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Article

Justiciable socio-economic rights as adaptive law for urban resilience

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ABSTRACT

This article argues that justiciable socio-economic rights enhance the adaptability and resilience of domestic legal systems, thereby enabling adaptive urban governance in times of crisis. It relates substantive concepts and standards associated with the protection of economic and social rights in international law to urban resilience, focusing on the right to adequate housing under Article 11 International Covenant on Economic, Social and Cultural Rights (ICESCR). Thereafter it considers the UN Committee on Economic, Social, and Cultural Rights' evaluation of individual complaints pertaining to the right to adequate housing under Article 8(4) of the Optional Protocol to the ICESCR, zooming in on the Committee's employ of 'reasonableness' as review standard and on the implications of this for domestic legal systems. Given that the Optional Protocol's 'reasonableness' standard draws on the standard earlier adopted by the South African Constitutional Court, the article then considers the standard's employ and supplementation with adaptive judicial remedies in South African socio-economic rights jurisprudence.

KEYWORDS: economic and social rights; urban resilience; reasonableness; optional protocol to ICESCR; adaptive law; adaptive governance.

1. INTRODUCTION

In the era of climate change, the world is said to be entering a state of 'polycrisis': 'the simultaneous occurrence of multiple, overlapping crises, which interact so that the whole of their impact is greater than the sum of their parts'.[1] A confluence of natural disasters, pandemics, and armed conflicts is interacting with economic, financial, political, social, and governance crises playing out at different scales, thereby exacerbating ongoing structural crises of poverty, precarity, and inequality.[2] For various reasons, this unfolding dystopia is most harshly experienced in urban

[1] A Nolan, 'Human Rights and the Cost-of-Living Crisis' (2023) 41 NQHR 3, 5.
[2] See D Madden, 'Polycritical City?' (2023) 27 City 271; *Nolan*, n 1, above, 5; T Ticlau, C Hintea and B Andrianu, 'Adaptive and Turbulent Governance: Ways of Governing that Foster Resilience' (2020) TRAS 167–82.

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areas. Cities and towns are where the multiple causes and effects of the polycrisis are primarily to be confronted.[3] The reality is rapidly dawning that treating crises and disasters as discrete states of exception is no longer practicable and that disaster resilience needs to be built into the ways in which cities are governed on a day-to-day basis.[4] Reflecting this, the United Nations' Sustainable Development Goals include an imploration to 'make cities inclusive, safe, *resilient* and sustainable' (emphasis added).[5]

In line with increasing scholarly awareness of the ways in which urban governance is enabled and structured by 'urban law',[6] this article is concerned with the legal foundations of urban resilience. In particular, I argue that human rights, and specifically socio-economic rights, are integral components of a resilient urban law. It is readily acknowledged in the literature that non-fulfilment of socio-economic rights increases vulnerability to a range of environmental shocks and stressors and that socio-economic rights are typically among the prime casualties of crises and disasters.[7] For instance, enjoyment of the right to adequate housing (on which this article focuses) is often directly compromised by calamitous events, such as when homes are destroyed or rendered inhabitable by natural disasters.[8] The right is also frequently threatened by state responses in the aftermath of crises. This occurs both directly, like when communities are evicted or displaced, ostensibly for their safety, following a natural disaster or during a pandemic,[9] and indirectly, for instance, where an economic crisis leads to an increase in home foreclosures and evictions by landlords while states reduce public housing assistance as an austerity measure.[10]

Moreover, it is regularly pointed out that the right to housing's future enjoyment is in jeopardy from the threatening climate catastrophe. It is predicted that millions of people around the world will be displaced or rendered homeless over the next decades by, for instance, sea-level rise, desertification, and an increase in extreme weather events and natural disasters.[11] While social class does not provide complete insulation from such personal housing disasters,[12] those whose

[3] See DJ Madden, 'Disaster Urbanization: The City between Crisis and Calamity' (2021) 15 Sociologica 91, 95–97; A van der Berg and J Verschuuren, 'Introduction to Climate Resilient Cities and the Law' in A van der Berg and J Verschuuren (eds), *Urban Climate Resilience: The Role of Law* (2022) 1–3.

[4] *Madden*, n 3, above, 92–94; D Matyas, 'Towards a Legal Toolkit for Disaster Resilience and Transformation' (2020) 45 Disasters 453, 456–57; *Ticlau, Hintea and Andrianu*, n 2, above, 173; A van der Berg and M Pieterse, 'Governing Urban Crisis through Adaptive Urban Law: Lessons from City Responses to Covid-19 in the Netherlands and South Africa' (2024) 20 ULR 1, 17–18.

[5] United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development* UN A/RES/70/1 (2015) Goal 11. See also United Nations, *New Urban Agenda* GA Res 71/256*, annex (23 December 2016) para 63.

[6] See for instance I Baptista, 'Practices of Exception in Urban Governance: Reconfiguring Power Inside the State' (2013) 50 US 39; MD Glasser and S Berrisford, 'Urban Law: A Key to Accountable Urban Government and Service Delivery' (2015) 6 WBLR 6; TL Humby, 'Law and Resilience: Mapping the Literature' (2014) 4 SJEL 85; A Layard, 'Researching Urban Law' (2020) 21 GLJ 1446; *Matyas*, n 4, above; M Mousmouti and G Crispi, 'Good Legislation as a Means of Ensuring Voice, Accountability and the Delivery of Results in Urban Development' (2015) 6 WBLR 257; M Pieterse, 'Corporate Power, Urban Governance and Urban Law' (2022) 131 Cities 103,893; *van der Berg and Pieterse*, n 4, above; *van der Berg and Verschuuren*, n 3, above.

[7] See D Bilchitz, 'Socio-economic Rights, Economic Crisis, and Legal Doctrine' (2014) 12 IJCL 710, 711–12; JL Černič, 'The European Court of Human Rights, Rule of Law and Socio-economic Rights in Times of Crises' (2016) 8 HJRL 227, 228–29; M Cullen and J Munro, 'Preventing Disasters and Displacement: How Economic, Social and Cultural Rights can Advance Local Resilience' (2022) 40 NJHR 118, 122–25; A Nolan, 'Not Fit for Purpose? Human Rights in Times of Financial and Economic Crisis' (2015) 4 EHRLR 360, 361–63; United Nations Special Rapporteur on Adequate Housing Rajagopal, 'Towards a Just Transformation: Climate Crisis and the Right to Housing' UN Doc A/HRC/52/28 (23 December 2022) paras 11–19.

[8] *United Nations Special Rapporteur Rajagopal*, n 7, above, paras 13–16.

[9] Ibid, paras 20–21, 25.

[10] See S Liebenberg, 'Austerity in the Midst of a Pandemic: Pursuing Accountability through the Socio-economic Rights Doctrine of Non-retrogression' (2021) 37 SAJHR 181, 189–90.

[11] See *Cullen and Munro*, n 7, above, 119–21; United Nations Special Rapporteur on Adequate Housing Rolnik, 'Report of the Special Rapporteur on Adequate Housing' UN Doc A 64/255 (6 August 2009) paras 13–15, 28–29.

[12] See I Leijten and K de Bel, 'Facing Financialization in the Housing Sector: A Human Right to Adequate Housing for All' (2020) 38 NQHR 94, 96–97, 111–12.

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enjoyment of housing rights is already most precarious (such as urban informal settlement dwellers) are by far most vulnerable.[13]

Yet, other than their non-fulfilment regularly being pinpointed as contributing to urban vulnerability in an era of climate crisis, and their violation being depicted as part of the damage wreaked when disaster does strike, socio-economic rights seldom feature pertinently, in and of themselves, in contemplations of legal and policy responses to disaster.[14] It is this oversight that this article intends to address. I argue that human rights are legal standards and mechanisms in and of themselves and, as such, can contribute to the overall resilience of legal frameworks for urban governance. Specifically, given the significant overlaps between the objectives of socio-economic rights and those of urban governance and of disaster management,[15] I argue that making socio-economic rights justiciable enhances the adaptability of domestic urban law, thereby in turn enabling resilient urban governance through the polycrisis.

To frame the argument theoretically, Section 2 below briefly unpacks the notion of urban resilience, shows how it is enhanced by adaptive urban governance, and how such governance, in turn, is both enabled and disciplined by adaptive urban law. In Section 3, these notions are first related to the substantive legal concepts and standards associated with the protection of economic and social rights in international law, with a focus on the right to adequate housing as component of the right to an adequate standard of living under Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The remainder of Section 3 considers the UN Committee on Economic, Social and Cultural Rights (UNCESCR)'s evaluation of individual complaints pertaining to the right to adequate housing under Article 8(4) of the Optional Protocol to the ICESCR. In particular, it zooms in on the UNCESCR's use of 'reasonableness' as a review standard of domestic law's compliance with the substance of the ICESCR and illustrates how this standard influences the content and operation of member states' domestic legal systems.

Given that the Optional Protocol's 'reasonableness' standard is documented to have been inspired by the approach adopted by the South African Constitutional Court in adjudicating the justiciable socio-economic rights contained in the 1996 South African Constitution,[16] Section 4 considers the standard's employ in South African socio-economic rights jurisprudence. In addition to highlighting relevant aspects of this jurisprudence and the extensive academic commentary that it has attracted, this discussion illustrates how the reasonableness standard, and its supplementation with adaptive judicial remedies such as meaningful engagement and supervisory jurisdiction, enhances the overall adaptability of domestic urban law, both inside and outside of crisis situations. To conclude, Section 5 reflects on how the domestication of socio-economic rights alters relationships between spheres and branches of government, and how it hardwires the characteristics of adaptive law into domestic legal frameworks for urban

[13] *Cullen and Munro*, n 7, above, 127–28; United Nations Special Rapporteur on Adequate Housing Farha, 'Guidelines for the Implementation of the Right to Adequate Housing', UN Doc A/HRC/43/43 (20 December 2019) para 70; *United Nations Special Rapporteur Rajagopal*, n 7, above, para 26; *United Nations Special Rapporteur Rolnik*, n 11, above, paras 18–20.

