**GROOTBOOM AND BEYOND: REASSESING THE SOCIO-ECONOMIC JURISPRUDENCE OF THE SOUTH AFRICAN CONSTITUTIONAL COURT**

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**Abstract**

This article reviews the emergent socio-economic jurisprudence of the South African Constitutional Court, focusing particularly on the seminal case of *Grootboom*. The first part disputes a particularly prevalent characterisation of the Court’s approach – namely, that it constitutes an administrative law approach the adjudication of socio-economic rights – and suggests, instead, that *Grootboom*, *TAC* and *Khosa* might be more profitably read as ensuring that vulnerable sectors of society are not neglected, or overlooked. *Grootboom* is also, it is argued, best understood as establishing a relationship of collaboration between the state and judiciary, in terms of which each branch of government brings its particular skills to bear on the problem of remedying such omissions. Thereafter, the most prevalent criticism of the Court’s approach – its failure to embrace the minimum core – is considered. Despite the apparent advantages of the minimum core, and the fact that not all of the Court’s objections are entirely convincing, the article concludes that the Court is indeed correct to be wary of this idea. In particular, it emphasises that discussions of the minimum core tend to overlook the complicated relationship between core and non-core needs, and the difficulty of balancing these against one another. Finally, it is argued that, although the approach taken by the Court is, by and large, sound, supervisory jurisdiction is, in certain cases, essential if that approach is to achieve its full effect, and should be regarded as furthering the collaborative approach that *Grootboom* establishes.

**Introduction**

In 1996, South Africa took the bold step of including directly enforceable socio-economic rights in its new Constitution. Thus far, four cases concerning socio-economic rights have been brought before the Constitutional Court: *Soobramoney v Minister of Health, KwaZulu-Natal*,¹ *Government of the Republic of South Africa v Grootboom*,²

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¹ 1998 (1) SA 765 (CC).

² 2001 (1) SA 46 (CC).
Minister of Health v Treatment Action Campaign\(^3\) and Khosa v Minister of Social Development.\(^4\) Of these, Grootboom is the most significant. The approach in Soobramoney seems now to have been largely abandoned and both TAC and Khosa draw heavily upon the Grootboom judgment. It was in Grootboom, it is submitted, that the Court laid the foundations for its future adjudication of socio-economic rights.

If so, however, how appropriate are those foundations? What, in other words, should we make of the approach to socio-economic rights that the Court has adopted? Initially, Grootboom was received by the academic community with cautious approval.\(^5\) More recently, that has lapsed into searing criticism and general disgruntlement.\(^6\) In this article I consider these questions anew and ask whether such pessimism is justified. Is Grootboom really as limited and contradictory as its detractors suggest? Or can that judgment be developed into a framework for the adjudication of socio-economic rights that is not only coherent but which also strikes an appropriate balance between the competing roles of the state and the judiciary? In this article, I suggest that the latter is the case. That is not to say that I agree with every aspect of Grootboom – there are respects in which the Court’s approach should be adjusted\(^7\) – but the basic structure can, in my view, be regarded as sound.

In the first part of this article I begin by recounting the now well-known Grootboom decision. Thereafter, I consider how best Grootboom might be understood. I dispute a particularly prevalent characterisation of Grootboom – namely, that it constitutes an administrative law approach to the adjudication of socio-economic rights – and suggest that the true picture is in fact more complex. On my reading, the Court can be understood as seeking to protect the interests of vulnerable sectors of society, while also leaving the primary responsibility for co-ordinating socio-economic programs in the hands of the state. The judgments in TAC and Khosa are also, I argue, best understood in terms of this approach, which will hopefully become clearer in the second part. In the third part, I consider the alternative with which the Court’s socio-

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3 2002 (5) SA 721 (CC).
4 CCT 12/03.
7 The Court has, for instance, generally failed to engage with the content of socio-economic rights, or the form that such rights should take when eventually realised. I am also of the view that state-led socio-economic programs should be required to set clear indicators and benchmarks. I am, however, unable to take up these issues in this article.
economic jurisprudence has been most often, and unfavourably, contrasted: the ‘minimum core’ approach developed by the United Nations Committee on Economic, Social and Cultural Rights (CESCR), the body tasked with monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR). I suggest, perhaps contentiously, that the Court is indeed correct to be wary of this idea, even if not all of its objections are entirely convincing, and therefore require elaboration. Finally, I introduce my most important criticism of the Court’s approach – its failure to exercise supervisory jurisdiction. I argue that, on the approach taken by the Court, there are certain types of cases in which supervisory jurisdiction is essential.

II Government of the Republic of South Africa v Grootboom

The facts of Grootboom are now well-known. Ms Grootboom and the other respondents lived in an informal settlement, in an area prone to flooding. Many had applied for low-cost housing but had been on the waiting list for many years and had not received any indication of when such housing might become available. In light of their circumstances and the fact that the winter rains were about to commence, the respondents left the settlement and erected shacks on nearby vacant land that had better drainage. Unfortunately, the land was privately owned. The owner obtained an eviction order and, in due course, the respondents were, in Yacoob J’s words, evicted ‘prematurely and inhumanely’, in a manner ‘reminiscent of apartheid-style evictions’.8 Finding that their former sites in the informal settlement had now been filled by others, the respondents sheltered on a nearby sports field under temporary structures that provided little protection against the elements.

It was at this point that the respondent’s attorney launched an urgent application to the High Court asking that they be provided with adequate basic shelter or housing until they obtained permanent accommodation. In the High Court,9 Davis J first considered s 26(1) and (2) of the Constitution, which provide as follows:

(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.

In this regard, Davis J noted that the local authority had implemented a rational housing program and was in the process of constructing a substantial number of housing units. In light of this and the fact that in the earlier case of Soobramoney the Constitutional Court had cautioned against an excessively generous approach to socio-economic rights, Davis J declined to find a violation of s 26(1) and (2). He was, however, willing

8 Grootboom (note 2 above) para 10.
9 Grootboom v Oostenberg Municipality 2000 (3) BCLR 277 (C).
to find a violation of s 28(1)(c) – which provides that ‘[e]very child has the right to basic nutrition, shelter, basic health care services and social services’ – because, in contrast to s 26(1) and (2), this section is unqualified by progressive realisation and the availability of resources. It therefore, held Davis J, creates an immediately realisable entitlement, enforcement of which is not subject to the constraints of Soobramoney.

