Proposing a way to develop the substantive content of the right of access to adequate housing: An alternative to the reasonableness review model

Gustav Muller[*]

Abstract

In this article an attempt is made to put forward a convincing case for giving substantive content to the right of access to adequate housing and looks towards relevant international law elaborations on the meaning of this right as contained in the International Convention on Economic, Social and Cultural Rights (ICESCR). It does so while being aware of the Constitutional Court's prior rejection of an international law-based minimum core interpretation of the right and opting, instead, for the so-called model of reasonableness review. Given that the court has so expressly taken and stuck to this stance, it is argued in the article that an international law-based substantive interpretation of the right is possible – given that South Africa has recently ratified the ICESCR – and that it is preferable given the shortfalls of the model of reasonableness review. The article further highlights what difference the preferred reading of section 26(1) would make as to how courts 'interpret' reasonableness, that is, how courts review compliance with section 26 at present if 'adequate' housing is understood as having security of tenure and access to basic municipal services; is affordable, habitable and accessible; is located in close proximity to social facilities; and is culturally adequate,

1 Introduction

Section 26(1) of the Constitution of the Republic of South Africa, 1996 reads that everyone has a right to access to adequate housing. Section 26(2) of the Constitution adds that the state has a positive obligation to take reasonable legislative and other measures to progressively realise the right within its available

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[*]LLD (Stell), Senior Lecturer, Rhodes University, Grahamstown. This contribution is based on a paper presented at the *Land and Housing: Prospects and Challenges Conference*, University of South Africa, Burgers Park Hotel, Pretoria, 18-19 September 2014.

resources. Section 26(3) of the Constitution rounds the housing clause off with a never-again provision that affords people the assurance that they will not be evicted from their homes or have their homes demolished unless it occurs in terms of a court order that was obtained after all relevant circumstances were considered. In *Government of the Republic of South Africa v Grootboom*[1] (*Grootboom*) the Constitutional Court adopted an interpretive approach to this section that requires, on the one hand, sections 26(1) and (2) to be read together, and on the other hand, sections 26(1) and (3) to be read together.[2] In this groundbreaking judgment the court explained that section 26(1) of the Constitution amounted to 'more than bricks and mortar' because it required the acquisition of land, the actual construction of a house and the provision of municipal services.[3] Sadly, in the fourteen years since the *Grootboom* judgment the court has not engaged with what it considered to be 'more than bricks and mortar'. This lack of engagement with the substantive content of section 26(1) of the Constitution can be attributed to the interpretive approach that the court adopted, particularly the strong reliance it places on the reasonableness of measures that the government has adopted in terms of section 26(2) of the Constitution. The result is that we have a limited and indirect understanding of what the scope of the right in section 26(1) of the Constitution is against which the reasonableness of the government's measures must be tested. It is possible to reach the same conclusion by looking at the other side of the interpretive approach. I will, however, limit my argument to the former part of the interpretive approach.[4]

The aim of this article is to propose a way to develop the substantive content of the right of access to adequate housing. My hypothesis is that it is important to give substantive content to the right of access to adequate housing because individuals and communities need to know what they can claim from government in terms of this right. Giving substantive content to the right serves the dual

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[1] 2001 1 SA 46 (CC).
[2] *Grootboom* (n 1) para 34.
[3] *Id* para 35.
[4] The burgeoning eviction jurisprudence that has developed in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE), which partially gives effect to section 26(3) of the Constitution, has indirectly provided us with a fragmented picture of what a substantive interpretation of the right of access to adequate housing might look like. However, I am left unsatisfied with the indirect and incremental development in these judgments because it only reveals the fragmented picture of the substantive content of the right of access to adequate housing if we string together the short and isolated *dicta* of the courts in those few judgments that do not turn on technical provisions of PIE or are characterised by avoidance. As a thorough analysis of the evictions jurisprudence in terms of PIE is beyond the scope of this article, I have intentionally limited myself to the former part of the interpretative approach mentioned above and have included references to some eviction cases that support my argument that follows in the second part of the article.

purpose of providing government with (a) a clear benchmark towards which it can progressively realise the right of access to adequate housing within its available resources, and (b) it will act as a standard against which government can be held accountable. I believe that it is an opportune time to make this argument because South Africa recently ratified the International Covenant on Economic, Social and Cultural Rights[5] (ICESCR). This ratification will make it difficult for the Constitutional Court to persist with its view that section 26(1) of the Constitution is distinct from article 11(1) of the ICESCR.[6] The time is thus ripe for the Constitutional Court to infuse its interpretive approach to section 26(1) of the Constitution with a more rigorous and substantive reading that is grounded in international law. This is important furthermore because the Constitutional Court has been slow to heed its obligation to consider international law when it interprets the right of access to adequate housing.

In part two, I provide a concise overview of the model of reasonableness review that the Constitutional Court developed and the criticism that has been levied against this model. I use this criticism as a springboard to propose, at least in outline, a way , to develop the substantive content of the right of access to adequate housing in part three.

2 The model of reasonableness review

2.1 Introduction

Section 26(2) of the Constitution imposes a positive obligation on the government to adopt reasonable legislative and other measures to achieve the progressive realisation of the right of access to adequate housing and to do so within its available resources. In *Grootboom* the court stated that this subsection must always be read with section 26(1) of the Constitution because it delineates the scope of the right.[7] Together, sections 26(1) and (2) form the positive obligations that are imposed on government to provide access to adequate housing. In *Port Elizabeth Municipality v Various Occupiers*[8] (*PE Municipality*) and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*[9] (*Residents of Joe Slovo*) the court added that this positive obligation also included a negative

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[5] 993 UNTS 3. The Covenant was adopted by the General Assembly of the United Nations on 16 December 1966 and came into force on 3 January 1976. As at 18 July 2015, the Covenant has been ratified by 164 countries. South Africa signed the Covenant on 4 October 1994 and ratified it on 12 January 2015. According to art 27 of the Covenant it entered into force three months after the South African government deposited its instrument of ratification on 12 April 2015.

[6] *Grootboom* (n 1) para 35.

[7] *Id* para 34.

[8] 2005 1 SA 217 (CC).

[9] 2010 3 SA 454 (CC).

obligation to the effect that government should be reluctant to institute eviction proceedings against unlawful occupiers of public land in instances where that eviction will lead to homelessness.[10] In *Grootboom* the court stated that this obligation also applied to the eviction of unlawful occupiers from private land. This construction of section 26 of the Constitution makes it clear that there is a definite link between negative obligations to desist from preventing people from enjoying their current access to housing, and the positive obligations to provide access to adequate housing. In this regard *Grootboom* was not only the first Constitutional Court case to deal with the interpretation of section 26 of the Constitution, but it also explained in detail the extent of the positive obligation in section 26(2) of the Constitution.