[14] Remarked regarding responses to the 2008 global financial crisis by *Nolan*, n 7, above, 360; I Saiz, 'Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis' (2009) 1 JHRP 277, 279–81.

[15] N Angel-Cabo and L Sotomayor, 'Seeing Human Rights Like a City: The Prospects and Perils of the Urban Turn' in Davis and others (eds), *Research Handbook on Human Rights and Poverty* (2021) 264, 275–76; M Pieterse, 'Urbanizing Human Rights Law: Cities, Local Governance and Corporate Power' (2022) 23 GLJ 1212, 1215.

[16] See B Griffey, 'The "Reasonableness" Test: Assessing Violations of State Obligations Under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) 11 HRLR 275, 302; S Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee of Economic, Social and Cultural Rights under the Optional Protocol' (2020) 42 HRQ 48, 53; B Porter, 'The Reasonableness of Article 8(4): Adjudicating Claims from the Margins' (2009) 27 NJHR 39, 45–46, 49; B Porter, 'Reasonableness and Article 8(4)', in M Langford and others (eds.), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2014) 182, 182–84, 187.

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governance. In closing, it is reiterated that ground-level enjoyment of socio-economic rights is itself a primary indicator of and prerequisite for urban resilience.

2. URBAN RESILIENCE, ADAPTIVE GOVERNANCE, AND ADAPTIVE LAW

Resilience refers to 'the capacity of a system to withstand or adapt to disturbance while maintaining the same basic structures and functions'.[17] Urban resilience, then, can be understood as the ability of cities' many interacting complex systems (their infrastructure, economic systems, governance systems, social systems, and so on) to resist and absorb damage and to adapt and transform, so as to be able to continue functioning to the benefit of their residents, amidst upheaval.[18] Alongside disaster readiness and effective disaster response, making urban systems more resilient requires identifying and addressing existing vulnerabilities in the urban fabric and reforming those parts of urban systems that produce and exacerbate such vulnerabilities.[19]

Resilience thus simultaneously requires robustness under pressure and adaptiveness to (often rapidly) changing conditions. The increasing routineness of calamity in an era of polycrisis means that, to enhance urban resilience, everyday urban governance needs to be sufficiently agile and responsive to prevent, ameliorate, and cope with an intensifying barrage of interlocking shocks and stressors.[20] 'Adaptive' urban governance standards, structures, and processes must be dynamic, iterative, and pliable, adjustable to different scales, open to learning and compromise, and responsive to the specific and continuously evolving demands and dynamics of multiple contexts.[21]

Apart from being a complex system in and of itself, the legal system is a fundamental underlying/structuring component of cities' economic, social, environmental, and governance systems.[22] The ways in which adaptive urban governance can be enabled or frustrated by law are accordingly increasingly studied, not least because rule of law is an integral organizing and stabilizing force during times of flux.[23] In addition to preserving order, law spurs, authorizes, structures, and consistently exerts accountability for responses to crises and disasters. It further safeguards fundamental rights and enables the protection of, and the rendering of assistance to, vulnerable groups.[24] As such, urban law can lend significant robustness to urban governance systems. However, law tends to fare less well when it comes to the adaptability dimension of resilience. Indeed, law's top-down essence, alongside its rigidity, fixity, monocentric tendencies and inherent path-dependence, can hinder and straitjacket adaptive governance.[25] Given the rising intensity, multidimensionality, and unpredictability of the polycrisis, it is crucial to enhance the adaptive capacity of the law.

In terms of the urban resilience literature, to be considered adaptive, an overall legal framework for urban governance must articulate with extra-legal governance mechanisms and can

[17] CAT Arnold, 'Resilient Cities and Adaptive Law' (2014) 50 ILR 245, 245.

[18] Ibid. See also P Ribeiro and LAPJ Gonçalves, 'Urban Resilience: A Conceptual Framework' (2019) 50 SCS 101,625, 3–4; *Ticlau, Hintea and Andrianu*, n 2, above, 169–70; *van der Berg and Pieterse*, n 4, above, 3.

[19] See *Cullen and Munro*, n 7, above, 127–28; *Madden*, n 3, above, 94–96; *Ribeiro and Gonçalves*, n 18, above, 4.

[20] *Matyas*, n 4, above, 457.

[21] See, for example, B Cosens and others, 'Designing Law to Enable Adaptive Governance of Modern Wicked Problems' (2020) 73 VLR 1687–732; *Ticlau, Hintea and Andrianu*, n 2, above, 169–77.

[22] See T Arnold and L Gunderson, 'Adaptive Law and Resilience' (2013) 43 ELR 10,426, 10426–27; *Cosens and others*, n 21, above, 1704–05; *Glasser and Berrisford*, n 6, above, 212.

[23] *Černič*, n 7, above, 228–29; *Matyas*, n 4, above, 463.

[24] *Arnold and Gunderson*, n 22, above, 10427; *Humby*, n 6, above, 127; *Matyas*, n 4, above, 465; *van der Berg and Pieterse*, n 4, above, 3.

[25] *Arnold and Gunderson*, n 22, above, 10426–29; *Arnold*, n 17, above, 250–51; *Cosens and others*, n 21, above, 1703–05, 1724–25; *Humby*, n 6, above, 110–11, 127; *Matyas*, n 4, above, 454–55, 463; *van der Berg and Verschuuren*, n 3, above, 18; *van der Berg and Pieterse*, n 4, above, 3–4.

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consist of a mix of statutory, regulatory, and judicial features.[26] It must allow for multi-centred, multi-scalar, and multimodal governance that co-opts and appropriately enables, coordinates and allocates power and responsibility between a range of state and non-state actors, with particular emphasis on the empowerment and accountability of those actors, such as local governments in cities, that are located closest to a problem.[27] These actors should be enabled to pursue and reconcile multiple (sometimes competing or conflicting) goals and to flexibly prioritize and manage trade-offs among them, while continuously protecting the most vulnerable people and interests.[28] Decision-making processes should be collaborative, flexible, and discretionary, and must be tolerant of uncertainty, capable of learning, and responsive to feedback.[29] Review and accountability standards, while consistent and rigorous, should similarly be flexible, accommodative of changing contexts, and circumstances, and sensitive to shifts in states of knowledge and science.[30]

Injecting urban law with such adaptiveness while maintaining its robustness is a multifaceted task. On the ground, the many different forms of law that collectively constitute urban law should adaptively exert substantive standards on, and demand accountability of, a wide array of urban processes and systems. Simultaneously, at a more meta level, urban law itself should be reviewable for its substantive justness, robustness, and adaptiveness. Human rights law generally, and socio-economic rights specifically, have a role to play at both of these levels.

3. URBAN RESILIENCE AND SOCIO-ECONOMIC RIGHTS IN INTERNATIONAL LAW

Rights-protection is an important objective of law both inside and outside of crisis situations, and it is readily accepted that respect for and fulfilment of human rights are crucial end goals of resilient legal frameworks.[31] At a level of principle, this is also true of socio-economic rights. As legal creatures, socio-economic rights are in many ways the very stuff of crisis. They have been designed precisely to exert public accountability for lifting people out of, and stopping others falling into, states of personal crisis, including hunger, homelessness, unemployment, illness, and suffering.[32] Upholding socio-economic rights further provides insulation against disasters, both by providing safety nets at individual and household levels and by enhancing the physical robustness of cities and human settlements. The protection and fulfilment of socio-economic rights, especially the right to adequate housing, is therefore frequently highlighted in international instruments as a precondition for urban resilience.[33]

While socio-economic rights might therefore be expected to be among the first legal tools to reach for when a disastrous occurrence unleashes a multitude personal crisis across various social strata, this is curiously seldom the case.[34] In addition to their limited enforceability in many domestic legal systems, this may be because the value of socio-economic rights as a component

[26] *Arnold*, n 17, above, 254, *Humby*, n 6, above, 113.

[27] *Arnold and Gunderson*, n 22, above, 10428–34; *Arnold*, n 17, above, 251–55; *Cosens and others*, n 21, above, 1727; *Humby*, n 6, above, 112, 124; *van der Berg and Verschuuren*, n 3, above, 9–18; *van der Berg and Pieterse*, n 4, above, 4; *UN Special Rapporteur Rajagopal*, n 7, above, para 72.

[28] *Cosens and others*, n 21, above, 1730; *Matyas*, n 4, above, 465.

[29] *Arnold and Gunderson*, n 22, above, 10427–31, 10,436; *Arnold*, n 17, above, 253–54, 257, 262; *Humby*, n 6, above, 118–19, 130.

[30] *Arnold and Gunderson*, n 22, above, 10441; *Arnold*, n 17, above, 251–53; *Humby*, n 6, above, 121–22.

[31] *Cullen and Munro*, n 7, above, 131–32; *Matyas*, n 4, above, 456.

[32] *Bilchitz*, n 7, above, 712, 719; *Černič*, n 7, above, 229; *Cullen and Munro*, n 7, above, 122–23.

