

CHAPTER 12: SOCIO-ECONOMIC RIGHTS

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1. WHAT ARE SOCIO-ECONOMIC RIGHTS?

The Constitution of the Republic of South Africa, 1996 ('the Constitution') protects several socio-economic rights. Among others, it guarantees the right to adequate housing (section 26(1)), food and water (section 27(1)(b)), social security (section 27(1)(c)) and basic education (section 29(1)). Broadly speaking, socio-economic rights can be defined as rights which entitle people to the material goods necessary for them to live in conditions consistent with human dignity¹ and reach their full potential.²

Not every Bill of Rights protects socio-economic rights. In fact, many do not.³ Most only protect what is commonly referred to as 'first generation' or civil and political rights – rights which broadly prohibit the state from interfering with basic individual liberties.⁴ The Bill of Rights protects several civil and political rights such as freedom of expression (section 16), to equality (section 9), free assembly (section 17) and privacy (section 13). Civil and political rights are also often described as 'negative

¹ See Danie Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in Danie Brand & Christof Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 1-2 and *Soobramoney v MEC Health KZN* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) para 8. Dignity is also both a constitutional value (section 1(a)) and right (section 10). How dignity influences socio-economic rights interpretation is discussed below.

² See *Government RSA v Grootboom* [2000] ZACC 19. 2001 (1) SA 46; 2000 (11) BCLR 1169 (CC) para 23.

³ For example, the United States Constitution protects no socio-economic rights. Whilst many Scandinavian countries provide citizens with various material goods at state expense – such as free education, healthcare and housing – these are legislative entitlements and not constitutional rights. Theoretically, this means the right to these social goods could be taken away by any new government that comes into power. See Etienne Mureinik 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' 8 *SAJHR* (1992) 464-5 and 468-9.

⁴ Iain Currie & Johan De Waal *The Bill of Rights Handbook* 6 ed (2014) 564. Mureinik *ibid* at 464 explains that civil and political rights are often referred to as 'first generation' rights because they 'were the first rights to be recognised as fundamental'.

rights' because their primary purpose is to restrict government power by imposing duties on it 'to not act in certain ways'.⁵ For example, the civil and political right to equality imposes duties on the state to not treat people differently for morally arbitrary reasons, while the right to privacy imposes duties on the state to not listen to the private communication of anyone without their permission.⁶ By contrast, socio-economic rights are often described as 'second generation' or 'positive' rights.⁷ This is because socio-economic rights impose positive duties on the government to actively do certain things. For example: to actively take steps towards providing people with access to adequate housing, healthcare and an education or to prevent private third parties from interfering with their existing enjoyment.⁸ However, as is explained below, there is an ongoing debate about whether there is such a wide distinction between judicial enforcement of 'negative' civil and political rights versus 'positive' socio-economic rights in practice.

The purpose of this chapter is to unpack the purpose, and importance, of socio-economic rights and explain how they are interpreted and enforced by the courts. It does this in five parts. First, it explains the two justiciability arguments against giving the courts authority to enforce socio-economic rights, the connection between socio-economic rights and transformative constitutionalism and why socio-economic rights and civil and political rights are interdependent. Secondly, it explains the various 'negative' and 'positive' duties socio-economic rights impose on the state - and private

⁵ Currie & De Waal *ibid.* However, as explained in chapter seven, section 8 of the Bill of Rights does allow for constitutional rights to be enforced against private parties in certain circumstances. See 12.3(c) below where the chapter considers the circumstances when socio-economic rights can bind both private persons and the state.

⁶ However, the state can limit these rights, including socio-economic rights, if the limitation complies with the two criteria for justification in section 36(1) of the Constitution. On the various difficulties with applying the general limitation clause to socio-economic rights - as opposed to civil and political rights - see *Khosa v Minister Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) para 83-4 and Kevin Illes 'Limiting Socio-Economic Rights beyond the Internal Limitation Clauses' (2004) 20 *SAJHR* 448. The reason why it is difficult to apply the general limitation clause to socio-economic rights will become clearer once the 'reasonableness review' test has been fully explained at 12.4 below.

⁷ Mureinik *op cit* note 3.

⁸ See 12.3(b) below where the difference between 'negative' and 'positive' duties is explained.

parties - and how to determine the content of these duties by interpreting socio-economic rights. Thirdly, it unpacks the 'reasonableness review' test the courts use to determine whether the state has complied with its positive duties to progressively realise and provide a socio-economic right. Finally, it discusses some of the legal remedies a court can order when someone successfully establishes a negative or positive duty imposed by a socio-economic right that has been violated.

2. JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS AND THEIR CONNECTION TO TRANSFORMATIVE CONSTITUTIONALISM

Before explaining how the courts interpret and enforce socio-economic rights, it is necessary to consider two fundamental things. First, how, and why, the separation of powers influences how strictly (or leniently) the courts will adjudicate socio-economic rights in practice. Secondly, why socio-economic rights are intrinsically connected to transformative constitutionalism and how they are also interdependent with civil and political rights.

(a) Justiciability: the separation of powers and polycentricity arguments against judicial enforcement of socio-economic rights

The separation of powers broadly refers to the division of state power between three separate branches of government: (a) the legislature; (b) the executive; and (c) the judiciary.⁹ While the Constitution does not expressly provide for the separation of powers, the Constitutional Court ('CC') has confirmed it is 'implicit' in the Constitution.¹⁰ There is also no universal model of the separation of powers, how it works may differ from one country to the next.¹¹ It is also not absolute because there can sometimes be

⁹ See Sanele Sibanda & Sebastian Seedorf 'Separation of Powers' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed 2013 (Revision Service 5) 12:3. It is important not to confuse the three branches of government (judiciary, legislature and executive) with the three spheres of government (national, provincial and local).

¹⁰ See *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 109-113 and *South African Association of Personal Injury Lawyers v Heath* [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77 (CC) para 21-2.

¹¹ See *De Lange v Smuts NO* [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (CC) para 60.

legitimate overlaps between the powers, functions and personnel in each branch.¹² At its most basic, the separation of powers doctrine proposes two reasons why it is necessary to divide state power into three separate parts:

- **Protection of human rights:** to ensure no single branch becomes too powerful because - if it does - that branch may become unaccountable and abuse its powers to violate fundamental human rights.¹³ The separation of powers tries to prevent such abuses by creating a system where each branch holds the other accountable for the exercise of their power through a system of 'checks and balances'.¹⁴
- **Government efficiency:** to ensure that the people best suited to perform the role, functions and tasks of each branch are allocated to it.¹⁵ In other words: to ensure those best suited to formulate and execute government policy are in the executive, those best suited to formulate and enact laws are in the legislature and those best suited to decide legal disputes are in the judiciary.¹⁶

Two important differences between the judiciary and the other branches affect how the courts interpret and enforce socio-economic rights. First, judges are not elected by the people; they are appointed by the President on recommendation of the

¹² For instance: there is an overlap between the persons in the executive and legislature because section 93(3)(a) of the Constitution requires the President to select the Deputy President from among the Members of the National Assembly ('the legislature') while section 93(3)(b) requires that all cabinet members, save for two, must also be members of the National Assembly. Also see *Kolbatschenko v King* NO 2001 (4) SA 336 (C) where a judge exercised 'administrative action' – something usually done by the executive branch.

¹³ Sanele Sibanda 'Basic Concepts of Constitutional Law' in Pierre de Vos & Warren Freedman (eds) *South African Constitutional Law in Context* (2014) 60.

¹⁴ See *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) para 38 and *Glenister v President RSA* 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) para 39.

¹⁵ Sibanda op cit note 13 at 61. Sibanda also notes that the idea that different people should be allocated to different branches to ensure government efficiency is also often traced back to Montesquieu *The Spirit of the Laws* (1748).

¹⁶ Ibid. However, whether the 'best people' always end up in these different branches in reality is debatable.

Judicial Service Commission ('JSC').¹⁷ Secondly, the judiciary is also arguably the least democratically accountable branch of government because judges cannot be removed in elections (albeit for good reason) unlike members of the other two branches.¹⁸ These differences, among others, are sometimes relied upon to argue that it is inappropriate to give judges the authority to enforce socio-economic rights.¹⁹ This raises an important problem regarding judicial enforcement of socio-economic rights known as the issue of justiciability: **to what extent can (or should) socio-economic rights be enforceable by the courts?**²⁰ People who oppose giving courts the legal authority to enforce socio-economic rights generally rely on two different and closely connected arguments.²¹ Both these arguments can be summarised as follows:

1. **Separation of powers argument:** *socio-economic rights should not be justiciable because giving courts authority to enforce them violates the separation of powers doctrine.* This argument has two interconnected points. First, justiciable socio-economic rights are inconsistent with the separation of powers, because giving courts authority to enforce them necessarily means unelected judges must dictate to the elected branches how state money should be spent to provide socio-economic rights.²² Second, this problem does not necessarily arise when courts enforce civil and political rights, because

¹⁷ In terms of section 174 of the Constitution. Related to this is the argument that giving judges authority to determine how state money should be spent to provide socio-economic rights would also undermine the government efficiency rationale of the separation of powers. This also links back to the 'polycentricity' argument against judicial enforcement of socio-economic rights discussed immediately below.

¹⁸ However, this does not mean judges cannot be held accountable for their actions in other ways. For instance, if a judge is guilty of an act of gross misconduct they can be impeached and removed from office by the National Assembly in terms of section 177 of the Constitution.

¹⁹ See Sandra Liebenberg *Socio-Economic Rights* (2010) 19-21.

²⁰ Currie & De Waal op cit note 4 at 566.

²¹ For a useful discussion of the main arguments against justiciable socio-economic rights, see DM Davis 'The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights except as Directive Principles' (1992) 8 *SAJHR* 475; Nicholas Haysom 'Constitutionalism, Majoritarian Democracy and Socio-Economic Rights' (1992) 8 *SAJHR* 451 and Mureinik op cit note 3.

²² *Certification case* supra note 10 at para 77-8.

enforcing 'negative duties' not to violate civil and political rights is different to enforcing 'positive duties' to actively provide socio-economic rights.²³

- 2. Polycentricity argument:** *socio-economic rights should not be justiciable because they involve 'polycentric tasks' which judges lack sufficient knowledge and expertise to determine.* Polycentric tasks are decisions that require the decision-maker to balance and coordinate 'mutually interacting variables'.²⁴ For example, when the minister of finance determines the national budget. Due to limited resources, the minister and the national treasury must carefully weigh and balance the interests of every department to ensure each has sufficient resources to perform its mandate. Determining how much each department receives is 'polycentric' because changing the amount of resources allocated to one department will necessarily impact on another, that is, taking resources away from Police to give to Education will impact on the ability of the department of Police to perform its functions and vice versa.²⁵ This argument says that the realisation of socio-economic rights necessarily requires polycentric decision-making to be undertaken – about how best to spend state money to provide the material goods they guarantee – which is a complex and polycentric issue that is best left to the legislature and executive alone to determine, not the courts.²⁶

Both arguments against the justiciability of socio-economic rights were rejected by the CC in *Ex parte Chairperson of the Constitutional Assembly: in re Certification*

²³ Ibid. In other words this argument states that judicial enforcement of first generation civil and political rights does not necessarily require unelected judges to tell the state how to spend taxpayers money, whereas judicial enforcement of second generation socio-economic rights always does. How the CC responded to this argument against the justiciability of socio-economic rights appears immediately below.

²⁴ Currie & De Waal op cit note 4 at 566. For a detailed discussion on 'polycentricity' see L Fuller 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353.

²⁵ See Nick Ferreira 'Feasibility Constraints and the South African Bill of Rights: Fulfilling the Constitution's Promise in Conditions of Scarce Resources' (2012) 129 *SALJ* 292-5 who explains other factors that add to polycentricity such as how much money the national department should allocate to the provincial one.

²⁶ Currie & De Waal op cit note 4 at 567. Also see Danie Brand 'Socio-Economic Rights' in Pierre de Vos & Warren Freedman (eds) *South African Constitutional Law in Context* (2014) 687.

of the Constitution of the Republic of South Africa, 1996 (*the Certification case*).²⁷ In rejecting both arguments, the court said two things²⁸

- **First, the difference between courts enforcing ‘negative’ civil and political rights versus ‘positive’ socio-economic rights is not as wide a distinction as opponents of justiciable socio-economic rights often make out.**²⁹ This is because when a court orders the government to comply with a negative duty not to violate a civil and political right, that order can also often have financial implications for the state.³⁰ For example: ordering the state not to violate the civil and political right of an indigent criminal accused to be legally represented at state expense (section 35(2)(c)) will necessarily have corresponding financial implications for the state because the state must spend money to provide that accused person with a legal representative.³¹
- **Secondly, and similar to civil and political rights, socio-economic rights can ‘at the very least’ be enforced against the state by ordering it to comply with any negative duty not to interfere with their existing enjoyment.**³² For example: by ordering the state to not evict someone from their home without an order of court and ‘only after considering all relevant circumstances’ (section 26(3))³³ or to not deprive someone of their existing

²⁷ Supra note 10 at para 77. Also see Davis op cit note 21 at 480 who makes various arguments for why the ‘polycentricity’ argument against the justiciability of socio-economic rights is a flawed one.

²⁸ Currie & De Waal op cit note 4 at 567-8.

²⁹ *Certification case* supra note 10 at para 77.

³⁰ Ibid para 77-8. Also see Davis op cit note 21 at 480.

³¹ *Certification case* ibid. See *S v Jaipal* [2005] ZACC 1; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC) para 54-5 (connection between right to a fair trial and available resources of the state) and *August v Electoral Commission* [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 (CC) (court ordering electoral commission to take positive steps to provide prisoners with facilities to exercise the civil and political right to vote despite the fact that the order of the court had resource implications for the state).

³² *Certification case* ibid. See also *Jaftha v Schoeman* 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) para 31-4 and the discussion at 12.3(b) below.

³³ See *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) para 17-23. This aspect of the right to adequate housing is now given effect to in

enjoyment of the right to social security (section 27(1)(c)) or healthcare (section 27(1)(a)), unless the state can show the court that there exist sufficiently justifiable and persuasive reasons for doing so.³⁴

On several occasions since the *Certification case*, the CC has confirmed that both the positive and negative duties that socio-economic rights impose on the state are justiciable.³⁵ This means the CC has consistently confirmed that neither the separation of powers or polycentricity prevent the courts from ordering the state to take positive steps to provide socio-economic rights or to comply with its negative duties not to interfere with their existing enjoyment. However, in practice, the key problem is not whether socio-economic rights are justiciable. **Rather, it is how courts should go about enforcing a particular socio-economic right in practice.**³⁶ Whilst the separation of powers and polycentricity do not prevent the courts from enforcing socio-economic rights, both these factors still influence the ‘level of scrutiny’ or ‘standard of review’ the courts will apply when enforcing them. The standard of review broadly refers to how strictly (or leniently) the courts will scrutinise the actions of the state to determine whether it has complied with either the negative or positive duties a socio-economic right imposes upon it. What the court must determine when someone argues that the state has failed to comply with its positive duties to provide a socio-economic right – or has violated its negative duty not to interfere with its existing enjoyment – is set out below.³⁷ First, it is necessary to briefly consider some important links between socio-economic rights and transformative constitutionalism,

practice by the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (‘PIE’). See the discussion on how legislation often gives effect to socio-economic rights in practice at 12.3(c) below.

³⁴ See *Khosa* supra note 6 at para 2-4.

³⁵ See *Grootboom* supra note 2 at para 20; *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (CC) para 23-5 and *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) para 46-7.

³⁶ *Grootboom* ibid

³⁷ See 12.4 below which explains how the ‘reasonableness review’ test works in practice. Also see 12.5 which explains the various factors that influence how strictly or leniently the court will apply the test in practice.

and how socio-economic rights and civil and political rights are interdependent and reinforce each other.

(b) Transformative constitutionalism: the constitutional purpose of socio-economic rights and their interdependency with civil and political rights

The South African Constitution, and more specifically its Bill of Rights, is often described as 'transformative'.³⁸ This description comes from the theory (or legal philosophy) of transformative constitutionalism.³⁹ Transformative constitutionalism argues the Bill of Rights is 'transformative' because it has a different role and purpose in society than a 'purely liberal' Bill of Rights, such as that of the United States.⁴⁰ To understand why the entrenchment of socio-economic rights makes the Bill of Rights 'transformative', it is necessary to briefly consider the primary purpose and function of a liberal Bill of Rights.

The main purpose of a purely liberal Bill of Rights is to restrict the exercise of government power by imposing duties on it that prohibit it from doing certain things.⁴¹ In other words, the primary function of a 'purely liberal' Bill of Rights is only to prevent the government from acting in ways that violate its 'negative duties' to not infringe civil and political rights to guarantees, such as freedom of speech or assembly, equality before the law or privacy. This means that a liberal Bill of Rights

³⁸ See M Pieterse 'What Do We Mean When We Talk About Transformative Constitutionalism?' (2005) 25 *SAPL* 155, Sandra Liebenberg & Beth Goldblatt 'The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution' (2007) 23 *SAJHR* 335 and *District Six Committee v Minister of Rural Development and Land Reform* [2019] ZALCC 13; [2019] 4 *SA* 89 (LCC) para 41.

³⁹ See Karl Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146.

⁴⁰ See Pius Langa 'Transformative Constitutionalism' (2006) 3 *Stell LR* 351 and *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C) para 100 ('Whatever the position may be in the USA or other countries, that is not the purpose of our Constitution . . . [it] provides a blueprint for the transformation of our society from its racist and unequal past to a society in which all can live with dignity').

⁴¹ Currie & De Waal op cit note 4 at 564.

does not normally impose 'positive duties' on the state, or private individuals, to provide vulnerable people in society with access to the basic material goods necessary to live a decent life such as housing, food and water, an education or adequate healthcare.⁴² This is because, as stated, the primary purpose of such a Bill of Rights is only to restrict state power. It does not necessarily concern itself with imposing positive duties on the state, or private persons, to provide other people with the basic material goods necessary for them to live in conditions consistent with human dignity.⁴³

The entrenchment of both 'negative' civil and political rights and 'positive' socio-economic rights makes it clear that the Bill of Rights is not a 'purely liberal' one. It is true that it restricts government power by imposing negative duties on the state to not violate constitutional rights, much like the United States Constitution. However, and unlike the United States Constitution, it also has an additional 'transformative purpose' - to address the continuing conditions of poverty, economic inequality and exclusion created by both apartheid and colonialism.⁴⁴ This is one central reason why the Bill of Rights not only protects socio-economic rights, but also imposes enforceable positive duties on the state to actively provide them. We can also identify two further reasons (or 'rationales') for why justiciable socio-economic rights are guaranteed by the Bill of Rights:

- 1. Interdependency of human rights:** *all human rights are interconnected and should be considered holistically.* This means that constitutional rights do not

⁴² This theme is developed in more detail by Pierre de Vos 'Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 78-80.

⁴³ See *Jackson v City of Joilet* 715 F 2ed 2 1200, 1203 (7th Cir) (1983) 1206 cited in Currie & De Waal op cit note 4 at 564 where Judge Posner of the United States Court of Appeals (7th circuit) said 'the dominant conception of the United States Constitution is of a charter of negative rather than positive liberties . . . the men who wrote the Bill of Rights were not concerned that Government might do too little for the people, but that it might do too much for them'.

⁴⁴ For instance: section 1(a) of the Constitution states that it is founded on the values of 'human dignity, the *achievement* of equality and the *advancement* of fundamental human rights and freedoms' (emphasis added). See *Soobramoney* supra note 1 at para 8-9 and *Grootboom* supra note 2 at para 1 and 6 which explains the relationship between these founding constitutional values and the realisation of socio-economic rights in more detail. Also see Sandra Liebenberg 'The Interpretation of Socio-Economic Rights' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed 2013 (Revision Service 5) 33:9.

exist in isolation because they all influence and reinforce each other.⁴⁵ Socio-economic rights are the same – but also different – because not only do they ensure people can live decent lives, but also because they strive to ensure all people can meaningfully exercise civil and political rights in practice. This is because people cannot meaningfully exercise and enjoy all of their civil and political rights in reality if they lack the basic material goods necessary for them to sustain themselves.⁴⁶ In other words, whilst civil and political rights are important, people cannot *eat* the right to free expression and neither will the right to privacy keep them warm at night.⁴⁷ Before people can meaningfully exercise and appreciate all of their civil and political rights in reality, their basic needs for the material goods necessary for a decent life must also be satisfied.

