Constitutional Review, Volume 11, Number 2, December 2025
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev1128

Protecting Marginalised Groups through Constitutional Complaint: Access to the South African Constitutional Court

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Received: 7 October 2025| Last Revised: 21 November 2025 | Accepted: 12 December 2025

Abstract

This paper examines South Africa's jurisprudence of South Africa's apex court in the context of the land and property rights of poor and marginalized communities. It speaks to the different ways to access the court, with regard had to the key features of socio-economic rights litigation, examining select Constitutional Court cases on advancing the land and property rights of marginalized communities.

Keywords: Constitutional complaint; Eviction and housing; Meaningful engagement; Socio-economic rights; South African Constitutional Court

I. INTRODUCTION

South Africa is a country plagued by a history of gross human rights violations. Despite 30 years having elapsed since the end of apartheid and its system of entrenched racial discrimination, it remains one of the most unequal countries in the world. The country's Constitution of the Republic of South Africa, 1996[1]

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[1] Constitution of the Republic of South Africa, 1996.

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[hereinafter the Constitution] represents a transition from a past plagued by such violations to a present and future built on human dignity, equality and freedom.[2] Yet, 30 years after the end of apartheid white people own more than 72% of rural land in the country,[3] around five million people live in informal dwellings and about 10% of South Africans continue to live in poverty.

Much of South Africa's past, described as that of "a deeply divided society characterised by strife, conflict, untold suffering and injustice" which "generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge",[4] remains evident in the daily lives of most South Africans a quarter of a century later. In spite of the Bill of Rights affirming the values of dignity, equality and freedom[5] and the enactment of the new Constitution, with its promise to unleash the transformation of society,[6] significant challenges remain. The capacity of the state to ensure the realisation of fundamental human rights, despite the constitutional commitment to the values of accountability, transparency and responsiveness as those underpinning the operation of the modern state,[7] remains constrained.

In this context the law and the legal remedies it provides have a critical role to play in the promotion and realisation of fundamental constitutional rights and in holding the state, its functionaries and officials to account in a manner "consistent with principles of justice, equality and fairness".[8] While courts, subject to constitutional control, may use their wide powers to make orders, including those that can affect policy and legislation,[9] any remedy must be imposed as

[2] *S v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.), paras. 261–63. See also Constitution of the Republic of South Africa, 1996, § 1(a).

[3] Terrence Corrigan, "Land Debate Distorted by Misrepresentation of Ownership Figures," Institute of Race Relations, February 26, 2025.

[4] *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) (S. Afr.) [hereinafter *Certification*], para. 5.

[5] Constitution of the Republic of South Africa, 1996, § 7(1).

[6] Jason Brickhill and Yana van Leeve, "Transformative Constitutionalism-Guiding Light or Empty Slogan?" *Acta Juridica* (2015): 144.

[7] Brickhill and Van Leeve, 151. See Michael Le Roux and Dennis Davis, *Lawfare* (Johannesburg: Jonathan Ball Publishers, 2020), iv.

[8] Brickhill and Van Leeve, 152.

[9] *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.) [hereinafter *Treatment Action Campaign*], para. 113.

a response to the right violated.[10] Since, as Kriegler J cautioned in *Sanderson v Attorney-General, Eastern Cape,*[11] flexibility in providing remedies and the broad range of remedial options available when rights are threatened or infringed should "not affect our understanding of the right."[12]

The country's emerging jurisprudence on socio-economic rights illustrates how marginalized groups can be protected through its constitution. This paper speaks to some of the seminal cases protecting the socio-economic rights of marginalized groups, particularly in the context of property and land. The reason for limiting this paper's scope to property and land is perhaps best encapsulated in the case of *Agri South Africa v Minister for Minerals and Energy*,[13] which held that:

> South Africa is not only a beauty to behold but also a geographically sizeable country and very rich in minerals. Regrettably, the architecture of the apartheid system placed about 87 percent of the land and the mineral resources that lie in its belly in the hands of 13 percent of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty. To address this gross economic inequality, legislative measures were taken to facilitate equitable access to opportunities in the mining industry.[14]

Constitutional litigation has been of critical importance in giving meaning to the progressively realization of access to adequate housing and in setting the parameters for those facing eviction from housing by, for example, ensuring provision of emergency alternative accommodation. In spite of this, courts are hesitant to resolve structural issues relating to land inequality, access to housing and property rights in South Africa when these are considered to stray into the area of government policy. This is so when the need for coherent government policy

[10] A. Price, "State Liability and Accountability," *Acta Juridica* (2015): 316.
[11] *Sanderson v. Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) (S. Afr.), para. 27.
[12] *Sanderson v. Attorney-General.*
[13] *Agri South Africa v. Minister for Minerals and Energy* 2013 (4) SA 1 (CC) (S.Afr.).
[14] *Agri South Africa v. Minister for Minerals and Energy*, para. 1.

on the issue remains fundamental in securing a just and lasting redistributive social and economic outcome in the country.

II. CONSTITUTIONAL FRAMEWORK

South Africa's Bill of Rights, unlike many constitutions drafted in the same period, expressly recognises social and economic rights as justiciable.

2.1. The Bill of Rights

Section 25, the property clause in the South African Bill of Rights, provides protection against arbitrary deprivation of property and for expropriation on just and equitable terms, with section 25(8) expressly requiring the state to take legislative and other measures to achieve land and related reform to redress past discrimination. In this regard, the Constitution seeks to balance the right not to be deprived of property, as opposed to an express property right, against the pressing need for land redistribution.

