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**To Be Reasonable or Not? A critique of the South African
Constitutional Court's Approach to Socio-economic Rights**

by

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Acknowledgements

Dear mum

Poverty dehumanises. It has a way of making one feel like they are not human. It is a feeling that good friend and brother of mine Zenzo Moyo calls a subaltern feeling. Its effect is to abort all that can ignite self confidence. I know you know very well what I am referring to. When I came of age, I could tell that you were a bright lady in your younger days. The reason why you did not become what you could have been became clearer to me - poverty. Your own family poverty is a story you have told me. Your body and soul has taken the blows of poverty. Your wrinkles are the drawings of the path we have all travelled to get here, here where we are. When I talk of this path, daughter and my beloved sister, sis Themby says 'talk of a broken family.' I wish we had a better family. You persevered though. You say the settler missionaries of colonial Rhodesia gave you education, the education with which you curved something for me to get education also. I can understand your faith, loyalty and commitment to the Roman Catholic Church.

Mum, when I got to South Africa, I heard of a man called Chris Hani. I read what he wrote, what he said, what they wrote about him, and also what kind of a man they say he was. From all I gather, he was a great man. He wanted something, if I remember well, he called *socialism*. He said it is not a complicated idea. It seems to make a lot of sense. It seems to make sure that those of the future will not go through what you personally and us as a family went through; the trappings and recycling of poverty. It promises to liberate. I will tell you more about it when we meet. When I become a noticeable person in the future, which I will, I will try it.

My teacher is called David Bilchitz. At the school I am at now we call them lecturers. For this specific subject I am doing, we call them supervisors. They are Professors. Professor is a title. It means the person is very educated. So his name becomes Professor David Bilchitz. Again I will explain in detail what it means when we meet. I would like you to meet him and thank him for all the guidance throughout this course. I assure you that all the good is from him and the bad I take unqualified responsibility. He is a good man.

The LLB was for us as a family as a key out of poverty. I know you might not understand what I wrote here, but this is for you mum. It has something do with liberation from poverty. I love you always.

Your last only son, *rugotwe rwenyu*

ABSTRACT

In societies that are plagued with inequality, socio-economic rights may be tangible rights in the hands of the poor. They may use these rights to agitate for a responsive state. Since they are rights, they create obligations. They are obligations against the state. This is hardly controversial. It is the nature of the obligation which brings a great deal of legitimate contestation. The two main 'camps' are the reasonableness test and the core minimum obligation. In this paper, I seek to look at the nature of the obligations imposed by socio-economic rights in the South African socio-economic rights jurisprudence. I set out descriptively what the reasonableness inquiry involves. I then look at the criticisms of the reasonableness test. I conclude that the reasonableness test has short comings. The alternative is the minimum core obligation. I set out its essential contents, and express preference of the minimum core. During the discussion on minimum core, it becomes evident that the minimum core shares some of the criticism of the reasonableness test. This takes me to tease a third way of adjudication of socio-economic rights. I call it the socio-economic rights reasonableness test. Central to the paper is an emphasis that unless rights are given content, the state made to prioritise the provision of socio-economic goods for the poor, the promises of the constitution will be a political and legal fraud.

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To Be Reasonable or Not? A critique of the South African Constitutional Court's Approach to Socio-economic Rights

Part I

1. Introduction

The Constitutional Court of South Africa ('the Constitutional Court' or 'the Court') in the Certification judgment confirmed that socio-economic rights were justiciable.¹ This represented a victory of those who had clamored for the constitutional recognition of socio-economic rights.² In practical terms, the justiciability of socio-economic rights has brought in "lawyers and judges in dealing with socio-economic deprivation."³ Socio-economic issues usually relate to the allocation of scarce national resources to a compendium of competing ends. Political questions and ultimately, the political approval of political actors generally rests on their ability to satisfy an expectant population with its multi-faceted demands.⁴ The "involvement of unelected

¹ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at para 78 ('Certification judgment'), *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 20.

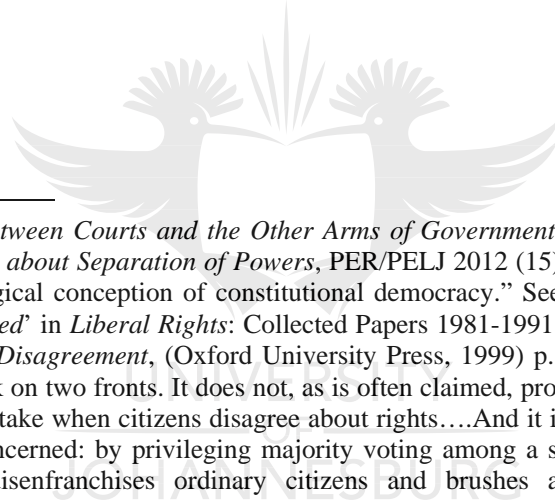
² Liebenberg, *Rights, Needs, Rights, and Transformation: Adjudicating Social Rights* Stell LR 2006 1 p.16, cf "The view of the South African Chamber of Mines and the South African Chamber of Business was that Socio-economic rights should not be included in the Bill of Rights as they were unattainable and were "bad for business": see "Socio-ekonomiese regte en die grondwet" Constitutional Talk 11 August to 25 August no 10.6, Devenish, *Some Thoughts on Socio-economic Rights*, 6 Potchefstroom Elec. L.J. 2003 footnote 3. This is so because, in Bilchitz, *Socio-economic rights, Economic Crisis and Legal Doctrine*, Lcon (2014), 14. Vol 12 No.3, p.713, Bilchitz observes that "[s]ocio-economic rights ultimately are designed to provide certain entitlements and protection for the interests of individuals in having access to certain socio-economic resources."

³ Bilchitz, *Does Sandra Liebenberg's New Book Provide a Viable Approach to Adjudicating Socio-economic Rights?* (2003) 3 SAJHR p. 546

⁴ See for instance in *Mazibuko v City of Johannesburg* 2010 4 (SA) 1 (CC) para 61 "... indeed it is desirable as a matter of democratic accountability that they should do so for it is their (political actors) programs and promises that are subjected to democratic popular choice."

lawyers, without a political constituency, in deciding on socio-economic issues brings into focus the role of courts on socio-economic issues in a constitutional democracy.”⁵

Given the deep-seated socio-economic inequalities which plague South Africa,⁶ socio-economic rights offer an avenue through which the promises of the Constitution of “healing the divisions of the past,” and “improve the quality of life of all citizens” can be realised.⁷ The object should be to free “the potential of everyone.”⁸ This is so because without socio-economic rights, people can hardly benefit from other civil and political rights. An uneducated person can hardly meaningfully participate in political questions of the country, neither can a hungry person. The Court in the *Certification*⁹ judgment therefore correctly reflected a rejection of pure capitalism and ignited the founding of a new South Africa on social democratic philosophy¹⁰ establishing a ‘... constitutional welfare state ...’¹¹ within the context of ‘thick democracy’.¹²



⁵ Davis, *The Relationship between Courts and the Other Arms of Government in Promoting Socio-economic Rights in South Africa: What about Separation of Powers*, PER/PELJ 2012 (15) 5 p.3/638. The learned author refers to this as “... a dialogical conception of constitutional democracy.” See also J. Waldron, *Rights and Majorities: Rousseau Revisited* in *Liberal Rights: Collected Papers 1981-1991*, (Cambridge University Press, 1993), ch. 16 and *Law and Disagreement*, (Oxford University Press, 1999) p.1353 who writes that “judicial review is vulnerable to attack on two fronts. It does not, as is often claimed, provide a way for society to focus clearly on the real issues at stake when citizens disagree about rights....And it is politically illegitimate, so far as democratic values are concerned: by privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality”.

⁶ Liebenberg (n2) p.5

⁷ *Grootboom* (n1) para 1

⁸ *Bilchitz, Placing Basic Needs at the Centre of Socio-economic Rights Jurisprudence* ESR Review vol No 1 p.2, *Grootboom* (n1) para 23, the Court held that “[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.” See also, *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at para 8.

⁹ *Certification* judgment (n1)

¹⁰ Devenish (n2) p.2

¹¹ Devenish (n2) p.3

¹² Davis (n5) p2,638

Assefa observes that “in recent years the jurisprudence of socio-economic rights has generated a lot of academic writings and jurisprudential debates.”¹³ This has certainly been true of South Africa since the Constitutional Court’s (‘the Court’) decision in *Grootboom*.¹⁴ As the Court held in *Grootboom*¹⁵ and *Treatment Action Campaign*,¹⁶ “the question now is not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case.”¹⁷ This remains a live debate.¹⁸

1.1 *Marking the lines, who says what?*

Bilchitz in his response to Christopher Mbazira warned against taking “... strong binary oppositions ... although they can be theoretically illuminating...”¹⁹ because “... they are rarely as rigid as they appear.”²⁰ Whilst bearing in mind the warning, it is submitted that in broad terms, the debate on the content of socio-economic rights has drawn two camps,²¹ those who advocate

¹³ Assefa, *Defining the Minimum Core Obligations –Conundrums in International Human Rights Law and Lessons from the Constitutional Court of South Africa* Mekelle University Law Journal Vol. 1 No.1, 2010, Bilchitz (n3) p.546, Liebenberg, *Socio-economic Rights; Adjudication under a Transformative Constitution* (Juta) (2010) p.5, *Grootboom* (n1) para 20, see also Devenish (n3) p.1

¹⁴ *Grootboom* (n1)

¹⁵ *Grootboom* (n1)

¹⁶ *Minister of Health v Treatment Action Campaign (No. 2)* 2002 (5) SA 721 (CC) (‘TAC’)

¹⁷ *Grootboom* (n1) para 20, *TAC* (n16) para 25, Assefa (n13) p.59, 70, Liebenberg (n2) p.5

¹⁸ Bilchitz (n3) p. 546 opines that “[d]etermining the meaning, and appropriate role of the judiciary in their enforcement were matters that were hotly contested during the drafting of the South African Constitution. Those questions have continued to elicit academic and judicial engagement subsequent to the adoption of the final Constitution in 1996.” See also Bilchitz, *Constitutionalism, the Global South and Economic Justice Draft 2* p.1 where Bilchitz observes that the Constitutions of India, Colombia and South Africa, because they have socio-economic rights, they have placed the distribution of resources at the “heart of constitutional enterprise.”

¹⁹ Bilchitz, *Judicial Remedies and Socio-economic Rights; A Response to Christopher Mbazira* ESR Review vol 9 no. 1 p. 9-10p. 9-10

²⁰ Bilchitz, (n19) 9-10

²¹ Steinberg, *Can Reasonableness Protect the Poor? A Review of South Africa’s Socio-economic Rights Jurisprudence* (2006) 123 South Africa Law Journal 264 p. 264 and 267

for a 'core minimum'²² obligation regime and those who endorse the Court's 'reasonableness'²³ approach.

1.2 *The task at hand*

I seek to engage with this debate. In the process, I will tease out a third way to the reasonableness and the minimum core obligation approaches. In order to do so, I will start descriptively and attempt to capture a number of key dimensions of the Court's jurisprudence on socio-economic rights. I will do this by considering the *Grootboom*, *Treatment Action Campaign* and *Mazibuko* cases which may fairly be described as the leading cases on socio-economic rights in South Africa. These cases firmly established the reasonableness test (as opposed to the minimum core obligation approach) as the test to be applied in the adjudication of socio-economic rights. From these cases, I will extract factors the Court considers to be relevant to a reasonableness test. I will then proceed to provide an understanding of the underlying justification for the use of the reasonableness test. The reasonableness test is considered by its advocates and the Court as best suited for South Africa. As I will tease out a third way, I will evaluate the justifications for the reasonableness test with a view to showing its inadequacies and its use as, "... a 'lost opportunity' to adjudicate the highly difficult and indeterminate content of socio-economic rights in concrete and practical terms."²⁴ I will then proceed to look at the alternative, the minimum core obligation approach. Its basic tenets will be outlined. It will be shown in explaining the basic tenets of the minimum core why the advocates of the minimum core obligation prefer the minimum core as opposed to the reasonableness test. Its basic tenets appear to answer to most of the criticism of the reasonableness test. I will then attempt an exposition of criticisms of the minimum core obligation. It will be shown that there is no merit in some of the criticism against the minimum core obligation. However, I will look at some of the criticism of the minimum core obligation and it will be shown to be similar to the criticism of the

²² Bilchitz, *Towards A Reasonable Approach to the Minimum Core: Laying the Foundation for Future Socio-economic Rights Jurisprudence* (2003) 19 SAJHR, Assefa (n13) p.69

²³ Steinberg (n21)

²⁴ Assefa (n13) p. 70.

reasonableness test. In other words, it will be suggested that the minimum core obligation, in material respects, suffers from some of the same limitations as the reasonableness test. I will then conclude that to achieve the stated laudable objectives and values of the Constitution, a third approach will be needed. This approach will be referred to as the socio-economic rights reasonableness test.

2 *The leading cases on socio-economic rights and the reasonableness test*

The Court has adjudicated three cases which may fairly be described as the leading foundational cases on socio-economic rights. These are *Grootboom*,²⁵ *Treatment Action Campaign*²⁶ and *Mazibuko*.²⁷ These cases established the reasonableness approach in the adjudication of socio-economic rights.

2.1 *Government of the Republic of South Africa and Others v Grootboom and Others*

In a case which the Court described as one which reminds “... us of the intolerable conditions under which many of our people are still living,”²⁸ the Court for the second time was called upon to interpret socio-economic rights after its early judgment in the *Soobramoney*²⁹ case (which will not be dealt with extensively here).

The Court was conscious that it had a role in alleviating the plight of people lest they “may be tempted to take the law into their own hands in order to escape ...” their difficult conditions³⁰ as “the Constitution’s promise of dignity and equality for all remains for many a distant dream.”³¹ The Court, it is submitted, with equal emphasis, noted that though “[p]eople (were) impelled by intolerable living conditions to resort to land invasions (but held that) [s]elf-help of this kind

²⁵ *Grootboom* (n1).

²⁶ *TAC* (n16)

²⁷ *Mazibuko* (n4).

²⁸ *Grootboom* (n1) para 2.

²⁹ *Soobramoney* (n8)

³⁰ *Grootboom* (n1) para 2.

³¹ *Grootboom* (n1) para 2, *Soobramoney* (n8) para 8.

cannot be tolerated...”³² This indicated an important awareness by the Court of the need to balance the realities people are facing and the demands of the law.³³ There is a need to reconcile these two ‘worlds’. This immediate awareness and recognition by the Court, it is submitted, is the nucleus of the adjudication of socio-economic rights disputes. The Court recognises the politics involved in matters of socio-economic provisions. The Court also recognises the role of the law in this politics. Politics often involves the allocation of scarce resources to a particular set of ends which are in competition.³⁴ It is, at least, trite that politics is ‘who gets what, when and how.’³⁵ In socio-economic rights cases therefore, the law meets politics, and this balancing of politics and law is done by the judiciary. I will refer to this instructive awareness and recognition by the Court as the *politico-legal* role of the judiciary or the Court.³⁶ This is to mean that the judiciary is playing both a political and legal role within a constitutional state committed to socio-economic rights.



³² *Grootboom* (n1) para 2.

³³ Davis (n5) “...constitutional politics ... is both nuanced and sometimes contradictory.” p.4/638

³⁴ Amitai Etzioni observes that “[t]here is no widely agreed upon definition of what is political. A definition that seems fruitful is to hold that political processes concern bridging power differences with society with those within the state, bridges that carry inputs both from society to the state (e.g., the results of elections) and from the state to society (e.g., Presidential speeches; legislation). The political realm also includes intrastate - but not intra-societal - processes concerning the application, reallocation, and legitimation of power” <http://www2.gwu.edu/~ccps/etzioni/A312.pdf> accessed 15 December 2015

³⁵ See Lasswell, *Who gets what, when, How*. Also, “Politics is exciting because people disagree. They disagree about how they should live. Who should get what? How should power and other resources be distributed? Should society be based on cooperation or conflict? And so on. They also disagree about how such matters should be resolved. How should collective decisions be made? Who should have a say? How much influence should each person have? And so forth. For Aristotle, this made politics the ‘master science’: that is, nothing less than the activity through which human beings attempt to improve their lives and create the Good Society.” https://www.palgrave.com/resources/sample-chapters/9780230363373_sample.pdf accessed 15 December 2015.

³⁶ Davis (n5) p.4/638 refers to this as ‘constitutional politics’. It is submitted that such description though instructive, is constrained in that it masks the politics of the role of the judiciary in adjudication of socio-economic rights in language that obscures the reality that in adjudication socio-economic rights the courts are involved in real politics, politik, and not only politics of a constitutional nature.

2.2 *The facts*

The matter concerned an indigent community which “... lived in appalling conditions, (and) decided to move out and illegally occupied (private owned) land.”³⁷ The community included women and children.³⁸ Before occupying the private property, they lived in Wallacedene which was also an informal settlement. In this informal settlement, the conditions were also terrible³⁹ with “... no water, sewage or refuse removal services and only 5% of the shacks had electricity.”⁴⁰ Cape Town rainy weather meant that their areas were routinely waterlogged.⁴¹ The settlement was also dangerously close to the main throughway.⁴² With no clear answers from the Municipality as to when they would be allocated houses, and the conditions remaining intolerable, they started to leave their place of residence and occupy private land. They built their shacks and shelter there.”⁴³ It is interesting to note that the land they occupied was private land and the government had earmarked the land for low cost housing.⁴⁴ It is not clear from the judgment how this land was to be procured from the private owner, and indeed what kind of tenure the occupants were to have.

The Court captured what it regarded as the ‘[t]he root cause of their problems (to be) the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing.’⁴⁵ Their living conditions were, without question, not only inhuman, but a health hazard. While the Municipality had a long term plan for housing, during

³⁷ *Grootboom* (n1) para 3.

³⁸ *Grootboom* (n1) para 7.

³⁹ *Grootboom* (n1) para 7.

⁴⁰ *Grootboom* (n1) para 7.

⁴¹ *Grootboom* (n1) para 7.

⁴² *Grootboom* (n1) para 7. The role of section 25 of the Constitution is beyond the scope of this paper. It is evident on the judgment how the land was to be acquired.

⁴³ *Grootboom* (n1) para 8.

⁴⁴ *Grootboom* (n1) para 8.

⁴⁵ *Grootboom* (n1) para 3, para 8, some had been on the waiting list for seven years.

the time in which they were waiting their turn, the Municipality had no policy to deal with their immediate crisis and or emergency needs.⁴⁶

At the instance of the Municipality, the community was evicted from the private land. In consequence, they were left homeless.⁴⁷ Their belongings were destroyed in scenes reminiscent of an apartheid *modus operandi*.⁴⁸ They were left with only plastic rudimentary sheeting to cover them on a sports field in the driving wind and rain of a Western Cape winter.⁴⁹ They approached the Court on an urgent basis and sought relief from the Court which essentially was to oblige the state to provide them “with adequate⁵⁰ basic shelter or housing until they obtained permanent accommodation.”⁵¹ The Respondents in the Court *a quo* and the Appellants in the Constitutional Court were representatives of all the spheres of the state responsible for housing.⁵² The constitutional claim was made on the basis of sections 26⁵³ and 28⁵⁴ of the Constitution.⁵⁵ The

⁴⁶ Grootboom (n1) para 5

⁴⁷ *Grootboom* (n1) para 3, see also para 9,

⁴⁸ *Grootboom* (n1) para 10.

⁴⁹ *Grootboom* (n1) para 10 and 11.

⁵⁰ The wording used was adequate shelter and not appropriate shelter. The paper will return to this difference in words and argue that it is a difference without substance and should not be taken too far.

⁵¹ *Grootboom* (n1) para 4 (underlining own emphasis-the paper will return to this below) .

⁵² *Grootboom* (n1) para 4.

⁵³ *Grootboom* (n1) para 13, 19, 20 and 21 and also see

Section 26 provides:

“(1) *Everyone has the right to have access to adequate housing.*

(2) *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*

(3) *No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”*

⁵⁴ Section 28 (1) (c) provides:

“(1) *Every child has the right –*

... .

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

⁵⁵ Constitution of the Republic of South Africa, 1996.

Court opined that these rights had to be “... considered within a cluster of other socio-economic rights.”⁵⁶

2.3 Reasonableness in *Grootboom*

As a signal of how the Court was to approach issues of socio-economic rights, the Court indicated that socio-economic rights have to be considered “carefully on a case-by-case basis.”⁵⁷ After considering the text of the Constitution and relevant international law, the Court concluded that “the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable.”⁵⁸ With this, the Court gave birth to the reasonableness test as the basis for the adjudication of socio-economic rights.⁵⁹

Using the reasonableness test as it had delimited, the Court held that the conduct of the government was unreasonable and therefore in breach of the relevant socio-economic rights. The Court held that government conduct was unreasonable in that it failed to respond to the needs of those in urgent need. The Court granted relief to vindicate the claimed right.⁶⁰ Other than a declaration of rights, the Appellants, were ordered to devise a “... programme (which had to) include reasonable measures ... to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.”⁶¹

The Court, almost being doctrinally prescriptive, gave indicators to use in evaluating the conduct of the state for reasonableness. I will refer to these indicators as the *Grootboom* test.