Davis J went further, however. Any such order must, he said, in accordance with the spirit and purport of s 28 as a whole, take account of the need of the child to be accompanied by his or her parents. Accordingly, Davis J held that the children and their parents could enforce an immediate entitlement to shelter under s 28(1)(c). The parents were, in other words, granted shelter through the unqualified right accorded to their children. The government then appealed against this decision to the Constitutional Court.

(a) The judgment of the Constitutional Court

At the core of Grootboom is the following question: what is entailed by the obligation to take reasonable legislative and other measures, within the available resources of the state, so as to realise a socio-economic right – in this instance, the right of access to housing? In Grootboom, the government had understood this obligation in a particular way, namely, as requiring the progressive provision of ‘permanent residential structures’.10 To this end, it had enacted legislation and instituted programs aimed at providing houses to an increasing number of people over time.

The Constitutional Court, in turn, settles upon the term ‘reasonable’ to evaluate the measures implemented by the government, clearly taking advantage of the fact that s 26(2) requires the state to take ‘reasonable legislative and other measures’11 to achieve the progressive realisation of socio-economic rights. Whether this is an administrative law notion of reasonableness – as many have suggested – or whether the approach formulated by the Court is in fact more complex, is discussed below. For now, I simply provide an overview of the Court’s reasoning.

According to Grootboom, reasonableness requires that a program implemented in order to realise a socio-economic right must be ‘comprehensive’,12 ‘coherent’,13 ‘balanced’ and ‘flexible’.14 More importantly, the Court insists that a ‘program that excludes a significant sector of society cannot be said to be reasonable’,15 and that:

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10 Section 1 of the Housing Act 107 of 1997.
11 My emphasis.
12 Grootboom (note 2 above) para 40.
13 Ibid para 41.
14 Ibid para 43.
15 Ibid.
Those whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right. . . . If the measures, though statistically successful, fail to respond to the needs of the most desperate, they may not pass the test.16

On this basis, Yacoob J found the state housing program to be invalid to the extent that it failed to make provision for people in immediate and desperate need. The program, although laudable, concentrated unduly on the goal of constructing permanent houses for as many people as possible over time, instead of providing some form of shelter for the desperate in the interim. In the words of the Court, '[t]he nationwide housing program falls short of obligations imposed upon national government to the extent that it fails to recognise that the state must provide for relief for those in desperate need'.17

The Court therefore held that, if the state was to meet its constitutional obligations, its housing program would have to be modified so as to include a component catering for those in immediate and desperate need, even if doing so detracted from the state’s long-term goals, or decreased the rate at which permanent houses could be constructed. As for the form of that component, that was left to the state, as was the exact proportion of the housing budget that should be allocated for that purpose. The Court did, however, stipulate that the budgetary allocation should be ‘reasonable’,18 that ‘a significant number of desperate people in need [must be] afforded relief, though not all of them need receive it immediately’19 and that the program should be ‘implemented with due regard to the urgency of the situations it is intended to address’.20

As for the judgment of Davis J in the court a quo, the Court held that such an approach is unacceptable because it produces an anomalous result: people who have children have a direct and enforceable right to housing, while others who have none are not entitled to housing.21 It is true, held the Court, that s 28(1)(c) – which provides that ‘[e]very child has the right to basic nutrition, shelter, basic health care services and social services’ – is unqualified by progressive realisation and the availability of resources. That does not mean, however, that every child has an entitlement to those services when they are lacking. Rather, the obligation falls primarily on the family and alternatively on the state. The state therefore incurs an obligation to provide shelter when children are, for example, removed from their families.

16 Ibid para 44.
17 Ibid para 66.
18 Ibid.
19 Ibid para 68.
20 Ibid para 67.
21 Ibid para 71.
(b) An administrative law decision?

One of the most interesting and, it would appear, influential analyses of Grootboom is that offered by Cass Sunstein in his recent book Designing Democracy: What Constitutions Do. For Sunstein, Grootboom is best understood as an administrative law judgment. In a typical administrative law case, he argues, an agency has a duty of accountability; it must explain why it has adopted a particular allocation of resources and not another. The role of the court is to guard against arbitrariness by ensuring that the resource allocation adopted by the agency is rational. It was through such an approach, Sunstein suggests, that the Court reached its decision in Grootboom.

Sunstein approves of Grootboom – so much so that he abandons his earlier view that socio-economic rights should not be included in constitutions – but his analysis does raise some awkward questions. If Grootboom could have been decided purely on administrative law grounds, then what role is there for socio-economic rights? To put this differently, does an administrative law approach not render socio-economic rights redundant, or ensure that they are not given their full effect? Is not something more required and, if so, what is it?

Before considering this, we need to address a prior issue, which is whether Sunstein’s characterisation of Grootboom is in fact correct. And to answer that we need to explore in greater detail what is meant by judicial review in administrative law. The classic exposition of this concept is provided by the English case of Associated Provincial Picture Houses Ltd v Wednesbury. In that judgment, Lord Greene distinguishes between two senses of unreasonableness: illegality and irrationality. Illegality encompasses grounds such as acting for improper purposes and acting mala fide. Here, the rationale for judicial intervention is that the agency has not acted within the powers conferred by Parliament in the enabling statute. The courts are therefore justified in intervening in order to uphold the will of Parliament.

Lord Greene goes on to emphasise, however, that, even if the agency has acted within the constraints of the enabling legislation, its decision can still be invalidated on the basis that it is substantively unreasonable, or irrational. By assuming such a power, however, the courts open themselves to the allegation that they are intervening too greatly in the merits of agency decisions. For this reason, Lord Greene emphasises that it is not the place of the courts to substitute their view for that of the administrative body; the courts may only intervene where the challenged
decision is so unreasonable that no reasonable body could have made it. Lord Diplock has, in a similar vein, expressed the *Wednesbury* standard as follows: the decision should be ‘so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it’.

Over the years, however, the so-called *Wednesbury* test has come under pressure. Firstly, various English academics have argued that ‘proportionality’, a test developed by the European Court of Justice (ECJ), would be a more appropriate standard. In essence, proportionality requires that a proper balance be struck between the objective that the public body is seeking to pursue, and the measures that it has adopted. In general, the ECJ formulates the test as follows: ‘the measures adopted must be appropriate and necessary in order to achieve the objectives legitimately pursued and, where there is a choice between several appropriate measures, recourse must be had to least onerous, and the disadvantages caused must not be disproportionate to the aims pursued’.