Section 26 provides for the right of access to adequate housing, with the state obliged to take "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right". This formulation embodies a "reasonableness" and "progressive realisation" standard, which balances enforceability with recognition of resource constraints. The provision bars arbitrary evictions, which can only be effected by court order. The interaction between sections 25 and 26 underpins many of the Constitutional Court's socio-economic rights decisions on the issue of property and land rights.

2.2. National Legislation

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 [hereinafter PIE] provides the procedural requirements for eviction, giving content to the constitutional bar on arbitrary evictions. It requires that all relevant circumstances be considered in an effort to avoid an eviction that would render people homeless without alternative accommodation. It creates safeguards for vulnerable groups and acts as a frontline statutory protection for marginalised

occupiers facing displacement. The Extension of Security of Tenure Act 62 of 1997 [hereinafter ESTA] provides similar protection for rural occupiers. At the same time, municipal by-laws on informal settlements and national land-reform legislation implementing section 25(7) of the Constitution restitution and land redistribution programmes form part of the legislative landscape.

III. ACCESS TO COURTS IN RAISING CONSTITUTIONAL COMPLAINT

Litigants may bring social and economic cases to a competent court through a number of pathways. Section 38 of the Constitution is a broad standing provision which allows several categories of persons to approach a competent court when a right in the Bill of Rights is threatened or infringed. This includes "anyone acting in their own interest; on behalf of another who cannot act in their own name; as a member of, or in the interest of, a group or class of persons; in the public interest; or an association acting in the interests of its members." This inclusive standing principle facilitates public interest litigation on behalf of vulnerable or marginalised groups.

3.1. Direct Access

Section 167(6) of the Constitution allows litigants to apply for direct access to the Constitutional Court when the interests of justice so require. The Court has interpreted this provision narrowly, granting direct access only in exceptional circumstances, usually where the matter is urgent or where the lower courts cannot offer an adequate remedy. In the *Treatment Action Campaign case*, for instance, the Court accepted direct access given the urgency and national importance of the case, which concerned the government's restriction on providing the anti-retroviral drug Nevirapine to HIV-positive mothers.

3.2. Appeal from Lower Courts

Most social and economic rights cases reach the Constitutional Court on appeal from the High Court or Supreme Court of Appeal. The High Court is recognised as the primary forum for factual inquiry and evidence-based

adjudication. Once constitutional issues arise, particularly involving legislative validity or alleged violations of fundamental rights, these may be appealed to the Constitutional Court.

3.3. Confirmation Proceedings

Under section 172(2)(a) of the Constitution, any High Court order declaring legislation or executive conduct unconstitutional must be *confirmed by the Constitutional Court*. This ensures that the Court retains ultimate authority in determining constitutional validity. For example, in the housing rights case of *Government of the Republic of South Africa v. Grootboom15 [hereinafter Grootboom]* the Constitutional Court confirmed that the State's housing programme was constitutionally deficient because it excluded those in desperate need of shelter.[16]

IV. KEY FEATURES OF SOCIO-ECONOMIC RIGHTS LITIGATION

4.1. Doctrine of Subsidiarity

The first feature of South African constitutional litigation is the recognition by our courts of the doctrine of subsidiarity, which holds that where legislation has been enacted to give effect to a constitutional right, litigants must rely on that legislation before invoking the right directly.[17] This doctrine aims to promote coherence and prevent constitutional arguments from being made unnecessarily when ordinary law provides an adequate framework. It also allows lower courts to consider the issues which arise in the interpretation of legislation before the issues are considered by the Constitutional Court.

4.2. Standard of Review

South African scholars such as Karl Klare have highlighted the importance of viewing social and economic rights as integral to transformative constitutionalism, a process aimed at dismantling apartheid-era structures of poverty and exclusion in accordance with constitutionally entrenched parameters.[18] They contend that

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[15] *Government of the Republic of South Africa v. Grootboom 2001 (1) SA 46 (CC) (S. Afr.).*

[16] This case is further analysed below.

[17] Hugh Corder, "The Doctrine of Subsidiarity and the Enforcement of Socio-Economic Rights in South Africa," *South African Public Law* 32 (2017): 114.

[18] Karl Klare, "Legal Culture and Transformative Constitutionalism," *South African Journal on Human Rights* 14, (1998): 150.

effective enforcement of socio-economic rights requires not only judicial vigilance but also participatory governance, where courts, legislatures, and civil society collaborate to realise constitutional promises.

In its approach to socio-economic rights the Constitutional Court has given content to the reasonableness standard referenced in many of the socio-economic provisions in the Bill of Rights, including the right of access to housing in its assessment of measures taken by the state in compliance with its constitutional obligations. The Court has refused to decide a "minimum core" threshold to be given to such rights on the basis that it considers its role not to be to define universal minimum entitlements but to evaluate whether government measures are reasonable in conception and implementation, given the constitutional commitment to progressive realisation. The Court's approach to the reasonableness standard has been the subject of continued criticism by scholars who often urge a more activist approach to the problems besetting South African society. For example, while the reasonableness standard has been said to mediate the tension between judicial restraint and the transformative vision of the Constitution, enforcing accountability without intruding into the technical and budgetary domains of government,[19] it has also been cautioned that the approach unduly defers to the State, leaving systemic inequalities intact.[20] Liebenberg defends the reasonableness model as a pragmatic and context-sensitive method that respects democratic separation of powers while ensuring accountability.[21] Bilchitz, by contrast, argues that the Court should adopt a minimum core obligations approach, grounded in international human rights law, to guarantee a baseline of protection for all citizens regardless of resource limitations.[22]

The Court's jurisprudence in relation to the reasonableness standard has not however engaged with the fact that South Africa ratified the International

[19] Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (South Africa, Juta, 2010), 144.
[20] David Bilchitz, "Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance," *South African Journal on Human Rights* 26 (2010): 31.
[21] Liebenberg, *Socio-Economic Rights: Adjudication*, 144.
[22] David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press, 2007).