- 2. Legitimacy of the Constitution:** *public faith in the Constitution would be undermined if socio-economic rights were not protected.* This recognises public faith in the Constitution is undermined whilst the majority of people live in conditions of poverty and indignity and lack the basic material goods necessary to meaningfully exercise their civil and political rights.⁴⁸ Justiciable and entrenched socio-economic rights are therefore not only necessary to ensure the poor majority retain faith in the Constitution, but also because if only civil and political rights were protected there would always be the risk that the Constitution would be viewed as ‘the exclusive tool of the rich and powerful to protect their vested interests’.⁴⁹

⁴⁵ See *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); [2009] 12 BLLR 1145 (CC) para 52-3; *SANDU v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469; 1999 (6) BCLR 615 (CC) para 8 and *Grootboom* *ibid* at para 22-5 which explains how all constitutional rights are interconnected and dependent on one another.

⁴⁶ See Liebenberg & Goldblatt *op cit* note 38 at 338-441.

⁴⁷ See De Vos *op cit* note 42 at 71 who explains how people who are starving may struggle to exercise their civil and political right to freedom of speech which, in turn, would make it difficult for them to enforce their socio-economic rights to access adequate housing, social security or adequate healthcare against the state.

⁴⁸ See *Soobramoney* *supra* note 1 at para 8-9 and *Grootboom* *supra* note 2 at para 1-2.

⁴⁹ See Liebenberg *op cit* note 44 at 33:2 who cites the United States Supreme Court decision in *Lochner v New York* 198 US 45 (1905) where business owners successfully overturned legislation that set

It is important to keep these three rationales in mind when we consider the various duties that socio-economic rights impose on the state (and private parties) and how socio-economic rights should be interpreted.⁵⁰ This is because all three rationales influence how the courts interpret the various duties socio-economic rights impose on the state and private individuals when enforcing them in practice. What these duties mean, and how socio-economic rights should be interpreted, is considered directly below.

3. WHO CAN SOCIO-ECONOMIC RIGHTS BE ENFORCED AGAINST AND HOW SHOULD THE DUTIES THEY IMPOSE BE INTERPRETED?

Before we can explain the ‘reasonableness review’ test used by the courts to determine whether the state has complied with its positive duties to progressively realise socio-economic rights, we must first consider two things. First, what kind of duties do socio-economic rights impose on the state and private parties? Secondly, how should these duties be interpreted to determine what they require the state, and private parties, to do or not to do? The factors that provide us with a broad indication about how to answer these two questions are summarised in the following table and expanded upon in more detail immediately below.

APPLICATION: WHAT KIND OF DUTIES DO SOCIO-ECONOMIC RIGHTS IMPOSE ON THE STATE AND PRIVATE PARTIES?
This requires considering the following two issues: (a) what duties do

maximum daily working hours – designed to protect vulnerable women workers – on the basis that this law violated the civil and political rights of business owners to due process of law and freedom of contract.

⁵⁰ Namely: (1) links between transformative constitutionalism and socio-economic rights; (2) that socio-economic rights and civil and political rights are interdependent; and (3) that socio-economic rights are necessary to ensure public faith in the Constitution is not undermined.

socio-economic rights impose on other parties; and (b) which duties are enforceable against the state and which are enforceable against private parties?

First issue: what kind of constitutional duties can socio-economic rights impose?

Socio-economic rights can impose two types of duties: (a) negative and (b) positive duties.

- 1. Negative duties:** these duties prohibit the state and private parties from interfering with the existing enjoyment of a socio-economic right. This means that negative duties impose legally enforceable obligations on others **which prohibit them doing certain things**. For example: a duty not to unfairly discriminate against another person or not to deprive them of their existing access or enjoyment of water, adequate healthcare or a basic education.
- 2. Positive duties:** these duties impose obligations on other parties to take active steps to provide socio-economic rights or prevent other parties from interfering with them. This means positive duties impose legally enforceable obligations on others **that require them to do certain things**. For example: to actively prevent people from unfairly discriminating against others or take steps to provide indigent people with water, food or adequate housing.

Second issue: which duties bind the state and which duties bind private parties?

Whether a particular duty imposed by a socio-economic right binds another party depends on whether that party is: (a) the state; or (b) a private person.

- 1. The state:** both the positive and negative duties imposed by socio-economic rights are binding and enforceable against the state. The negative and positive duties imposed on the state are regulated by the application provisions of the Constitution and the text of the right:

1.1. Section 7(2): imposes both positive and negative duties on the state to

'respect, protect, promote and fulfil' socio-economic rights.

1.2. Section 8(1): states that the Bill of Rights 'applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'.

1.3. Text: some socio-economic rights 'condition' or 'qualify' the positive duties imposed on the three qualifications of: (a) 'reasonable legislative and other measures', (b) 'progressive realisation'; and (c) 'within available resources'.

2. Private parties: negative duties are enforceable against private parties. It is less settled whether positive duties are too. Determining whether a positive socio-economic right duty can bind a private person requires considering sections 8(2) and 8(3) of the Constitution:

2.1. Section 8(2): provides that a socio-economic right can impose positive duties on a private 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'.

2.2. Section 8(3): requires the court to consider four questions to determine how any duty imposed by a socio-economic right on a private person should be enforced:

2.2.1. Whether legislation gives effect to the horizontal application of the socio-economic right. If not, it must consider whether the common law does.

2.2.2. The court must consider whether the common law gives effect to the horizontal application of any duty imposed by the right. If yes, the court must apply the common law or develop the common law if necessary to do so.

2.2.3. The court must create a common law rule to give effect to the horizontal application of any duty imposed by the right, if that duty is not regulated by any legislation or by any common law rule.

2.2.4. When the court creates a common law rule to give effect to any duty imposed by a particular socio-economic right, the court can limit the extent of any duty imposed by the right under section 36(1) of the Constitution.

INTERPRETATION: WHAT FACTORS INFLUENCE THE CONTENT OF THE DUTIES SOCIO-ECONOMIC RIGHTS IMPOSE ON THE STATE AND PRIVATE PARTIES?

This requires considering how to determine the content of the various duties socio-economic rights impose on both the state and private parties. This is influenced by four general factors:

- 1. Section 39(1) of the Constitution:** this is the 'interpretation clause'. Section 39(1) influences the interpretation of the duties imposed by socio-economic rights in three different ways:
 - 1.1. Section 39(1)(a):** requires the court to interpret the duties imposed by socio-economic rights in a way which will 'promote the values of human dignity, equality and freedom'.
 - 1.2. Section 39(1)(b):** imposes a duty on the court to 'consider international law' when determining the content of any duties that socio-economic rights impose on other parties.
 - 1.3. Section 39(1)(c):** gives the court a choice to 'consider foreign law' when determining the content of any duties that socio-economic rights impose on other parties.
- 2. Generous and purposive interpretation:** the courts must interpret socio-economic rights broadly so that they achieve their purpose and so that they benefit as many people as possible 'as far as the language [of that socio-economic right] permits'.
- 3. Text:** qualified socio-economic rights require courts to consider that the state's positive duty to realise these socio-economic rights are qualified by the three conditions of (a) 'reasonable legislative and other measures'; (b) 'progressive realisation'; and (c) 'available resources'.

4. Connection to civil and political rights: courts should consider that one purpose of socio-economic rights is to ensure that everyone can meaningfully exercise civil and political rights.

(a) The three categories of socio-economic rights

Before considering the various duties socio-economic rights impose on the state, and also private parties, it is useful to first distinguish between three different categories of socio-economic rights which the Bill of Rights guarantees. These three categories are: (1) 'qualified socio-economic rights'; (2) 'unqualified/basic socio-economic rights'; and (3) 'negative socio-economic rights'. Each category can be broadly summarised as follows:

- 1. Qualified socio-economic rights:** these socio-economic rights qualify the positive duty of the state to provide the material goods they guarantee to three conditions: (a) 'reasonable legislative and other measures'; (b) 'progressive realisation'; and (c) 'within available resources'.⁵¹ Most qualified socio-economic rights have the same formula which consists of two components: (i) they give 'everyone the right of access to' the right; and (ii) they qualify the entitlement of everyone to 'have access to' the right to the above three conditions. The right of access to adequate housing in section 26(1) and 26(2) can illustrate how these two components work. First, section 26(1) states that 'everyone has the right of access to adequate housing'. Secondly, section 26(2) subjects the positive duty of the state to provide 'everyone with access to adequate housing' to three different qualifications: (i) 'reasonable legislative and other measures'; (ii) 'to progressively realise the right'; and (iii) 'within its available resources'. These three qualifications are explained in more detail below.⁵²

⁵¹ Liebenberg op cit note op cit note 44 at 33:5-33:6.

⁵² See 12.3(b)(i) below where the state's positive duties to provide qualified socio-economic rights is explained.

2. **Unqualified/basic socio-economic rights:** these socio-economic rights are not subject to the three qualifications of: 'reasonable measures', 'progressive realisation' or 'within available resources'. For example: section 29(1)(a) simply provides that 'everyone has the right to a basic education' and section 28(1)(c) states that every child has the right to 'basic nutrition, shelter, healthcare services and social services'.⁵³
3. **Negative socio-economic rights:** this does not necessarily refer to socio-economic rights that exist separately from the other two categories. Rather, this refers to 'expressly guaranteed manifestations of a particular socio-economic right'.⁵⁴ For example: section 26(1) and 26(2) impose positive duties on the state to provide everyone with access to adequate housing subject to the three qualifications of 'reasonable measures', 'progressive realisation' and 'within available resources'. However, section 26(3) also states, 'no one may be evicted from their home . . . without an order of court'. Section 26(3) therefore fleshes out the content of the right to adequate housing by expressly prohibiting the state and private persons from evicting anyone from their home without a court order.⁵⁵

Having explained the differences between the three categories of socio-economic rights, we can now consider the following question: **what kind of duties do socio-economic rights impose on other parties and who can those duties be enforced against?**

⁵³ Liebenberg op cit note 44 at 33:5-33:6. Also see *Governing Body Juma Masjid Primary School v Essay N.O.* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) para 34.

⁵⁴ Brand op cit note 26 at 668.

⁵⁵ See *Occupiers Erven 87 v De Wet NO* [2017] ZACC 18; 2017 (8) BCLR 1015 (CC); 2017 SA 346 (CC) para 40-5. Another example of a 'negative' socio-economic right is section 27(3) which states that 'no one may be refused emergency medical treatment'. See *Soobramoney* supra note 1 at para 20.

(b) Vertical application: duties socio-economic rights impose on the state

Socio-economic rights impose both 'positive' and 'negative' duties on the state. When socio-economic rights are enforced against the state – based on the allegation it has violated either a positive or negative obligation – the Bill of Rights applies vertically. When a socio-economic right applies vertically, it does two things: (a) it confers benefits on a private person; and (b) it imposes corresponding duties on the state.⁵⁶ Before explaining these different duties, it is useful to briefly reiterate the difference between a 'negative' versus a 'positive' duty:

- **Negative duties:** impose legal obligations on someone *to not do* something. For example: a duty not to unfairly discriminate against another person (section 9(3)) or not to evict someone from their home without an order of court (section 26(3)).
- **Positive duties:** impose legal obligations on someone *to do* something. For example: a duty to actively take steps to fulfil the right of everyone to access adequate housing (section 26(2)) or to a basic education (section 29(1)(b)).

The Constitution imposes both negative and positive duties on the state in relation to the entire Bill of Rights.⁵⁷ This is because section 7(2) of the Constitution requires the state to 'respect, protect, promote and fulfil' all the rights contained in the Bill of Rights.⁵⁸ In other words, section 7(2) of the Constitution imposes both 'positive' and 'negative' duties on the state to 'respect, protect, promote and fulfil' socio-economic rights.⁵⁹ The duty to 'respect' imposes negative obligations on the state to not directly or indirectly violate, or interfere with, the existing enjoyment of a socio-

⁵⁶ See Pierre de Vos 'Introduction and Application of the Bill of Rights' in Pierre de Vos & Warren Freedman (eds) *South African Constitutional Law in Context* (2014) 330.

⁵⁷ See Liebenberg op cit note 44 at 33:7-33:8.

⁵⁸ The formulation of the duties to 'respect, protect, promote and fulfil' human rights is often traced back to Henry Shue *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980) 5.

⁵⁹ *Grootboom* supra note 2 at para 20.

economic right.⁶⁰ Conversely, the duties to ‘protect, promote and fulfil’ socio-economic rights impose positive duties on the state to: (a) ‘protect’ socio-economic rights against interference by third parties; (b) ‘promote’ awareness of socio-economic rights; and (c) ‘fulfil’ socio-economic rights by ensuring they are provided to people in society who do not currently have access to them.⁶¹ These duties are briefly summarised in the following table and expanded upon in more detail immediately below:

‘RESPECT, PROTECT, PROMOTE AND FULFIL’ SOCIO-ECONOMIC RIGHTS
1. Negative duties
<ul style="list-style-type: none"> • ‘Respect’: this means the state has a duty not to pass any law or act in any way which will diminish access to the right or take away its existing enjoyment.
2. Positive duties
<ul style="list-style-type: none"> • ‘Protect’: this means the state must take active steps to ensure its own officials and third parties do not interfere with the existing enjoyment of a socio-economic right. • ‘Promote’: this means the state must take active steps to raise awareness about the right, how it can be enforced and take proper steps to expand access to it over time. • ‘Fulfil’: this means the state must take active steps to provide vulnerable people who do not currently have access to the right with the material goods it protects

⁶⁰ Brand op cit note 26 at 697-708. Also see *Jaffha* supra 32 at para 34.

⁶¹ Brand *ibid*.

and ensure that access to the right is progressively expanded over time.

(i) Positive duties on the state to ‘protect, promote and fulfil’ socio-economic rights

As explained immediately above, section 7(2) of the Bill of Rights imposes positive duties on the state to: (a) ‘protect’; (b) ‘promote’; and (c) ‘fulfil’ socio-economic rights. The broad content of what these positive duties imposed on the state can be summarised as follows:

- **‘Protect’:** requires the state to take active steps to prevent third parties – such as a private individual or company – from interfering with or violating the existing enjoyment of a socio-economic right of another person and to ensure that adequate remedies exist when violations occur.⁶² The duty to ‘protect’ socio-economic rights could require the state to: pass legislation to prevent landlords from unlawfully evicting people from their homes, prevent banks from repossessing people’s homes without following due process or create institutions to prevent a private medical aid from discriminating against people because of their race or socio-economic status.⁶³
- **‘Promote’:** requires the state to create an ‘enabling environment’ which will meaningfully advance the full realisation of socio-economic rights.⁶⁴ The duty to ‘promote’ socio-economic rights could be fulfilled through the state: using public education programmes to raise awareness about socio-economic rights and

⁶² Liebenberg op cit note 44 at 30:6.

⁶³ See Liebenberg op cit note 19 at 85-6; *Grootboom* supra note 2 at para 34 and *Jaftha* supra note 32 at para 29-34. For example, see *Mwelase Director-General for the Department of Rural Development and Land Reform* 2019 (11) BCLR 1358 (CC) ; 2019 (6) SA 597 (CC) (court ordering the Department of Rural Development and Land Reform to appoint a ‘special master’ to facilitate the finalisation of land claims).

⁶⁴ See *Grootboom* ibid at para 35 where the CC remarked that ‘the state *must create the conditions for access to adequate housing* for people at all economic levels of our society’ (emphasis added). Also see Geoff Budlender ‘Justiciability of Socio-economic Rights: Some South African Experiences’ in Yash Ghai & Gill Cotterel (eds) *Economic, Social and Cultural Rights in Practice* (2004) 37-8.

how they can be enforced⁶⁵ or by imposing legal duties on officials to consider the impact of their administrative decisions on socio-economic rights when, for instance, considering an application for a mining licence or to develop an inner city building.⁶⁶

- **‘Fulfil’**: requires the state to ‘adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of the right’.⁶⁷ The duty to ‘fulfil’ requires the state to take direct steps towards providing socio-economic rights to people who do not currently enjoy or have access to them. The duty to ‘fulfil’ could be realised by the state building free houses for destitute people, providing free medical care to people who cannot afford private doctors or by paying for the university education of poorer students who cannot afford university fees.⁶⁸

While section 7(2) of the Constitution requires the state to take active steps to ‘promote and fulfil’ socio-economic rights, it does not tell the state *how* it should go about fulfilling these positive constitutional obligations. This is why the positive duties to ‘promote’ and ‘fulfil’ must also be read together with the text (wording) of a particular socio-economic right which can flesh out what these positive duties require the state to do in more detail.⁶⁹ When it comes to ‘qualified’ socio-economic rights in particular,

⁶⁵ Liebenberg op cit note 44 at 30:6.

⁶⁶ Budlender op cit note 64. For example: the Mineral and Petroleum Resources Development Act 28 of 2002 (‘MPRDA’) requires every person who applies for a mineral right to develop a ‘social and living plan’ (‘SLP’) to improve the socio-economic conditions of the community where mining operations occur. See Janine Howard ‘Half-Hearted Regulation: Corporate Social Responsibility in the Mining Sector’ (2014) 131 *SALJ* 111.

⁶⁷ Brand op cit note 26 at 672. This wording is taken directly from the Committee on Economic Social and Cultural Rights General Comment No 14 *The right to the highest attainable standard of health (Art 12 of the Covenant)* UN Doc E/C 12/2000/4 para 33.

⁶⁸ Brand *ibid*.

⁶⁹ See *Grootboom* supra note 2 at para 21 and *Soobramoney* supra note 1 at para 10-11. Also see *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) para 69 where the CC stated that ‘[t]he rights contained in the Bill of Rights ordinarily impose, in the first instance, an obligation that requires those bound not to act in a manner which would infringe or restrict the right...However, in some circumstances, the correlative obligations imposed by the rights in the *Bill of Rights* will require positive steps to be taken to fulfil the rights. In the case of most

as explained above, the state's positive duties to 'promote' and 'fulfil' the right is subjected to three qualifications: (a) '**reasonable legislative and other measures**'; (b) '**progressive realisation**'; and (c) '**within available resources**'. Once these three qualifications are summarised in the following table, we can consider them in more detail immediately below.

'REASONABLE MEASURES', 'PROGRESSIVE REALISATION' AND 'WITHIN AVAILABLE RESOURCES'
<ol style="list-style-type: none"> 1. 'Reasonable legislative and other measures': this requires the state to enact legislation and take 'reasonable' administrative and other measures to fully realise socio-economic rights. 2. 'Progressive realisation': this means the state must ensure any programme it adopts will progressively realise socio-economic rights over time. 3. 'Within available resources': this means the state's duty to progressively realise the right can only take place within the resources available to it at a particular point in time.

(aa) 'Reasonable legislative and other measures'

The duty to take 'reasonable legislative and other measures' recognises that the separation of powers requires the courts to give the state a degree of leeway when it takes steps to fulfil its positive duty to 'promote and fulfil' a particular socio-economic

of the socio-economic rights in the Bill of Rights, the ambit of the positive obligation that flows from the right is explicitly determined in [the text of] the Bill of Rights.' (emphasis added).

right.⁷⁰ This is because this qualification recognises that the elected branches of government (legislature and executive) should – in the first instance – determine how best to ‘promote’ and ‘fulfil’ socio-economic rights by enacting ‘**legislation**’ and through taking ‘**other measures**’.⁷¹

Whenever the legislature enacts legislation to give effect to a socio-economic right, a litigant cannot rely directly on the right to enforce it against the state or even a private person.⁷² This is because of the principle of constitutional subsidiarity. This principle broadly states that whenever legislation is enacted to ‘give effect’ to a constitutional right, a litigant must rely on that legislation to enforce that constitutional right in practice and cannot directly rely on the underlying constitutional right that legislation regulates.⁷³ However, any legislation enacted for the purpose of ‘giving effect’ to a socio-economic right must still be purposively interpreted to ensure it properly gives effect to the socio-economic right it seeks to regulate.⁷⁴ However, it is possible for someone to rely directly on a socio-economic right, which is given effect to by legislation, where they challenge the constitutionality of that legislation. Such a constitutional challenge could be because the challenged legislation does not properly ‘protect’, ‘promote’ or ‘fulfil’ that socio-economic right⁷⁵ or because it infringes other constitutional rights such as the right to human dignity or equality for example.⁷⁶

⁷⁰ See *TAC* supra note 35 at para 36-8 and *Mazibuko* supra note 35 at para 60-1.