In *Grootboom* the Constitutional Court stated that the positive obligation in section 26(2) of the Constitution did not impose an absolute or unqualified obligation on government to provide access to adequate housing.[11] Yacoob J emphasised that this positive obligation was limited by the fact that government only had to firstly, take reasonable legislative and other measures that, secondly, had to enable the progressive realisation of the right and that, finally, this should be done only to the extent that its available resources allowed it.[12]

2.2 Reasonableness review

The wording of section 26(2) of the Constitution implies that there should be some standard against which government's social programmes can be measured. In *Grootboom* the *amici curiae* encouraged the court to approve the notion of a minimum core obligation for this purpose.[13] The court rejected this notion of a minimum core obligation because it would be a complex task to define in the abstract what the minimum core should be for access to adequate housing. The court further stated that the opportunities for fulfilling this right varied considerably and the needs were diverse in the South African context.[14]

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[10] *PE Municipality* (n 8) para 28 and *Residents of Joe Slovo* (n 9) para 148.
[11] *Grootboom* (n 1) para 38.
[12] *Ibid.*
[13] The Committee on Economic, Social and Cultural Rights developed this notion in General Comment no 3 *The nature of State parties' obligations (art 2(1) of the Covenant)*, UN Doc E/1991/23. The purpose of this document is to give interpretative direction to the scope and application of a 2(1) of the ICESCR (n 5). In para 10 of General Comment no 3 the Committee states that every State Party to the Covenant incurs a minimum core obligation to ensure that the minimum essential levels of each right contained in the Covenant is satisfied. According to the Committee any State Party would *prima facie* be in violation of its obligations if any significant number of individuals were deprived of an essential level of any of the rights contained in the Covenant. The Committee further stated that the Covenant would be deprived of its *raison d'être* if it was interpreted in a way that did not establish such a minimum core obligation.
[14] *Grootboom* (n 1) paras 32-33.

Instead, the court stated that the core inquiry should be whether the measures taken by the government to realise section 26 of the Constitution are reasonable.[15] The central question flowing from this inquiry is whether the means chosen by the government are reasonably possible of facilitating the realisation of section 26 of the Constitution. The court emphasised that it was the prerogative of the legislature and the executive to decide on the precise contours of the measures that had to be adopted to fulfil the rights in sections 26 (and 27) of the Constitution. The court added that a wide range of possible measures could be adopted by the legislature and the executive to meet this obligation.[16] In this regard the court added that the government should be afforded a margin of discretion in developing and implementing these legislative and other measures. The court emphasised that it was not the place of a court to question whether a better measure could have been adopted or whether public funds could have been expended more effectively. The sole enquiry must be whether the measures that have been adopted are reasonable.[17]

The court proceeded to flesh out this standard of reasonableness review by enumerating a few factors that would be relevant when reviewing the reasonableness of a programme that government adopted to give effect to a socio-economic right in the Constitution. In summary, a reasonable programme must: (a) be comprehensive and co-ordinated in the sense that it clearly allocates responsibilities and tasks to all the spheres of government and ensures that appropriate financial and human resources are available;[18] (b) be capable of facilitating the realisation of the right;[19] (c) be reasonable both in its conception and its implementation;[20] (d) it must be balanced and flexible in the sense that it makes provision for short-, medium- and long-term needs;[21] and (e) must include a component that answers to the exigencies of those in desperate need.[22]

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[15] *Id* para 33.
[16] *Id* para 41.
[17] *Id* para 41.
[18] *Id* paras 39-40. See ss 3, 7 and 9 of the Housing Act 107 of 1997, which clearly state the statutory obligations of the national, provincial and local spheres of government.
[19] *Grootboom* (n 1) para 41.
[20] *Id* para 42. See Muller 'Conceptualising "meaningful engagement" as a deliberative democratic partnership' (2011) 22 *Stell LR* 742 at 745-752 for a discussion of why meaningful engagement, which is squarely grounded in s 26(2) of the Constitution, transcends procedural fairness in terms of ss 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), which focuses only on the moment of decision-making and not on the preceding and subsequent process of interaction between the parties.
[21] *Grootboom* (n 1) para 43.
[22] *Id* para 44.

2.3 Academic criticism

The court's rejection of the notion of a minimum core obligation has been criticised by many commentators for characterising the notion as involving complex questions, for its failure to engage in priority-setting and for arguing that it is impossible to fulfil such an obligation.[23] The model of reasonableness review that the Constitutional Court developed in *Grootboom* and subsequently applied in *Minister of Health v Treatment Action Campaign (no 2)*,[24] *Khosa and v Minister of Social Development; Mahlaule v Minister of Social Development*,[25] and *Mazibuko v City of Johannesburg*[26] has also attracted criticism. While neither the notion of the minimum core obligation or the model of reasonableness review is beyond reproach, for purposes of this article, I will focus on the weakness of the latter.

These commentators have argued that the model of reasonableness review amounts to an administrative-law model because it fails to engage in a substantive analysis of the content of the right of access to adequate housing and the obligations that flow from this right.[27] The vagueness and open-ended nature of the model allow courts to avoid giving content to the right of access to

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[23]See Liebenberg 'The interpretation of socio-economic rights' in Woolman, Bishop and Brickhill (eds) *Constitutional law of South Africa* 2nd ed (Original Service, December 2003) at 33-27 for a summary of these arguments. See also Young 'The minimum core of economic and social rights: A concept in search of content' (2008) 33 *Yale J of Int'l L* 112 at 138-140; Lehman 'In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core' (2006) 22 *American Univ Int'l LR* 163; Porter 'The crisis on economic, social and cultural rights and strategies for addressing it' in Squires, Langford and Thiele (eds) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 43 at 48-55; Wesson '*Grootboom* and beyond: Reassessing the socio-economic rights jurisprudence of the South African Constitutional Court' (2004) 20 *SAJHR* 284; Sachs 'The judicial enforcement of socio-economic rights' (2003) 56 *Current Legal Problems* 579; Kende 'The South African Constitutional Court's construction of socio-economic rights: A response to the critics' (2003-2004) 19 *Conn J Int'l L* 617; Kende 'The South African Constitutional Court's embrace of socio-economic rights: A comparative perspective' (2003) 6 *Chap LR* 137 at 153-154; Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?' (2002) 6 *Law, Democracy and Development* 159; Roux 'Understanding *Grootboom* – A response to Cass R Sunstein' (2002) 12 *Constitutional Forum* 41 at 47; Scott and Alston 'Adjudication constitutional priorities in a transnational context: A comment on *Soobramoney*'s legacy and *Grootboom*'s promise' (2000) 16 *SAJHR* 206 at 244-245 and 250-252; and De Vos 'Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67 at 97.

[24]2002 5 SA 721 (CC) (*Treatment Action Campaign*).

[25]2004 6 SA 505 (CC) (*Khosa*).

[26]2010 4 SA 1 (CC).