[33] See United Nations, *Sendai Framework for Disaster Risk Reduction* UN Doc A/conf.224/L.2 (7 April 2015) para 19; *United Nations Transforming Our World*, n 5, above, at Goal 11.1, 11.5, 11.6; *United Nations New Urban Agenda*, n 5, above, paras 13–14. See further *Cullen and Munro*, n 7, above, 122–25, 127–29; *UN Special Rapporteur Farha*, n 13, above, paras 71–72; *UN Special Rapporteur Rajagopal*, n 7, above, paras 41–62; *UN Special Rapporteur Rolnik*, n 11, above, paras 51, 57.

[34] *Nolan*, n 7, above, 360.

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of the legal machinery of crisis responses may not be immediately apparent. Socio-economic rights are often vaguely formulated and conceptually underdeveloped in domestic legal systems, tend to be guaranteed subject to the availability of resources (which are inevitably strained under emergency conditions), and are sometimes criticized for being overly state-centred in their operation and thereby failing to exert accountability on the many non-state actors involved in both urban governance and crisis responses.[35]

Moreover, judicial rights-vindication tends significantly to lag rights-violations, while courts and treaty monitoring bodies may be difficult to access during emergencies and are often accused of showing exaggerated deference to executives in times of distress.[36] Therefore, the invocation of socio-economic rights in the front lines of a crisis may seem to some like a pointless afterthought. As will now be shown, this is far from accurate.

A. The ICESCR's operation under crisis conditions

One of the most prominent distinctions between the ICESCR and the International Covenant on Civil and Political Rights (ICCPR) is that the ICESCR does not permit states to derogate from its enshrined rights during states of emergency.[37] This is arguably because suspending socio-economic rights would undermine the core objective of state responses to a wide range of emergencies: to preserve human life and dignity.[38] Socio-economic rights thus very much operate during emergencies, however grave.[39]

Yet, the ICESCR is alive to the realities of crises and disasters, which can instantaneously diminish enjoyment of socio-economic rights while drastically reducing the human, financial, and other resources that states can devote to their restoration, never mind their protection and fulfilment.[40] Primarily through the flexibilities inherent to the notion of progressive realization at the centre of the obligations that it imposes,[41] the ICESCR obviates the need for derogating from rights during emergencies. Instead, it affords states a wide margin of discretion in complying with its substantive dictates.[42] By doing this, the ICESCR may itself be described as an inherently adaptive instrument. However, the margin of discretion does not mean that states can simply turn their back on socio-economic rights during times of turbulence. Article 4 of the ICESCR determines that 'the State may subject [economic and social] rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. Restrictions to the enjoyment of socio-economic rights, under both 'normal' and emergency

[35] See *Bilchitz*, n 7, above, 711; *Nolan*, n 7, above, 365, 368–69; *Pieterse*, n 15, above, 1214–15.

[36] *Bilchitz*, n 7, above, 715; *Matyas*, n 4, above, 464; *Nolan*, n 7, above, 366–68.

[37] See *Griffey*, n 16, above, 286; A Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 HRLR 557, 558. ICCPR Article 4(1) allows states to derogate from obligations under the Covenant 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed', '. . . to the extent strictly required by the exigencies of the situation'. See also *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (1985) paras 39, 51, 53. Article F of the European Social Charter (1996) allows for limited derogation from social and economic rights 'in time of war or other public emergency'.

[38] *Müller*, n 37, above, 593; KG Young, *Constituting Economic and Social Rights* (2012) 108–10.

[39] On how limitations on certain socio-economic rights, like labour rights, may approximate derogation due to the practicalities of certain emergencies, see *Müller*, n 37, above, 562–67, 592–97.

[40] *Müller* (ibid) 586; A Nolan, NJ Lusiani and C Courtis, 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights' in A Nolan (ed), *Economic and Social Rights After the Global Financial Crisis* (2014) 123, 124.

[41] ICESCR Article 2.1 determines: 'Each State Party to the present Covenant undertakes to take steps, . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.

[42] N Moons, *The Right to Housing in Law and Society* (2018) 161; *Müller*, n 37, above, 593; *Nolan, Lusiani and Courtis*, n 40, above, 124; *Young*, n 38, above, 110.

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conditions, must further conform with the anti-discrimination imperative underscoring all rights in the ICESCR.[43]

In addition, the UNCESCR has indicated that it understands the notion of progressive realization to impose 'an obligation to move as expeditiously and effectively as possible' towards full realization of the rights in the ICESCR, while 'any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'.[44] This means that, under disaster conditions, states must prioritize maintaining residents' existing access to essential goods and services and must guard that emergency response measures (such as curfews, lockdowns, and school closures) do not unjustifiably amount to a diminished enjoyment of socio-economic rights.[45]

Moreover, the UNCESCR has emphasized that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party' and that 'for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.[46] Even in conditions of acute scarcity, states must further 'strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances' and must safeguard the interests of vulnerable members of society through targeted measures.[47] Upholding minimum core obligations under crisis conditions would ensure that people's access to goods and services essential for their survival, such as food and essential medicines, remains prioritized in the course of crisis responses.[48]

The UNCESCR has, however, been criticized for not comprehensively articulating the links between the limitation provision in Article 4 of the ICESCR and its understanding of deliberately retrogressive measures and minimum core obligations.[49] While these standards are valuable for determining states' compliance with the Covenant in times of societal distress, their rigid and acontextual application in volatile conditions may be counterproductive (or, in resilience parlance, not sufficiently adaptive). Too rigid an approach to retrogressive measures may, for instance, preclude a reallocation of resources from fairly secure sectors of a population to those whose survival interests are acutely threatened by a disaster.[50] A focus on retrogression may further deflect attention from the positive dimensions of the obligation to adopt measures in pursuit of progressive realization. This means that the standard would exert accountability for diminished enjoyment of socio-economic rights resulting from the intentional implementation of crisis-response measures, but not where this is occasioned by a lack of appropriate measures or by their failure to sufficiently restore or protect rights.[51]

This latter concern might be mitigated by insisting that minimum core protection always be maintained. However, focusing too closely on the minimum core may be overly permissive of measures that scale back the enjoyment of socio-economic rights yet maintain protection above core levels.[52] Rigidly imposing a core-focused understanding of socio-economic rights further

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43 ICESCR Article 2.2. See also UNCESCR, General Comment No 3: The nature of States Parties' obligations (Art. 2 para. 1 of the Covenant) (1990) para 1.
44 UNCESCR, ibid, para 9.
45 See *Liebenberg*, n 10, above, 193–97; *Müller*, n 37, above, 570, 585–87; *Nolan, Lusiani and Courtis*, n 40, above, 124–25.
46 *UNCESCR, General Comment 3*, n 43, above, para 10.
47 Ibid, paras 11–12.
48 See *Bilchitz*, n 7, above, 729–30, 739.
49 *Müller*, n 37, above, 569.
50 *Nolan, Lusiani and Courti*, n 40, above, 130–31.
51 *Moons*, n 42, above, 183; *Nolan*, n 1, above, 6–7.
52 *Nolan*, n 1, above, 7–8.

risks straitjacketing crisis responses and would fail to guide trade-offs between conflicting core interests (say, access to food and the need to safeguard health) that may be required by the exigencies of a situation.[53]

To counter these drawbacks, it has been argued that the prohibition on retrogressive measures and the minimum core standard need to be accommodated more explicitly within the proportionality assessment implied by Article 4 of the ICESCR. Under Article 4, states can limit socio-economic rights in the wake of a crisis only by way of non-discriminatory measures aimed at enhancing the overall and long-term protection of rights in the Covenant for all members of society, the societal benefit of which must outweigh short-term sacrifices in individual rights-enjoyment.[54]

In line with the UNCESCR's understanding of the prohibition on retrogression, this would mean that diminished individual rights-enjoyment brought about by crisis response measures could only be justified with reference to the measures' ability to enhance overall protection for the totality of Covenant Rights within the totality of available resources.[55] The inviolability of minimum core obligations could then constitute a necessary substantive baseline for this proportionality exercise. For instance, a minimum core infringement could indicate instances where the extent of an individual deprivation inherent to an emergency measure or situation (such as a complete inability to access food occasioned by a stay-at-home order) would be so severe as to usually render a limitation disproportionate and thus impermissible.[56]

It appears that the UNCESCR itself has embraced such a substantive proportionality assessment in considering states parties' adherence to the ICESCR in times of economic duress. In its General Comment on the right to social security, the UNCESCR stated that the permissibility of retrogressive measures would depend on whether they were adopted with 'reasonable justification' after comprehensive examination of alternatives, whether they allowed for 'genuine participation' by affected groups, as well as whether they were directly or indirectly discriminatory and whether they would have a sustained negative impact on rights-enjoyment.[57] Then, in a 2012 open letter pertaining to cutbacks in social spending as a response to the 2008 global financial crisis by states parties to the ICESCR, the UNCESCR emphasized that retrogressive measures had to be 'temporary, necessary and proportionate', needed to focus on reducing societal inequalities and always needed to observe rights' minimum core.[58]

The proportionality assessment is also logically influenced by the substantive content of particular rights. For instance, the UNCESCR understands the right to adequate housing under Article 11(1) of the ICESCR to entail a 'right to live somewhere in security, peace and dignity'[59], and as encompassing security of tenure, access to essential services, and housing that is affordable, accessible, habitable, and located close to livelihood opportunities.[60] At the core of the right, states must pay particular attention to the needs of vulnerable social groups 'living in unfavourable conditions'.[61] On this understanding, evictions would be impermissible unless

[53] X Contiades and A Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation' (2012) 10 IJCL 660, 669–74.

[54] N-H Grohmann, 'Tracing the Development of the Proportionality Analysis in Relation to Forced Evictions under the ICESCR' (2022) 22 HRLR 1, 4; *Müller*, n 37, above, 573–74, 584–85. On proportionality as preferred method for determining acceptable limits to socio-economic rights during crises see generally *Contiades and Fotiadou*, n 53, above.