The Court stated that reasonableness must be evaluated in the context of the structure of the Constitution. The Constitution “... creates different spheres of government: national government,

⁵⁶ *Grootboom* (n1) para 19, 23 and 24.

⁵⁷ *Grootboom* (n1) para 20.

⁵⁸ *Grootboom* (n1) para 33.

⁵⁹ *Soobramoney* (n8), was a fuzzy and ambivalent. See also Bilchitz (n19) p.10, Davis (n5) p.8/638.

⁶⁰ There is debate on the appropriateness of the relief.

⁶¹ *Grootboom* (n1) para 99.

provincial government and local government.”⁶² It allocates responsibilities to the various spheres of government.⁶³ In this frame, all spheres of government are bound to the guarantees of the Bill of Rights. Reasonableness is thus evaluated in the “... context of the Bill of Rights as a whole”⁶⁴ and the rest of the Constitution. Each matter has a specific set of facts and context. Reasonableness, therefore, is also context sensitive.⁶⁵ It depends, for instance, on the geographic location of those who are claiming the right in issue.⁶⁶ It also depends on which level of the government sphere that is required to deliver on the claimed right.⁶⁷ Given the existing constitutional structure, the Court held that “[a] reasonable programme ... must clearly allocate responsibilities and tasks to the different spheres of government and ensure that appropriate financial and human resources are available.”⁶⁸ The programmes of the spheres of government or the relevant sphere of government “... must be able to realise the right.”⁶⁹ In other words, the programme must be capable of achieving what it sets to achieve.

The state may enact legislation to attend to the socio-economic right in issue.⁷⁰ However, merely having legislation will not be reasonable.⁷¹ A government programme crafted with the involvement of all spheres of government must be comprehensive⁷² and coherent.⁷³ It must be able to achieve the intended result.⁷⁴ Put simply, a government programme must be reasonable both from conception to implementation.⁷⁵ The programme has to be “... balanced and flexible

⁶² *Grootboom* (n1) para 39.

⁶³ *Grootboom* (n1) para 39.

⁶⁴ *Grootboom* (n1) para 44.

⁶⁵ *Grootboom* (n1) para 35-37.

⁶⁶ *Grootboom* (n1) para 34.

⁶⁷ *Grootboom* (n1) para 39.

⁶⁸ *Grootboom* (n1) para 39.

⁶⁹ *Grootboom* (n1) para 41.

⁷⁰ See footnote (n53).

⁷¹ *Grootboom* (n1) para 42.

⁷² *Grootboom* (n1) para 40.

⁷³ *Grootboom* (n1) para 41.

⁷⁴ *Grootboom* (n1) para 42.

⁷⁵ *Grootboom* (n1) para 42.

and make appropriate provision for attention to housing crises and to short, medium and long term needs.”⁷⁶

As stated above, the Municipality had an elaborate long-term plan for housing. It, however, did not have a plan to deal with emergency situations and respond to the immediate needs of a significant number of vulnerable people.⁷⁷ As one of the grounds on which the matter turned, reasonableness could not leave out those in desperate need in the anticipated hope of statistical advantage in the future.⁷⁸ Reasonableness required that as conditions changed, the program be reviewed⁷⁹ such that “[a] programme that excludes a significant segment of society cannot be said to be reasonable.”⁸⁰ This would be so because the Constitution enjoins the need to enhance “... human dignity, freedom and equality”⁸¹ as a component of the content of reasonableness.

The measures adopted had to be evaluated within the context of the available resources.⁸² The Court also indicated that the historical social and political circumstances of the country had to inform the evaluation of the reasonableness of government conduct.⁸³ It also appears that the Court doubted the capacity of some government institutions immediately to deliver on the rights promised by the Constitution.⁸⁴ This had to be because of the weakened state capacity in respect of human and financial resources given the history of the country.

It is important to emphasise what the Court held the test for reasonableness not to include. The Court expressly held that “[a] court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted or whether public money could have been better spent...”⁸⁵ Put differently, the Court held that a reasonable measure need not be the best since “[i]t is necessary to recognise that a wide range of possible measures could be

⁷⁶ *Grootboom* (n1) para 43.

⁷⁷ *Grootboom* (n1) para 43, 44.

⁷⁸ *Grootboom* (n1) para 44.

⁷⁹ *Grootboom* (n1) para 44.

⁸⁰ *Grootboom* (n1) para 44.

⁸¹ *Grootboom* (n1) para 44.

⁸² *Grootboom* (n1) para 46, 47 *Soobramoney* (n8) para 11.

⁸³ *Grootboom* (n1) para 43.

⁸⁴ *Grootboom* (n1) para 43.

⁸⁵ *Grootboom* (n1) para 43.

adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness.”⁸⁶ Therefore “[o]nce it is shown that the measures (are reasonable), this requirement is met.”⁸⁷

2.4 *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*

2.4.1 *The facts*

Having set the reasonableness test as the basis of adjudication of socio-economic rights, the reasonableness test was the basis of the Court’s decision in *Treatment Action Campaign*⁸⁸ (‘TAC’) case. It dealt with the government’s response to HIV/AIDS, “... an incomprehensible calamity and the most important challenge facing South Africa since the birth of our new democracy,”⁸⁹ Civil society challenged the constitutionality of the government’s response.⁹⁰

The government, as part of “... a formidable⁹¹ array of responses to the pandemic, devised a programme to deal with mother-to-child transmission of HIV at birth. The drug nevirapine had

⁸⁶ *Grootboom* (n1) para 43.

⁸⁷ *Grootboom* (n1) para 41, see also *Glenister v President of the Republic of South Africa* 2011 7 BCLR 651 (CC) para 61 where the court held that “[t]his Court will not be prescriptive as to what measures the state takes as long as they fall within the range of possible conduct that a reasonable decision maker in the circumstances may adopt.”

⁸⁸ *TAC* (n16).

⁸⁹ *TAC* (n16) para 1 and also 19 and para 131.

⁹⁰ “The Treatment Action Campaign (TAC) was founded in December 1998 to campaign for access to AIDS treatment. It is widely acknowledged as one of the most important civil society organisations active on AIDS in the developing world. One of its most significant victories was the 2002 Constitutional Court ruling in which the South African government was ordered to provide anti-retroviral drugs to prevent transmission of HIV from mothers to their babies during birth. In the years following the judgment the TAC’s campaigns were instrumental in securing a universal government-provided AIDS treatment programme, which has since become the world’s largest.” http://www.tac.org.za/about_us (accessed 10 July 2015).

⁹¹ See also *TAC* (n16) para 40 and para 84 to 87. With respect, this is an interesting phrase employed by the Court. It might have been meant to placate the executive given the conclusion the Court came to. It could have been meant to indicate that the Court was not in a combative mood with the executive. See *TAC* (n16) para 120 the Court observed that “[i]n our country the issue of HIV/AIDS has for some time been fraught with an unusual degree of political, ideological and emotional contention. This is perhaps unavoidable, having regard to the magnitude of the catastrophe we confront. Nevertheless it is regrettable that some of this contention and emotion has spilt over into this case. Not only does it bedevil future relations between government and non-governmental agencies that will perforce have to join in combating the common enemy, but it could also have

been shown to be effective for this purpose as it helps reduce the transmission of HIV by the mother to her child at birth. The problem with the government's policy in this case was that it "... imposed restrictions on the availability of nevirapine in the public health sector."⁹² The government made the drug available at selected sites, two for each province⁹³, one in an urban set up and another in a rural area.⁹⁴ In consequence, doctors in other government hospitals other than the pilot hospitals could not prescribe⁹⁵ the drug to patients notwithstanding their professional medical opinion that they should do so.⁹⁶ This was despite the uncontested fact that the manufacturers of the drug had offered to provide it to the South African government for free⁹⁷ for a period of 5 years.⁹⁸ The situation which obtained was that the government had restricted the provision of nevirapine to areas identified as pilot projects, and there was no national programme. Neither were there time frames as to when there was to be a national programme.⁹⁹ In its justification, the government, amongst other things, argued that it doubted the "safety and efficacy of the drug"¹⁰⁰ and needed time to research.¹⁰¹ It is important to state that the drug had been approved by the Medicines Control Council¹⁰² and, as such, was available at

rendered the resolution of this case more difficult." See also para 95. This was an early indicator of the slippery ground the judiciary have to navigate in adjudication of socio-economic rights.

⁹² *TAC (n16) para 4, 17.*

⁹³ *TAC (126) para 10, 14 and 41.*

⁹⁴ *TAC (n16) para 17.*

⁹⁵ *TAC (n16) para 41, 44*

⁹⁶ *TAC (n16) para 11*

⁹⁷ *TAC (n16) para 44.* Affidavit of Dr Ntsaluba. He says: "I admit that the medicine has been offered to the first to ninth respondents for free for a period of five years by the manufacturer."

⁹⁸ *TAC (n16) para 11, 19, 48 and 73.* This essentially undercut an argument about resources constrain by the state see *TAC (n26) para 71.* The Court acknowledged that (*TAC (n16)* at para 15 "... an important reason for this decision was that government wanted to develop and monitor its human and material resources nationwide for the delivery of a comprehensive package of testing and counselling, dispensing of nevirapine and follow-up services to pregnant women attending at public health institutions." The Court opined that "[a]ll of this obviously makes good sense from the public health point of view."

⁹⁹ *TAC (n16) para 2*

¹⁰⁰ *TAC (n16) para 10 and 11*

¹⁰¹ *TAC (n16) para 14*

¹⁰² The Medicines Control Council "... is a specialist body created by the Medicines and Related Substances Control Act 101 of 1965 to determine the safety of drugs before their being made available in South Africa. In terms of this Act registration of a drug by definition entails a positive finding as to its quality, safety and efficacy." *TAC (n16) para 12.*

private hospitals and could be prescribed by doctors in such institutions. It was just not available at all government hospitals. The case concerned the constitutionality of this restricted availability of the drug at government hospitals.

The *TAC*, "... contended that these restrictions are unreasonable when measured against the Constitution, which commands the state and all its organs to give effect to the rights guaranteed by the Bill of Rights."¹⁰³ It contended that:

"... the measures adopted by government to provide access to health care services to HIV- positive pregnant women were deficient in two material respects: first, because they prohibited the administration of nevirapine at public hospitals and clinics outside the research and training sites; and second, because they failed to implement a comprehensive programme for the prevention of mother-to-child transmission of HIV."¹⁰⁴

They based their claim on sections 7 (2),¹⁰⁵ 8 (1),¹⁰⁶ 27(1)¹⁰⁷ and 28 (1)¹⁰⁸ of the Constitution. In consequence, they contended that government conduct was inconsistent with the Constitution and "... in breach of its international obligations as contained in a number of conventions that it has both signed and ratified."¹⁰⁹

¹⁰³ *TAC* (n16) para 4

¹⁰⁴ *TAC* (n16) para 44

¹⁰⁵ 7 (2) *the state must respect, protect, promote and fulfil the rights in the Bill of Rights.*

...

¹⁰⁶ 8 (1) *the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.*

¹⁰⁷ 27(1) *Everyone has the right to have access to –*

(a) *health care services, including reproductive health care;*

....

(2) *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*

....

¹⁰⁸ 28(1) *Every child has the right –*

....

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

¹⁰⁹ *TAC* (n16) para 19

The issue of justifiability of socio-economic rights having been reaffirmed,¹¹⁰ the Court held that the legal question before it was “... what (was) to happen to those mothers and their babies who cannot afford access to private health care and do not have access to the research and training sites?”¹¹¹ In line with its pre-stated jurisprudence on adjudication of socio-economic rights, the reasonableness test as set out in *Grootboom*, the Court formulated the real dispute in the matter before Court as being “... whether ... it was reasonable to exclude the use of nevirapine for the treatment of mother-to-child transmission at those public hospitals and clinics where testing and counselling are available and where the administration of nevirapine is medically indicated.”¹¹²

2.4.2 Court's findings

The Court proceeded on the understanding of *Grootboom*¹¹³ that its duty was to consider whether “... the measures taken in respect of the prevention of mother-to-child transmission of HIV are reasonable.”¹¹⁴ Restating *Grootboom*, the Court held that reasonableness is measured against the social and historic context of the country.¹¹⁵ The Court held that “[t]he state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society.”¹¹⁶ This, it is submitted, clearly was said on the presumption that the Court had settled the meaning and content of the term “reasonable measures.” The Court restated, as it did in *Grootboom*, that “[i]t is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations.”¹¹⁷ The measures had to be reasonable. As if to indicate that the Court was conscious that the policy choices on the practical

¹¹⁰ TAC (n16) para 25

¹¹¹ TAC (n16) para 17

¹¹² TAC (n16) para 50

¹¹³ *Grootboom* (n1), the Court also referred to *Soobramoney* (n30)

¹¹⁴ TAC (n16) para 17

¹¹⁵ TAC (n16) para 25

¹¹⁶ TAC (n16) para 36

¹¹⁷ TAC (n16) para 36, 110 see also and compare with *Eldridge v British Columbia (Attorney General)* (1997) 151 DLR (4th) 577 (SCC) para 96.

implementation of socio-economic rights lay in the political arena, the Court restricted its role on socio-economic issues to "... (guaranteeing) that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1."¹¹⁸

The Court held that the costs the government was concerned about in the provision of the drug were "... relevant to the comprehensive programme to be established at the research and training sites. They are not, however, relevant to the provision of a single dose of nevirapine to both mother and child at the time of birth."¹¹⁹ The same was true in respect of the argument about alleged capacity constraints¹²⁰ of the government.¹²¹ This was more so because the drug was being offered for free for a period of five years. If costs were there, the Court held the costs to be insignificant. In any event, as the matter weaved its way in the Courts, the government had increased its budget to address the pandemic from R350 million to R1 billion; a further indication that resource constraints were not really the main factor.¹²²

The Court also held that it was "... clear from the evidence that the provision of nevirapine will save the lives of a significant number of infants even if it is administered without the full package and support services that are available at the research and training sites."¹²³ There were some places where there were counselling and testing facilities and personnel, but the government policy restricted the availability of nevirapine to the test sites. The government policy was held to be too inflexible. On the efficacy argument, the Court held that "... the wealth of scientific material produced by both sides makes plain ... nevirapine ... remains to some

¹¹⁸ *TAC* (n16) para 36. This is particularly important in that the paper argues that the role of the Courts in socio-economic matters is a politico-legal one. It is also against the background that the government had argued that should the Court intrude much into policy choice issues, the Court would be infringing on the doctrine of separation of powers as the "... powers the making of policy is the prerogative of the executive and not the courts, and that courts cannot make orders that have the effect of requiring the executive to pursue a particular policy." However, this is not unique to adjudication of socio-economic rights. See also para 97 to 101. The Court must "[u]ltimately... (find) it possible to cut through the overlay of contention and arrive at a straightforward ... conclusion." *TAC* (n16) para 21

¹¹⁹ *TAC* (n16) para 49

¹²⁰ See also *TAC* (n16) para 88

¹²¹ *TAC* (n16) para 66

¹²² *TAC* (n16) para 120

¹²³ *TAC* (n16) para 57

extent efficacious in combating mother-to-child transmission ...”¹²⁴ The Court acknowledged and accepted that a patient might develop resistance to the drug. However, so the Court held, given the potential benefit,¹²⁵ on the scales, it was better to provide the drug than not to. The risk was worth taking. On the submission about the safety of the drug, the Court held that it was a hypothetical argument to question the safety of the drug.¹²⁶ The drug had been approved by the World Health Organisation and the Medicines Control Council.¹²⁷ These two bodies approve the use of medication at international level and in South Africa respectively. The approval implied that the drug had been certified as safe to use.

On the remedy, the government argued that the doctrine of separation of powers enjoined the judiciary to defer to the executive and only make declaratory orders; the government would then go ahead and formulate policy to meet the constitutional imperative as stated by the Court.¹²⁸ The Court rejected this argument and restated that it is required by the Constitution, where the need arises, to make mandatory orders which impact on government policy.¹²⁹

In consequence, the Court held that the relevant government policy was unreasonable within the meaning of the *Grootboom* reasonableness test in that “ [t]he policy of confining nevirapine to research and training sites fails to address the needs of mothers and their newborn children who do not have access to these sites.”¹³⁰ Referring to *Grootboom*, the Court opined that the policy left the vulnerable¹³¹ in a dire situation pending the completion of the government pilot scheme.

¹²⁴ TAC (n16) para 58 and 72

¹²⁵ TAC (n16) para 59

¹²⁶ TAC (n16) para 60. The Court had every reason to be dismissive of this submission. In the absence of a review challenge to the approval of the drug under the Medicines Control Council as legislated in Drugs Act, the Court to proceed on the basis that the drug was safe.

¹²⁷ TAC (n16) para 61

¹²⁸ TAC (n16) para 22, 96-98

¹²⁹ TAC (n16) para 98

¹³⁰ TAC (n16) para 67

¹³¹ TAC (n16) para 70. at para 78, the Court, with reference to children, opined; “Their needs are “most urgent” and their inability to have access to nevirapine profoundly affects their ability to enjoy all rights to which they are entitled. Their rights are “most in peril” as a result of the policy that has been adopted and are most affected by a rigid and inflexible policy that excludes them from having access to nevirapine.” See also para 79

¹³² The government program lacked the flexibility¹³³ to address short, medium and long term needs.¹³⁴

2.4.3 Reasonableness in TAC

The Court reaffirmed the meaning and indicators to be applied in assessing the reasonableness of government conduct. The factors identified above in *Grootboom*, it is submitted, could be regarded as restated in *TAC*. In fact, the Court quoted with approval and restated most of what it said in *Grootboom*. The Court added the element that the “best must not be the enemy of the good.”¹³⁵ It is unreasonable to allow children to die whilst developing the best programme possible when there are immediate measures, which may not be the best, which can immediately save a life. Essentially, reasonableness is context sensitive. The reasons provided by the government are tested for cogency. From the submissions of the parties, the Court paid attention to the scientific evidence before it. The different experts postulated their views and offered the outcomes of their various researches as a basis for their conclusions. Statistical data showed the structural readiness of government systems and institutions to attend to the provision of the drug. From this, it is submitted that, where the government justifies the reasonableness of its decisions on scientific notions, such ideas should be clear, coherent, reliable, credible, consistent and self-sustaining. It must be capable of rational demonstration both logically and scientifically. It also has to take into account and cater for different social –classes, those who can afford to acquire the socio-economic good in issue on their own and those who cannot afford.¹³⁶ Further, where there is an identifiable risk of taking a given decision, the Court, in assessing reasonableness, will conduct an assessment which can, it is submitted, be referred to as a type of proportionality test. Where resource constraints are not an issue of central concern, for instance where the realisation of the right is at no cost to the government, stronger reasons are necessary to justify

¹³² *TAC* (n16) para 68

¹³³ *TAC* (n16) para 80

¹³⁴ *TAC* (n16) para 68

¹³⁵

¹³⁶ *TAC* (n16) para 70

not realising a right. All these factors are considered holistically with no one factor being singularly determinative. It is unreasonable not to provide a socio-economic right where there are no resource constraints that prevent the government from doing so.

Grootboom and *TAC* stated and restated respectively, that there is a positive obligation on the government to fulfill socio-economic rights as contemplated in section 26 and 27. This had at first been recognised in *Soobramoney*.¹³⁷ There is a positive duty to do something. The government must act, and indeed act on its own without being requested to do so.¹³⁸ This duty to act is part of the reasonableness of government conduct. From *TAC*, particularly in view of the constant reference and direct quotation of *Grootboom*, it is submitted that reasonableness is a requirement that has two parts. First, the government must act, secondly, justify why it acted the way it did. Reasonableness then means government's ability to justify its chosen course of action. Government has to provide reasons for each and every policy choice made. If government has a policy, it has acted and therefore satisfied the first part of the obligation.¹³⁹ If the policy is justified, the reasonableness test is satisfied. In a sense, while there can be pointers to what reasonableness is, the facts of each particular case will indicate what is reasonable and what is not.

2.5 *Mazibuko v City of Johannesburg*

2.5.1 *The facts*

For the first time,¹⁴⁰ the Court was confronted with a matter which turned on the "... proper interpretation of section 27(1) (b) of the Constitution. Section 27 (1) (b) provides that everyone

¹³⁷ *Soobramoney* (n8). v Minister

¹³⁸ *TAC* (n16) para 23

¹³⁹ This in part, it is submitted, is what the Court meant in *Grootboom* when it held at paragraph 42 that legislative measures may not be enough. In a way, legislative measures are acting, which is fulfilling the first part of the obligation. The second part would be justification of the legislative content of the legislation (or policy) in issue.

