ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: STRENGTHENING THE REASONABLENESS APPROACH

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Abstract: This paper discusses the extent to which the South African courts have given effect to the socio-economic rights in the Constitution. While the courts have surmounted traditional prejudices against these rights the reasonableness review approach adopted to enforce the rights is lacking in some respects. Two such shortcomings are the failure of the court to give content to the rights and to interrogate the effectiveness of the means adopted for their realisation. These shortcomings can be overcome were the courts to carry out an inquiry similar to that set out in the section 36 limitations analysis. The state would be required to demonstrate a rational connection between the means chosen to realise the rights and the rights themselves.

Keywords: Judicial enforcement, socio-economic rights, reasonableness approach

A. INTRODUCTION

The 1996 South African Constitution (the Constitution)¹ perhaps has the most comprehensive domestic protection of economic, social and cultural rights (socio-economic rights) as enshrined in international treaties such as the International Covenant on Economic, Social and Cultural Rights (the ICESCR).² The socio-economic rights in the Constitution are drafted along the same lines as those of the ICESCR.³ The drafters of the Constitution reasoned that this formulation had the advantage of facilitating consistency between South Africa’s domestic policies and laws and its international human rights obligations.⁴ Article 2(1) of the

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¹ Act No. 108 of 1996 (Constitution).


³ See Constitutional Assembly Constitutional Committee, Draft Bill of Rights, Volume I, Explanatory Memoranda of Technical Committee to Theme Committee IV of the Constitutional Assembly (9 October 1995).

ICESCR requires states to undertake steps to the maximum of their resources, with a view to progressively realising the rights by all appropriate means. Similarly, the South African Constitution compels the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights. The differences between the Constitution and the ICESCR are mainly nomenclatural; a closer scrutiny shows that the obligations engendered by the two instruments are similar in many respects. Both are subject to limitations defined by the available resources and the need to realise the rights progressively. In determining the appropriateness of the measures taken by the state, guidance may be sought in the test of reasonableness: what is appropriate will also be reasonable.

In South Africa, it was not until 1994 that a Bill of Rights protecting human rights was adopted as part of the Constitution. Prior to this, with the exception of constitutions of some homelands, human rights did not enjoy constitutional protection. This facilitated the massive violation of all kinds of human rights, especially of the black majority, who endured decades of political subjugation as well as economic and social deprivation. Even when provision was made for some socio-economic goods and services, this was based on racial discrimination; the white minority enjoyed access to better quality goods and services while the blacks either had to make do with poor quality services or none at all. It is within this context of deprivation and discrimination that the struggle for human rights was carried on. The struggle against apartheid was a struggle for both political and socio-economic equality. As early as 1955, the Freedom Charter (the Charter) made the call for socio-economic justice in addition to political rights. It also called for the removal of restrictions on land ownership and equal access to work, housing and education. This paper does not intend to detail the events leading to the inclusion of socio-economic rights in the Constitution. What is apparent, however, is that the process of including these rights in the Constitution needed to overcome opposition to the constitutional protection of the rights. In many circles, the rights were rejected on the ground that they did not meet the essential requirements of rights per se. I.e., they were positive in nature and had budgetary implications requiring the redistribution of resources – a function only political organs were deemed competent to discharge as opposed to the judiciary.

5 Sections 26(2) and 27(2); the right to further education in 29(1)(b) is also to be realised progressively by the state taking reasonable measures, but no mention is made of acting within available resources.


se objections were, however, unsuccessful. With subsequent judicial approval, a wide array of socio-economic rights were incorporated into the Constitution as judiciously enforceable rights on the same basis as the civil and political rights.

The Bill of Rights protects three categories of socio-economic rights: rights with internal limitations; rights without internal limitations; and prohibition rights. Suffice it to say here that the most controversial of them, however, are those with internal limitations. These include the right to adequate housing in section 26 and the rights to health care services, sufficient food and water, and social security and assistance. In respect of these rights, the state is required to undertake reasonable legislative and other measures, within its available resources, to progressively realise them. This obligation has given birth to the reasonableness review approach as used by the Constitutional Court (the CC) to enforce the rights. This paper pursues one of the criticisms directed at the CC’s approach for failing to give substantive content to the rights, that is, defining the rights in a manner that details their ingredients. This is in addition to the failure to interrogate the effectiveness of the means chosen to realise these rights.

The purpose of this paper, after a review of the rights, is to interrogate the effectiveness of the means chosen to realise them. I will propose applying a test of interrogation similar to the one applied under the section 36 inquiry. As will be seen, section 36 allows the state to impose on the rights limitations that are consistent with a society based on democracy, human dignity and freedom. Before discussing how the section 36 test could be used, the paper will first lay bare the reasonableness review approach as used by the CC and some of its shortcomings.

