

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

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ABSTRACT

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

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

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

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under the Constitution to show respect and concern for those whose basic needs have to be met. The courts must give meaning to and apply the Bill of Rights and other provisions of the Constitution in the context of our history, the conditions prevailing in our society, and the transformative goals of the Constitution.⁵³ The manner in which the government and the courts give effect to their constitutional obligations, and in particular the way in which government action is taken and the law developed to promote the values of the Constitution have important implications for the process of transformation.

Speaking after almost thirty years of service on the US Supreme Court, Justice Brennan said:

I do not mean to suggest that we have in the last quarter-century achieved a comprehensive definition of the constitutional ideal of human dignity. . . . For if the interaction of this Justice and the constitutional text over the years confirms any single proposition, it is that the demands of human dignity will never cease to evolve.⁵⁴

In the light of our history the recognition and realisation of the evolving demands of human dignity in our society – a society under transformation – is of particular importance for the type of society we have in the future.

The Constitution offers a vision of the future. A society in which there will be social justice and respect for human rights, a society in which the basic needs of all our people will be met, in which we will live together in harmony, showing respect and concern for one another. We are capable of realising this vision but in danger of not doing so. We seem temporarily to have lost our way. Too many of us are concerned about what we can get from the new society, too few with what is needed for the realisation of the goals of the Constitution. What is lacking is the energy, the commitment and the sense of community that was harnessed in the struggle for freedom. The Legal Resources Centre has not lost that energy, commitment and sense of community; nor have other important organs of civil society. They deserve our support and encouragement. But more is needed than that. All of us have an obligation to make the Constitution work, and it is in all of our interests that this be done. It is important that we regain the energy, the commitment and the sense of community we once had, and use it to give effect to the values and aspirations of the Constitution. At a gathering such as this, when we reflect on the life choices made by Bram Fischer and others like him who dedicated themselves to the achievement of a just society in South Africa, and when we reflect on our Constitution and its aspirations, it is appropriate that we remind ourselves of what still remains to be done and of the commitment that it demands from us all.

⁵³ *S v Makwanyane* (note 28 above) para 10; *Soobramoney v Minister of Health* (note 51 above); *Pretoria City Council v Walker* (note 50 above) para 46; and *President of the Republic of South Africa v Hugo* (note 44 above) paras 41–43.

⁵⁴ Cited in Stephen J Wermiel 'Law and Human Dignity: The Judicial Soul of Justice Brennan' (1998) 7 *William and Mary Bill of Rights J* 223, 239. Justice Brennan was speaking at the Georgetown University Law Centre.

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

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

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

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

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

Section 26 Housing

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

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

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

Section 28 Children

(1) Every child has the right –

(a) . . .

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

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

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

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

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

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

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

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

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

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

II THE FACTS AND RESULT IN *GROOTBOOM*

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

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

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

⁶ *Grootboom* (note 1 above) 280B–C.

⁷ *Ibid* 281B–D.

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

⁹ *Ibid* 281H–I.

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

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

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

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

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

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

10 Ibid 281.

11 Ibid 280D-E.

12 Ibid 282E-F.

13 Ibid.

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

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

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

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

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

III SOUTH AFRICA AND TRANSNATIONAL CONSTITUTIONALISM

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

¹⁵ Ibid 293H–294C.

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

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

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

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

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

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

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

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

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

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

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

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

IV THE NORMATIVE STRUCTURE OF THE SOUTH AFRICAN BILL OF RIGHTS

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

(a) Normative inclusiveness and intermingling

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Purposes and context

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

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

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

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

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

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

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

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

³⁰ Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) International law: reprise

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

