal) connotation, might the Court not still be correct in seeing an arbitrary-barriers interpretation as providing the self-standing content for s 27(3)? Here, one might focus on systemic and unintended frustration ‘by reason of bureaucratic requirements or other formalities’, to use the Court’s own words. But, here too, this is easily covered by another specific provision, namely the right to ‘just administrative action’ in s 33.¹⁰⁸ To keep s 27(3) from being redundant, one would thus not only have to exclude s 27(1)’s applicability but also say that other kinds of barriers than those prohibited by ss 9 and 33 exist that would be caught by s 27(3). *Perhaps* some content *could* be given to the Court’s words that sidesteps the redundancy charge, but, in so doing, one would still be searching – scrambling, even – to elevate a right from being redundant to being very thin, even in a resource-strapped country like South Africa.¹⁰⁹

The most that can be said is that the Court’s interpretation will not be redundant in the least if a future court were to invoke the s 8 test for horizontality so as to interpret s 27(3) as applying to private hospitals, at least in part.¹¹⁰ Where emergency facilities are available and not being used to capacity, and a public sector ambulance calls in to say all public hospitals are full up, would it be a violation of the 1996 Constitution were the private hospital to refuse flat-out to treat or to condition such treatment on capacity to pay? If the answer to that or related questions were ‘yes’, then there would be something independently salvageable out of s 27(3).

But, here again, we must return to s 27(1).

108 Section 33(1) provides: ‘Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.’

109 ‘No health card, no treatment’: perhaps this is an example. How about ‘No money, no treatment’? Were public hospitals to start charging users fees for emergency care, it may be that the Court would read in a requirement that the treatment must be ‘free’. But prohibiting financial barriers does not easily square with the Court’s own very formal language – ‘bureaucratic requirements or other formalities’ – and it would rapidly get the Court trapped in a quandary created by its own negative-rights conception. This is because the state or specific hospital could say that user payment is the only way to keep services at their level: take away that money and the services are not available. The Court could refine its analysis and say it is only the charging of persons who cannot afford it that is prohibited, but this only alleviates the problem rather than eliminates it.

110 It may be of some future relevance here to note *Samity*’s reference to recent Congressional legislation in the US which requires private hospitals to carry out emergency care in defined circumstances, including contexts in which evidence showed that such hospitals were ‘turning away uninsured indigent persons in need of urgent medical care and these patients were often transferred to, or dumped on[,] public hospitals and the resulting delay or denial of treatment had sometimes disastrous consequences’. *Samity* (note 79 above) 2431, para 14.

(ii) *A purely definitional role for s 27(1)?*

Section 27(1) contains a right of 'access to health care services'. The Court made clear that it considered the state to have positive obligations to bring needed health care services on stream (over time), by virtue of s 27(2). But there is no discussion of whether s 27(1) plays an independent substantive role beyond serving a definitional function as to the interests that are subject to the state's s 27(2) duty. The sum total of the Court's discussion of s 27(1) is as follows:

The appellant's demand to receive dialysis treatment at a state hospital must be determined in accordance with the provisions in ss 27(1) and (2). . . . These sections entitle everyone to have access to health care services provided by the state 'within its available resources'.¹¹¹

Because the issue before the Court did involve the claim that a right was violated by virtue of a breach of a duty to fulfil, it is understandable for the Court to have immediately leapt to s 27(2). Yet, rights claims related in whole or in part to breaches of the duty to respect (as in the above discussion of the issue of refusal of access to health care services) and the duty to protect (from infringements occasioned by non-state actors) may well be best located within s 27(1) or in ss 27(1) and (2) taken as a whole. If one had to choose either one subsection or another rather than reading them together, all priority duties with respect to core entitlements may best fit, conceptually, in s 27(1). For that reason, there are dangers that the Court will be read as having conflated the two subsections, not so as to accommodate all of s 27's four kinds of general obligation, but so as to come close to suggesting that the only duty is the duty to fulfil (which is most closely associated with the progressive realisation principle stated in s 27(2)). At the very least, the Court must be read as having not applied its mind to the precise role of each of ss 27(1) and (2), and thus to the analogous relationship between subsections in other provisions such as ss 26(1) and (2) at issue in *Grootboom*.

(iii) *A continuum of priorities as part of the obligation to achieve the progressive realisation of positive constitutional rights*

In the UN Committee on Economic, Social and Cultural Rights' General Comment 3, the following principle is stated:¹¹²

[T]he full realisation of economic, social and cultural rights will generally not be achieved in a short period of time. . . . Nevertheless the fact that the realisation over time or in other words progressively is foreseen under the [ICESCR] should not be misinterpreted as depriving the obligation of all meaningful content. 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 [to the ICESCR] in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care or basic shelter and housing, or the most basic form of education is prima facie failing to discharge its obligations under the Covenant.

111 *Soobramoney* (note 4 above) para 22.

112 General Comment 3 (note 47 above) para 9 (emphasis added).

Under international human rights law, then, the duty of progressive realisation that is stated in s 27(2) of the 1996 Constitution does not mean that there are no substantive obligations to fulfil rights which are, in principle, immediate. Where these 'immediate' obligations are not being met, the state is under a duty to act remedially by raising new resources or reallocating existing resources so that these duties are met on a priority basis. *Each state* must go about making sure that it fulfils, as its first priority in resource allocation, at least what the Committee calls 'minimum core obligations' as a function of that state's available resources. And *every state* must meet at least a core universal minimum represented by the most basic provision of state assistance to those in need reflected by the basic-survival examples listed in the last sentence of the above quotation. There is thus a distinction between relative (state-specific) core minimums and absolute core minimums. For instance, Canada's core minimum will go considerably beyond the absolute core minimum while Mali's may go no further than this absolute core.