¹⁴⁰ *Mazibuko* (n4) para 38

has the right to have access to sufficient water.”¹⁴¹ The applicants were poor people¹⁴² who lived in, Phiri,¹⁴³ Soweto. They lived in separate households.¹⁴⁴ They were low income persons. In terms of the City of Johannesburg (‘the City’) water supply policy, the city supplied water to the residents of Soweto and charged at a deemed consumption rate.¹⁴⁵ As the term deem suggests, the City charged for the water as if the resident concerned had in fact consumed the amount of water it was charging. The City also charged a flat rate for the water supply. On the revenue side, there was a general culture of non-payment of the flat rates. This negatively affected the revenue stream of the City, in turn affecting its ability to recapitalize its water supply infrastructure. The municipal water-supply pipes and infrastructure in general had decayed and there were a lot of water leakages. As a way of ameliorating the situation, the City resolved to institute three levels of water consumption options.¹⁴⁶ First, level 1 provided a tap within 200 metres of each

¹⁴¹ *Mazibuko* (n4) para 1. See also

Section 27 (1) Everyone has the right to have access to—

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

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

¹⁴² *Mazibuko* (n4) para 10.

¹⁴³ *Mazibuko* (n4) para 10.

¹⁴⁴ *Mazibuko* (n4) para 4.

¹⁴⁵ Deemed consumption meant that a flat rate was charged to the consumers. The City assumed that the residents used the amount they were being charged. There was no reading of consumption per household, but rather a ‘blanket’ consuming was assumed.

¹⁴⁶ *Mazibuko* (n4) para 14, 78 and 79.

Section 3 of the City’s Water Services By-laws, 2003:

“(1) The Council may provide the various levels of service set out in subsection (2) to consumers at the fees set out in the schedule of fees, determined by the Council.

(2) The levels of service shall comprise—

(a) Service Level 1, which must satisfy the minimum standard for basic water supply and sanitation services as required in terms of the Act and its applicable regulations, and must consist of—

(i) a water supply from communal water points; and

dwelling.¹⁴⁷ Second, level 2, was “the provision of a tap in the yard of a household which (had) a restricted water flow so that only 6 kilolitres of water are available monthly.”¹⁴⁸ Third, level 3,

(ii) a ventilated improved pit latrine located on each site;

And

(b) Service Level 2, which must consist of–

(i) an unmetered water connection to each stand with an individual yard standpipe;

(ii) a water borne connection connected to either a municipal sewer or a shallow communal sewer system; and

(iii) a pour flush toilet which must not be directly connected to

the water installation; which service must be provided to consumer at the fees set out in the schedule of fees determined by the Council, provided that–

(aa) the average water consumption per stand through the unmetered water connection for the zone or group of consumers in the zone does not exceed 6kl over any 30 day period;

(bb) the water standpipe is not connected to any other terminal water fittings on the premises;

(cc) in the case of a communal sewer having been installed, a collective agreement has been signed by the group of consumers accepting responsibility for the maintenance and repair of the communal sewer; and

(dd) the Council may adopt any measures necessary to restrict the water flow to Service Level 2 consumers to 6kl per month.

(c) Service Level 3,

which must consist of–

(i) a metered full pressure water connection to each stand;

and

(ii) a conventional water borne drainage installation connected to the Council’s sewer.

(3) If a consumer receiving Service Level 2 contravenes subparagraph (aa) or

(bb) to subsection (2)(b)–

(a) the Council may install a prepayment meter in the service pipe on the premises; and

(b) the fees for water services must be applied in accordance with section 6

(4) The level of service to be provided to a community may be established in accordance with the policy of the Council and subject to the conditions determined by the Council.”

¹⁴⁷ Mazibuko (n4) para 14.

was a “metered connection.”¹⁴⁹ The Applicants contended that “the City’s policy in relation to the supply of free basic water, and particularly, its decision to supply 6 kilolitres of free water per month to every accountholder in the city (the Free Basic Water policy) (was) in conflict with section 27 of the Constitution.”¹⁵⁰ Further, they contended that the installation of pre-paid meters was unlawful.¹⁵¹ The Applicants also contended that that since the 6 kilolitres were being supplied to rich and poor households and allocated per stand rather than per person,¹⁵² the supply would be insufficient for larger households.¹⁵³ They also argued that since the City made the policy under a misconception of law in that “the City did not consider that it was bound to provide any free water to citizens,” the policy stood to be set aside.¹⁵⁴ Finally, they contended that the provision of 6 kilolitres of free water was inflexible given that a household may experience emergencies requiring more water.

2.5.2 *The Court findings*

The case took interesting turns as it weaved its way to the Constitutional Court. The South Gauteng High Court, per Tsoka J, held that the conduct of the City was inconsistent with the Constitution. He ordered that the City supply the residents with a minimum of 50 litres of water per day.¹⁵⁵ On appeal to the Supreme Court of Appeal, the Court held that the City was obligated to supply a minimum of 42 litres¹⁵⁶ of water per day. The Minister of Water, in regulation 3(b) of the National Water Standards Regulations, had determined the minimum supply to be 25 litres¹⁵⁷ per day or 6 kilolitres per household per month. The differences in the quantities which the

¹⁴⁸ *Mazibuko* (n4) para 14.

¹⁴⁹ *Mazibuko* (n4) para 14.

¹⁵⁰ *Mazibuko* (n4) para 6.

¹⁵¹ *Mazibuko* (n4) para 6.

¹⁵² *Mazibuko* (n4) para 82.

¹⁵³ *Mazibuko* (n4) para 82.

¹⁵⁴ *Mazibuko* (n4) para 82.

¹⁵⁵ *Mazibuko* (n4) para 26 and 27.

¹⁵⁶ *Mazibuko* (n4) para 29.

¹⁵⁷ Regulations relating to compulsory national standards and measures to conserve water, Government Gazette, Gazette No 22355, Notice R509 of 2001 (8 June 2001) published in terms of section 9 of the Water Services Act

different Courts held the City to be constitutionally obliged to give the residents related to the approach adopted by the High Court and the Supreme Court of Appeal to the expert evidence presented before the Court. The Constitutional Court, however, refused to set the amount the City was obliged to supply. The Constitutional Court accepted what “ ... (emerged) from research by the World Health Organisation in 2003 to which two of the experts ... referred, (that) what constitutes sufficient water depends on the manner in which water is supplied and the purposes for which it is used.”¹⁵⁸ The experts differed on what constituted sufficient water. For what the Court termed ‘institutional and democratic’ reasons, the Court held that it was ill-equipped to decide what constituted sufficient water.¹⁵⁹ This mirrored the Court’s rejection of the minimum core obligation.

The Court determined that the matter it had to adjudicate on was “... what obligations the right of access to sufficient water imposes upon the state.”¹⁶⁰ As such, the “ ... primary question in this case ... (was) the extent of the state’s positive obligation under section 27(1)(b) and section 27(2)”¹⁶¹ of the Constitution. To determine this issue, the Court called to memory its previous decisions in *Grootboom* and the *TAC* cases.¹⁶² The Court reaffirmed its approach to socio-economic rights adjudication as set out in *Grootboom* and *TAC*. The test adopted was a reasonableness test.¹⁶³ At this stage in the development of South Africa’s constitutional jurisprudence on socio-economic rights, the idea of the minimum core obligation had been held, at best, to be inopportune at that stage, and at worst, rejected.

Overall, the Court held that the government must be candid.¹⁶⁴ On the free basic water issue, the Court reaffirmed its unwillingness to adjudicate socio-economic rights on the basis of a minimum core obligation, even when it appears as a minimum amount set by legislation. The test was whether the conduct of the City was reasonable. In this case, the submission of the

108 of 1997

¹⁵⁸ *Mazibuko* (n4) para 62.

¹⁵⁹ *Mazibuko* (n4) para 62.

¹⁶⁰ *Mazibuko* (n4) para 46.

¹⁶¹ *Mazibuko* (n4) para 48.

¹⁶² *Mazibuko* (n4) para 48 and 49.

¹⁶³ *Mazibuko* (n4) para 68.

¹⁶⁴ *Mazibuko* (n4) para 94, 100 and 102.

Applicants appeared to require something more than the minimum core.¹⁶⁵ It required the City to be obliged to provide the quantity of water necessary for a dignified life. The court held that the submission had to fail for the same reasons the minimum core obligation failed. The Court rejected the argument that the City was obligated to provide a minimum amount of water. In line with the Court's reasoning in previous cases, the Court held that it was not for the Court to determine the amount of free water the City was obliged to provide. In the result, unlike the holding of the Supreme Court of Appeal, the Court held that there was no misconception on the part of the City of its legal obligations. The Court reaffirmed that in relation to socio-economic rights, as in this case the right to water, the right does not entitle a litigant to receive, on demand, sufficient water. The state is required to do what is reasonable given the available resources to progressively realise the right of access to sufficient water.¹⁶⁶

On the purported distinction between rich and poor on the provision of a quantum of free basic water, the Court held that the reasons provided by the City were reasonable.¹⁶⁷ The rationale of the cross-subsiding the poor from the tariffs of the rich withstood challenge. The Court also found as unassailable the reasons advanced by the City for making allocations of water per household rather than per individual. The Court held that "... there was cogent evidence ..." ¹⁶⁸ which formed the basis of the City's policy. It also made administrative sense to do it that way.¹⁶⁹ On the evidence presented, an uneven allocation of water was inevitable.¹⁷⁰ The Court further held that, compared to the national prescribed amount, the amounts of free water allocated by the City were even more than what the Applicants prayed for. Given the complexity of the situation, the averages extrapolated from the data available were a reasonable basis for decision.¹⁷¹ It was also shown that the City adopted measures to deal with emergencies. It

¹⁶⁵ *Mazibuko* (n4) para 56.

¹⁶⁶ *Mazibuko* (n4) para 50.

¹⁶⁷ *Mazibuko* (n4) para 83.

¹⁶⁸ *Mazibuko* (n4) para 84.

¹⁶⁹ *Mazibuko* (n4) para 84.

¹⁷⁰ *Mazibuko* (n4) para 89.

¹⁷¹ *Mazibuko* (n4) para 89. Consultation suggests a right to be heard in administrative law terms. As will be discussed below, reasonableness has been taken to have some administrative law inclination.

continuously made its policy responsive to the needs of the residents of Soweto.¹⁷² The City continuously revised its policy. The policy was held to be flexible. The indigent policy showed how the City grappled with the best way to attend to the provision of water. The indigent policy, absent a better alternative, catered for those with lesser needs meaning they in fact had, in real terms, what the Applicants were asking for. Given the continuous review, inflexibility was not established. The conduct of government was therefore held to be reasonable.

2.5.4 Reasonableness in *Mazibuko*

The Reasonableness test as set in *Mazibuko*, it is submitted, mirrors the *Grootboom* test in all material respects. As a point of general departure, for government conduct to be reasonable, it “... should set the targets it wishes to achieve in respect of social and economic rights clearly.”¹⁷³ If the government targets are unclear, they are unreasonable within the meaning of the *Mazibuko* reasonableness test. Accepting that there are various ways of attending to socio-economic rights, reasonableness “... requires government to explain the choices it has made.”¹⁷⁴ Of necessity, the government “... must provide the information it has considered and the process it has followed to determine its policy.”¹⁷⁵ This information must be meaningfully detailed¹⁷⁶ and engage on the various options available to the government.¹⁷⁷ It must show sufficient

¹⁷² *Mazibuko* (n4) para 97.

¹⁷³ *Mazibuko* (n4) para 70.

¹⁷⁴ *Mazibuko* (n4) para 71.

¹⁷⁵ *Mazibuko* (n4) para 71.

¹⁷⁶ *Mazibuko* (n4) para 71.

¹⁷⁷ *Mazibuko* (n4) para 99. At para 99 “Mr Seedat described how the City has grappled with the question as to whether the provision of services should be on a universally available basis or on a means tested basis. His affidavit neatly captures the advantages and disadvantages of both systems: “There are therefore two broad approaches to administering the current social package. One approach – a so-called universalist approach – gives benefits to all households regardless of income. This approach is easy (and therefore cheaper) to administer, but it has the disadvantage of not being targeted only at poor households. Wealthy households that do not really need subsidies also benefit. The second approach – a so-called means testing approach – evaluates whether applicants do or don’t have the means to pay for a service. This approach targets the benefit effectively towards poor households, but it also has some disadvantages. One disadvantage is that it asks poor households to present themselves to the City as poor. This is often regarded as undignified, and it results in a situation where many potential beneficiaries prefer not to come forward. Another disadvantage is that means

demonstrable cause in light of the available options. On the process the government has taken, such ought to be transparent, procedurally and substantively open to involvement not only by the rich and educated, but by the poor and vulnerable. This may relate to the accessibility of meeting places where the issues are canvassed by the various government departments, and to the language used in the documents. The decision-makers must bring to bear an open mind susceptible to being persuaded about alternatives.

The Court also flags an important question on the content of reasonableness.¹⁷⁸ It insinuates, without definitively deciding, that even where a sphere of government has met a set minimum of the socio-economic rights prescribed in legislation, regulation and or policy, that in and of itself does not mean that the standard of reasonableness has been met.¹⁷⁹ It is submitted that what the Court in essence was holding was that reasonableness is a function of available resources.¹⁸⁰ The more resources the government can demonstrate or be demonstrated to have, the more is expected. It is unreasonable to fail to utilize available resources for the constitutional right claimed. Reasonableness is context sensitive.

For government conduct to be reasonable, it must be based on cogent evidence.¹⁸¹ The evidence must be clear.¹⁸² It will be strenuously tested through the lenses of a comprehensive¹⁸³ analysis of any data, particularly statistical data, and financial data¹⁸⁴ from authoritative sources.¹⁸⁵ The government should persuade the Court that the chosen policy is administratively prudent and

testing is extremely onerous administratively. The system is expensive to run. It is time consuming. It is open to fraud. And it also requires that the City has the ability to check whether the applicants' statement of income is correct or not, and keep this information continuously updated. The City must constantly make difficult decisions between systems which, while more suitable, are prohibitively expensive to run and those that, while imperfect, are more cost-effective."

¹⁷⁸ *Mazibuko* (n4) para 74.

¹⁷⁹ *Mazibuko* (n4) para 74.

¹⁸⁰ The Court acknowledged the difficulties which arise in such a challenge see *Mazibuko* (n4) para 76.

¹⁸¹ *Mazibuko* (n4) para 84.

¹⁸² *Mazibuko* (n4) para 84.

¹⁸³ *Mazibuko* (n4) para 134 "... evidence establishes that the process followed in the implementation of the project was thorough and comprehensive."

¹⁸⁴ *Mazibuko* (n4) para 140-141.

¹⁸⁵ *Mazibuko* (n4) para 86-89.

efficient.¹⁸⁶ It, in the consequence, must make financial sense.¹⁸⁷ Also, reasonable measures must be based on a proper and correct understanding of the legal frame-work within which the government is enjoined to deliver on a claimed socio-economic right.¹⁸⁸ With a clear understanding of the legal framework, it is desirable that people be consulted.¹⁸⁹ However, this does not mean every single individual must be consulted.¹⁹⁰ There must simply be the possibility of an aggrieved person being able to approach the government for a tailor-made solution within the available options.¹⁹¹ The cost implications of a decision ought to be balanced against the expected benefit.¹⁹² It must also respond, progressively, to short and medium term concerns and needs.¹⁹³ This envisages a constant review¹⁹⁴ of government policy with a view to improve it.¹⁹⁵ A failure to do so is unreasonable. A policy which might have been reasonable at the point of formulation and initial implementation may become unreasonable because it has not been reviewed.¹⁹⁶ Progressiveness¹⁹⁷ is a litmus test in the evaluation of reasonableness.¹⁹⁸ The government is required to do what is reasonable, not what is impossible.¹⁹⁹ On the whole, reasonableness is a mosaic of factors.²⁰⁰

¹⁸⁶ *Mazibuko* (n4) para 89.

¹⁸⁷ *Mazibuko* (n4) para 89.

¹⁸⁸ *Mazibuko* (n4) para 85.

¹⁸⁹ *Mazibuko* (n4) para 166.

¹⁹⁰ *Mazibuko* (n4) para 134.

¹⁹¹ *Mazibuko* (n4) para 134.

¹⁹² *Mazibuko* (n4) para 88.

¹⁹³ *Mazibuko* (n4) para 144.

¹⁹⁴ *Mazibuko* (n4) para 168.

¹⁹⁵ *Mazibuko* (n4) para 164.

¹⁹⁶ *Mazibuko* (n4) para 162.

¹⁹⁷ *Mazibuko* (n4) para 142.

¹⁹⁸ *Mazibuko* (n4) para 94.

¹⁹⁹ *Mazibuko* (n4) para 164.

²⁰⁰ *Mazibuko* (n4) para 161 “When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be

Having set out the content of reasonableness as established in the leading and formative cases on reasonableness, I proceed to deal with justifications for the adoption of the reasonableness test in South African constitutional jurisprudence.



reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions.”

PART II

1 *Separation of powers doctrine as a justification for reasonableness test*

It has been suggested that the reasonableness test reconciles well with the doctrine of separation of powers. Before setting out the separation of powers, a brief setting of the scene will be helpful.

1.1 *Defining separation of powers.*

At its most basic, the separation of powers doctrine is a constitutional law- political doctrine “... (in) which the three branches of government (executive, legislative, and judicial) are kept separate to prevent abuse of power.”¹ It is “[a]lso known as the system of checks and balances, each branch is given certain powers so as to check and balance the other branches.”² It contemplates that the state, in its three manifestations as the judiciary, executive and legislature,³ interact in a mutually complementary and reinforcing manner.⁴ The state should not act against itself through intrusions by one arm of the state into the domain reserved for the other arm of the state.⁵ Each arm is viewed as best suited to conduct the task conferred on it. In the *Certification* judgment,⁶ the Constitutional Court affirmed that the doctrine of separation of powers is part of

¹ https://www.law.cornell.edu/wex/separation_of_powers-accessed 6 December 2015

² https://www.law.cornell.edu/wex/separation_of_powers-accessed 6 December 2015, see also *Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC) para 45, 109.

³ See *Certification judgment* (n2) para 6 the Court describes the separation of powers as a “... Montesquieuan principle of a threefold separation of state power...”.

⁴ See generally *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883; 2001 (1) BCLR 77 (28 November 2000) and cases referred to therein, also *Glenister v President of the Republic of South Africa and Others* 2009 (2) BCLR 136 (CC).

⁵ *Certification judgment* (n2) para 110.

⁶ *Certification judgment* (n2).

South African constitutional order. It then argued that the Court must be sensitive to the constitutional demarcations of responsibility.⁷

1.2 Reasonableness test and separation of powers

There are a number of aspects which can be drawn from the way the Court has characterised the reasonableness test. The Court, with emphasis, has held that there are various means of achieving socio-economic rights obligations. The state may choose any of them so long the measures are reasonable.⁸ In this way, the Court evinced its acute awareness of the political and policy questions which arise in delivering and adjudication on socio-economic goods before the Court. As was argued before, the Court, in particular in *Grootboom*,⁹ indicates its political consciousness of constitutional politics in a constitutional democracy. The Court signalled its intent to carve its politico-legal role in a narrow sense. This is done in the hope of evading political tension between the judiciary and the executive. The reasonableness test can be seen to have been adopted as being what the court considered to be the most compatible with the doctrine of separation of powers. Proponents of the reasonableness test contend that the reasonableness test is best suited to achieve the "... transformative interpretation of socio-economic rights."¹⁰ It is viewed as the one which strikes an appropriate balance between the three arms of the state - namely, the executive, the judiciary and the legislature - to achieve the transformative goals of the Constitution.

⁷<http://www.news24.com/SouthAfrica/News/Judiciary-shouldnt-interfere-in-politics-Nzimande-20150618>

"Judiciary shouldn't interfere in politics – Nzimande" accessed 18 July 2015, see also <http://www.thepresidency.gov.za/pebble.asp?relid=4462>, 8 July 2011 Keynote address by President Jacob Zuma on the Occasion of the 3rd Access to Justice Conference, Pretoria where he stated that "[t]he Executive, as elected officials, has the sole discretion to decide policies for Government. This means that once government has decided on the appropriate policies, the judiciary cannot, when striking down legislation or parts thereof on the basis of illegality, raise that as an opportunity to change the policies as determined by the Executive area of government." See the response by the Democratic Alliance <https://www.da.org.za/archive/the-access-to-justice-conference-south-africa-needs/> (accessed 10 August 2015).

⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46; 2000 (11) ('*Grootboom*') para 43.

⁹ *Grootboom* (n8) para 43.