B. AN APPRAISAL OF THE REASONABLENESS REVIEW APPROACH

According to the CC, it is beyond doubt that socio-economic rights are capable of judicial enforcement; the question should not therefore be one of whether or not these rights are judicially enforceable but how to enforce them in a given case. The Court has rejected contentions that the rights cannot be enforced by the courts because they have budgetary implications. The CC has observed that when the courts enforce socio-economic rights, the task conferred upon them is no different from the one by which they enforce civil and political rights such as the right to vote and the right to a fair trial. Accordingly, just like socio-economic


9 In re Certification of the Constitution of the Republic of South Africa (First Certification case) 1996 (10) BCLR 1253 (CC), para 77.


11 See Liebenberg (note 4 above) 41–5.

12 See sections 26(2) and 27(2) of the Constitution.


rights, orders to enforce civil and political rights may have budgetary implications.\textsuperscript{15} The CC has also said that the inclusion of socio-economic rights in the Constitution does not result in the violation of the doctrine of separation of powers between the different organs of state, the judiciary, executive and legislature.\textsuperscript{16} It is on this basis that the CC has entertained and adjudicated a number of socio-economic rights cases.

The first case to engage directly with the enforcement of these rights was \textit{Soobramoney v Minister of Health, Kwazulu-Natal.}\textsuperscript{17} The case was instituted by a patient diagnosed with chronic kidney failure at Addington Hospital in Kwazulu-Natal. He was denied access to dialysis treatment under a policy that excluded patients of his status from the treatment because of the limited resources at the disposal of the hospital. Mr Soobramoney based his case on the section 27(3) right not to be denied emergency medical care and the section 11 right to life.\textsuperscript{18} However, the Court rejected this formulation holding his case was not an emergency. An emergency, according to the CC, occurs when ‘[a] person suffers a sudden catastrophe which calls for immediate medical attention’.\textsuperscript{19} His condition, the Court noted, was by contrast ‘an ongoing state of affairs resulting from a deterioration of … [his] renal function which is incurable’.\textsuperscript{20}

Properly speaking, the Court added, Mr Soobramoney’s case could be located only in sections 27(1) and (2), which guarantees the right to health cares services subject to the available resources and progressive realisation. The CC found that while the state was under a duty to provide Mr Soobramoney with access to health care services, it had been established that the hospital did not have sufficient resources to provide dialysis treatment to all those in need thereof.\textsuperscript{21} The Court emphasised that

\begin{quote}
[The] guarantees of the Constitution are not absolute but may be limited in one way or another. In some instances, the Constitution states in so many words that the state must take reasonable legislative and other measures, within its available resources “to achieve the progressive realisation of each of these rights.” In its language, the Constitution accepts that it cannot solve all of our society’s woes overnight, but must go on trying to resolve these problems. One of the limiting factors to the attainment of the Constitution’s guarantees is that of limited or scarce resources. In the present case the limited haemodialysis facilities, inclusive of haemodialysis machines, beds and trained staff constitute the limited or scarce facilities.\textsuperscript{22}
\end{quote}

Additionally, the Court said it would only interfere with the decision of the hospital if it was irrational and taken in bad faith: ‘[a] court will be slow to interfere with rational decisions

\textsuperscript{15} \textit{First Certification} case (note 9 above) para 77.
\textsuperscript{16} \textit{First Certification} case (note 9 above) para 78.
\textsuperscript{17} 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) (Soobramoney case).
\textsuperscript{18} As I will show later, the CC held that Mr Soobramoney’s case could not be decided on the basis of the right to life but on the basis of the specific right to have access to health care services in section 27(1), para 19.
\textsuperscript{19} Para 20.
\textsuperscript{20} Para 21.
\textsuperscript{21} See paras 24–26.
\textsuperscript{22} Para 44.
taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.\textsuperscript{23} Unlike the political organs, held the Court, it did not have the institutional capacity to engage with the agonising problems of making choices.\textsuperscript{24}

The Soobramoney case was followed by Government of the Republic of South Africa v Grootboom & Others,\textsuperscript{25} a case brought by a group of almost 1,000 adults and children who had been evicted from a shanty town in the most brutal manner. Their shacks had been set on fire and, in a desperate condition, they had sought refuge at a local sports ground. Here, they only managed to erect the most rudimentary and inadequate shelter. This case was instituted under sections 26 (1) to enforce everyone’s right of access to adequate housing and the children’s 28(1)(c) rights to shelter, basic nutrition and health care respectively.