[55] *Griffey*, n 16, above, 321–22; *Liebenberg*, n 10, above, 188–91, 196–97; *Müller*, n 37, above, 584–87, 590–91; *Nolan, Lusiani and Courtis*, n 40, above, 124–25.

[56] *Bilchitz*, n 7, above, 729–33, 738–39; D Kedzia, 'The Committee on Economic, Social and Cultural Rights: The Power of Subjective Rights' (2022) 14 JHRP 50, 64; *Müller*, n 37, above, 575, 580–83, 596–99.

[57] UNCESCR, General Comment No 19: The right to social security (Art. 9) (2008) para 42.

[58] See *Liebenberg*, n 10, above, 189, 191; *Nolan, Lusiani and Courtis*, n 40, above, 137.

[59] UNCESCR, General Comment No 4: The right to adequate housing (Art. 11(1) of the Covenant) (1991) para 7.

[60] Ibid, para 8. For exposition of the content of the right, also in the European human rights system, see *Leijten and de Bel*, n 12, above, 97–100.

[61] *UNCESCR, General Comment No 4*, n 59, above, para 11.

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they are 'carried out in strict compliance with the relevant principles of international human rights law and in accordance with general principles of reasonableness and proportionality',[62] even under emergency conditions. Evictions must further be procedurally fair, which always requires at least adequate notice and an opportunity for 'genuine consultation' with would-be evictees,[63] and may not result in people being rendered homeless or vulnerable to other human rights violations. States must accordingly ensure the availability of adequate alternative accommodation for those evictees who are unable to secure it themselves.[64] Both individually and collectively, beneficiaries are further entitled to participate meaningfully in decisions and policy processes that impact on their enjoyment of the right.[65]

B. Bringing ICESCR standards into domestic law under the 2008 optional protocol

The ICESCR has, for much of its existence, been enforced only by way of a state reporting mechanism. Yet, the UNCESCR's norm-clarification endeavours and its assessments of state compliance with the Covenant have considerably influenced the substantive content of ICESCR states parties' domestic legal systems. As emphasized in the UNCESCR's General Comment on the ICESCR's domestic application, states are expected to recognize and give effect to Covenant norms in their domestic orders, which must provide for adequate governmental accountability as well as for appropriate remedies and/or redress for victims of economic and social rights violations.[66] While the ICESCR operates primarily at the level of the nation state, the close connections between socio-economic rights and the objectives of local government in most legal systems mean that, in complying with this obligation, states must pay particular attention to how domestic law empowers and exerts accountability from local governments for their role in the delivery of the objects of socio-economic rights.[67] The manner in which states 'domesticate' the ICESCR, therefore, shapes the role that socio-economic rights play in urban governance, also under crisis conditions.

In particular, states have been strongly encouraged to make the rights in the ICESCR domestically justiciable and thereby to allow for judicial scrutiny of state laws, policies, or actions (at all levels) that limit or purport to advance socio-economic rights, and for effective judicial remedies where socio-economic rights are infringed.[68] The coming into force of the 2008 Optional Protocol to the ICESCR, which empowers the UNCESCR to deliberate and make recommendations based on individual complaints of violations of rights in the Covenant, has considerably strengthened the normative pull towards domestic justiciability for ratifying states.[69] Apart from enabling the application of ICESCR's norms and standards to concrete factual scenarios,[70] the effect of the Optional Protocol's individual complaints mechanism has been to subject domestic legal systems' alignment to the Covenant to the UNCESCR's scrutiny. This includes scrutiny of the extent to which domestic systems allow courts to assess the proportionality of limitations to Covenant rights at all levels of government.

This scrutiny is circumscribed by Article 8(4) of the Optional Protocol, which determines that, when examining complaints, the UNCESCR 'shall consider the reasonableness of the steps

[62] UNCESCR, General Comment No 7: The right to adequate housing (art. 11(1) of the Covenant): Forced evictions (1997) para 14. See also *UNCESCR, General Comment No 4*, n 59, above, para 18.

[63] *UNCESCR, General Comment No 7*, n 62, above, para 15.

[64] Ibid, para 16.

[65] *UNCESCR, General Comment No* 4, n 59, above, para 9. See also *UN Special Rapporteur Farha*, n 13, above, paras 20–24.

[66] UNCESCR, General Comment No 9: The domestic application of the Covenant (1998) paras 2–3.

[67] UN HRC, 'Role of Local Government in the Promotion and Protection of Human Rights—Final Report of the Human Rights Council Advisory Committee' UN Doc A/HRC/30/49 (7 August 2015) paras 10, 14, 26, 33. See also *Pieterse*, n 15, above, 1214–17.

[68] *UNCESCR, General Comment No 9*, n 66, above, paras 9–10.

[69] *Griffey*, n 16, above, 284.

[70] *Liebenberg*, n 16, above, 50.

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taken by the State Party', bearing in mind that states 'may adopt a range of possible policy measures for the implementation of the rights'. The choice of reasonableness as review standard under Article 8(4) is significant, not least because reasonableness is generally associated with a considerable margin of state discretion and is thought to be more permissive, open-ended, and context-sensitive than, for instance, 'strict' proportionality review.[71]

The UNCESCR's employ of the reasonableness standard in the handful of individual complaints that it has thus far considered suggests that it treats the standard as a flexible tool to judge the acceptability of states parties' treatment of individual claimants as well as, more broadly, to assess whether their domestic legal systems sufficiently give effect to the rights in the ICESCR.[72] In adjudicating complaints (which, thus far, have mostly been brought against Spain and have mostly concerned evictions in urban areas, under austerity conditions in the wake of the 2008 financial crisis), the UNCESCR has seemingly adjusted the exactitude of its scrutiny depending on nature of the challenged measures, the vulnerability of the claimants and the importance and urgency of the affected interests in every particular case.[73]

In relation to the right to housing and evictions in urban areas, the UNCESCR has regularly infused its reasonableness inquiry with proportionality concerns,[74] to find states parties in violation of the Covenant in instances where limitations on the housing rights of vulnerable persons were not appropriately justified under Article 4 of the ICESCR.[75] The UNCESCR also regards it as a violation of the Covenant where domestic law fails to ensure that evictions do not result in homelessness, fails to provide for case-by-case judicial assessment of the reasonableness and proportionality of evictions, and fails to ensure that authorities prioritize the urgent housing needs of vulnerable persons.[76] The UNCESCR has further emphasized the importance, within assessments of the proportionality of evictions under domestic law, of genuine consultation with evictees over the resolution of their personal housing crises[77] and of whether evictees were provided with alternative accommodation in appropriate circumstances.[78]

Several states parties to the ICESCR have long been loath to heed the call to make the Covenant's provisions domestically justiciable and are similarly weary of ratifying the Optional Protocol. This has ostensibly been due to concerns that the UNCESCR's scrutiny may unduly narrow states' sovereign law- and policy-making space.[79] Proponents of ratification, on the other hand, point to the respectful distance inherent to reasonableness review under the Optional Protocol. For instance, the UNCESCR's recommendations to states parties found to have infringed the ICESCR have typically involved suggestions of how domestic law can be brought

[71] See *Griffey*, n 16, above, 304; *Grohman*, n 54, above, 3–4; *Liebenberg*, n 16, above, 53; *Moons*, n 42, above, 207–08; *Porter* (2014), n 16, above, 178–79, 183–88.

[72] *Grohman*, n 54, above, 12–13; *Kedzia*, n 56, above, 61.

[73] *Kedzia*, n 56, above, 58, 63; *Liebenberg*, n 16, above, 82–84.

[74] *Grohman*, n 54, above, 21; *Liebenberg*, n 16, above, 69–76, 82.

[75] See *Ben Djazia and Belili v Spain* (5/2015) Views, CESCR E/C.12/61/D/5/2015 (2017) paras 13.4, 17.5; *El Ayoubi and El Azouan Azouz v Spain* (54/2018) Views, CESCR E/C.12/69/D/54/2018 (2021) paras 11.2–11.4.

[76] See *Ben Djazia*, n 75, above, paras 13.3–13.4; *Lopez Alban v Spain* (37/2018) Views, CESCR E/C.12/66/D/37/2018 (2019) paras 9.1, 11.5, 14; *Gomez-Limon Pardo v Spain* (52/2018) Views, CESCR E/C.12/67/D/52/2018 (2020) para 9.3; *Walters v Belgium* (61/2018) Views, CESCR E/C.12/70/D/61/2018 (2021) paras 11.6, 16. For discussion, see *Grohman*, n 54, above, 5–12; *Leijten and de Bel*, n 12, above, 108; *Liebenberg*, n 16, above, 70–76.

[77] See *Ben Djazia*, n 75, above, para 13.4; *Cortes and Rodriguez Bermudez v Spain* (26/2018) Views, CESCR E/C.12/72/D/26/2018 (2022) para 13(c).

[78] See *Ben Djazia*, n 75, above, para 15.2; *Cortes*, n 77, above, para 9; *Lopez Alban*, n 76, above, para 9; *El Ayoubi*, n 75, above, para 17(c); *Walters*, n 76, above, para 16(c); M Vols, 'The Optional Protocol to the ICESCR, Homelessness and Moral Hazard: The Alternative Adequate Housing Requirement in the CESR's Jurisprudence—an Incentive Not to Pay for Housing?' (2023) 12 IHRLR 1, 9–14.

[79] See *Griffey*, n 16, above, 278–79, 298–300; *Kedzia*, n 56, above, 51; *Vols*, n 78, above, 3.