¹⁰ Steinberg, *Can Reasonableness Protect the Poor? A Review of South Africa's Socio-economic Rights Jurisprudence* (2006) 123 South Africa Law Journal p.264.

1.3 *Efficiency*

Those who justify the appropriateness of the reasonableness test in socio-economic rights adjudication argue that it pays sufficient regard to the doctrine of separation of powers¹¹ insofar as it seeks to achieve, in the broad sense, governmental efficiency. Within a constitutional state, it is argued that Courts have a limited role in the adjudication of socio-economic rights.¹² It is argued that that respecting¹³ these boundaries enables the state to function efficiently.¹⁴ Even for the judiciary itself as an arm, it is argued that "... [t]he efficiency of the judiciary depends on the acceptance of its role by the wider legal, cultural and political system."¹⁵ This is achieved, so the submission is put, "by an appropriate separation and distribution of power."¹⁶ Steinberg in response to Bilchitz characterizes the minimum core, which is viewed an alternative to the reasonableness test as will be discussed below, as "... intense judicial activism..." which offends the separation of powers. Judges become activists. The argument is that if the Courts act in an activist way and breach the separation of powers by straying into the domain of the representative arms of the state, for instance, and the executive on policy matters, this efficiency will not be achieved. Efficiency is achieved, by amongst other things, the arms of the state 'specializing' in their defined roles and, in the process, eliminating destructive tensions between them.

¹¹ Steinberg (n10) p.264, 276

¹² Steinberg (n10) p.265

¹³ Statement on the meeting of the National Executive and the Judiciary, Union Buildings, Pretoria <http://www.politicsweb.co.za/politics/judiciary-and-executive-reaffirm-commitment-to-sep>, "Judiciary and executive reaffirm commitment to separation of powers - Jacob Zuma"(accessed 27 August 2015)

¹⁴ Steinberg (n10) p.274

¹⁵ Steinberg (n10) 274

¹⁶ Steinberg (n10) p. 274

1.4 Deference

The Court in *Grootboom*,¹⁷ *TAC*¹⁸ and *Mazibuko*,¹⁹ essentially takes the view that reasonableness includes the appropriate deference to other arms of the state, namely, the executive and the legislature. The justification for this may be framed on three notions which I will refer to as institutional competence, democratic accountability and constitutional structure.

In *Grootboom*, *TAC* and *Mazibuko*, the Court deferred to the executive, holding that it did not have the institutional competence to make policy choices. The Court expressly held that such choices were the domain of the executive. The Court will not substitute its decision for that of the executive simply because it prefers another policy choice within a range of many policy options which may achieve the same purpose. The question, so the Court has held, is whether the decision is reasonable and one a reasonable government would take. If it is, the conduct of the government will be constitutional. It appears from this, Bilchitz observes that "... the use Yacoob J makes of (reasonableness) ... is reminiscent of its use in administrative law..."²⁰

The idea that the Court should defer to the executive is also informed by the argument that Courts are not elected by democratic means and, as such, should have a limited role to play in relation to socio-economic rights. Those subjected to popular plebiscite should govern and determine policy.²¹ Socio-economic rights are regarded, in the main, as political questions according to this view. They relate to who gets what, when and how; a quintessential political inquiry. It is argued that political questions should be left to political players. Political players have a legitimate political mandate which arises and is legitimized by a plebiscite. The Courts are regarded as undemocratic elite bodies. The political implications of their choices are not as direct and immediate as those of political players and this accords those actors a high level of

¹⁷ *Grootboom* (n7)

¹⁸ *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721; 2002 (10) BCLR 1033 ('TAC')

¹⁹ *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) ('Mazibuko').

²⁰ Bilchitz, *Poverty and Fundamental Rights; The Justification and Enforcement of Socio-economic Rights* p.142.

²¹ *Mazibuko* (n19) para 160, 165.

democratic accountability. In essence, the role of judges in so far as they relate to socio-economic issues as political questions is contested²² and contentious.²³

1.5 *Textual defence of the reasonableness test*

As a point of departure, the High Court in *Grootboom*²⁴ has held that the test for reasonableness is textually defensible.²⁵ This approach was confirmed in the Constitutional Court.²⁶ The Court regarded the sections as having been "... carefully crafted."²⁷ In that respect, the Court held that the text of the section had to be broken down into three parts, two of which are relevant for present purposes: the first part confers a general right, and the second delimits the positive obligations. The positive obligations include enacting legislative and other measures. All these obligations are done taking into account available resources.²⁸ Sections 26 (1) and section 26 (2), the Court held, had to be read together.²⁹ Section 26 (1) establishes some form of negative obligation on the state.³⁰ This obligation is for the state to provide *access*.³¹ According to the Court, access refers to what can be termed opening the doors. Section 26 (2) then imposes

²² <http://www.thepresidency.gov.za/pebble.asp?relid=20418> "President Zuma convenes meeting of Executive and Judiciary" accessed 27 August 2015, <http://www.anc.org.za/show.php?id=11598>, Zizi Kodwa "ANC welcomes meeting of Executive and Judiciary" accessed 27 August 2015.

²³ <http://www.dailymaverick.co.za/opinionista/2015-07-15-anc-is-paying-mere-lip-service-to-judicial-independence/#.VkSU1LeDFBc> MMUSI MAIMANE, "ANC is paying mere lip service to judicial independence." (accessed 15 July 2015), see also <http://www.politicsweb.co.za/politics/emerging-trend-of-judicial-overreach--alliance> African National Congress and its alliance partners Alliance Summit Declaration (accessed 1 July 2015), <http://www.news24.com/SouthAfrica/News/Judiciary-not-guilty-of-overreach-Mogoeng-20150827>, Judiciary not guilty of overreach – Mogoeng accessed (27 August 2015), <http://mg.co.za/article/2015-07-10-ramaphosa-anc-will-defend-independence-of-judiciary> "Ramaphosa: ANC will defend independence of judiciary" (accessed 10 July 2015).

²⁴ The judgment of Davis J in which Comrie J concurred is reported as *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C).

²⁵ *Grootboom* (n8).

²⁶ *Grootboom* (n8) para 22, 34.

²⁷ *Grootboom* (n8) para 21.

²⁸ *Grootboom* (n8) para 21.

²⁹ *Grootboom* (n8) para 34, *TAC* (n18) para 29.

³⁰ *Grootboom* (n8) para 34.

³¹ *Grootboom* (n8) para 35.

positive obligations.³² These obligations are subject to qualifications.³³ These qualifications are to “take reasonable legislative and other measures”; (b) “to achieve the progressive realisation” of the right; and (c) “within available resources.”³⁴ In *TAC*,³⁵ the Court rejected the argument that section 26 (1) conferred a self-standing right. What was required, so the Court held, was for the government to take reasonable measures to achieve socio-economic goods; hence the reasonableness test. Reasonableness test was therefore regarded as mandated by the text of the Constitution.

This reasonableness approach adopted by the Court “... has been subject to much academic criticism, particularly from academics rooted in the Global South.”³⁶ Liebenberg in fact observes that the “Court has not provided a detailed explanation of what it understands by positive duties imposed by socio-economic rights.”³⁷ Academics and critics prefer what is referred to as the minimum core obligation jurisprudence. I will return to this below. Before dealing with the minimum core obligation, I attempt to evaluate the cogency some of the reasons offered in defence of the reasonableness test.

2 *Evaluation of the defences of the reasonableness test*

2.1 *Separation of powers argument*

It is submitted that Steinberg’s premise of the base upon which the authority of the Court has to be respected is faulty. The authority of the Court cannot be said to be accepted because the judiciary is playing pragmatic politics. The authority of the Court is constitutionally mandated.³⁸

³² *Grootboom* (n8) para 38.

³³ *Grootboom* (n8) para 38.

³⁴ *Grootboom* (n8) para 38, *TAC* (n18) para 23.

³⁵ *TAC* (n18).

³⁶ Bilchitz, *Socio-economic rights, Economic Crisis and Legal Doctrine*, I.con (2014), 14. Vol 12 No.3, p.727 and see academics referred to by Bilchitz in footnote 67, see also Liebenberg p.163ff.

³⁷ Liebenberg, *Socio-economic rights adjudication under a transformative constitution* (Juta) (2010) p.133.

³⁸ King, *Judging Social Rights* (Cambridge University Press) (2012) p.198.

It will be dangerous for Courts to measure political temperatures in the conduct of their duties. Courts are bound to the dictates of the Constitution and should display unquestionable fidelity to the Constitution. Section 165(2) of the Constitution vests the judicial authority in Courts. It is the duty of Courts to interpret the Constitution. The provisions of the Constitution are given meaning by Courts. In the drafting of the Constitution, the Constitutional Court was left to give meaning to the right to life in section 11 of the Constitution. This had been a contentious issue during the drafting process. There are many policy options which could have been decided by the Constitutional Assembly which drafted the Constitution. The Constitutional Assembly sat as a representative organ, representing the people of South Africa. It had representative legitimacy the same way the executive and the legislature have representative legitimacy. It has not, nor can it be, argued that by allowing the Constitutional Court to define the content of the right to life in section 11, there is a violation of the separation of powers doctrine. There is, it is submitted, equally no violation of the doctrine of separation of powers if the Courts accept an alternative interpretation of socio-economic rights, in particular, as will be argued below, the core minimum obligation or the socio-economic rights reasonableness test.

Further, it is also faulty to characterize the minimum core as judicial activism as Steinberg does. Minimum core is the clearest way, according to its proponent, to make true the promises of the Constitution. It obliges the government to prioritise the realization of the minimum core even when the government cannot or claims not to be able to meet the basic interests of those claiming the benefit of the right.³⁹ The Constitution itself is activist. In other words, it should be read as a welfarist Constitution intent on establishing a welfare state.⁴⁰ It must be kept in mind that the Constitution is not just a liberal document whose primary task is to restrain state power. It is unlike Constitutions of the “more established ‘northern’ Constitutions where liberty is prioritized.”⁴¹ The Constitution has a clear transformative objective.⁴² It seeks to improve the dignity, freedom and reaffirm the equality of all to enable them to realise their full potential. It makes seeks to make true the claim that social provisions for the poor is “state responsibility

³⁹ Bilchitz (n36) p.738.

⁴⁰ King (n38) p.39-41; see also Raz, *Morality of Freedom* (1998) p.166.

⁴¹ Bilchitz, *Constitutionalism, the Global South and Economic Justice, Draft 2* p.1.

⁴² Liebenberg, *Rights, Needs, Rights, and Transformation: Adjudicating Social Rights* Stell LR 2006 1 p.31.

from cradle to grave.”⁴³ In the *Certification* judgment, the Court held that there is no single form of separation of powers. Its “purpose ... is division of responsibility.”⁴⁴ It is dependent on the context. It is submitted that in the context of South Africa, given South Africa’s history in which organs of state were structured to manage and promote the affairs of a few, separation of powers must be understood as a dynamic reinforcing mechanism of restoring the dignity of many. Against a history of a government whose objective was to dignify the lives of a minority, separation of powers creates checks and balances which, amongst other things, protect the interests of those who have been marginalised by the pre-1994 state. These checks and balances in turn foster a responsive and accountable government which can be held to its obligations by all through the Courts and through plebiscite. The Court may become a forum for holding the democratic government accountable in between plebiscites. This is needed by all in a democratic state, much more so by the previously disadvantaged. This is the very object of separation of powers. Separation of powers should therefore be understood in a way which enables and reinforces the ability of all to achieve the promises of the Constitution. When the Court orders the government to act in a particular way, it is not breaching the doctrine of separation of powers; it is strengthening the Constitutional imperative of giving dignity, accountability and responsiveness. The Court has this responsibility. For the Court to shy away will be a breach of the doctrine of separation of powers by omission.⁴⁵ If the Court fails to order the government to act when it has this authority mandated to it by the Constitution, it is itself breaching the separation of powers doctrine and by implication acting unconstitutionally. The doctrine of separation of powers does not only imply a negative obligation to stop an organ of state from acting in a particular way; it creates a positive duty on the organ to which a particular responsibility is given to act as such. A failure to act as expected and mandated is a breach of the doctrine by omission.

It is worth observing that this idea of separation of powers lingers in most justifications of the reasonableness test. To that end, it is submitted it is worth recasting the idea of the separation of powers so that it can be understood for what it really is in the post-1994 constitutional

⁴³ King (n38) p.29.

⁴⁴ King (38) p.51.

⁴⁵ Steinberg (n10) seems to anticipate this argument on p. 276, but does not engage with it.

democracy. This will show that it does not provide a sound defence of the reasonable test. I now attempt to recast the separation of powers.

2.2 *Separation of powers within the context of the 1996 Constitution*

Separation of powers was first developed by Montesquieu.⁴⁶ In the South Africa of today, this doctrine has to be understood within a constitutional structure which places at its center equality, dignity and freedom within the context of a responsive state.⁴⁷ The question of separation of powers should not arise in the determination of whether the Courts can adjudicate matters of socio-economic rights. It is constitutionally irrelevant.

As stated above, the Constitution envisages that there are three arms of the state,⁴⁸ the judiciary, executive⁴⁹ and the legislature.⁵⁰ The doctrine of separation of powers is implied in the constitution. It is therefore a constitutional dictate and imperative. The doctrine of separation of powers seeks to delimit and distribute state power between three organs of the state-the judiciary, the executive and parliament. Rossum describes this as "... government of separated institutions sharing powers ..."⁵¹ It accords certain functions to each in a counter-balancing way, ensuring or in the hope that, "... by their mutual relations, be the means of keeping each other in their places."⁵² Each of these arms have distinct roles to play. They must respect each other.⁵³ At its

⁴⁶ It is even doubtful that Plato in the first instance understood or postulated the separation of powers as understood today. Plato may have become an accidental genius, at least in this respect. For a discussion of Plato and the idea of separation of responsibilities for government (not the same as separation of powers) see Glenn Raymond Morro, *Plato's Cretan City: A Historical Interpretation of the Laws* (Princeton University Press) at p.541, Aleksandr Vladimirovich Avakov, *Plato's Dreams Realized: Surveillance and Citizen Rights from KGB to FBI* (Algora Publishing) p.188.

⁴⁷ State referring to the judiciary, executive and the legislature.

⁴⁸ S 8 (1) of the Constitution of the Republic of South Africa, 1996.

⁴⁹ Section 40 of the Constitution of the Republic of South Africa, 1996, Chapter 3 and section 84 of the Constitution of the Republic of South Africa, Chapter 5.

⁵⁰ Section 44 of the Constitution of the Republic of South Africa, Chapter 4.

⁵¹ Rossum, *American Constitutional Law, The Structure of Government* vol 1 p.18.

⁵² Rossum (n51) p. 18.

⁵³ *Mazibuko* (n19) para 65.

basic, it is the duty of the judiciary to interpret the law, the legislature of making law and the executive to implement the law. In this sense therefore, when the Courts interpret the law, they are performing a constitutional mandate, a mandate they cannot abscond from without risking the collapse of the constitutional structure. It is submitted therefore that when Courts are interpreting the meaning of social economic rights, at the interpretation stage, giving content to the right, the Court cannot be influenced by any notion of deference to any other arm of the state. It is the duty of the Court to do so⁵⁴. The doctrine of separation of powers even in its classic form cannot therefore be an impediment. It in fact is an enabler.⁵⁵ Put differently, if the Court were to defer to the executive on some perceived notion of reasonableness, that would in fact be the breach of the doctrine of separation of powers because the judiciary would be absconding from its responsibility to interpret the constitution. It is submitted that there is a difference between deference by the judiciary to other arms of the state as proponents of the reasonableness test advocate, and the judiciary interpreting the Constitution aware of the responsibilities of other arms of the state. The former borders on absconding from its constitutional duty. It is the latter the Courts should be mindful of. It should bear in mind that it is for the executive and the legislature to be at the coal-face of the realization of socio-economic rights as they control the levers which realise the goods envisioned in those entitlements. The Courts cannot be the actual administrator or policy drafter dishing out socio-economic goods. To do so would be to usurp all powers of other arms of the state in the name of judicial authority. However, when it comes to interpretation and making orders consistent with the respect of the Constitution, they must do so without fail.

The retort maybe that to meet socio-economic rights, the government is involved in allocation of limited resources to multiple and, at times, competing ends. Such allocation of resources is poly-centric and may require people with the know how to do so. Poly-centricity is taken to mean that

⁵⁴ *TAC* (n18) para 99 the Court opined that “[t]he primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the state to respect, protect, promote, and fulfil the rights in the Bill of Rights”.

⁵⁵ *Mohamed and Another v President of the Republic of South Africa and Others* (Society for the Abolition of the Death Penalty in South Africa and Another Intervening) 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) the Court stated that “[t]o stigmatise ... an order as a breach of the separation of State power as between the Executive and the Judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of State and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights.”

“... the best answer demands comprehension of a highly complex range of cause and effect relationship (of) potential solutions.”⁵⁶ As such, the Court should leave this task to the executive. The answer is that there is some truth in this statement; yet, there is a need to distinguish between implementation and the interpretation of the right. Giving the rights concerned content is one part of the process whereby the standards required by the constitution are outlined; implementing the demands of the content of the right so defined by the Court is another which involves considering the methods of giving effect to the standards. The notion of reasonableness as espoused by the Court conflates the definition of the content of the right⁵⁷ and its practical implementation so much so that in the final analysis, it in fact abandons the definition of the content of the right or at the very least treats it cursorily.

3 *Institutional capacity of Courts*

Reduced to its bare, the separation of powers argument in support of the reasonableness test is that the judiciary is ill-equipped to deal with policy-centric matters.⁵⁸ This, so the argument proceeds, is the preserve of the executive (or the legislature). This is characterized as an institutional capacity limitation on the part of the judiciary. Being institutionally ill-equipped, it is contended that the judiciary lacks the expertise and legitimacy to make findings in this area.⁵⁹ In *TAC*, the Court reasoned that it was “... not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining ... the minimum-core standards...” Consequently, the “... Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community.”⁶⁰ Sunstein, in apparent agreement with the Court’s reasoning, argues that “... the problems of policy [are] solved by

⁵⁶ Liebenberg (n37) p.190, 194.

⁵⁷ Liebenberg (n37) p175, see also cf S.Woolman & H.Botha ‘*Limitations*’ in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed Os (2006) Chapter 34 (1-6) 16-29.

⁵⁸ Steinberg (n10) p.269, 270.

⁵⁹ Steinberg (n10) p.268, 269.

⁶⁰ *TAC* (n18) para 38.

people who understand problems of policy, not by lawyers skilled in reading Supreme Court opinions.”⁶¹

It is argued that Courts lack the competence to adjudicate socio-economic rights because they involve delicate balancing of scarce resources. They argue that the judiciary does not have the skill to resolve matters which involve other considerations not immediately before the Court hearing a particular matter. This is the policy –centricity argument in a different cloth. Further, because judges are trained in law and not the specific discipline before the Court, for instance housing or health-care, judges are ill-suited properly to adjudicate the matters without some measure of deference. In a word, judges lack the expertise.

The argument about the institutional capacity and competence of Courts to adjudicate socio-economic rights is, it is submitted, unconvincing. It is submitted that the moment it is conceded that the judiciary are constitutionally obliged to engage socio-economic rights which involves policy matters, the argument of the judicial skill or lack thereof, must fall away. To sustain the argument will be to suggest that the Constitution contemplates a task they are not equipped to perform. This cannot be. The proponents cannot have it both ways. It has not been argued, nor can it be, that there was a fundamental error in the drafting of the Constitution and how responsibilities are allocated to different arms of the state. To the extent the judiciary is demarcated by the Constitution as the final arbiter and interpreter of the Constitution and its provisions, the Courts have to be taken as competent to attend to that duty. It is submitted that it is equally unconvincing to suggest that it is not the proper role of the Court. The Constitution gives the Court such a role. There is nothing to show why the Court cannot perform the role given to it by the Constitution.

Further, this argument mirrors the objection to the inclusion of socio-economic rights in the constitution.⁶² The Court satisfactorily rejected this argument by holding that the task confronted by the Court in adjudicating socio-economic rights is not very different from the task it conducts in its adjudication of other disputes like civil and political rights. It is not suggested that because judges are not political scientists, they cannot make rulings on political rights; neither is it

⁶¹ Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge MA, Harvard University Press) 1999.