The High Court found that the rights of the adults had not been violated since they are subject to available resources and progressive realisation. It did, however, find in favour of the children insofar as the rights under section 28 were considered by the Court to be immediate and not subject to available resources.\textsuperscript{26} In setting aside the decision of the High Court, the CC held that children’s rights were no different from those of adults as section 28 did not establish independent rights for children on demand. According to the Court, the duty to provide for the section 28(1)(c) rights lay in the first place with the parents and fell to the state only when the children were removed from parental care. For those children living with their parents, their right to housing would be enforced under section 26. The CC held that for the right in section 26 to be fulfilled, the Constitution would require the state to put in place a comprehensive and workable plan in order to meet its socio-economic rights obligations. But this obligation in turn is defined by three key elements that have to be considered separately: (a) ‘to take reasonable legislative and other measures’; (b) ‘to achieve the progressive realisation’ of the right; and (c) ‘within available resources.’\textsuperscript{27} A reasonable programme, according to the Court, must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.\textsuperscript{28} Each sphere of government must accept responsibility for the implementation of particular parts of a comprehensive and well-coordinated programme.\textsuperscript{29}

The Court noted further that while the contours of this programme will be for the state to decide,\textsuperscript{30} the programme must be balanced and flexible and make appropriate provision for attention to short, medium and long-term needs. ‘A programme that excludes a significant segment of society cannot be said to be reasonable.’\textsuperscript{31} Those whose needs are the most urgent and whose ability to enjoy all rights is most in peril must not be ignored by measures aimed at achieving realisation of the right.\textsuperscript{32} It is on this basis that the National Housing Programme was found to be unreasonable because it did not have an element that responded to the needs

\textsuperscript{23} Pará 29 [Emphasis mine].
\textsuperscript{24} Pará 58.
\textsuperscript{25} Note 14 above.
\textsuperscript{26} Grootboom v Oostenberg Municipality and Others 2000 (3) BCLR 277 (C).
\textsuperscript{27} Pará 38.
\textsuperscript{28} Pará 39.
\textsuperscript{29} Pará 40.
\textsuperscript{30} Pará 41.
\textsuperscript{31} Pará 43.
\textsuperscript{32} Pará 44.
of such vulnerable people as the applicants. Later, in the case of Minister of Health and Others v. Treatment Action Campaign,\textsuperscript{33} the CC added that for a public programme to meet the constitutional requirements of reasonableness, its contents must be made known appropriately.\textsuperscript{34}

In both the Grootboom and TAC cases, the CC rejected application of the concept of minimum core obligations in South Africa. The concept of minimum core obligations was coined by the United Nations Committee on Economic, Social and Cultural Rights, the Committee that monitors the implementation of the ICESCR. It construed the provisions of the ICESCR as engendering a minimum core obligation incumbent upon all state parties. The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.\textsuperscript{35} The Committee gave as an example of a 	extit{prima facie} violation a state party in which any significant numbers of individuals are deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education.\textsuperscript{36} The minimum core content of a right is therefore its essential elements, without which the right risks losing its substantive significance as a right.\textsuperscript{37} It is the level below which standards should not fall.\textsuperscript{38}

In South Africa, this notion has, however, been rejected by the CC; in the Grootboom case, that it was impossible, without sufficient information, to define the minimum core where people’s housing needs are diverse. In the TAC case, it was held that it was impossible to give everyone access to a minimum core and that all the state can do is undertake reasonable measures within its available resources to progressively realise the rights. In these cases all that the state was required to demonstrate was that it has in place a reasonable programme.

1. Giving the Rights Normative Content

One of the shortcomings of the CC’s reasonableness approach is its failure to give content to the socio-economic rights in the Constitution. In the Grootboom case, the CC was quick to emphasise that the rights in the Constitution must be understood in their contextual setting. This requires consideration of chapter two (the Bill of Rights) and the Constitution as a whole.\textsuperscript{39} In considering the right to adequate housing, the Court held that section 26 must be understood in its context; the first subsection confers a general right of access to adequate housing and the second subsection establishes and delimits the scope of the positive obligati-

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\textsuperscript{33} 2002 (5) SA 721, the TAC case.
\textsuperscript{34} Para 123.
\textsuperscript{36} As above.
\textsuperscript{39} Para 22.
ons to realise that right.\textsuperscript{40} Accordingly, subsections (1) and (2) are related and must be read together. In this, the Court conflated the subsections in such a manner that subsection (1) disappeared in subsection (2). In all three cases, \textit{Soobramoney}, \textit{Grootboom} and \textit{TAC}, the CC, after casually referring to subsection (1), concentrated its interpretative efforts on subsection (2). In the \textit{Grootboom} case the CC said that

\[ \text{[H]ousing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself.} \textsuperscript{41} \]

The Court held that section 26 does not expect more of the state than is achievable within its available resources.\textsuperscript{42} In the \textit{Soobramoney} case, while the CC made an attempt to define the right not to be denied emergency medical treatment as protected in section 27(3), it construed the right narrowly as a negative right devoid of any positive elements and merely requiring that people should not be turned away. The Court held that