Covenant on Economic, Social and Cultural Rights in 2015. This has had the effect that the terms of the Convention, which include a minimum-core approach to socio-economic rights, have been brought into South African law. Thus, while the Constitutional Court's approach to socio-economic rights accords with the express wording of the text of socio-economic provisions, including section 26 of the Constitution, it does not accord with that of the ratified Convention, a tension which has still to play itself out in South African courts. What is clear is that the Constitutional Court in its jurisprudence has approached socio-economic rights on the basis that it cannot usurp the functions of the executive or legislature given that, as was stated in the case of *Mazibuko v. City of Johannesburg23 [hereinafter Mazibuko]* courts are "ill-suited to adjudicate upon issues requiring budgetary and technical expertise." As is recognised by scholars such as Young, judicial findings of unreasonableness should rather prompt the State to revise policies rather than to replace them with judicially imposed alternatives.[24]

4.3. Remedies

The Constitutional Court's remedial powers under sections 38 and 172(1)(b) are broad, allowing it to "make any order that is just and equitable." Limited content has been given to this remedial mandate, with remedies applied on a case by case basis. While the provision has permitted the Court to craft innovative remedies suited to the structural nature of social and economic rights violations, it would benefit from more jurisprudential content being given to the issue of relief in expanding the reach of these rights. The forms of relief granted include supervisory orders, requiring the administration to implement and report to the court on such implementation; structural interdicts, which require the administration to act in accordance with directions given by the court; and the award of constitutional damages, such as in *President of the Republic of South Africa v. Modderklip Boerdery (Pty) Ltd*[25] [hereinafter *Modderklip*] where the state failed to provide alternative accommodation for land occupiers, thereby vindicating the right of access to housing.

[23] *Mazibuko v. City of Johannesburg* 2010 (4) SA 1 (CC) (S. Afr.).
[24] Katharine Young, *Constituting Economic and Social Rights* (United Kingdon, Oxford University Press, 2012), 54.
[25] *President of the Republic of South Africa v. Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC) (S. Afr.).*

In this manner, broad standing provisions, innovative remedial powers, and a context-sensitive reasonableness review, allows the Court to hold the state to account for socio-economic deprivation. However, for litigants the challenge remains that they are still required, in the quest to enforce social and economic rights, to navigate what remain often complex and at times archaic procedural rules, building evidence-based claims, and framing sometimes difficult arguments in terms of reasonableness, dignity, and accountability.

V. SELECTED CONSTITUTIONAL COURT CASES ON PROTECTING THE LAND AND PROPERTY RIGHTS OF MARGINALIZED GROUPS

The Constitutional Court's jurisprudence on property and land in the context of marginalized groups has specifically centered around issues such as eviction, meaningful engagement, just and equitable eviction orders and the state's constitutional obligations to take reasonable measures to ensure access to adequate housing and alternative accommodation for affected persons. On reasonableness, it has also called into question whether South Africa should adopt a minimum core approach and why such approach is not appropriate. The following cases aim to illustrate how South Africa's Constitution protects marginalized groups in the face of property and land rights' infractions.

5.1. Daniels v. Scribante

In the case of *Daniels v. Scribante*,[26] a farm worker, Ms Daniels, wished to make certain improvements to her dwelling, but was instructed to cease doing so by the farm manager.[27] Ms Daniels argued that she was legally entitled to make improvements to her dwelling on the basis that the ESTA enabled her to do so, along with her constitutional right to human dignity.[28] The Constitutional Court held that Ms Daniels could make improvements to her home by virtue of the fact that ESTA gives effect to section 25(6) of the Constitution, which

[26] *Daniels v. Scribante* 2017 (4) SA 341 (CC) (S. Afri.).
[27] *Daniels v. Scribante* 2017 (4) SA 341 (CC) (S. Afr.), paras. 6–8.
[28] *Daniels v. Scribante* 2017 (4) SA 341 (CC) (S. Afr.), paras. 6, 10.

provides that: “A person or community whose tenure of land is legally insecure as a result of past racially 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.”[29] It further found in favour of Ms Daniels on the basis that ESTA protects farm workers, such as her, as a means to address South Africa’s history of land dispossession.[30] In speaking to the importance of giving effect to Ms Daniels right to human dignity, the Constitutional Court held:

> For present purposes, the right enjoyed by an occupier in terms of section 6(1) of ESTA is to reside on and use the land in issue. An occupier who lives on property under the most deplorable conditions does “reside” on that property. But is that the right conferred by ESTA? Definitely not. The occupier’s right to reside must be consonant with the fundamental rights contained in section 5, in particular – for present purposes – the right to human dignity. Put differently, the occupation is not simply about a roof over the occupier’s head. Yes, it is about that. But it is about more than just that. It is about occupation that conduces to human dignity and the other fundamental rights.[31]