⁶² *Certification Judgment* (n2) at para 78

suggested that because judges are not economists, they cannot make rulings on economic matters; indeed it is not suggested that because judges are not businessmen and women, they cannot adjudicate commercial disputes. When a Court makes a ruling on what is in the best interests of child, it is not suggested that the Court is acting as a social worker. It is submitted that when judges perform the task of evaluating government conduct, they conduct no *sui generis* task in respect of socio-economic rights. If the Court deems it prudent to be better placed to understand the issue before the Court, Courts routinely employ the experts in a given field to assist them in adjudication. If the Court deems it necessary, it will request additional information and expertise. Courts deal with matters relating to motor vehicle accidents, poor workmanship in all areas from plumbing to physics and robotics, from medical mal-negligence to deciding on what a reasonable employer would have done in a particular area. In all these varied areas, the Courts are not accused of lack of competence. The experts assist the Courts where necessary to arrive at judicial decisions, which essentially is the constitutional task of the Court. The experts may very well be the parties or organizations helping the parties before the Court.⁶³

Socio-economic rights affect all human beings regardless of race, class and or creed. It is true that it is the poor who generally make a claim on the state to provide certain services. However, judges as human beings (though they may not be indigent), will know what a normal human being requires to survive from human experience which they share. They can draw in expert evidence to ascertain anything else extraneous to that relating to the matter before them. As jurists, they also should have expertise in relation to fundamental rights. There is no special expertise required at the basic level of understanding that, for instance, a person needs food and requires this entitlement to be strictly protected. Perhaps at the level of detail, for instance, how much sugar, water, vitamin or carbohydrates a person needs in a day, there is expertise required. This, it is submitted, is in the detail not the conceptualization. They can draw in the relevant expertise to address these points. In that respect, it may be fair to argue that it is in the realm of socio-economic rights that judges, as human beings who share in the human experience of survival, are in fact best suited to, from the onset, understand the conceptual content of these rights and the broad standards they set. Not all judges will have an appreciation of business,

⁶³ *Mazibuko* (n19) para 165, the Court referring to organizations in public interest litigation, opined that “[t]hese organisations have developed an expertise in litigating in the interests of the poor to the great benefit of our society.”

economics or human or political science, but all judges know that a person needs socio-economic goods to survive. Even ideological differences, for a moment, fade into insignificance.

Further, it is fallacious to argue that members of parliament have all the expertise in areas of law on which they make wide-ranging legislation. It is equally an exaggeration that members of the executive have all the capacity to make policy in all the areas they make policy on. Executive and parliamentary appointments and positions are, in the main, political appointments. These institutions make decisions which the individuals concerned may not be academically qualified to make. Executive members are appointed and reshuffled at an instant's notice and the rationale for such reshuffling can hardly be primarily based on expertise but the political demands of political actors in a given political environment or factual dynamics, whether at party, national, regional or local level. Senior executive members act and serve at the pleasure of the President, while Members of Parliament are at the pleasure of their respective political parties. These appointees rely on sound advice and expert opinions. The same is true of Courts. Even if it is argued that other institutions are assumed to be better placed, the argument is incomplete because it does not state in what way they are better placed since, as argued, such institutions basically use the same support system, experts. The argument about one arm of the state being better placed is an objective comparison. The objective facts as stated above do not establish in what way the judiciary is less well-placed to perform the tasks it is required to.

It is submitted that it is worth noting that the critique of the Court's capacity and legitimacy to adjudicate socio-economic rights stands in contrast to the theoretical base the Court set in the *Certification* judgment. In the *Certification* judgment, the Court held that

“... many of the civil and political rights entrenched in the NT will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability.”⁶⁴

When a Court is exercising its authority to vindicate civil and political rights, for instance the right to legal representation at the state's expense, it is performing a task no different from when it seeks to enforce a socio-economic right. Proponents of the reasonableness test do not dispute

⁶⁴ *Certification Judgment* (n2) para 78

that the Court may “... engage in evaluation of social and economic policy...”⁶⁵ Steinberg makes an outright concession that the Courts are “... constitutionally obliged to do so.”⁶⁶ She then says the real question is whether the Courts are best suited to conduct the inquiry. Steinberg refers to this as an inquiry “... of the most appropriate role for the Courts.”⁶⁷ It is submitted that for Steinberg to resort to the phrase ‘most appropriate role of the Courts’, is an emphasis without substance. This is so because in the Certification judgment it was held that the adjudication of civil and political rights give rise to similar budgetary and indeed policy considerations as socio-economic rights. As argued, Courts are appropriately suited for the task.

Further to the above, it is submitted that the Courts in fact have the capacity to scrutinize poly-centric matters. Steinberg in the use of substantive reasonableness requires that the Court scrutinize government conduct and hold it to a standard much higher than in administrative law. That is by implication an admission of the capacity of Courts. Further, it is clear that Steinberg agrees with the decisions of the Court in *Khosa*⁶⁸ and *TAC*⁶⁹ in particular. In *Khoza*,⁷⁰ Steinberg celebrates “... the boldness of the Court’s scrutiny of the state’s budget...”⁷¹ The Court concluded, by looking at the figures that the contemplated increase in government expenditure was “... small ...”⁷² Budget analysis is, on the face it, not what lawyers are trained to do. However Steinberg does not appear to object to Justice Mokgoro doing so notwithstanding the perceived institutional incapacity. Further, Steinberg does not object to Justice Mokgoro making a determination that the increase in the budget was ‘small.’ Justice Mokgoro is making a financial judgment which Steinberg does not object to. Justice Mokgoro makes no attempt in her judgment to state why she regards the increase as small. On the papers before the Court, there was hardly much evidence on which the Court could make such a finding. Also importantly, Justice Mokgoro orders the state to “... increase its budget to accommodate permanent

⁶⁵ Steinberg (n10) p.270.

⁶⁶ Steinberg (n10) p.270.

⁶⁷ Steinberg (n10) 270.

⁶⁸ *Khosa* (n63).

⁶⁹ *TAC* (n18).

⁷⁰ *Khoza* (n63).

⁷¹ Steinberg (n10) p.280.

⁷² *Khosa* (n63) para 62.

residence.”⁷³ The learned author also does not object. The ordering of an increase in budget is a policy matter and polycentric. Against a charge of the institutional incapacity and lack of skill on the part of the judiciary, the support the learned author gives leads to the exact opposite conclusion to her intended conclusion. The learned author’s submissions are inconsistent. In *Mazibuko*,⁷⁴ all the Courts from the High Court, the Supreme Court and the Constitutional Court displayed an incredible ability to engage with complex data and evidence presented before it. To differ with any the Courts’ conclusion does not suggest, and indeed has nothing to do with the demonstrable and demonstrated institutional capacity of the Courts to engage with complex information, which information may be poly-centric.

4 *Textual argument*

It is submitted that the crux of the reasoning of the Court in *TAC* as to why section 26 (1) and section 26 (2) should be read together is that “[t]he reference to “this right” is clearly a reference to the section 26(1) right.” In essence, this right, the right in section 26 (1) is limited by the availability of resources, available legislative and other means. It is submitted that this reasoning is unassailable to the extent the Court recognises and hold that the reference to ‘this right’ refers to the right in section 26 (1). However, it is not too clear why the limitation of the right by the factors identified in section 26 (2) automatically entails that the right, this right, conferred in section 26 (1) cannot be given ‘independent content’. Put differently, section 26 (1) can be read to confer a self-standing right which the state must meet. The content of this right would need to be defined. If the state fails to meet the meet the content of the right, section 26 (2) may then be used to justify the failure. Section 26 (2) cannot be applied to section 26 (1) in a vacuum. Section 26 (1) needs to be given content. A failure to define the content of section 26 (1) makes it difficult to apply section 26 (2) as there is no independent understanding of the content of a right. Section 36 of the Constitution is usually applied after the content of a right has been identified, tested against the facts and the conduct that is complained of is found to violate the content of the

⁷³ *Khosa* (n63).

⁷⁴ *Mazibuko* (n19).

right. It is easier and structurally sound to approach the limitation of a right that way. The factors in section 26 (2) and in section 36 of the Constitution on what needs to be considered in limiting a right have some overlap. In that respect, the reasonableness of the legislative and other measures as well the use of the available resources will be tested against the established content of the right as defined in section 26 (1). To clump section 26 (1) and section 26 (2) together as the Court has held, in the context of an amorphous and fluid notion of reasonableness,⁷⁵ it is submitted, does not promote the achievement of the rights in the Bill of Rights as contemplated in section 7 (2) of the Constitution.⁷⁶ Unless the right, this right, in section 26 (1) and section 27 (2) can be interpreted as having a defined content, the rights will be paper rights with minimal practical implication on the intended beneficiaries.

Related to the textual argument is the *stare decisis* argument. In response to the *Amicus Curie* attempt to reargue for the minimum core obligation, the Court interestingly held that “argument fails to have regard to the way subsections (1) and (2) of both sections 26 and 27 ... have been interpreted by this Court in *Soobramoney* and *Grootboom*.” That might very much be so; however, the submission of the *amicus currie* was, by implication, an invitation to the Court to abandon the previous approach so early on in socio-economic jurisprudence. While the principle of *stare decisis* is a central part of South African law and that Courts are bound by their previous *ratio decidendi*, in respect of constitutional interpretation of rights in the Bill of Rights, its application has to be modeled to accommodate the clarion call to interpret rights progressively with the transformative obligations and goals of the Constitution in mind. A rigid understanding of *stare decisis* may be too inflexible to achieve the promise of the Constitution and to achieve its transformative character. It will become “a pathology of legalism.”⁷⁷ In that respect, it is submitted that a resort to *stare decisis* as an answer to a litigant, as in the *TAC*, is an inadequate answer to the submission. The invitation by the *amicus currie*, by implication, was that the Court’s previous decision was incorrect, and the Court should depart from it. As argued above, the textual argument of conflating section 26 (1) and section 26 (2) does not incontrovertibly lead to a conclusion that section 26 (1) has no independent content. The Court’s reading of

⁷⁵ Bilchitz (n36) p.727-29.

⁷⁶ See *Grootboom* (n8) para 20.

⁷⁷ Titmuss, *Welfare “Rights”*, *Law & Discretion* (1971) 42 *Political Quarterly* 113.

section 26 (1) and section 26 (2) together may not be clearly wrong, but it is not the only interpretation possible. The Court, for reasons stated above in the last decision on same chose an interpretation that section 26 (1) and section 26 (2) should be read together, therefore giving birth to the reasonableness jurisprudence. The *amicus currie* was in essence arguing that such was not preferable. It is submitted that it is insufficient at the nascent stages of constitutional litigation to simply brush off an argument by reference to one or two previous decisions where the jurisprudence developed is not entrenched and is under development. Legal certainty, while important, is not all the law, much more human rights and constitutional law seeks to achieve. *Stare decisis* also allows for departures from previous decisions where the previous decisions are regarded as incorrect. The intent of human rights law is to advance the socio-economic interests of the most vulnerable. Those interests should not be sacrificed at the altar of legal certainty. The textual argument is therefore not self-evidently the only option and therefore cannot out-rightly justify the reasonableness test.

The debate about the value of judicial precedents in constitutional matters wherein social issues are litigated upon has drawn sharp debates in the United States of America. In the matter of *Payne v Tennessee*⁷⁸ Justice Scalia held “... the notion that an important constitutional decision with plainly inadequate rational support must be left in place for the sole reason that it once attracted five votes” was astonishing. Contrary to the approach adopted by the Court, it is submitted that there is merit in the argument that Constitutions are forward looking such that looking back to previously decided cases slows down achieving the objective of the constitution.⁷⁹ It is truly “... like driving an automobile down a busy street while looking only through the rearview mirror.”⁸⁰ ‘Social problems, to which we are concerned about in socio-economic rights, cannot be solved on the same basis of past legal problems.’⁸¹ Each case is unique. This, it is submitted, is sound reasoning. Too much “insistence on legal rules based precedent ... (responds) slowly to human needs and circumstances.”⁸² Those who argue for a reasonableness test cannot suggest that a reconsideration of the value of precedents will affect

⁷⁸ 501 U.S. 808 (1991).

⁷⁹ Rossum, (n47).

⁸⁰ Rossum (n47) p.5.

⁸¹ Rossum (n47) p.5.

⁸² King (n38) p.77.

legal certainty so gravely as to upset the legal system in a reprehensible way. As argued above, reasonableness is indeterminate. It does not give a predetermination of the outcome of litigation. It creates legal uncertainty in itself. In any event, precedent, as will be argued below, will make much more sense and be capable of creating legal certainty if there is a minimum content of a right defined. The uncertainty which will arise in the reasonableness inquiry in a minimum core obligation under the internal limitation or the section 36 limitation is inevitable and unavoidable.

5 *Courts as undemocratic structures*

It is argued that Courts are not elected by democratic means and, as such, should have a limited role to play on socio-economic rights and that those subjected to popular plebiscite should do so.⁸³ It is submitted that there is no merit in this critique. Being a constitutional imperative, the question of the legitimacy of the Court in socio-economic rights cannot arise without questioning the legitimacy of the Constitution itself. The Constitution itself gives the Court the role to interpret the Constitution. The critique based on legitimacy does not question the legitimacy of the Constitution. It is submitted therefore that, absent the questioning of the legitimacy of the Constitution, the critique of the legitimacy of Courts to deal with socio-economic matters is without foundation. Secondly, an understanding of the separation of powers doctrine which is used to justify the reasonableness test is both outdated and incompatible with the overall scheme of the Constitution.

Having suggested that the key justifications for the reasonableness test are inadequate, I proceed to examine the leading alternative approach to the adjudication of socio-economic rights.

⁸³ *Mazibuko* (n19) para 160, 165.

PART III

1 *Minimum core obligation*

An alternative is offered by those who critique the reasonableness test. They contend that the Court should follow the ‘minimum core obligation’ approach as developed by the United Nations Committee on Economic, Social and Cultural Rights (‘the UNCESCR’). In *Grootboom*,¹ the Applicants sought to convince the Court that the minimum core approach was desirable.² Considerable emphasis was placed by the *amicus currie* on the UNCESCR and the General Comments³ of the UNCESCR that were said to be a venerable guide⁴ to the Court in interpreting socio-economic rights in South Africa.⁵ In all three cases, *Grootboom*,⁶ particularly in *TAC*⁷ and⁸ *Mazibuko*,⁹ the argument to establish a core-minimum was rejected by the Court.

¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46; 2000 (11) BCLR 1169 (*Grootboom*)

² *Grootboom (n1) para 15, 18, also Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721; 2002 (10) BCLR 1033 (‘*TAC*’) para 26

³ 1990, General Comment 3, paragraph 10

⁴ General Comment number 3, para 10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties’ reports the Committee is of the view that minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps “to the maximum of its available resources”. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”

⁵ *Grootboom (n1) para 27 and 29*

⁶ *Grootboom (n1)*

⁷ *TAC (n2) para 26*

⁸ *TAC (n2) para 28* “This minimum core might not be easy to define, but includes at least the minimum decencies of life consistent with human dignity. No one should be condemned to a life below the basic level of

Advocates of the minimum core approach view the minimum core as the “... starting point for the realization of socio-economic rights.”¹⁰ This is so because it creates a threshold which becomes the “... minimum legal content of the ... economic and social right.”¹¹ It then requires that the provision of, “... at the very least, minimum essential levels of each of the rights is incumbent upon every state party.”¹² Bilchitz observes that “[w]hile the general positive obligations in relation to socio-economic rights require “progressive realization,” states are required to meet a minimum threshold of provisions as a matter of priority.”¹³ It, of necessity, requires an “understanding of a threshold below which individuals should not be allowed to fall without strong justification.”¹⁴ The threshold is informed by a defined content of a right. In this way, the content of a right has a “... floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation.”¹⁵ There is an acknowledgement that it is possible for a state party to fail to meet the minimum threshold, but any such failure has to be strongly justified. Assefa, perhaps too strongly, states that minimum core is a “... presumptive legal entitlement, a non-derogable obligation and an obligation of strict liability.”¹⁶ It is too strong to state that there is strict liability since there can be defences open to state. Although there is an entitlement to have the needs realised, such entitlement is “... not automatic ...”¹⁷ but “... requires the state to give utmost priority to fulfilling the basic needs of individuals.”¹⁸ If the

dignified human existence. The very notion of individual rights presupposes that anyone in that position should be able to obtain relief from a court.”

⁹ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC)

¹⁰ Bilchitz, *Socio-economic rights, Economic Crisis and Legal Doctrine*, I.con (2014), 14. Vol 12 No.3, p.730

¹¹ Assefa, *Defining the Minimum Core Obligations –Conundrums in International Human Rights Law and Lessons from the Constitutional Court of South Africa* Mekelle University Law Journal Vol. 1 No.1, 2010p.54

¹² Committee on Economic, Social and Cultural Rights, General Comment No., The Nature of State Parties Obligation (Art. 2 (1) of the Covenant) 10, UN Doc.E/1991/23 (1990)

¹³ Bilchitz (n10) p. 729

¹⁴ Bilchitz (n10) p.730

¹⁵ *Grootboom* (n1) para 31

¹⁶ Assefa (n11) p.54

¹⁷ Assefa (n11) p.70

¹⁸ Assefa (n11) p.70

government fails to provide the core of the right, a *prima facie* violation of the right is established.¹⁹In consequence,

“[i]n order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”²⁰

The minimum core clearly involves a very strict approach, and, to the extent that Assefa suggests that, the observation is not objectionable.²¹ By implication, if not cardinally, the minimum core accepts the notion that rights accrue to an individual.²² This individual is recognized as an end in him/herself. The state may not “... treat individuals ... as representing one problem to be dealt with amongst many others.”²³ An individual is an end who must benefit from a defined right. The “... minimum core obligation (then requires that there be a) satisfaction of the very least minimum essential levels of each of the rights ...”²⁴ In this way, it is an absolute necessity that “... a meaning and content of (a) socio-economic right ...”²⁵ is specified so as to be able to know the “threshold of resources that must be provided (to the) individuals.”²⁶ There are different ways to specify this threshold: Bilchitz, for instance, contends that the minimum threshold involves being provided with the “conditions necessary to be free from threats of survival.”²⁷ Those conditions are those “... that have a close connection with the preservation of life under elementary conditions of dignity as distinct and autonomous human beings.”²⁸ The survival

¹⁹ Assefa (n11) p.53

²⁰ 1990, General Comment 3

²¹ Bilchitz (n10) p.730

²² See also Bilchitz, *Poverty and Fundamental Rights, The Justification and Enforcement of Socio-economic Rights* (Oxford University Press) (2007) p. 145

²³ Bilchitz (n22) p. 16

²⁴ Committee on Economic, Social and Cultural Rights, General Comment 3 (1990) para 10

²⁵ Bilchitz (n10) p.730

²⁶ Bilchitz (n10) p.730

²⁷ .Bilchitz, (n22) p.39-40 and 187-188

²⁸ *Tutela* action presented by Abel Antonio Jaramillo, Adela Polanía Montaña, Agripina María Nuñez and others against the Social Solidarity Network (Red de Solidaridad Social), the Administrative Department of the Presidency of the Republic (Departamento Administrativo de la Presidencia de la República), the Ministry of Public Finance (Ministerio de Hacienda y Crédito Público), the Ministry of Social Protection (Ministerio de la

needs have been identified as “... food stuffs, essential primary health care, basic shelter and housing ...”²⁹

The threshold is claimable by all people³⁰ so that they can live a life with and of dignity,³¹ rather than mere survival. Bilchitz argues that the realization of a life of dignity for all requires more than mere survival and there is a need to improve the provision beyond the minimum threshold under the obligation to progressively realise these rights.³² There is therefore an acceptance that “... there are state obligations towards (those who need the content of the right that are) of imperative and urgent compliance, and those which, even though they must be fulfilled, do not have the same priority.”³³ In this way, the minimum core obligation “... recognizes that socio-economic rights protect interest of differing degrees of urgency for individuals.”³⁴ Those in need are made a priority though and provided with what they need. In the Colombian case, this was held to mean that the minimum core levels must be provided immediately.³⁵ It is trite that the state does not have infinite resources. With resource scarcity, resources of the state are prioritized to “... those in greatest need.”³⁶ They get what is sufficient for the present. They can then get the “more extensive realization of the right”³⁷ later. These resources have to be distributed within a given polity with particular features. With emphasis on the poor and vulnerable, the state has a social justice legal responsibility. This responsibility may even accrue to private entities.³⁸

Protección Social), the Ministry of Agriculture, the Ministry of Education, the National Institute for Urban Reform (INURBE), the Colombian Institute for Agrarian Reform (INCORA), the National Learning Service (SENA), and others. Colombian Constitutional Court, Decision T-025 of 2004(Colombian case)

²⁹Committee on Economic, Social and Cultural General Comment 3, Assefa (n11) p. 54, Bilchitz (n22) p.15

³⁰ Committee on Economic, Social and Cultural Rights, General Comment 15 (2003) para 44 (c)

³¹ Bilchitz (n22) p.40-45 and 191-194

³² Bilchitz (n22) p.193-194

³³ Magdalena Sepúlveda, *Colombia, in Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* 144 (Malcolm Langford ed., 2008).p.43

³⁴ Bilchitz, *The Right to Health Care Services and the Minimum Core; Disentangling the Principled and Pragmatic Strands* ESR Review vol 7 no 2 p.3

³⁵Colombian case (n28)

³⁶ Bilchitz (n10) 730

³⁷ Bilchitz (n22) 13

³⁸ *City of Johannesburg v Blue Moonlight Properties* 2012 (2) SA 104 (CC) 96, *Governing Body of Juma Masjid Primary School v Essay* 2011 (8) BCLR 761 (CC), *Jaftha v Schoeman* 2005 (2) SA 140 (CC)

The Court has rejected the minimum core obligation. I now look at some of the reasons for the rejection of the minimum core obligation.