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in line with the Covenant, rather than prescribing the content of laws or policies, or dictating how individual cases must be resolved.[80]

The proportionality-based margin of discretion inherent in reasonableness review at the international level therefore allows for, perhaps even requires, adaptive domestic responses to the substantive standards espoused by the ICESCR. It appears that states can successfully defend themselves against individual complaints under the Optional Protocol by showing that their domestic legal systems already reflect, and exert accountability for, the substantive safeguards implied by rights in the ICESCR. Subjecting laws and policies that impact on the enjoyment of socio-economic rights to proportionality-infused reasonableness review by domestic courts would be one obvious way of accomplishing this. Reasonableness-based domestic adjudication would enable concrete application of relevant substantive standards and the context-specific tailoring of appropriate remedies for breaches of socio-economic rights, within local conceptions of the rule of law and separation of powers.[81]

Indeed, in line with the UNCESCR's approach and the European Court for Human Rights' similar insistence on proportionality-based justification for infringements of the right to housing as inherent to family life under Article 8.1 of the European Convention of Human Rights,[82] several domestic legal systems worldwide now provide for judicial assessment of the proportionality or appropriateness of limitations of socio-economic rights.[83] Among these, the jurisprudence of South African courts is arguably both the most extensive and the most studied, not least since it persuaded the drafters of the Optional Protocol to settle for reasonableness as a review standard. This jurisprudence thus makes for an appropriate case study of the adaptive potential of socio-economic rights-based reasonableness review in domestic law, especially as it pertains to urban governance under emergency conditions.

4. JUSTICIABLE SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA INSIDE AND OUTSIDE OF CRISIS

In addition to entrenching a suite of justiciable socio-economic rights that the state must 'respect, protect, promote, and fulfil',[84] the 1996 Constitution of the Republic of South Africa acknowledges the special role of local government in their fulfilment. It tasks municipalities with ensuring sustainable essential service provision and the promotion of social and economic development, while emphasizing that local governance must be democratic, accountable, and participatory.[85] Not coincidentally, the bulk of the socio-economic rights jurisprudence of the South African courts, which are constitutionally empowered to grant 'appropriate', 'just and equitable' relief for infringements of rights in the Bill of Rights,[86] has concerned the actions and responsibilities of local governments in the country's major urban areas.[87] Most of this caselaw has involved the right of access to housing in section 26 of the Constitution, which determines:

[80] *Liebenberg*, n 16, above, 53–54, 70–71. See also *Porter* (2009) n 16, above, 50. In *Ben Djazia*, n 75, above, para 21, the UNCESCR recommended that Spain modify its domestic law to allow for curial assessment of the proportionality of evictions and their compatibility with the substantive dictates of the Covenant. See also *Cortez*, n 77, above, para 13; *El Ayoubi*, n 75, above, para 17(a); *Gomez-Limon Pardo*, n 76, above, paras 9.5, 14(a); *Lopez Alban*, n 76, above, paras 11.7, 17(a).

[81] See *Černič*, n 7, above, 240–44; *Porter* (2014), n 16, above, 178–79, 183–84.

[82] See for example *Connors v United Kingdom*, (2004) 40 EHRR 9 and discussion by *Grohman*, n 45, above, 14–15; P Kenna, 'Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights' (2008) 13 EHRLR 193–208; *Moons*, n 42, above, 108–11. This jurisprudence is beyond the scope of this article.

[83] See examples discussed by *Nolan, Lusiani and Courtis*, n 40, above, 143–45; *Moons*, n 42, above, 185–87.

[84] Section 7(2) of the Constitution of the Republic of South Africa, 1996. The 1996 Constitution contains rights of access to land and tenure security (sections 25(5)–(6)), access to adequate housing (section 26), access to health care services, sufficient food and water, and social security (section 27), and access to education (section 29).

[85] Section 152 of the 1996 Constitution.

[86] Section 38 read with section 172 of the 1996 Constitution.

[87] See M Pieterse, 'Socio-economic Rights Adjudication and Democratic Urban Governance: Reassessing the "Second Wave" Jurisprudence of the South African Constitutional Court' (2018) 51 VRU 12, 13.

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

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

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

In its widely celebrated first decision vindicating the right of access to adequate housing, *Government of the Republic of South Africa v Grootboom*, the South African Constitutional Court aligned its interpretation of section 26 of the Constitution with the normative guidelines of the UNCESCR, particularly in relation to the meaning and implications of 'progressive realization'.[88] However, the Court explicitly declined to elevate the UNCESCR's minimum core concept to a fully-fledged review standard,[89] a stance it would harden in subsequent matters.[90] For reasons connected to its institutional legitimacy and competence, and to its nascent understanding of the functioning of the doctrine of separation of powers under the 1996 Constitution,[91] the Court felt that the standard of 'reasonableness', employed in section 26(2) of the Constitution to indicate the nature of legislative and other measures that the State must adopt to progressively realize socio-economic rights, was the more appropriate yardstick. Minimum core, the Court held, could well be relevant to a judicial assessment of reasonableness, but would not be determinative of its outcome.[92]

While emphasizing that it was up to the legislative and executive branches to formulate and implement housing laws and policies, and therefore that 'a court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent',[93] the *Grootboom* Court determined that measures had to be reasonable both in their content and their implementation.[94] This not only connected the reasonableness assessment to multiple concrete implementation contexts but also highlighted the implementation capability of local government agencies, with the Court holding that 'a reasonable program therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available'.[95]

Given that housing needs 'may differ from province to province, from city to city, from rural to urban areas and from person to person',[96] the Court emphasized that a reasonableness assessment would always be context-specific. Moreover, it stressed that reviewed measures, in addition to being comprehensive, coherent, and workable,[97] had to be capable of reasonable implementation in various contexts, including during crisis conditions:

> 'it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a

[88] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) paras 27–29, 45–46.

[89] Ibid, paras 29–33.

[90] See *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (hereinafter '*TAC*') paras 26–38; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) paras 56–58.

[91] See S Liebenberg, *Socio-economic Rights Adjudication under a Transformative Constitution* (2010) 149–51; T Roux, *The Politics of Principle: The First South African Constitutional Court 1995–2005* (2013) 264, 270, 273, 288.

[92] *Grootboom*, n 88, above, para 33. See also *TAC*, n 90, above, paras 34–36, 38; *Mazibuko*, n 90, above, paras 60–67.

[93] *Grootboom*, n 88, above, para 41. See also *TAC*, n 90, above, paras 37–38; *Mazibuko*, n 90, above, paras 65–66.

[94] *Grootboom*, n 88, above, para 42.

[95] Ibid, para 39. See also para 40.

[96] Ibid, para 37.

[97] Ibid, paras 39–40.

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> significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review'.[98]

At its core, reasonableness required measures to be capable of identifying and meeting the most urgent needs of the most vulnerable members of society, in different contexts:

> 'To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realize. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures . . . . It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realization of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test'.[99]

This was the downfall of the national public housing programme challenged in *Grootboom*. The applicant community had previously been evicted from informal housing and had to settle in makeshift structures on a sports field, where it was left to face the elements. While the housing programme was ambitious and comprehensive, it did not prioritize the alleviation of emergency housing needs, thereby failing to address the 'immediate crisis' of the applicants, who were 'people in desperate need', 'left without any form of assistance with no end in sight'.[100] It was accordingly unreasonable and unconstitutional.[101]

In response to *Grootboom*, the national government introduced a policy providing for temporary emergency accommodation for displaced persons, to be implemented by the relevant local government authorities.[102] It further conducted an extensive review of laws and policies in various sectors, in an attempt to align them to the judgment's substantive dictates. Such '*Grootboom*-proofing', as it became colloquially known, is credited for ensuring that an array of laws and policies at national and local levels make provision for emergency relief and prioritize the needs of vulnerable sectors of society.[103]

Amidst global praise for the judgment, South African scholars were initially disgruntled over *Grootboom*'s refusal to engage the minimum core concept, which was seen as the Constitutional Court declining to elaborate the substantive content of socio-economic rights.[104] However, scholars were also attuned to the strategic wisdom of the Court's resort to reasonableness review. A minimum core-focused approach would have required the Court to define and impose a once-off, top-down, one-size-fits all understanding of what socio-economic rights required of the state, which might over time have painted it into uncomfortable institutional corners.[105] In contrast, a reasonableness assessment allowed for malleable scrutiny of adjustable intensity, closely connected to the factual context and micro-politics of each individual matter and

[98] Ibid, para 43. See also para 37.
[99] Ibid, para 44. See also para 36. See further *TAC*, n 90, above, para 70.
[100] *Grootboom*, n 88, above, para 65. See also paras 59, 63, 66, 68.
[101] Ibid, para 69.
[102] See M Langford, 'Housing Rights Litigation: Grootboom and Beyond' in M Langford and others (eds), *Socio-economic Rights in South Africa: Symbols or Substance?* (2014) 187, 199–201.
[103] Ibid, 203–04; M Pieterse, 'Towards a Right to the City? The Slow Convergence of Rights to Housing and Land in South African Constitutional Jurisprudence' (2022) 11 IHRLR 36, 45–46.
[104] As representative of this extensive literature, see D Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence' (2003) 19 SAJHR 1–26.
[105] *Liebenberg*, n 91, above, 167–68; S Liebenberg, 'Rights, Needs and Transformation: Adjudicating Social Rights' (2006) 17 SLR 5, 31; *Roux*, n 91, above, 264, 288; C Steinberg, 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-economic Rights Jurisprudence' (2006) 123 SALJ 264, 268–74.