Section 27(3) itself is couched in negative terms – it is a right not to be refused emergency treatment. The purpose of the right seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities.\textsuperscript{43}

Though the CC had said that the rights must be construed in the context of other provisions of the Constitution, in particular the Bill of Rights,\textsuperscript{44} in the \textit{Soobramoney} case it declined an invitation to construe section 27(3) consistently with the right to life in section 11.\textsuperscript{45} It said that the right to medical treatment does not have to be inferred from the right to life in section 11 since it is directly protected by section 27.\textsuperscript{46} The problem with this sort of reading is that it disintegrates the rights and isolates them from each other, in addition to undermining the notion that the rights are interdependent.\textsuperscript{47} The Court’s definition has been criticised by many commentators. The interpretation, they say, renders the right redundant by denying the existence of the duty to ensure that emergency services are sufficient to attend all who need them.\textsuperscript{48} It

\begin{itemize}
\item \textsuperscript{40} Para 21.
\item \textsuperscript{41} Para 35.
\item \textsuperscript{42} Para 20.
\item \textsuperscript{43} Para 20; see also para 38.
\item \textsuperscript{44} 1995 (3) SA 391 (CC) (\textit{Makwanyane case}) para 10.
\item \textsuperscript{45} Para 14.
\item \textsuperscript{46} Para 19.
\end{itemize}
has been submitted further that by reading the provisions together, greater coherence could be achieved as to determining what is protected and what is not. This is especially necessary when the question is whether certain interests are protected implicitly by the Constitution.49

The CC’s restrictive approach in defining the right not to be refused emergency medical care can be likened to what Scott has described as ‘negative textual inferentialism’. According to Scott, a treaty monitoring body may use provisions of another treaty to limit rights that are granted in the treaty it monitors. Such body may allege that since the monitored treaty does not mention certain aspects of a right mentioned in another treaty, the treaty should be read as excluding those aspects. In the same way, the CC declined to invoke section 11 on the right to life to develop the right to emergency medical care on the ground that the right was express in section 27(3); yet it denied the right any meaningful content. In the TAC case, the CC concentrated on dismissing the arguments to the effect that section 27 should be read as establishing two self-standing and independent rights:

[O]ne an obligation to give effect to the 26(1) and 27(1) rights; the other a limited obligation to do so progressively through “reasonable legislative and other measures, within its available resources”. Implicit in that contention is that the content of the right in subsection (1) differs from the content of the obligation in subsection (2).50

It had been argued that the right to health care in section 27(1)(a) is one of the rights in the Bill of Rights and accordingly attracts the duties imposed on the state by s 7(2) and further that there is nothing in section 27(2) to suggest that the duties it imposes replace any of the duties imposed on the state by section 7(2). Section 7(2) requires the state to respect, protect, promote and fulfil all the rights in the Bill of Rights. It had further been argued that to give meaningful content to the constitutional right of every person to have access to the goods and services described in s 27(1), there must be some concomitant duty on the state to make those goods and services accessible to ‘everyone’. Section 27(2) does not do this because it is a ‘macro’ duty, rather than one that obliges the state to make the goods and services accessible to every or any particular person. It accordingly cannot be exhaustive of the positive duties imposed on the state.51 The Court relies on the Soobramoney and Grootboom cases in rejecting this argument; it held that the two subsections cannot be separated from each other; reference to ‘the right’ in subsection (2) is clearly also reference to the subsection (1) right:52

[S]ection 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the state to “respect, protect, pro-

49 Scott & Alston (Note 48 above) 245.
50 Para 29.
52 Para 30.
mote and fulfil” such rights. The rights conferred by sections 26(1) and 27(1) are to have “access” to the services that the state is obliged to provide in terms of sections 26(2) and 27(2).53

The *Grootboom* case adopted the same approach, interpreting subsection (2), especially on the requirement that the state undertakes reasonable legislative and other measures to realise the right, but also loosely on ‘progressive realisation’ and ‘within available resources’, independently from subsection (1).54 The Court thus summed up: 'both the content of the obligation in relation to the rate at which ... [a right] is achieved as well as the reasonableness of the measures employed ... are governed by the availability of resources.'55 As with the *Grootboom* and *Soobramoney* cases, the Court in the *TAC* case does not give content to the right of access to health care services; it does not answer the question of the services to which a person is entitled and whether it includes preventive or curative medical care.56