In this respect, the Committee's use of the term 'prima facie' in reference to non-compliance is an important recognition that there may be some states incapable of meeting even a universal basic-needs minimum even with efficient tapping of societal resources. It would also apply to states faced with sudden crises such as near-total economic collapse or natural catastrophes that create virtual emergency conditions in the country as a whole or areas of it. But the presumption is that such states are few and it is for such states to demonstrate their societal poverty and patterns of wealth distribution so as to prove that some people simply cannot – yet – have minimum needs met. Thus, from the perspective of the ICESCR jurisprudence, South African courts should start from a universal core minimum as the absolute bottom-line requirement and respond accordingly to individual and group claims which demonstrate that such a standard has not been met. However, despite vast poverty, the core minimum in South Africa will almost certainly still be higher than the universal minimum given the overall level of per capita wealth of the society in comparison to many other countries. While *precise* identification of the minimum (including the minimum as it evolves upward if and when national wealth increases and state capacity to redistribute wealth effectively develops) as some objective measure is of course an illusory quest, the responsibility to exercise best judgement in the national and local context cannot be avoided. Courts will of course have to balance reaction to deprivation on a 'calling it as we see it' case-by-case basis with a pragmatic sense of what remedies are desirable and likely to prove effective.¹¹³

113 For the relevance of this very pragmatic case-by-case approach, so familiar to the common law, see a discussion of how US due process and equal protection jurisprudence evolved over the years on the basis of the courts often acting on the basis of 'knowing an abuse when they see it': P Alston 'International Law and the Human Right to Food' in Alston & Tomasevski (note 23 above) 57.

What is striking about *Soobramoney* is how the notion of minimum essential levels is not even discussed, let alone found to have been satisfied. If the concept of core minimum had been raised, it is hard to see how the Court would not at least have had to assess the claim seriously given the nature of health interests at stake: interests going to life itself. In deciding on core minima, the comparative importance of protected interests must be considered. In a hypothetical world in which a comparatively poor government chooses to identify the right of everyone to visit the palaces of the head of state (say, ten of them, and counting) as a core entitlement worthy of priority state allocation of funds, but to exclude acquisition and provision of life-saving technology, there is a problem from a human rights perspective. To put it mildly. While judgments that must be made in the real world of South Africa are a far cry from this facetious example, the point is that distinctions as to priorities must be made in light of the fundamental constitutional values of 'human dignity, equality and freedom'.

The prima facie claim of Mr Soobramoney to constitutional protection within a South African constitutional minimum would have gained some assistance from s 27(3). Even if his situation did not qualify as an 'emergency', the underlying health interests being protected are clearly those going to the risk to life. It is a purely arbitrary cause of life-threatening condition as to whether a person falls from a train like Mr Seikh or is struck down by renal failure like Mr Soobramoney: from the perspective of the sufferer of harm, treatment is no less needed in one case than the other. From the perspective of personal responsibility for a life-threatening condition, the matter could be even more arbitrary if the person falling from the train had been playing the fool and fell as a result. Looking at s 27 in this purposive way, some unity of principle between s 27(3) and the other two subsections should have been brought to bear on the analysis. While treatment in narrowly defined 'emergencies' may have been identified by the drafters in s 27(3) as a kind of priority of priorities, surely other life-threatening health conditions should be amongst the first in line in adjudicating core minima for health care generally? However, instead of seeing an organic link between the provisions, the Court implicitly viewed them in terms of a radical separation untouched by any unity of principle. The Court implicitly approached the issue in an all-or-nothing way: a claimant is either included in s 27(3)'s protections and entitled to some kind of immediate access to care – at least available care – or the claimant is entirely outside any constitutional imperative, despite the fact that the person's life is on the line to no less an extent than the accident victim's. A hard choice had to be made – and was made – by the Court as to whether Mr Soobramoney's claim to life-prolongation was disproportionate to the call on society's resources his treatment would have entailed. Had Sachs J's separate reasons been adopted as part of the majority judgment, a reader of *Soobramoney* would have seen the articulation of a philosophy

of the value of human life in a context of a philosophy of unavoidable dying.¹¹⁴ The exclusion of Mr Soobramoney from South Africa's present core minimum would have been explained, not avoided.

The point is important not necessarily because the result was wrong with respect to Mr Soobramoney's situation. Given the Court's reasoning about the rationality of prioritising the curing of renal failure over prolonging life with no hope of cure with respect to the allocation of very costly technology (access to which is rationed to some extent at this stage even in far more affluent public health care systems), it could be that the Court would have had little difficulty – legally, not existentially, speaking – finding that life-prolonging dialysis could not reasonably be treated as part of South Africa's present core minimum at that time (1997). The problem is that the Court avoided this analysis entirely by taking refuge in the very fact that setting constitutional priorities would have allocation-of-resource impacts. When priorities are in essence cited as the problem, the very point of constitutional rights as priority setters for government would seem to have been missed. Positive rights and the notion of core guarantees *do* have a significant prioritising function. Trying to interpret the constitution to remove or neutralise this function thus misses the constitutional point.

One element of the Court's reasoning on the skewing effect of recognising a claim needs to be noted because it may be dangerous if generalised as an argument in future cases. Recall that Mr Soobramoney's argument that there is a positive duty under s 27(3) to make dialysis available was viewed as having a couple of negative consequences. It prioritised treatment of life-threatening ('terminal') illness over other forms of medical needs and associated treatment, and it diverted resources from the effort of the state to fulfil the rights of 'everyone' to health care. If the Court had said that it wished to interpret s 27(3) narrowly because the wider one interprets s 27(3) the more difficult it will become to meet other priority health needs of a life-threatening nature, the problem of trade-offs would have been pitched at the right level – that is, at the level of commensurable claims of priority using a fundamental interest (life itself) as a normative measure of a *prima facie* valid claim. However, the Court's concern was of a much more diffuse nature than that. In expressing concern that the progressive realisation of the rights of 'everyone' to health would be compromised by being delayed, the Court was in effect treating the claim to treatment for urgent life-threatening conditions as having no more call upon society than any other health care claim. The individual is quickly sacrificed to an amorphous general good on this kind of reasoning which, if taken all

114 See Sachs J in *Soobramoney* (note 4 above) para 57 on the lack of a constitutional right 'indefinitely to evade death'; and para 59 on present 'resources [not being] co-extensive with compassion'.

the way, would preclude virtually any adjudication of a claim to resources as enjoying a constitutional priority over other claims.¹¹⁵