⁷¹ Currie & De Waal op cit note 4 at 574. The meaning of ‘other measures’ is explained further below.

⁷² See *Mazibuko* supra note 35 at para 72-5 and *MEC for Education KZN v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) para 40.

⁷³ See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC); 2004 (7) BCLR 787 (CC) para 25-6 and the minority judgment of Cameron J in *My Vote Counts NPC v Speaker of the National Assembly* (CCT121/14) [2014] ZACC 31 (CC) para 44-66.

⁷⁴ *Bato Star* ibid.

⁷⁵ See *My Vote Counts NPC* supra note 73 at para 55-56.

⁷⁶ See *Khosa* supra note 6 at para 42 and 68-80 (legislation enacted to give effect to the constitutional right to social security declared unconstitutional because it excluded destitute permanent residents

At its most basic, the state's positive duty to take 'reasonable legislative and other measures' requires it to do three different things. First, it must enact legislation to 'protect, promote and fulfil' socio-economic rights.⁷⁷ Secondly, it must also take 'other measures' – in addition to enacting legislation – such as formulating socio-economic rights programmes or enacting executive and administrative policies to support the protection, promotion and fulfilment of socio-economic rights in reality.⁷⁸ Thirdly, it must ensure that the content of any socio-economic rights legislation or 'other measure' is also 'reasonable'.⁷⁹ How the courts determine whether socio-economic rights legislation or 'other measure' is 'reasonable' is explained below where the reasonableness review test is discussed.⁸⁰ First, it is necessary to consider the other qualifications of 'progressive realisation' and 'within available resources'.

(bb) 'Progressive realisation'

The first way in which the positive duties of the state to 'respect', 'protect' and 'promote' qualified socio-economic rights is conditioned is through the concept of 'progressive realisation'.⁸¹ "Progressive realisation' has two primary principles:

- **Socio-economic rights cannot be realised immediately:** this first principle that recognises competing demands on limited state resources means that socio-economic rights can only be fully realised over an extended period of

which unjustifiably violated their constitutional right to social security, to equality and to inherent human dignity).

⁷⁷ See *Grootboom* supra note 2 at para 42.

⁷⁸ See *Grootboom* ibid where the CC remarked that '[l]egislative measures by themselves are not likely to constitute constitutional compliance. *Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive...*' (emphasis added).

⁷⁹ Ibid.

⁸⁰ See 12.4 below.

⁸¹ Currie & De Waal op cit note 4 at 580.

time.⁸² The CC has relied on this principle to hold that this means that qualified socio-economic rights do not have a 'minimum core' - a basic 'floor' or entitlement that is immediately realisable and enforceable against the state.⁸³ However, the court has acknowledged that the minimum core concept - developed under international human rights law by the Committee on Economic, Social and Cultural Rights (CESCR)⁸⁴ - could still be relevant to determine whether a particular socio-economic rights programme or piece of legislation complies with the requirement of 'reasonableness'.⁸⁵

- **Socio-economic rights must still be progressively realised:** this second principle that states that simply because socio-economic rights cannot be realised immediately does not mean that the state can escape its positive duties to progressively promote and fulfil them in reality. First, the state must 'move as expeditiously and effectively as possible' towards the full realisation of all socio-economic rights.⁸⁶ Secondly, any 'deliberately retrogressive measures' which decrease access to a socio-economic right must be 'fully justified' in order to comply with the requirement that the content of any socio-economic rights programme and legislation must also be 'reasonable'.⁸⁷

(cc) 'Within available resources'

⁸² *Soobramoney* supra note 1 at para 11; *Grootboom* supra note 2 at para 45.

⁸³ *Grootboom* ibid at para 32-33; *Mazibuko* supra note 35 at para 61. However, this same principle does not necessarily apply to 'basic' socio-economic rights, such as the right to a basic education. See for example *Governing Body Juma Masjid Primary School* supra note 53 at para 37.

⁸⁴ See *Grootboom* ibid at para 26-9.

⁸⁵ Ibid para 33.

⁸⁶ Ibid para 45.

⁸⁷ Ibid. For a further discussion on the meaning of the 'minimum core' concept, and how the courts could use it in future, see David Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance' (2002) 118 *SALJ* 484 and David Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1.

The second way in which the state's duty to 'promote' and 'fulfil' qualified socio-economic rights is conditioned through the concept of 'within available resources'. This qualification expressly recognises that the ability of the state to progressively realise and provide socio-economic rights is constrained by what its present resources allow. In *Soobramoney v Minister of Health: KZN* ('*Soobramomey*') the CC explained this qualification as follows:

*'... the obligations imposed by the State by ss 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon resources available for such purposes, and the corresponding rights themselves are limited by reason of the lack of resources'*⁸⁸ (emphasis added).

Resource availability therefore plays an important role when a court determines whether a socio-economic rights programme or piece of legislation complies with the requirements of 'reasonableness'.⁸⁹ This qualification also means that the state could also theoretically justify any 'deliberately retrogressive measures' which decrease access to a socio-economic right because of constraints on its current available resources.⁹⁰ However, the onus to persuade the court that the state lacks sufficient resources to properly provide a particular socio-economic right rests on the state, not the applicant.⁹¹ This means the state has the duty to place sufficient evidence before the court to convince it that the state is doing all it presently can 'within its available resources' to progressively realise that socio-economic right in reality.⁹² However, the court will closely scrutinise any claim that a 'deliberately retrogressive measure' is justified because of insufficient resources.⁹³ Furthermore, if resources later become available, it would be difficult for the state to persuade the court any deliberately

⁸⁸ *Soobramoney* supra note 1 at para 11 (emphasis added). Also see *Grootboom* ibid at para 46.

⁸⁹ Currie & De Waal op cit note 4 at 581; Liebenberg op cit note 44 at 33:44-33:45.

⁹⁰ See Ferreira op cit note 25 and Currie & De Waal ibid.

⁹¹ *Khosa* supra note 6 at para 60-63 and *City of Johannesburg Metropolitan Municipality v Blue Moonlight* 20112 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) para 74.

⁹² Ibid.

⁹³ See *District Six Committee* supra note 38 at para 91.

retrogressive measures it has previously taken continue to remain ‘reasonable’.⁹⁴

This means that the qualification of ‘within available resources’ can operate in two different ways. First, the state could use it as a ‘**shield**’ to justify a deliberately retrogressive measure or to show that a particular socio-economic programme or measure it has taken will progressively realise the right ‘within the available resources’ the state presently has.⁹⁵ Secondly, litigants can use it as a ‘**sword**’ to show that a deliberately retrogressive measure renders a programme unreasonable, because the state has sufficient resources to progressively realise the right, or because the state is not properly utilising the ‘available resources’ it presently has to progressively realise a particular socio-economic right in reality.⁹⁶

(ii) Negative duties on the state to ‘respect’ socio-economic rights

As explained above, section 7(2) of the Constitution also imposes ‘negative’ duties on the state to ‘respect’ socio-economic rights. This broadly prohibits the state from interfering with the existing enjoyment of a socio-economic right or from doing anything which will decrease the existing access to a socio-economic right. In the *Certification case*, the CC explained that this means that socio-economic rights can ‘at the very least be negatively enforced against improper invasion’.⁹⁷ Similarly, in *Jafftha v Schoeman* (*Jafftha*) the CC held that, ‘any measure which permits a person to be deprived of their access to housing . . . will violate the negative obligations imposed by the Constitution’.⁹⁸ At its most basic, the negative duty to ‘respect’ socio-economic rights prohibits the state from adopting any measure – or acting in any way – which

⁹⁴ Currie & De Waal op cit note 4 at 582. Also see 12.4(a)(ii)(ee) below where the requirement that the state must continuously revise its existing socio-economic rights programmes and legislation is explained.

⁹⁵ *Grootboom* supra note 2 at para 46; *Soobramoney* supra note 1 at para 11. Also see Ferreira op cit note 25.

⁹⁶ See *TAC* supra note 35 at para 118-120 and Liebenberg op cit note 44 at 33:44-33:45.

⁹⁷ *Certification case* supra note 10 at para 78.

⁹⁸ Supra note 32 at para 34. Also see *Grootboom* note 2 at para 34.

will directly or indirectly interfere with the existing enjoyment of a socio-economic right, unless such interference can be justified as 'reasonable' or as a permissible and justifiable limitation of that socio-economic right in terms of section 36(1) of the Constitution, the general limitation clause.⁹⁹ Brand identifies three things which the negative duty on the state to 'respect' socio-economic rights entails:

'First, the state must not limit or take away people's existing access to [a socio-economic right] without good reason and without following proper procedure. Second, where the limitation or deprivation of existing access [to a socio-economic right] is unavoidable, the state must take steps to mitigate that interference. Third, the state must not place undue obstacles in the way of people gaining access to [socio-economic rights]'.¹⁰⁰

(c) Horizontal application: duties socio-economic rights impose on private parties

As explained, both the positive and negative dimensions of socio-economic rights are binding on the state and must be enforced 'vertically' against it. In addition, and in certain circumstances, socio-economic rights can also be enforced 'horizontally' against a private person.¹⁰¹ When a socio-economic right applies horizontally it also does two things: (a) it confers benefits on a private person; and (b) it imposes duties on another private person.¹⁰² First, we will consider the various 'negative duties' that socio-economic rights can impose on private parties. Secondly, we will consider whether socio-economic rights can also impose 'positive duties' on private parties to 'protect', 'promote' or 'fulfil' them.

⁹⁹ See Budlender op cit note 64 at 33-35. However, it can sometimes be difficult to distinguish between the violation of a 'negative' versus a 'positive' duty when it comes to socio-economic rights. Similarly, it can also be difficult to apply the section 36(1) general limitation clause criteria to any limitation of a socio-economic rights in practice. See Liebenberg op cit note 44 at 33:18-33:19 and 33:55-33:66 and Illes op cit note 6.

¹⁰⁰ Brand op cit note 26 at 671. Own emphasis.

¹⁰¹ See Liebenberg op cit note 44 at 33:57-33:58. On the horizontal application of the Bill of Rights generally see MH Cheadle, DM Davis & NRL Haysom *South African Constitutional Law: The Bill of Rights* (2018) 3:20.

¹⁰² De Vos op cit note 56 at 330.

(i) Negative duties on private parties to ‘respect’ socio-economic rights

The CC has indicated that socio-economic rights can, ‘at the very least’, impose negative duties on private parties to ‘respect’ them.¹⁰³ This means socio-economic rights can impose negative duties on private parties not to do anything that will directly or indirectly interfere with the existing enjoyment of a socio-economic right held by another private person.¹⁰⁴ For example, in *NM v John Wesley School*, the High Court held that a private school violated its negative duty to ‘respect’ the basic/unqualified socio-economic right to a basic education by unreasonably preventing a child from attending class because his parents could no longer afford school fees.¹⁰⁵ Similarly, in *Governing Body Juma Masjid Primary School v Essay NO* the CC held that a private person violated its negative duty to ‘respect’ the socio-economic right to a basic education in section 29(1)(a) by failing to take steps to minimise the negative impact on this right on school children when evicting a primary school from its property.¹⁰⁶

The wording (text) of a socio-economic right can sometimes provide an indication about the kind of negative duties it may impose on a private person. For example, section 26(3) states that ‘no one may be evicted from their home or have their home demolished without an order of court’ and section 24(a) states that ‘everyone has the right to an environment that is not harmful to their health or wellbeing’. The negative duty not to evict someone from their home without a court order is a duty which is clearly capable of binding *both* the state and private persons.¹⁰⁷ Similarly, the right to a clean environment which is ‘not harmful to health or wellbeing’

¹⁰³ See *Certification case* supra note 10 at para 78. Also see *Grootboom* supra note 2 at para 34 where the court stated that the right of access to adequate housing in section 26(1) can, ‘. . . at the very least, [impose] a negative obligation on the state *and all other entities and persons* to desist from preventing or impairing access to adequate housing’. Emphasis added by Liebenberg op cit note 44 at 33:58.

¹⁰⁴ See *Grootboom* ibid and *Jafftha* supra note 32 at para 31.

¹⁰⁵ *NM v John Wesley School* (4594/2016) [2018] ZAKZDHC 64; 2019 (2) SA 557 (KZD) para 69.

¹⁰⁶ *Juma Masjid* supra note 53 at para 62 and 70-2.

¹⁰⁷ See *P.E Municipality* supra note 33 at para 19-20.

is also capable of imposing negative duties on the state and private parties by, for example, imposing duties on a private mining company or government department to not directly or indirectly pollute the water supply of a local community.¹⁰⁸

In practice, legislation regulates many of the negative duties that socio-economic rights impose on private parties. For example, the negative duty to not interfere with the right to a clean environment is largely regulated by the National Environmental Management Act ('NEMA')¹⁰⁹ and the negative duty not to evict someone from their home without a court order is regulated by the Prevention of Illegal Evictions Act ('PIE').¹¹⁰ Whenever such legislation exists, as noted above, litigants must rely upon it to enforce any negative duty a socio-economic right imposes on a private party, or the state, because of the principle of constitutional subsidiarity.¹¹¹ However, as explained earlier, it is possible to rely directly on any negative or positive duty imposed by a socio-economic right, which is regulated by legislation, if the constitutionality of that legislation is challenged.¹¹² However, where no legislation regulates any duty a socio-economic right imposes on a private party (or the state), it may be necessary for the court to develop the common law to create a remedy for the violation of any negative duty that socio-economic right may impose.¹¹³ The development of the common law to achieve this objective would occur in terms of section 8 of the Constitution which is discussed in more detail immediately below.

¹⁰⁸ See Currie & De Waal op cit note 4 at 525-6 and *Fuel Retailers Association of Southern Africa v Director General: Environmental Management* 2007 (10) BCLR 1059 (CC); 2007 (6) SA 4 (CC) para 43-5. Also see *Mshengu v Msunduzi Local Municipality* [2019] 4 SA 460 (KZP) (court holding that private landowners have a duty to allow municipality onto their property to provide tenants with water and sanitation).

¹⁰⁹ National Environmental Management Act 107 of 1998. See *Fuel Retailers* ibid at para 40.

¹¹⁰ Prevention of Illegal Evictions Act 19 of 1998. See *P.E Municipality* supra note 32 at para 19-20.

¹¹¹ *Mazibuko* supra note 35 at para 72-75.

¹¹² Ibid. For a useful discussion of the principle of constitutional subsidiarity as it relates to socio-economic rights, see *Mshengu* supra note 108 at para 66-70.

¹¹³ See Liebenberg op cit note 44 at 33:57-33:58 and de Vos op cit note 42 at 100-101.

(ii) Can socio-economic rights impose positive duties on private parties?

Unlike negative duties, it is less clear whether socio-economic rights can also impose positive duties on private parties to 'protect', 'promote' or 'fulfil' them.¹¹⁴ The CC has not yet definitively decided whether socio-economic rights can impose positive duties on private people. However, it has also not definitively said private parties can never have positive duties to 'protect', 'promote' or 'fulfil' socio-economic rights either. In *Daniels v Scribante* ('*Daniels*') the CC reiterated this fact when it said that 'this Court has not held that under no circumstances may private parties bear positive obligations under the Bill of Rights'.¹¹⁵

Similar to the horizontal application of the negative duty to 'respect' socio-economic rights, certain pieces of legislation do in fact impose limited positive duties on private parties to 'promote' or 'fulfil' socio-economic rights.¹¹⁶ For example: the Mineral and Petroleum Resources Development Act ('MPRDA')¹¹⁷ states that every person who applies for a mining licence must submit a 'Social and Living Plan' ('SLP') to promote socio-economic development in any community where mineral resources are mined.¹¹⁸ Similarly, the National Health Act ('NHA') imposes a legal duty on both private and state doctors to provide people with 'emergency medical treatment' whenever it is requested.¹¹⁹

However, there may be cases where a positive duty on a private person to 'promote' or 'fulfil' a socio-economic right is not regulated by any legislation. In these

¹¹⁴ Liebenberg *ibid* at 33:57-33:58.

¹¹⁵ *Daniels v Scribante* 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) para 48.

¹¹⁶ Liebenberg *op cit* note 44 at 33:59-33:60.

¹¹⁷ Act 28 of 2002.

¹¹⁸ See Howard *op cit* note 66.

¹¹⁹ Section 5 of Act 61 of 2003. This legal duty gives effect to both the vertical and horizontal application of the socio-economic right not to be refused emergency medical treatment contained in section 27(3) of the Bill of Rights. See further Currie & De Waal *op cit* note 4 at 592-594.

circumstances, it would be necessary for the court to apply both section 8(2) and 8(3) of the Constitution to determine two things.¹²⁰ First, the court must apply section 8(2) to determine if that socio-economic right can (or should) impose a positive duty on private persons to 'protect' or 'promote and fulfil' it.¹²¹ Secondly, if yes, the court must apply section 8(3) to determine *how* any positive duty imposed by that socio-economic right should be enforced.¹²²

In *Daniels*, the CC said the following should be considered to determine whether a socio-economic right does (or should) impose positive duties on a private person to 'protect', 'promote' or 'fulfill' it in terms of section 8(2) of the Constitution:

*... Whether private persons will be bound depends on a number of factors. What is paramount includes: what is the nature of the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the 'potential of invasion of that right by persons other than the State or organs of state'; and, would letting private persons off the net not negate the essential content of the right? If, on weighing up all the relevant factors, we are led to the conclusion that private persons are not only bound but must in fact bear a positive obligation, we should not shy away from imposing it; section 8(2) does envisage that.'*¹²³

If the court concludes that the socio-economic right should impose positive duties on a private person, it must then apply section 8(3) to determine *how* that positive duty should be enforced.¹²⁴ Section 8(3) would require the court to consider these four questions:

¹²⁰ See Liebenberg op cit note 44 at 33:57-33:58 and Cheadle op cit note 101 at 3:19-3:20. Also see chapter seven where the horizontal application of the Bill of Rights in terms of section 8(2) and (3) of the Constitution is explained in more detail.

¹²¹ Cheadle *ibid*.

¹²² *Ibid*.

¹²³ *Daniels* *supra* note 115 at para 39. Footnotes omitted.

¹²⁴ Cheadle op cit note 101 at 3:19-:3:20.

- **First, does any legislation give effect to the horizontal application of the positive duty imposed by that socio-economic right?**¹²⁵ If no legislation gives effect to the horizontal application of that positive duty, court considers the second question.
- **Secondly, does the common law give effect to the horizontal application of any positive duty imposed by that socio-economic right?**¹²⁶ If a common law rule regulates the positive duty imposed by that socio-economic right, the court must apply the common law rule. If the common law does not properly give effect to that positive duty, the court must develop the common law to do so.¹²⁷ If no legislation or common law rule gives effect to that positive duty, the court moves to the third question.
- **Thirdly, if no legislation or common law rule gives effect to any positive duty imposed by that socio-economic right the court must create a rule.**¹²⁸ This means the court must create a common law rule to provide a remedy for the violation of any duty imposed by that socio-economic right or to properly give effect to the horizontal application of any positive duty that socio-economic right imposes.¹²⁹
- **Fourthly, the court can limit the right when developing the common law to give effect to any positive horizontal duty the right imposes.**¹³⁰ This means it may be necessary for the court to limit the ambit and extent of any positive duty imposed on a private person by a socio-economic right, provided

¹²⁵ Ibid. If legislation gives effect to the right, the court must apply it unless its constitutionality is challenged.