2 *Some reasons for the rejection of the minimum core obligation*

2.1 *Textual justification*

For the Court, the minimum core was not supported³⁹ by the text of the Constitution.⁴⁰ The Court reasoned that "... rights need to be considered in the context of the cluster of socio-economic rights enshrined in the Constitution."⁴¹ Almost as a precursor to how the Court was to approach socio-economic rights, the Court held that the enforcement of socio-economic rights was a "... very difficult issue which must be carefully explored on a case-by-case basis."⁴² The Court, instructively, held that section 26 had been "... carefully crafted."⁴³ The Court further held that the wording of the South African Constitution and the ICESCR was significantly different.⁴⁴ It is appropriate to quote the explanation of the Court at length. The Court held that;

"[t]hese differences, in so far as they relate to housing, are: (a) The Covenant provides for a right to *adequate housing* while section 26 provides for the right of *access to adequate housing*. (b) The Covenant obliges states parties to take *appropriate* steps which must include legislation while the Constitution obliges the South African state to take *reasonable* legislative and other measures."⁴⁵ (emphasis in original text)

The Court has also held that "section 26 (1) and 26 (2) are related and must be read together."⁴⁶ Section 26 (1) was held to be "... delineating the scope of the right."⁴⁷ It was read to include a

³⁹ TAC (n2) para 29

⁴⁰ Grootboom (n1) para 34-38, cf TAC (n2) para 27-submission so the Applicants and para 39, see also Mazibuko (n9) para 57

⁴¹ Grootboom (n1) para 19, 21 and 25

⁴² Grootboom (n1) para 20

⁴³ Grootboom (n1) para 21

⁴⁴ Grootboom (n1) para 28, 35

⁴⁵ Grootboom (n1) para 28

negative obligation requiring the “... state and other persons to desist from preventing or impairing the right of access to adequate housing.”⁴⁸ In respect of section 26 (2), the Court held that it refers “... to the positive obligation imposed upon the state. It requires the state to devise a comprehensive and workable plan to meet its obligations in terms of the subsection.”⁴⁹ Further the Court held that “... subsection (2) ... makes it clear that the obligation imposed upon the state is not an absolute or unqualified one.”⁵⁰ The obligations of the state are considered by reference to “... (a) the obligation to “take reasonable legislative and other measures”; (b) “to achieve the progressive realisation” of the right; and (c) “within available resources.”⁵¹ The Court reads section 26 (1) and section 26 (2) as continuous sections. They are read together as both describing the right and defining its content. In doing so, the Court holds that the obligation on the state is essentially to take reasonable means. In this way, the section does not envisage a minimum core obligation.

2.2 *Difficulty in determining the minimum core*

The Court further held that “[i]t is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right.”⁵² There were many variations which include “... income, unemployment, availability of land and poverty...”⁵³ Further “... [t]he differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right.”⁵⁴ Unlike “ [t]he committee (which) developed the concept of minimum core over many years of examining reports by reporting states ... (the) Court (did) not have comparable information.”⁵⁵ The Court then held that it would require much more

⁵² *Grootboom* (n1) para 32

⁵³ *Grootboom* (n1) para 32

⁵⁴ *Grootboom* (n1) para 32 and 35

⁵⁵ *Grootboom* (n1) para 34

information, which information the ICESCR had but the Court did not have, to be able to determine the minimum core.⁵⁶ The Court questioned whether in fact it was possible to determine what this minimum core would be.⁵⁷ Presumably under the historical and contextual approach to interpretation,⁵⁸ the Court held that “[i]t is impossible to give everyone access even to a “core” service immediately.”⁵⁹ In the result, in so far as socio-economic rights are concerned, the Constitution “... does not expect more of the State than is achievable within its available resources⁶⁰ (and) does not confer an entitlement to “claim shelter or housing immediately upon demand.”⁶¹ In the result, “the State is not obliged to go beyond available resources or to realise these rights immediately.”⁶² The Court held that “[m]inimum core (was to be) treated as possibly being relevant to reasonableness ... (inquiry) ... and not as a self-standing right conferred on everyone...”⁶³

2.3 *Resource capacity*

The Court has further held that to adopt the minimum core was not ideal because it will push the government into a position of obvious failure. Within a context of limited resources and numerous demands, it is not possible to give everyone access to even a core of services immediately.⁶⁴ It is a “... residual fear that the minimum core requires the government to do the impossible.”⁶⁵

⁵⁶ *Grootboom* (n1) para 32,

⁵⁷ *Grootboom* (n1) para 32

⁵⁸ *Grootboom* (n1), see also *Mazibuko* (n9) para 59

⁵⁹ *TAC* (n2) para 35

⁶⁰ See also *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC)

⁶¹ *Grootboom* (n1)

⁶² *TAC* (n2) para 32 (footnotes omitted)

⁶³ *TAC* (n2) para 34 (footnotes omitted)

⁶⁴ *TAC* para 35

⁶⁵ Bilchitz, *Towards A Reasonable Approach to the Minimum Core: Laying the Foundation for Future Socio-economic Rights Jurisprudence* (2003) 19 SAJHR p. 17

2.4 Participatory democracy

Liebenberg argues that as “... the adjudication of needs claims operates to destruct radical participatory democracy and depoliticizes questions concerning definitions and meeting of needs, it will ultimately undermine the project of advancing social transformation.”⁶⁶ It is argued that having a core minimum closes off the debate and discussions about rights. It is suggested that having minimum core obligation closes “... legitimate diversity of views regarding the nature and role of socio-economic rights, how different socio-economic needs should be prioritized and ranked and the measures through which these rights should be realized.”⁶⁷ Liebenberg put it rather strongly to say “it takes away democracy to involve judges.”⁶⁸ Instructively, it is argued that the minimum core clashes with the notion of a plural society.⁶⁹

Steinberg takes the argument further and submits that within a context of a closed debate as suggested by Liebenberg, “[a]ny definition of the context of socio-economic rights will run the risk of over-or-under inclusivity.”⁷⁰ Of this, Liebenberg says the minimum core is “... exclusionary.”⁷¹ The fear, it appears, is that the debate may be closed off in less than optimal final understanding of the content of the right in issue. Steinberg then prefers what she refers to as “...incompletely theorized agreements.”⁷²

Within the same line of reasoning rejecting the minimum core is the claim that the reasonableness test creates a standard rather than a rule created by the minimum core.⁷³ The minimum core is criticized for its “...full or nearly full before-the- fact specification of legal

⁶⁶ Liebenberg, *Needs, Rights, and Transformation: Adjudicating Social Rights* Stell LR 2006 1 p. 15

⁶⁷ Liebenberg, *Socio-economic Rights Adjudication Under a Transformative Constitution* (Juta) (2010) p.167

⁶⁸ Liebenberg (n66) p.19

⁶⁹ Liebenberg (n66) p.7

⁷⁰ Steinberg, *Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence*, (2006) 123 South Africa Law Journal p. 273

⁷¹ Liebenberg (n66) p.31

⁷² Steinberg (n70) p.276

⁷³ Steinberg (n70) p.273

outcomes.”⁷⁴ The reasonableness test, it is argued, “... makes for narrow decisions that leave a great deal of work to be done at the moment of application.”⁷⁵ The benefit of this is postulated to be that it ensures that the Court “... never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”⁷⁶ On this line of reasoning, the *ratio* in the matter of *Zantsi v Council of State, Ciskei*⁷⁷ can be cited as support for that proposition.

A few more remarks about Steinberg’s ‘incompletely theorized agreements.’ The submission she makes is that there are many ways to achieve socio-economic betterment of the poor. She calls them “... developmental paradigms.”⁷⁸ On this, Liebenberg states that there could be agreements on broad issues and disagreements on specifics.⁷⁹ Also, society is always in continuous discussion and reflecting on its needs and opportunities. The submission properly understood says that there are different economic models to achieve benefits for the poor and reasonable people will differ on the appropriate economic formula. Reasonableness test is said to be better because it can accommodate this disagreement.⁸⁰

Having provided some of the reasons for the rejection of core minimum obligation, I now evaluate the cogency of such reasons.

3. *Evaluating reasons for the rejection of minimum core obligation*

3.1 *Constitution as incompletely theorized agreement*

It is true, as Steinberg argues above, that there are different economic models of attending to the interests of the poor. It is, however, difficult to understand how she regards issues of economic models as relevant to the discussion about the content of rights. It is submitted that this shows the

⁷⁴ Steinberg (n70) p.273

⁷⁵ Steinberg (n70) p.273-4

⁷⁶ Steinberg (n70) p.273

⁷⁷ 1995 (4) SA 615 (CC)

⁷⁸ Steinberg (n70) p.275

⁷⁹ Liebenberg (n66) p.15

⁸⁰ Steinberg (n70) p.275

misunderstanding common to critics of the minimum core obligation on the argument submitted in favour of the core minimum obligations. The minimum core obligation requires that rights be given a minimum content below which no one must live. How this is done is different a discussion. At this point, the inquiry is simply what the poor are entitled to. The minimum core obligation in essence requires that whatever economic model is used, such economic model should accord people a basic minimum. The government is free to choose whatever economic model it wishes, so long it makes the core minimum available. Choice of economic models is therefore not an impediment to the core minimum obligation.

3.2 *Resource capacity*

It is argued that the state has no resources to provide the minimum core of a right. This is too broad a claim. This reasoning by the Court is not substantiated by any scientific or financial data. The Court simply assumes that it is not possible to provide for everyone. There are reports of various government departments and municipalities returning money to the treasury⁸¹ at the end of the financial year.⁸² It cannot simply be accepted as fact that the resources are not there. In any event, in a constitutional dispensation which requires democracy, transparency and accountability, it is strikingly concerning that the Court makes findings on the incapacity of

⁸¹<http://fstimes.co.za/Municipalities%20risk%20losing%20R300m.html> , ‘Municipalities risk losing R300m’ “MUNICIPALITIES in the Free State still have over R300 million of their municipal infrastructure grants (MIG) to spend before the financial year closes at the end of this month, the Free State Times learnt this week.

The grants are given by national treasury to bankroll infrastructure development and service delivery programmes in municipalities. All MIG money unspent within the respective financial year is returned to national treasury.

A report dated May 22 and presented on the same date to the provincial legislature’s portfolio committee on cooperative governance, traditional affairs and human settlements said the municipalities were by the end of April still holding on to R315 288 706 or about 31 percent of the total R1, 020 billion grant money made available to them by national treasury in July last year. The municipalities had only the months of May and June to spend the money failure of which it would be forfeited to national treasury. The report, a copy of which was shown to this newspaper, was prepared by the provincial department of cooperative governance, traditional affairs and human settlements. It said municipalities had together managed to spend 69 percent of the grant money which is 13 percentage points less than the 82 percent that local government insiders say the local authorities should have exhausted by the time the report was compiled.

⁸² http://www.localgovernmentaction.org/activists-guide/key-processes/municipal_budget

government without calling for critical and if necessary, expert analysis to evaluate if it is indeed so that the government has no resources. The Court has in some cases refused to pronounce on one aspect or another because no evidence in that regard would have been presented. Also, this objection to the minimum core fails to take into account cases where resources are not serious concern or not the germane issue. In *TAC*, there was no question of resource allocation, and if it was there, it was very insignificant. Further, the argument is a misreading of the minimum core obligation approach.⁸³ The minimum core does not envisage that the core will always be provided.⁸⁴ The state has a strong burden of justification that it is unable to do so. In this respect, section 26 (2) or section 27 (2) or indeed section 36 may be used to show that the violation of the right is reasonable and justifiable. If resources are an issue, what is required is that there is prioritization to the threshold. Bilchitz offers what appear moralistic arguments in rejecting the Court's argument. Amongst other things, he argues that the minimum core "... requires us to recognize that it is simply unacceptable for any human being to live without sufficient resources to maintain their survival."⁸⁵ It is similar to the idea expressed above that it is "state responsibility (to provide socio-economic provisions) from cradle to grave."⁸⁶ He further resorts to the values of the Constitution and submits that "[o]ne of the main ideas behind constitutional rights is to protect the vulnerable."⁸⁷ Bilchitz is on solid ground. "A state must do everything within its powers to rectify ... intolerable ... living conditions."⁸⁸

3.3 *Participatory democracy*

It is argued that minimum core obligation closes debate and in essence democratic participation. It is contended that it fixes the content of the right. Once the content is fixed, it is feared that there will not be space for discussion in other democratic organs of the state. It is submitted that

⁸³ Bilchitz (n65) p. 17

⁸⁴ Bilchitz (n65) p.18

⁸⁵ Bilchitz (n65) p.15

⁸⁶ See King, *Judging Social Rights* (Cambridge) (2012) p.39

⁸⁷ Bilchitz (n65) p.15

⁸⁸ Bilchitz (n65) p.15

the argument has no merit. The giving of content of a right does not distract from continuous discussion on the subject. In fact, it is difficult to understand how it can be alleged to do so. The notion of reasonableness which the Court engages in socio-economic rights is not completely lost by the adoption of the minimum core approach as well. It only means that instead of engaging in the reasonableness inquiry in section 26 (1) and section 27 (1), that inquiry will be held in section 26 (2) and 27 (2). Whatever the perceived benefits of the reasonableness inquiry are retained. Reasonableness, if it is, and however it is suggested to be the basis for democratic participation, is retained. As argued above, the minimum core itself may be limited. This limitation will require that it be justified. The justification of the limitation will involve a reasonableness inquiry akin to a proportionality inquiry. Democratic participation continues in the justification inquiry even of the minimum core obligation. Further, the content of the right can still be re-argued again in Court if the Court comes to the wrong conclusion. There is nothing that stops an Applicant from approaching a Court to convince the Court that its previous conclusion was wrong. This then in fact means that the setting of the content of the right is a product of democratic participation. Its revision is also a product of democratic participation. This democratic participation does not stop at any point.

3.4 *Differences in the text of the Constitution and the ICESCR*

3.4.1 *Access to adequate housing and adequate housing*

It is submitted that the differences in the text of the Constitution and the ICESCR are evident. However, the difference does not negate the argument about the minimum core obligation's desirability and cogency.

The ICESCR provides for adequate housing while the Constitution provides for *access* to adequate housing. The difference is in the inclusion of the word access in the Constitution, which word is noticeably absent in the ICESCR. It appears that the Court was of the view that there is no claim to a physical house, but rather to factors which enable one to have a house. This is the meaning the Court ascribed to the word access. It is instructive though that the Court does not linguistically lay a basis for adopting this meaning of the word access. It was suggested that

the meaning was self-evident and incontrovertible. It is submitted that the word access does not have this self-evident meaning. The Court ought to have provided justification for the meaning it gave to this word.

Accepting, without conceding, the meaning ascribed to the word access by the Court, it is submitted, that the difference in the wording only leads to a difference in what constitutes the minimum core of the right in issue rather than whether or not the minimum core can be established. The Court could have interpreted the Constitution, it is submitted, to mean that the ‘there is a minimum threshold beyond which the right to have access to housing, as understood above, should not go’ and given content to that. This would refer to the minimum expected of the state in providing access to socio-economic good under consideration. The Court in paragraph 35 of *Grootboom*,⁸⁹ indicated some factors relevant in identifying the minimum required. In that respect, the content becomes the ‘minimum access required by the human beings in order to survive.’ In this respect, one is entitled to a minimum access, a minimum core access. This does not mean that one is entitled immediately to have ‘in hand’ the substantive benefit of the right claimed. Put differently, one may not be immediately entitled to own something, but one may be entitled to access it. For instance in housing, one does not own actual house or material, but can access shelter or rent or that which enables him or her independently to provide the house for themselves. This may also relate to structural issues like accessing private or government capital or enabling resources. On the other hand, the minimum core in respect of *adequate* housing as provided in the ICESCR relates to what form of physical shelter constitutes the ‘minimum beyond which the very survival of a human being becomes threatened.’ What is appropriate can only be appropriate if it is adequate. In this sense, the difference in the words employed in the Constitution and in the ICESCR is not really material. The ordinary linguistic meaning of the appropriate⁹⁰ and adequate,⁹¹ properly construed, is essentially the same. Further, given the thrust of *Grootboom*⁹², government conduct cannot negate the most needy and government conduct

⁸⁹ *Grootboom* (n1)

⁹⁰ <http://www.oxforddictionaries.com/definition/english/appropriate---> ‘appropriate’ “Suitable or proper in the circumstances”

⁹¹ <http://www.oxforddictionaries.com/definition/english/adequate> -- ‘adequate’ “ Satisfactory or acceptable in quality or quantity”

⁹² *Grootboom* (n1)

must respond to the need complained of. If the response of the government is *not appropriate*, it is certainly *not adequate*, and if it is *appropriate*, it is *adequate* in the sense that it attends to the needs identified. This approach reconciles well with the elements which constitutes reasonableness as discussed above. In this sense, the reasonableness test is not lost, it is just moved to a second inquiry after the content of the right has been established.

3.4.2 *Appropriate steps and reasonable steps*

The second difference identified by the Court in the text was that "... [t]he Covenant obliges states parties to take *appropriate* steps which must include legislation while the Constitution obliges the South African state to take *reasonable* legislative and other measures." It is submitted that the difference in the wording is also self-evident. However, the difference is not material to the issue in contention. To be able to judge what is *appropriate* and/or *reasonable*, there is a need for a reference point. What is appropriate and or reasonable has to be measured against a definable expectation. That definable expectation is the minimum core of the right. It is important therefore to define the content of the right. Once the minimum core of the right has been identified, government conduct if it is appropriate when measured against the minimum core, it will also be reasonable. Put differently, if government conduct is reasonable measured against the minimum core, such conduct will be appropriate. In essence, the submission is that that what is reasonable is appropriate and what is appropriate is reasonable. Further, it will not be reasonable or appropriate if it does not meet the minimum core. This is so because the minimum core is the base measurement. The differences in the wordings of the Constitution and ICESCR, it is submitted, do not defeat the minimum core obligation. If anything, it reinforces it.

3.5 *Progressive realization of a right in section 26 and 27.*

Liebenberg defines progressive realization as "the dismantling of a range of legal, administrative, operational and financial obstacles which impede access to the rights and the expansive, over

time, of such access to a larger and broader range of people.”⁹³ This means “gradually (improving) the quality of goods and services which people have access (to) until the goal of full realization of the right is achieved.”⁹⁴ Bilchitz, although to the same effect, explains reasonableness from a slight different angle. He states that reasonableness “does not mean some receive housing now and others receive it later, rather, it means each is entitled as a matter of priority to basic ... provisions which the government is required to improve gradually over time.”⁹⁵ If this is accepted, as it should, it is submitted that progressive realization cannot be evaluated in a vacuum. Minimum core obligation will help in evaluating the progressive realization of a right in section 27 and 26. The approach of the *amicus curiae* of identifying two self-standing rights is the best suited to provide content to the section 26 (1) and section 27 (1). Progressive realization can only be meaningfully measured against a giving of a core minimum to the right in section 26 (1) and section 27 (1). As already submitted above, in the definition of the content of the right, resource scarcity does not enter the discussion. Progressive realization is invariably linked to resource availability.

3.6 *Minimum core better suited for legal a degree of legal certainty*

It is preferred that the government must know or reasonably anticipate the legal, much more human rights consequences of their conduct or omission. This helps in the formulation of governmental policies designed to give effect to human rights. This enables the government to better understand the progressive realization of rights. With the minimum core, the ‘takeoff’ implementation and the progressive realization of the rights is much clearer to implement and measure respectively. However, as stated above, legal certainty is not the only end of constitutional law in general and human rights law in particular. The ratio of the judgment on *Zantsi v Council of State, Ciskei*⁹⁶ in so far as it is suggested the Court should not go beyond the

⁹³ Liebenberg (n67) p.187

⁹⁴ Liebenberg (n67)p.187

⁹⁵ Bilchitz (n22) p.193

⁹⁶ *Zantsi* (n77)

facts on the matter before it, of doubtful cogency in today's constitutional adjudication. In the matter of *Pillay*,⁹⁷ it is clear that the Court went beyond the facts of the matter before them. The Court, in my view correctly, sought to give wide guidance on how private schools should engage with issues relating to human rights.⁹⁸ Further, jurisprudence on eviction matters has largely been developed in a way which anticipates future disputes and gives clarity as to how state organs and or private persons should approach evictions. This has, it is submitted, largely progressively settled the law (and rights) around evictions. The law in this area is largely settled, certain and predictable. The same may be a positive result of the core minimum obligation approach. Standards are too amorphous for any meaningful constitutional development. What Steinberg appears to fear, that is that "[t]he minimum core approach could result in actual and perceived restrictions on the legislature ..."⁹⁹, what she calls "... constitutional straitjacket."¹⁰⁰ In this sense, Steinberg fears that the setting of minimum core will restrict the government in a slavish following of what is determined as the minimum core. For instance, in *Mazibuko*,¹⁰¹ the debate centered on a minimum amount of water to be provided. In this sense, cynically, the government might provide the identified quantity and leave it at that. However, this fear is misplaced.