In these three decisions socio-economic rights have been interpreted in a manner that only entitles the beneficiaries of the rights granted in sections 26 and 27 to reasonable state action undertaken to progressively realise these rights subject to the available resources.57 It is clear from subsection (2) of both sections 26 and 27 that what is required of the state is to realise the right mentioned in subsection (1). To this extent, one agrees with the CC’s decision in the *TAC* case that the two subsections must be read together. What the CC does not realise, however, is that these sections establish a goal as well as the means to achieve that goal. The goal is that the rights in subsection (1) should be realised, but only through the means stated in subsection (2). If we take this further, on the basis of what the CC says, viz, that the two subsections have to be read together, the means need to be understood therefore in the context of the goal. We cannot test the efficacy, or even reasonableness, of the means used in realising the goal unless we know precisely what the goal entails.58 The CC should have begun by understanding the content of the right, because only then would it have been able to determine whether the measures adopted were reasonable methods of realising the right.59 The failure of the CC

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53 Para 39.
54 See paras 39–46.
55 Para 46.
58 Brand (as above) 44; see also Bilchitz (note 56 above) 8; and David Bilchitz: “Placing basic needs at the centre of socio-economic rights jurisprudence” (2003) 4(1) *ESR Review* 2, at 3.
to adopt this approach has serious implications on the efficacy of the remedies the Court may have chosen to address a violation. It has been submitted that in order to resolve issues related to constitutional remedies, courts need to identify the goals they seek to achieve in this area of law. In this way, a court can evaluate the alternatives by asking which of them will better achieve the policies at stake.\(^{60}\)

The approach of the CC in conflating the two subsections has rendered section 7(2) partially redundant in as far as the section obligates the state to respect and protect the rights. Generally, these two obligations are not so dependent on resources and therefore may not be subjected to progressive realisation: they are mainly of a negative nature, and generally speaking, do not require positive action that would call for allocation of resources. Conflating the two subsections haphazardly means that the duties to respect and protect the rights in sections 26(1) and 27(1) are also subject to progressive realisation and available resources. In the TAC case, the argument had been made to the effect that section 27(2) is not exhaustive of the positive duties imposed on the state towards fulfillment of the rights created in section 27(1), including the right to health care; and that those rights also attract the duties imposed on the state by section 7(2).\(^{61}\) In identifying the elements of the right of access to health care services that are immediately enforceable by virtue of section 7(2), the amici made reference to positive elements that could only be realised at the level of fulfilment.\(^{62}\) For instance, the amici stated that individuals have access to the minimum core of necessities of life and have a claim against the state for access to those goods and services under section 7(2). This claim is not subject to the complications of claims under sections 26(2) and 27(2).\(^{63}\)

As can be deduced from Bilchitz,\(^{64}\) the advocates of the above arguments are struggling here not only to give content to the rights in subsection (1) but also to locate the minimum core within this subsection without invoking subsection (2). However, there is a difficulty with an approach that excludes subsection (2) as the basis for the minimum core. It is my contention that the minimum core approach has been derived from the notion of progressive realisation, stressing the point that certain needs are immediate and need not be subject to available resources and realised progressively. The point being made here is that one cannot exclude subsection (2) and locate the minimum core only in subsection (1). Rather, the minimum core has to be derived from sections 26(1) and 27(1) read together with their respective subsections (2) in addition to section 7(2).

The failure of the Court to give content to the rights also leaves the government without guidance as to what is expected of it in implementing the rights.\(^{65}\) Davis Dennis has argued that

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\(^{61}\) *TAC amici submissions*, para 34.

\(^{62}\) *TAC amici submissions*, see paras 47 and 48.

\(^{63}\) *TAC amici submissions*, para 48.2.

\(^{64}\) Bilchitz (note 56 above) 11. See also Sandra Liebenberg: “The interpretation of socio-economic rights” in Chaskalson et al. (note 56 above) 33–1 to 33–64, 33–42.

If the Constitutional Court does not define these rights with any precision, the burden placed upon the executive by the courts is significantly increased. That is precisely what the Court’s approach to these sections is designed to prevent.

There is therefore a need on the part of the courts to help the executive by defining in precise terms the goal, that is, to specify the ingredients of each right. This would forestall moves by the state to contend that it had discharged its duties even when it is clear that the programmes adopted have not led to realisation of the rights. Defining the goal also makes the task of monitoring the implementation of court orders much easier. This is because it makes it possible for the courts to prescribe, in precise terms in their orders, what the government should do to remedy a violation. This lack of precision makes the task of enforcing court orders insurmountable since enforcers cannot point precisely to the steps required to remedy the violation. The court would be able to define the goals and interrogate the means for their realisation by using a proportionality test.

C. Interrogating the Means and End: A Proportionality Test

The main thesis of this paper is that the South African courts could interrogate the means adopted by the state for the realisation of the rights only by subjecting these means to a heightened level of proportionality beyond the reasonableness test that has been employed. Such heightened level of proportionality is used in the section 36 analysis and could be borrowed from here. Section 36 provides as follows:

36 Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

The drafters of this section were much inspired by the provisions of the Canadian Charter of Rights and Freedoms, and the reasoning in the cases from the Canadian courts. Section 1 of this Canadian Charter provides that

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.