Secondly, in cases involving civil and political rights, the English courts have declined to apply the *Wednesbury* test in its traditional form, and have instead applied the standard with greater intensity. In *Brind v Secretary of State for the Home Department*, for instance, a case involving freedom of speech, Lord Bridge held that the Court must enquire whether a reasonable Secretary of State could reasonably have made the primary decision being challenged, and began his enquiry from the premise that only a compelling public interest could justify the invasion of a right. In *R v Ministry of Defence, ex parte Smith*, which concerned the exclusion of gays and lesbians from the military, Sir Thomas Bingham MR’s formulation is very similar. The rationale for applying the reasonableness standard more intensely is the fundamental nature of the interest that is threatened by the administrative action.

A third, and related, development is that certain English judges have expressed dissatisfaction with *Wednesbury*, arguing that the standard set out therein is too deferential. Most notably, Lord Cooke has condemned *Wednesbury* as ‘excessive’, and has suggested that a more appropriate test

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25 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410.
27 Craig (ibid) 590-91.
30 Ibid 748-49.
31 [1996] 1 All ER 257.
32 Ibid 263 (‘[t]he more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above’).
would be whether the decision was one that a reasonable authority could have reached.\textsuperscript{33} In short, on this issue, English public law appears to be in a state of flux.

Likewise, in South Africa, there has been considerable uncertainty about the appropriate standard of review in cases of this nature. The Promotion of Administrative Justice Act 3 of 2000, enacted in order to give effect to the constitutional requirement that administrative action should be ‘reasonable’,\textsuperscript{34} settles upon a formulation that is reminiscent of 
\textit{Wednesbury}: the decision should not be ‘so unreasonable that no reasonable person could so have exercised the power or performed the function’.\textsuperscript{35} Despite this, in the recent case of \textit{Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism},\textsuperscript{36} O’Regan J, writing for the Constitutional Court, interpreted this section in light of Lord Cooke’s test.\textsuperscript{37}

With this rather confusing picture in mind, we can now return to \textit{Grootboom} and decide whether that judgment is best read as epitomising judicial review under administrative law. It is, firstly, submitted that the Court is unlikely to have found the housing program to be unreasonable, had it regarded itself as engaged in traditional \textit{Wednesbury}-style review. Recall that \textit{Wednesbury}, in its classic formulation, requires that something extreme must be proven: the decision must be so unreasonable that no reasonable body could have reached it, or so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it.

In evaluating the state’s housing program, however, the Court expressly notes that ‘[w]hat has been done in execution of this program is a major achievement. Large sums of money have been spent and a significant number of houses have been built’.\textsuperscript{38} Far from emphasising that the program is ‘arbitrary’ or ‘irrational’, in the sense that those terms are traditionally employed in administrative law, the Court expressly states that ‘[a]location of responsibilities and functions has been coherently and comprehensively addressed. The programme is not haphazard but represents a systematic response to a pressing social

\textsuperscript{33} \textit{R v Chief Constable of Sussex, ex parte International Trader’s Ferry Ltd} [1999] 1 All ER 129, 157.

\textsuperscript{34} Section 33(1).

\textsuperscript{35} Section 6(2)(b).

\textsuperscript{36} CCT 27/03.

\textsuperscript{37} Ibid para 44 (‘Section 6(2)(b) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke’s words, it is one that a reasonable decision-maker could not reach’). See also the earlier case of \textit{Bel Portu School Governing Body v Premier of the Western Cape} 2002 (3) SA 265 (CC) para 87 in which Chaskalson P, writing for the majority, expressed a preference for Lord Cooke’s test without deciding the issue (‘[i]f the decision is one that a reasonable authority could make, courts would not interfere with the decision’).

\textsuperscript{38} \textit{Grootboom} (note 2 above) para 53.
need’. In light of this, it seems clear that Wednesbury, at least in its traditional formulation, provides a poor explanation of Grootboom.

Nor, secondly, can Grootboom be explained on the basis of a proportionality test. As Paul Craig notes, to ‘talk of proportionality at all assumes that the public body was entitled to pursue its desired objective’. The task of the court is then to balance that objective against the measures adopted by the public body to achieve it. Now, as mentioned, in Grootboom the state interpreted s 26(1) and (2) as requiring the provision of ‘permanent residential structures’ to an increasing number of people over time. The point of Yacoob J’s judgment is not, however, that the program implemented by the state was disproportionate to that goal. Rather, it is that the state’s aim was itself flawed to the extent that it unduly prioritised the construction of adequate housing at the expense of short-term needs.

Can Grootboom then be explained on the basis of Lord Cooke’s test, or the more intense form of review employed by English courts when civil and political rights are at stake? Here the question admittedly becomes more delicate. My own view, however, is that this also provides a poor explanation of Grootboom. It must be recognised that, even in those cases in which the English courts apply the Wednesbury test more intensely, a significant margin of appreciation is retained. In Brind, for instance, Lord Bridge emphasises that the task of the courts is to apply a ‘secondary’ judgment. Similarly, in Smith, Sir Thomas Bingham cautions that the ‘threshold of irrationality is a high one’, while Thorpe LJ finds that the policy in question – that of excluding gays and lesbians from the military – ‘could not possibly be labelled as falling outside the significant margin of appreciation vested in the Secretary of State’.

In light of these dicta, it is submitted that a court that regarded itself as engaged in even a more intense form of Wednesbury review would have found that the state’s conceptualisation of its obligation under s 26(1) and (2) – namely, as requiring the provision of houses to an increasing number of people over time – constituted an entirely reasonable interpretation of those provisions. Such a court would, it is submitted, have regarded the housing program as falling within the ‘significant’ margin of appreciation granted to the state and would only have intervened if houses were not being constructed at a satisfactory rate.

39 Ibid para 54.
40 Wednesbury provides a better explanation of the earlier case of Soobramoney (note 1 above).

In that case, Chaskalson P, in his majority judgment, cautioned that ‘[a] court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters’ (para 29).
41 Craig (note 25 above) 723.
42 Note 28 above, 723.
43 Note 30 above, 266.
44 Ibid 274, my emphasis.
More to the point, there is another reading of Grootboom available that not only makes better sense of the judgment, but also makes it a more powerful resource in the hands of human rights advocates.