5.2. Government of the Republic of South Africa v. Grootboom

The case of *Grootboom* is the seminal case for developing the reasonableness test, albeit in the context of the right of access to adequate housing. It is also one of the first cases which dealt with the imperative for meaningful engagement between parties. This case concerned men, women and children who occupied private land as a result of the horrendous conditions they lived in in an informal settlement.[32] They were subsequently evicted from such land, only to subsequently occupy a sports field.[33] They sought relief from government in the form of temporary shelter or housing.[34] The High Court found that their right of access to adequate housing was not breached under section 26(1) of the Constitution, but section 28(1)(*c*) of the Constitution was breached, which aims to protect the

[29] *Daniels v. Scribante* 2017 (4) SA 341 (CC) (S. Afr.), paras. 61–71.
[30] *Daniels v. Scribante* 2017 (4) SA 341 (CC) (S. Afr.), para. 23.
[31] *Daniels v. Scribante* 2017 (4) SA 341 (CC) (S. Afr.), para. 31.
[32] *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), paras. 3–4.
[33] *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), paras. 2–4.
[34] *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), para. 4.

rights of children to shelter.[35] When the matter came before the Constitutional Court, it rejected arguments around a minimum core approach[36] and held that:

> The state's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.[37]

Most importantly, the Constitutional Court held that the right of access to adequate housing hinges on the state's ability to achieve it within its available resources.[38] It further held that the state must meaningfully engage with individuals and communities affected by housing development, with a view to resolving any conflicts.[39]

5.3. Port Elizabeth Municipality v. Various Occupiers

In *Port Elizabeth Municipality v. Various Occupiers*[40] [hereinafter *Port Elizabeth Municipality*], the Port Elizabeth Municipality sought an order pursuant to section 6 of the PIE to evict unlawful occupants from privately owned land.[41] The provision provides that an eviction order may only be granted by a court so long as it is just and equitable, taking into account the circumstances of the occupation of the land; the time of unlawful occupation and so long as there is alternative accommodation. Notwithstanding the unlawful occupation, the Constitutional Court chose not to grant the eviction order on the basis that

[35] *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), para. 15.

[36] *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), paras. 18, 32; see also *Mazibuko v. City of Johannesburg* 2010 (4) SA 1 (CC) (S. Afr.), para. 59, where the Constitutional Court again rejected arguments around a minimum core approach when it held that: "[W]hat the right requires will vary over time and context. Fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context. The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable."

[37] *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), para. 37.

[38] *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), para. 20.

[39] *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), para. 84.

[40] *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (S.Afr.).

[41] *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.), para. 1.

such occupiers were a small community, comprising of children.[42] Further, that those who would be deemed to lawfully occupy the land were not doing so and there was no alternative accommodation for the unlawful occupiers.[43] Hence, the Court found that it was not just and equitable to grant the eviction order. This was also yet another case in which meaningful engagement was emphasized by the Constitutional Court, as most aptly put by Sachs J when he held:

> In seeking to resolve the … contradictions, … [t]he managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.[44]

Hence, the case also speaks to how meaningful engagement is used to enforce socio-economic rights and remedy disputes, thus serving as a review standard to grant an eviction order.[45]

5.4. Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg[46] [Hereinafter *Occupiers of 51 Olivia Road*] is the seminal case dealing with meaningful engagement in the context of eviction proceedings. In this case, the Constitutional Court issued an interim order for the City of Johannesburg and the applicants to engage meaningfully with each other.[47] It held that where people face homelessness due to an impending eviction, the state must meaningfully engage.[48] It held that:

> Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides

[42] *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.), paras. 53–61.
[43] *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.), paras. 53–61.
[44] *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.), para. 39.
[45] *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.), para. 61
[46] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg* 2008 (3) SA 208 (CC) (S.Afr.).
[47] *Occupiers of 51 Olivia Road… v. City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr.), paras. 53–54.
[48] *Occupiers of 51 Olivia Road… v. City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr.), paras. 9–21.

are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.[49]

5.5. City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 Pty (Ltd)

The case of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 Pty (Ltd)*[50] dealt with the issue of evicting unlawful occupiers from private property pursuant to the abovementioned PIE.[51] It called into question the arbitrary deprivation of property, the right of access to adequate housing and the state's obligation to provide temporary emergency housing. Blue Moonlight sought to evict the unlawful occupiers, however doing so would render such occupiers homeless.[52] The occupiers challenged the City's housing policy as it failed to prescribe availing alternative emergency accommodation.[53] The High Court found such policy to be unconstitutional and ordered that the occupiers be provided with alternative temporary accommodation when evicted.[54] Following the Supreme Court of Appeal decision, which upheld the High Court finding, the Constitutional Court held that unlawful occupiers can only be evicted so long as it is just and equitable.[55] More importantly, the Constitutional Court held that the state is obliged to provide temporary emergency accommodation.[56]

[49] *Occupiers of 51 Olivia Road... v. City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr.), para. 15.
[50] *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.).
[51] *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.), para. 1.
[52] *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.), para. 11.
[53] *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.), para. 15.
[54] *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.), para. 76.
[55] *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.), paras. 29, 97–104.
[56] *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.), para. 104.