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responsive to the evolving and dynamic content of rights.[106] This approach further preserved a flexible margin of discretion for the democratic branches while keeping them focused on their constitutional obligations and insisting that they always prioritized the urgent needs of the most vulnerable members of society.[107]

Grootboom-reasonableness clearly approximates an adaptive legal review standard of the kind championed by urban resilience scholars. It is capable of upholding rule of law and exerting accountability in various contexts and volatile conditions, and amidst dynamic resource constraints.[108] More importantly, as reflected by the practice of '*Grootboom*-proofing', the standard requires of the laws and policies that it evaluates to themselves be adaptive in their implementation and to explicitly cater for the context-appropriate satisfaction of emergency needs.

Two examples from the Constitutional Court's subsequent socio-economic rights caselaw illustrate the reasonableness standard's inherent adaptability. First, in *Treatment Action Campaign v Minister of Health*, the Court found that a national policy which restricted availability of the drug Nevirapine for purpose of preventing mother-to-child transmission of Human Immunodeficiency Virus (HIV) to a limited number of 'pilot sites' at selected public hospitals was unreasonable. This was primarily because of the policy's rigidity in failing to allow for the drug to be administered in other public hospitals where it was medically indicated and available, and where capacity to administer it existed.[109] While accordingly ordering the government to make Nevirapine available in all such instances, the Court emphasized that orders in socio-economic rights cases should not have the effect of straitjacketing policy[110] and stipulated that 'the orders made . . . do not preclude government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child-transmission of HIV'.[111]

Secondly, and in the context of everyday urban governance, in *Mazibuko v City of Johannesburg*, the City of Johannesburg's willingness to adopt a water supply policy was central to the Constitutional Court holding that it was not unreasonable. The policy, in terms of which domestic water meters would supply a legislated quantity of free water before dispensing further water only upon payment, was challenged for not meeting the needs of large, poor households. Ostensibly reacting to the evidence produced by the applicants, the City modified the policy so as to increase the amount of free water supplied to households on an indigency register. In finding the policy to be reasonable, the Court stated that

> 'the City was continually reconsidering its policy and investigating ways to ensure that the poorest inhabitants of the City gained access not only to water, but also to other services, such as electricity, sanitation and refuse removal . . . . If the City had not continued to review and refine its Free Basic Water policy after it was introduced . . . and had taken no steps to ensure that the poorest households were able to obtain an additional allocation, it may well have been concluded that the policy was inflexible and therefore unreasonable . . . given the evidence that

[106] *Liebenberg*, n 91, above, 172, 174; G Quinot and S Liebenberg, 'Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-economic Rights Jurisprudence in South Africa' (2011) 22 SLR 639, 640; *Roux*, n 91, above, 290, 292, 302–03; *Steinberg*, n 105, above, 277–82.

[107] *Liebenberg*, n 105, above, 22–23; *Liebenberg*, n 91, above, 151, 174; *Porter* (2014), n 16, above, 195–96; *Roux*, n 91, above, 264, 290; *Steinberg*, n 105, above, 265, 274, 276.

[108] See LJ Kotze, 'Phiri, the Plight of the Poor and the Perils of Climate Change: Time to Rethink Environmental and Socio-economic Rights in South Africa' (2010) 1 JHRE 135, 155–56; M Pieterse, *Rights-based Litigation, Urban Governance and Social Justice in South Africa: The Right to Joburg* (2017) 215; B Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (2016), 55, 94–98.

[109] *TAC*, n 90, above, paras 80–81, 95.

[110] Ibid, para 127.

[111] Ibid, para 135.3.

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poorer households are also often larger than average and thus most prejudiced by the 6 kilolitre cap. However, the City has not set its policy in stone. Instead, it has engaged in considerable research and continually refined its policies in the light of the findings'.[112]

After *Grootboom*, near all South African housing rights judgments have centred around the prohibition on arbitrary evictions in section 26(3) of the Constitution, and near all were brought against local governments in major cities. Aided by the Prevention of Illegal Eviction from and Occupation of Land Act 19 of 1998, which requires judicial evaluation of whether evictions are 'just and equitable' through a case-by-case balancing of competing interests, the Constitutional Court's scrutiny of evictions in these matters has often approximated 'full-blown' proportionality review.[113] Indeed, the Court has held that legislation may not require the 'blanket' eviction of communities without providing for case-specific evaluation of the appropriateness (and thereby proportionality) of each eviction.[114]

Further notable substantive principles emanating from the Constitutional Court's evictions caselaw include the finding in *City of Johannesburg v Blue Moonlight Properties* that all evictions which might render people homeless constitute housing emergencies, regardless of what sparked them and whether they have been at the behest of private parties or the state.[115] In the same judgment, the Court emphasized that cities are constitutionally empowered to respond to housing emergencies through appropriate budgetary and policy measures and that their obligations to provide emergency housing after evictions could therefore not be sidestepped by failure to adequately budget for emergency housing.[116]

But arguably the most innovative, and most strikingly adaptive, feature of this evictions caselaw has been the Constitutional Court's development of the substantive requirement that, in order to reasonable, evictions that might result in homelessness had to be preceded by bona fide and transparent, meaningful engagement between local government officials and would-be evictees.[117] Such meaningful engagement had to entail, in every instance, joint consideration of the need for and consequences of an eviction, as well as of how city authorities could assist to alleviate these consequences (including by providing temporary alternative accommodation).[118] However, city authorities maintained their margin of discretion, with the Court emphasizing that the engagement process could render a wide range of reasonable outcomes.[119]

The requirement of meaningful engagement has been concretized by the Constitutional Court often also ordering engagement as a remedy in eviction disputes, in lieu of itself imposing a solution on parties. The Court would thus direct parties to themselves come up with solutions to eviction standoffs, and would then endorse the negotiated outcomes of engagement processes after satisfying itself that they were constitutionally compliant.[120] Scholars have been skeptical

[112] *Mazibuko*, n 90, above, paras 94–95. See *Pieterse*, n 87, above, 31.

[113] *Liebenberg*, n 91, above, 276; *Pieterse*, n 103, above, 41–42; *Quinot and Liebenberg*, n 106, above, 648–53; *Young*, n 38, above, 177–81. See especially *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 22–23, 31, 37 (emphasising that the 'balance' between occupiers and owners interests must be 'concrete and case-specific').

[114] *Abahlali baseMjondolo Movement SA v Premier, KwaZulu Natal* 2010 (2) BCLR 99 (CC) paras 114–15, 122.

[115] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 2012 (2) SA 104 (CC) paras 63, 89–90, 92. This is similar to the UNCESCR's finding in *Ben Djazia*, n 75, above, para 13.3.

[116] *Blue Moonlight* (ibid), paras 63, 67, 74. See A Pillay and M Wesson, 'Recession, Recovery and Service Delivery: Political and Judicial Responses to Financial and Economic Crisis in South Africa' in A Nolan (ed), *Economic and Social Rights After the Global Financial Crisis* (2014), 335, 357–59.

[117] *Occupiers of 51 Olivia Road Berea Township v City of Johannesburg* 2008 (3) SA 208 (CC) paras 10–17; 20–21. See also *PE Municipality*, n 113, above, paras 39, 45.

[118] *Olivia Road*, n 117, above, para 14.

[119] Ibid, paras 18, 22; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) paras 117–18, 244, 301–04. See A Pillay, 'Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement' (2012) 10 IJCL 732, 746, 750–51; *Pillay and Wesson*, n 116, above, 347; *Ray*, n 108, above, 116–17.

[120] See *Olivia Road*, n 117, above, paras 5–6, 24–30; *Joe Slovo*, n 119, above, para 7.

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of meaningful engagement's remedial potential in this regard, warning that it is unlikely to solve housing crises rooted in structural injustices.[121] Others have expressed discomfort that engagement processes take place off the radar and without institutionalized correction for inequalities in bargaining power.[122]

Yet, many commentators viewed meaningful engagement's open-endedness and context-specificity as major strengths.[123] As a prerequisite for reasonableness, meaningful engagement concretizes the UNCESCR's insistence on 'genuine participation' by individuals and communities affected by proposed evictions over solutions to their housing crises and forces city authorities to confront the urgent human dimensions of housing emergencies.[124] As a remedy, it can enhance the voice of and restore control to those who experience housing emergencies, and can allow for informed, consensual navigation of the trade-offs that may be inherent to specific crises.[125] If institutionalized as part of local governments' stock response to crisis situations, which might require relocation,[126] meaningful engagement might thus render real-time, rights-conducive solutions to a wide range of housing emergencies.[127] In this manner, its simultaneous employ as an indicator of reasonableness and a remedy injects adaptability into both local housing policies and the judiciary's oversight over their implementation.

That the adaptive capacity of reasonableness and meaningful engagement can be boosted by proactive judicial remedies is illustrated by *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*, where the Constitutional Court found that relocating inhabitants of an informal settlement to allow for the settlement's upgrading was constitutionally compliant, but issued a detailed order in terms of which each individual relocation had to be preceded by meaningful engagement and had to guarantee residents' continued access to places of work, schools, and essential services.[128] This was coupled with a supervisory interdict requiring periodic reporting to the Court on the implementation of the order and allowing the parties to approach the Court for its variation.[129] When the political implementation conditions changed to such an extent that the government would rather upgrade the settlement without first relocating the residents, the Court endorsed this new solution and discharged its original order.[130]

While commentators expressed concern over various features of the original *Joe Slovo* judgment, there was near-unanimous praise for the manner in which the Court employed the supervisory interdict to ensure that rights remained protected throughout a volatile implementation process.[131] Specifically, the Court has been commended for its willingness to adapt

[121] S Liebenberg, 'Participatory Approaches to Socio-economic Rights Adjudication: Tentative Lessons from South African Evictions Law' (2014) 32 NJHR 312, 328; *Ray*, n 108, above, 292.