(c) Understanding Grootboom

In the section above, I argued that Grootboom is not best understood as expressing the ratio that programs designed to progressively realise socio-economic rights should satisfy an administrative law standard of reasonableness. How then might the ratio of Grootboom best be stated? To my mind, it is that such programs should not exclude a ‘significant sector of society’. This, it is submitted, underpins and precedes the Court’s finding that those whose needs are most basic should not be excluded – in the sense of not being specifically, or adequately, catered for – from the state’s housing program; they, in the view of the Court, constitute a ‘significant sector of society’.

What, however, is meant by a ‘significant sector of society’? Clearly, this cannot be taken to mean any group in South African society. After all, certain groups – such as the wealthy – are simply not in need of assistance. Rather, it must be taken to include groups of people who cannot be expected to meet their socio-economic needs independently, on the basis of their own resources. If such a group is excluded, the legality of the state’s socio-economic program will be thrown into doubt.

The mere fact that a group is vulnerable, or unable to meet its needs independently, does not, however, mean that it automatically has a claim to public resources. What is required, therefore, is a contextual examination of whether the group in question – the ‘significant sector of society’ before the Court – has a legitimate claim to inclusion in a socio-economic program from which others already benefit. This, it is submitted, is the paradigm form in which socio-economic claims will be brought before the courts.

This, it should be noted, accords with a classic justification for judicial review, which is that courts should protect the interests of vulnerable minorities who, by virtue of being minorities, are unable to avail

46 It is difficult to disagree with the outcome of Soobramoney yet the appellant – chronically ill, previously disadvantaged and indigent – must surely have ranked amongst the most vulnerable members of society.
47 This assumes, of course, that the state has a program in place that is delivering results. If it has not, or if progress is unacceptably slow, then greater judicial intrusion may be required. To put this differently, the role of the courts expands and contracts depending upon the competence and proactiveness of the state.
themselves of majoritarian political processes. The courts should, in other words, regard themselves as guardians of the interests of such groups. In the US, the seminal case in this regard is *United States v Carolene Products*, in which Justice Stone, writing for the US Supreme Court, held that ‘strict scrutiny’ should be applied in cases in which legislation appears to be directed at ‘discrete and insular’ minorities, or groups of people who have historically been marginalised and subjected to prejudice. Like the discrete and insular minorities of *Carolene Products*, the groups of people whom the Court undertakes to protect in *Grootboom* – people who cannot meet basic needs through their own resources – are, one might say, similarly marginalised and unable to draw attention to their plight through conventional means; they are among the most vulnerable in society. The Court is therefore justified in intervening – and applying the type of close evaluation I have described – in order to protect their interests.

That said, where *Grootboom* does appear to extend significant discretion to the state, in a manner that seems analogous to administrative law, is in relation to the state’s subsequent implementation of the judgment. On this issue, Yacoob J stipulates that the state has a number of options. ‘The precise contours and content of the measures to be adopted’ are, he says, ‘primarily a matter for the legislature and the executive’. Furthermore, ‘[i]t is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first place’. In so doing, the Court famously, or perhaps notoriously, declines to adopt a ‘minimum core’ approach to socio-economic rights, which would have required that emergency housing be provided to everyone in the position of the respondents.

The minimum core is an issue that I return to below. For now, I consider how best to read this part of *Grootboom*. Is the Court seeking to employ two standards of review, one to ensure that vulnerable groups are not excluded and another to assess the measures subsequently implemented by the state to assist such groups? If so, then the judgment does risk becoming incoherent and confusing. I think that a better reading is as follows. In *Grootboom* the Court recognises that it is poorly qualified to dictate how the state should attend to the needs of people without shelter. It also recognises that it is poorly qualified – as I argue in greater detail below – to strike an appropriate balance between the short and long-term aims of the state housing program. It therefore does not dictate exactly what the state should do to assist people in the position of the respondents but instead gives it broad guidelines. If, however, the

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48 304 US 144 (1938).
49 *Grootboom* (note 2 above) para 41.
50 Ibid para 66.
matter were to be brought back to court then the standard would, once again, be one of reasonableness. The state would have to explain why it implemented a program of a particular shape and form and its reasons would, again, be subjected to close evaluation by the Court.

This feature of *Grootboom* appeals to me because, in my view, it establishes a relationship of *collaboration* between the state and the judiciary. The state is accorded primary responsibility for organising socio-economic programs; the Court, however, undertakes to supplement this by pointing out when particular sectors of society – vulnerable minorities – have been neglected or excluded. As to how such omissions are to be remedied, the process is, once again, collaborative. The state is accorded primary responsibility for taking certain steps, but is disciplined by the fact that its actions must meet the standard of reasonableness. In this way, it is submitted, each branch of government brings its particular skills to bear on the problem of fulfilling socio-economic rights.

**III TAC AND KHOSA**

*Grootboom* remains, in my view, the leading South African judgment on socio-economic rights. For this reason, in what follows, I discuss *TAC* and *Khosa* more briefly, primarily to show how those decisions can be accommodated within the jurisprudential framework that, I have argued, the Court establishes in *Grootboom*.

In *Grootboom*, it will be recalled, the Court found that a particular group of people, or sector of society – those in immediate and desperate need of shelter – had been unduly excluded from the state’s housing program. They ought, the Court held, to be accorded a measure of priority by the state, even if doing so compromised long-term aims. The state’s housing program was therefore found to be invalid to the extent that it failed to provide emergency relief to people without any form of shelter.

The claim in *TAC* can be configured in a similar manner. In that case, the government had restricted the availability of the drug Nevirapine, which reduces the incidence of mother to child transmission of HIV/AIDS, to two test sites in each province, despite the fact that it was available free of charge and had been approved by the Medicines Control Council and the World Health Organisation. This, however, had the effect of excluding a significant and vulnerable sector of society – HIV-positive pregnant women, and their children, falling outside those sites – from that service. The issue before the Court was therefore whether those women and children had been unjustifiably excluded.

In the event, the Court found that they had. The government was required to give reasons for its policy, which it did, arguing inter alia that Nevirapine is possibly toxic and could give rise to resistant strains of HIV/AIDS. The Court then evaluated those reasons, found them to be unconvincing, and ordered that nevirapine should be made available at
‘all public hospitals and clinics when, in the judgment of the attending medical practitioner, the drug is medically indicated, which shall if necessary include that the mother has been appropriately tested and counselled’. In addition, the government was ordered to take ‘reasonable’ measures to extend testing and counselling facilities – necessary in some instances for the administration of Nevirapine – throughout the public health sector. In this way, as in Grootboom, a sector of society that had previously not been catered to found inclusion in a state-led socio-economic program.