[27]Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 173. See Brand 'The proceduralisation of South African socio-economic rights jurisprudence or "What are socio-economic rights for?"' in Botha, Van der Walt AJ and Van der Walt J (eds) *Rights and democracy in a transformative Constitution* (2003) 33.

adequate housing.[28] To this extent the model may be described as weak because it is at risk of being highly deferential to the state.[29] This could explain why the allure of the minimum core is so strong because it responds to this weakness by carving out a clear normative content for the right of access to adequate housing.[30] Some authors are convinced that the model enables courts to attain a skilful balance between judgments that dictate how government should set its priorities and abdicating the role of the judiciary in enforcing socio-economic rights.[31] To this extent these authors argue that government acquires a burden to justify or explain its actions.[32]

The model of reasonableness review provides courts with a tool that is both flexible and allows context-sensitive engagement with the socio-economic rights claims of people because it ensures that government has the space to conceptualise and implement legislation, policies and programmes.[33] The model ensures that these measures are reasonable, inclusive and caters for the emergency needs of those living in abject poverty. Reasonableness review enables the courts to adjust the stringency of its review standard according to factors such as the position of the claimant in society, the nature of the resource or service claimed, and the impact of the denial of access on the claimant group. The jurisprudence of the Constitutional Court suggests that the government's justifications will be subject to more stringent scrutiny when a disadvantaged sector of society is deprived of access to essential services and resources. In this regard the Constitutional Court has acknowledged the poor as a vulnerable group in society, whose needs require special attention.[34]

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[28]Liebenberg (n 27) 173. See too Pieterse 'Coming to terms with the judicial enforcement of socio-economic rights' (2004) 20 *SAJHR* 383 at 410-411.

[29]Liebenberg (n 27) 173. See also Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *SAJHR* 301 at 311 and Davis 'Socio-economic rights in South Africa: The record of the Constitutional Court after ten years' (2004) 5(5) *ESR Review* 3 at 5.

[30]Liebenberg (n 27) 173. See too Bilchitz *Poverty and fundamental rights* (2007) 135-237; Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *SAJHR* 1; Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 118 *SALJ* 484 and Pillay 'Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights' (2002) 6 *Law, Democracy and Development* 255.

[31]Liebenberg (n 27) 173. See Sunstein 'Social and economic rights? Lessons from South Africa' (2000-2001) 11(4) *Constitutional Forum* 123.

[32]Mureinik '"A bridge to where?" Introducing the interim Bill of Rights' (1994) 10 *SAJHR* 31 introduced the concept of a culture of justification.

[33]Liebenberg (n 27) 174.

[34]*Ibid*. See *Grootboom* (n 1) paras 2-11; *Treatment Action Campaign* (n 24) paras 78-79; and *Khosa* (n 25) paras 71, 76-77, 80-81.See too Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *SALJ* 264 at 277 who argues that 'the intense scrutiny' of government conduct, combined with the heavy weighting of the values of

The stringency of the review standard adopted in the model could vary according to the position of the claimant group, the nature of the resource or service that is claimed, and what the impact would be on the claimant group if access to the resource or service is denied.[35] However, the following problems remain with the model of reasonableness review.

Firstly, the fact that the Constitutional Court has persistently held that sections 26(1) and (2) must be read together has ensured that both the initial determination of the content of the right and the consideration of the possible reasons why the right is limited are conflated into one single enquiry into the reasonableness of the measures taken by government. The result is that there is no clear distinction between what the scope of the right is, whether it has been infringed, and the weight of the reasons that government advanced in justifying any limitation of the right.[36] This allows the courts to elide an initial principled engagement with the purpose and underlying values of the rights and the impact of the deprivations on those people before the court. The result is that the model focuses exclusively on the justifiability of the reasons advanced for limiting the right of access to adequate housing, without first engaging with the purpose and underlying values of the right of access to adequate housing.[37]

This links up with the second problem of the model, namely that the analysis of whether the legislation and other measures taken are capable of facilitating the progressive realisation of the right of access to adequate housing takes place in a normative vacuum.[38] Put differently, without any clear indication on what it means to have access to adequate housing, the government has no benchmark or goal towards which it can progressively realise. Thirdly, the result of this failure to engage with the content of the right of access to adequate housing has narrowed the dialogic space in the adjudication of the right and precludes the people claiming the benefit and protection of the right from articulating their needs. This places a significant limitation on the ability of South African courts to function as forums for deliberation on the meaning of constitutional rights and the values that underpin them.[39] This links up with the fourth problem of the model, namely that the failure to develop an independent content of the right of access to adequate housing and engagement with its underlying values precludes the assignment of an appropriate weight to it in the evaluation of the reasonableness

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human dignity and equality in the proportionality assessment, gives the model of reasonableness review in socio-economic rights cases a discrete character.

[35] Liebenberg (n 27) 174.

[36] *Id* 175.

[37] *Ibid.*

[38] *Id* 176.

[39] *Ibid.* See too Pieterse 'On "dialogue", "translation" and "voice": A reply to Sandra Liebenberg' in Woolman and Bishop (eds) *Constitutional conversations* (2008) 331 at 343-347.

of the measures that the government has taken. Put differently, it is impossible to really determine the reasonableness of the measures that government has taken without knowing what it means to have access to more than bricks and mortar. Finally, the Constitutional Court has consistently neglected – perhaps even refused – to consider international law.[40] Section 39(1)(b) of the Constitution places an explicit obligation on courts to consider international law when it interprets any right contained in the Bill of Rights. The burgeoning jurisprudence on the right to housing in international law provides a wealth of material that the Constitutional Court should consider in terms of section 39(1)(b) of the Constitution for purposes of developing the content of the right of access to adequate housing and for considering how persuasive are the arguments based on the ability of measures to progressively realise the right and on the scarcity of resources.[41] This obligation to consider international law is complemented by the

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[40]Liebenberg (n 27) 178.

[41]See Hohmann *The right to housing – law, concepts, possibilities* (2013). The European Court of Human Rights has had to interpret art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 in a few major eviction cases of gypsies/travellers in the United Kingdom. See *Dudgeon v United Kingdom* (1982) 4 EHRR 149; *Gillow v United Kingdom* (1989) 11 EHRR 335; *Lustig-Prean and Beckett v United Kingdom* (2000) 39 EHRR 548; *Buckley v United Kingdom* (1997) 23 EHRR 101; *Chapman v United Kingdom* (2001) 33 EHRR 18 para 90; and *Connors v United Kingdom* (2005) 40 EHRR 9 para 81. See Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD thesis, US (2011) 172-190 for a discussion of these judgments. The European Committee of Social Rights has had to interpret arts 16, 30, 31 and E of the Revised European Social Charter CETS no 163 in a number of major eviction cases of Roma in various European countries. See *European Roma Rights Center v Greece* Complaint No 15/2003 (Decision on the merits, 8 December 2004); *International Centre for the Legal Protection of Human Rights v Greece* Complaint No 49/2008 (Decision on the merits, 11 December 2009); *European Roma Rights Center v Italy* Complaint No 27/2004 (Decision on the merits, 7 December 2005); *European Roma Rights Centre v Bulgaria* Complaint No 31/2005 (Decision on the merits, 18 October 2006); *International Movement ATD Fourth World v France* Complaint No 33/2006 (Decision on the merits, 5 December 2007); *European Federation of National Organisations working with the Homeless v France* Complaint No 39/2006 (Decision on the merits, 5 December 2007); *European Roma Rights Center v France* Complaint No 51/2008 (Decision on the merits, 19 October 2009). See Muller (n 41) 190-213 for a discussion of these judgments. The American Convention on Human Rights OASTS No 36; the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights OASTS No 69 and the African Charter on Human and Peoples' Rights 1520 UNTS 217 do not include a right to housing explicitly. As a result the Inter-American Commission on Human Rights and Inter-American Court of Human rights have had to adjudicate housing rights with reference to the right to life and the right to humane treatment. See *Corumbiara v Brazil* Case 11.556, Report No 77/98, Inter-Am CHR, OEA/Serv.L/V/II.95 doc 7 rev 2 (1998) and *Mayagna (Sumo) Awas Tingni Community v Nicaragua* Judgment of 31 August 2011 by the IACtHR, (Ser. C) No. 79 (2001). The African Commission on Human and People's Rights have had to adopt the same interpretive approach in *The Social and Economic Rights Action Group and the Centre for Economic and Social Rights v Nigeria* Communication 155/96, Ref. ACHPR/COMM/A044/1 (27 May 2002).