A final observation: in some contrast to the Court's concern about affecting resource-allocation priorities in *Soobramoney*, the Court had earlier – in the *First Certification* judgment – noted that its constitutional role with respect to rights such as the rights to health and housing would necessarily entail making decisions with budgetary implications.¹¹⁶ Significantly, the Court had noted that such implications were also attendant upon many, if not most, 'traditional' rights in the Constitution, such as the right to a fair trial. But, by expressing such concerns about shifting priorities within state resource allocation, the *Soobramoney* court was implicitly – and to some extent explicitly – working from the assumption that 'available resources' in s 27(2) refers only to *state* resources and, indeed, to *existing* state resources. Constitutional adjudication on positive obligations cannot help but put pressure on the state to find the necessary resources, whether from within existing budgetary allocations or by converting societal resources into state resources (most obviously, but not only, through taxation).¹¹⁷ This is an unavoidable feature of a constitution such as South Africa's. At some point it risks becoming a breach of constitutional faith for the courts to calculate, to the point of paralysis, the multiplier effects of cases to arrive at an overall price tag of a given right for the public purse. Coping with the budgetary implications of constitutional priorities is one of the central responsibilities of Parliament and the executive, and the courts stay well within their constitutionally mandated role if they adjudicate, as best they can, on matters of principle and allow budgetary implications to be

115 Here it may be worth noting that false empirical assumptions tied up with unproven economic theories may give more solace to the judiciary than is appropriate. The notion of sacrifice has as its subtext the idea that economic growth must first be achieved before (further) redistribution can occur and that disparities in wealth and other associated incentives are the price to be paid to create that growth – benefiting everyone eventually. Whatever the merits or demerits of this approach, it must be counter-balanced in at least two respects. First of all, it is a myth that providing for basic needs on a priority basis produces a financial sinkhole and treadmill for the national economy. Nothing could be further from the conclusions of those economists working with the relationship between basic needs and economic development. Quite apart from the intrinsic principle of meeting greatest needs first, basic needs satisfaction has economic multiplier effects, especially when purchasing power is complemented by some adjustment of the economy to meet the consumer needs of those of modest means, adjusting itself further as needs grow, with increasing affluence, into material wants. Beyond economic knock-on effects, there is of course the 'human resource' benefit. Any 'holistic' analysis must consider the sheer instrumental benefits for a national economy when the workforce and potential workforce are healthy and not alienated in the face of gross disparities. Secondly, and speaking of future workforces, a certain 'children first' priority makes sense from a purely instrumental perspective: who are the future brains and brawn of any economy? See generally A Sen *Development as Freedom: Human Capability and Global Need* (1999); and United Nations Development Programme *Human Development Report 2000* (forthcoming).

116 *First Certification* judgment (note 25 above) paras 77–78.

117 Although only an interim measure, recall how Josman AJ in the first *Grootboom* judgment constitutionally commandeered a resource not otherwise available to meet constitutional needs: the community centre. See II above.

factored into the fashioning of remedies – but not the very interpretation of core minima.

(iv) Beyond core minima: past, present and future violations of the principle of progressive realisation

In the constitutional adjudication of positive rights, clear findings of present violations of named individuals' substantive rights will sometimes be possible. Sometimes the delay of the state in addressing a situation of serious need is so protracted as to be unreasonable or even a demonstration of bad faith, in which case a court will be able to treat the state's failure to take concrete steps as a violation and will be on a sure footing in ordering with some degree of specification what minimum steps will be needed to rectify the constitutional omission.

Moreover, sometimes the situation is in a grey zone where individual and group suffering will be undeniable, but where it is a major judgement call as to whether the state has – to that point – failed to act with sufficient alacrity and prioritisation. Because determining the point at which harm is a violation is by no means an exact science, such grey-zone situations may be scarcely distinguishable from situations of pending violations – 'if the state does not act reasonably soon, there is a substantial risk that our situation will unbearably worsen', and so on. In both of these situations (the grey-zone situation and the pending-violation situation), a court may at least have the option of assessing whether the *sine qua non* procedural requirements of the duty to realise human rights progressively have been complied with, notably: the duty to gather the information necessary to know the exact extent and nature of need; the duty to develop benchmarks as measures of minimal entitlements in their societal context; an information capacity that is able to disaggregate information so as to know which persons and groups are most in need; and preparation of targeted plans of action (linking service-delivery objectives both to the raising of financial resources and budgetary allocation) for progressively addressing the needs of everyone while treating the situation of the most disadvantaged and the seriously suffering on a special priority basis.¹¹⁸ In finding a violation for failure to perform these procedural first steps, much can be achieved, not least of which is setting in motion a principled policy-making and implementation process.

However, while public interest groups may well wish to seek standing under s 38(d) to bring constitutional claims about breach of framework procedural duties, individual claimants will understandably wish to see something geared more to their own situation and are unlikely to wish to

¹¹⁸ The ICESCR's General Comment 1 addressed in some detail these procedural obligations and made clear that they are so instrumentally necessary to the substantive realisation of human rights that states may not plead financial hardship as a reason not to put this procedural framework in place. See Committee on Economic, Social and Cultural Rights, 'Reporting by States Parties', General Comment No 1, UN Doc E/1989/22 (adopted in February 1989).

bring constitutional cases purely to serve as constitutional triggers for general policy processes. There is, however, a way to conceptualise affected persons and groups bringing constitutional claims in a way that need not always assert a clear violation of their rights as having already occurred and yet which can point clearly to the substantive needs which must immediately be addressed if their constitutional rights are to be taken seriously. Arguably, South African courts can have recourse to the idea of rights which are ‘threatened’ while not yet ‘infringed’ within the terms of s 38. Nothing in s 38 requires that a violation be imminent before a constitutional application can be brought. By interpreting the scope of claims for threatened violations in a way that allows courts to be part of a more timely process of addressing constitutional rights, there is considerable potential for courts to insert the rights of disadvantaged and marginalised sectors of society into government policy-making and resource-allocation decisions in time to affect the crucial processes and help realign them.