Now, even if the validity of this comparison is accepted, one might, nevertheless, be tempted to conclude that, in TAC, the Court stepped beyond Grootboom and developed a more assertive approach to the enforcement of socio-economic rights. After all, in Grootboom the Court adopted a collaborative approach to addressing the needs of destitute people. Broad guidelines were stipulated in terms of which the state was required to implement a program catering to the needs of such individuals. The Court, however, refused to recognise any form of housing on demand or individual entitlement and, in so doing, declined to adopt the minimum core.

In contrast, post-TAC, any HIV-positive pregnant woman should be able to claim, as a matter of right, a single dose of Nevirapine at any public health facility in South Africa, where the drug is medically indicated, and where, if necessary, testing and counselling are available. At first glance, TAC therefore appears to go beyond Grootboom by extending individual entitlements to the group in question.

Despite this, it is submitted that the crucial factor that separates TAC from Grootboom is not greater assertiveness on the part of the Court, but the fact the extending an entitlement to Nevirapine – where the drug is medically indicated and where, if necessary, testing and counselling are available – had only limited cost-implications and did not involve issues requiring great expertise. Indeed, it is notable that, on that aspect of TAC that does have far-reaching cost-implications, and which does involve expertise – the extension of testing and counselling facilities throughout the public health sector – the Court reverts to the Grootboom approach and orders that the state need only take reasonable measures in this regard. Furthermore, as in Grootboom, the Court declines to adopt the notion of the minimum core.

Most recently, in Khosa v Minister of Social Development, the question was whether permanent residents are entitled to social grants. Under the Social Assistance Act, these had, previously, been reserved

51 TAC (note 3 above) para 135(3)(c).
52 Ibid para 135(3)(d).
53 Ibid.
54 Note 9 above.
solely for citizens, and the applicants sought to challenge this restriction under s 27(1)(c) of the Constitution, as well as s 9, the equality guarantee.

As such, like the previous cases of *Grootboom* and *TAC*, *Khosa* concerns the exclusion of a particular group – in this instance, permanent residents – from a socio-economic program from which others already benefited. And, once again, as in the cases of *Grootboom* and *TAC*, the Court works closely through the reasons advanced by the state – such as that its primary obligation is to its citizens, that the financial repercussions of extending grants to permanent residents would be too onerous, and that the state should encourage self-sufficiency – and finds them to be unconvincing. The state was consequently ordered to extend social grants to all permanent residents who meet the relevant criteria.

Does *Khosa*, unlike *TAC*, step significantly beyond the *Grootboom* paradigm? Certainly, the Court displays a greater willingness to impose far-reaching financial obligations upon the state where it fails to meet the standard of reasonableness. And it also appears to sharpen the reasonableness standard to some extent. But this does not mean, I think, that *Grootboom* would now have been decided differently, or that the state’s obligations in relation to socio-economic rights have been fundamentally changed. In general, I suspect, in matters that have far-reaching financial implications, or which involve significant expertise, the Court will adopt the *Grootboom* approach of stipulating that the state should cater to the needs of a particular sector of society without dictating the exact form and extent that its program should take. This approach has, as I have mentioned already, been severely criticised. In particular, it has been repeatedly, and unfavourably, contrasted with the ‘minimum core’ approach developed by the by CESCR. It is to this concept that I now turn.

IV MINIMUM CORE

The CESCR introduces the idea of minimum core obligations as follows:

> The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party 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 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...

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55 ‘Everyone has the right of access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance’.
56 Ibid para 49 (‘In considering whether that exclusion is reasonable, it is relevant to have regard to the purpose served by social security, the impact of the exclusion on permanent residents and the relevance of the citizenship requirement to that purpose’).
at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.57

At the outset, before considering whether the minimum core should be transplanted to the South African context, an ambiguity about what is entailed by this concept must be resolved. From the above quote, it is unclear whether the CESCR regards the minimum core as establishing a right that is vested in everyone, or as constituting a benchmark against which a state’s progress in realising socio-economic rights might be assessed. The remark that a state breaches its obligations if ‘a significant number of people is deprived’ might be taken to mean that the minimum core does not establish a right: provided that most people have access to minimum essential levels of socio-economic rights, the state does not fall short of its obligations under the ICESCR.

In subsequent general comments, however, the CESCR has resolved this ambiguity by stating that the minimum core establishes a right that is due to all. In General Comment 15, on the right to water, for instance, the CESCR insists that a violation of this right is established if the state fails to ensure that a ‘minimum essential level of the right is enjoyed by everyone’.58 This is, moreover, the form in which the minimum core has been presented to the Constitutional Court.59

In essence, therefore, the minimum core is intended to establish certain classes of needs as enjoying priority over others. The state is obliged to realise these ‘core’ needs immediately, as a matter of individual right.60 The justification for this approach is that these needs are, it is argued, the most urgent and must therefore be taken to trump needs located outside the minimum core. Thus, for instance, a state in which certain people have no form of shelter should not expend resources on housing subsidies, which are likely only to benefit people who already have some form of protection from the elements. Rather, the state should ensure that everyone has some form of shelter, before moving on to other, less pressing, needs. In this way, the minimum core constitutes the starting-point of progressive realisation.61 Moreover, over time, as the state

58 CESCR General Comment 15: The Right to Water (2002) para 44.
59 In TAC (note 3 above) the amicus argued that the minimum core constitutes ‘an individual right vested in everyone’ (para 26) and ‘no one should be condemned to a life below the basic level of dignified human existence’ (para 28).
60 It has been suggested to me that the minimum core could be understood, not as generating an immediately realisable right, but as giving rise to an obligation that core needs should merely be accorded priority by the state, and may therefore be realised progressively, through programs. Unfortunately, I have been unable to explore this possibility. In writing this article I took the minimum core to constitute an immediately realisable entitlement because that interpretation seemed most consistent with the developed position of the CESCR, and because that is also, as mentioned, the form in which the minimum core appears to have been presented to the Constitutional Court.
61 Bilchitz (SALJ) (note 6 above) 493.
progressively realises socio-economic rights, so what is encompassed by the minimum core, what is available to the citizen as a matter of right, becomes increasingly expansive. There is therefore a universal minimum core – an absolute baseline, applicable to all countries – and more expansive definitions of the minimum core, specific to particular countries.\(^{62}\)

What is the content of the universal minimum core? The CESCR has addressed this question in a series of general comments, dealing with different rights in the ICESCR. By way of illustration, in General Comment 14, on the right to the highest attainable standard of health, the Committee states that the following constitute core obligations: To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups; to ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone; to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; to provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs; to ensure equitable distribution of all health facilities, goods and services; and to adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalised groups.\(^{63}\)

Is this a viable approach to the enforcement of socio-economic rights, and one that the South African Constitutional Court should adopt?