obligation in section 39(1)(a) of the Constitution, which requires courts to promote the values of human dignity, equality and freedom when it interprets any right contained in the Bill of Rights. Taken together, sections 39(1)(a) and (b) require courts to interpret the right of access to adequate housing in a purposive, value-orientated[42] manner that is informed by an international law understanding of the content of the right.

It is against this background that I would like to propose that article 11(1) of the ICESCR and the interpretive guidance that flows from it should be used in South Africa to develop the substantive content of the right of access to adequate housing.

3 The substantive content of the right of access to adequate housing

3.1 Introduction

The guiding international norm in the context of housing is contained in article 11(1) of the ICESCR, which provides everyone with the right to an adequate standard of living. Article 11(1) of the ICESCR reads:

> The States Parties to the Present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

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[42] See Fox 'The meaning of home: A chimerical concept or a legal challenge?' (2002) 9 *J of Law and Society* 580; Fox 'The idea of home in law' (2005) 2 *Home Cultures* 1 and Fox *Conceptualising home – theories, laws and policies* (2007). Fox developed the concept of 'home' in the context of the United Kingdom to show how courts could weigh the tangible, monetary interests of creditors against the intangible, affective interests of occupiers who face eviction claims from the creditors. These intangible, affective interests of occupiers include the home as: (a) a physical structure because it provides occupiers with the requisite shelter from the elements and the facilities that sustain and support them; (b) a territory because it affords the occupiers of the home the opportunity to exercise control over the space in the home and the activities within it; (c) as identity because it embraces the adage 'home is where the heart is' and reveals the fact that occupiers forge strong emotional connotations with their homes through the experience of living in a particular place over a period of time; and (d) as a social and cultural unit because it creates an intimate link between the family and their place of residence that is sustained through a complex process of social interaction between members of the household. See also the submissions of the *amici curiae* in *Residents of Joe Slovo* (n 9) paras 27-49.

The United Nations Committee on Economic, Social and Cultural Rights[43] ('CESCR') is responsible for developing authoritative interpretations of what the obligations of States Parties are in terms of the ICESCR through its concluding observations[44] and general comments.[45] In General Comment No 4[46] the CESCR stated that the article 11(1) of the ICESCR is the most comprehensive provision on the right to adequate housing and posited that it was the most important provision on the right contained in international human rights instruments.[47] The CESCR noted that the need for a general comment on the right to housing arose from the fact that it was receiving insufficient information from States Parties on the standards of living conditions that prevailed in the respective countries and therefore set out to identify some of the principal issues that are important in relation to the right to housing.[48]

The CESCR stated that the right applied to everyone and that it should not be construed in any way to exclude anyone from enjoying its protection.[49] The right to housing must be interpreted as having 'the right to live somewhere in security, peace and dignity.'[50] Any interpretation that purports to reduce it to the

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[43]The Committee consists of 18 experts with internationally recognised competence in the field of human rights who serve in their personal capacity for a renewable four-year term. The primary task of the Committee is to assist the Economic and Social Council with its consideration of the reports that States Parties submit to the Secretary-General of the UN (art 16(2) of the ICSECR).

[44]See Langford and King 'Committee on Economic, Social and Cultural Rights – past, present and future' in Langford (ed) *Social rights jurisprudence – emerging trends in international and comparative law* (2008) 477 at 479 (Langford and King *CESCR*) for a discussion of how the CESCR makes its concluding observations.

[45]General comments are considered to be soft international law because they have not crystallised into treaty provisions or norms of customary international law. Soft international law can include: first, resolutions that have been adopted at international conferences that were organised under the auspices of the United Nations or any of the regional human rights bodies in the European, Inter-American and African systems; secondly, guidelines adopted by international organisations; or thirdly, reports and guidelines issued by special rapporteurs, working groups and other non-treaty based international mechanisms. While these sources of international law are not binding on South Africa, they serve as interpretive tools to which South African courts can give regard to for purposes of s 39(1)(b) of the Constitution. Langford and King *CESCR* (n 44) 480 note that general comments are not comparable to ordinary judgments because they are based on the experience of the CESCR in reviewing State Party reports.

[46]General Comment No 4 *The right to adequate housing*, UN Doc E/1992/23 (General Comment No 4).

[47]General Comment No 4 (n 46) para 3.

[48]*Id* para 5. Interestingly in *Grootboom* (n 1) para 32 the Constitutional Court held that the lack of information on the needs and the opportunities for the enjoyment of the right of access to adequate housing distinguished it from the CESCR and precluded it from adopting the minimum core obligation. This argument can clearly not pass constitutional muster anymore with the wealth of information that is available in official government reports like Statistics South Africa *General Household Survey, 2013* (2014) and the *Development Indicators* that the Minister in the Presidency for Performance Monitoring and Evaluation produces.

[49]General Comment No 4 (n 46) para 6.

[50]*Id* para 7.

mere fact of having a roof above your head should be avoided because such an interpretation would fail to appreciate the interconnected nature of all human rights[51] and would specifically preclude any substantive evaluation of the adequacy of housing for human habitation.[52]

3.2 An organising framework for developing the substantive content

It is my view that the best way to give substantive content to the right of access to adequate housing would be to use the characteristics that the CESCR identify in General Comment 4 as interpretative guidelines. Housing would then be 'adequate' if it provides security of tenure and certain services; is affordable, habitable and accessible; is located in close proximity to social facilities; and is culturally adequate.[53]

The following paragraphs will show that it is possible to give substantive content to the right by adopting the characteristics as an organising framework that the courts can use as an interpretative guide. This will ensure that courts cannot elide an initial principled engagement with the right of access to adequate housing before it considers the reasonableness of any measures taken or the resource constraints within which the government has to operate. The result would be that the courts employ the classic two-stage approach of constitutional adjudication to the interpretation of the right of access to adequate housing while simultaneously avoiding all the drawbacks that result from the conflation of sections 26(1) and (2) – the government will have a clear goal towards which it needs to aspire to progressively realise the right, individuals who seek the protection of the right will have the dialogic space to articulate their needs, the courts will be in a position to articulate what it means to have access to more than bricks and mortar, and South Africa will unequivocally signal its openness and receptiveness to the norms and values of international law.