¹²⁶ Ibid.

¹²⁷ Ibid. See *Thebus v S* 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) para 28 where the CC discussed the two circumstances when it would be necessary to develop the common law to better give effect to the 'spirit, purport and objects of the Bill of Rights' more generally.

¹²⁸ Cheadle *ibid*.

¹²⁹ Ibid. Also see Liebenberg *op cit* note 44 at 33:60-33:62.

¹³⁰ Cheadle *ibid* at 3:19-3:20.

the limitation of any such duty complies with the criteria for justification in section 36(1) of the Constitution.¹³¹

(d) Interpretation of socio-economic rights

Having explained the various negative and positive duties socio-economic rights can impose on the state and private parties, we are now in a position to consider the following question: **how should these duties be interpreted to determine what they require the state and private parties to do or not to do?** For present purposes, we can identify three general factors that influence how the courts interpret the duties imposed by socio-economic rights. First, general factors of constitutional interpretation which include: (a) the generous and purposive theory of Bill of Rights interpretation; (b) constitutional values of human dignity and equality; (c) text of the socio-economic right and its history; and (d) the interdependence between socio-economic rights and civil and political rights. Secondly, the duty to consider international law in terms of section 39(1)(b) of the Constitution. Thirdly, the discretion (choice) to consider foreign law in terms of section 39(1)(c) of the Constitution.

(i) General factors of constitutional interpretation

Broadly speaking, four general factors of constitutional interpretation influence socio-economic rights interpretation. First, all constitutional rights, including socio-economic rights, must be interpreted 'generously and purposively'.¹³² Secondly, all socio-economic rights must be interpreted in a manner that will best promote the values of 'human dignity, equality and freedom'.¹³³ Thirdly, the history and text of socio-economic rights should be taken into account in determining their content. Fourthly,

¹³¹ Ibid. Section 8(3) of the Bill of Rights states that: '[w]hen applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court may develop the rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)'.

¹³² See Currie & De Waal op cit note 4 at 136-9 and *S v Makwanyane* 1995 (3) SA 391 (CC) at para 9.

¹³³ In terms of section 39(1)(a) of the Constitution which requires every court to interpret constitutional rights in a manner which will 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. See *Department of Land Affairs v Goedgeleegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (10) BCLR 1027 (CC) ; 2007 (6) SA 199 (CC) para 51-4.

the interdependence between socio-economic rights and civil and political rights should be considered when determining the content of the duties which they impose on the state or private persons.

The generous and purposive theory of rights interpretation means that the courts should interpret socio-economic rights in a manner which seeks to maximise their enjoyment and ensure they benefit as many people as possible 'as far as their language [text] permits'.¹³⁴ For example, in *Khosa v Minister for Social Development* ('*Khosa*'), the CC relied on this principle of interpretation to conclude that the exclusion of indigent permanent residents from the Social Assistance Act¹³⁵ violated their constitutional right to both social security (section 27(1)(c)) and against unfair discrimination (section 9(3)).¹³⁶ The founding constitutional values of human dignity and equality also mean socio-economic rights should be interpreted in a way which will ensure all people can live in conditions consistent with human dignity¹³⁷ but also so everyone can meaningfully exercise all their civil and political rights in reality.¹³⁸

The history and text of socio-economic rights influence their interpretation in two ways. First, as above, the text of 'qualified' socio-economic rights condition the duties they impose on the state through the qualifications of: (a) 'reasonable legislative and other measures'; (b) 'progressive realisation'; and (c) 'within available resources.'¹³⁹ Secondly, the history of socio-economic rights influences their content and understanding because a central purpose of the Constitution is not only to prevent

¹³⁴ Currie & De Waal op cit note 4 at 136-138 referring to *Makwanyane* supra note 132.

¹³⁵ Act 59 of 1992.

¹³⁶ Supra note 6 at para 44 and 56-7. Unfair discrimination established on the analogous ground of citizenship.

¹³⁷ Ibid para 41; *Soobramoney* supra note 1 at para 8-11; *Grootboom* supra note 2 at para 2 and 21-5. See generally *Dawood v Minister Home Affairs* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) para 35 and Sandra Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1.

¹³⁸ See *Grootboom* ibid and *Khosa* supra note 6 at para 49.

¹³⁹ *Grootboom* ibid at para 22 and 34-8.

rights abuses from occurring in the constitutional era - such as the abuses which occurred during Apartheid and Colonialism - but also to ensure that the ongoing legacy of poverty and inequality which apartheid and colonialism created is comprehensively and fully addressed.¹⁴⁰

(ii) Section 39(1)(b): duty to consider international law

Section 39(1)(b) of the Constitution imposes a duty on the courts to ‘consider’ international law when interpreting socio-economic rights.¹⁴¹ The reference to ‘international law’ in section 39(1)(b) is not limited to binding international law.¹⁴² This means that the courts should consider both binding and non-binding sources of international law when interpreting the socio-economic rights guaranteed by the Bill of Rights.¹⁴³

The CC has used international law fairly extensively when interpreting socio-economic rights.¹⁴⁴ Perhaps the most influential source of international law it has relied upon is the International Covenant on Economic, Social and Cultural Rights of 1996 (‘ICESCR’) which South Africa ratified in 2015.¹⁴⁵ For instance, in *Government RSA v Grootboom* (‘*Grootboom*’), the court referred to comments on the ICESCR written by its supervisory body of experts - the Committee on Economic, Social and Cultural Rights (‘CESCR’) - when interpreting the socio-economic right of access to adequate

¹⁴⁰ Ibid para 6, *Soobramoney* supra note 1 at para 8-11.

¹⁴¹ See Kevin Hopkins & Hennie Strydom ‘International Law’ in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Revision Service 5) 30:11-30:14 and *Glenister* supra note 14 at para 201.

¹⁴² See *Makwanyane* supra note 132 at para 36-7 and *Grootboom* supra note 2 at para 26.

¹⁴³ Ibid. For an example see *Centre for Child Law v Minister of Basic Education* [2019] ZAECGHC 126; [2020] 1 All SA 711 (ECG) (court considering both binding and non-binding international law when interpreting the socio-economic right to a basic education).

¹⁴⁴ See Currie & De Waal op cit note 4 at 570-3.

¹⁴⁵ Ibid at 570. Also see Liebenberg op cit note 44 at 33:10-33:14.

housing in section 26(1) and (2) of the Constitution.¹⁴⁶ Another influential source of international law, which may provide guidance about the interpretation of socio-economic rights, is the African Charter on Human Rights, a treaty of the African Union ('AU'), which South Africa has also ratified.¹⁴⁷

However, in *Grootboom* the CC also held that whilst international law is a valuable tool to interpret socio-economic rights, textual and other differences between the Bill of Rights and international should always be kept in mind.¹⁴⁸ This resulted in the CC rejecting two arguments about the interpretation of the socio-economic right of access to adequate housing which the CESCR has made when interpreting the ICESCR.¹⁴⁹ First, it rejected the argument that all socio-economic rights have a 'minimum core' that are enforced immediately realised and enforceable against the state because it would be difficult for courts to determine in the abstract what a 'minimum core' of a socio-economic right would be.¹⁵⁰ Secondly, it held the socio-economic right of access to adequate housing in section 26(1) and (2) could not be interpreted in entirely the same way as the ICESCR. The court explained this was because of two differences in wording between the socio-economic right of access to adequate housing in the Constitution and the corresponding textual formulation of the right in the ICESCR:

'(a) the Covenant provides for a right to adequate housing while section 26 provides for the right of access to adequate housing.

¹⁴⁶ *Grootboom* supra note 2 at para 26-7. On the CESR generally, see Brand op cit note 26 at 675-676.

¹⁴⁷ See Currie & De Waal op cit note 4 at 573 and Brand *ibid*. See *Centre for Child Law* supra note 143 at para 78 where the High Court referred to the African Charter on the Rights and Welfare of the Child when interpreting the socio-economic right to a basic education and the constitutional right of children to have their best interests considered paramount in matters which affect them.

¹⁴⁸ *Grootboom* supra note 2 at para 28.

¹⁴⁹ *Ibid* para 27-8.

¹⁵⁰ *Ibid* para 32-3. However, see *Juma Masjid* supra note 53 at para 37 and *Centre for Child Law* supra note 143 at para 94-5 where both courts acknowledged that different considerations may apply when it comes to 'basic' or 'unqualified' socio-economic rights, such as the socio-economic right to a basic education in section 29(1)(a).

(b) the Covenant obliges state parties to take appropriate steps which include legislation while the Constitution obliges the state to take reasonable legislative and other measures'.¹⁵¹

In sum: section 39(1)(b) requires the courts to 'consider' relevant sources of international law when interpreting socio-economic rights. However, this does not mean that the courts are not necessarily required to always interpret all socio-economic rights in exactly the same way as international law. The amount of weight the court will place on international law would thus depend on the particular facts and circumstances of each case.¹⁵²

(iii) Section 39(1)(c): discretion to consider foreign law

Section 39(1)(c) of the Constitution gives the courts a discretion (or choice) to consider foreign law when interpreting socio-economic rights.¹⁵³ However, and unlike international law, foreign law tends to be far less influential when it comes to socio-economic rights.¹⁵⁴ There is a logical reason for this. As explained above, very few countries have a Bill of Rights which expressly guarantee justiciable socio-economic rights and which also impose legally enforceable positive duties on the state to provide or progressively realise them.¹⁵⁵ This means there is not much comparable and relevant foreign case law that the South African courts can rely upon when interpreting socio-economic rights in practice. However, on one or two occasions, the courts have referred to the decisions of foreign courts when interpreting socio-economic rights, but this does not appear to happen that often in practice.¹⁵⁶

¹⁵¹ *Grootboom* ibid at para 28. Emphasis in original.

¹⁵² See Hopkins & Strydom op cit note 141.

¹⁵³ On the use of foreign law, when interpreting the Bill of Rights generally, see *S v Williams* [1995] ZACC 6; 1995 (3) SA 632; 1995 (7) BCLR 861 (CC) para 51 and *Sanderson v Attorney General Eastern Cape* [1997] ZACC 18; 1997 (12) BCLR 1675; 1998 (2) SA 38 (CC) para 26-7.

¹⁵⁴ See Brand op cit note 26 at 675.

¹⁵⁵ Liebenberg op cit note 44 at 33:16-33:17.

¹⁵⁶ See *Soobramoney* supra note 1 at para 18 where the Constitutional Court relied on the decision of the Indian Supreme Court in *Paschim Banga Chet Mazood Amity v State of West Bengal* (1996) AIR

4. REASONABLENESS REVIEW: DETERMINING WHETHER THE STATE HAS FULFILLED ITS POSITIVE DUTIES TO PROGRESSIVELY REALISE SOCIO-ECONOMIC RIGHTS

We should now broadly understand the different negative and positive duties socio-economic rights impose on the state and private parties, and how these duties should be interpreted. We can now consider a central question about judicial enforcement of socio-economic rights: **what test do the courts apply to determine whether the state has complied with its positive constitutional duties to progressively realise qualified socio-economic rights?** The primary test courts use to determine this question is known as the ‘reasonableness review’ test. This test has two elements and both elements must be established by the state.¹⁵⁷ First, it must establish that it has taken ‘legislative and other measures’ to give effect to a socio-economic right.¹⁵⁸ Second, it must show that the content of any ‘legislative’ or ‘other measures’ it has enacted to give effect to that socio-economic right is also ‘reasonable’.¹⁵⁹ How both elements of this test work is briefly summarised in the following table and then expanded on further immediately below.

TWO ELEMENTS OF REASONABLE REVIEW: ‘THE REASONABLE PLAN’
Qualified socio-economic rights require the state to do two things: (1) ‘take legislative and other measures’ to ‘respect, protect, promote and fulfil’ socio-

SC 2426 when determining the content of the constitutional right to life and its connection to emergency medical treatment.

¹⁵⁷ *Mazibuko* supra note 35 at para 67. This means that the applicant does not have to convince the court that the plan is ‘unreasonable’ because the onus rests on the state to establish ‘reasonableness’. However, as is explained below, the applicant should still produce enough evidence to establish a *prima facie* case of unreasonableness.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

economic rights; and (2) ensure that the content of any legislative or other measures it adopts for this purpose are also 'reasonable'.

1. **The state must have a programme:** the state must create a plan or programme by taking 'legislative and other measures' to 'respect, protect, promote and fulfil' socio-economic rights and which will 'progressively realise' these rights within its current 'available resources'. If the state fails or refuses to create such a programme, the court can order the state to create one.
2. **The programme must be reasonable:** the programme must be 'reasonable' which means it must be capable of 'progressively realising' the right 'within [the state's] available resources'. Case law shows us that a 'reasonable plan' must have (at least) the following six elements:
 - 2.1. **Comprehensive and co-ordinated:** the plan must address all aspects relating to the progressive realisation of the right and be co-ordinated between all three spheres of state.
 - 2.2. **Sufficient personnel and resources must be allocated:** sufficient resources must be allocated and the state cannot adopt 'token measures' to progressively realise the right.
 - 2.3. **Sufficiently flexible to cater for short, medium and long term needs:** the plan must be able to cater for people who are in desperate situations or in immediate need of the right.
 - 2.4. **The plan must be transparent:** the plan must be made available when it is conceived and made publicly available once it is finalised, especially to those people it affects.
 - 2.5. **The state must continuously revise the plan:** the plan cannot be set in stone and the state must continuously revise it to ensure that it is progressively realising the right in reality
 - 2.6. **The plan cannot exclude a significant or vulnerable section of society:** the plan cannot unreasonably exclude a significant part of society or vulnerable people in desperate need.

(a) Two elements of ‘reasonableness review’

(i) *Element one: the state must take ‘legislative and other measures’ to progressively realise socio-economic rights*

First, the state must take ‘legislative and other measures’ to comply with its positive constitutional duties to progressively achieve the right of ‘access’ to the right within its available resources and to ‘protect’, ‘promote’ and ‘fulfil’ the right. Logically, this is the first thing the state must do to comply with the positive duties that the socio-economic rights in the Bill of Rights impose on it.¹⁶⁰ This means that if the state has no plan whatsoever it will have failed to comply with its positive duty to take ‘legislative and other measures’ to promote access to the right and ‘promote’ and ‘fulfil’ it.¹⁶¹ In this scenario, the court can order the state to take ‘legislative and other measures’ but will not – as explained below – tell the state what those legislative or other measures should contain or how the socio-economic right should be progressively realised.¹⁶² The court will only order the state to: (a) take ‘legislative and other measures’ to progressively realise the right; and (b) ensure that the content of any measures it takes to progressively realise the right is also ‘reasonable’.¹⁶³ Generally speaking, most cases turn on this second element: whether the legislative and other measures adopted by the state are ‘reasonable’. This second element is considered below.

(ii) *Element two: the ‘legislative and other measures’ must be ‘reasonable’*

Secondly, the state must ensure that the content of any ‘legislative and other measures’ it takes are reasonable. This means that if the state has adopted legislative and other measures – often referred to collectively as a socio-economic rights ‘plan’ or ‘programme’ – the court must then determine whether the content of that plan is

¹⁶⁰ *Grootboom* supra note 2 at para 42.

¹⁶¹ *Mazibuko* supra note 35 at para 67.

¹⁶² *Ibid.*

¹⁶³ *Ibid.* Also see *Grootboom* supra note 2 at para 41.

also 'reasonable'.¹⁶⁴ This means if the content of the plan is not 'reasonable', it will be unconstitutional and the court will order the state to fix or remove any 'unreasonable' aspects of the plan.¹⁶⁵ The essential purpose behind this second element is to require the state to ensure that any measures or plans it adopts 'does not exist on paper only' - they must be capable of progressively realising the right in reality.¹⁶⁶ In *Grootboom*, the CC summarised the enquiry into this second element as follows:

*'The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge . . . where it is argued the state has failed to meet the positive obligations imposed upon it . . . the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire if other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question will be whether the measures adopted are reasonable. It is necessary to recognise a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.'*¹⁶⁷ (emphasis added)

Whenever it is argued that the measures taken by the state do not satisfy this second element, the applicant should produce sufficient evidence to establish a *prima facie* case of 'unreasonableness.'¹⁶⁸ Once a *prima facie* case is established, the state has the onus to convince the court that the challenged measures are 'reasonable'.¹⁶⁹ This means the state (not the applicant) bears the overall onus to establish the measures are 'reasonable', which means they should be capable of progressively

¹⁶⁴ *Grootboom* supra note 2 at para 33 and 39.

¹⁶⁵ *Mazibuko* supra note 35 at para 67. In principle, if a state plan to give effect to a qualified socio-economic right is 'unreasonable', the court would first have to determine if the plan could be justified as a permissible violation of the right in terms of section 36(1) of the Constitution before declaring it unconstitutional. However, in practice, the courts do not appear to apply to section 36(1) to socio-economic rights programmes in this way. See *Illes* op cit note 6, *Liebenberg* op cit note 44 at 33:55-33:56 and *Khosa* supra note 6.

¹⁶⁶ *Grootboom* supra note 2 at para 41.

¹⁶⁷ *Ibid.* Emphasis added.

¹⁶⁸ *Liebenberg* op cit note 44 at 33:53-33:54.

¹⁶⁹ *Ibid.* Also see *Grootboom* supra note 2 at para 47.

achieving the full realisation of that right within the current available resources of the state in reality.¹⁷⁰ If the state convinces the court that the challenged measures are ‘reasonable’, that will be the end of the case because the state will have established compliance with its positive duties to take ‘reasonable’ legislative and other measures to progressively achieve the full realisation of the right within its current available resources.¹⁷¹ The case law shows us that in order for the measures to be ‘reasonable’, the state should produce enough evidence to convince the court that the measures have, at least, the following six characteristics: (1) the programme is comprehensive and coordinated between all three spheres of state; (2) sufficient personnel and resources have been allocated to the programme; (3) the programme is sufficiently flexible to cater for short, medium and long term needs; (4) the programme is transparent; (5) the programme is continuously revised to ensure it is progressively realising the right in reality; and (6) the programme does not exclude a significant or vulnerable section of society.¹⁷² Each characteristic is explained below.

(aa) The programme must be comprehensive and coordinated between all spheres of state

This characteristic can be broken down into two parts. First, the programme must be ‘comprehensive’ which requires it to address all aspects related to the provision and progressive realisation of the right.¹⁷³ Second, the programme must be ‘coordinated’ which means all three spheres of government (national, provincial and local) must be allocated duties and responsibilities under the programme to progressively realise the right.¹⁷⁴ An example of a programme which was not ‘comprehensive’ occurred in *Minister of Health v Treatment Action Campaign*

¹⁷⁰ Ibid. See Liebenberg op cit note 44 at 33:53-33:55.

¹⁷¹ *Grootboom* supra note 2 at para 41.

¹⁷² See Brand op cit note 26 at 713-716 for a further summary of these six characteristics.

¹⁷³ *Grootboom* supra note 2 at para 39. Also see Brand ibid at 713.

¹⁷⁴ *Grootboom* ibid at para 40.

(‘TAC’).¹⁷⁵ In the TAC case, the CC held that the HIV/AIDS programme adopted by the state was not ‘comprehensive’, and therefore unreasonable and unconstitutional, because it did not provide for the provision of the anti-retroviral (‘ARV’) drug Nevirapine beyond various restricted ‘test sites’.¹⁷⁶ This meant HIV positive mothers who could not access the test sites, to prevent mother to child transmission of HIV, were denied access to Nevirapine which meant the programme was not ‘comprehensive’ because it did not address all aspects related to the provision of the socio-economic right to adequate healthcare in section 27(1)(a) and was therefore ‘unreasonable’ and unconstitutional.¹⁷⁷

(bb) Sufficient personnel and resources must be allocated to the programme

This characteristic means a reasonable programme ‘cannot exist on paper alone’.¹⁷⁸ For a programme to be reasonable the state must ensure that sufficient resources and personnel are allocated to it, to ensure it will progressively achieve the full realisation of that socio-economic right in reality.¹⁷⁹ This means that if the state only adopts ‘token measures’ – cosmetic measures which will never actually progressively achieve the full realisation of the right – the programme itself will be unreasonable and unconstitutional.¹⁸⁰

(cc) The programme must be flexible to cater for short, medium and long term needs

¹⁷⁵ TAC supra note 35 at para 17.