(a) A viable approach?

At the outset, the numerous advantages of a minimum core approach should be noted. The minimum core appears, firstly, to direct resources to where they are most needed, to where, in other words, the needs of individuals are most urgent. It also promises to introduce clarity to the Court’s socio-economic jurisprudence, by ensuring that the state has a clear understanding of its priorities. The minimum core would, furthermore, allow for a clearer formulation of the concept of progressive realisation, by ensuring that the state has a starting-point from which to


work. And, finally, it would have the advantage of converting programmatic socio-economic rights into individual entitlements. This, it might be argued, would place resources directly into the hands of individuals, thereby contributing to the achievement of substantive equality, and the transformation of South African society.

Despite this, the Constitutional Court has, as mentioned, consistently declined to adopt the notion of minimum core obligations. Instead, in terms of the approach taken in the foundational case of *Grootboom*, the state must attend to the needs of vulnerable groups that have a legitimate claim to public resources but the extent to which it should do so is not necessarily dictated by the Court. Instead, it may be arrived at through a process of collaboration in terms of which the Court initially sets broad guidelines, instead of insisting that each member of the group has an individual entitlement to the service in question.

What are the Court’s reasons for declining to adopt a minimum core approach, and how convincing are they? As we shall see, my view is that the Court is correct to be suspicious of this idea, but not all of its objections are entirely persuasive. As such, the Court’s doubts require elaboration.

Firstly, in *Grootboom* the Court held that it would not be possible to determine the minimum core of the right of access to adequate housing without first determining the ‘needs and opportunities’ for the enjoyment of the right. These are, however, diverse; some need land, others need land and houses, and yet others require financial assistance. This raises the question of whether it is indeed possible to stipulate a minimum core that is valid in such a range of contexts. In other words, if people in need of housing have diverse needs, then the state does not have a uniform obligation in respect of such persons, but a range of different obligations.

The difficulty with this objection is, as Bilchitz has pointed out, that it does not preclude the Court from stipulating a general obligation – for example, that every person in South Africa should have access to accommodation that involves protection from the elements and access to basic services – and then leaving it to the state to determine what that obligation requires in particular circumstances. In other words, if people in need of housing have diverse needs, then the state does not have a uniform obligation in respect of such persons, but a range of different obligations.

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64 Note 2 above, para 32.
65 Ibid para 33.
66 Bilchitz (*SALJ*) (note 6 above) 489.
Secondly, the Court has repeatedly expressed doubts about its competence to define the minimum core. In *Grootboom*, the Court observed that the Committee had developed the concept of the minimum core ‘over many years of examining reports’.\(^{67}\) In contrast, it held, it did not have comparable information. Consequently, it was not yet possible to determine the minimum core in the context of the South African Constitution.\(^{68}\) In a similar vein, in *TAC* the Court found that it was simply ‘not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum standards . . . should be’.\(^{69}\)

As it stands, however, this objection is not entirely convincing. In a series of general comments, the CESCR has attempted to isolate the core elements of rights such as food, health and water. There is no apparent reason why these could not be judiciously adapted to the South African context.\(^{70}\)

Furthermore, in *Grootboom*, in the court a quo, as outlined briefly above, Davis J adopted what was virtually a minimum core approach by requiring that the children before the Court, as well as their parents, should be entitled to ‘shelter’, which he took to mean something less than ‘adequate housing’. In Davis J’s words, he found that the degree of protection connoted by shelter involves a ‘significantly more rudimentary form of protection from the elements than is provided by a house’.\(^{71}\) Consequently, he held that ‘tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum’.\(^{72}\) If, as Craig Scott and Philip Alston recommend, this order had been extended by the Constitutional Court to encompass the needs of all people deprived of housing, regardless of whether or not they have children, it would have amounted to a minimum core approach.\(^{73}\) Whatever the merits of Davis J’s judgment, it illustrates that, for the courts, the difficulties inherent in defining the minimum core are not insurmountable.

Thirdly, in *TAC*, the amici sought to convince the Court of the necessity of the minimum core by distinguishing between ss 26(1) and 27(1), which provide for unqualified rights of access to various socio-economic rights; and ss 26(2) and 27(2), which provide that the state ‘must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights’.

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\(^{67}\) Note 2 above, para 32.
\(^{68}\) Ibid para 33.
\(^{69}\) Note 3 above, para 37.
\(^{70}\) Indeed, various academics undertake precisely this task in D Brand & S Russell (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002).
\(^{71}\) *Grootboom v Oostenberg Municipality* (note 9 above) 288B-C.
\(^{72}\) Ibid 293A.
\(^{73}\) Note 63 above, 260.
The amici argued that ss 26(1) and 27(1) create self-standing core entitlements, whereas ss 26(2) and 27(2) impose additional obligations to progressively expand those rights. In response, the Court emphasised that the subsections should be read together; the right referred to in, for example, s 26(2) is the right in s 26(1). The subsections should not, in other words, be read as generating separate obligations.

The Court’s response to the arguments advanced by the amici is, it is submitted, convincing. It is worth noting, however, that the text of the Constitution does not rule out a minimum core approach. As Bilchitz has pointed out, if the minimum core is regarded as the starting-point of progressive realisation, then such an approach is not inconsistent with the obligations imposed by ss 26(2) and 27(2). In other words, it is true that the right referred to in, for instance, s 26(2) is the right in s 26(1), and that this right must be progressively realised. But, provided that the minimum core is regarded as the first stage of progressive realisation, there is no inconsistency. Put otherwise, if the Court wanted to adopt the minimum core, the text of the Constitution would not pose an obstacle.

Finally, in TAC the Constitutional Court found that it was simply ‘impossible’ for the state to provide core services to everyone immediately. The minimum core is, in other words, simply unrealistic. In a country such as South Africa, this might be true. However, as the passage quoted from General Comment 3 illustrates, the CESCR does envisage circumstances in which a state may be able to justify its failure to meet the minimum core by reference to a lack of resources. According to the CESCR, a state will not be found to be in violation of its obligations if it is able to demonstrate that, to repeat, ‘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’. In theory, therefore, instead of simply dismissing the minimum core as ‘impossible’, the Court could have called upon the state to prove that it is unable to meet the minimum core, and that it is doing everything it can to do so. In this regard, the standard of proof should be especially high; Bilchitz, for example, envisages a possible role for the limitation clause. Only if such evidence is forthcoming, should the state be found to be in compliance with the Constitution.