Firstly, the minimum core will not restrict government as it will be laid as a general standard below which the government must not fall. If the government only provides for the standard minimum core, over time, it will fail the progressive realization test. There is therefore no incentive for the government only to provide the 'straight-jacket.' The straight-jacket may be immediately something to celebrate; however, owing to the constitutional imperative of

⁹⁷ *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) ('Pillay')

⁹⁸ *Pillay* (n97) the Court opined at 114 that "[i]t is worthwhile to explain at this stage, for the benefit of all schools, what the effect of this judgment is, and what it is not. It does not abolish school uniforms; it only requires that, as a general rule, schools make exemptions for sincerely held religious and cultural beliefs and practices. There should be no blanket distinction between religion and culture. There may be specific schools or specific practices where there is a real possibility of disruption if an exemption is granted. Or, a practice may be so insignificant to the person concerned that it does not require a departure from the ordinary uniform. The position may also be different in private schools, although even in those institutions, discrimination is impermissible. Those cases all raise different concerns and may justify refusing exemption. However, a mere desire to preserve uniformity, absent real evidence that permitting the practice will threaten academic standards or discipline, will not."

⁹⁹ Steinberg (n70) p.274

¹⁰⁰ Steinberg (n708) p. 274

¹⁰¹ *Mazibuko* (n9)

progressive realization, it may be a basis for new demands. Further, although the Court in *Mazibuko* did not decide the question, it certainly insinuated that a bare compliance with legislation, regulation or policy may be held to be unreasonable.¹⁰² Further, once the minimum is established, the government is under an obligation not to negatively interfere with the minimum core provided. Socio-economic rights also have a negative obligation on the government barring the government from negatively affecting the rights¹⁰³. In this sense, the minimum core obligation confers a benefit both from a perspective concerned with the progressive realization of the right - in that it lays a base for further enhancing the provision of the content of the right - and a perspective that seeks to protect from regression on the provided content of the right.¹⁰⁴

4 *Court's legal questions in socio-economic rights*

It is submitted that it is noteworthy that the Court formulated the legal issue to be determined, say in *TAC*,¹⁰⁵ as “what was to happen to those mothers and their babies who cannot afford access to private health care and do not have access to the research and training sites?”¹⁰⁶ The Court asked an analogous question in *Grootboom*¹⁰⁷ when it inquired what was to happen immediately to the people in need. This question, in light of the discussion on minimum core obligations, could be interpreted as an inquiry as to whether the mothers and babies who cannot afford private health care had an entitlement to anything as of immediate right. This is more so against the common cause facts that the government did not know when the drug would be more widely available. In essence, the Court, by asking this question, seems to be suggesting that the government has to provide something in the present immediately. It is an entitlement to realise the core of the right, the essence of the right below which no one should go. The Court correctly

¹⁰² *Mazibuko* (n9) para 76

¹⁰³ *Japhtha v Schoeman and Others, Van Rooyeb v Stoltz and Others* 2005 (2) SA 140 (CC), Bilchitz (n10) p.714, 715, 720-726

¹⁰⁴ Negative regression will require much more stringent justification.

¹⁰⁵ *TAC* (n2)

¹⁰⁶ *TAC* (n2) para 17

¹⁰⁷ *Grootboom* (n2)

inquires what is it that the mothers are entitled to in the immediate without regard to available resources. The Court does not say anything about immediately; however, implicit in the inquiry is that the Court was of the opinion that the mothers and the children are entitled to something. It is submitted that there is an implicit recognition of the minimum core obligation. This is the minimum core which the Court postures to reject. The Court appears to be flirting with the minimum core argument even though it expressly rejects it. To require the government to provide something to the mothers and children in the immediate is in fact, it is submitted, ordering the government to do something, is poly-centric, and done with the recognition of the separation of powers doctrine and the appropriate role of the Court. It is submitted that the legal questions the Court puts demonstrates that the Court recognises the need for a minimum core obligation. It is the Court's fear about what it perceives to be the stage the country is in its reconstruction after centuries of colonialism and Apartheid, the capacity of the civil service and the state which makes the Court reluctant to adopt the minimum core obligation. There is an unstated residual fear, it is submitted, that the conferring, in substantive terms, of a minimum core may put the state under civilian pressure who expect the promises of the Constitution on demand. In the end, the state may be paralysed and in the long run, become illegitimate.¹⁰⁸ There is a fear of unintended political consequences. The national implications may be more than the Court would have intended by conferring the minimum core. However, this fear is unreasonable.

It been argued above that this is based on a misconception of the implications of the minimum core obligation. There is difference between the definition of the content of the right and implementation. Further, the minimum core, while it is better placed in giving content of a right; it is not too high a standard of provision. For a Constitution which gives people rights to be much more than a paper document, the rights in the Constitution should give people something concrete. Put differently, rights should give people concrete entitlements. The alternative is to make true the cynicism "many accept as a virtual truism that courts provide little solace for the poor."¹⁰⁹ It will weaken the legitimacy of Courts as forums of having 'disputes which can be resolved by application of law' as the Constitution contemplates.

¹⁰⁸See also Bilchitz (n67) p.714 and at p.718 where he observes that " ... the increase in the number of individuals living in inadequate housing could lead to strong political instability and continued land/property occupations that might over time threaten the political and socio-economic order"

¹⁰⁹ King (n86) p.79

I have attempted to show that the reasons for the rejection of the minimum core obligation are not all together convincing. The minimum core obligation is a better approach than the reasonableness test. It has evident benefits. I now will briefly discuss why the minimum core obligation is better than the reasonableness test.

5. *Minimum core is better than the reasonableness*

It is argued by some authors that the notion of minimum core obligation is jurisprudentially preferable as it "... places people's most fundamental interests at the centre of socio-economic rights jurisprudence."¹¹⁰ It "... addresses certain vital interests that people have."¹¹¹ In this way, the Court will be "... placing the individual at the centre of its inquiry in such cases."¹¹² It therefore vindicates the individual as the primary concern of rights. This is so because, as Bilchitz argues, the "... minimum core describes minimum essential levels of the right."¹¹³ These essential levels, as indicated above, are set out in General Comment 3. It is the "... basic resources that are necessary to allow individuals to be free from threats to achieve a minimum level of well-being."¹¹⁴ The services have to be provided to the "... population under all circumstances"¹¹⁵ placing the individual as the end of rights. A large amount of resources must be deployed to the attainment of achieving the minimum level of well-being. As stated above, if the state fails to provide the minimum core, the state has a very difficult burden of justification. The state must show that it has done all it can to realise the minimum core of the right by prioritizing the minimum core and deploying resources accordingly. Assefa, argues that the "... minimum core is an essential element of any right without which the right risks losing its substantive significance as a right. It provides a threshold below which standards should not

¹¹⁰ Bilchitz (n34) p.2

¹¹¹ Bilchitz (n34) p.2

¹¹² Bilchitz (n34) p.3

¹¹³ Bilchitz (n34) p.3

¹¹⁴ Bilchitz (n34) p.3, 4

¹¹⁵ Bilchitz (n22) p.12

fall.”¹¹⁶ Bilchitz appears to agree and states that if people’s survival interests are not protected “... all other interests and rights that they may have – whether civil, political, social or economic – become meaningless”¹¹⁷ To this, King observes that “democracy depends on guarantee of social human rights”¹¹⁸ Liebenberg accepts that there are benefits to the minimum core obligation.¹¹⁹

6 *Challenges of the minimum core obligation*

The minimum core obligation is a better alternative to the reasonableness test. It is defensible in many respects. However, as has been shown above, directly and by implication, the minimum core has its own challenges. Even a proponent of the minimum core, Assefa, notes that “[o]ne of the most difficult articulations of the CESCR has been the notion of the core minimum obligations.”¹²⁰ On the other hand, Bilchitz observes that “[t]he UN Committee has left some vagueness about thresholds”¹²¹ of the minimum core obligation.¹²² Of importance, Bilchitz recognises that there could be differences in the content of the minimum threshold between, generally, developed and developing countries, particularly given that in developed countries “... the level of well being of most individuals exceeds (the) minimum threshold-by far.”¹²³ On this Liebenberg argues that the minimum core has “no clarity and certainty on what priorities are.”¹²⁴ It is unclear what are priorities are at long, short or medium term.¹²⁵ Young also argues that it is unclear whether the reference of survival means survival in the biological sense or something else.¹²⁶ If it is, then it is argued that “survival in the biological sense is unduly

¹¹⁶ Assefa (n11) p.54

¹¹⁷ Bilchitz (n22) p.12

¹¹⁸ King (n86) p.187

¹¹⁹ Liebenberg (n67) p.184

¹²¹ Bilchitz (n10) p.730

¹²² It has to be remembered that Bilchitz criticises the reasonableness test suggesting that it is vague or amorphous.

¹²³ Bilchitz (n10) p.732

¹²⁴ Liebenberg (n67)

¹²⁵ Liebenberg (n67)p.167

¹²⁶ Young, *The Minimum Core of Socio-economic Rights: A Concept in Search of Content* (2008) 33 *The Yale of International Law* 112-175 at 138-140

reductionist, it is suggestive ... when attaching to life of a more scientific needs based assessment of commodities necessary for biological survival” when in fact human being needs more. They need non-materialistic commodities like psychological well being or recreation in general.

Bilchitz and Assefa concede that minimum core may be vague in content.¹²⁷ There could be legitimate differences on what constitutes the minimum core requiring “... us to think about the impact that societal expectations have on the specification of the thresholds required by socio-economic rights.”¹²⁸ As Young argues, the threshold of the minimum core “reveals its own controversies and indeterminacies.”¹²⁹ Bilchitz recognising the perceived vagueness and indeterminacy of the minimum core submits “... that there is a ... a strong virtue in having a universal objective standard that applies across the world that flows from the most basic needs and interests of human beings in being free from threats to survival.”¹³⁰ This may very well be so. The point though is that there could be legitimate difference on what constitutes what Bilchitz calls “objective standard.” Various factors are brought in determining the “objective standard” so much that the objectivity of the standard itself becomes a point of contention. The objectivity of the standard may itself be challenged. Unable to respond to the vagueness criticism, the minimum core “offers thin guidance”¹³¹ on socio-economic rights jurisprudence Reasonableness has been argued to be vague. This vagueness may also lead to indeterminacy. Some of the vices of the reasonableness test may be similar to those of the minimum core obligation.

7 *Teasing a third way*

As shown above, I prefer the minimum core obligation. I equally recognise its challenges. It is unlikely though that the Constitutional Court will jettison the reasonableness test anytime soon. Can there be a third way? I now intend to suggest, a basis for further discussion on a third way,

¹²⁷ Bilchitz (n10) p.732

¹²⁸ Bilchitz (n10) p.732

¹²⁹ Young, *Constituting Economic and Social Rights* 39 (2012)

¹³⁰ Bilchitz (n10) p.732

¹³¹ King (86) p.115. King refers to countries like Brazil, Colombia and Argentina which have dealt with issues of life saving drugs as set guidance on the minimum core obligation. The learned author correctly observes that there is a benefit from lessons from other countries.

which in the fullness of time may be an acceptable compromise which accommodates the best of the reasonableness test and the minimum core obligation. I make no more case than to suggest a foundation for relooking at the test to apply in socio-economic rights. In a word, I tease. I wish to tease out a blending of the best of the minimum core obligation, which I prefer, and the best of the reasonableness test as set by the Court. In this way, I hope to suggest a solution to the criticism of the minimum core's vagueness and its alleged breach of the separation of powers. At the same time, I hope to suggest a solution to the alleged vagueness of the reasonableness test and its administrative law bias.¹³²



¹³² Brand, *The Proceduralisation of Socio-economic Rights Jurisprudence or “What are socio-economic Rights For?”* in Botha et al, *Rights and Democracy in a Transformative Constitution* (2004)

PART IV

1 *Making a base case for a third way on jurisprudence on socio-economic rights*

The reasonableness test and the minimum core obligation are, in the main, based on what their advocates contend is the textual interpretation of the provisions of section 26 (1) and section 26 (2) and section 27 (1) and section 27 (2) of the Constitution. It is suggested that through a faithful interpretation of the text of the Constitution, for the reasonableness test advocates, the reasonableness test is defensible. The same is true of the minimum core obligation advocates. The text of section 26 (1) and 26 (2) and section 27 (1) and 27 (2) of the Constitution is made the point of departure. The advocated textual interpretation by both the reasonableness test and minimum core obligation is justified for various reasons as being, on the whole, broadly compatible with the South African context. Below, I intend to look at the matter differently. I want to use a different point of departure in finding the test to apply in socio-economic rights. As a point of departure, I question the nature of government action when it formulates and implements socio-economic rights policy. Having understood the nature of action, I then suggest a way of approaching socio-economic rights.

Socio-economic rights place legal obligations on the state to act. The state acts in at least two ways. First, it formulates socio-economic rights policy and secondly, it implements socio-economic rights policy. The two, formulation and implementation, may be located within the executive. In other words, it is the executive that formulates socio-economic rights policy and also implements the policy. Firstly, the formulation of socio-economic rights policy may involve the conceptualization, at an abstract level, of the government's approach to delivering socio-economic rights. For instance, in *Grootboom*,¹³³ the state had a housing policy which captured how the state intended to provide housing, a socio-economic right, in *TAC*,¹³⁴ it had a policy to provide nevirapine, and in *Mazibuko*,¹³⁵ a policy to provide water. This policy formulation is

¹³³ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC)

¹³⁴ *Minister of Health v Treatment Action Campaign (No. 2)* 2002 (5) SA 721 (CC)

¹³⁵ *Mazibuko v City of Johannesburg* 2010 4 (SA) 1 (CC)

mainly done by high-ranking members of the executive. By high ranking members of the executive, I am referring to those who have direct constitutional or legislative responsibility to do so and are enjoined constitutionally or legislatively to account for it as the political heads. This may refer, for instance, to Ministers or Members of the Executive Committees in provinces.¹³⁶ This power to formulate policy is given to the executive by the Constitution. It is constitutionally mandated.¹³⁷ The Constitution is the source of power. Secondly, in the implementation of socio-economic rights policy, high-ranking executive members make use of executive functionaries and bureaucrats. Although located in the executive, they are lower-ranking so much that their role is, in the ordinary meaning, administrative.¹³⁸ The implementation of the formulated policy requires administrative machinery. By administrative machinery, I am referring to an administrative system and personnel. These functionaries or bureaucrats assume, descriptively and substantively, administrative responsibility.¹³⁹ They are, as it were,¹⁴⁰ where the 'tyre hits the tar' in that "... it is connected with the daily business of government."¹⁴¹ The Constitution envisages that the executive coordinates administration.¹⁴² The power of the functionaries to implement policy can be said to be delegated authority from high-ranking members of the executive who have the direct authority to act. This delegation happens as expressed from and in the policy so formulated by the higher-ranking members of the executive.¹⁴³ Put differently, these functionaries are empowered to act as administrators by virtue of delegated power from the high-ranking members of the executive through a) a constitutional provision empowering the high-ranking executive member to do so¹⁴⁴, b) policy formulated by

¹³⁶ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 41 "... it is clear from the Constitution itself that the exercise of executive authority, in terms of section 85, is a collaborative venture in terms of which the President acts together with the other members of Cabinet."

¹³⁷ S 85 (2) (b) of the Constitution, 1996

¹³⁸ This is what is envisaged by s 85 (2) (c) of the Constitution, 1996

¹³⁹ *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) para 37

¹⁴⁰ See generally *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 24

¹⁴¹ Currie & J de Waal, in association with Lawyers for Human Rights and the Law Society of South Africa, *The Bill of Rights Handbook* (5th ed) (2005)

¹⁴² s 85 (5) (2) of the Constitution, 1996

¹⁴³ *President of the Republic of South Africa v South African Rugby Football Union* (n4) para 138-147

¹⁴⁴ This is important for the submission to be made further below. The source of power of the lower ranking official is not the Constitution itself, but rather the delegated authority by a high ranking executive member

the high-ranking members of the executive or c) legislation proposed by high-ranking members of the executive and enacted by the legislature. The nature of their power is administrative in the ordinary grammatical sense.

From the above, it is then clear that the executive has at least two main functions. It formulates and then implements the policy on socio-economic rights. Conceptually thinking, there are two issues a) policy formulation and b) administration in the ordinary grammatical sense. All this is also exercising public power granted by the Constitution. What then is the form of the action when the executive formulates and implements socio-economic rights policy?

a. *Executive action and administrative action*

It has been established that the identity of the decision maker, the nature of action, nature and purpose of the power, the source of power may be instructive in identifying the nature of an action; that is, whether it is administrative or executive action.¹⁴⁵ The constraints of the power must also be considered.¹⁴⁶ I have suggested that the source of power for the higher-ranking members of the executive to formulate policy is the Constitution,¹⁴⁷ while the source of power to administer the policy by lower ranking members of the executive may be delegation from a Minister or Member of the Executive Committee, legislation or from the policy so formulated. On the identity of the decision maker, it is the Minister or Member of the Executive Committee (a member of the executive) who formulates policy and therefore decides on the policy choices and lower-ranking functionaries administer the policy and decide on the implementation of the

who himself or herself is empowered to delegate by the Constitution. The power to delegate is given to the high ranking member of the executive by the Constitution but it does not mean the source of the power for the lower ranking member of the executive is the Constitution itself. It is such delegation. Without the delegation by the higher ranking member, the lower ranking member of the executive has no power.

¹⁴⁵ *President of the Republic of South Africa v South African Rugby Football Union* (n4) *Masetlha v President of the Republic of South Africa and Another* 2008 (1) BCLR 1 (CC) at para 65 and 69-70. Cf *Minister of Defence and Military Veterans v Motau and Others* (n7) para 40

¹⁴⁶ *Minister of Defence and Military Veterans v Motau and Others* (n7) para 41

¹⁴⁷ *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) para 21

policy from an administrative perspective.¹⁴⁸ The nature of the power conferred on the functionaries is administrative, while the power conferred on the high-ranking member of the executive is executive. Further, the nature of action of the high-ranking member of the executive is executive, while the nature of action of the lower-ranking member of the executive is administrative. Given the source of power, the nature of the action, the nature of the power and the identity of the decision maker, the formulation of socio-economic rights policy is executive action. On the other end, given the source of power, the nature of action, the nature of the power and the identity of the decision maker in the implementation of socio-economic rights policy, the implementation of socio-economic rights is administrative action.¹⁴⁹

From the above, two strands are identifiable in respect of the realization of socio-economic rights. I will refer to the formulation of policy by high ranking members of the executive as pure executive action and the implementation of the formulated policy by lower ranking functionaries as administrative action.¹⁵⁰ In this way, it is submitted, the implementation of socio-economic rights is a complex hybrid of administrative and executive action. The difference in the two may not be too obvious and will require an attentive application of judicial mind.¹⁵¹ The difficulty in observing the difference may also depend on the complexity of the working of the government structure and system. Either way, however, there is executive action and administrative action. I now turn to consider the two in turn and the implications thereof the test to be used in challenges to socio-economic rights.

¹⁴⁸ The paper will, below, draw a distinction between structural administration and day to day administration

¹⁴⁹ It worth noting that policy and implementation may overlap at times. It may be difficult, at times, in telling the one from the other.

¹⁵⁰ The paper will draw a distinction between administrative action within the executive and pure administrative action on day to day administration. See also Chaskalson CJ in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (8) BCLR 872 (CC) at para 126

¹⁵¹ *Minister of Defence and Military Veterans v Motau and Others* (n7) para 36

b. *Administrative action and executive action evaluation*

It is submitted that, the nature of the power makes a difference to the constitutional standard that is to be applied. Once it is established that the decision being challenged is administrative action, the decision should be subjected to an evaluation for reasonableness which allows for more searching analysis of the decision and accords with the standard in administrative law. On the other hand, once it is established that the decision being challenged is a pure executive action, the decision is subjected to at least two evaluations, legality¹⁵² and a rationality evaluation.¹⁵³ This is a less searching analysis of the decision. This is also so since it is an exercise of public power but by a member of the executive who has a strong degree of democratic accountability.¹⁵⁴ The legality evaluation is rather straight-forward.¹⁵⁵ The source of the power must be identified. I have suggested that the Constitution is the source of power. This is hardly controversial. I now consider the rationality evaluation. It is here that something more needs to be said about the content of the rationality test. I proceed to suggest this content.¹⁵⁶

c. *Rationality test*

As stated above, when the executive is formulating policy, it is broadly mandated to do so by section 85 of the Constitution, 1996 ('the Constitution'). This policy may relate to how the

¹⁵² *President of the Republic of South Africa v South African Rugby Football Union* (n4)

¹⁵³ *Democratic Alliance v President of the Republic South Africa* 2013(1) SA 248 (CC) para 12

¹⁵⁴ *S v Makwanyane* 1995 (3) SA391 (CC) para 156; *New National Party v Government of South Africa* 1999 (3) SA 191 (CC) para 19 and 24; *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of South Africa* 2000 (2) SA 674 (CC) para 85 and 90; *United Democratic Movement v President of South Africa (No 2)* 2003 (1) SA 495 (CC) para 55; and *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 74-9.