The Court in *Soobramoney* did at one point hint that it was fully aware that the capacity to violate the Constitution evolves with the development of the resource capacity to address constitutional priorities.¹¹⁹ However, its reasoning was such that it is far from clear that the Court would see *chronic* renal failure patients as having sufficiently weighty constitutional claims for present compliance with the Constitution to evolve very quickly into non-compliance should the state fail to make the life-prolonging treatment of such patients one of its top priorities in bringing services on-stream in the near future. So, *Soobramoney* itself is not necessarily the ideal case in which to suggest that the Court might have considered entering into a more future-oriented mode in which it could have used what knowledge it had gained to inject the needs of similarly placed persons to Mr Soobramoney into the political and policy processes – albeit perhaps requiring further hearings in order to get a fuller picture.

However, one need only ask: what if access to *acute* renal treatment had been at stake? Even if the Court had considered the question of core minimum entitlement and had then decided renal dialysis treatment could not qualify, the nature of the interests at stake (lives that could be saved from otherwise imminent death) might have presented exactly the kind of ‘threat’ of future violation to spur the Court into conducting hearings into ‘appropriate relief’ for those coming after the hypothetical (acute renal failure) Mr Soobramoney. It is of considerable interest here that the one partly dissenting judge, Madala J, in effect ended his judgment with a kind of ‘soft’ remedy, a future-oriented suggestion worded as follows:

Perhaps a solution might be to embark upon a massive education campaign to inform the citizens generally about the causes of renal failure, hypertension and diabetes and the diet which persons afflicted by renal failure could resort to in order to prolong their life expectancy.¹²⁰

119 Recall ‘not *presently* capable of being fulfilled’: *Soobramoney* (note 4 above) para 11.

120 *Ibid* para 49 (Madala J).

While nothing grand, this dictum is worth noting as a hint of a preventative remedial paradigm that takes seriously the promotional role of constitutional rights adjudication as provided for in s 39.

VII *GROOTBOOM*

The *Grootboom* case provides a perfect illustration of the view that a deeper understanding of the intricacies of economic and social rights can only be gained by exploring the implications of the general principles that are already in place in relation to the facts of particular cases. A significant number of the misunderstandings and misrepresentations that have plagued the general debate over these rights can be seen for what they are through an analysis of *Grootboom*. Indeed, the case provides an almost ideal lens through which to examine the relationship between children's rights and human rights, the concept of 'progressive realisation', the notion that there must be a 'core minimum content' to each right, the extent of justiciability, and the appropriate role of different actors in making decisions as to what precisely is required to be done in remedying clear instances of the non-realisation of economic and social rights. Before turning to each of these issues it is necessary, in light of the foregoing analysis of *Soobramoney*, to clarify the nature of the relationship between the two cases.

Davis J clearly states in *Grootboom* that 'the approach of the Constitutional Court in *Soobramoney* is applicable to the facts of the present case'¹²¹ and his judgment refers to it on five occasions. This approach is justified by Davis J with reference to the fact that both cases involve socio-economic rights and that the nature of the governmental obligation in each case is comparable. While not contesting that proposition, two important caveats apply. The first is that the tests laid down in *Soobramoney* are rudimentary in nature and require considerably more elaboration if they are to be helpful in the factual context of *Grootboom*. We return to this point below, especially in relation to the rationality test expounded by Chaskalson P in *Soobramoney*. The second caveat is that, while the facts of the two cases appear to be very similar, on closer examination they can be seen to involve almost diametrically opposed situations. In the earlier case, the applicant sought access to a level of health care which clearly went well beyond any conceivable universal minimum core and was also demonstrably beyond the relative capacity of the government to provide within the constraints of available resources. By contrast, the applicants in *Grootboom* were seeking a remedy which was close to, if not even based upon, a plausible definition of the core minimum content of the right to housing. The second difference is that, while the government in *Soobramoney* was seeking to defend a low-cost plan designed to achieve maximum coverage, in *Grootboom* the government seeks to defend a relatively high-cost plan which is able to achieve such low coverage that it is premised upon the

121 *Grootboom* (note 1 above) 283E.

continuation of a 20-year waiting list. The third difference concerns the evidence available to the court in each case as to the steps that had been taken to ensure that the remedy sought was unaffordable. In *Soobramoney* the government was able to rely upon a set of guidelines drawn up by medical specialists precisely in order to address the issue of the maximum use of available resources, whereas in *Grootboom* the government did no more than outline a range of general programmes from which it sought to draw a sweeping conclusion. The precedential value of the former case must thus be viewed through a lens which acknowledges these important factual differences between the two cases.

(a) The avoidance of s 26(3)

Before considering the key jurisprudential issues raised by *Grootboom* it is appropriate to note that the High Court chose to pass up the opportunity to reflect upon the import of s 26(3) in the circumstances of the case. That subsection provides: '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.' While the requirement of a court order was clearly satisfied, the manner in which the eviction was carried out raises important questions as to the behaviour of both the police and the owners of the property on which the illegal settlement had been established. The bulldozing of the site before either the building materials or personal belongings could be salvaged, along with the subsequent alleged burning of those materials, raise serious questions which the court chose not to address. Given the High Court's willingness to place considerable interpretative reliance upon the General Comments of the Committee on Economic, Social and Cultural Rights, the analysis contained in General Comment No 7 (1997) on forced evictions¹²² would have provided a basis for calling into question both the reasonableness of the measures taken and their compliance with the provisions of the Covenant as a whole. Instead, *Davis J* merely indicates that the circumstances of the eviction are matters to be taken into account, without giving any indication of how exactly they are relevant.

One possibility would be to use the fact of direct state involvement in an unreasonable eviction as a basis for formulating an analysis which would make the state liable to provide alternative accommodation in this case because state action was involved. This would have the 'advantage' of significantly limiting the potential liability of the state in eviction cases in which s 26 is invoked. But it would also have the disadvantage of undermining, indeed gutting, the essential objective of the inclusion of social rights in the Constitution, namely the protection of human dignity, rather than the limitation of certain forms of governmental action. Fortunately for the future of social rights jurisprudence, this

122 General Comment 7 (note 41 above).

possible approach is foreclosed by the very clear statement in the 1996 Constitution rejecting the adoption of this form of public/private divide. This is apparent from s 8's extension of the Bill of Rights to cover private persons, s 7's four-fold set of obligations, and from the right in s 12(1)(c) 'to be free from all forms of violence from either public or private sources'. The adoption of any state-action approach such as that favoured by the US Supreme Court has drawn extensive criticism and has yielded outcomes which are, at best, difficult to comprehend or defend.¹²³

(b) The relationship between ss 26 and 28 of the 1996 Constitution

In deciding *Grootboom*, the High Court concentrated on the application – and interaction – of two provisions of the 1996 Constitution, ss 26 and 28. For ease of reference, the material parts of the provisions are again reproduced. Section 26 ('Housing') provides:

- (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. . . .