If, as they stand, these objections are unconvincing, should the Constitutional Court embrace the notion of minimum core obligations? In what follows, I suggest that, despite the fact that its objections do not stand up to close scrutiny, the Court is nevertheless correct to be wary of this idea. My concerns are best introduced by revisiting the final objection and considering, in greater detail, what is entailed by the duty

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74 Bilchitz (SAJHR) (note 6 above) 11-3.
75 General Comment 3 (note 57 above) para 10.
76 Bilchitz (SAJHR) (note 6 above) 18.
imposed upon the state to demonstrate that 'every effort has been made to use all resources that are at its disposal to satisfy, as a matter of priority, those minimum obligations'. As we shall see, this obligation is, in fact, far more complex than it might at first appear. Indeed, three different interpretations are available. And none, it is submitted, recommend adoption of the idea of minimum core obligations.

The first interpretation is the most obvious, namely, that any resources located outside the minimum core to ‘non-core’ needs should be redistributed to satisfy core entitlements as a matter of absolute priority. If core needs are rights then it would, after all, seem to follow that they should trump non-core allocations. This interpretation is, furthermore, consistent with the rationale for the minimum core, which is that non-core needs are less urgent and should not therefore be attended to until core needs are met.

If this is what the minimum core requires we should, however, tread very carefully. Consider, for example, the right to health, the core content of which – determined by the CESC in General Comment 14 – is set out above. At present in South Africa various vulnerable groups fall outside the minimum core and are, to varying degrees, reliant upon government funding. An example that comes to mind – and many could be cited – are the chronically ill. As Soobramoney, the first case concerning socio-economic rights to be brought before the Constitutional Court, illustrates, the South African state currently provides renal dialysis at public health facilities, provided that patients meet certain conditions. Would we really be prepared to accept that resources should be diverted from such groups until everyone in South Africa has access to minimum levels of food, water, shelter, sanitation, and so on? It should be obvious that such an approach would simply be unrealistic and unconscionable. In contexts such as those of health and social security we cannot simply assume that core needs should always take precedence over non-core needs. It is, instead, more accurate to regard the state as faced with a spectrum of needs, no particular part of which should be accorded absolute priority.

In this form, the minimum core also has the potential to be counterproductive. As we saw in Grootboom, the South African state currently employs a variety of measures to combat the housing crisis, ranging from emergency relief to the construction of low-cost housing and the provision of subsidies. In an unqualified form, the minimum core would not allow for a layered approach such as this. Instead, all of the state’s resources would have to be diverted to emergency relief – the type of measures ordered by Davis J in the court a quo in Grootboom – until every person in South Africa has access to basic shelter, water and sanitation. Only once this is achieved, could the state proceed to the construction of low-cost housing and the provision of subsidies.
The difficulty with this, however, is that the type of measures described by Davis J in the court a quo – the provision of tents and portable latrines, coupled to regular transportation of water – do not constitute long-term investments. Indeed, they constitute an ongoing drain on resources; tents must be replaced, latrines maintained and water transported. If measures such as these are to be effective they must, it is submitted, be carefully targeted. Furthermore, provision must be made for those facilities that are provided to be rapidly upgraded. In short, emergency relief must be linked to programs – such as the construction of low-cost housing – that constitute durable investments, thereby freeing up resources that can be applied elsewhere.

In a rigid form, however, the minimum core would preclude the allocation of any resources to non-core needs until the core needs of everyone are met. As the above discussion demonstrates, this might not, in the long-term, constitute the most effective allocation of scarce resources. Once again, it seems that a more nuanced approach might be advisable that does not prioritise one set of needs to the absolute exclusion of others, and which allows for a balance between short-term and long-term aims. In short, implementing the minimum core cannot simply be a matter of ascertaining how much it would cost, checking whether there is sufficient money in the relevant budget, and ordering that it be done. The true picture is, in fact, far more complex.

Secondly, the concept of minimum core obligations could be taken to mean that there should be no redistribution from non-core to core needs. In other words, any non-core services currently provided by the state should remain intact. As additional resources become available, these should be devoted to core needs, while existing services are simply maintained without being expanded.

This interpretation would, however, almost certainly deprive the minimum core of its raison d’être. The essence of the minimum core approach is that certain ‘core’ needs have a greater claim to resources than others. This interpretation, by allowing non-core services to be maintained across the board, would appear not to recognise that. It would, furthermore, preclude any possibility of core needs being realised immediately, or even expeditiously, thereby depriving the minimum core of one of its chief attributes.

Thirdly, and most promisingly, the concept of minimum core obligations could be taken to entail some form of limited redistribution. In other words, certain allocations could be compromised to satisfy core needs, while others are maintained. If interpreted in this way, the minimum core would not result in inappropriate services being terminated (the difficulty with the first interpretation) nor would it be deprived of its teeth (the problem with the second interpretation).

The question, however, is how this might be achieved through the judicial process. Presumably, in an appropriate case, the court could
adopt the minimum core as a general approach to socio-economic rights. Thereafter, if core needs are unsatisfied, the state would have to justify that under the limitation clause, or an equivalent form of enquiry. To put this differently, non-core allocations would have to be regarded as violations of constitutional rights, and justified as such, if they result in core needs being unrealised elsewhere.

To my mind, however, this would simply be a bridge too far. Certainly, as we have seen, courts may call upon the state to provide reasons for not catering to a particular group and subject those reasons to close evaluation. But the type of scrutiny applied under a limitation clause enquiry, in response to a violation of a constitutional right, is, and should be, the most exacting and detailed that can be applied by a court. If we can imagine a spectrum, then administrative law review would be situated at one end, *Grootboom*-type review at the centre, and a limitation clause enquiry at the far pole. Courts are unlikely to regard themselves as competent to determine the appropriate balance between short and long-term aims (in the context of housing) and, say, primary health care and treatment for chronically ill individuals (in the context of health) via this form of enquiry. In practice, this would amount to courts themselves making these determinations – a task for which they are ill-suited.