¹⁷⁶ Ibid para 47 and 95.

¹⁷⁷ Ibid para 95.

¹⁷⁸ Brand op cit note 26 at 713.

¹⁷⁹ Grootboom supra note 2 at para 39.

¹⁸⁰ Brand op cit note 26 at 713.

This means the programme must be sufficiently flexible to ensure it can provide relief for people living in desperate or intolerable conditions.¹⁸¹ This requires the programme to be sufficiently flexible so that all three spheres of state have sufficient room to adapt the programme to respond to any short, medium and long terms needs as they may arise.¹⁸² In *Grootboom*, the CC concluded that the state housing programme failed to meet this requirement because it made no provision for emergency temporary housing for people who were in desperate need and living in intolerable conditions.¹⁸³ Similarly, in *TAC*, the CC concluded that the ‘rigidity’ of the HIV/AIDS programme rendered it unreasonable because the programme could not be properly adapted by the different spheres and organs of state to assist HIV positive mothers who could not access the various limited test sites.¹⁸⁴

(dd) The programme must be transparent both in conception and implementation

The state must make the plan available to the public when it is being conceived and ensure that the programme is made available to all people who are affected by it.¹⁸⁵ In practice, this ‘transparency’ requirement is very important because people who want to challenge the ‘reasonableness’ of a socio-economic rights programme cannot properly do so in court if they do not know the contents of the programme.¹⁸⁶ In the

¹⁸¹ *Grootboom* supra note 2 at para 44.

¹⁸² *Ibid.*

¹⁸³ *Ibid* at para 65 and 69.

¹⁸⁴ *TAC* supra note 35 at para 95.

¹⁸⁵ *Ibid* para 123.

¹⁸⁶ See Brand op cit note 26 at 716. On the importance of transparency generally, for challenging state decisions in court, see Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 463-466 and *Koyabe v Minister for Home Affairs* 2009 (12) BCLR 1192 (CC) ; 2010 (4) SA 327 (CC) para 58-71.

TAC case, this was a significant factor, among others, which rendered the state HIV/AIDS programme unreasonable because various spheres and organs of state refused to disclose the contents of the HIV/AIDS programme, despite various and repeated requests for the contents of the programme to be made public.¹⁸⁷

(ee) The state must continuously revise the programme

The state must continuously revise the programme to ensure it is progressively achieving the full realisation of the socio-economic right in reality¹⁸⁸ and also so that it can be expanded over time.¹⁸⁹ This means that any programme which is 'set in stone' is unlikely to be reasonable and constitutional.¹⁹⁰ The basic reason is because conditions change over time. Therefore, any programme which is never adapted or revised, to adapt to changing conditions to ensure it is actually achieving the full realisation of the socio-economic right in reality is unlikely to be a reasonable one.¹⁹¹

(ff) The programme cannot exclude a significant section of society or vulnerable group

The plan cannot exclude a significant section of people in society or vulnerable group who do not presently have access to the right and require state assistance to be provided them with the basic material goods necessary for them to live in conditions consistent with human dignity.¹⁹² An example of such a programme occurred in *Khosa*, where the state decided to exclude permanent residents from social security legislation based on its belief that only 'citizens' benefited from the constitutional right

¹⁸⁷ TAC supra note 35 at para 123.

¹⁸⁸ *Mazibuko* supra note 35 at para 50 and 67.

¹⁸⁹ *Grootboom* supra note 2 at para 43.

¹⁹⁰ Ibid.

¹⁹¹ *Mazibuko* supra note 35 at para 40 and 67.

¹⁹² *Grootboom* supra note 2 at para 43 and *Khosa* supra note 6 at para 76-8.

to social security in section 27(1)(c).¹⁹³ The CC declared the exclusion of permanent residents from social security benefits to be 'unreasonable' and unconstitutional because it found that not only do indigent permanent residents benefit from the socio-economic right to social security, but also because it was also unreasonable for the state to exclude poor permanent residents from social security benefits given that they are a vulnerable and marginalised group who require state assistance to ensure they can provide for their basic material needs.¹⁹⁴

5. THE VARIABLE STANDARD OF 'REASONABLENESS REVIEW'

We should now have a basic understanding about how the 'reasonableness review' test works and the various factors that the state must ensure a 'reasonable' socio-economic rights programme should have. Next, we will consider a further question: **how strictly or leniently ('deferentially') will a court apply the reasonableness review test when scrutinising a socio-economic rights programme?** While the CC has not said so expressly, the case law clearly shows us that the courts will scrutinise the 'reasonableness' of a socio-economic rights programme more strictly or leniently depending on the circumstances of the case.¹⁹⁵ This means the 'reasonableness review' test has a variable standard of scrutiny, i.e. it can be applied more strictly or leniently depending on the presence (or absence) of various factors.¹⁹⁶ Before discussing these factors, it is necessary to discuss and explain the three 'standards of review' the courts could adopt when applying the 'reasonableness review' test.

¹⁹³ *Khosa* ibid para 1 and 3 and 33-55.

¹⁹⁴ *Ibid* para 46-47 and para 50-52.

¹⁹⁵ See Brand op cit note 26 at 710 and Marius Pieterse 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' 20 *SAJHR* (2004) 383.

¹⁹⁶ Brand *ibid*.

(a) Three standards of scrutiny when courts apply ‘reasonableness review’

The case law establishes there are three potential standards of review the court could apply when determining the ‘reasonableness’ of a socio-economic rights programme: (a) ‘rationality’; (b) ‘reasonableness’; and (c) ‘proportionality’. These standards, and the factors that influence which one the court could adopt, are summarised in the following table.

THE VARIABLE STANDARD OF REASONABLENESS REVIEW
THE THREE STANDARDS OF REVIEW
<ol style="list-style-type: none"> 1. ‘Rationality’: this is the most lenient standard of review which makes it easier for the state to show a plan is ‘reasonable’. This requires determining if the state has acted in good faith. 2. ‘Reasonableness’: this is a stricter standard than rationality. This requires determining if the plan is reasonably capable of progressively realising the socio-economic right in reality. 3. ‘Proportionality’: this is the strictest standard. This requires determining if the right could be better achieved through other more effective measures other those the state has adopted.
FACTORS WHICH INFLUENCE THE STANDARD OF REVIEW
<p>Two groups of factors influence the standard of reasonableness review: (1) factors which may increase the intensity of review; and (2) factors which may decrease the intensity of review.</p> <p style="text-align: center;">The following five factors tend to increase the standard of review:</p> <ol style="list-style-type: none"> 1. If the state has defined its own obligations in legislation or executive policies. 2. If the court is asked to enforce a ‘negative’ duty and not a ‘positive’ duty. 3. If the plan contains ‘deliberately retrogressive measures’. 4. If the plan violates other constitutional rights or impacts on vulnerable people. 5. The state’s enthusiasm in taking steps to progressively realise the right. <p style="text-align: center;">The following three factors tend to decrease the standard of review:</p> <ol style="list-style-type: none"> 1. If the court is asked to enforce a ‘positive’ and not a ‘negative’ duty. 2. If there are practical problems in providing the right or if resource availability is an issue. 3. The enthusiasm of the state in taking reasonable steps to progressively realise the right.

(i) Rationality

The first standard of review is 'rationality'. Rationality is the most deferential or lenient standard of review. This standard of review only appears to have been applied by the CC in *Soobramoney v MEC Health: KZN* ('*Soobramoney*') which involved complicated polycentric questions about the state's available resources and the socio-economic right not to be refused emergency medical treatment (section 27(3)).¹⁹⁷ When the court applies the rationality standard, it will only ask the following question to determine whether the programme is 'reasonable': **has the state acted in good faith in allocating resources to the programme and have the beneficiaries of the programme been selected in a rational manner?**¹⁹⁸ If yes, the programme will be reasonable and the state will have complied, in terms of this standard of review, with its positive duty to take reasonable legislative and other measures to progressively realise that socio-economic right within its available resources.¹⁹⁹

(ii) Reasonableness

The second standard of review is 'reasonableness'. This is the second most intense standard of review. The courts usually apply this standard of review in most cases where the 'reasonableness' of a socio-economic rights programme is challenged.²⁰⁰ This standard of review requires the court to ask the following question: **are the measures the state has adopted 'reasonably capable' of achieving the progressive realisation of the socio-economic right?**²⁰¹ It is not necessary for the state to show that the chosen measures will 'definitely' achieve the realisation of the socio-economic right within a specific time period, or that the state has chosen the

¹⁹⁷ *Soobramoney* supra note 1 at para 1-3 and 21-26. Also see Liebenberg op cit note 44 at 33:32-33:34.

¹⁹⁸ *Soobramoney* ibid para 29.

¹⁹⁹ Ibid. For a discussion on this aspect of *Soobramoney*, see D Moellendorf 'Reasoning about Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims' (1998) 14 *SAJHR* 34.

²⁰⁰ See Liebenberg op cit note 44 at 33:33-33:99.

²⁰¹ See *Grootboom* supra note 2 at para 41 and TAC supra note 35 at para 33.

'best measures' to progressively realise the right.²⁰² Provided the measures chosen by the state are 'reasonably capable' of progressively achieving the full realisation of that socio-economic right, the plan will be reasonable and constitutional.²⁰³

(iii) Proportionality

The third standard of review is 'proportionality'. This is the most intense standard of review. The CC only appears to have applied this standard of review in *Khosa* which involved the violation of the constitutional rights to: social security (section 27(2)), equality (section 9) and human dignity (section 10) of a vulnerable and marginalised group – indigent permanent residents.²⁰⁴ Proportionality is the most intense standard of review because it does not only ask whether the programme was formulated and applied in good faith ('rationality') or whether the measures are reasonably capable of progressively achieving the right ('reasonableness'). **The proportionality standard of review also requires the court to ask whether the benefits of excluding any person or group from the programme is outweighed by the harm caused to the excluded group or whether the right could be achieved in a more efficient or better way.**²⁰⁵ For example, in the *Khosa* case the CC applied the 'proportionality' standard of review by examining whether: (a) the purpose of excluding permanent residents from social security benefits ('expanding provision to South African citizens') against (b) the impact of the exclusion on the rights of indigent permanent residents ('violation of dignity, equality and social security rights'); struck a proportional balance between the harm caused by the exclusion, the

²⁰² See *Grootboom* *ibid* where the CC stated that, 'a court considering reasonableness will not enquire whether more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable'.

²⁰³ *Ibid*. Also see *Mazibuko* *supra* note 35 at para 62.

²⁰⁴ *Khosa* *supra* note 6. However, the CC does arguably appear to have also applied the proportionality standard of review in *Jafftha* *supra* note 32 at para 35-51 as well. See further Brand *op cit* note 26 at 715-16.

²⁰⁵ Brand *ibid*. See further Theunis Roux 'Understanding Grootboom – A Response to Cass R Sunstein' (2001) 12*Constitutional Forum* 41 48-49.

purpose it sought to achieve and whether means less restrictive of the rights of permanent residents were available to achieve the purpose of expanding social security benefits to South African citizens.²⁰⁶ Given the serious violations of the constitutional rights of permanent residents to equality, dignity and social security, it was unsurprising the state was unable to convince the court that excluding them from the constitutional right to social security benefits was ‘reasonable’ and proportional.

(b) Factors resulting in a stricter standard of scrutiny

Five factors generally result in the courts feeling *less constrained* by the separation of powers and polycentricity when enforcing socio-economic rights.²⁰⁷ These factors are: (1) if the state has defined its own duties in executive or legislative policies; (2) if the court is only asked to enforce a ‘negative’ duty not to interfere with the existing enjoyment of a socio-economic right; (3) if the plan contains ‘deliberately retrogressive measures’ which decrease access to the right; (4) if the plan violates other constitutional rights or adversely affects the dignity of a vulnerable group; and (5) if the state has not shown sufficient enthusiasm and responsibility towards its duties to progressively achieve the full realisation of that socio-economic right.

(i) *The state extensively defines its own duties in legislation or executive and administrative policies*

As explained above, the duty to take ‘reasonable legislative and other measures’ means the Constitution envisages that the progressively realisation of socio-economic rights will – in the first place – be determined by legislation and executive policies enacted by the legislative and executive branches at all three spheres of government.²⁰⁸ When the legislature and executive extensively define the content of the state’s positive duties to provide socio-economic rights, the courts are

²⁰⁶ *Khosa* supra note 6 at para 114-134. See Brand *ibid* for a further discussion of how the proportionality standard of review works in practice.

²⁰⁷ Brand *op cit* note 26 at 710.

²⁰⁸ See *Mazibuko* supra note 35 at para 65-6.

more likely to adopt a stricter review standard.²⁰⁹ This is because the court will not necessarily be required to determine the content of the positive duties socio-economic rights impose on the state. Rather, it will only be required to ‘police’ the state’s duties by holding it accountable to the duties it has already set itself to provide.²¹⁰ This can be illustrated by the case of *B v Minister of Correctional Services* where the High Court ordered the state to provide the applicants, HIV positive prisoners, with ARV medication.²¹¹ Here, the court was relatively unconstrained by polycentricity and the separation of powers, regarding the provision of ARV medication to convicted prisoners, because the state had already made a commitment to provide ARV medication to them.²¹² The court therefore did not have to determine the content of the state’s positive duty to provide adequate healthcare in the circumstances: the court only had to ‘police’ the state’s own pre-defined duties by ordering it to comply with its previous commitment to the applicants to provide them medication.²¹³

(ii) The court is asked to enforce a ‘negative’ and not a ‘positive’ duty

The courts tend to adopt a stricter standard of scrutiny when asked to enforce ‘negative’ duties not to interfere with the existing enjoyment of socio-economic rights, as opposed to when they are asked to enforce ‘positive’ duties to actively provide them.²¹⁴ The basic reason appears to be that asking the court to order the state (or even a private person) to comply with any negative duty not to interfere with a socio-economic right has less implications for state resources and the separation of powers.²¹⁵ An example of such a case is *Jaffha*, where the CC concluded that both a

²⁰⁹ Brand op cit note 26 at 690.

²¹⁰ Ibid.

²¹¹ 1997 (6) BCLR 789 (c) discussed further in Brand ibid at 691-2.

²¹² *B v Minister of Correctional Services* ibid para 35-36.

²¹³ Ibid. See Brand op cit note 26 at 691-2.

²¹⁴ Brand ibid at 683.

²¹⁵ Ibid. However, whether the enforcement of a negative duty always has less implications for state resources is debatable. See the discussion of the *Certification case* supra note 10 at 12.2(a) above.

private person, and the state, violated their negative duties not to interfere with the applicant's existing enjoyment of the right to adequate housing in section 26(1), by attempting to sell her home for a relatively minor debt she owed to another person.²¹⁶ However, as both Brand and Liebenberg have noted, the difference between asking the court to enforce a 'negative' versus a 'positive' duty imposed by a socio-economic right is sometimes more of a fiction than a reality.²¹⁷ This is because distinguishing between the violation of a 'negative' versus a 'positive' duty, when it come to socio-economic rights in particular, can be a difficult and often even somewhat artificial exercise in practice.²¹⁸ Regardless, the general point remains that the courts will, generally speaking, scrutinise the infringement of a 'negative' duty to 'respect' socio-economic rights more strictly than any alleged infringement of a 'positive duty' to 'promote' or 'fulfil' a socio-economic right.

(iii) The programme contains 'deliberately retrogressive measures'

As explained, a key element of a 'reasonable' programme is that it will actually progressively achieve the full realisation of the right in reality. Any programme which deliberately decreases the existing access or enjoyment of a socio-economic right could constitute an infringement of both the positive duty to 'promote and fulfil' that right and also the negative duty to 'respect' it.²¹⁹ An example of a deliberately retrogressive measure occurred in *Khosa*, where decision of the state to exclude permanent residents from social security benefits – benefits they previously enjoyed – deprived them of their existing enjoyment of the constitutional right to social security.²²⁰ This resulted in the court adopting the strictest standard of review ('proportionality') because the measure (or decision) to exclude permanent residents

²¹⁶ *Jaftha* supra note 32 at para 31-45.

²¹⁷ Brand op cit note 26 at 720 and Liebenberg op cit note 44 at 33:19.

²¹⁸ Liebenberg ibid.

²¹⁹ Ibid. See *Grootboom* supra note 2 at para 45 where the Court appeared to accept that deliberately retrogressive measures create a rebuttable presumption of unreasonableness the state must dislodge.

²²⁰ Supra note 6 a para 1. Also see *Jaftha* supra note 32 at para 34.

was deliberately retrogressive as it directly resulted in a decrease of their existing enjoyment of a socio-economic right. However, this does not necessarily mean that every deliberately retrogressive measure is unreasonable or unjustifiable. Rather, the state would have to convince the court that any deliberately retrogressive measure complies with the requirements of 'reasonableness', but this could be very difficult to establish in practice.²²¹

(iv) *The programme violates constitutional rights or excludes a vulnerable group*

If the programme violates the constitutional rights or dignity of a vulnerable group, the court is more likely to adopt a stricter standard of review when determining its reasonableness.²²² This occurred in *Khosa* where, as explained above, the exclusion of destitute permanent residents from the socio-economic right to social security also violated several other constitutional rights, such as: the right not to be unfairly discriminated against on the analogous ground of citizenship (section 9(3)) and to inherent human dignity (section 10).²²³

(v) *Enthusiasm of the state in fulfilling its obligations*

If the state does not take its obligations to provide a socio-economic right seriously by, for example, never reviewing the programme to determine whether it is progressively realising the right in reality, the court is more likely to adopt a stricter standard of review.²²⁴ By the same token, if the state continuously reviews the programme to determine its effectiveness, and takes serious and deliberate measures to provide the right, the court is more likely to adopt a more deferential standard of

²²¹ See *Khosa* ibid at para 58-62. Also see *Grootboom* supra note 2 at para 45 where the Court endorsed the following comment of the CESR: 'any deliberately retrogressive measures . . . would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use . . . of available resources'.

²²² Brand op cit note 26 at 710.

²²³ *Khosa* supra note 6 at para 40-5.

²²⁴ Brand op cit note 26 at 710.

review.²²⁵ However, even where the state takes its obligations to provide the right seriously, that does not mean the courts will hesitate to invalidate an unreasonable programme. This occurred in *Grootboom* where the CC accepted that the state had taken serious and deliberate steps to progressively realise the socio-economic right to adequate housing.²²⁶ However, the fact that the state housing programme failed to provide for people who required emergency shelter, and who lived in intolerable conditions, meant that the court did not hesitate to declare the programme ‘unreasonable’.²²⁷

(c) Factors resulting in a more deferential standard of scrutiny

Three factors generally result in the courts feeling *more constrained* by the separation of powers and polycentricity when enforcing socio-economic rights.²²⁸ These factors are: (1) when the court is asked to enforce a ‘positive’ duty to order for the state to provide a socio-economic right; (2) when there exist practical problems in ordering the state to provide the right because resource constraints or polycentricity are properly in issue; and (3) how seriously the state has approached its positive duty to take steps to progressively achieve the full realisation of the socio-economic right within the available resources it presently has.

(i) When the court is asked to enforce ‘positive duties’ to provide the right

As explained above, the courts tend to feel less constrained by polycentricity and the separation of powers when asked to enforce a ‘negative’ duty not to interfere with the existing enjoyment of a socio-economic right. Conversely, the courts could feel *more constrained* by the separation of powers and polycentricity when asked to order the state (or even a private party) to comply with any positive duties to ‘promote’

²²⁵ Ibid. Also see *Mazibuko* supra note 35 at para 168.

²²⁶ *Grootboom* supra note 2 at para 51-4.

²²⁷ Ibid para 69.