Section 28 ('Children') provides:

- (1) Every child has the right –
 - (a) . . .
 - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition, shelter, basic health care services and social services. . . .
- (2) A child's best interests are of paramount importance in every matter concerning the child.
- (3) In this section 'child' means a person under the age of 18 years.

Davis J in *Grootboom* considered first the more generally applicable rights – those in s 26 – before moving to the rights applying specifically to children in s 28. By attaching great importance to the differences between the two provisions, his analysis enabled him to reject the applicability of s 26 while adopting an interpretation of s 28 which, while circumspect as to the quality of shelter that had to be provided, was broad in including parents and guardians of children. This contrast highlights the need for us to explore the relationship between the two sections. This accords with the desirability noted by the Constitutional Court, and to which we alluded above,¹²⁴ of reading the provisions of the 1996 Constitution in an holistic manner. The problem is that reading ss 26 and 28 together appears to reveal an unexplained and confusing duplication. Specifically, if children are already entitled to 'access to adequate housing' under s 26(1), what more is added by stating that every child also has the right to shelter under s 28(1)(c)? Some will be tempted by an interpretation

¹²³ See the constitutional negative-rights paradigm of *De Shaney v Winnebago Department of Social Services*, 489 US 189, 194 (1989) (State of Wisconsin under no affirmative duty to protect a child from a brutally abusive father even when on notice of that brutality).

¹²⁴ See II above.

which sees the obligations in s 26 to be so attenuated as to be 'merely aspirational' because they are qualified by a 'progressive realisation according to available resources' clause, but the obligations in s 28 as absolute because unqualified by resource considerations.

This interpretation might appeal to some for both principled and pragmatic reasons. In terms of the former, the thrust of the principles embodied in the Convention on the Rights of the Child is towards the establishment of a priority for children – a 'first call for children', to use a phrase popularised by UNICEF in the early 1990s. Many interpretations of the principle that the 'best interests of the child shall be a primary consideration'¹²⁵ seek to attribute this implication to it,¹²⁶ and some go so far as to argue that 'first call' signifies an absolute priority. In pragmatic terms, limiting such an absolute right to children and excluding adults, would appear to be an attractive way of containing the potential resource implications of s 28. But on closer scrutiny these attractions prove not to be compelling.

Just as the Convention on the Rights of the Child cannot reasonably be interpreted as trumping other human rights instruments and establishing an absolute priority for children, regardless of the competing rights-based considerations arising in relation to adults placed in the same situation, s 28 should not be so interpreted. Such an approach would reflect an absolutism incompatible with the general need to balance competing rights and would elevate an important principle such as that concerning the best interests of the child to the status of a right per se. The pragmatic argument is equally unconvincing. In countries like South Africa, with a high proportion of children in the population and a high birth rate, the principle that 'a child shall not be separated from his or her parents against their will'¹²⁷ would mean that a large number of adults would also have to be cared for if the unqualified right to shelter, nominally attributable only to children, were to be satisfied.

Erika de Wet, whose book is cited at one point by Davis J in *Grootboom*, takes this point to its logical extreme and suggests that the rights attributed to children under s 28 will only be guaranteed if the relevant measures are undertaken 'for the community as a whole'.¹²⁸ Having thus eliminated the distinction between ss 26 and 28, she proceeds to draw the conclusion that the 'far-reaching financial consequences' of such an approach would undermine 'the division of state powers' (meaning, presumably, the appropriate separation of powers between the courts and the legislature), thus leaving the courts with no option but to defer to the legislature. But since such a conclusion would undermine the Constitution's attempt to ensure that at least a

125 Convention on the Rights of the Child, art 3.

126 See generally P Alston and B Gilmour-Walsh *The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values* (1996).

127 Convention on the Rights of the Child, art 12.

128 E de Wet *The Constitutional Enforceability of Economic and Social Rights* (1996) 108.

certain minimum provision is made for children, de Wet seeks to resolve the dilemma by viewing the s 28 right as one which could be satisfied, as a last resort, by accommodating children in state institutions, provided that no other alternative options (such as an extended family) existed.¹²⁹ Davis J does not at first sight appear to embrace such a solution, given that he resolutely interprets s 28(1)(c) as requiring shelter of children other than by way of the child-only institutionalisation envisaged by the Child Care Act 74 of 1983. *But* he does effectively consign s 26 to marginal relevance using very similar reasoning to that of de Wet. By creating near-total deference for s 26, this leaves room for him to adopt a quite limited approach to the meaning of 'shelter' in s 28, thereby managing to come up with an approach which goes further than his approach to s 26 while still not going very far at all. Existing child-only institutions are interpreted as being insufficient, but Davis J's use of the definition in the Child Care Act is such that he may have left it open for institutionalisation of parents with children to satisfy the duty to provide shelter. But, even as he has been normatively minimalist, he turns around and reads parental accompaniment into the right of children to shelter, thereby arriving at a solution which is hardly less costly or manageable than those which he has rejected with respect to s 28. Any cost savings stem from a totally unprincipled exclusion of those adults not fortunate enough to have children – but at a considerable 'cost' in terms of human rights jurisprudence.

There is, however, a far less convoluted solution, one which is more consonant with both the letter of the 1996 Constitution and the spirit of economic and social rights in general. That is to treat s 28 as a provision which seeks to spell out, in the case of children, the core minimum content of s 26. While such core content would exist by necessary implication within s 26 were s 28 not there,¹³⁰ s 28 makes certain that there is no chance of the core entitlements of children being lost in the interpretive evolution of the Bill of Rights. In the process, this does not mean that there is no core entitlement of either adults generally or, in the context of a case like *Grootboom*, adults without parental or guardianship responsibility for children. What s 28 does is to convey the sense of an added, while not absolute, priority for children.