67 Schedule B of Constitution Act, 1982 (Charter).
This section has been dealt with by the Canadian courts in a number of cases. The most prominent of these decisions is the Supreme Court case of *R v Oakes* where the Court found that the rights and freedoms guaranteed by the *Charter* are not absolute; they may be limited in circumstances where their exercise would be inimical to the realisation of collective goals of fundamental importance. According to the Court, it was for this reason that section 1 provides criteria to be used in deciding whether a limitation on the rights and freedoms guaranteed by the *Charter* is justified, which imposes a stringent standard of justification. The Court went on to hold that the onus of proving that a limitation of a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. According to the Court, to establish that a limitation is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objectives which the limitation is designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. Second, once a sufficiently significant objective is recognised, then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified, which involves a form of proportionality test. The Court goes on to hold that although the nature of the proportionality test will vary depending on the circumstances, in each case, courts will be required to balance the interests of society with those of individuals and groups. And, there must be a rational connection between the objective and the means chosen and also as little as possible impairment of the right.

In South Africa, the application of section 36(1) has come through a two-stage approach in litigation. At the first stage this approach requires that whenever it is argued that a right in the Bill of Rights has been infringed, it must be proved by the complainant that indeed the right has been infringed. This requires it to be established that the activity for which constitutional protection is sought falls within the sphere of activities protected by the Bill of Rights. After such establishment has been made, the complainant must then show that either the law or government conduct impedes the exercise of the protected activity. At the second stage, the state will have to justify the infringement as a limitation of the right within the provisions of section 36(1). As is explicit from the section itself, the state must prove that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The manner in which this section is crafted and has been applied suggests that it is more suited for negative violations, and of limited application to positive violations – especially of socio-economic rights. By its very nature, the section requires the state to justify restrictions imposed on the enjoyment of the rights. Though violations of socio-economic rights may

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69 at 136.
70 at 136.
71 at 136-137.
72 at 138-139.
come as restrictions, in most cases the state’s violation arises from its failure to provide. However, it appears that the limitation clause may only be applied to violation of negative elements of socio-economic rights, such as the failure to respect the rights. In this respect, Pierre de Vos has given the example of a case based on the failure to respect the right to housing, which if proven, would require the state to justify the violation on the basis of section 36(1). The other reason why the general limitation clause cannot be applied to all violations of socio-economic rights is because section 36(1) envisages limitations resulting from exercising a law of general application. While socio-economic rights may be limited by legislation, in some cases they are limited by policy measures or sheer administrative decisions. Such forms of limitation are not excluded by the internal limitation clause. Liebenberg contends that requiring the limitation of socio-economic rights to be justified by a law of general application has the advantage of ensuring that limitations of these rights are publicly debated and adopted by the elected representatives of the people. This is because the limitation must be adopted through legislation after it has been debated by Parliament and the public. The problem with this is that it will subject limitations, or even provision for socio-economic rights and services, to the rigorous and bureaucratic processes of passing legislation. While this may be necessary in circumstances seeking to establish long-term benefits, it may impede response to short-term needs arising at short notice and requiring immediate attention. Yet, pre-adopted legislation may not have foreseen these needs. It would also curtail the flexibility emphasised in the Groothboom case as one of the requirements of a reasonable programme. This is an issue which those who advocate the application of section 36(1) to socio-economic rights litigation have ignored in their discussion.

Additionally, the limitations imposed on the socio-economic rights in sections 26(1) and 27(1) are expressly prescribed in sections 26(2) and 27(2). In the Khosa case, the CC was of the view that there is a difficulty in applying section 36(1) of the Constitution to the socio-economic rights entrenched in sections 26 and 27 because these sections contain an internal limitation which qualifies the rights. According to the Court, the state’s obligation in respect of these rights goes further than to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the rights. The Court was of the view that section 36 can only have relevance if what is ‘reasonable’ for the purposes of section 36(1) is different from what is ‘reasonable’ for purposes of sections 26 and 27. This makes use of the limitation in sections 26 and 27 more appropriate than the general limitation in section 36. What needs to be done, however, is to heighten the level of scrutiny under section 26 and 27 and require strict justification. This is where one could use the section 36 limitation analysis.