3.2.1 Security of tenure

Security of tenure demands that, notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. This characteristic is underpinned by section 25(6) of the Constitution.[54] Placed on a continuum,

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[51] *Id* para 9.
[52] *Id* para 7.
[53] *Id* para 8.
[54] Section 25(6) of the Constitution states that '[a] person or community whose tenure of land is legally insecure as a result of past discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress'.

security of tenure should range from informal settlements and emergency housing[55] on the weaker side to private rental housing and ownership on the stronger side. In-between these tenure options[56] there is community care, shelter care, transitional housing, communal housing, social housing[57] and public rental housing.[58] Giving content to the right by identifying security of tenure as a characteristic would not be a rigid or inflexible approach as it provides a court with a wide range of tenure options to have regard to when considering the current living conditions of the occupiers and whether there has been any improvement in this condition over a period of time.

3.2.2 Basic municipal services

Access to basic municipal services demands that all beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water,[59] energy for cooking, heating and lighting,[60]

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[55]As a direct result of the *Grootboom* judgment (n 1) the government adopted chapter 12 of the National Housing Code, entitled Housing Assistance in Emergency Housing Situations. This chapter creates rules to assist people who find themselves in an emergency situation as a result of circumstances beyond their control. The chapter foresees that such emergency situations may flow from the damage to or destruction of current shelter; the immediate threat that prevailing living circumstances may pose to their life, health and safety; or the threat of imminent eviction proceedings. The chapter establishes a fund from which municipalities can obtain grants to provide basic services and shelter in the interim while land is being developed. The relief that this chapter provides, falls short of access to formal housing that people may get access to in the medium- or long-term as provided for in terms of the housing subsidy scheme.

[56]Development Action Group 'Housing ladder for vulnerable people' (2010) 7(1) *Urban Land Matters* 8 provides a graphic illustration of the range of tenure options that are available.

[57]This form of housing is regulated by the Social Housing Act 16 of 2008.

[58]See Maass 'Rental housing as adequate housing' (2011) 22 *Stell LR* 759 (also published in Liebenberg and Quinot *Law and poverty: Perspectives from South Africa and beyond* (2012) 317).

[59]The White Paper on Housing *GG* 354 GN 1376 of 1994-12-23 para 3.1.4(a) estimated that 25% of all functional urban households did not have access to piped potable water supply in 1994. Statistics South Africa *General Household Survey 2012,Statistical Release P0318* (2014) 28-33 shows that 2.022 million or 14.1% of households did not have access to piped municipal water in 2012. However, of the 12.372 million or 85.9% of households that did have access to piped municipal water in 2012, only 5.586 million or 45.3% of the households could not pay for the water. These households rated the quality of the water service that they received as follows: 7.380 million or 60.1% of the households rated the service as good; 3.415 million or 27.8% of the households rate the service as average; and 1.490 million or 12.1% of the households rated the service as poor. This is reflected in the perceptions of these households about the quality of the water that is consumed: 1.020 million or 7% of households believed that the water was not safe to drink; 1.052 million or 7.3% of households believed that the water was cloudy or muddy; 1.147 million or 7.9% of households believed that the water did not taste good; and 0.954 million or 6.6% of households believed that the water smelt bad.

[60]White Paper para 3.1.4(c) estimated that 46.5% of all households did not have a link to the electricity supply grid in 1994. In 2012, 14.7% of households were not connected to the main electricity supply according to Statistics South Africa *General Household Survey 2012,Statistical*

sanitation and washing facilities,[61] means of food storage, refuse disposal, site drainage and emergency services. Access to basic services is underpinned by sections 27(1)(b)[62] and 152(1)(b),[63] read with schedule 4B[64] and 5B,[65] of the Constitution. In *Joseph v City of Johannesburg*[66] (*Joseph*) the Constitutional Court affirmed the public law nature of the duties of local authorities to provide basic municipal services to residents. The public law nature of these duties is not negated by the interposition of a contractual relationship between the residents and a landowner.[67] In *Joseph* the electricity-service provider that is wholly-owned by the City of Johannesburg, City Power (Pty) Ltd terminated the electricity supply to the applicants' homes because their landlord owed it a substantial amount of money. The Constitutional Court was asked to consider whether any legal relationship existed between the applicants and City Power, beyond the contractual relationship that existed between City Power and the landlord,[68] and whether that relationship (between service provider and consumer) would entitle the applicants to procedural fairness in terms of section 3(2)(b) of PAJA.[69] Skweyiya J held that the legal question in this case should not be answered with reference to the law of contract[70] because the landlord entered into the contract with City Power for the sole purpose of facilitating the supply of electricity to the

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Release P0318 (2014) 25–27. However, 38.4% of the households that were connected to the main electricity supply in 2012 rated the quality of their electricity supply as bad. The main sources of energy for cooking purposes during 2012 were: electricity (75.2%), wood (11.6%), paraffin (7.8%), gas (3.3%), and coal (0.8%).

[61] White Paper para 3.1.4(b) estimated that 48% of all households did not have access to flush toilets or ventilated improved pit latrines ('VIP toilets') whilst 16% of all households did not have access to any type of sanitation system in 1994. Statistics South Africa *General Household Survey 2012,Statistical Release P0318* (2014) 34 shows that 5.3% of households did not have access to any toilet facilities or were still using bucket toilets in 2012.

[62] Section 27(1)(b) of the Constitution affords everyone the right to have access to 'sufficient food and *water*' (emphasis added).

[63] Section 152(1)(b) of the Constitution states that it is one of the objects of local government 'to ensure the provision of services to communities in a sustainable manner'.

[64] The range of basic municipal services that a municipality should provide includes, in terms of schedule 4B of the Constitution, electricity and gas reticulation; municipal health services; municipal public transport; municipal public works; storm water management systems in built-up areas; and water and sanitation services limited to potable water supply systems and domestic waste water and sewage disposal systems.

[65] Schedule 5B of the Constitution adds cleansing; local amenities; municipal parks and recreation; municipal roads; refuse removal, refuse dumps and solid waste disposal; and street lighting.

[66] 2010 4 SA 55 (CC).

[67] See Quinot 'Substantive reasoning in administrative-law adjudication' (2010) 3 *CCR* 111 for an analysis of the seemingly contrasting approaches to legal reasoning adopted by the Constitutional Court in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) and *Joseph* (n 66).

[68] *Joseph* (n 66) para 2.

[69] *Id* paras 10 and 22.