This interpretation is consistent with the particular emphasis the 1996 Constitution accords to the protection of children and also follows readily from the different terminology used in each section. While s 26 speaks of 'access to adequate housing' in broad terms, the reference to 'shelter' in s 28 can only be designed to convey a rather more limited conception such as would be associated with the core entitlement of all persons within the right to adequate housing. The question remains,

¹²⁹ *Ibid.*

¹³⁰ Recall the previous discussion in relation to *Soobramoney* on how s 27 must be interpreted to include core entitlements and not simply medium and long-term duties of progressive realisation.

however, as to how to define the concept of 'shelter'. Here, the analysis by Davis J confuses more than it enlightens. He adopts the approach of De Wet, described earlier, whose main objective seems to be to arrive at a definition which is sufficiently restrictive as to impose only a minimalist obligation upon the state. Davis J achieves this by seeking to reconcile a dictionary definition which defines 'shelter' as providing basic protection from the elements, with the approach reflected in the Child Care Act, for the purposes of which a shelter is a state-run institution designed to ensure the safety and temporary protection of children who have been removed from the care of their parents. He thus concludes that s 28 'appears to provide for a right to be protected from the elements in circumstances where there is no need to remove such children from their parents'.¹³¹

But this artificial hybrid ignores the common sense interpretation of the concept reflected in s 28. In that context, two defining characteristics of the term 'shelter' assume importance. The first is that, unlike two of the other elements of the section which are described in minimalist terms as 'basic nutrition' and 'basic health care services', shelter is subject to no such qualification. While even 'basic' protection must be adequate to the limited needs signalled by the notion of basic, shelter which is more than 'basic' must surely be designed to provide more than mere protection from the elements and must extend to that degree of protection which is required to enable a child to subsist and to benefit from the other component parts of his or her s 28 rights (perhaps something along the lines of the 'survival and development of the child', which states parties to the Convention on the Rights of the Child are obligated to 'ensure to the maximum extent possible').¹³²

The second characteristic is that the section as a whole could only have been designed with a view to ensuring the overall protection of the basic material needs of children, and this gives us a reasonable indication of the type of functions which 'shelter' would be expected to serve. The section is not primarily focused upon institutionalisation per se, even though in extreme circumstances that might be the only option. It is designed to protect the basic economic and social rights of children and the shelter component should be seen as being complementary to the provision of basic nutrition and health care services. It must therefore be interpreted as meaning more than the provision of a zoo-like situation in which the child's food will be protected from the elements and in which he or she can receive food and minimal health care services.

The appropriate conclusion is that, for constitutional purposes, the definition of shelter should neither be derived from an unhelpful and formalistic dictionary definition nor be interpreted on the basis of a very restrictive usage taken from the highly specialised and quite separate context of institutional care. By the same token, there are good reasons

131 *Grootboom* (note 1 above) 287J–288A.

132 Article 6(2).

why 'shelter' must be interpreted as being more limited than 'housing' understood as a home. For Davis J this means that the degree of protection connoted by 'shelter' 'falls far short of adequate housing' and that it offers a 'significantly more rudimentary form of protection from the elements than is provided by a house'.¹³³ These characterisations are not necessarily problematic as long as it is recalled that international definitions of the right to housing, whether those adopted in the human rights area or by international diplomatic conferences, have consistently been relatively comprehensive and have included elements such as legal security of tenure; the availability of services, materials, facilities and infrastructure essential for health, security, comfort and nutrition; affordability; habitability; accessibility; a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities; and cultural adequacy in terms of what form of housing is made available and the building materials used.¹³⁴ These expansive interpretations leave considerable leeway for a definition of shelter which is contextualised to local environments and cultures, and is neither overly generous nor self-defeatingly narrow. While the details will be for the government to determine and the court to review, matters of health, basic security, and basic psychological well-being would presumably figure in any definition of such a right to shelter designed to ensure respect for human dignity. It should be recalled that Davis J appeared to use 'rudimentary' in a relative rather than an absolute sense: 'more rudimentary . . . than . . . a house'. Adequacy does not, and should not, fall out of the picture.

(c) Progressive realisation and minimum core content

The single most complex and misunderstood dimension of economic and social rights is that relating to their 'progressive realisation'. Rather than rehearsing all of the attendant arguments yet again, our only aim in this context is to consider how the High Court in *Grootboom* dealt with this issue. Section 26(2) of the 1996 Constitution mirrors very closely the formula used in art 2(1) of the ICESCR. In essence, there are two differences. The first involves the use of the phrase 'within available resources' rather than the Covenant's 'to the maximum of available resources'. While it could be argued that the 1996 Constitution thus adopts a less stringent test, it is difficult to see what practical differences might flow from the formula used other than the word 'maximum' playing a useful rhetorical role in highlighting that which is already entailed by the idea of 'within available resources'. Furthermore, it bears recalling that the courts must consider international law when interpreting the Bill of Rights. For reasons already given in earlier sections of this article, it would cut against the principles that should govern invocation of international law were a court to draw a negative

¹³³ *Grootboom* (note 1 above) 288B–C.

¹³⁴ See generally Centre on Housing Rights and Evictions *The Human Right to Adequate Housing 1945 to 1999* (2000).

inference from the fact that the word 'maximum' does not appear. The second difference is that the 1996 Constitution requires 'reasonable . . . measures' to be taken whereas the Covenant speaks in terms of 'all appropriate means'. Again the difference in practice would appear to be negligible. Would it be 'reasonable' if a government chose not to adopt 'all appropriate' means or measures? Asked and answered.

In *Grootboom* neither side disputed the fact that housing rights may only be realised progressively. Indeed, Davis J cites with approval the observation by Chaskalson P in *Soobramoney* that 'an unqualified obligation to meet [all housing] needs would not presently be capable of being fulfilled'. This is a very helpful formulation since it stresses that, while the impossibility currently exists, it need not be permanent. Moreover, this impossibility relates to an 'unqualified' obligation. The question then becomes, what qualified or limited obligation is capable of being fulfilled immediately or at least in the near future? Unfortunately, Davis J does not address this issue. Instead, he invokes the fact that the 1996 Constitution is only three years old and observes that the government could hardly be expected to have 'solved' the housing crisis within such a short period of time. But the focus on a 'solution' serves only to misdirect the inquiry. No government can solve, as opposed to ameliorate, a major social rights crisis in anything other than the long term. Two things can, however, be required. The first is that within a reasonable period (surely not more than three years) the government will have adopted a set of objectives and policies which flow directly from its analysis of its constitutional obligations under s 26. The second is that any such plans will give priority to ensuring that respect for a minimum core content of the right to housing can be achieved within the shortest possible time.