75 Currie & De Waal (as above) 594.
77 Paras 83 and 105.
In the *Makwanyane* case, the CC said that the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality. The CC held that the fact that the different rights had different implications for democracy and, in the case of the Constitution, for ‘an open and democratic society based on freedom and equality’, there could be no absolute standard for determining reasonableness and necessity. Principles can be established, but their application to particular circumstances could only be done on a case-by-case basis. This indeed is inherent in the requirement of proportionality, the Court went on, which calls for the balancing of different interests. In the balancing process, according to the Court, the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right.78

Section 36 also has a set of factors that have to be considered in determining whether a limitation is reasonable and justifiable in the said society. Of relevance to my discussion is first whether there is a relation between the limitation and its purpose and second whether there are less damaging means of achieving the purpose. The effect of these considerations is that restrictions on human rights will not be justifiable unless there is good reason to do so and there is no other realistically available way in which the purpose can be achieved without restricting the right.79 It has to be shown that there is a causal connection between the means chosen to limit the rights and the objective to be served.80 If the restrictive measures do not lead to the realisation of the object of the restriction, justification will have failed. In the *Makwanyane* case, the state argued that the objects to be achieved by the imposition of the death penalty were to prevent and deter commission of violent crime. The CC’s stand was that while the death penalty may effectively prevent criminals from committing crime again (since the criminal is dead) the state had not adduced sufficient evidence to prove that the penalty actually deterred the commission of crime.81

Though it is not the duty of the court to decree what it may consider as less restrictive means, it is duty bound to assess the selected means alongside examples of less restrictive means. 'A court will … need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions.'82 In so doing, the court must not ‘second-guess the wisdom of policy choices made by legislators’,83 but allow for

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78 Para 104. See also *S v Bhulwana* 1996 (1) SA 388 (CC), para 18.
79 Currie & De Waal (note 74) 164.
80 Currie & De Waal (note 74) 182. See also *Minister of Home Affairs v National Institute of Crime Prevention (Nicro) and Others* 2004 (5) BCLR 445 (CC). Indeed the proportionality test is being used in enforcing such provision of the Bill of Rights as affirmative action under section 9(2). The CC has held that, amongst others, it has to be proved that the affirmative action is reasonably capable of realising the intended goal of advancing persons disadvantaged by discrimination in the past. See *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC).
81 Para 184.
82 *Oakes* case (note 68 above) 138.
83 *Makwanyane* case (note 44 above) para 104.
some exercise of discretion on the part of the state in selecting the most effective means.\textsuperscript{84}

A similar approach could be employed by the courts in socio-economic rights litigation to interrogate the effectiveness of the means chosen to realise the rights. The court would have to investigate whether there is a rational connection between the means chosen and the right to be realised. The state would have to convince the court that the selected programme or policy was the most effective means of realising the targeted socio-economic right(s).\textsuperscript{85} In addition to this, the court would inquire whether there are less restrictive means of achieving the state’s purpose without denying socio-economic rights.\textsuperscript{86} But the court in this process would be alive to the fact that there are several ways of effectively realising socio-economic rights, leaving some room for the exercise of discretion on the part of the state – that is, in terms of choosing amongst various means.\textsuperscript{87} That notwithstanding, where the means chosen by the state are demonstrably inadequate and incapable of reasonably realising the right(s), then the court should make such a declaration. Though at this stage the court may propose what it considers to be the most appropriate means, the choice of means would be left to the state. The court should, however, be entitled to be prescriptive if, after being given a reasonable opportunity and time to substitute the condemned means the state fails to do so. This approach would not only allow the courts to interrogate the effectiveness of the means chosen but would compel them to give content to the rights. This is because the court could not assess the effectiveness of the means chosen without an understanding of the goal to be achieved, which is the realisation of the right.

The \textit{Khosa} case is an example of how the court can effectively apply this approach in socio-economic rights litigation, without applying section 36. The case was brought by a group of permanent residents of Mozambican origin who had been denied access to social assistance benefits on the basis of their nationality. The Social Assistance Act, No. 59 of 1992 amongst others, set South African nationality as one of the prerequisites to gain access to the benefits (sections 3 and 4). Non-nationals, supported by some civil society organisations, based their case on their perceived constitutional right to social assistance, as well as the rights to life, human dignity and equality. The state argued inter alia that including the applicants in the social assistance scheme would impose a financial burden on the state and discourage self-sufficiency amongst non-nationals.\textsuperscript{88} The Court rejected this argument on the ground that there were other means available to the state of ensuring that non-nationals entering the country were self-sufficient.\textsuperscript{89} The Court held that once the non-self-sufficient are granted permanent resident status, then the state has a duty to provide for them. This is irrespective of the financial burden that may be imposed on the state.\textsuperscript{90} The application of the pro-

\textsuperscript{84} Currie & De Waal (note 74) 184.

\textsuperscript{85} In making its analysis, the court would rely on the content of the right and the purpose it is intended to achieve.

\textsuperscript{86} Liebenberg (note 76 above) 27.