5.6. Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes

The case of *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes*[57] [hereinafter *Joe Slovo*] dealt with an application to evict thousands of residents from an informal settlement in place of developing housing for poor communities.[58] While the Constitutional Court found the residents to be unlawful occupiers within the meaning of PIE and that the state acted reasonably in seeking to promote the right of access to adequate housing, it again highlighted the importance of the state providing alternative accommodation to those affected.[59] It further held that 70% of the houses developed in Joe Slovo go to current and former residents.[60] More importantly, the case speaks to meaningful engagement and how the absence of such engagement must militate against granting an eviction order.[61]

5.7. Charnell Commando and Others v. City of Cape Town

In *Charnell Commando and Others v. City of Cape Town*,[62] decided by the Constitutional Court at the end of 2024, residents of cottages near the City Centre of Cape Town enjoyed lawful tenancy and inter-generational lease arrangements in terms of which they paid rent.[63] Their property was sold to a developer. The Court held that the City's emergency accommodation far away from the inner city can worsen the significant problem of spatial inequality in South Africa and undermine the rights to dignity, access to opportunity and other fundamental rights.[64] The City was ordered to provide transitional or emergency housing in the inner-city area within six months.[65]

57 *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes* 2010 (3) SA 454 (CC) (S. Afr.)
58 *Residents of Joe Slovo Community... v. Thubelisha Homes* 2010 (3) SA 454 (CC) (S. Afr.), para. 2.
59 *Residents of Joe Slovo Community... v. Thubelisha Homes* 2010 (3) SA 454 (CC) (S. Afr.), paras. 5, 7.
60 *Residents of Joe Slovo Community... v. Thubelisha Homes* 2010 (3) SA 454 (CC) (S. Afr.), para. 7.
61 *Residents of Joe Slovo Community... v. Thubelisha Homes* 2010 (3) SA 454 (CC) (S. Afr.), paras. 5, 7, 21.
62 *Charnell Commando v. City of Cape Town* 2025 (3) SA 1 (CC) (S.Afr.).
63 *Charnell Commando v. City of Cape Town* 2025 (3) SA 1 (CC) (S. Afr.), para. 6.
64 *Charnell Commando v. City of Cape Town* 2025 (3) SA 1 (CC) (S. Afr.), paras. 82, 104–5, 108.
65 *Charnell Commando v. City of Cape Town* 2025 (3) SA 1 (CC) (S. Afr.), para. 205.

5.8. First National Bank of SA Limited t/a Wesbank v. Commissioner for the South African Revenue Services

Just how far South Africa's Constitution goes in protecting property rights was best illustrated in the case of *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services*.[66] This case centered around the issue of whether a law permitting the South African Revenue Service to confiscate property owned by one party to settle the tax debt of another was constitutional.[67] The Constitutional Court found such law to be unconstitutional and set precedent in clarifying the relationship between the deprivation and expropriation of property. It held that when a person alleges that there has been an infringement of their property rights, the alleged infringement must be analyzed as follows: namely, whether what is taken away constitutes property under section 25 of the Constitution; whether there was a deprivation and whether such deprivation is consistent with section 25; if not, whether the deprivation can be justified under section 36 of the Constitution; does the deprivation lead to expropriation under section 25(2) of the Constitution; if so, does the expropriation comply with section 25(2)(a) of the Constitution; is the expropriation justified under section 36 of the Constitution.[68]

VI. DISCUSSION

As societal tensions rise regarding the failure of the state to substantially improve socio-economic living conditions for the majority of South Africans, criticisms have been increasingly raised regarding the purpose and utility of the South African Constitution in its current form. The Constitutional Court in particular is criticised for taking a hands-off approach to the increasing fulfilment of socio-economic rights despite its just and equitable remedial jurisdiction. This increasing societal pressure means that the Court must remain alive to

[66] *First National Bank of SA Limited t/a Wesbank v. Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) (S.Afr.).
[67] *First National Bank...* 2002 (4) SA 768 (CC) (S. Afr.), para. 1.
[68] *First National Bank... 2002 (4) SA 768 (CC) (S. Afr.), para. 46.*

the challenges of access to courts, the enforcement of rights and the need to incremental reform and development in the area of remedy.

6.1. Difficulties of Access to Court

As with countries such as Germany or South Korea, South Africa has a stand-alone "constitutional complaint" procedure which allows individuals to petition the Constitutional Court for direct access to the Court. The law on direct access to the Constitutional Court is sourced from the Constitution and the Court's Rules. Section 167(6)(a) of the Constitution provides that "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court to bring a matter."

One of the difficulties with the Court's approach to direct access, unlike other foreign jurisdictions, is that it is treated as an extraordinary procedure and is only granted by the Constitutional Court in exceptional circumstances. Such exceptional circumstances have been found to exist only if a matter is of such urgency or public importance that the delay necessitated by the use of ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government.[69] In addition, as was held by the Constitutional Court in the socio-economic rights case in *Mazibuko*, it must be in the interests of justice for direct access to be granted;[70] and there must also be good prospects of success for such direct access to be granted.[71] This is especially so given that consideration must be had to whether there are issues and related evidence which could be better ventilated before the lower courts, following the ordinary judicial process, particularly because this Court could benefit from their insight.[72]

What is clear from the Constitutional Court's approach to granting litigants direct access is that the Court does not prefer to hear matters without the benefit of the matter having been considered by a lower court. This is all the more so

[69] *Bruce v. Fleecytex Johannesburg CC* 1998 (2) SA 1143 (CC) (S. Afr.) [hereinafter *Fleecytex*], para. 35; see also *Mazibuko v. City of Johannesburg* 2010 (4) SA 1 (CC) (S. Afr.), para. 35.