By contrast, the High Court judgment treats 'progressive realisation' as though it is an entirely open-ended concept which authorises the indefinite deferral of any defined results. In terms of a core content, Davis J recites the arguments in favour of such an approach, noting specifically the analysis adopted by the UN Committee on Economic, Social and Cultural Rights, but fails to either endorse or reject the concept. He relies instead upon a minimalist 'rationality' test to justify a failure to make the inquiries which would be demanded by the application of the minimum core content approach in the interpretation of s 26.

Paradoxically, his reluctance to pursue the core content line of inquiry in relation to s 28 leads him into difficulties of the opposite nature to those which he had earlier sought to avoid through the adoption of a restrictive approach to s 26. He accepts the view that because s 28 contains no equivalent of the 'progressive realisation' clause in s 26(2) 'the question of budgetary limitations is not applicable to the determination of rights in terms of s 28(1)(c)'.¹³⁵ He therefore dismisses

135 *Grootboom* (note 1 above) 291B–C.

without further ado the government's submission that the recognition of even a right to temporary shelter for children 'would have a dramatic impact on the budget'. But, notwithstanding the 1996 Constitution's silence on the matter, there are inevitably significant budgetary questions which *do* need to be resolved, even in relation to s 28. It is simply not persuasive to show great sympathy for, and effectively defer to, the budgetary arguments which underpinned the government's position in relation to s 26, and then to conclude that budgetary matters can have no relevance where s 28 applies. In the latter case a minimum core content analysis is also unavoidable, even if it is not acknowledged or described in those terms. Either the government is left to its own devices to make a determination as to what is affordable in providing shelter to children (given that there are always some budgetary outer limits) or the court must exercise its legitimate role in scrutinising the reasonableness of such determinations. Either way, the minimum core approach would have yielded a much more satisfactory outcome and one which would provide a sustainable basis for an emerging jurisprudence of social rights under the 1996 Constitution.

(d) Defining the role of the courts: justiciability and rationality

In *Grootboom*, the government introduced a novel theory of 'imperfect justiciability' which it derived from the progressive realisation provisions of s 26(2). The claim that the right of access to adequate housing is 'imperfectly justiciable' would not per se seem to be problematic since most rights issues, including of course economic and social rights, are likely to be less than completely justiciable. The problem with the concept, however, is that the government sought to translate it into practice through the application of its own rather strongly deferential approach:

[so] long as the relevant public authority can justify its response to this right in terms of a plan or programme designed to give effect to the right, the courts should not employ their review function to 'second guess' the suitability of a programme rationally conceived and implemented.¹³⁶

Thus, any plan prepared by the government which is (a) designed to give effect to the right and (b) rationally conceived and implemented should not be subject to review by the courts. It is unclear whether the government considered this to be no more than a restatement of the rationality test formulated by Chaskalson P in *Soobramoney* or whether it put it forward as a new formulation which would be conducive to an even higher level of deference. In the event, the High Court did not take up the concept of imperfect justiciability and instead relied entirely on the rationality test.¹³⁷ For present purposes the key passage from *Soobramoney* is:

¹³⁶ Ibid 283G–H.

¹³⁷ See III above.

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.

The test has at least three elements which are relevant to *Grootboom*. The first element consists of two substantive qualities of a decision being reviewed. It thus requires not only rationality but also good faith. In this respect, the test is substantially less deferential than the standard form of rationality test, such as that which has been developed over many decades by the US Supreme Court.¹³⁸ The addition of the good faith element makes it clear that the opposite of rational is not irrational and it actually brings the test much closer to one of reasonableness since the formulation carries the clear implication that a decision could be rational but not represent a good faith effort to give effect to both the letter and the spirit of the constitutional provision in question. A reasonableness test would also fit more closely and directly with the formulation used in s 26(2) which calls for 'reasonable' measures to be taken. This is not, however, the basis upon which the test is applied by Davis J. He found (a) that 'a rational housing programme ha[d] been initiated' and (b) that it had been 'designed to solve a pressing problem in the context of . . . scarce financial resources'.¹³⁹ The evidence upon which these findings were made is telling. It consisted of a series of unsystematic statistics all of which pointed to the unsurprising facts that there would be a major long-term shortage of housing and a limited and shrinking budget.

At no point did any of the respondent governmental authorities indicate what they understood the right of access to adequate housing in s 26 to mean, how the entry into force of the 1996 Constitution had affected their pre-existing approach to housing policy, or how they had in fact endeavoured to match the available resources with the established need. The only criterion to which the evidence seemed to accord importance is that of orderliness – with the government of the Western Cape indicating that it had drawn up a plan 'in accordance with the principle that access to land and housing must be made in an orderly manner'.¹⁴⁰ Davis J concludes by citing with approval the government's assertion that to interpret s 26 as actually requiring the provision of housing in a situation such as that in *Grootboom* would 'create impediments towards the implementation of their housing programme because it would dilute scarce resources'.

This approach actually turns the rationality or reasonableness test on its head. The key issue, which goes entirely unaddressed, is whether the programmes into which the government has chosen to invest its scarce resources are those which are in fact most conducive to realisation of the

138 In US constitutional law, the rationality test has traditionally led to 'remarkable deference to state objectives . . . in the sphere of economic regulation'. L Tribe *American Constitutional Law* 2ed (1988) 1443.

139 *Grootboom* (note 1 above) 286H–J.

140 *Ibid* 284E–F.

right of access to adequate housing by the totality of persons who are currently being denied that right. If some 900 persons, whose desperate need is not contested, are barely within the purview of all of the relevant programmes there would seem to be a clear failure either of rationality or of good faith in the design of those programmes. The appropriate response to such a finding would then be to put the burden back onto the government to ask what it was planning to do in order to address such problems. Instead, Davis J simply ratifies the status quo, despite the assurances given that the programmes in place will do nothing to address the plight of any of the applicants but will ensure the orderly implementation of the obviously flawed programmes designed by the various government departments which give no indication that they have been making any particular effort to operate within a rights framework. Indeed the essence of such a framework – a focus on the rights of individuals, rather than on aggregate statistical situations – appears not to enter into the decisional framework adopted by the court.