[70] *Id* para 18.

tenants in his building.[71] Instead the legal question should be answered with reference to what Sachs J describes in *Residents of Joe Slovo*[72] as a 'special cluster of legal relationships'. Sachs J explains this concept as follows:

> In my opinion, the question of the lawfulness of the occupation of council land by homeless families must be located not in the framework of the common-law rights of landowners, but in the context of the special cluster of legal relationships between the council and the occupants established by the Constitution and the Housing Act. The common law might have a role to play as an element of these relationships, but would not be at their core. The very manner in which these relationships are established and extinguished will be different from the manner in which these relationships might be created by the common law, for example, through contract, succession or prescription. They flow instead from an articulation of public responsibilities in relation to the achievement of guaranteed social and economic rights. Furthermore, unlike relationship between owners and occupiers established by the common law, the relationship between a local authority and homeless people on its land will have multiple dimensions, involve clusters of reciprocal rights and duties and possess an ongoing, organic and dynamic character that evolves over time.[73]

Skweyiya J reasoned that the 'right' to receive electricity flowed from the public duty obligations[74] that the Constitution and the Local Government: Municipal Systems Act[75] imposed on local government. He added that it has become almost essential for local governments to provide access to electricity to its residents.[76] Skweyiya J also held, flowing from this special cluster of legal relationships, that City Power's decision to terminate the supply of electricity to the tenants' homes did have a 'direct, external legal effect'[77] on the tenants in that it 'impacts directly and immediately'[78] on their ability to access and use electricity in their homes. He further held that City Power's decision affected the rights of the tenants 'materially and adversely'[79] in that their inability to access and use

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[71] *Id* para 23.
[72] (N 8).
[73] *Id* para 343.
[74] See *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng, (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 1 SA 530 (CC) para 38 and Bilchitz 'Citizenship and community: Exploring the right to receive municipal services in *Joseph'* (2010) 3 *CCR* 45.
[75] 32 of 2000.
[76] *Joseph* (n 66) para 34.
[77] See the definition of 'administrative action' in s 1 of PAJA.
[78] *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA) para 23.
[79] Section 3(1) of PAJA.

electricity had a 'significant and not trivial effect'.[80] While innovative, the court's reasoning is laboured and favours the creation of a constitutional right to receive electricity where it could easily have stated that the right to receive basic municipal services forms an integral part of the right of access to adequate housing. This would have been a much more direct and stronger conclusion than this substantive due process right to electricity that flows from a special cluster of legal special relationships between local government and the people living within its jurisdiction.

This characteristic merely identifies a number of basic municipal services that local government must provide without specifying the precise quantity or quality of the service to be provided. Giving content to the right by identifying the basic municipal services that local government must provide as a characteristic would provide a court with a wide menu of service options from which to choose when considering the current living conditions of the occupiers and whether there has been any improvement in the level of service provision over a period of time.

3.2.3 Accessibility

Accessibility demands that people living with some measure of social or health disadvantage should receive preferential treatment in housing policy and law to get access to land. In the eviction context PIE explicitly requires special consideration of the rights and needs of the elderly, people with disabilities, children and female-headed households.[81] This characteristic is underpinned by section 152(1)(d) of the Constitution.[82] When a court considers the rights and needs of the elderly it could formulate an order that would direct the local government to establish an enabling environment to suit the rights and needs of elderly people or to comply with sections 6 and 7 of the Older Persons Act;[83] the National Norms and Standards regarding the Acceptable Levels of Services to Older Persons and Service Standards for Community-Based Care and Support Services;[84] and the National Norms and Standards regarding the Acceptable Levels of Services to Older Persons and Service Standards for Residential Facilities.[85]

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[80] Hoexter *Administrative law in South Africa* (2012) 397-398, Currie *The Promotion of Administrative Justice Act: A commentary* (2007) 100 and De Ville *Judicial review of administrative action in South Africa* (2003) 223-224.

[81] Muller 'On considering alternative accommodation and the rights and needs of vulnerable people' (2014) 30 *SAJHR* 41-62 proposes a way for courts to consider the suitability of alternative accommodation as part of the just and equitable eviction order that a court must grant in terms of ss 4(8) and (9) of PIE.

[82] Section 152(1)(d) of the Constitution states that it is an object of local government 'to promote a safe and healthy environment'.

[83] 13 of 2006.

[84] *GG* 33075, GN 9255 of 1 April 2010, Annexure B (para 1).

[85] *GG* 33075, GN 9255 of 1 April 2010, Annexure B (para 2).

The Convention on the Rights of the Child[86] (CRC) recognises that children are entitled to special care and assistance[87] because they are 'disproportionately vulnerable to the negative effects of [in]adequate and insecure living conditions'.[88] The CRC requires States Parties to render material assistance and support programmes[89] to parents that are unable to provide their children with an adequate standard of living.[90] States Parties must provide this assistance according to what the prevailing national conditions demand so that the living conditions needed for the development of the child can be fostered.[91] This requires the establishment of an environment that will advance the child's physical, mental, spiritual, moral and social development.[92] The best interests of the child[93] then imply that a home be established for a child in an environment that promotes her well-being[94] by encouraging her to learn,[95] to participate in social activities,[96] to discover her culture

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[86]1577 UNTS 3. The General Assembly of the United Nations adopted the Convention on 20 November 1989 and it came into force on 2 September 1990. As at 18 July 2015, the Covenant has been ratified by 195 countries. South Africa signed the Convention on 29 January 1993 and ratified the Convention on 16 June 1995 without filing any reservations or interpretive declarations.

[87]Preamble to the CRC.

[88]United Nations Special Rapporteur on the right of access to adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, UN Doc E/CN.4/2001/51 para 69.

[89]Article 27(3) of the CRC (n 86).

[90]*Id* art 27(1).

[91]*Id* art 27(2). Van Bueren 'Committee on the Rights of the Child – overcoming inertia in this age of no alternatives' in Langford (ed) *Social rights jurisprudence – emerging trends in international and comparative law* (2008) 569 at 576-577 argues that the national conditions of States Parties do not function as a limitation for the application of the provision in addition to the limitations provided for in art 4 of the CRC.

[92]Article 27(1) of the CRC (n 86).

[93]The Constitutional Court has considered the obligations contained in the CRC in detail in other contexts. See *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 322 (CC) para 16 (in considering whether to impose imprisonment on the primary caregiver of young children) and *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 4 SA 222 (CC) paras 71-79 (whether the protection afforded to child complainants in criminal proceedings involving sexual offences in terms of ss 153(3) and (5), 158(5), 164(1), and 170A(1) and (7) of the Criminal Procedure Act 51 of 1977 are sufficient).

[94]Article 32 of the CRC requires States Parties to protect children from 'economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or be harmful to the child's health or physical, mental, spiritual, moral or social development'.

[95]Article 28(1)(a) of the CRC requires States Parties to 'make primary education compulsory and available free to all' while art 29(1)(a) of the CRC requires education to be directed to '[t]he development of the child's personality, talents and mental and physical abilities to their fullest potential'.

[96]Article 31 of the CRC affords children the right 'to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts'.

and to practice a religion[97] while living in close proximity to health care and other services.[98] When a court considers the rights and needs of children it could formulate an order that would direct the local government to establish an environment to suit the rights and needs of children or to comply with the provisions of the CRC and the Constitution.