[122] See for example L Chenwi, 'A New Approach to Remedies in Socio-economic Rights Adjudication: *Occupiers of 541 Olivia Road and Others v. City of Johannesburg and Others*' (2009) 2 CCR 371, 384; S Liebenberg, 'Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication. The Possibilities and Pitfalls of Meaningful Engagement' (2012) 12 AHRLJ 1, 19–26; *Pieterse*, n 108, above, 55.

[123] *Liebenberg*, n 122, above, 8, 13, 17; S Liebenberg and K Young, 'Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?' in HA Garcia, K Klare and LA Williams (eds), *Social and Economic Rights in Theory and Practice* (2015) 237, 243; *Ray*, n 108, above, 110, 115.

[124] *Liebenberg*, n 10, above, 197–98.

[125] *Liebenberg*, n 122, above, 25; *Pieterse*, n 87, above, 25–27; *Ray*, n 108, above, 123.

[126] As arguably envisaged by the Constitutional Court. See *Olivia Road*, n 117, above, para 118; *Ray*, n 108, above, 117.

[127] *Ray*, n 108, above, 321. See also, in the context of informal settlement upgrading, L Chenwi, 'Legislative and Judicial Responses to Informal Settlements in South Africa: A Silver Bullet?' (2012) 23 SLR 540, 556–57.

[128] *Joe Slovo*, n 119, above, para 7.

[129] Ibid.

[130] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 (7) BCLR 723 (CC).

[131] See *Liebenberg*, n 122, above, 23–24; *Pieterse*, n 108, above, 57–58; *Pillay*, n 119, above, 754; *Pillay and Wesson*, n 116, above, 348; *Ray*, n 108, above, 123; KG Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' (2010) 8 IJCL 385, 406. On the adaptive remedial potential of structural interdicts see further *Liebenberg*, n 91, above, 418–19.

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its assessment of the appropriateness of relocation in light of changing circumstances on the ground.[132]

Building on this, the Constitutional Court has twice employed the combination of proportionality-infused reasonableness review, meaningful engagement, and supervisory relief to adaptably navigate eviction disputes in emergency conditions. In *Pheko v Ekurhuleni Metropolitan Municipality*,[133] the Court declared that the evacuation of an informal settlement community from sinkhole-prone land in terms of disaster management legislation was unlawful and unconstitutional, because it bypassed the constitutional requirement that the appropriateness of evictions had to be judicially assessed.[134] Under the guise of reasonableness, the Court proceeded to itself consider the proportionality of the eviction. It found that the negative impact of summary removal without judicial oversight was, in the circumstances, disproportionate to the (in the Court's opinion, remote and unlikely) threat of sinkholes,[135] and therefore that the community should at least have been meaningfully engaged about alternative sites for settlement. A supervisory order was issued to oversee a process of engagement that had to result in the provision of suitable and nearby alternative accommodation.[136]

In *Schubart Park Residents' Association v City of Tshwane*,[137] the Constitutional Court found that the Pretoria High Court could not be faulted for granting an immediate eviction order of residents from a building which was set on fire in the course of violent protests over the living conditions in the building.[138] However, it also held that residents had a right to return to their homes after calm was restored, and that, once the immediate danger to their lives and safety was averted, the municipality had to engage them over satisfaction of their interim accommodation needs and their eventual reoccupation of the building.[139] The municipality's failure to do this rendered the eviction unreasonable, and the municipality was accordingly ordered to comply with the obligation and to report back to the court on the outcome of the engagement process.[140]

Read together, *Pheko* and *Schubart Park* show, first, how a reasonableness-based assessment of compliance with obligations generated by socio-economic rights allows for the proportional relaxation of 'ordinary' legal processes during moments of destabilization while simultaneously ensuring adherence to rule of law, requiring full rights-restoration as soon as the dust settles, and safeguarding against opportunistic exploitation, overreaction and overblown risk assessment, which are all-too-common features of crisis responses.[141] Secondly, the judgments' joint employ of meaningful engagement and supervisory relief inject justice into the difficult trade-offs that often need to be made at the coalface of crisis navigation, by giving the very people whose lives must absorb those trade-offs a determinative say in the decision.[142]

These simultaneously stabilizing and adaptable properties of socio-economic rights review were on prominent display during the COVID-19 pandemic, which predictably exerted a disproportionate toll on South Africa's urban poor, many of whom live in under-serviced, unsafe, and overcrowded informal settlements.[143] While limitations to the exercise of civil and political

[132] *Liebenberg*, n 122, above, 24.
[133] 2012 (2) SA 598 (CC).
[134] Ibid, paras 39–45.
[135] Ibid, para 41. See A du Plessis and A van der Berg, 'Some Perspectives on Constitutional Conflict in Local Disaster Management through the Lens of *Pheko v Ekurhuleni Metropolitan Municipality*' (2012) 28 SAPL 448, 457–68.
[136] *Pheko*, n 133, above, para 53. See *Pillay and Wesson*, n 116, above, 360; *Ray*, n 108, above, 199.
[137] 2013 (1) SA 323 (CC).
[138] Ibid, para 35.
[139] Ibid, paras 38–49.
[140] Ibid, paras 51, 53.
[141] *Pillay and Wesson*, n 116, above, 361. On the need for such protection, see *Bilchitz*, n 7, above, 715; *Nolan, Lusiani and Courtis*, n 40, above, 131–32.
[142] See M Pieterse, Balancing Socio-economic Rights: Confronting Covid-19 in South Africa's Informal Urban Settlements' (2021) 39 NJHR 33, 49; *Pillay and Wesson*, n 116, above, 364.
[143] See *Liebenberg*, n 10, above, 182; *Pieterse*, n 142, above, 34–35.

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rights in terms of 'lockdown' regulations proclaimed by the national executive under disaster management legislation were near universally upheld by (perhaps disconcertingly deferent) courts,[144] socio-economic rights fared somewhat better. Strict proportionality review under the guise of *Grootboom*-reasonableness for instance led to courts declaring that emergency social security relief measures that excluded (and discriminated unfairly) against vulnerable groups of migrants including asylum seekers were unconstitutional.[145] In another case, it was found that the delayed reintroduction of a national school feeding scheme, which impacted detrimentally on the nutritional needs of vulnerable children, was unreasonable and therefore unconstitutional.[146]

In the housing sector, the section 26(3) evictions jurisprudence provided a bulwark against opportunistic transgressions of a moratorium on evictions in informal settlements during the initial stages of 'lockdown' by the City of Cape Town, with courts emphasizing the centrality of housing to pandemic-resilience and subjecting attempts at evictions to strict proportionality review.[147] Meanwhile, human rights groups successfully relied on *Pheko* to persuade the National Department of Human Settlements to renege from an ill-advised attempt, early in the pandemic, to 'de-densify' informal settlements through forced emergency relocation, and instead to allow for voluntary relocations through meaningful engagement, while upscaling provision of water and sanitation in informal settlements.[148]

5. REFLECTIONS AND CONCLUSION

This article has argued that domestically justiciable socio-economic rights can enhance urban resilience in a time of polycrisis. It showed that the reasonableness standard employed by the UNCESCR to evaluate states' compliance with socio-economic rights under the Optional Protocol to the ICESCR requires of domestic legal systems to protect the most vulnerable members of society and to foreground their needs in responding to a wide array of crises, whilst ensuring that any emergency-compelled stunting of socio-economic rights is temporary and proportionate.

Where states internalize these demands by ensuring that domestic laws and policies comply with the Covenant while empowering domestic courts to review the laws and policies accordingly, this enhances protection of vulnerable groups in emergency conditions. This is not least because incorporating socio-economic rights into domestic law tends to make the rights directly binding on local governments, which are typically the implementing agents for on-the-ground crisis responses in urban areas.[149]

As was prominently on display worldwide during the recent COVID-19 pandemic, state responses to emergencies tend to be dominated by national executives. These executives not uncommonly resort to top-down, command-and-control type governance under exceptional legal frames (such as 'states of emergency' or 'states of disaster') that are associated with

[144] See J Brown, 'Lawfare under Lockdown: Challenges to South Africa's Covid Regulations, March to August 2020' (2021) 37 SAJHR 302–12.

[145] *Scalabrini Centre of Cape Town v Minister of Social Development* 2021 (1) SA 553 (GP). That *Grootboom*-reasonableness involves strict proportionality scrutiny for discriminatory measures was settled in *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

[146] *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP). See *Liebenberg*, n 10, above, 191–92.

[147] See *Community Hangberg v City of Cape Town* [2020] ZAWCHC 66 (15 July 2020); *South African Human Rights Commission v City of Cape Town* 2021 (2) SA 565 (W); F Dube and A du Plessis, 'Unlawful Occupiers, Eviction and the National State of Disaster: Considering South Africa's Emergency Legislation and Jurisprudence During Covid-19' (2021) 65 JAL 334, 337–45.

[148] See *Dube and du Plessis*, ibid, 334; *Pieterse*, n 142, above, 37–38, 49.

[149] See *UN Special Rapporteur Farha*, n 13, above, paras 59–62; *Pieterse*, n 15, above, 1214–15, *van der Berg and Verschuuren*, n 3, above, 16–18.