[70] *Mazibuko v. City of Johannesburg* 2010 (4) SA 1 (CC) (S. Afr.), paras. 87, 126.

[71] *Transvaal Agricultural Union v. Minister of Land Affairs* 1997 (2) SA 621 (CC) (S. Afr.), para. 46; see also *Fleecytex*, para. 7.

[72] *Women's Legal Trust v. President of the Republic of South Africa* 2009 (6) SA 94 (CC) (S. Afr.) [hereinafter *Women's Legal Trust*], paras. 27–29.

where it gives rise to disputes of fact. In *Women's Legal Trust v. President of the Republic of South Africa*,[73] the Court put it this way:

> [T]he power to grant litigants direct access outside the Court's exclusive competence is one this Court rarely exercises, and with good reason. It is loath to be a court of first and last instance, thereby depriving all parties to a dispute of a right of appeal. It is also loath to deprive itself of the benefit of other courts' insights. In addition, a multi-stage litigation process has the advantage of isolating and clarifying issues as well as bringing to the fore the evidence that is most pertinent to them . . . The ventilation of the difficult issues the application involves in the High Court, followed possibly by a considered judgment from the Supreme Court of Appeal, will ensure that the views of these organisations, and the evidence that may be germane to their contentions, will be properly considered.[74]

It follows that the majority of constitutional complaints are channelled through ordinary litigation, beginning their life in the High Court and culminating ultimately in a hearing before the Constitutional Court, which has final jurisdiction over constitutional matters as per section 167(3) of the Constitution.

There are many challenges which arise in this regard. The first of these is delay. It may take many years for a constitutional complaint which follows the ordinary litigation process to make their way to the Constitutional Court. This is so for a number of reasons. These include extensive delay in having matters set down given that courts are over-extended, there are insufficient numbers of judges appointed and court rooms available to hear matters and court rolls are swamped.

A further difficulty is that of cost. The costs of litigation are prohibitive, with limited legal support available through the state-funded Legal Aid system or through donor-funded public interest law organisations outside of the government system.

In addition, for complainants to attempt to litigate constitutional complaints in their own name is often extremely difficult given the complexity of court rules and the lack of knowledge of court procedures. Even the requirements of an

[73] *Women's Legal Trust*... 2009 (6) SA 94 (CC) (S. Afr.), paras. 27–29.

[74] *Women's Legal Trust... 2009 (6) SA 94 (CC) (S. Afr.), paras. 27–29.*

application for direct access are generally beyond the scope of knowledge of most litigants complaining of a constitutional infringement of threatened violation. The result is that this often leads to matters not being filed in the correct form, or in not being prosecuted in the manner required by the rules of court.

Furthermore, limited access to legal representation by marginalised communities remains a challenge in the country. For example, while the Legal Aid South Africa Act 39 of 2014, provides that indigent people have a constitutional right to legal representation in criminal matters, this is not so in civil or constitutional matters in which legal aid may be granted in such cases when they are of public importance. Non-governmental organisations are limited in their reach, both due to geographic location and funding constraints. All of these factors have a serious and direct impact on the ability of litigants to prosecute matters before the Constitutional Court and limits the nature and scope of cases brought to the Court. Other obstacles to access remain. These include low education levels and levels of literacy, geographic isolation, particularly in rural areas of the country.

The result is that increasingly there is call for the funding of more public interest cases by non-governmental organisations and Legal Aid South Africa, with compulsions to be enforced that further work is done by pro bono lawyers to realise fundamental constitutional rights.

6.2. Relaxing Court Rules to Enable Access

In the area of housing rights, the Constitutional Court relaxed procedural formalities in the abovementioned case of *Joe Slovo*. Ordinarily, a direct and substantial interest in the outcome of a case must be shown. In this case, the Court accepted that the applicant represented a large community not easily defined in legal terms and accepted that the applicant had collective standing, allowing representatives in the form of public interest lawyers to act on behalf of the residents, even though every resident was not individually cited. In *Grootboom*, discussed above, the Court similarly accepted that constitutional issues are of fundamental importance and that vulnerable, poor and marginalised groups must not be barred from asserting their constitutional rights.

In addition, Rule 10 of the Constitutional Court Rules, permits individuals or organisations with an interest in a case to be admitted as amicus curiae (friends of the court), to support constitutional issues raised. This allows civil-society groups to present expert evidence, social context, and comparative perspectives that amplify the voices of marginalised communities. This has had the result that the number of cases challenging socio-economic provisions brought to the Constitutional Court have been limited in number. In doing so, the Court persistently permits both written and oral submissions to be made to it by such organisations and individuals, leading to court processes which are often inclusive and encourage participation and access. All of these innovations collectively represent what scholars such as Liebenberg and Albertyn describe as a "dialogic" model of enforcement — one that combines judicial oversight with participatory democracy, with even the structure and location of the Constitutional Court chamber advancing this approach.[75]

6.3. Making Remedies Meaningful in the South African Context

Appropriate relief under section 38 of the Constitution, which is "required to protect and enforce the Constitution",[76] must also be effective.[77] In *Fose* in which damages for torture at the hands of the police were sought, it was stated:

> Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.[78]

[75] Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Cape Town: Juta, 2010); and Cathi Albertyn, "Transformative Constitutionalism and the Development of South African Constitutional Jurisprudence," in [edited volume title], ed. [editor(s)] (Cape Town: Juta, 2018).