²²⁸ Brand op cit note 26 at 717.

or 'fulfil' a socio-economic right. However, as explained above, it is arguable that the distinction between 'negative' versus 'positive' duties is often more of a fiction than a reality insofar as socio-economic rights are concerned. Regardless, the general point remains that the courts tend to adopt a more deferential and lenient standard of review when this factor exists.

(ii) *Practical problems in ordering the state to provide the right or when resource availability is properly in issue*

This means that if the state can properly show the court, with reliable evidence, that providing the right in the manner contended for by the applicant will affect the proper administration of the programme, or have severe budgetary consequences, the court could be inclined towards adopting a more deferential standard of review. This occurred in *Soobramoney* where the applicant, a terminally ill unemployed man, asked the court to order a state hospital to provide him with weekly dialysis treatment to prolong his life.²²⁹ The CC denied his application on the basis that ordering the hospital to provide him with weekly treatment simply to prolong his life would have a disproportionate impact on the limited resources of the hospital which would place the lives of other patients at risk.²³⁰ This was because the court accepted the argument that state hospitals did not have enough resources to provide terminally ill people with indefinite medical treatment simply to prolong their lives, as opposed to patients whose lives the hospital could use those same resources to save.²³¹

(iii) *Enthusiasm of the state in fulfilling its constitutional obligations*

Similar to how the court could adopt a stricter standard of review when the state has not shown sufficient enthusiasm or responsibility for its positive duties to progressively realise socio-economic rights, the courts could equally adopt a more

²²⁹ *Soobramoney* supra note 1 at para 1-5.

²³⁰ *Ibid* para 19-30.

²³¹ *Ibid*. For a further discussion of this aspect of *Soobramoney* see Moellendorf op cit note 199 and Karin Lehman 'In Defence of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core' (2006) 22 *Amherst International Law Review* 167-169.

lenient standard where the state takes its positive obligations seriously to provide the right and continuously reviews its existing socio-economic rights programmes.²³² For example: if the state does not treat people with respect and dignity when evicting them, or demolishing their home, it is possible the court could declare the eviction unlawful on the basis of, amongst other things, that the state has not taken seriously its negative duty to 'respect' the socio-economic right to housing.²³³ Conversely, if the state continuously reviews its socio-economic rights programmes, and can show it has properly budgeted for these programmes and is using its available resources to the best of its ability to progressively realise the socio-economic right in question, the court may potentially be more inclined towards adopting a more lenient standard of review.²³⁴

6. REMEDIES FOR THE VIOLATION OF A SOCIO-ECONOMIC RIGHT

Having discussed the 'reasonableness review' test, and the three different standards of review, we can now consider one final question: **what remedies can a court provide a litigant who successfully establishes that either a positive or negative duty imposed by a socio-economic right has been violated?** Some of these remedies are considered below.²³⁵

²³² See Brand op cit note 26 at 710.

²³³ See *Occupiers 51 Olivia Road v City of Johannesburg* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) para 11-18. For a similar example of the state not taking its positive obligations seriously, see *District Six Committee* supra note 38 at para 73-78.

²³⁴ See *Mazibuko* supra note 35 at para 164.

²³⁵ For a general discussion on remedies for the violation of socio-economic rights, see Thomas J. Bollyky 'R IF C > P + B: A Paradigm for Judicial Remedies of Socio-Economic Rights Violations' (2002) 18 *SAJHR* 161 and W Trengove 'Judicial Remedies for Violations of Socio-economic Rights' (1999) 1(4) *ESR Review* 8.

(a) Ordering the state to adopt a programme or reformulate an unreasonable one

As emphasised, the first thing the state must do to fulfil its positive obligations to ‘protect’, ‘promote’ and ‘fulfil socio-economic rights is create a plan to progressively and fully realise socio-economic rights over time.²³⁶ If the state takes no steps to create any plan whatsoever, the court can order it to create one.²³⁷ Similarly, as noted above, where the state has created a plan, but the plan itself does not comply with the requirements of a ‘reasonable’ programme, the court can order the state to remove or fix any ‘unreasonable’ aspects of the plan.²³⁸

Some case law examples can illustrate this second scenario. In *Grootboom*, the state created a plan to progressively realise the socio-economic right to adequate housing.²³⁹ This meant the main issue before the court was whether the content of the housing plan was ‘reasonable’.²⁴⁰ The court concluded the plan was ‘unreasonable’ and unconstitutional because it **‘was not sufficiently flexible to cater for short, medium and long term needs’** and because it **‘made no provision for people who required immediate assistance and who were living under intolerable conditions’**.²⁴¹ In *TAC*, the CC similarly concluded that the state HIV/AIDS programme was ‘unreasonable’ because it was **‘not comprehensive’** as it did not provide for the ARV Nevirapine beyond various limited test sites, because the programme was **‘rigid’** and also because it was not **‘transparent’**.²⁴² In *Khosa*, the CC similarly ordered the state to include permanent residents in social security legislation because their

²³⁶ See *Grootboom* supra note 2 at para 42.

²³⁷ *Mazibuko* supra note 35 at para 65-67.

²³⁸ *Ibid.*

²³⁹ *Grootboom* supra note 2 para 47.

²⁴⁰ *Ibid* para 54.

²⁴¹ *Ibid* para 69.

²⁴² *TAC* supra note 35 at para 80, 95 and 123.

exclusion meant the programme ‘**excluded a significant section of society**’ and ‘**violated the human dignity and constitutional rights of a vulnerable group**’.²⁴³

What the above examples illustrate is that this remedial power could operate in two different ways. First, the court could order the state to ‘remove’ obstacles in a programme to ensure it becomes ‘reasonable’. Second, the court could order the state to ‘expand’ a programme to ensure it becomes ‘reasonable’, so that the measures taken actually become capable of progressively realising that right within the state’s current available resources.

(b) Meaningful engagement

In appropriate circumstances, the remedy of ‘meaningful engagement’ could provide an appropriate and effective remedy for the violation (or threatened violation) of a socio-economic right.²⁴⁴ Meaningful engagement is when a court orders the parties to engage in a process of mediation in an attempt to reach a middle ground with each other to resolve their dispute in a mutually agreeable way.²⁴⁵ Meaningful engagement could, for example, be used between the state and private parties to determine the best way for the state to provide socio-economic rights in particular circumstances and for the parties to then make their agreement legally enforceable by asking for it to be made an order of court. However, meaningful engagement will not be appropriate in every case. If meaningful engagement is to have any measure of success, both parties must engage transparently with an open mind and be willing to compromise in order to resolve their dispute.²⁴⁶ Coupling an order of meaningful engagement with a structural interdict, requiring the parties to report back to the court on their progress in

²⁴³ *Khosa* supra note 6 at para 71 and 76-77. In addition, as identified in *Grootboom* supra note 2 at para 45, this was a ‘deliberately retrogressive measure’ which created a rebuttable presumption of unreasonableness.

²⁴⁴ For a detailed discussion see Anashri Pillay ‘Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement’ (2012) 10 *International Journal of Constitutional Law* 732.

²⁴⁵ See *Olivia Road* supra note 233 at para 20.

²⁴⁶ *Ibid.*

resolving their dispute, could provide an effective remedy where the parties mutually determine their own solution without involving the court in the finer details.

(c) Structural interdict

A structural interdict is when the court supervises the implementation of any order it makes.²⁴⁷ Generally, a structural interdict requires the state, or even a private person, to provide the court with regular updates on its progress in implementing the order of the court.²⁴⁸ In its early cases, the CC appeared hesitant to grant structural interdicts whenever it found that the state failed to comply with a negative or positive duty imposed by a socio-economic right.²⁴⁹ However, persistent failures of some spheres of government to take pro-active steps towards progressive realisation of socio-economic rights has resulted in some courts taking a more robust approach, by ordering structural interdicts when it is established the state has failed to comply with the duties imposed by socio-economic rights.²⁵⁰

(d) Constitutional damages

It is possible that the courts could order the state, or even private persons to pay people constitutional damages for the violation of a socio-economic right.²⁵¹ However, the courts are, generally speaking, very reluctant to order constitutional damages for the violation of a constitutional right – including the violation of a socio-

²⁴⁷ Currie & De Waal op cit note 4 at 199-200.

²⁴⁸ For an example of meaningful engagement see *District Six Committee* supra note 38.

²⁴⁹ See *TAC* supra note 35 at para 129 where the CC rejected the request for a structural interdict and remarked, '[w]e do not consider . . . that orders should be made in those terms unless this is necessary. The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case'. Whether the courts still have this same level of enthusiasm and trust towards the state faithfully executing its orders is debatable.

²⁵⁰ See *District Six* supra note 38; *Residents of Joe Slovo Community v Thubelisha Homes* 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC) and *Pheko v Ekurhuleni Metropolitan Municipality* 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC).

²⁵¹ See *Ngomane v City of Johannesburg Metropolitan Municipality* [2019] ZASCA 57; 3 All SA 69 (SCA).

economic right.²⁵² Regardless, and in certain appropriate circumstances, it remains possible that the courts could consider granting constitutional damages when this remedy would provide appropriate relief for a litigant who has had their socio-economic right(s) violated.²⁵³ This occurred in the recent Supreme Court of Appeal ('SCA') decision in *Ngomane v City of Johannesburg* ('*Ngomane*') where police officers, employed by the City of Johannesburg, forcefully removed various homeless people from a traffic circle and destroyed their makeshift homes and belongings.²⁵⁴ Whilst the SCA technically ordered the City to compensate the victims of the police actions based on a violation of their right not to be arbitrarily deprived of property (section 25(1)), and not a violation of a socio-economic right *per se*, it remains possible that the courts could, in future appropriate cases, consider constitutional damages as an appropriate remedy to repair the violation of a socio-economic right by either the state or a private individual.²⁵⁵

²⁵² See *Fose v Minister of Safety and Security* 1997 (7) BCLR 851, 1997 (3) SA 786 (CC) para 60-69 and *Komape v Minister of Basic Education* (1051/2018) [2019] ZASCA 192 (18 December 2019) para 57-63.

²⁵³ For example, see *MEC Department of Welfare v Kate* 2006 (4) SA 478 (SCA); [2006] 2 All SA 455 (SCA) para 33 and *President RSA v Modderklip Boerdery (Pty) Ltd* 2005 (8) BCLR 786 (CC) para 52-8.

²⁵⁴ *Supra* note 251 at para 1-7.

²⁵⁵ See Liebenberg *op cit* note 19 at 438-446.

7. PRACTICE QUESTIONS

MULTIPLE CHOICE QUESTIONS [1 MARK EACH]

1. In the *Certification case*, the Constitutional Court said the following about the justiciability of socio-economic rights:
 - (a) Socio-economic rights are not justiciable because justiciable socio-economic rights are incompatible with the separation of powers.
 - (b) Socio-economic rights can be 'negatively enforced' by ordering the state not to interfere with any existing enjoyment of a socio-economic right.
 - (c) Socio-economic rights are justiciable because the enforcement of socio-economic rights and civil and political rights both have resource implications.
 - (d) Both (b) and (c)

2. In *Government RSA v Grootboom*, the Constitutional Court said the state's duty to take 'reasonable legislative and other measures' means the state must do the following:
 - (a) Only enact legislation to give effect to a socio-economic right.
 - (b) Enact legislation and take all other 'reasonable measures' to ensure socio-economic rights are progressively realised over time.
 - (c) Ensure any plan or programme it enacts is also reasonably implemented and will actually achieve the right over time.
 - (d) Both (b) and (c).

3. In *Minister of Health v TAC*, the Constitutional Court said the following about the socio-economic rights programme of the state:
 - (a) The programme was unreasonable because it was not transparent.
 - (b) The programme was unreasonable because there was no justifiable reason for not extending Nevirapine beyond the pilot test sites.
 - (c) The programme was reasonable because the state used its 'available resources' to provide Nevirapine.
 - (d) Both (a) and (b).

4. Which of the following is **not true** about the concept of 'within available' resources:
- (a) The state's positive duty to provide socio-economic rights is limited by its 'available resources'.
 - (b) The applicant bears the onus to establish that the state is not using its 'available resources' to provide a socio-economic right.
 - (c) It can be used to challenge a programme ('sword') and be used by the government to justify a programme ('shield').
 - (d) None of the above.
5. In *Jaftha v Schoeman*, the Constitutional Court said the following about the state's negative obligation to respect and protect the socio-economic rights to housing:
- (a) Negative obligations not to infringe the existing enjoyment of a socio-economic right can be enforced against both the state and private people.
 - (b) Negative obligations mean the government must ensure legislation does not infringe the existing enjoyment of the socio-economic right to housing.
 - (c) Courts should develop the common law or customary law when legislation does not properly give effect to the negative obligations socio-economic rights impose.
 - (d) Both (a) and (b)
6. Which of the following is **not true** about the three categories of socio-economic rights in the Constitution:
- (a) 'Qualified socio-economic rights' are subject to the three conditions of 'reasonable measures, resource constraints and progressive realisation'
 - (b) Failure to provide a 'basic/unqualified' socio-economic right can be justified if the government shows it is using the available resources at its disposal.

- (c) Negative socio-economic rights refer to expressly guaranteed aspects or manifestations of a particular socio-economic right.
 - (d) None of the above.
7. In *Daniels v Scribante*, the Constitutional Court said the following about whether socio-economic rights can impose positive duties on private people:
- (a) Socio-economic rights can only impose negative duties on private people and never positive duties to 'promote and fulfil' socio-economic rights.
 - (b) Socio-economic rights cannot be enforced against private parties because only the state has the power to pass legislation to give effect to socio-economic rights.
 - (c) Socio-economic rights could impose positive obligations on private parties in an appropriate case.
 - (d) Both (a) and (b).
8. Which of the following is **not true** about the 'variable standard of review' when the 'reasonableness review' test is applied by the courts:
- (a) Courts apply reasonableness review more strictly if the programme infringes other constitutional rights such as equality or just administrative action.
 - (b) Courts apply reasonableness review more strictly if the court is required to order the state to comply with a negative obligation not to infringe a right.
 - (c) Courts apply reasonableness review less strictly if the case involves polycentric issues.
 - (d) None of the above.
9. In *Government RSA v Grootboom*, the Constitutional Court said the following about the International Covenant on Economic, Social and Cultural Rights ('ICESCR'):
- (a) The concept of 'within available resources' means the state must use its 'maximum available resources' to provide socio-economic rights.

- (b) The concept of 'within available resources' is different from requiring the state to use its 'maximum available resources' to provide socio-economic rights.
 - (c) The court has a discretion (choice) to decide whether it should take the ICESCR into account because of section 39(1)(c) of the Constitution.
 - (d) Both (a) and (c).
10. In *Khosa v Minister for Social Development* the Constitutional Court applied the following standard of review when applying the 'reasonableness review' test:
- (a) Rationality: because there were several polycentric issues involved which means the court had to show deference to the measures adopted by the state.
 - (b) Rationality: because the state persuaded the court that it did not have enough 'available resources' to provide social security to permanent residents.
 - (c) Proportionality: because the state's exclusion of permanent residents from the programme also infringed their constitutional right to equality.
 - (d) Both (a) and (b).
11. In *Governing Body of the Juma Masjid Primary School*, the Constitutional Court concluded that a private person:
- (a) Had a positive duty to ensure that the right of children to education was provided at their own expense.
 - (b) Had a negative duty not to infringe the socio-economic rights of children to a basic education.
 - (c) Had a positive duty to ensure that the government complied with its duties to provide children with the socio-economic right to a basic education.
 - (d) None of the above.
12. In *Mazibuko v City of Johannesburg*, the Constitutional Court said the following about legislation which is enacted by the state to give effect to a socio-economic right:
- (a) When legislation is enacted to give effect to a socio-economic right, a litigant can choose to rely on that legislation or the constitutional right directly.

- (b) When legislation is enacted to give effect to a socio-economic right, the principle of subsidiarity requires the litigant to rely on that legislation.
 - (c) When legislation is enacted to give effect to a socio-economic right, a litigant can rely on the right directly to challenge the legislation as unconstitutional.
 - (d) Both (b) and (c).
- 13.** In *Grootboom*, the Constitutional Court said the following about the concept of a 'minimum core' obligation on the state:
- (a) The 'minimum core' concept was developed by expert commentary on the state's obligation under the ICESCR.
 - (b) Socio-economic rights in the South African Bill of Rights do not have a minimum core which the courts can immediately enforce.
 - (c) The concept of the minimum core could be relevant to determining if a socio-economic rights programme is 'reasonable'.
 - (d) All of the above.
- 14.** In *Soobramoney v MEC for Health: KZN*, the Constitutional Court said the following about the socio-economic right to adequate healthcare:
- (a) All socio-economic rights are inherently limited by the availability of the resources of the state at a given time.
 - (b) The refusal to provide emergency medical treatment can also be challenged as a violation of the constitutional right to life.
 - (c) The courts will not readily scrutinise the budget of the state unless it can be shown that the budget was allocated irrationally or in bad faith.
 - (d) Both (a) and (c).
- 15.** In *Mazibuko*, the Constitutional Court said a socio-economic rights programme is more likely to be 'unreasonable' if the government:
- (a) Does not periodically review the programme to determine if it is actually 'progressively realising' that socio-economic right in reality.
 - (b) Does not ensure that the programme is sufficiently coordinated between the three spheres of government.
 - (c) Does not ensure that sufficient personnel and resources are allocated to the programme.
 - (d) All of the above.

TRUE AND FALSE QUESTIONS

[1 mark each. If the answer is false, you must briefly substantiate your answer and refer to relevant case law or international law where possible.]

1. The applicant has the onus to persuade the court that the state has not adequately complied with its positive duty to provide a socio-economic right.
2. In *Soobramoney v Minister of Health KZN*, the Constitutional Court adopted a strict standard of scrutiny because the availability of resources was not in issue.
3. In *Grootboom and Mazibuko*, the Constitutional Court accepted the argument that all socio-economic rights have a 'minimum core'.
4. Where the state defines its own duties, the court is more likely to adopt a strict standard of scrutiny when applying the reasonableness review test.
5. In *Khosa*, the Constitutional Court declined to extend social security to permanent residents because this would place an undue financial burden on the state.
6. In the *Certification* case, the Constitutional Court said that only the negative aspects of socio-economic rights are justiciable by the courts.
7. The concepts of 'within available resources' and 'progressive realisation' apply to all socio-economic rights.
8. The Constitutional Court has held private parties have no duties when it comes to socio-economic rights because it would be unfair to impose duties on them.
9. The courts must consider relevant sources of international law when interpreting socio-economic rights because of section 39(1)(b) of the Constitution.
10. In practice, the courts tend to rely more on foreign law and not international law when interpreting socio-economic rights.
11. When the state engages in 'deliberately retrogressive measures' the court will apply the reasonableness review test strictly.
12. A socio-economic rights programme must be sufficiently flexible to cater for short, medium and long term needs.
13. The enthusiasm of the state in providing a socio-economic right could – depending on the circumstances – either increase or heighten the standard of review.

14. The duty to take 'reasonable legislative measures' to provide socio-economic rights can be enforced horizontally against private people.
15. The concept of the 'minimum core' can be considered by the courts to determine if a socio-economic rights programme is 'reasonable'.

SHORT QUESTIONS

1. Explain the differences between the three categories of socio-economic rights protected by the Bill of Rights. (6 marks)
2. Explain the separation of powers and polycentricity arguments against the justiciability of socio-economic rights and how the Constitutional Court dealt with these arguments in the *Certification case*. (6 marks)
3. Explain the factors that influence the 'standard of review' when a court determines whether the state has complied with its duties 'to progressively realise socio-economic rights within its available resources'. (6 marks)
4. Explain the various factors a socio-economic rights programme should have in order to be 'reasonable'. (6 marks)
5. Explain four remedies courts can order if it is established that the state has failed to fulfil its duties to progressively realise socio-economic rights. (6 marks)

LONG QUESTIONS

1. Recent fires have destroyed the homes of many people in poor and vulnerable communities on the outskirts of the City of Cape Town ('the City'). With nowhere else to go, they occupy the common in Rondebosch and erect makeshift houses. Many are permanent residents who fled their home countries because of persecution and war. Others are South African citizens. They give their community the name 'New Rust'.