The prevalence of physical barriers prevents persons with disabilities[99] from having access to housing,[100] water,[101] electricity[102] and employment.[103] In a home the most common barriers include inaccessible toilets and other sanitary facilities, grab rails to assist mobility, the lack of security from intruders, health and safety problems caused by incomplete structures.[104] The impairments of these people usually prevent them from reaching objects that are too high; carrying heavy objects; travelling in narrow doorways and down stairs; moving on uneven, stony or steep surfaces; maintaining the structure of the home; cooking and completing household chores.[105] The barriers in the community environment include unsurfaced roads; uneven,

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[97] Article 30 of the CRC affords children the right 'to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language'. See also art 12 of the African Charter on the Rights and Welfare of the Child OAU doc CAB/LEG/24.9/49.

[98] Article 24 of the CRC requires States Parties to ensure that children enjoy 'the highest attainable standard of health' while art 26 of the CRC requires State Parties to ensure that children 'benefit from social security'. See also art 14 of the African Charter on the Rights and Welfare of the Child OAU doc CAB/LEG/24.9/49.

[99] According to Statistics South Africa there were 2 255 982 people (or 5% of the total population) living with some sort of disability in South Africa. These disabilities include sight (32.1%), hearing (20.1%), communication/speech (6.5%), physical (29.6%), intellectual (12.4%) and emotional (15.7%). The census showed that 1 854 376 (879 680 males and 974 696 females) black people, 191 693 (92 230 males and 99 462 females) white people, 168 678 (88 583 males and 80 095 females) coloured people, and 41 235 (21 550 males and 19 685 females) Indian people suffered from some sort of disability. See Statistics South Africa *Prevalence of disability in South Africa: Census 2001* (2005) 11-12 and 14-15, available at www.statssa.gov.za/census01html/ Disability.pdf (accessed 2010-08-21) (Stats SA *Prevalence of Disability*).

[100] The census showed that households headed by disabled people had access to the following types of dwelling: house or brick structure on site stand or yard (53.2%), traditional dwelling/hut/structure (22.4%), flat in block of flats (4.1%), town-/cluster-/semi-detached house (1.9%), house/flat/room in backyard (2.7%), informal dwelling/shack in backyard (3.5%), informal dwelling/shack not in backyard (11%), and room/flatlet not in backyard (0.9%). See Stats SA *Prevalence of disability* (n 99) 26.

[101] The census showed that 22.3% of households headed by disabled people did not have access to piped water. See Stats SA *Prevalence of disability* (n 99) 30.

[102] Stats SA *Prevalence of disability* (n 99) 30 indicates that 38.2% of households headed by disabled people did not have access to electricity for lighting either.

[103] Stats SA *Prevalence of Disability* (n 99) 21 indicates that only 18.6% of disabled people were employed compared to the 34.6% of able-bodied people.

[104] Coulson, Napier and Matsebe 'Disability and universal access: Observations on housing from the spatial and social periphery' in Watermeyer *et al* (eds) *Disability and social change – a South African agenda* (2006) 325 at 332 (Coulson 'Disability and universal access').

[105] *Id* 335.

muddy, rocky and high pavements; crossing busy streets; accessing buildings; utilising public toilets, public phones and automated teller machines; long distances between public transport hubs and their homes or other destinations and accessing public transport vehicles.[106] These barriers are usually created by architects, contractors, designers and developers that do not have a firm grasp of the needs of persons with disabilities. The effect is that persons with disabilities are precluded from enjoying certain opportunities, receiving services and actively participating in normal community life. This has a significant impact on the families, friends and communities of persons with disabilities because they are forced into relationships of dependency when they are capable of leading productive lives in an enabling environment.[107] When a court considers the rights and needs of persons with disabilities it could formulate an order that would direct the local government to alter an existing environment to suit the needs of persons with disabilities or to comply with Part S (Facilities for Persons with Disabilities) of the National Building Regulations;[108] and the key principles of accessibility, self-sufficiency, access to appropriate services and social integration of the *Policy on Disability*.[109]

3.2.4 Affordability

Affordability demands that the costs associated with housing should be commensurate with income levels[110] and there should be protection for tenants against extraordinary annual increases. A recent report by the McKinsey Global Institute[111] identified the following factors as being critical in substantially narrowing the affordability gap:

(i) unlocking land supply at the right location;

(ii) adopting an industrial approach will ensure housing delivery that is quick, on a large scale, and at an affordable cost;

(iii) improving construction operations and maintenance will reduce costs and preserve sound housing stock; and

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[106] *Id* 337-340.
[107] Mji 'Disability and homelessness: A personal journey from the margins to the centre and back' in Watermeyer *et al* (n 104) 350 at 354-355.
[108] *GG* 12780 GN R2378 (12 October 1990) 1.
[109] Republic of South Africa, Department: Social Development (*s.d.*) Policy on disability, available at www.pmg.org.za/files/docs/090317disabilitypolicy.pdf (accessed 2010-08-21).
[110] Hogan 'The rent is too damn high: What we mean when we talk about "affordable housing"' *The Guardian* (21 January 2015) observes that '[t]he problem is basic supply. We simply need more housing, of all kinds, for all different kinds of people, living in all places'.
[111] Woetzel *et al A blueprint for addressing the global affordable housing challenge* (2014).

(iv) expanding access to lending and reducing financing costs will help buyers and developers.

There should also be policies in place to help people that construct their houses using natural materials to get such materials.[112] Affordability is underpinned by section 26(2) of the Constitution.

3.2.5 Habitability

Habitability is also underpinned by section 152(1)(d) of the Constitution. Section 1 of the Rental Housing Act[113] was recently amended to include a definition of habitability as 'a dwelling that is safe and suitable for living in'. The definition adds that the following characteristics would be indicative of a habitable house: (i) adequate space; (ii) protection from the elements and other threats to health;[114] (iii) physical safety of the tenant, the tenant's household and visitors;[115] and (iv) a structurally sound building.[116]

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[112]Shackleton *et al* 'Multiple benefits and values of trees in urban landscapes in two towns in northern South Africa' (2015) 136 *Landscape and Urban Planning* 76 argue that trees provide a variety of tangible and intangible benefits (ecosystem services) that may be valued differently across diverse households and individuals in urban landscapes. See also Kaoma and Shackleton 'Collection of urban tree products by households in poorer residential areas of three South African towns' (2014) 12 *Urban Forestry and Urban Greening* 244; Shackleton *et al* 'Low-cost housing developments in South Africa miss the opportunities for household level urban greening' (2014) 36 *Land Use Policy* 500.

[113]50 of 1999.

[114]Section 20(1) of the Health Act 63 of 1977 reads:

> Every local authority shall take all lawful, necessary and reasonably practicable measures –
> (a) to maintain its district at all times in a hygienic and clean condition;
> (b) to prevent the occurrence within its district of –
> (i) any nuisance;
> (ii) any unhygienic conditions;
> (iii) any offensive condition; or
> (iv) any other condition which will or could be harmful or dangerous to the health of any person within its district or the district of any other local authority, or, where a nuisance or condition referred to in subparagraphs (i) to (iv), inclusive has so occurred, to abate, or cause to be abated, such nuisance, or remedy, or cause to be remedied, such condition, as the case may be;
> …

[115]Section 12 of the National Building Regulations and Building Standards Act 103 of 1977 empowers a local authority to issue a notice to the owner of a building, land or earthwork to demolish or alter it in a manner that it will no longer be dilapidated or in a state of disrepair; or to secure the building, land or earthwork in a manner that it will no longer show signs of being dangerous or of becoming dangerous.