The second element of the Chaskalson test requires that *decisions* have been actually taken by the relevant (political or other) authorities. Although there is no evidence – as already discussed – that their decisions were tailored in such a way as to satisfy the requirements that flow from s 26 of the 1996 Constitution, it can be assumed that the relevant political organs have taken a deliberate decision not to meet the ss 26 and 28 needs of the applicants. We would do well to bear in mind, however, that this would be a generous assumption – an assumption *arguendo* – because the failure to prioritise pressing need is so great that one suspects that no decision in any meaningful sense was actually taken. The third element requires that *responsible authorities* take the decisions, in other words not just the amorphous state as a whole. This element was satisfied in *Soobramoney* in a far more convincing manner than is the case in *Grootboom*. In the former, the court attached particular importance to the guidelines that had been drawn up by medical experts precisely for the purpose of guiding the ‘agonising choices’¹⁴¹ that had to be made. In the latter, there is barely even a recognition that such choices need to be made, let alone any evidence adduced by the relevant experts that the dilemmas have been specifically addressed or that the choices made have been decided on the basis of any systematic set of guidelines.

In practice, the High Court in *Grootboom* seems not to apply the Chaskalson test, but to come closer to the standard suggested by de Wet. In a formulation which would effectively limit judicial review to situations involving governmental abdication of all its responsibilities, she suggests that ‘[o]nly if the state has done nothing for quite some time to improve the housing shortage, would it be possible to say that the state had neglected its duty’.¹⁴² The result is a standard of review which is rarely going to be triggered, leading to a *de facto* abdication of the court’s

¹⁴¹ *Soobramoney* (note 4 above) para 24.

¹⁴² De Wet (note 128 above) 118.

responsibility for ensuring that the government takes seriously the social rights provisions of the Constitution.

(e) The relationship between the case in hand and the broader policy function

In any litigation that puts human rights into the spotlight there is an appropriate tension between the objective of achieving justice in the case at hand and promoting a normative framework which will be conducive to the realisation of the right in question in future contexts. Curiously, however, courts which are confronted with social rights issues seem to be almost paralysed by floodgates-type arguments to the effect that if they grant relief in the case at hand the implications for future policy-making will be utterly unsustainable. There are various ways around this dilemma, one of which is simply to insist that courts are not general policy-making fora and can do little more than take one case at a time. As discussed above, this is a legitimate option but it would seem preferable to combine it with a more transparent recognition of the need to probe floodgates-type claims which are invariably invoked in order to discourage innovative approaches to economic and social rights. In *Grootboom*, the government behaves in a very predictable way by forecasting or warning that disaster will ensue if s 26 claims are addressed and the High Court, rather than probing the basis for these predictions, simply accepts them at face value. It is almost inconceivable that a court would accept such an approach in relation to political rights even though governments in semi-repressive contexts routinely argue that granting press freedom to one particular journal would inevitably open the floodgates to a completely uncontrolled press which would undermine not only the government of the day but also the very fabric of society. In *Grootboom* it would have been relatively easy for the court to have requested the government to present a clear analysis of the basis upon which its predictions were made and to have asked it to explore and cost various options ranging from the construction of housing units of the type already being built through to much more innovative and affordable community-based schemes for the provision of minimalist building materials and access to land on a transitional basis. In the absence of such inquiries, it is far from convincing to assert that recognition of even a core minimum content approach to the right to housing would bankrupt the economy. Had there been constitutional review based on such inquiries, the High Court would in all likelihood have had to pursue a similarly active remedial approach to that which it adopted for the s 28 breach. Absent evidence not available to us, the state respondents in *Grootboom* presented no evidence that justified failing to attend to the free-standing right to adequate housing – most notably, the core right to adequate shelter – of all adults living in the inhuman conditions of the *Grootboom* applicants, and not simply those adults who have children to care for. Whatever degree of special attention may be justified for children in human rights jurisprudence, it is neither an absolute priority nor one so

much weightier than those of adults with the same needs that the courts can be content to allow government to get by with the kind of 'justifications' offered in *Grootboom*.

VIII CONCLUDING OBSERVATIONS

This article has not claimed that rights such as those at issue in *Soobramoney* and now in *Grootboom* are somehow the preserve of the courts. One of its main purposes, however, has been to caution against an undue willingness to concede this constitutional terrain to the government in the face of general arguments that the government has some plan in place and that it is making agonising tragic choices. It is understandably easy to be overwhelmed by the magnitude of the challenges facing South African constitutionalism – both in terms of new institutional paradigms and the stunning deprivation of large numbers of people. As Chaskalson P put it in *Soobramoney*:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. . . . These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.¹⁴³

It is impossible to gainsay anything in this eloquent passage, but the daunting nature of the challenge cannot blind courts to the place of constitutional rights as a central feature of the way the drafters of the South African Constitution decided these humanity-denying conditions were to be addressed – and to the corresponding active role envisaged for the courts in upholding this constitutional choice by promoting, through constitutional rights adjudication, the values of dignity, freedom and equality which cocoon the Bill of Rights and indeed the entire Constitution. The result of *Soobramoney* was more than arguably a justifiable one, but the reasoning the Constitutional Court used to get there and the general signals that the case is now being taken as having sent by judges such as Davis J in *Grootboom* is problematic, as it has been the purpose of this article to show. *Soobramoney* must be viewed as a tentative first step on a limited issue in a litigation context framed by the urgency of the proceedings, in other words, a beginning rather than virtually the end to the possibilities of a combined rigorous and vigorous approach to adjudicating the human rights priorities entrenched in the 1996 Constitution: In that regard, the final sentence of the passage by Chaskalson P cited above could well have read: 'For as long as these conditions continue to exist judicial reticence will have a hollow ring.' Such reticence need not necessarily be *Soobramoney*'s legacy for *Grootboom* and the cases to follow. It should not be.

143 *Soobramoney* (note 4 above) para 8.