¹⁵⁵ I do acknowledge that legality has of late a content which is not just about the source of power.

¹⁵⁶ The decisions which have been challenged thus far in Court have been where the Applicants contend that the policy of government is unconstitutional. It has not been that the administrative action aspect of the policy are unconstitutional. In that respect, it is beyond the scope of this paper to address the administrative action test necessary.

executive, for instance, appoints an ambassador.¹⁵⁷ Nothing in section 85 of the Constitution, stipulates the areas the executive should make policy on. It confers general powers.¹⁵⁸ If a decision to appoint an ambassador is challenged, because it is executive action, it should be tested for, at the very least,¹⁵⁹ rationality¹⁶⁰. The executive will have to show that the appointment is rational. Rationality review requires that the action taken is "... more or less efficient means to an end rather than any other."¹⁶¹ The action taken "... must be rationally related to the purpose for which the power was conferred."¹⁶²This was held to mean that;

"The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is not to determine whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."¹⁶³

¹⁵⁷ This involves the exercise of political judgment see *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa* (n22), see also *I. Currie* (n9) p.652

¹⁵⁸ *Minister of Defence and Military Veterans v Motau and Others* (n7) para 28

¹⁵⁹ There could be challenges based on legality

¹⁶⁰ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA374 (CC) para 56-8; *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of South Africa* (n22) para 85.

¹⁶¹ *Currie* (n9) p.676 (foot note omitted)

¹⁶² *Democratic Alliance v President of the Republic of South Africa* (n21) para 28. See also *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* (n22) at para 85. See also *Affordable Medicines Trust and Others v Minister of Health and Another* (n20) at para 75 and *Masetlha v President of the Republic of South Africa and Another* (n12)

¹⁶³ *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (5) BCLR 391 (CC) para 51.

The Court in *Democratic Alliance* surmised the rationality test to be;

“... really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional.”¹⁶⁴

Rationality review is a low threshold.¹⁶⁵ It is the “minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries.”¹⁶⁶ It grants wide discretion to the executive. The executive are political players subject to plebiscite and electoral mandate. They are accountable to the electorate for their decisions. It is submitted that it makes constitutional sense to give the higher-ranking executive wider latitude to act as they deem prudent in the formulation of policy on broad issues (executive action),¹⁶⁷ for instance, the appointment of an ambassador¹⁶⁸ as these involve political judgment. This will invariably “... achieve a proper balance between the role of the legislature (and the executive) on the one hand, and the role of the courts on the other.”¹⁶⁹ Separation of powers is respected.¹⁷⁰ In fact as the Court held, “[t]he separation of powers has nothing to do with whether a decision is

¹⁶⁴ *Democratic Alliance v President of the Republic of South Africa* (n21) para 32

¹⁶⁵ *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 (3) SA 265 para 46

¹⁶⁶ *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of South Africa* (n22) para 78

¹⁶⁷ *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc* (n15)

¹⁶⁸ Cf *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC)

¹⁶⁹ *Affordable Medicines v Minister of Health* (n22) para 83. See also *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (10) BCLR 1348 (CC) para 44.

¹⁷⁰ *Democratic Alliance v President of South Africa* (n21) para 44

rational. In these circumstances, the principle of separation of powers is not of particular import ...”¹⁷¹ This is certainly an apt observation by the Court.

d. *Constitutional reasonableness test*

When the executive acts in formulating socio-economic rights, it is not only acting on the basis of wide powers conferred to it by section 85 of the Constitution. In fact, it is not acting, strictly speaking, on the basis of section 85 of the Constitution. It is acting on the basis of section 26 (2) and 27 (2) read with section 8 (1) of the Constitution. Section 26 (2) and 27 (2) of the Constitution, provide that “[t]he state *must* take reasonable legislative and *other measures*, within its available resources, to achieve the progressive realisation of this right” (emphasis added). Section 8 (1) of the Constitution provides that the “[t]he Bill of Rights ... binds the ... executive ...” In this way, there is a constitutional injunction on the executive to formulate policy on socio-economic rights. This can be through drafting legislation¹⁷² or other measures which include the drafting of policy. It is worth emphasizing that the Constitution specifically, as opposed to broadly in section 85 of the Constitution, confers powers on the executive to formulate socio-economic rights policy. Section 26 (2) and section 27 (2) of the Constitution, read with section 8 (1) of the Constitution may therefore be read in two ways. Firstly, it is a constitutional requirement that the government formulates socio-economic rights policy.

¹⁷¹*Democratic Alliance v President of South Africa* (n21) para 44

¹⁷² See also section 85 (2) (d) of the Constitution provides that ;

Section 85 (1) The executive authority of the Republic is vested in the President.

(2) The President exercises the executive authority, together with the other members of the Cabinet, by—

(a)

(b) ...

(c) ...

(d) preparing and initiating legislation; and

(e) ...

Secondly, it is an empowering section. It is the source of the power for the executive to formulate socio-economic rights policy. It is the later sense that I now focus on.

Given that section 26 (2) and section 27 (2) of the Constitution, read with section 8 (1) of the Constitution are specific and directed empowering provisions for socio-economic rights policy formulation, the level of scrutiny of policies formulated in consequence of a specific, directed mandate and specifically enacted provision, it is submitted, cannot be same as policy formulated in consequence of general mandate and general power conferred by section 85. Special constitutional attention needs to be paid to such policy proportionate to the special attention given to socio-economic rights policy formulation by section 26 (2) and 27 (2) of the Constitution. The evaluating test for socio-economic rights policy, given the specific mandate, and empowering provisions, has to be higher than that which arises from general mandate and a general empowering provision in section 85 of the Constitution.

In the general sense, conduct of government which has been adjudged to be executive action should be evaluated on the basis of rationality as stated above. However, in the case of section 26 (2) and section 27 (2), the Constitution specifically states that the conduct must be tested for reasonableness. We therefore have, at a conceptual general level, the requirement to evaluate government executive action on the basis for rationality and a specific mandate from the Constitution to evaluate the executive action for reasonableness. It is submitted therefore that this creates a complex hybrid of rationality (from a conceptual level) and reasonableness (from the text of the Constitution). Since the text of the Constitution requires that the conduct of government be evaluated for reasonableness, it is the reasonableness test which should apply. The question becomes what kind of reasonableness test is applicable. It is submitted that the resulting reasonableness test, a complex hybrid of rationality and reasonableness, is reasonableness of a special type. I will refer to this reasonableness as *socio-economic rights reasonableness*.¹⁷³

¹⁷³ Reasonableness test is also used in administrative law. Administrative action of the government is tested for reasonableness. However, this constitutional reasonableness should distinguish it from the administrative law reasonableness. This is so because, the action of the government in formulating socio-economic rights policy has been argued to be executive action.

e. *Content of socio-economic rights reasonableness test*

In contrast to a general rationality test in section 85 of the Constitution, socio-economic rights reasonableness must be one which evaluates if the executive action, the policy, is demonstrably sound. Demonstrably sound socio-economic rights policy must be one which is demonstrably the best of all the alternatives available. In other words, a reasonable socio-economic rights policy must be demonstrably the best. This is a higher and stricter test than general reasonableness test. It requires that there be a demonstration that the socio-economic rights policy is demonstrably the best of the available alternatives. It is consequently less deferential to the executive. This reduced deference is justified because the Constitution in section 26 and 27 pays specific attention to socio-economic rights. Other executive actions have no specific attention paid in the Constitution. The executive may then be conferred greater latitude and deference in those executive actions because they do not have special and specific attention in the Constitution. In those circumstances, the ordinary rationality test suffices.

f. *Administrative action*

From the rationale above, where the decision relates to administrative action, that is conduct of lower-ranking officials, the reasonableness test would be applicable. As it relates to day to day operations, for the same reasons above, it should be stricter and less deferential to the executive functionaries. The overall day to day operations must also fall within the crux of the policy, which policy, as stated above has to be demonstrably the best of the available alternatives. In other words, the day to day operational administrative actions of the government must be capable of demonstrable soundness. They must be the best of the available alternatives. The overall administrative plan must be capable to realizing the policy objectives. If they are not, they should be held to be unreasonable within the meaning of socio-economic rights reasonableness. There is therefore less deferral to the executive. This is so because this reasonableness is not and must be distinguished from the 'ordinary' administrative law reasonableness sense. That is the preserve of section 33 of the Constitution. This is administrative reasonableness given specific meaning in sections 26 and 27; it is reasonableness, socio-economic rights reasonableness. If the

administrative aspect relates to purely technical administration, there could be greater deferral to the functionary. Technical administration can be for instance, how many officials to put at the reception desks on a particular day or the sequencing of servicing of machines or motor vehicles. However, this has to happen within the strict parameters of the policy, the policy which would have passed the demonstrably sound test.

g. *Implications of the socio-economic rights reasonableness test*

From the above, in practical terms, this will mean that if the policy of government is challenged, the government will have to show that its policy is demonstrably the best policy. It is for the Applicant to show that the policy of the government is not the best. Of necessity, the Applicant has a duty to present policy alternatives. In presenting policy alternative, the Applicant has the onus to show that its proposed policy is demonstrably the best. The government also has the onus to show that its policy is demonstrably the best against the proposal of the Applicant. The parties must justify the substance of their policy. The Applicant and the government also have the evidential burden to demonstrate the cogency of their policy. This it is submitted, is appropriate for a constitutional democracy committed to open, transparent and responsive government with an active citizenship. It ensures that government and citizens are in continuous conversation about the best way to achieve socio-economic rights. The citizen is not a passive recipient of socio-economic rights, but actively engages with the government, if need be through the Court as an arbiter. Cases like *Opposition to Urban Tolling Alliance*¹⁷⁴ demonstrate that civil society has the capacity to offer alternatives to complex matters¹⁷⁵ and, as such, this is not an unduly hard

¹⁷⁴ See www.outa.co.za, see also *Opposition to Urban Tolling Alliance v The South African National Roads Agency Limited* [2013] ZASCA 148. It could be argued that this type of civil society organizations have financial resources for research and in depth studies and therefore be able to meet the test I set. This, it may be argued, may not be true of the poor or less resourced civil society organizations. This may be so. It however remains important that proper cases be presented. If need be, the Court may appoint a friend of the Court to assist a poor Applicant. Further, any of the Chapter 9 institutions may, on their own, or on the invitation of the Court, be requested to be a friend of the Court or act for the Applicants. What is important is that there has to be some involvement of the Applicants beyond just making demands.

¹⁷⁵ The civil society organisation presented what it argued were more efficient ways for paying for tools for the construction of free-ways in Gauteng. The High Court and the Supreme Court of appeal did not engage with the proposals of the civil society organisation.

burden. Further, in this way, the citizenry does not just demand from the state without being party to finding real solutions to its demands.¹⁷⁶ For instance, it is desirable, as in the *Mazibuko* case, for residents of Phiri to have a given amount of water they demanded, but given the complexities of doing so, it is incumbent upon the residents of Phiri to offer demonstrably sound understandings on how to do so. In *Mazibuko*, to its credit, the City of Johannesburg grappled with how best to attend to the needs of the residents of Phiri. The residents of Phiri, other than just demanding what they wanted, should have had a duty to demonstrate a sound alternative to the one offered by the City of Johannesburg. Continuous democratic debate, something advocates of reasonableness want, is realized since the government is in continuous conversation with its people. This also means that there is no real concern about the separation of powers. Society is involved in a joint enterprise to sharpen the ways of achieving the promises of the Constitution. It is the cogency of the proposal which is in issue, not who or which arm of the state is supposedly best suited to attend to socio-economic rights decisions. This also makes the state efficient, something valued by the advocates of reasonableness. Arms of the state are concerned about how best to achieve socio-economic rights benefits and less concerned about which arm of the state is doing what. It is understood as a joint responsibility. In this way, there is greater potential to realise socio-economic rights from the combined efforts of government and citizens. The focus is on delivery of socio-economic goods not turf. There is no need for shouting contests between the arms of the state on who has better democratic mandate to make choices about socio-economic goods.

Further, the continuous offer of alternative policy by an Applicant ensures that the progressive realization of socio-economic rights in section 26 (2) and section 27 (2) of the constitution happens faster. With each demonstrably sound policy alternative argued and the accepted as the best, it sets, by implication what the state is expected to deliver on. There will be a negative obligation on the government not to regress from the established obligation. If a party wishes to offer another alternative, the party has to show that the existing obligation, which obligations had been demonstrated to be the best, are no longer the best. The ‘new best’ is tested against the ‘old

¹⁷⁶ Chris Hart tweet. [Chris Hart](#) @chrishartZA “More than 25 years after Apartheid ended, the victims are increasing along with a sense of entitlement and hatred towards minorities....” This tweet raised a lot of controversy for alleged racial undertones. However, other than the prevailing mood at the time, it is difficult to understand why this tweet was taken as racist. On the substance, there appears merit in the tweet. Accessed 4 January 2016

best.’ In this way, it is possible to track the progressive realization of rights. The faster the progressive realization of rights, the less important the debate about the specific content of a right. The content is established by each demonstrably sound policy, the policy identified as the best. This answers the concern about the vagueness and indeterminacy of the reasonableness and core minimum core obligation test. This is so because with each policy proposal which is shown to be demonstrably the best, what the citizens were getting as the right becomes the identified content of the right. This cannot be negatively affected by the government since, as stated above, section 26 and section 27 also have a negative obligation on the government not to interfere with a right. Progressive improvements in policy set the content of the right by implication. They set, to use the language of core minimum obligation, the minimum threshold which cannot be regressed from without strong justification. With this, Bilchitz’s concern about the lack of content definition on the reasonableness test is attended to, albeit progressively by the setting of each demonstrably sound policy. Bilchitz’s concern about the vagueness of reasonableness¹⁷⁷ and the vagueness of the minimum core rescinds as the policy is being evaluated for socio-economic rights reasonableness which requires that the policy be demonstrably sound. When section 26 (2) and section 27 (2) employ the word ‘reasonable,’ reasonableness will mean socio-economic policy that is demonstrably the best. What is demonstrably sound, that is, the best policy, will be established by reference to a combination of the minimum core and reasonableness criteria as stated above. If it is established that there is a violation of the socio-economic right in issue, the prevailing content of reasonableness as stated above will also be used in the limitations inquiry. There will be, as Steinberg suggests, a proportionality inquiry involving the “... weighing of the adverse and beneficial consequences of the ... action and assessing the existence of less restrictive means to achieve the purpose for which the decision is taken.”¹⁷⁸ The proportionality test should be a full proportionality test.¹⁷⁹ Steinberg refers to this as ‘substantive reasonableness.’¹⁸⁰ It is submitted that what Steinberg is arguing is that to engage

¹⁷⁷ See also Currie (n9) p.676 where she observes that “[t]he standard of reasonableness is a little harder to pin down.”

¹⁷⁸ Steinberg, *Can Reasonableness Protect the Poor? A Review of South Africa’s Socio-economic Rights Jurisprudence* p.278

¹⁷⁹ See for factors to consider in a full proportionality inquiry see *Bato Star Fishing (PTY) LTD v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 43-46, Jacques de Ville *Judicial Review of Administrative Action in South Africa* (2003) 5 p.214-215

¹⁸⁰ Steinberg (n46) p.279

with the reasonableness test, those who critique the same must do so on the basis of an understanding of the reasonableness test as adopted by the Court as one which calls for a rationality and proportionality inquiry.¹⁸¹ Currie correctly observes that “... reasonableness ... is not identical to rationality. Non-identity, though, does not rule out the possibility of an overlap between the two grounds.”¹⁸²

h. *Conclusion*

As shown above, the reasonableness test as described above has been subject to trenchant criticism.¹⁸³ It is argued that reasonableness focuses primarily on “procedural defects rather than the substantive interests at stake.”¹⁸⁴ Bilchitz describes the reasonableness test as an “amorphous standard.”¹⁸⁵ Critiques further contend and cynically argue that, with the reasonableness test, “the state has such wide latitude that maybe everyone will get the bare minimum in 20 or 30 years. In the meantime, people will die with their constitutional rights in their hands.”¹⁸⁶ This may be said to be true of Mr Soombramoney and Mrs Mazibuko. Put even more cynically, “nobody has a right to anything in particular, and therefore, everyone has a right to nothing at all.”¹⁸⁷

Socio-economic rights as constitutional rights “... are not simply moral rights but deserve to be constitutionalized.”¹⁸⁸ The practical benefits of making socio-economic rights constitutional rights are important, particularly in a developing country like South Africa where deep rooted

¹⁸¹ Steinberg (n46) p. 280

¹⁸² Currie (n9) p.675

¹⁸³ Bilchitz, *Placing Basic Needs at the Centre of Socio-economic Rights Jurisprudence* ESR Review vol No 1 p.2, Steinberg (n46) p.264

¹⁸⁴ Bilchitz (n51) p.4

¹⁸⁵ Bilchitz, *Towards A Reasonable Approach to the Minimum Core: Laying the Foundation for Future Socio-economic Rights Jurisprudence* (2003) 19 SAJHR p. 10

¹⁸⁶ Quoted in Steinberg (n46) p.267

¹⁸⁷ Quoted in Steinberg (n46) p.264

¹⁸⁸ Bilchitz, *Socio-economic rights, Economic Crisis and Legal Doctrine, Icon* (2014), 14. Vol 12 No.3 p.713. Bilchitz refers, with approval to Cecile Fabre’s work in *Social Rights Under the Constitution* 101 (2000)

socio-economic deprivation is “not the exception but the norm”¹⁸⁹ I have described the notion of reasonableness as developed by the Court. I have attempted to show that the justifications for adopting the reasonableness approach are not convincing. I also discussed the essence of the minimum core obligation and its genesis. Further, I attempted to show that that the minimum core is better placed to establish a working certainty for both government and citizens on the meaning and content of the rights guaranteed by the Constitution. The various critics of the minimum core have been shown to be lacking in merit. The notion of separation of powers for instance, has been argued to be of no be no impediment to the minimum core obligation. It has been shown that the judiciary in fact has the capacity to adjudicate complex matters of policy as they do in other dispute which require the application of law. Overall, the text of the Constitution may support a minimum core obligation, or at the very least, be susceptible to an interpretation of a minimum core obligation. It would not strain the text of the Constitution. This reconciles well with the idea that the Constitution is a transformative document which seeks to restore the dignity of all, and most importantly, the poor through the poor being recognized by a responsive state as ends in themselves. In the result, it is submitted that the “... recognition of the minimum core obligation would ensure that the Court would be stringent in evaluating the defences offered by a government for not meeting basic needs.”¹⁹⁰ The poor will be prioritized. However, I also alluded to some challenges of the minimum core obligation. For instance that what the threshold obligation is, is an aspect reasonable people may legitimately differ. I then teased out the possibility that there could be a third way to the adjudication of socio-economic rights. That way is the socio-economic rights reasonableness test. I suggested that that test takes the best of the core minimum obligation and reasonableness test. This test answers some the criticism of the reasonableness and the core minimum obligation. It can be used as a basis for future elucidation of a third way to the adjudication of socio-economic rights.

At the threat of irrelevance, the purpose of the Constitution needs to be achieved within the shortest possible time. The reasonableness test as set by the Constitutional Court will not achieve these laudable Constitutional objectives. It is too fluid for a constitutional interlocutor.

¹⁸⁹ Bilchitz (n56) p.718

¹⁹⁰ Bilchitz, *Poverty and Fundamental Rights; The Justification and Enforcement of Socio-economic Rights* (Oxford University Press) 2007 p.146

In the result, the paper adds its humbled voice to those calling for a change of course in the way the Court has adjudicated socio-economic rights. There is need to arrest the current jurisprudence and carve out a new path. It is worth repeating the words of Justice Scalia that; “ ... the notion that an important constitutional decision with plainly inadequate rational support must be left in place for the sole reason that it once attracted five votes” is astonishing. It is time the Court changes its approach to the adjudication of socio-economic rights. It is not too late, but with each day on the path on which the Court is, the masses will regard that the Constitution is a piece of paper not worth a yawn. What will happen thereafter is for students of political science to state.



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