[116]Section 17(1) of the National Building Regulations and Building Standards Act 103 of 1977 empowers the Minister to make regulations that provide detailed guidelines about the minimum requirements that a building or structure must meet during its construction.

3.2.6 Location

Location has no direct constitutional or statutory provision counterpart. However, it can be argued that section 26 in itself incorporates this characteristic because the history of forced evictions in South Africa requires courts to redress the spatial apartheid that the plethora of discriminatory legislation created.[117] This characteristic demands that housing should be located in close proximity to employment opportunities and other social amenities in both urban and rural contexts bearing in mind the costs of transport. Housing should further not be built close to or near polluted sources that threaten the safety and health of people. Here the Spatial Planning and Land Use Management Act[118] will find specific application to achieve spatial justice.[119] From a political theory point of view the Constitutional Court could even consider the burgeoning literature on the right to the city.[120] Also, from an economic geography point of view we could consider location theory and the interesting work that is being done to establish clear links between the transportation cost of living far away from your place of formal or informal employment and poverty.[121] The increased time and cost of commuting means that she can spend less time with her family and has even less money available to provide food and other basic necessities for her family. Rospabe and Selod explain that the distance between places of work and places of residence drive unemployment and that this can be ascribed to the spatial

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[117]See Muller 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* 367 for a discussion of the rural land tenure measures that systematically deprived black people from acquiring land and forced them into oppressive labour relationships on white farms and the urban land measures that regulated the access of black people to white urban areas.

[118]16 of 2013.

[119]See Strauss and Liebenberg 'Contested spaces: Housing rights and evictions law in post-apartheid South Africa' (2014) 13 *Planning Theory* 428.

[120]The idea of the right to the city was first articulated in the work of French philosopher Henri Lefebvre *Le Droit a la Ville* (1968), translated and reprinted as part of Henri Lefebvre (tr Kofman and Lebas) *Writings on cities* (1996). See Purcell 'Excavating Lefebvre: The right to the city and its urban politics of the inhabitant' (2002) 58 *Geo Journal* 99; Mitchell *The right to the city* (2003); Simone 'The right to the city' (2005) 7 *Interventions* 321; Pindell 'Finding a right to the city: Exploring property and community in Brazil and in the United States' (2006) 39 *Vanderbilt J of Transnational L* 435; Harvey 'The right to the city' (2008) 53 *New Left Review* 23; Marcuse 'From critical urban theory to the right to the city' (2009) 13 *City* 185; Layard 'Shopping in the public realm: A law of place' (2010) 37 *J of Law and Society* 412; Coggin and Pieterse 'Rights and the city: An exploration of the interaction between socio-economic rights and the city' (2012) 23 *Urban Forum* 257 and Pieterse 'Development, the right to the city and the legal and constitutional responsibilities of local government in South Africa' (2014) 131 *SALJ* 149.

[121]See Martin 'Spatial mismatch and costly suburban commutes: Can commuting subsidies help?' (2001) 38 *Urban Studies* 1305; and Venter 'Transport expenditure and affordability: The cost of being mobile' (2011) 28 *Development Southern Africa* 121.

organisation of cities.[122] They use the 'spatial mismatch hypothesis' of Kain[123] to explain that the disconnection between the place of employment and place of residence increases the duration as well as the cost of commuting to work.[124] They note further that the disconnection is exacerbated by the congestion, quality and infrequency of public transport systems which, except for the modes of self-propelled transportation, is often the only form of transport that people living in informal settlement can afford.[125] Women face the structural barriers of commuting from their homes to their places of employment at costs that are disproportionately high in comparison with the wages they are offered.[126] As a result location as a characteristic of adequate housing has featured in a number of recent eviction cases.[127] While it appears clear that this characteristic will not allow occupiers to dictate where they want to live, it affords courts the possibility to engage with the proximity of housing to employment opportunities, educational facilities, recreational facilities and other social amenities; and whether there has been an improvement in this area over a period of time.

3.2.7 Cultural adequacy

Culturally appropriate housing, the seventh characteristic of adequate housing, demands that the way in which housing is constructed, the building materials used and the policies supporting this must be sensitive to the expression of cultural identity and diversity. The development or upgrading of housing should not sacrifice cultural identity or diversity, but should focus on using modern technological facilities. Cultural adequacy is underpinned by sections 30[128] and 31[129] of the Constitution. This characteristic of adequate housing affords courts

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[122]Rospabe and Selod 'Does city structure cause unemployment? The case of Cape Town' in Bhorat and Kanbur (eds) *Poverty and policy in post-apartheid South Africa* (2006) 262 at 262 (Rospabe and Selod).

[123]Kain 'Housing segregation, negro employment and metropolitan decentralization' (1968) 82 *Quarterly J of Economics* 175.

[124]Rospabe and Selod (n 122) 263.

[125]*Ibid*.

[126]*Ibid*.

[127]See *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 20; *Residents of Joe Slovo* (n 8) para 254; and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA) order 5(4) at para 77.

[128]Section 30 of the Constitution states that '[e]veryone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights'.

[129]Section 31 of the Constitution reads:

> (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
>
> (a) to enjoy their culture, practice their religion and use their language; and
>
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

the possibility to engage with the intangible aspects of the right of access to adequate housing and the affective value a house has as a home.

4 Conclusion

I believe that all the courts in South Africa will be able to have an initial principled engagement with the purpose and underlying values of the right of access to adequate housing if the Constitutional Court adopted the above-mentioned organising framework to give substantive content to section 26(1) of the Constitution. This will enable courts to follow the classic model of constitutional adjudication where it first delineates the scope of the right concerned and establishes whether the right has been infringed before it considers whether the limitation of the right can be justified. This will ensure that the adjudication of the right of access to adequate housing does not occur in a normative vacuum.[130] All the courts in South Africa will furthermore be in a position to satisfy their obligation to consider international law when interpreting the right of access to adequate housing because they will be able to draw on the international human rights dialogue on the adequacy of housing.

In practice the organising framework for giving substantive content to section 26(1) of the Constitution will afford people who seek the protection of the right of access to adequate housing an opportunity to articulate their housing needs in terms of the specific characteristics that are indicative of adequacy through a process of meaningful engagement. Courts will be able to use this organising framework to evaluate the reasonableness of legislative and other measures in terms of the model of reasonableness review with specific reference to the prevailing conditions of a particular community and the rights and needs of the people who call it home. Put differently, courts will be better placed to evaluate whether the government is succeeding in its goal of facilitating the progressive realisation of the right of access to adequate housing because it will have a clear indication of what it means to have access to adequate housing.

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(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

[130] Liebenberg (n 27) 175.