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diminished political accountability.[150] Rights-based judicial review provides a powerful counterweight against this tendency, as does multi-level power-sharing under federalism, devolution, or similar arrangements.[151]

The mere fact of socio-economic rights' domestic justiciability boosts both of these counterweights. First, as borne out by the above discussion of the South African experience during COVID-19, justiciable social and economic rights extend courts' oversight over executive power into the socio-economic realm, meaning that emergency governance can be reviewed not only for how it restricts civil liberties but also for how it impacts vulnerable populations' struggle for survival.[152] The South African example further shows that making socio-economic rights domestically justiciable alters the relationship between the judiciary and the democratic branches of government in a manner that strengthens the overall resilience of the legal system and its responsiveness to crisis conditions. As it became more comfortable with its review function, the South African Constitutional Court settled into what has been described as a 'catalytic' role, varying the intensity of its scrutiny and remedial prescriptiveness in the specific context of each matter, depending on what it perceived to be required to 'lower the political energy required in order to achieve a rights-protective outcome'.[153] Much of this catalytic role has been enabled by the Court's embrace of proportionality-infused reasonableness as review standard in socio-economic rights matters.

Secondly, systems entrenching socio-economic rights tend also to entrench a greater degree of local government autonomy.[154] Indeed, as has explicitly been articulated by the South African Constitutional Court, judicial review for compliance with obligations imposed by socio-economic rights serves to focus attention on the extent to which local governments in urban areas are empowered and resourced to deliver and safeguard the objects of socio-economic rights, also in crisis situations. This obviously enhances the accountability of local governments during emergencies. At the same time, it increases their powers, not only to themselves devise and implement context-specific crisis responses but also to adaptively manage their implementation of responses in a way that prioritizes the satisfaction of local needs, even where this requires departing from a national executive script.[155]

But the usefulness of socio-economic rights in steering emergency urban governance extends beyond their obvious enabling and accountability-exerting properties. This article has argued that socio-economic rights enhance resilience because they may be seen as a form of adaptive law. This is in the first instance because socio-economic rights themselves display adaptive characteristics in their functioning as accountability-exerting legal review standards. Secondly, socio-economic rights require legal and urban governance standards, structures and processes to which they apply to be more adaptive, and thereby resilient, in pursuing rights-conducive goals.

The reasonableness standard developed by the South African Constitutional Court in the *Grootboom* case provides an apt case study of both of these instances. As a legal review standard in and of itself, *Grootboom*-reasonableness displays most of the features of adaptive law canvassed

[150] See MK Bayirbağ, JS Davies and S Münch, 'Interrogating Urban Crisis: Cities in the Governance and Contestation of Austerity' (2017) 54 US 2023, 2028; T Ginsburg and M Versteeg, 'The Bound Executive: Emergency Powers During the Pandemic' (2021) 19 IJCL 1498; S Kipler and J Mohamud, 'The Pandemic as Political Emergency' (2021) 102 SPE 268; *van der Berg and Pieterse*, n 4, above, 2.

[151] *Ginsburg and Versteeg*, n 150, above, 1512–13, 1520–23.

[152] See generally *Bilchitz*, n 7, above; *Liebenberg*, n 10, above.

[153] *Young*, n 131, above, 387. See also ibid, 399–401, 411–17; *Young*, n 38, above, 172–91; *Pieterse*, n 108, above, 216–17; *Ray*, n 108, above, 107–08, 224–29.

[154] See *Angel-Cabo and Sotomayor*, n 15, above, 16; *Pieterse*, n 15, above, 1222–23.

[155] See K Broadhurst and N Gray, 'Understanding Resilient Places: Multi-level Governance in Times of Crisis' (2022) 37 LE 84, 88, 97–98; *Ginsburg and Versteeg*, n 150, above, 1501, 1529–31; S Kuhlman and J Franzke, 'Multi-level Responses to Covid-19: Crisis Coordination in Germany from an Intergovernmental Perspective' (2022) 48 LGS 312–34; *van der Berg and Pieterse*, n 4, above, 16–17.

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in Section 2 above. Its employ has allowed South African courts to tailor the exactitude of their scrutiny to particular contexts, to afford government at all levels ample discretion to navigate crises whilst ensuring that vulnerable people's needs remain at the core of responses. Reasonableness review has further permitted measures to adapt in response to shifts in circumstances, resources and knowledge, and even to allow for the relaxation of rights-based legal requirements when (and to the extent) demanded by the exigencies of emergency conditions, while insisting on full restoration of rights-protection as soon as this becomes practically feasible.[156] Moreover, the South African Constitutional Court's willingness to couple proportionality-infused reasonableness review with structural remedies has enabled 'complex problems involving multiple actors, institutions and processes to be addressed through an incremental process of mutual dialogue and experimental learning'.[157]

As has been shown, *Grootboom*-reasonableness also requires adaptiveness (and, indeed, broader resilience) of the policies and practices that it reviews. As discussed in Section 4 above, in order to be considered reasonable, policies must enable multi-modal and multi-scalar governance, not least by clearly articulating the roles and responsibilities of different spheres of government. They must further be balanced and flexible, mediate between short-, medium-, and long-term needs and ensure that immediate attention is paid to the emergency needs of the most vulnerable.[158] The South African state's attempts to ensure that its policies would withstand *Grootboom*-style reasonableness review have had the effect of hardwiring adaptiveness into domestic housing law, which now allows for dynamic, proportional, and participatory responses to housing emergencies, driven by local governments in close proximity to affected populations.[159]

Even more strikingly adaptive has been the South African Constitutional Court's employ of the reasonableness standard to insist that affected populations be at the helm of navigating their own immediate crises. Its subsidiary requirement of meaningful engagement demanded the creation, at urban local government level, of extra-curial, on-the-ground and in-the-moment participatory spaces for negotiating and implementing individualized solutions to a full range of calamities. As a requirement and a remedy, meaningful engagement ensures that local governments substantively comply with the dictates of the right to adequate housing while allowing their responses to remain anchored in local realities and to adapt to the exigencies of particular emergencies.[160]

Of course, reasonableness-based review of justiciable socio-economic rights is only a single component of domestic legal systems, and there are many additional ways in which the adaptability of socio-economic rights as resilience-enhancing devices can be improved. It is especially necessary to connect judicial review for compliance with socio-economic rights to a range of extra-curial oversight and implementation mechanisms at city level. For instance, if South African cities were to fully internalize and operationalize meaningful engagement in the implementation of their emergency housing policies, this would significantly enhance the policies' adaptability, legitimacy, and credibility.[161] Indeed, meaningful engagement's adaptive properties make it a desirable component of everyday urban governance practices in a range

[156] See *Contiades and Fatiadou*, n 53, above, 665–71, 674, 676; *Liebenberg*, n 91, above, 414; *Moons*, n 42, above, 213; *Porter* (2014), n 16, above, 188; *Quinot and Liebenberg*, n 106, above, 640.

[157] *Liebenberg*, n 91, above, 436.

[158] See n 93–101, above, and accompanying text.

[159] Of course, there remains ample room for improvement. See for instance LR Cirolia, 'South Africa's Emergency Housing Programme: A Prism of Urban Contest' (2014) 31 DSA 397.

[160] See *Liebenberg*, n 91, above, 437; *Pieterse*, n 87, above, 32–33; *Ray*, n 108, above, 321. On the downsides of a local frame for engagement processes see *Liebenberg and Young*, n 123, above, 249–54.

[161] For an early investigation into options for mainstreaming meaningful engagement as articulated in *Olivia Road*, see L Chenwi and K Tissington, *Engaging Meaningfully with Government on Socio-economic Rights: A Focus on the Right to Housing* (Cape Town: Community Law Centre, 2010).

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of sectors. For instance, the standard's usefulness in negotiating on-the-ground standoffs over the 'dedensification' of informal settlements in the course of South African cities' response to the COVID pandemic shows that meaningful engagement has a valuable role to play in the implementation of city-level emergency public health measures.[162]

Effective judicial review of socio-economic rights must further be facilitated by legislative elaboration of the rights' normative content, perhaps especially in relation to the prohibition on retrogressive measures and the minimum core.[163] Given that crisis responses are inevitably launched under exacerbated resource constraints, it is further clearly necessary to better understand and operationalize ICESCR's requirement that socio-economic rights be pursued within the maximum of available resources.[164] Moreover, since crisis conditions will increasingly be climate-induced, there is an urgent need to improve articulation between standards inherent to socio-economic rights and those imbued in environmental rights, especially in urban contexts.[165]

Finally, it bears repeating that socio-economic rights are as much prerequisites for and indicators of urban resilience as they are tools for its enhancement. Much of cities' vulnerability to the polycrisis is underscored and exacerbated by longstanding structural crises of poverty, inequality, deprivation, and marginalization.[166] This underlines the urgency of fulfilling socio-economic rights also in 'ordinary' times of respite from emergency. Acceding to the relevant international instruments and domesticating their demands is a crucial first step. Far from straitjacketing local authorities, the domestication of socio-economic rights can serve to focus their attention on creating and maintaining resilient living conditions through adaptive and responsive everyday urban governance practices.

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[162] See *Pieterse*, n 142, above, 49.

[163] See *Bilchitz*, n 7, above, 729–30, 739; *Liebenberg*, n 91, above, 175–79, 224, 226; *Liebenberg*, n 10, above, 193–99; *Quinot and Liebenberg*, n 106, above, 651–53, 660; *Pillay*, n 119, above, 754–55; *Young*, n 38, above, 82–83.

[164] *Nolan*, n 1, above, 8–9.

[165] See *UN Special Rapporteur Farha*, n 13, above, paras 70–71; *UN Special Rapporteur Rajagopal*, n 7, above, para 69; *Arnold and Gunderson*, n 22, above, 32; *Nolan*, n 1, above, 12.

[166] *Bilchitz*, n 7, above, 716–19; *Madden*, n 3, above, 93–96; *Pieterse*, n 142, above, 50.

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