New Rust decides to elect a leadership Committee ('the Committee'). The Committee asks the City to provide alternative accommodation in terms of the 'housing programme' created by the National Government under the Housing Act 32 of 2008 ('the Housing Act'). The City says it cannot use the housing programme to help New Rust for the following reasons: (a) the programme does not give the local or provincial spheres of government any authority to implement

it (b) the programme only applies to 'citizens' and not 'permanent residents' and (c) the programme has rigid requirements and cannot be adapted to cater for the immediate needs of the New Rust community. When the Committee asks for a copy of the programme, the City refuses because National Government has classified the programme as 'confidential'.

The City then tells the Community that even if it had its own programme – *which it does not have* – it would not be able to help them because it 'does not have enough resources to assist them'. However, it turns out the City recently used R350 million to provide the Mayor with 'security upgrades' which included a vintage Rolls Royce and personal sushi chef. When the Community tells the City of this expenditure, they reply that the community should 'mind their business and not interfere with state security issues'.

Rondebosch residents are also unhappy about 'New Rust'. They complain the community is decreasing the value of their properties and ask the City to evict them. The City arrives on an early winter morning and destroys the homes and possessions of the New Rust community. They are then forcefully loaded into vans and taken to a makeshift settlement on the outskirts of town. The City tells the community the settlement is only temporary because it is arranging alternative accommodation. The makeshift settlement also lacks proper water and sanitation facilities and is located near a nuclear storage facility that is unsafe for human habitation. Later, the community discovers that the City failed to comply with local by-laws that required it to: (i) give the community seven days' notice before evicting them (ii) reasonably engage with them (iii) relocate them in a humane way that is consistent with the Bill of Rights (iv) provide alternative temporary accommodation which does not pose a risk to human health or safety and which has proper water and sanitation facilities that are consistent with human dignity.

Three years later, the community still lives in the settlement on the City outskirts. Again, they approach the mayor, Mr Milton Hayek, for assistance, but he says, 'government does not give handouts and they should get a job like everyone else'. The City still does not have a proper programme and the National Housing programme has stayed the same. The national, provincial and local

economy has boomed in the past three years but no sphere of government has put any more money into its socio-economic rights programmes.

You are a lawyer who specialises in socio-economic rights. The leadership Committee approaches you for advice about their situation and whether the actions of the City and National government are constitutional. They ask you to advise them on the following:

- (i) Does the housing programme of the national sphere of government comply with the elements of a 'reasonable' programme? *(15 marks)*
- (ii) If the New Rust community challenged the national housing programme and eviction and relocation by the City, would the court adopt a strict or lenient 'standard of review' and why? *(10 marks)*
- (iii) What remedies should the community ask the court to provide them if they can establish that the City and national government have violated their socio-economic right to adequate housing? *(5 marks)*

(30 marks in total)

2. You are a legal advisor to the Minister of Social Development ('the Minister'). The Department is currently reviewing its current programme to ensure the Social Assistance Act 13 of 2004 ('the Social Security Act') complies with the positive duties of the state to provide eligible people with the constitutional right to social security.

The Minister asks you to write a memo which explains the following:

- (i) Whether the existence of the Social Security Act will prevent people from relying directly on the constitutional right to social security if the programme of the Department is challenged in court and why? *(5 marks)*
- (ii) Which test would the court use to determine whether the programme of the Department complies with the state's positive obligations to provide social security and how this test works? *(10 marks)*
- (iii) What factors the court will consider to determine whether the Department has properly complied with its obligations to provide the right? *(6 marks)*

- (iv) Whether the Department will be able to exclude permanent residents from the programme because it lacks available resources? (4 marks)

(30 marks in total)

3. Some authors have argued that the inclusion of justiciable socio-economic rights in a Bill of Rights is incompatible with the separation of powers. They argue that giving the courts authority to determine how the state should provide material goods to things such as housing, education or healthcare will actually do more to undermine respect for the Bill of Rights and the courts than enhance it.

Write an essay where you respond to this argument and indicate if you agree or disagree with it. Your answer should refer to relevant case law and should consider the arguments both for and against justiciable socio-economic rights.

(25 marks)

8. PRACTICE ANSWERS

MULTIPLE CHOICE: ANSWERS

1. In the *Certification case*, the Constitutional Court said the following about the justiciability of socio-economic rights:
- (a) Socio-economic rights are not justiciable because justiciable socio-economic rights are incompatible with the separation of powers.
 - (b) Socio-economic rights can be 'negatively enforced' by ordering the state not to interfere in any existing enjoyment of a socio-economic right.
 - (c) Socio-economic rights are justiciable because the enforcement of socio-economic rights and civil and political rights both have resource implications.
 - (d) Both (b) and (c)

Correct answer: the correct answer is (d). Answer (a) is incorrect because the Court rejected the arguments that socio-economic rights are incompatible with the separation of powers.

2. In *Government RSA v Grootboom*, the Constitutional Court said the state's duty to take 'reasonable legislative and other measures' means the state must do the following:
- (a) Only enact legislation to give effect to a socio-economic right.
 - (b) Enact legislation and take all other 'reasonable measures' to ensure socio-economic rights are progressively realised over time.
 - (c) Ensure any plan or programme it enacts is also reasonably implemented and will actually achieve the right over time.
 - (d) Both (b) and (c).

Correct answer: the correct answer is (d). Answer (a) is incorrect because enacting legislation is only the first step. The state must ensure that the programme itself is reasonable and is also reasonably implemented (see *Mazibuko*).

3. In *Minister of Health v TAC*, the Constitutional Court said the following about the socio-economic rights programme of the state:

- (a) The programme was unreasonable because it was not transparent.
- (b) The programme was unreasonable because there was no justifiable reason for not extending Nevirapine beyond the pilot test sites.
- (c) The programme was reasonable because the state's obligations could only be fulfilled 'within its available resources'.
- (d) Both (a) and (b).

Correct answer: the correct answer is (d). Answer (c) is incorrect because the 'availability of resources' was not in issue because the pharmaceutical manufacturer of Nevirapine said they would offer it to the state free of charge.

4. Which of the following is **not true** about the concept of 'within available' resources:

- (a) The state's positive duty to provide socio-economic rights is limited by its 'available resources'.
- (b) The applicant bears the onus to establish that the state is not using its 'available resources' to provide a socio-economic right.
- (c) It can be used to challenge a programme ('sword') and be used by the government to justify a programme ('shield').
- (d) None of the above.

Correct answer: the correct answer is (b). This is because the onus is on the state to persuade the court that it does not have sufficient resources to provide the right (see *Khosa*).

5. In *Jaftha v Schoeman*, the Constitutional Court said the following about the negative duties of the state to 'respect and protect' socio-economic rights:

- (a) Negative duties not to infringe the existing enjoyment of a socio-economic right can be enforced against both the state and private people.
- (b) Negative duties mean the government must ensure legislation does not infringe the existing enjoyment of the socio-economic right to housing.

- (c) Courts should develop the common law or customary law when legislation does not properly give effect to the negative obligations socio-economic rights impose.
- (d) Both (a) and (b)

Correct answer: the correct answer is (d). The *Jaftha* court made no mention of the circumstances when the common law or customary law should be developed to give effect to the negative duties that socio-economic rights impose.

6. Which of the following is **not true** about the three categories of socio-economic rights protected by the Bill of Rights:
- (a) 'Qualified socio-economic rights' are subject to the three conditions of 'reasonable measures, resource constraints and progressive realisation'
 - (b) Failure to provide a 'basic/unqualified' socio-economic right can be justified if the government can prove that it is using all available resources at its disposal.
 - (c) Negative socio-economic rights refer to expressly guaranteed aspects or manifestations of a particular socio-economic right.
 - (d) None of the above.

Correct answer: the correct answer is (b). This is because 'basic/unqualified' socio-economic rights are not subject to: 'reasonable measures, progressive realisation or within available resources'. This means the state cannot justify any failure to fulfil its positive constitutional duty to provide these rights because of resource constraints.

7. In *Daniels v Scribante*, the Constitutional Court said the following regarding whether socio-economic rights can impose positive duties on private people:
- (a) Socio-economic rights can only impose negative duties on private people and never positive duties to 'promote and fulfil' socio-economic rights.
 - (b) Socio-economic rights cannot be enforced against private parties because only the state has the power to pass legislation to give effect to socio-economic rights.

- (c) Socio-economic rights could impose positive obligations on private parties in an appropriate case.
- (d) Both (a) and (b).

Correct answer: the correct answer is (c). Based on the facts, the court concluded an enforceable positive duty could be enforced against a private person based on the provisions of the Extension of Security of Tenure Act (also see *Juma Masjid*).

8. Which is **not true** about the ‘variable standard of review’ the courts apply to determine if the state has fulfilled its positive duty to provide socio-economic rights:

- (a) Courts apply the reasonableness review test more strictly if the programme infringes other constitutional rights such as equality or just administrative action.
- (b) Courts apply the reasonableness review test more strictly if the court is only asked to order the state to comply with a negative obligation not to infringe a right.
- (c) Courts apply the reasonableness review test less strictly if the case involves polycentric issues.
- (d) None of the above.

Correct answer: the correct answer is (d). This is because (a), (b) and (c) are all true. The courts will generally apply the reasonableness review test *more strictly* when any of these factors are present – not less strictly.

9. In *Government RSA v Grootboom*, the Constitutional Court said the following about the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’):

- (a) The concept of ‘within available resources’ means the state must use its ‘maximum available resources’ to provide socio-economic rights.
- (b) The concept of ‘within available resources’ is not the same as requiring the state to use its ‘maximum available resources’ to provide socio-economic rights.

- (c) The court has a discretion (choice) to decide whether it should take the ICESCR into account because of section 39(1)(c) of the Constitution.
- (d) Both (a) and (c).

Correct answer: the correct answer is (b). The court expressly rejected (a) because the ICESCR uses the phrase 'maximum available resources' which is different from the concept 'within available resources' and 'reasonable legislative and other measures'. Answer (c) is also incorrect because section 39(1)(b) of the Constitution imposes a duty (not a choice) on the courts to consider relevant sources of international law when interpreting constitutional rights.

10. In *Khosa v Minister for Social Development* the Constitutional Court applied the following standard of review when applying the 'reasonableness review' test:

- (a) Rationality: because there were several polycentric issues involved which means the court had to show deference to the measures adopted by the state.
- (b) Rationality: because the state persuaded the court that it did not have enough 'available resources' to provide social security to permanent residents.
- (c) Proportionality: because the state's exclusion of permanent residents from the programme also infringed their constitutional right to equality.
- (d) Both (a) and (b).

Correct answer: the correct answer is (c). Both (a) and (b) are incorrect because the court applied the stricter standard of 'proportionality'.

11. In *Governing Body of the Juma Masjid Primary School*, the Constitutional Court concluded that a private person:

- (a) Had a positive duty to ensure that the right of children to education was provided at their own expense.
- (b) Had a negative duty not to infringe the socio-economic rights of children to a basic education.
- (c) Had a positive duty to ensure that the government complied with its duties to provide children with the socio-economic right to a basic education.
- (d) None of the above.

Correct answer: the correct answer is (b). The court did not consider whether a private person had a duty to provide children with the right to a basic education or that the government had a duty to ensure the government fulfilled this right either.

12. In *Mazibuko v City of Johannesburg*, the Constitutional Court said the following about legislation which is enacted by the state to give effect to a socio-economic right:

- (a) When legislation is enacted to give effect to a socio-economic right, a litigant can choose to rely on that legislation or the constitutional right directly.
- (b) When legislation is enacted to give effect to a socio-economic right, the principle of subsidiarity requires the litigant to rely on that legislation.
- (c) When legislation is enacted to give effect to a socio-economic right, a litigant can rely on the right directly to challenge the legislation as unconstitutional.
- (d) Both (b) and (c).

Correct answer: the correct answer is (d). Answer (a) is incorrect because the principle of subsidiarity *requires* a litigant to rely on legislation enacted to give effect to a constitutional right: they do not have a *choice*. However, that legislation can be challenged as unconstitutional if it does not properly give effect to that socio-economic right (see *My Vote Counts NPC*).

13. In *Grootboom*, the Constitutional Court said the following about the possibility of imposing a 'minimum core' obligation on the state:

- (a) The 'minimum core' concept was developed by expert commentary on the obligations of state who ratify the ICESCR.
- (b) Socio-economic rights in the South African Bill of Rights do not have a minimum core the courts can immediately enforce against the state.
- (c) The concept of the minimum core could be relevant to determining if a socio-economic rights programme is 'reasonable'.
- (d) All of the above.

Correct answer: the correct answer is (d). In *Grootboom* the Court rejected the argument that the positive duties of socio-economic rights have an immediately

enforceable 'minimum core'. However, it also said 'minimum core' could be relevant to determining 'reasonableness'.

14. In *Soobramoney v MEC for Health: KZN*, the Constitutional Court said the following about the socio-economic right to adequate healthcare:

- (a) All socio-economic rights are inherently limited by the availability of the resources of the state at a given time.
- (b) The refusal to provide emergency medical treatment can also be challenged as a violation of the constitutional right to life.
- (c) The courts will not readily scrutinise the budget of the state unless it can be shown that the budget was allocated irrationally or in bad faith.
- (d) Both (a) and (c).

Correct answer: the correct answer is (d). The court rejected the argument that an applicant could also rely on the right to life when they are refused emergency medical treatment.

15. In *Mazibuko*, the Constitutional Court said a socio-economic rights programme is more likely to be 'unreasonable' if the government:

- (a) Does not periodically review the programme to determine if it is actually 'progressively realising' that socio-economic right in reality.
- (b) Does not ensure that the programme is sufficiently coordinated between the three spheres of government.
- (c) Does not ensure that sufficient personnel and resources are allocated to the programme.
- (d) All of the above.

Correct answer: the correct answer is (d). This is because (a), (b) and (c) are all elements which a 'reasonable' socio-economic rights programme should have.

TRUE AND FALSE: ANSWERS

1. **False:** this is because the duty to persuade the court that the state does not have sufficient available resources rests on the state, not the applicant (see *Khosa*).

2. **False:** this is because the availability of resources was *in issue*. This meant that the court adopted the more lenient standard of review of 'rationality' and not 'proportionality'.
3. **False:** both courts rejected the argument that the positive duty to provide socio-economic rights has an immediately enforceable 'minimum core' content. The 'minimum core' however can still be examined to see if the programme is 'reasonable'.
4. **True:** this is because the court does not necessarily have to determine what the positive duty on the state to provide the right is. Rather, the court simply orders the state to comply with its own pre-defined duty to provide the right.
5. **False:** this is because the court did order the state to extend social security to permanent residents because the state did not provide enough evidence to establish that it did not have enough resources to extend social security benefits to permanent residents.
6. **False:** the court remarked that the negative aspects are 'at the very least' enforceable and justiciable. It confirmed that the positive aspects are also justiciable in *Grootboom*.
7. **False:** these two concepts or 'qualifications' only apply to the 'qualified' socio-economic rights. They do not apply to 'basic/unqualified' socio-economic rights.
8. **False:** the court has accepted that the negative obligations/duties are enforceable against private people (*Jaftha, Juma Masjid*) and the positive obligations/duties may be capable of enforcement against a private person in an appropriate case (*Scribante*).
9. **True:** section 39(1)(b) of the Constitution imposes a duty (not a choice) on the courts to consider relevant sources of international law when interpreting the Bill of Rights (see *Grootboom*).
10. **False:** the courts have tended to rely more on international law than foreign law. This is because not many countries have a Bill of Rights which impose positive duties on the state to provide socio-economic rights.
11. **True:** this is because this factor creates a 'presumption' that the retrogressive measures which decrease access to the right are not reasonable (*Grootboom*).
12. **True:** this factor was emphasised in *Grootboom* to conclude that the failure to provide emergency housing for people displaced by floods was unreasonable and unconstitutional.

13. **True:** if the state can show it has enthusiastically and seriously tried to comply with its positive duty to provide socio-economic rights, it is more likely that the programme will be unreasonable. If the state cannot show it has seriously tried to comply with its positive duty to provide the right, then the court may adopt a stricter standard of review.
14. **False:** this duty cannot be enforced against a private person because private people cannot 'enact legislation' to give effect to socio-economic rights: only the state has this power.
15. **True:** in *Grootboom* and *Mazibuko*, the Constitutional Court rejected the argument that the positive aspects of socio-economic rights have an immediately enforceable 'minimum core' but did conclude that the 'minimum core' could be relevant to determining if the programme adopted by the state is 'reasonable'.

SHORT QUESTIONS: ANSWERS

1. Model answer:

The three categories of socio-economic rights are: (a) 'qualified socio-economic rights' (b) 'unqualified/basic socio-economic rights' and (c) 'negative socio-economic rights.' (1 mark)

'Qualified' socio-economic rights are subject to the positive duty of the state to 'promote and fulfil' the right based on three qualifications/conditions: (i) 'reasonable legislative and other measures' (ii) 'progressive realisation' and (iii) 'available resources. Examples are: access to adequate housing (section 26(1)) and food and water (section 27). This category of socio-economic rights requires the state to do two things. First to adopt a 'programme'. Secondly, to ensure the programme is 'reasonable' which means it must progressively realise the right within its available resources (*Grootboom; Mazibuko*). Generally, it is difficult to apply the general limitation clause in section 36(1) to limitations of these rights (*Khosa*). (2 marks)

'Unqualified/basic' socio-economic rights are not subject to the three qualifications of: (i) 'reasonable measures' (ii) 'progressive realisation' or (iii) 'resource constraints'. Examples are the rights of children to basic nutrition (section 28(1)(c)) or

the right of everyone to a basic education (section 29(1)(a)). If the state infringes any of these rights, then the court must determine if the infringement ('limitation') can be justified under section 36(1). (2 marks)

'Negative socio-economic rights' are not necessarily separate free-standing rights. Rather, this category refers to particular rights where its wording (text) expressly protects a particular aspect of it. For example: section 26(1) is a 'qualified socio-economic right' which protects the right of everyone to have access to adequate housing. Section 26(3) is a particular component of this right because it expressly prohibits people from been evicted from their home without an order of court and only after considering all relevant circumstances. (2 marks)

2. Model answer

The separation of powers and polycentricity arguments are two different arguments against the justiciability of socio-economic rights by the courts, i.e. their ability to be enforced by courts against the state or private parties. People who oppose making socio-economic rights justiciable rely on both arguments to argue it is inappropriate for unelected judges to have the constitutional power (authority) to determine how the state should provide socio-economic rights. (2 marks)

The separation of powers argument says that because judges are not elected (rather appointed) and cannot be removed in elections, they are the least directly democratically accountable branch of government. This argument says the courts should therefore not have the power to enforce socio-economic rights because their enforcement of socio-economic rights means they will always breach the separation of powers because it means the courts must always necessarily tell the elected branches of government (legislature and executive) how to spend tax money to provide material goods to people. (1 mark)

The polycentricity argument says that determining how to provide socio-economic rights requires engaging in 'polycentric decision-making'. Polycentric decision-making refers to decision-making which requires balancing mutually interacting variables – such as the government budget. This argument says that because judges do not have sufficient experience, knowledge or expertise to

determine how state money should be spent, they should leave the provision of socio-economic rights to the legislature and executive to determine. (1 mark)

In the *Certification* case, three organisations argued that the inclusion of socio-economic rights in the Bill of Rights was incompatible with the constitutional principle requiring a separation of powers between the three branches of government, the legislature, executive and judiciary. The court rejected this argument. It made two points. First, the enforcement of 'negative' civil and political rights such as the right to vote (*August*) to legal representation in a criminal trial at state expense (*Jaipal*) could also have resource implications. This means the distinction between the justiciability of civil and political rights and socio-economic rights is not as wide as often made out. Second, socio-economic rights can – at the very least – be 'negatively enforced' by preventing the state from interfering with the existing enjoyment of the right (*Khosa; Jafftha*). The court will also not tell ('dictate') the government how to give effect to a socio-economic right. It will only require the state to act 'reasonably' and ensures that any programme it adopts will progressively realise the right over time (*Grootboom, TAC*). (2 marks)