[76] *Fose v. Minister of Safety and Security* 1997 (3) SA 786 (CC) (S. Afr.) [hereinafter *Fose*], para. 19.

[77] *President of the Republic of South Africa v. Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) (S. Afr.), para. 58.

[78] *Fose* 1997 (3) SA 786 (CC) (S. Afr.), para. 69.

In *Hoffmann v. South African Airways*,[79] it was recognised that appropriate relief imports elements of justice and fairness and "a consideration of the interests of all those who might be affected by the order."[80] This balancing of the interests—

> must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, "we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source.[81]

As was stated in *Steenkamp N.O* v *Provincial Tender Board of the Eastern Cape*:[82]

> In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law.[83]

In eviction and housing rights cases involving marginalised groups, the Constitutional Court has increasingly sought ways in which to allow the constitutional rights entrenched in the Bill of Rights to become a reality. This has included mandated meaningful engagement between authorities and affected communities in cases such as the abovementioned *Occupiers of 51 Olivia Road*. Without such a process, it has been judicially determined that the eviction contemplated may not proceed. This has enabled marginalised communities to be consulted with regards to the eviction, alternatives to it and the availability of emergency accommodation. The Constitutional Court has often imposed supervisory remedies to retain jurisdiction to monitor compliance with orders benefiting marginalised groups.

[79] *Hoffmann v. South African Airways* 2001 (1) SA 1 (CC) (S. Afr.).
[80] *Hoffmann v. South African Airways* 2001 (1) SA 1 (CC) (S. Afr.), paras. 42–43.
[81] *Hoffmann v. South African Airways* 2001 (1) SA 1 (CC) (S. Afr.), para. 45.
[82] *Steenkamp N.O. v. Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) (S. Afr.), para. 29.
[83] *Steenkamp N.O. v. Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) (S. Afr.), para. 29.

In the South African constitutional context, the concept of transformative constitutionalism, first articulated by Karl Klare, frames the Constitution as a long-term project of social transformation through law.84 The Constitutional Court has embraced this idea, acknowledging that litigation is not merely about vindicating individual rights but about reshaping society's structures of power and exclusion. In this sense, enabling marginalised communities to access the Court and assert constitutional rights is itself a transformative act insofar as it seeks to disrupt patterns of domination and make the Constitution a living instrument for justice.

VII. CONCLUSION

In South Africa such a shared conception of justice, absent under apartheid, started to emerge with the adoption of, first, the interim and, secondly, the final Constitution. The uniqueness of the South African Constitution is its clear transformative intent[85] seen from its commitment to oversee the progressive realisation of socio-economic rights,[86] improve the quality of life of all citizens and free the potential of each person.[87] It lay the foundation for an open and democratic society, equal protection of the law, adherence to the rule of law and accountable, responsive and open government,[88] with the Bill of Rights, as the cornerstone of democracy, entrenching fundamental human rights and freedoms and affirming the values of human dignity, equality and freedom.[89]

Yet, in spite of the constitutional entrenchment of fundamental rights and careful structure of government, including a formal separation of powers between the three branches, there is growing discontent in South Africa as to the extent and speed of the transformation required to remove the lasting legacy of

[84] Karl Klare, "Legal Culture and Transformative Constitutionalism," *South African Journal on Human Rights* 14 (1998): 150.

[85] David Bilchitz, Daryl Glaser and Andrew Konstant et al, "Assessing the Performance of the South African Constitution", *International Institute for Democracy and Electoral Assistance, Stockholm*, (2016): 9 -12. See also *Soobramoney v. Minister of Health (KwaZulu-Natal)*1998 (1) SA 765 (CC) at para 8 (S.Afr.) [hereinafter *Soobramoney*]; *Investigating Directorate Serious Economic Offences v. Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO,* 2001 (1) SA 545 (CC) at para. 21 (S.Afr.).

[86] Constitution of the Republic of South Africa, 1996, §§ 26(2), 27(2), 29(1).

[87] Constitution of the Republic of South Africa, 1996, Preamble.

[88] Constitution of the Republic of South Africa, 1996, § 1.

[89] Constitution of the Republic of South Africa, 1996, § 7(1).

apartheid.[90] This manifests as dissatisfaction with the persistence of seemingly intractable problems related to poor governance, state policy implementation failures, institutional malaise caused in part by a failure to transfer skills and continued high levels of crime and corruption, within the context of increasing fiscal constraints on government. The continued existence of these issues inhibits the ability of the democratic state to deliver.[91] As a result, more than two decades after its transition to democracy, and in stark contrast to its express constitutional commitment to transformation, South Africa remains one of the most unequal countries in the world,[92] with its distinctly racialised and gendered forms of inequality and poverty[93] not having altered fundamentally since 1994.[94]

The uniquely unequal nature of South African society was recognised almost a quarter of a century ago by the Constitutional Court in the above cited case of *Soobramoney*:

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security and many do not have access to clean water or to adequate health services. These conditions already existed when the constitution was adopted and a commitment to address them and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.[95]

Within this context of deep-rooted poverty and inequality and the failure on the part of the state to deliver many basic services, real meaning has not been given to many of the fundamental rights contained in the Constitution. This is despite the obligation on the state to ensure the progressive realisation

[90] Seen in debates to amend section 25 of the Constitution (the property clause).