For these reasons, the approach adopted by the Constitutional Court – whereby the Court identifies, on a contextual basis, that a particular sector of society has not been adequately catered to, and then either orders that the omission be remedied, or addressed through the formation of a collaborative partnership with the state – strikes me as preferable. In this way, the Court is able to fulfil functions for which it is well-suited (protecting the interests of vulnerable groups and holding the state to standards of justification) while the state is accorded primary responsibility for organising and implementing socio-economic programs.

V THE WAY FORWARD

If so, however, we are faced with a lacuna. Under *Grootboom*, the state must attend to the needs of vulnerable groups but the exact extent to which it should do so will not necessarily be prescribed by the Court. This has given rise to the entirely legitimate fear that even limited, or nominal, efforts on the part of the state will be sufficient to ensure compliance with the Court’s judgments. Indeed, this concern appears to have been borne out by the state’s subsequent implementation of *Grootboom* and the programmatic elements of *TAC*. Regarding *Grootboom*, Kameshni Pillay writes that the judgment has been interpreted narrowly, with the result that ‘there has been little tangible or visible change in housing policy so as to cater for people who find themselves in desperate and crisis
situations’. As for TAC, Mark Heywood explains that ‘[t]he judgment seems to have been misunderstood as simply a negative injunction to remove the restrictions on the availability of nevirapine. The positive dimensions of the order [relating to progressive provision of testing and counselling facilities] . . . seem to have been misunderstood’.78

If so, this is an exceptionally serious indictment. It suggests that the approach of the Constitutional Court is ultimately ineffective, and will do little to promote the interests of vulnerable sectors of society, or further the transformative vision of the Constitution. Have we therefore reached a dead-end, in which we are confronted with a choice between the minimum core (which is impractical) and the approach of the Constitutional Court (which, it would appear, is ineffectual)? Or is there a way forward?

The most effective means of remedying this difficulty would, it is submitted, be for the Court to, in certain cases, exercise supervisory jurisdiction – a power that it has thus far declined to invoke.79 As we saw in Grootboom, the Court did not regard itself as competent to prescribe the exact amount of its budget that the state should allocate to programs that target those in desperate need. The state was, instead, simply provided with guidelines. The precise allocation, held the Court, must be reasonable, but is for government to decide in the first place. Similarly, in TAC, apart from ordering that restrictions on the availability of nevirapine be lifted, the Court required the state to take ‘reasonable’ steps to extend testing and counselling facilities throughout the public health sector.

Now, when court orders are this vaguely worded there is always the danger that the state will interpret them narrowly.80 That, as Pillay and Heywood explain, appears to have been the fate of Grootboom and the programmatic elements of TAC. In considering how best to meet this difficulty, it is, however, important to see that the judgments themselves are not the problem. The problem is, instead, the state’s subsequent implementation of them. As Pillay points out, the chief difficulty with the

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79 In Grootboom (note 2 above) the Court ordered the South African Human Rights Commission (SAHRC) to report back to it about the state’s subsequent implementation of the judgment. According to Pillay, however, the SAHRC’s report was partial and incomplete. See Pillay (note 78 above) 2. In TAC (note 3 above) the Court acknowledged that it could exercise supervisory jurisdiction, but declined to do so on the basis that ‘[t]he government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case’ (para 129).
80 Clearly this difficulty will not arise where court orders are framed in clear and specific terms, such as the order in Khosa and those parts of TAC that required that required that restrictions on the availability of nevirapine be lifted (as opposed to those aspects of the order that required the programmatic expansion of testing and counselling facilities). In instances such as this supervisory jurisdiction is unnecessary.
state’s implementation of *Grootboom* has been a ‘lack of clear understanding that the judgment requires systemic changes to national, provincial and local housing programs to cater for people in desperate and crisis situations’.

Heywood, as mentioned, takes a similar view of the state’s limited implementation of the positive elements of *TAC*.

If the Court were to exercise supervisory jurisdiction in cases of this nature – by asking the state to report back to it at a later stage with an outline of the measures that it regards as appropriate, that would then be evaluated by the Court – it would be able to ensure that judgments such as *Grootboom* and *TAC* are given their full effect. In this way, the initially vague prescriptions of such cases would become increasingly concrete. Certainly, this is a more realistic option than, in such cases, handing down orders that are more detailed and specific (which would take the Court beyond its institutional role) or expecting a new case to be brought if the state does not implement the order in good faith (which is unrealistic, given the cost of litigation, and the limited resources available to those who bring cases dealing with socio-economic rights).

Supervisory jurisdiction should not, moreover, be regarded as an unwarranted assertion of authority on the part of the judiciary. As I have argued throughout this article, by far and away the best reading of *Grootboom* is that it establishes a relationship of collaboration between the state and the judiciary in terms of which each branch of government brings its particular skills to bear on the problem of realising socio-economic rights. Supervisory jurisdiction should, it is submitted, be regarded as a means of extending, or facilitating, that relationship – the missing half of *Grootboom*, if you will.

**VI Conclusion**

This article has reviewed the emergent socio-economic jurisprudence of the South African Constitutional Court, focusing particularly on the seminal case of *Grootboom*. In the first part, I disputed a particularly prevalent characterisation of the Court’s approach – namely, that it constitutes an administrative law approach to the adjudication of socio-economic rights – and suggested, instead, that *Grootboom, TAC* and *Khosa* might be more profitably read as ensuring that vulnerable sectors of society are not neglected, or overlooked. Where remedying the omission is likely to have significant financial implications, or involve expertise not typically possessed by courts, I suggested that the Court will probably opt, as it did in *Grootboom*, for a collaborative approach in terms of which the state is given primary responsibility for addressing the problem.

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81 Pillay (note 78 above) 1.
Thereafter, I turned to the most prevalent critique of the Court’s approach – its failure to embrace the minimum core, an idea developed at the international level by the CESCR. Despite the apparent advantages of the minimum core, and the fact that not all of the Court’s objections are entirely convincing, I nevertheless concluded that the Court is indeed correct to be wary of this idea. In particular, I emphasised that discussions of the minimum core have tended to overlook the complicated relationship between core and non-core allocations, and the difficulty of balancing these against one another. I suggested that a minimum core approach – which would require courts to consider non-core allocations as violations of constitutional rights if core needs are not addressed elsewhere – would constitute an unworkable and inflexible means of addressing this problem. Finally, I argued that, although the approach taken by the Court is, by and large, sound, supervisory jurisdiction is, in certain cases, essential if that approach is to achieve its full effect.