3. Model answer

The 'standard of review' refers to how strictly or leniently the court will apply the 'reasonableness review test' when determining whether the state has complied with its positive obligation to: (i) 'take reasonable legislative and other measures'; (ii) to 'progressively realise'; (iii) a socio-economic right within its available resources'. While the court has not expressly said that 'reasonableness review' has a variable standard of review/level of scrutiny, the case law shows that such a variable standard does exist depending on the facts of the case. (2 marks)

Generally speaking, the following factors will result in a more lenient standard of review: (i) when the case involves 'polycentric issues' or when resource availability is in issue (*Soobramoney*) (ii) when the case involves the enforcement of positive duties (to provide the right) and not negative duties (not to interfere with the right) (*Soobramoney, Mazibuko*) or (iii) when the state has acted with enthusiasm to provide the right (*Grootboom*). (2 marks)

Generally speaking, the following factors will result in a stricter standard of review: (i) when the court is asked to enforce negative duties and not positive duties (*Jaftha*); (ii) when the programme impacts, excludes or infringes the rights of a vulnerable group (*Khosa, TAC*) (iii) when the state has defined its own duties in legislation or executive action or (iv) when the state cannot provide proper evidence to show that its available resources cannot progressively realise the right in the circumstances (*Khosa*). (2 marks)

4. Model answer

Section 7(2) of the Constitution imposes positive duties on the state to take active steps to 'promote and fulfil' the socio-economic rights the Constitution protects. When it comes to 'qualified socio-economic rights', the positive duty to 'promote and fulfil' is subjected to an additional three qualifications/conditions: (i) 'reasonable legislative and other measures' (ii) 'progressive realisation' and (iii) 'within available resources'. (1 mark)

In *Grootboom*, the Constitutional Court held that the duty to take 'reasonable' legislative and other measures means the Constitution imposes a duty on the state to ensure any programme it adopts is 'reasonable'. The Court has identified the following elements a 'reasonable' programme should have: (i) it must be co-ordinated between the three spheres of government who must all have specified duties (*Grootboom*) (ii) sufficient personnel and resources must be allocated (*Grootboom*) (iii) it must be comprehensive (*TAC*) (iv) it must be transparent (*TAC*) (v) it should be periodically revised to ensure the programme is progressively realising the right over time (*Mazibuko*) (vi) it must be sufficiently flexible to cater for short, medium and long term needs and to provide for people in desperate need (*Grootboom*) and (vii) it cannot exclude a vulnerable section of society (*TAC*) or discriminate against them (*Khosa*) (5 marks)

5. Model answer

Constitutional remedies are determined by the following three things. First, section 38 which gives the court authority to grant 'appropriate relief' for any violation

or threatened violation of the Bill of Rights. Second, section 172(1)(a) which requires the court to declare any law that is inconsistent with the Bill of Rights to be unconstitutional. Third, section 172(2)(b) which allows the court to grant any order that is 'just and equitable'. (2 marks)

There are various remedies courts can order when it is established that either the 'positive' or 'negative' duties socio-economic rights impose have been violated. First, it must declare any programme that is 'unreasonable' to be unconstitutional (*Dawood, Grootboom*). Second, if the state does not have a plan, it can order the state to adopt a plan (*Mazibuko*). Third, if the plan is 'unreasonable' the court can order the state to remove the 'unreasonable' aspects of the plan. Fourth, it could order a private person or the state to comply with any negative obligation/duty not to interfere with the existing enjoyment of the right (*Khosa; Juma Masjid*). Fifth, in appropriate cases, it could order a structural interdict to supervise the implementation of the state's positive duty to give effect to that socio-economic right (*August, Strydom*). Sixth, in appropriate cases, it could also order constitutional damages (*Ngomane*). (4 marks)

LONG QUESTIONS ANSWERS

1. Model answer:

This memo discusses three issues: (i) does the national housing programme comply with the elements of a 'reasonable' socio-economic rights programme; (ii) would the court adopt a 'strict' or 'lenient' standard of review if the housing programme and eviction of the New Rust community were challenged in court; and (iii) what remedies could a court provide the community if it established their socio-economic right to adequate housing was violated?

Does the national housing programme comply with the 'reasonableness' test?

Section 7(2) of the Constitution imposes 'positive' duties on the state to take active steps to 'promote and fulfil' socio-economic rights – such as the socio-economic right of access to adequate housing (section 26). Because the right to housing is a 'qualified' socio-economic right, the positive duty of the state to provide this right is

subject to three qualifications/conditions. First, the state must take 'reasonable legislative and other measures' to provide the right. Second, it must ensure that the right is 'progressively realised' over time. Third, its duty to progressively realise the right is subject to 'available resources'. (2 marks)

The Constitutional Court has held that the duty to take 'reasonable legislative and other measures' has two broad elements (*Grootboom; Mazibuko*). These are: (i) the state must adopt a programme; and (ii) the programme must also be 'reasonable' in conception and implementation (*Grootboom, Mazibuko*). If the programme is 'reasonable' that is the end of the case because the state will have complied with its positive constitutional obligation to 'promote and fulfil' that socio-economic right (*Grootboom*). If the state does not have a programme – or if the programme itself is 'unreasonable', the state will have failed in its positive constitutional duty to take 'reasonable legislative and other measures' to 'promote and fulfil' that socio-economic right (*Grootboom; TAC*). (3 marks)

In this case, the national government has adopted a programme under the Housing Act. This means it has complied with the first element because it has created a programme to fulfil this right. However, the housing programme itself must also be 'reasonable' to comply with the second element. If the programme is 'unreasonable' it will be unconstitutional.

(1 mark)

The Constitutional Court has identified the following elements which a 'reasonable' socio-economic rights programme must have: (i) it must be sufficiently coordinated between the three spheres of government (*Grootboom*) (ii) sufficient personnel and resources must be allocated to it (*Grootboom*) (iii) it must be transparent (*TAC*) (iv) it cannot exclude a significant section of society or discriminate against them (*Khosa*) (v) it must be periodically revised to ensure it will 'progressively realise' the right over time (*Mazibuko*) and (vi) it must be flexible to cater for short, medium and long term needs (*Grootboom*). The duty (or onus) to persuade the court that the national housing programme is 'reasonable' and constitutional rests on the state and not the New Rust Community (*Khosa, Grootboom*). The community should still place evidence before the court to establish a *prima facie* ('face value') case that

the programme is unreasonable and does not properly comply with the state's positive obligations. (5 marks)

In this case, the New Rust community has good prospects of successfully arguing that the national housing programme is 'unreasonable' and unconstitutional. This is because of the following: (i) the programme is not properly coordinated between the three spheres of government because the local sphere ('the City') has no duties under the programme; (*Grootboom*); (ii) it excludes a significant and vulnerable section of society because it excludes permanent residents which also violates their constitutional right to equality (*Khosa*); (iii) it is not flexible because it is rigid and cannot cater for short, medium and long term needs; (*Grootboom*); (iv) it is not transparent because national government has classified it as 'confidential' (*TAC*); and (v) the programme has not been periodically revised to ensure that it is progressively realising the right to adequate housing. (4 marks)

Would the court adopt a strict or lenient standard of reasonableness review?

The standard of review refers to how strictly or leniently the court will apply the 'reasonableness review' test to determine if the state has complied with its positive duties to provide socio-economic rights. The Constitutional Court has not expressly said that 'reasonableness review' has a variable standard of scrutiny. However, case law clearly shows the court will apply a stricter or more lenient standard depending on the facts. Generally, there are two different standards of review the court will apply: (i) rationality: which is more lenient and (ii) proportionality: which is more strict/intensive. (2 marks)

Rationality only requires the court to ask if the measures the state has chosen to provide that socio-economic right are rational and were taken in good faith (*Soobramoney*). However, rationality can also be applied more strictly when the court considers the elements of a 'reasonable programme' to determine if the programme the state has adopted will actually progressively realise the right in practice over time (*TAC, Grootboom*). (2 marks)

Proportionality is the strictest standard of review (*Khosa; Jaftha*). This means the court will not only consider rationality but will also consider other things such as how the programme impacts on other constitutional rights and whether there are less restrictive means the state could use to ensure people are not excluded from the programme. (2 marks)

In this case, it is likely that the court will adopt a 'strict' standard of review closer to proportionality in examining the constitutionality of the national programme and the eviction of the community from the common and their relocation. First, both the state and city have defined their own duties in legislation – when this occurs the court is more likely to adopt a stricter standard of review. The City has failed to comply with its own by-laws because it: (i) evicted the community without consulting them; (ii) removed them in conditions inconsistent with human dignity; (iii) placed them in alternative accommodation which is not safe for human habitation because it is near a nuclear storage facility and has no proper sanitation; and (iv) did not reasonably engage with them or give them seven days advance notice of the eviction. Second, neither the national government nor the City have taken their obligations seriously to progressively realise the right to housing. The City does not have any plan whatsoever and the Mayor, Mr Hayek, has made it clear that he does not think the City has a constitutional duty to assist the community. The plan has also not been revised at all in the past three years and no additional money has been allocated to it despite the fact that the entire economy is booming. Third, the programme violates the rights to equality of the permanent residents in the community because it discriminates against them because of citizenship (*Khosa*). (4 marks)

What remedies should the New Rust community ask the court to provide?

The New Rust community should ask the court to provide it with the following remedies: (i) declaring the national housing programme to be 'unreasonable' and unconstitutional in terms of section 172(1)(a) of the Constitution (*Dawood; Grootboom*); (ii) ordering the city to adopt a plan which complies with its positive obligations to take 'reasonable legislative and other measures' to progressively realise the right of the community to adequate housing (*Grootboom*); (iii) ordering the national government to remove the parts of the national housing programme which are 'unreasonable' such as the exclusion of permanent residents (*Khosa*), to make it more

flexible to cater for short, medium and long term needs (*Grootboom*) and to ensure the local sphere of government is allocated duties under the programme (*Grootboom*); and (iv) it may also be appropriate to ask for constitutional damages to be paid to the members of the community for the destruction of their property and possessions during their unlawful eviction from the Rondebosch common (*Ngomane*). (5 marks)

2. Model answer

This memo discusses three issues: (i) does the Social Security Act prevent people from directly relying on the right to social security if the programme is challenged in court; (ii) what test will the court apply to determine if the Department has complied with its positive duties to provide the constitutional right to social security; (iii) what factors will the court consider to determine whether the programme is constitutional; and (iv) can the Department exclude permanent residents from the programme because it does not have sufficient resources to assist them?

Does the Social Security Act prevent someone from directly relying on the constitutional right to social security?

The existence of the Act will prevent someone from directly relying on the constitutional right to social security if they argue the state has failed to properly provide them with the right. This is because of the principle of constitutional subsidiarity. The principle of subsidiarity says that whenever legislation is enacted to 'give effect' to a constitutional right, a litigant must rely on that legislation to enforce that constitutional right in practice (*Mazibuko*). This means they cannot rely directly on the constitutional right to social security unless the constitutionality of the Social Security Act itself is challenged in court as unconstitutional (*Mazibuko*). (2 marks)

A challenge to the constitutionality of the Social Security Act could be on two different grounds: (i) the Act does not properly give effect to the right to social security (*My Vote Counts NPC*); or (ii) because the Act unjustifiably violates other constitutional rights, such as the right not to be unfairly discriminated against because of citizenship (*Khosa*).
(2 marks)

What test will the court apply to determine whether the Department has complied with its positive duty to provide the constitutional right to social security?

The court will determine whether the Department has complied with its positive duty to provide social security according to the 'reasonableness review' test (*Grootboom*). This test has two elements: (i) the state must take 'reasonable legislative and other measures' to provide the right; and (ii) the plan itself must also be 'reasonable' (*Mazibuko*). (2 marks)

Because the Department has adopted a plan – in terms of the Social Security Act – it has complied with the first element which requires the adopting of a plan. The second element means the plan itself must also be 'reasonable' (*Grootboom*). This means the plan cannot exist on paper only. It must also be 'reasonable' in reality which means the plan must also progressively realise the constitutional right to social security in reality (*Mazibuko*).

(2 marks)

The Constitutional Court has identified the following elements which a 'reasonable' socio-economic rights programme must have: (i) it must be sufficiently coordinated between the three spheres of government (*Grootboom*); (ii) sufficient personnel and resources must be allocated to it (*Grootboom*); (iii) it must be transparent (*TAC*); (iv) it cannot exclude a significant section of society or discriminate against them (*Khosa*); (v) it must be periodically revised to ensure it will 'progressively realise' the right over time (*Mazibuko*); and (vi) it must be sufficiently flexible to cater for short, medium and long term needs (*Grootboom*). The onus to persuade the court that the programme is 'reasonable' and constitutional rests on the department and not any person who challenges the 'reasonableness' of the plan (*Khosa, Grootboom*). (6 marks)

What factors will the court consider to determine if the programme of the Department complies with its positive duties to provide social security?

The Constitutional Court has said that any socio-economic rights programme the state adopts must be 'reasonable' to be constitutional (*Grootboom*). It has

identified the following elements which a 'reasonable' socio-economic rights programme must have: (i) it must be sufficiently coordinated between the three spheres of government (*Grootboom*); (ii) sufficient personnel and resources must be allocated to it (*Grootboom*); (iii) it must be transparent (*TAC*); (iv) it cannot exclude a significant section of society or discriminate against them (*Khosa*); (v) it must be periodically revised to ensure it will 'progressively realise' the right over time (*Mazibuko*); and (vi) it must be sufficiently flexible to cater for short, medium and long term needs (*Grootboom*). The duty (or onus) to persuade the court that the programme is 'reasonable' and constitutional will be on the Department (*Khosa, Grootboom*). (6 marks)

Can the Department exclude permanent residents from social security benefits because it lacks sufficient resources?

In principle, it is possible for the Department to exclude permanent residents from the programme if the Department does not have 'available resources' to provide permanent residents with the constitutional right to social security. (1 mark)

However, it will be difficult for the Department to show that the exclusion of permanent residents is 'reasonable' and not unconstitutional if challenged in a court. This is because the court will most likely adopt the strict 'proportionality' standard of review for three reasons: (i) the exclusion will impact on a vulnerable group in society; (ii) it could infringe the right of permanent residents to equality (*Khosa*); and (iii) it will result in a 'deliberately retrogressive measure' which creates a presumption of unreasonableness (*Grootboom*). The court will also require the Department to bring evidence to persuade the court that its 'available resources' currently prevent it from providing permanent residents with the right to social security (*Khosa*). (3 marks)

3. Model answer

Note: there are different ways to answer this type of question. Primarily, it requires you to show a proper knowledge and ability to think critically about four things: (i) how justiciable socio-economic rights impact on the separation of powers (ii) the weight of separation of powers and polycentricity arguments against their justiciability (iii) the difference between 'negative' civil and political rights and 'positive socio-

economic rights' and (iv) transformative constitutionalism and the interdependency of socio-economic rights with civil and political rights.

The Constitution is often described as 'transformative'. This is because it protects both civil and political rights and socio-economic rights. Civil and political rights are often referred to as 'negative first generation rights'. This is because they restrict the power of government by preventing it from acting in ways – or passing laws – that violate the rights to guarantees such as: freedom of speech, assembly or to vote. Socio-economic rights are often described as 'positive second generation rights'. This is because they impose active duties on the government to provide people with the material goods necessary for human welfare and dignity, such as adequate housing, education, food, water, clothing or social security.

(4 marks)

Broadly, there are two reasons why the Constitution protects socio-economic rights and imposes justiciable (legally enforceable) duties on the government to provide them. First, because it recognises that people can only enjoy civil and political rights in a meaningful way if they live in conditions consistent with human dignity (*Soobramoney, Grootboom*). This means civil and political rights are interdependent with socio-economic rights because people cannot properly enjoy civil and political rights if they do not have adequate food, water, clothing or housing (*Soobramoney*). Third, the values of the Constitution and its preamble commit South African society to one of 'substantive equality' which means it expressly recognises that the state (and even private people) must take active positive steps to ensure conditions of poverty caused by apartheid and colonialism are properly addressed.

(3 marks)

People who oppose giving courts the authority to enforce socio-economic rights often rely on two arguments: (i) the separation of powers and (ii) polycentricity. First, the separation of powers argument says socio-economic rights should not be justiciable because giving courts authority to enforce them means that unelected judges must tell the elected branches of government (legislature and executive) how they should allocate tax revenue to provide social goods. Second, the polycentricity

argument says socio-economic rights should not be justiciable because the courts lack sufficient knowledge and expertise to tell the government how it should provide things such as housing, education, food or water.

(4 marks)

In the *Certification case*, the Constitutional Court rejected both arguments ('separation of powers' and 'polycentricity') when various organisations argued justiciable socio-economic rights were inconsistent with the constitutional principle of the separation of powers. The Court said two things in rejecting the separation of powers and polycentricity arguments. (2 marks)

First, it said the difference between enforcing 'negative' civil and political rights and 'positive' socio-economic rights is not as wide as often appears. This is because the enforcement of civil and political rights such as rights to vote (*August*), equality (*Pillay*) or a fair trial (*Jaipal*) often also have resource implications for the state. Second, it said that socio-economic rights can 'at the very least' be negatively enforced against the government by ordering it not to infringe the existing enjoyment of a socio-economic right. (2 marks)

This does not mean that courts will not respect the separation of powers when interpreting and enforcing socio-economic rights. This is because judges are not elected by the people. They are also arguably the least directly democratically accountable branch of government because they cannot be removed in elections. The Bill of Rights also recognises this problem because it subjects certain 'qualified socio-economic rights' to things such as housing or health care to three qualifications of: (i) 'reasonable legislative and other measures' (ii) 'progressive realisation' and (ii) 'available resources'. 'Reasonable measures' means how the government provides socio-economic rights should be determined – in the first instance – by the legislature and executive. 'Progressive realisation' recognises the government can only provide these rights over time and not immediately (*Soobramoney; Mazibuko; Grootboom*). 'Available resources' also recognises the state can only provide socio-economic rights according to what its present resources allow (*Soobramoney*). The Constitutional Court has also recognised these three qualifications only require the state to 'act reasonably' which does not require it to provide all socio-economic rights immediately on demand (*Grootboom, Mazibuko*). (4 marks)

Another point is that courts will give the elected branches of government (legislature and executive) a degree of leeway when determining whether they have complied with its positive duties to provide socio-economic rights. This is because the courts will test the measures adopted by the state according to a 'variable standard of scrutiny', i.e. it will test state measures more leniently or strictly depending on the facts of the case. This means the strictness of the standard of scrutiny will depend on: (i) whether the measures of the state exclude a vulnerable section of society or unfairly discriminate against them (*Khosa*); (ii) how seriously the state has taken its duties to provide the right; (iii) if ordering the state to provide it immediately involves 'polycentric issues' the court cannot properly determine (*Soobramoney*); or (iv) if the state has defined its own duties in legislation. The Constitutional Court has also recognised the state cannot be expected to provide a 'minimum core' of socio-economic rights to people immediately on demand to things such as housing (*Grootboom*), health care (*TAC*) or water (*Mazibuko*). Overall, this means the courts will not subject the steps the state has taken to provide socio-economic rights to an unreasonable or unfair standard – without considering the separation of powers – and will also give the state a degree of leeway in determining how the right should be provided, if the state acts 'reasonably'. (4 marks)

In conclusion, justiciable socio-economic rights are necessary to achieve the society the Constitution envisages and are not incompatible with the separation of powers. If socio-economic rights were not protected or justiciable, the vast majority of people would live in the same conditions they lived in under apartheid. The Bill of Rights and the courts both recognise the tension between justiciable socio-economic rights and the separation of powers but resolve this through: (i) the three qualifications of 'reasonable measures, progressive realisation and resource constraints' and (ii) the variable standard of scrutiny. The interdependence of socio-economic rights and civil and political rights means if the vast majority of people do not benefit from socio-economic rights, their respect for the Constitution and courts will be diminished. Justiciable socio-economic rights therefore actually achieve the objective of enhancing the respect of society for the Constitution and the courts – they do not diminish it. (2 marks)