\textsuperscript{87} This would quell fears that the courts are going to hide under the cloak of choosing the most effective means to carry out functions that are reserved for the executive and legislative organs of the state. See Woolman (note 73 above) 12–8.

\textsuperscript{88} Paras 60 and 63.

\textsuperscript{89} Para 64.

\textsuperscript{90} Para 68.
portionality test in this case lies in the fact that providing social assistance to the applicants outweighed the financial and immigration concerns.\footnote{Liebenberg (note 76 above) 21–22.} The Court said that

The importance of providing access to social assistance to all who live in South Africa and the impact upon life and dignity that a denial of such access has far outweighs the financial and immigration considerations on which the State relies. For the same reasons, I am satisfied that the denial of access to social grants to permanent residents who, but for their citizenship, would qualify for such assistance does not constitute a reasonable legislative measure as contemplated by section 27(2) of the Constitution.\footnote{Para 82 [Emphasis mine].}

The CC in this passage appears to suggest that proportionality has a role to play in considering whether the measures adopted by the state are reasonable. The Court appears to have been pushed to the edge to apply this test because of the direct invocation by the applicants of the right to equality in section 9. The proportionality test has featured strongly in the approach that the CC has adopted in considering equality cases, particularly when considering whether discrimination amounts to unfair discrimination. At this stage of dealing with the rights to equality the court has to consider the impact of the discrimination on the victim. If the discrimination burdens people who have in the past been victims of discrimination, then it will be unfair unless the purpose it intends to achieve outweighs the burdens imposed. This requires a proportionality test which requires asking, amongst other things, whether there are less burdensome means that could have been adopted.\footnote{See Harksen v Lane NO 1998 (1) SA 300 (CC); para 53. See President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC); Pretoria City Council v Walker 1998 (2) SA 363 (CC); and National Coalition for Gay & Lesbians Equality v Minister of Home Affairs 2000 (2) SA 1 (CC).}

Another case where the CC applied the proportionality test is Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Kyalami).\footnote{2001 (3) SA 1151 (CC).} The facts of the case are briefly as follows: a group of residents of a township called Alexandra had had their homes destroyed by flooding following heavy rains. As an immediate relief measure the government had moved them to a safe piece of land where they stayed in tents and later huts constructed to accommodate them. However, poor sanitation and overcrowding made the site far from ideal. In order to ameliorate the conditions of the victims, the government decided to set up a camp in another location with better houses and sanitation facilities. This move was, however, resisted by a group of residents adjoining the prison farm on which the camp was to be established. The residents argued that the authorities had not followed due process prescribed by town planning and environmental protection laws, and had not given the residents a chance to air their objections. However, their biggest concern appears to have been that by siting the camp on a prison farm in the neighbourhood it would spoil the character of the neighbourhood and reduce the value of their properties.\footnote{Paras 93–94.} The Court, however, applied the proportionality test to uphold the right of access to adequate housing against the right to property. The decision in this case shows how the proportionality test can be applied to cases that invoke purely positive obligations. One cannot, therefore, use the Khosa case to argue that the
test is only applicable in cases invoking negative violations. The Court held that although the property interests of the Kyalami residents was a factor to consider, it was not the only factor, there were the interests of the flood victims and their constitutional right of access to adequate housing as well.\textsuperscript{96} According to the Court,

\begin{quote}
The fact that property values may be affected by low cost housing development on neighbouring land is a fact that is relevant ... it is only a factor and cannot in the circumstances of the present case stand in the way of the constitutional obligation that government has to address the needs of homeless people.\textsuperscript{97}
\end{quote}

It should be noted that use of this test is the only way by which the undue burden imposed on litigants in socio-economic rights cases to prove the unreasonableness of the state’s measures can be shifted to the state. This test compels the state to put before the courts adequate evidence, allowing them to make informed decisions. Indeed, the CC in the \textit{Khosa} case held that the state had an evidential burden to put all relevant information before the court. This is especially so in cases where court orders would have budgetary implications.\textsuperscript{98}

\section*{D. Conclusion}

The test used in the application of section 36 would go a long way in strengthening the reasonableness review test as used by the CC in the adjudication of socio-economic rights. However, successful use of this test would require that the rights be given content by definition of their substantive content, something the CC has yet to do. The content of the rights would be determinative of the goal towards which the state is working and would make it easier for the court to test the reasonableness of the means chosen to realise the rights. The state would have to prove that the means chosen are capable of realising the rights in a rational manner. Where the chosen means are demonstrated to be inadequate, then the court would proclaim them as such and require the state to come up with another plan. If the state fails to do so, the court may be justified in proposing to the state what it thinks to be the most appropriate means of realising the rights.

\textsuperscript{96} Para 106.
\textsuperscript{97} Para 107.
\textsuperscript{98} Para 19.