[91] Jason Brickhill and Yana van Leeve, "Transformative Constitutionalism—Guiding Light or Empty Slogan?," *Acta Juridica* (2015): 151; see also Michael Le Roux and Dennis Davis, *Lawfare* (Johannesburg: Jonathan Ball Publishers, 2020), iv.

[92] Neva Makgetla, contribution in Gilbert M. Khadiagala et al., [book/report title] (2018), 14, quoting Haroon Bhorat and Carl van der Westhuizen, "Poverty, Inequality and the Nature of Economic Growth in South Africa," in Judith Misra-Dexter and Jeremy February, eds., *Testing Democracy: Which Way Is South Africa Going?* (Cape Town: IDASA, 2010).

[93] Neva Makgetla, in Gilbert M. Khadiagala et al., [book/report title] (2018), 1.

[94] Neva Makgetla, in Gilbert M. Khadiagala et al., [book/report title] (2018), 15.

[95] *Soobramoney v. Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) (S. Afr.), para. 8.

of socio-economic rights through reasonable legislative and other measures.[96] Persistently poor socio-economic conditions continue to prevail for the majority of South Africans, estimated to be 64 million people.[97] Approximately 13,1 % of South African households are informal,[98] with 3.3 million people living in informal settlements. 36,6% of South Africans continue to use pit latrines,[99] 20,2% of South Africans continue to have inadequate access to food[100] and 46,3% of people have access to piped water in their dwellings,[101] while 44.3% of households by 2018 relied on at least one type of social grant.[102]

More than 77,1% of learners who attended public schools benefitted from school feeding schemes in 2018.[103] As at June 2020 there remain approximately 3000 schools at which no water is provided, with inadequate provision of water at 7000 schools across the country and up to 4000 schools still using pit latrines.[104] South Africa's healthcare system is similarly compromised. Access to healthcare remains deeply unequal, with the state of public healthcare facilities compromised and service delivery and resource shortages apparent across the system, in which approximately 80% of medical specialists serve 16% of the population in the private sector. As the public health care system has strained, the number of successful medical negligence claims against the state have spiralled,[105] which has placed further strain on the availability of funds and resource allocation in the public health sector.[106]

Similarly, the number of complaints of police misconduct have not subsided, with systemic problems persisting in the extent of and adequacy of crime investigation and its prosecution. Of a total of 5829 complaints of police misconduct reported in the 2018/2019 year, 214 related to deaths in custody, 393

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96 Constitution of the Republic of South Africa, 1996, § 27(2).
97 "South Africa Population," Worldometer, October 13, 2025.
98 Statistics South Africa, *General Household Survey 2019* (Pretoria: Statistics South Africa, 2020), 32.
99 Statistics South Africa, *General Household Survey 2019*, 49.
100 Statistics South Africa, *General Household Survey 2019*, 67.
101 Statistics South Africa, *General Household Survey 2019*, 42.
102 Statistics South Africa, *General Household Survey 2019*, 30.
103 Statistics South Africa, *General Household Survey 2019*, 17.
104 Inside Education, "Angie Motshekga Admits 4000 South African Public Schools Still Use Pit Latrines," *Inside Education*, August 3, 2020.
105 Kollapen et al (2017) at 3.
106 Department of Health (2015).

deaths as a result of police action, 124 incidents of rape by a police officer (half of this number by off-duty policemen), 13% cases of rape led to those being in custody, 270 cases of torture and 3835 of assault;[107] and damages claims against the police show no signs of abating. By 2018, Human Rights Watch reported, "(c) orruption, poverty, high unemployment, and violent crime significantly restricted South Africans enjoyment of their rights. Cuts to health and education services also compromised quality and access to these rights."[108]

The result is that much of South Africa's past, described as that of "a deeply divided society characterised by strife, conflict, untold suffering and injustice" which "generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge",[109] remains evident in the daily lives of most South Africans a quarter of a century after the end of apartheid. In spite of the enactment of the new Constitution, with its Bill of Rights affirming the values of dignity, equality and freedom,[110] social and economic rights and the promise to unleash the transformation of the society,[111] significant challenges remain. The realisation of fundamental human rights, despite their entrenchment in the Bill of Rights and the constitutional commitment to the values of accountability, transparency and responsiveness underpinning the operation of the modern state,[112] very often remain constrained.

In this context, the courts continue to be used as a "a core tool" in the development of the constitutional state,[113] with a broad range of societal issues litigated in the courts, including those concerned with the violation of fundamental rights. Subject to constitutional control, courts use their power to apply or, where appropriate, develop the law and impose remedies, including

[107] Independent Police Investigative Directorate, *Annual Report 2018/2019* (Pretoria: IPID, 2019), 38.
[108] Human Rights Watch, [report title] (New York: Human Rights Watch, 2019).
[109] *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) (S. Afr.), para. 5.
[110] Constitution of the Republic of South Africa, 1996, § 7(1).
[111] Brickhill and Van Leeve, "Transformative Constitutionalism," 144.
[112] Brickhill and Van Leeve, 151. See also Michael Le Roux and Dennis Davis, *Lawfare* (Johannesburg: Jonathan Ball Publishers, 2020), IV.
[113] Le Roux and Davis, *Lawfare*, 1.

those against the executive, the government administration at different levels and state functionaries.

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